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USA: President Obama defends Guantánamo closure, but endorses ‘war’ paradigm and indefinite preventive detention

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In a major speech on national security on 21 May 2009, President Barack Obama restated his commitment to closing the Guantánamo detention facility and to ending the use of the so-called “enhanced interrogation techniques” approved under the previous US administration.

“Our government made a series of hasty decisions”, President Obama said, “based upon fear rather than foresight”, and all too often after officials had “trimmed facts and evidence to fit ideological predispositions.” The Guantánamo detentions were a “misguided experiment” based on the “misplaced notion” that detainees could be held “beyond the law”. Those who argued for interrogation techniques that amounted to torture were “on the wrong side of history”, and those methods belong “in the past”.

This is a firm rejection of the approach adopted by the Bush administration on these issues, an approach which still has its vocal defenders. Among them is former Vice President Dick Cheney, who spoke at a Washington DC think tank shortly after President Obama’s speech concluded.

“I was and remain a strong proponent of our enhanced interrogation program”, said the former Vice President, adding that “to call this a program of torture is to libel the dedicated professionals who have saved American lives”. He took issue with those who were calling for accountability: “Some are even demanding that those who recommended and approved the interrogations be prosecuted”, he noted, “in effect treating political disagreements as a punishable offence”.

To characterize torture as a question of political choice must continue to be challenged. Torture is a crime under international law which can never be legal and can never be justified. Enforced disappearance is also an international crime, one to which those who faced torture or other cruel, inhuman or degrading treatment in US secret detention were also subjected. The USA has an obligation under international law to investigate these crimes and to prosecute those responsible, and to ensure meaningful access to remedy for those who were subjected to human rights violations.

This legal obligation is not “to cast terrorists and murderers as victims”, as the former Vice President would have it. Attacks targeting civilians and murder are also crimes, for which individuals should be brought to justice before competent, independent and impartial courts, applying trial procedures meeting international standards for fairness. Denial of due process, however, was part of the “misplaced notion” upon which the Bush administration’s Guantánamo detention regime was based.

So it is a disturbing step backwards for the new administration to pursue the military commission experiment begun by President George W. Bush in November 2001 and continued with congressional approval under the Military Commissions Act of 2006. This experiment failed, as it was doomed to, because it was never actually about determining criminal responsibility through fair trial. It was about short-changing justice. While announcing that “where feasible”, Guantánamo detainees would be prosecuted in civilian federal courts, President Obama restated his support for military commissions, with

some modified procedures, to try detainees “who violate the laws of war”.¹ Amnesty International will continue to campaign for the commissions to be abandoned, not reformed.²

President Obama also stated his opposition to an independent commission of inquiry into human rights violations committed in what the Bush administration dubbed the “war on terror”, on the grounds that “our existing democratic institutions are strong enough to deliver accountability”. Despite the existence of such institutions, however, accountability and remedy have remained largely absent. For example, there has not been a single prosecution of anyone involved in authorizing or carrying out the crimes under international law that occurred in the secret detention programme of which the former Vice President, for one, remains such an ardent advocate.

Amnesty International has called for an independent commission of inquiry since 2004, and will continue to do so.³ The establishment and operation of such a commission, however, must not be used to block or delay the prosecution of any individuals against whom there is already sufficient evidence of wrongdoing.

President Obama reiterated his commitment to transparency, and that his administration was reviewing its use of the “state secrets privilege”. It had invoked this doctrine shortly after taking office to seek to block a lawsuit brought by detainees who alleged human rights violations as part of the USA’s “rendition” programme.⁴ In his speech on 21 May, the President stated that “we must not protect information merely because it reveals the violation of a law or embarrasses the government”. Amnesty International awaits with interest the result of his administration’s review into the state secrets privilege. It has urged the new administration to ensure that the right to remedy and redress is effective as required by international law. The government should therefore preclude any invocation of state secrets privilege that might prevent a victim of torture or other ill-treatment, arbitrary detention, unfair trial, enforced disappearance, or other human rights violations from establishing the violation and obtaining an effective remedy.

President Obama also explained again why he had decided to block publication of photographs of the abuse of detainees in Iraq and Afghanistan. This is a decision which Amnesty International has appealed to the President to reverse. To any extent that continued concealment of photographic evidence of human rights violations perpetuates an absence of accountability and remedy, it would be inconsistent with the USA’s obligations under international human rights law. Further, the right of society as a whole to know the full truth of violations, as a prerequisite to public accountability and as a measure against recurrence, is also undermined by continued suppression of evidence of the abuses.⁵

¹ President Obama stated that his administration was preparing to transfer a Guantánamo detainee to the US mainland for trial in federal court in relation to the 1998 US embassy bombings in Africa. A statement issued on 21 May by the US Department of Justice confirmed that the detainee is Ahmed Khalfan Ghailani and that the prosecution would be conducted pursuant to an indictment which has been pending against him in the US District Court for the Southern District of New York since 12 March 2001. Ahmed Ghailani was arrested in Gujrat in Pakistan on 25 July 2004. He was held in US secret custody for two years before being transferred to Guantánamo in early September 2006 and charged for trial by military commission in 2008. For background on this case, see, USA: Another CIA detainee facing death penalty trial by military commission, 2 April 2008, <http://www.amnesty.org/en/library/info/AMR51/027/2008/en>.

² See USA: Any return to unfair trials must be rejected: Time to take military commissions off the table, 7 May 2009, <http://www.amnesty.org/en/library/info/AMR51/061/2009/en>.

³ See USA: Investigation, prosecution, remedy. Accountability for human rights violations in the ‘war on terror’, December 2008, <http://www.amnesty.org/en/library/info/AMR51/151/2008/en>; USA: Torture in black and white, but impunity continues. Department of Justice releases interrogation memorandums, 17 April 2009, <http://www.amnesty.org/en/library/info/AMR51/055/2009/en>.

⁴ See USA: Federal court rejects government’s invocation of ‘state secrets privilege’ in CIA ‘rendition’ cases, 29 April 2009, <http://www.amnesty.org/en/library/info/AMR51/058/2009/en>.

⁵ USA: Transparency and accountability dealt another blow: Administration reversal on release of detainee abuse photos, 14 May 2009, <http://www.amnesty.org/en/library/info/AMR51/067/2009/en>.

While questions around the issue of transparency remain, President Obama's strong defence of his decision to close the Guantánamo facility is to be welcomed. He stressed that "as President, I refuse to allow this problem to fester. Our security interests won't permit it. Our courts won't allow it. And neither should our conscience." Nevertheless, it remains the case that, from the perspective of the vast majority of the Guantánamo detainees who were held in the US naval base at the time of the presidential inauguration, the change in US administration has meant no discernible change in their situation. They are still in indefinite detention after a prolonged period, in violation of international law, with little or no idea of what their future holds.

President Obama noted the cases of Guantánamo detainees whose detention has been ruled unlawful by federal judges and whose immediate release has been ordered. President Obama said "the United States is a nation of laws, and we must abide by these rulings". The government should do so urgently. The cases include 17 Uighurs, who remain in detention in Guantánamo six months after a judge ordered their release into the USA. They include Chadian national Mohammed el Gharani, ordered released six days before President Obama took office and still in Guantánamo more than four months later. Mohammed el Gharani was taken into custody at the age of 14. He has now spent one third of his life in US custody.

Lakhdar Boumediene, whose immediate release was ordered by a federal judge on 20 November 2008 was only released from Guantánamo on 15 May 2009. Even then, the government did not appear to be acting pursuant to the judicial order, but as a matter of its own executive discretion. In the statement announcing the release, the Justice Department said that, as directed by President Obama's 22 January executive order to close Guantánamo, "the interagency Guantánamo Review Task Force conducted a comprehensive review of Boumediene's case. As a result of that review, Boumediene was approved for transfer to France." There was no mention of the US District Court order.

The Bush administration's approach to detentions was to maximize executive discretion and to avoid or minimize judicial oversight. This was justified under the global "war" paradigm developed by that administration. Human rights violations, including torture, arbitrary and secret detention, and unfair trials, were the outcome.

In his 21 May speech, President Obama emphasised that "we are indeed at war with al Qaeda and its affiliates". Under this global war theory, he pointed to the possibility that the USA would develop a preventive detention regime for those detainees who "cannot be prosecuted for past crimes, but who nonetheless pose a threat to the security of the United States". "If and when we determine that the United States must hold individuals to keep them from carrying out an act of war", the President said, "we will do so within a system that involves judicial and congressional oversight". The administration would work with Congress to develop "an appropriate legal regime".

Amnesty International remains concerned that this administration continues to invoke the laws and means of war without recognizing its international legal obligations to ensure and respect the human rights of every individual, no matter what they are accused of. One hallmark of the previous administration was its insistence on applying its own distorted interpretations of the international law of armed conflict to situations to which those rules were never intended to apply, to the grave detriment of fundamental human rights. Should this administration seek to construct a system for indefinite "national security" detention on the premise of an essentially permanent and global "war", in the name of countering the general threat of terrorism, it would only entrench more firmly the mistakes of its predecessor, putting the USA essentially into a permanent state of emergency. Amnesty International opposes any such preventive "national security" detention, and will be urging the USA to rely more fulsomely on its time-tested systems of ordinary criminal justice, within a framework of respect for

universal human rights, rather than to embark a new and dangerous experiment that only risks more broadly and deeply undermining the right to liberty of all.

While his speech was littered with references to US values, President Obama did not once expressly mention human rights. Amnesty International deeply regrets that the administration has yet to firmly and expressly embrace the recognition of universal human rights and respect for international human rights law as not only *applicable* to all counter-terrorism measures and all detainees, but also (as the nations of the world agreed in the UN Global Counter-Terrorism Strategy) as *a key element* of any effective plan for countering the threat posed by groups such as *al-Qa'ida* and others like it.

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