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This briefing presents the key findings and recommendations of a longer report of the same title, available at [www.ictj.org](http://www.ictj.org)

## Criminal Justice for Criminal Policy: Prosecuting Abuses of Detainees in U.S. Counterterrorism Operations

After September 11, 2001, U.S. counterterrorism policies authorized and fostered systematic violations of human rights standards under national and international law. Those most responsible were not held accountable. Contrary to fundamental democratic values, these policies and actions damaged the standing of the United States in the world and irreparably injured individuals. Abuses against prisoners were committed in detention facilities in Afghanistan, Iraq, and Guantánamo Bay, and in secret prisons run by the Central Intelligence Agency (CIA). These violations humiliated and degraded detainees, stripped them of their core bearings in the world, and, in a number of instances, resulted in death.

On August 24, 2009, U.S. Attorney General Eric Holder announced that he was appointing Assistant U.S. Attorney John Durham to conduct a preliminary review into the possibility that federal laws were violated in the interrogation of specific detainees outside of the United States. The review should serve to gather facts and determine whether a full investigation is warranted. While limited, this is a welcome step in a terrain that has been marked by notable failures of accountability in the face of continuing revelations that crimes were committed.

**Abundant documentation indicates that serious abuses of a similar nature occurred across U.S. detention sites in Guantánamo, CIA prisons, and detention facilities in Iraq and Afghanistan.** Evidence of these abuses appears in the reports of U.S. government investigations as well as NGO, academic, and journalistic accounts that rely on interviews with detainees, former guards, and interrogators who have first-hand knowledge of incidents and practices. Reports regarding practices in all these locations reveal similar patterns of detainee abuse, both physical and psychological, perpetrated by military personnel, CIA agents, and security contractors alike. Detainees were shackled in stress positions, including suspension by the arms, slapped, kicked, punched, savagely beaten, slammed into walls, and choked. Forced nudity, sleep deprivation, 24-hour light exposure or complete darkness, freezing cold cells without adequate blankets or clothing, extended isolation, use of threatening dogs, religious abuse including desecration of the Qur'an, sexually degrading treatment and abuse, and threats to torture, rape or kill detainees or their families were common techniques, often used in combination, during detention and interrogation.

**Far from being isolated incidents, detainee abuses were sanctioned at the highest levels of government, validated in legal opinion, and then perpetrated systematically. These abuses qualify as “system crimes” and should be prosecuted as such.** Available sources indicate that the CIA and Department of Defense (DOD), after discussing with and getting approval from

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### U.S. Accountability Project

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The U.S. Accountability Project develops realistic policy options for addressing the serious and systematic violations of human rights incurred through U.S. counterterrorism operations after September 2001. The project seeks to inform and persuade advocates, policy-makers and the public about the importance and feasibility of accountability measures for serious past abuses. For more information: <http://www.ictj.org/en/where/region2/2260.html>

high-level officials of President George W. Bush's administration, developed specific abusive interrogation techniques to be used on detainees. Department of Justice (DOJ) lawyers produced memoranda that opined that the Geneva Conventions did not protect detainees. Applying a radically narrowed definition of torture, DOJ analyzed and approved the use of specific techniques, such as waterboarding, sleep deprivation, stress positions, and physical force, stating that these acts, used alone or in combination, were not torture. The migration of these techniques through various theaters of war and detention facilities can be tracked through the accounts of military personnel and documents detailing the approval of techniques. The fact that these abuses were the result of officially sanctioned policies means that these crimes should be approached as "system crimes"—crimes that are perpetrated systematically, often as part of an officially sanctioned policy.

**Previous failures of accountability for these violations amount to de facto impunity, including an unwillingness to pursue these cases up the chain of command and, where prosecutions did ensue, lenient penalties.** Although revelation of the abuses at Abu Ghraib prison in Iraq resulted in a spate of court martial convictions, those who were tried were mainly low-level guards such as dog handlers or others who were directly involved in abuses. The only commanding officer tried was acquitted of all serious charges. In fact, most of the supervising officers who were implicated in the abuses by government investigations suffered no consequences, and some were promoted within the military. Yet the prosecutions for the abuses at Abu Ghraib were the most organized and comprehensive prosecutions to date. Other military criminal investigations of abuses in Afghanistan and Iraq have occurred on a more sporadic basis, usually resulting in very low sentences or administrative reprimands for serious crimes such as torture by electric shock, sexual assault, severe beatings, setting a detainee on fire, and several instances of torturing detainees to death. Federal courts have successfully prosecuted only a single CIA contractor, who beat a detainee to death during a four-day interrogation. Overall, there has been a failure to effectively investigate or prosecute anyone beyond those who immediately carried out the abuses and a tendency toward lenient penalties for anyone who has been tried. This has resulted in de facto impunity that should not in any way be regarded as an adequate response by the United States to these violations.

**Prosecutions should focus on policy-makers and high-level officials.** System crimes are usually perpetrated pursuant to a policy that facilitates the widespread commission of crimes and in some cases insulates perpetrators from liability. To prosecute system crimes such as those sanctioned by U.S. officials, it is insufficient to hold accountable only those who carried out orders or whose actions went beyond the stated government policy. A prosecutor must examine the role of the policy itself and the policy's engineers in creating an environment where systematic abuse became commonplace and escalated to even more egregious abuses and detainee deaths. In the current case, evidence indicates that senior politicians and lawyers who actively formulated the policy or proactively aided it through flawed legal advice potentially are those most responsible for its consequences.

**The U.S. legal system can adequately deal with system crimes and prosecutions of high-level officials.** The abuse of detainees in U.S. custody and related acts violate federal criminal laws prohibiting torture, murder, manslaughter, sexual abuse, assault, kidnapping, war crimes, and obstruction of justice as well as similar provisions under the Uniform Code of Military Justice. Current laws provide adequate jurisdiction to prosecute current and former members of the military, government, and civilians such as contractors who were involved in developing and implementing abusive policies. Tracing criminal liability to high officers and policy-makers is also possible under U.S. law. Conspiracy, aiding and abetting, and dereliction of official duties may be used to track criminal liability up civilian and military chains of command. To highlight

the severity of the crimes, prosecutors should focus on using the War Crimes Act and Torture Act when possible.

**Obstacles and efforts to discourage prosecution are present but not insurmountable.** A prosecutorial strategy should consider how to overcome certain obstacles. The 2006 Military Commissions Act revised the War Crimes Act and limited the definition of war crimes, with retroactive effect. As a result, humiliating and degrading treatment of detainees in post 9/11 U.S. counterterrorism operations can no longer be charged as war crimes under the statute. Furthermore, statutes of limitations for various crimes must be taken into account. Torture with foreseeable risk of death or serious injury, capital crimes such as murder, or other war crimes resulting in death have no limitations period, but for some cases of torture, cruel treatment, or conspiracy to commit torture, charges may be subject to an eight-year statute of limitations. Under current laws, charges must be filed within five years for most other crimes, including many war crimes. Additionally, although a significant amount of information is already in the public realm, prosecutions for detainee abuses also may involve special evidentiary rules, such as those dealing with classified evidence or privileged executive communications.

Certain defenses, such as necessity and self-defense, already distorted in public discourse as alleged justifications for maltreatment of detainees, are likely to be raised. Given the speculative nature of future terrorist threats and the fact that detainees were imprisoned, these are untenable claims. Interrogators might raise other possible legal defenses, such as mistake of law or superior orders, although they would not be applicable to high-level officials who developed or oversaw the policies, nor to the lawyers who provided legal justifications for them. Despite their currency in public discourse, these defenses essentially seek to justify torture on the grounds of exceptional circumstances, public authority, or superior orders, all of which are expressly prohibited under the UN Convention Against Torture to which the United States is a party.

**Prosecution of these crimes is necessary to fulfill international and domestic legal obligations, reaffirm core values, and restore trust in the rule of law within the United States.**

**Prosecution will also assist in establishing global credibility.** Prosecution of detainee abuses will send a clear signal, now and in the future, that the distortions of the internationally and domestically recognized prohibition against torture, devised at the highest levels of the U.S. government, were illegal. Although the detainees who experienced abuse were noncitizens whose suffering is infrequently recognized in the mainstream U.S. discourse, the experience of other countries makes it clear that legitimizing torture “when necessary” unleashes a cascade of detrimental effects on human rights and the rule of law. The United States is a party to the UN Convention Against Torture that requires a signatory state to criminalize torture and to prosecute that crime. The U.S. Congress passed a statute to fulfill those obligations, and ignoring well-documented breaches will only serve to further erode this norm. On an international level, prosecutions will help restore U.S. credibility that has been badly tarnished by its public circumvention of the Geneva Conventions and legal justifications for detainee abuse. If full-fledged prosecutions are pursued, the United States will take a major step toward restoring its position as one of the foremost advocates for human rights and accountability in the world.

**Political will to take up prosecutions should be based on objective legal standards, demonstrated by action, and informed by public knowledge of the truth rather than by partisan sentiment.** The largest hurdle advocates of prosecution for human rights abuses currently face in the United States is a lack of political will to pursue investigation and accountability for past and current detainee abuse. Evidenced by the initial resistance to Attorney General Holder’s announcement of preliminary investigations into detainee abuses, it is likely that continued pursuit of prosecutions will meet with backlash by some pundits and a segment of the public inclined to turn a blind eye to crimes perpetrated in the name of “national security.” Leadership and a

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## About the Authors

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long-term vision in this respect will be needed, and more limited, "expedient" approaches should be rejected. Prosecution will provide the strongest assurance that the intent to reverse course on U.S. abuses can be trusted. Despite divisions in domestic public sentiment that have been linked to partisan views, the legal obligations to prosecute remain in force. Inaction is not a choice of neutrality over political vengeance or retribution, but in fact is a choice of indifference toward the objective operation of justice that erodes faith in the rule of law.

The failure to pursue criminal investigations in the United States has already led to actions in several European countries, and the continued failure of domestic prosecution may raise international pressure. Additionally, experience with systematic or officially sanctioned abuses in other countries indicates that crimes of this nature cannot simply be forgotten. Evidence and information will continue to surface, whether from information leaks, detainee accounts, or investigation by human rights organizations and the media. As more information becomes available, the sector of the U.S. public that rejects the torture and cruel, inhuman, and degrading treatment that was carried out in their name will likely increase. Although the victims of these crimes may not garner significant public support in the United States at this time, in the future, their pain and suffering may finally be recognized as one of the very real and condemnable consequences of these policies. Attorney General Holder reminded the public in August 2009 that his duty was to follow the facts and the law where they lead; it is the duty of the public to insist on it.

### Conclusions

- Given the vast amount of evidence that crimes were committed on the basis of official policy, criminal prosecution for detainee abuses in the United States is a moral and legal imperative.
- Domestic and international legal obligations require that these crimes be prosecuted, and the facts demand that detainee abuses be treated as system crimes.
- The attorney general must follow the evidence wherever it might lead and pursue investigations and prosecutions. It is likely that this entails going beyond the constraints of Assistant U.S. Attorney Durham's current mandate.
- A prosecutorial strategy should focus on the role of the policy, its authors, and overseers and, where possible, should put to use anti-torture and war crimes laws specifically designed to indicate the seriousness of these actions.
- Action is needed now, particularly since measures taken to pursue criminal accountability thus far have been inadequate and the time period for prosecuting some crimes is limited.
- The U.S. legal system has the tools to adequately deal with the complexities of system crimes. Prosecutions can and should be pursued in the United States.
- Rigorous investigation and serious efforts at prosecution of these violations should help to restore the rule of law and send a clear signal, now and in the future, that the absolute prohibition on torture and the ban on cruel, inhuman, and degrading treatment will be respected by the United States and that breaches will not be tolerated.
- Prosecutions are a cornerstone of accountability and should be complemented by non-judicial inquiries into the broader picture, institutional reforms that ensure such abuses will not recur, and reparative measures for the victims of these serious harms.



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The International Center for Transitional Justice works to redress and prevent the most severe violations of human rights by confronting legacies of mass abuse. ICTJ seeks holistic solutions to promote accountability and create just and peaceful societies. For more information, [www.ictj.org](http://www.ictj.org)

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