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USA: Investigation, prosecution, remedy

Accountability for human rights violations in the 'war on terror'

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1. Truth and accountability are rule of law principles

After photographic evidence of torture and other ill-treatment by US personnel in Abu Ghraib prison in Iraq became public in 2004, President George W. Bush not only said that the actions of the perpetrators did "not represent the values of the United States of America"[1], but also that it was "important to understand that in a democracy"

> "there will be a full investigation... The system will be transparent, it will be open and people will see the results... The world will see the investigation and justice will be served... In other words, people want to know the truth. That stands in contrast to dictatorships. A dictator wouldn't be answering questions about this. A dictator wouldn't be saying that the system will be investigated and the world will see the results of the investigation."[2]

A few days later, US Secretary of Defense Donald Rumsfeld said:

> "Friends of freedom will understand that it is a virtue of our system that the president and the most senior officials take responsibility for and are involved in seeing that the punishment for such violations of human rights occur. That stands in stark contrast to the many parts of the world where governments use torture or collude in it and do not express shock or dismay, nor do they apologize when it's uncovered."[3]

Four and a half years later, as President Bush's term in office comes to an end, official US assurances of full accountability for human rights violations, like the assurances that all detainees in US custody in the "war on terror" would be treated humanely, ring hollow. The violations committed by US personnel in Iraq, Afghanistan, Guantánamo and elsewhere have been many and varied. They have included enforced disappearance, torture and other cruel, inhuman or degrading treatment (in some cases resulting in death in custody), prolonged incommunicado detention as well as other forms of arbitrary and indefinite detention, secret international transfers of detainees without due process ("rendition"), and flagrantly unfair trials. Official reviews of detention policies have been piecemeal, have generally lacked independence or the mandate to reach up the chain of command or outside the military, failed to interview victims, failed to apply international standards, and many of their findings remain classified as secret. Much is still un-investigated. Much is still obscured from public view. Accountability is still largely absent, as is remedy for the victims.

The USA is required by international law to respect and ensure human rights, to thoroughly investigate every violation of those rights, and to bring perpetrators to justice, no matter their level of office or former level of office. Victims of human rights violations have the right under international law to effective access to remedy and reparation. In addition, there is a collective and individual right to the truth about violations. The United Nations, among others, has formally recognised "the importance of respecting and ensuring the right to the truth so as to contribute to ending impunity and to promote and protect human rights", referring in part to "the right of victims of gross violations of human rights and serious violations of international humanitarian law, and their families and society as a whole, to know the truth regarding such violations, to the fullest extent practicable, in particular, the identity of the perpetrators, the causes and facts of such violations, and the circumstances under which they occurred".[4]

If the USA is to demonstrate that it is genuinely committed to human rights and the rule of law, Amnesty International considers that the new administration and Congress must ensure that truth and accountability are no longer buried under laws or policies that exploit or facilitate secrecy or impunity. Without "observance of the right to know and, by implication, the right to the truth, the right to justice and the right to reparation… there can be no effective remedy against the pernicious effects of impunity". [5] As the independent non-governmental International Center for Transitional Justice has said, a holistic approach is necessary following a period of widespread human rights violations:

> "Without any truth-telling or reparation efforts, for example, punishing a small number of perpetrators can be viewed as a form of political revenge. Truth-telling, in isolation from efforts to punish abusers and to make institutional reforms, can be viewed as nothing more than words. Reparations that are not linked to prosecutions or truth-telling may be perceived as 'blood money' – an attempt to buy the silence or acquiescence of victims. Similarly, reforming institutions without any attempt to satisfy victims' legitimate expectations of justice, truth and reparation, is not only ineffective from the standpoint of accountability, but unlikely to succeed in its own terms."[6]

This document outlines the importance of immediately initiating effective independent criminal investigations, including into crimes under international law such as torture and enforced disappearance committed by individuals acting for or on behalf of the USA; removing potential obstacles in existing US law to successful investigation and prosecution of all such cases; and ultimately bringing perpetrators to justice. Any prosecutions must be conducted in independent and impartial courts applying international fair trial standards, without recourse to the death penalty.

This document also reiterates Amnesty International's call, first made in May 2004, for the US authorities to establish a comprehensive independent commission of inquiry into the USA's detention policies and practices since 11 September 2001, including the programs of rendition and secret detention operated largely by the Central Intelligence Agency (CIA).[7] If and when the inquiry concludes that particular conduct may have amounted to crimes under national or international law not known to be already under investigation, the information gathered should be referred to the appropriate federal authorities with a view to possible prosecution of the individual or individuals concerned. The establishment and operation of the

commission, however, must not be used to block or delay the prosecution of any individuals against whom there is already sufficient evidence of wrongdoing.

This document also addresses the need to ensure redress and remedy for victims of human rights violations, outlining the basic requirements of restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

Why look back?

But why dig over the past, some may ask. At a time of political transition and promise of change, would not investigations and prosecutions be unnecessarily divisive? Surely what matters now are future policies and current security, not past conduct? Secretary of Defense Rumsfeld took such a line two years after the Abu Ghraib torture revelations, when a congressional committee was seeking documents from him as part of a probe into the abuses. He said: "I can't imagine, frankly, why the people want to go back over those things at this stage."[8] It is difficult to imagine a more appropriate response than that given by retired US Army Major General Antonio Taguba, who led a military investigation in 2004 into detainee abuse at Abu Ghraib. In the preface to a 2008 report on abuse of detainees in US custody in Afghanistan, Guantánamo and Iraq, Major General Taguba wrote:

> "Our national honor is stained by the indignity and inhumane treatment these men received from their captors... After years of disclosures by government investigations, media accounts, and reports from human rights organizations, there is no longer any doubt as to whether the current administration has committed war crimes. The only question that remains to be answered is whether those who ordered the use of torture will be held to account. The former detainees in this report, each of whom is fighting a lonely and difficult battle to rebuild his life, require reparations for what they endured, comprehensive psycho-social and medical assistance, and even an official apology from our government. But most of all, these men deserve justice as required under the tenets of international law and the United States Constitution. And so do the American people."[9]

Others, including current and former administration officials, have argued that it would be inadvisable for the new administration or Congress to initiate investigations into government conduct towards detainees in the "war on terror". US Attorney General Michael Mukasey, for example, has accused the administration's critics of making "casual requests for criminal investigations" and conflating "legal disagreements with policy disagreements". He has claimed that the "institutional effects" of such investigative measures "could well endanger our future national security".[10] In similar vein, the former head of the US Department of Justice's Office of Legal Counsel (OLC), the office which has provided a number of legal opinions during the "war on terror" that helped enable crimes under international law and other human rights violations to be committed with (thus far) impunity, has claimed that such investigations would weaken the Justice Department and the CIA "in ways that would compromise our security".[11] Stripped to their essence, such arguments amount to little more than assertions that the government should be able to perpetrate torture, enforced disappearance or other such human rights violations with impunity, so long as they are carried out in the name of national security. Such arguments have been heard before; indeed, the inclusion of an obligation to bring all perpetrators of torture and similar violations to justice in

treaties such as the Geneva Conventions and the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) was intended to reject such arguments categorically, based on the experience of gross violations of human rights that were seen in the twentieth century.

As the Supreme Court said in its landmark *Boumediene v. Bush* ruling in June 2008 restoring to the Guantánamo detainees habeas corpus rights that the OLC advised in late 2001 should be unavailable to them, "Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law." Among the principles that the USA's own National Security Strategy describes as "non-negotiable" is the rule of law, and the USA maintains that the rule of law is a core value of US constitutional democracy.[14] US politicians frequently assert that the USA is "a nation of laws". President-elect Barack Obama has said it.[15] President Bush has said it, including when responding to public concern that US administration lawyers had found ways for officials to bypass the prohibition against torture.[16]

At the time of writing, there was concern that the outgoing administration might consider issuing pre-emptive presidential pardons, possibly amounting to a blanket amnesty, to individuals who have perpetrated crimes, including crimes under international law such as torture and enforced disappearance, during the so-called "war on terror".[12] International law prohibits the use of pre-emptive pardons or other forms of amnesty where they result in impunity for crimes under international law – including all instances of torture, any other ill-treatment of detainees held for reasons related to an armed conflict, and enforced disappearance – or for other serious human rights violations.[13]

If President Bush were to issue the rumoured pardons, it would compound the gross violations of international law, and human rights in particular, already committed in the name of national security. The USA will remain bound to reverse any resulting impunity, including potentially by the administration and Congress challenging the validity of any such pardons. Such pardons would also all the more clearly oblige other states to exercise their jurisdiction over such crimes, including, for instance, as expressly provided for by the Convention against Torture and Geneva Conventions. Treaty obligations also require the USA to assist such foreign prosecutions, including by extraditing the individuals accused and/or providing evidence.

The administration of President Bush, in developing its interpretations of US and international law, and the Congress in enacting certain changes to US laws sought by the administration, have pursued policy preferences in the "war on terror" with little or no regard or respect for the USA's international legal obligations. This has led to failure to comply with some of the most fundamental, absolute, and non-derogable rules of international law, such as, the rule that anyone deprived of his or her liberty must be treated with humanity and with respect for the inherent dignity of the human person, the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, the prohibition of enforced disappearance, and the prohibition of arbitrary detention.[17] Any development of detention policies must recognise and respect the overarching international legal frameworks, not seek to bypass them. This international legal framework equally requires that violations must be investigated and perpetrators brought to account. Without meeting these obligations, the USA cannot claim to be a state ruled by law.

Amnesty International believes that the new US administration and Congress must make accountability for the USA's conduct in the "war on terror" a high priority from their early days in office. Prioritizing this issue must be part of a new relationship on the part of the USA to its

international obligations, and part of a new commitment that human rights will never again be sacrificed in the name of national security.

2. Rejection of impunity

Rejecting impunity is crucial not only for dealing with past human rights violations, but also for preventing recurrences. The new US administration must ensure that investigations and prosecutions in individual cases are initiated while simultaneously working to remove legal or practical obstacles to criminal responsibility.

The obligation to take such steps derives in part from the USA's obligations under international law. The USA has been party to the International Covenant on Civil and Political Rights (ICCPR) since 1992 and to the UNCAT since 1994. Under these treaties:

- All suspected violations must be promptly, thoroughly and effectively investigated through independent and impartial bodies.[18]
- Where torture or other ill-treatment, summary or arbitrary killing, or enforced disappearance, are revealed, states must ensure that "those responsible are brought to justice".[19] This includes not only those who directly perpetrated the acts, but also those who encouraged, ordered or tolerated them.[20] States may not relieve those responsible for such violations from personal responsibility through general amnesties, legal immunities or indemnities or other similar measures. Impediments such as immunities arising from official statutes, defences of obedience to superior orders or unreasonably short periods of statutory limitation must accordingly be removed.[21]
- The UNCAT specifically requires that each state ensure that "all acts of torture" (including at least all acts covered by the definition in article 1 of the UNCAT), any attempt to commit torture, and any "act by any person which constitutes complicity or participation in torture" are offences under its criminal law.[22] Any state where a person alleged to have committed any of these offences (anywhere in the world) is found must "submit the case to its competent authorities for the purpose of prosecution" unless it extradites him or her to another state for prosecution.[23] The UNCAT expressly precludes defences such as "exceptional circumstances", superior orders, or public authority from ever being capable of being invoked in justification of acts of torture.[24]

Similar obligations are found under the Geneva Conventions and under customary international law.[25]

Removing obstacles to accountability

The new administration will need to undertake a thorough and transparent review of all legal and practical obstacles to bringing perpetrators of human rights and humanitarian law violations to justice and allowing victims effective access to remedy. However some obstacles are already obvious and should be removed immediately. Among other things, the new US administration should:

- Revoke the 20 July 2007 Executive Order on Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency. This order purports to deem the CIA program of secret

detention and interrogation to comply with certain Geneva Conventions provisions, subject to some limited conditions, apparently in order to avoid individual criminal responsibility for those engaged in it. This should be replaced with orders necessary to make it clear that no-one acting for or on behalf of the USA is authorised, under any circumstances, to perpetrate, encourage, order, attempt, be complicit or otherwise participate in enforced disappearance, secret detention, or torture or other cruel, inhuman or degrading treatment, as defined under international law.

- Revoke the Military Order on the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, signed by President Bush on 13 November 2001, which provides for indefinite detention without charge or trial and, among other things, states that those held under it "shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual's behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal."
- Work with Congress to repeal Section 1004 of the Detainee Treatment Act 2005 (DTA) and Sections 5, 6, 7 and 8 of the Military Commissions Act 2006 (MCA).[26] Section 1004 of the DTA (further amended by section 8 of the MCA) purports to create a sort of special "ignorance of the law" defence for any US personnel against whom civil or criminal proceedings are brought in relation to their activities in the detention and interrogation of foreign nationals suspected of involvement or association with "international terrorist activity". Section 5 of the MCA purports to prohibit anyone from invoking "the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States, or a current or former officer, employee, member of the Armed Forces, or other agent of the United States is a party as a source of rights in any court of the United States or its States or territories". Section 6 of the MCA purports to artificially restrict under US law the definition of certain war crimes under the Geneva Conventions. These changes must be reversed as quickly as possible. Further, although Section 7 of the MCA, purporting to end habeas corpus challenges by alien "enemy combatants", was declared to be unconstitutional by the US Supreme Court in *Boumediene v Bush* (2008), the government argues that the section is only unconstitutional in relation to a so-called "core habeas function" of challenging the legality of detention, and claims that it continues to preclude court review of any other aspect of detention.
- Fully reveal all administration legal opinions discussing whether interrogation techniques or detention conditions are consistent with the international prohibition of torture and other ill-treatment, or defences to criminal charges that are inconsistent with international law including the UNCAT, and unequivocally disavow and revoke all such opinions or other documents that support, authorise or approve techniques, conditions, or defences that would be inconsistent with international law.
- Amend Executive Order 13292 on Classified National Security Information, itself an amendment to Executive Order 12958, to make it clear that information cannot be classified or remain classified if, *by design or effect*, to do so would conceal past or current violations of international human rights or humanitarian law, such as the

prohibition of torture and other ill-treatment, secret detention and enforced disappearance.

- Declassify all statements made by detainees setting out allegations of torture or other ill-treatment in US custody, including detainees held in the CIA's secret detention program.
- Ensure that legal counsel, investigators, and others, have the necessary access to those still in US custody in order to obtain information and evidence concerning human rights violations.
- Work with Congress to repeal or amend §1101 of the National Security Act 1947[27] so as to ensure that it does not apply to any treaty or other international agreement relating to human rights or humanitarian law.
- Revoke Executive Order 13233 of 1 November 2001 which purports to give current and former US Presidents and Vice-Presidents broad authority to withhold presidential and vice-presidential records or delay their release indefinitely, and work with Congress to establish procedures ensuring timely release of such records.
- Clarify that the administration does and will not interpret the Authorization for Use of Military Force – passed by Congress on 14 September 2001 and signed into law by President Bush on 18 September 2001 – as representing any intent on the part of Congress to authorize torture, enforced disappearance, or other violations of international human rights or humanitarian law, or as otherwise providing authority for such violations.

Action on individual cases

Any time it may take to remove the potential obstacles described above must not prevent the government from immediately taking specific actions on individual investigations and prosecutions. These include the following measures:

- Effective and impartial investigations, criminal or otherwise, should be promptly commenced into every instance where there is reasonable ground to believe an act of torture or other ill-treatment, unlawful detention, or enforced disappearance, has been committed by or on behalf of the USA.
- Every act potentially constituting a crime under international law should be subject to an investigation capable of leading to a criminal prosecution.
- Prosecution should not be limited to those who directly perpetrated the violations. Individuals in positions of responsibility who either knew or consciously disregarded information that indicated that subordinates were committing violations, yet failed to take reasonable measures to prevent or report it, should also be included, as well as anyone who authorized or was potentially complicit or participated in the acts, including by knowingly providing assistance.
- Prosecutions should not be limited to members of the US forces, but also should include private contractors and foreign agents where evidence of criminal wrongdoing by such individuals is revealed.

- Prosecutions must themselves meet international standards of fairness.
- Any complainant and witnesses must be protected against ill-treatment or intimidation as a consequence of the complaint or any evidence given.[28]
- Victims and their legal representatives should have access to information relevant to the investigation, as well as access to each other. If the results of the investigation are not to be revealed through prosecution of the case, the findings should be made public by other means.
- Claims of confidentiality on the basis of national security or other similar interests that might prevent successful investigation and prosecution of a person for human rights violations, including in cases of torture or other ill-treatment and enforced disappearance, should be precluded.
- Prosecutors should seek penalties which take into account the grave nature of the offences.[29] They should not seek the death penalty in any case.
- Where investigations or prosecutions are undertaken by foreign authorities into torture or other ill-treatment or enforced disappearance, the USA must assist the proceedings, including by supplying all necessary evidence at its disposal and extraditing any alleged perpetrators that it is unwilling or unable itself to prosecute.[30]

Amnesty International believes that justice is best served by prosecuting war crimes, crimes against humanity, and other grave violations of international law, such as torture and enforced disappearance, in independent and impartial civilian courts, rather than military tribunals. Military tribunals should in any event never be used in respect of anyone who is not a member of the armed forces of a state, accused of crimes in an international armed conflict.

3. Establishing an independent commission of inquiry

Since 2004, Amnesty International has been calling on the USA to establish an independent commission of inquiry into the USA's "war on terror" detention policies and practices worldwide. The commission must have the necessary scope to be able to fully investigate all such US policies, practices and facilities, including in relation to the CIA and other agencies, and including in relation to secret transfers of detainees between the USA and other countries.

Although the investigations and reviews that have been conducted to date by the USA have provided substantial information, insight and analysis, they have been piecemeal, have lacked the necessary independence from the executive, and have failed to apply international standards. Only portions of their findings have been made public, much remains un-investigated and much remains obscured in secrecy. Documents released under Freedom of Information Act litigation, and through the efforts of congressional committees in their oversight function, have provided some insights, but the use of classification means that a large proportion of even this information remains redacted (censored) from the public record.

The program of CIA detention is a case in point. It is known that detainees held in the program have been subjected to enforced disappearance, torture and other cruel, inhuman or degrading treatment. Where detainees have been held, and what conditions of confinement and interrogation techniques have been applied to them remain classified at the highest level of secrecy. Apart from several detainees whom the government has admitted to holding in the

CIA program and who have been transferred to and remain in Guantánamo (and whose allegations of torture remain classified), the exact number of detainees who have been held in the program and the current fate and whereabouts of many of them remain unknown. The CIA has failed to cooperate fully in previous military investigations, and impunity for human rights violations committed as part of the CIA program, including crimes under international law such as torture and enforced disappearance, remains a hallmark of the program.

The UN Principles for the investigation of torture and other cruel, inhuman or degrading treatment set out the purposes of effective investigation and documentation. These are appropriate to investigating a range of unlawful practices, including enforced disappearance, unlawful detention and unlawful killing:

(a) Clarification of the facts and establishment and acknowledgement of individual and State responsibility for victims and their families;

(b) Identification of measures needed to prevent recurrence;

(c) Facilitation of prosecution and/or, as appropriate, disciplinary sanctions for those indicated by the investigation as being responsible and demonstration of the need for full reparation and redress from the State, including fair and adequate financial compensation and provision of the means for medical care and rehabilitation.

The UN Principles also state that where the "established investigative procedures are inadequate because of insufficient expertise or suspected bias, or because of the apparent existence of a pattern of abuse or for other substantial reasons, States shall ensure that investigations are undertaken through an independent commission of inquiry or similar procedure. Members of such a commission shall be chosen for their recognized impartiality, competence and independence as individuals. In particular, they shall be independent of any suspected perpetrators and the institutions or agencies they may serve. The commission shall have the authority to obtain all information necessary to the inquiry".

The inadequacy of US investigations, their lack of independence, evidence of the pattern of unlawful detention and interrogation policies and practices that has emerged and continues to emerge, the refusal by the USA to apply international human rights law and standards to the treatment of detainees or to the investigation of abuses, and the evidence of high-level authorization of and complicity in internationally unlawful conduct, all demand that a commission of inquiry be established in addition to criminal investigations as described above.

What sort of commission of inquiry?

In the USA, commissions of inquiry can be established in a number of ways. These include commissions established by legislation (passed by Congress and signed by President), by executive order, and by congressional resolution. Amnesty International's position is that any such commission, regardless of which route to establishment is chosen, must meet the criteria listed below. The commission should:

- Be established under clearly and publicly defined terms of reference, including its objectives, composition, scope of inquiry, powers, time frame of operation, and reporting mechanisms, that maximize its credibility both domestically and internationally;

- Be established under procedures that guarantee its independence, impartiality and competence;
- Be adequately resourced, in terms of material and human resources, and have transparent funding;
- Enjoy operational, administrative and financial autonomy within the transparent budgetary constraints;
- Be composed of credible experts, who will be seen to be independent, impartial and objective, who command public confidence, whose expertise includes international human rights and humanitarian law, and whose terms as commissioners are properly guaranteed;
- Establish a vetting process to ensure that each commission member has the highest levels of recognized impartiality, independence and personal integrity. To this end, no one should be appointed to the commission who is or has been closely associated with any person or entity, such as a military unit or government department, potentially implicated in human rights violations under the commission's scope of inquiry. Senior commission staff should undergo similar vetting procedures;
- Be able to investigate all agencies and levels of government, and private contractors, with a view to establishing the role of all actors in any violations of human rights and/or humanitarian law;
- Have access to inspect any places that are relevant to its investigations;
- Apply international standards, both in relation to the definitions of what is lawful and unlawful, and in relation to the conduct of the investigation;
- Seek the advice of international experts, such as the Special Procedures of the UN Human Rights Council;
- Have the necessary clearance to access all relevant classified information;
- Be able to seek the assistance of law enforcement authorities, including for witness protection;
- Have the necessary power to compel the appearance of witnesses, and to be prepared to use this subpoena power whenever necessary;
- Be able to provide the necessary protection for whistle-blowers;
- Be open to victims and survivors to testify voluntarily;
- Respect confidentiality of victims and their relatives, and provide the necessary resources to facilitate their testimony and minimize its personal impact;
- Facilitate the testimony of current detainees or prisoners, and to promote treatment of such individuals that complies with international law and standards;
- Safeguard evidence for later use in the administration of justice;

- Preserve an archive of its investigations, with access provided to victims and their relatives, as well as to anyone implicated as a perpetrator for use in their defence, prosecuting authorities, and for historical research;
- Make public its final report, which should be disseminated as widely and effectively as possible;
- Include in its final report, recommendations for legislative and other measures to combat impunity and prevent recurrence of violations of human rights and humanitarian law.

In addition to meeting such criteria, there are certain things that a commission should not do. For example, the commission of inquiry must:

- Not act as a substitute for the judiciary, or as a substitute for the authorities undertaking prompt, thorough, independent and impartial criminal investigations and ensuring that those responsible for crimes under international law are brought to justice;
- Not be used to block or delay criminal proceedings in the case of any alleged perpetrator against whom there is already evidence of having committed crimes under international law, or against whom evidence emerges during the time period of the commission's operation;
- Not be used to block or delay the public release of any information pursued under other means, such as Freedom of Information Act litigation, and must not be used to block or delay any separate executive, congressional or judicial oversight functions.

Part of restoring checks and balances

A hallmark of the USA's "war on terror" has been the pursuit by the US administration of unchecked executive power under its interpretation of the war powers of the President as Commander-in-Chief of the Armed Forces under the US Constitution. When the judiciary has intervened, the administration has sought to minimize or delay the impact of court decisions on this overarching strategy, including by resorting to secrecy. For its part, Congress has generally failed in its oversight function, and moreover has passed legislation such as the Detainee Treatment Act and the Military Commissions Act which has left the USA on the wrong side of its international obligations and more or less rubber-stamped the administration's detention regime.

A new administration and new Congress must now work, together where necessary, to put this right. Congress must ensure rigorous oversight of the executive, and the executive must end any use of secrecy that obscures human rights violations from public scrutiny and facilitates impunity. As a part of its effort to bring the USA into compliance with international law, the government is obliged to ensure full accountability for human rights violations. This obligation, as stated above, is set out in treaties such as the ICCPR and the UNCAT to which the USA is party. Under international law, the US government cannot invoke any domestic law, or any purported obstacle created by the USA's structure of government established under its Constitution, as justification for failing to meet its international treaty obligations.[31] Whether it

chooses a congressional or presidential commission of inquiry, or a hybrid of both, the end result must be the same: truth, accountability, and remedy.

4. Redress and remedy for victims of human rights violations

International law requires the USA to provide the victims of violations with remedies that are not only theoretically available in law, but are actually accessible and effective in practice.[32] Victims are entitled to equal and effective access to justice; adequate, effective and prompt reparation for harm suffered; and access to relevant information concerning violations and reparation mechanisms. Full and effective reparation includes restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. In the case of detainees held in the CIA secret detention program, for example, acknowledgement of their detention would be a necessary part of redress.

Restitution seeks to restore the victim to the situation he or she was in before the violation, and could include: "restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one's place of residence, restoration of employment and return of property." Compensation should cover any economically assessable damage, and rehabilitation should include medical and psychological care as well as legal and social services. Guarantees of non-repetition could include, among other things, reviewing and reforming laws that contribute to or allow the violations to take place. Among possible elements of satisfaction are:

- effective measures aimed at the cessation of continuing violations;
- verification of the facts and full and public disclosure of the truth;
- establishing the fate and whereabouts of people who have disappeared;
- acknowledgement of the detention of those held in the CIA secret detention program and subsequently released;
- an official declaration or judicial decision restoring the dignity, reputation and rights of the victim;
- a public apology, including acknowledgement of the facts and acceptance of responsibility; and
- judicial and administrative sanctions against perpetrators of human rights violations.

To ensure that the right to remedy and redress is effective as required by international law, 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, must be precluded.

As already stated above, rejecting impunity is a crucial step for governments to take in preventing recurrence of human rights violations. The right of victims to remedy, including non-repetition, also demands steps such as:

- Prohibiting the provision of information to foreign governments, the posing of questions to detainees held abroad or other participation in interrogations, and other intelligence activities where there is a substantial risk that it will contribute to

unlawful detention, torture or other ill-treatment, enforced disappearance, unfair trial or the imposition of the death penalty;

- Prohibiting any use, in judicial or other proceedings, of information or evidence obtained by torture or other ill-treatment or other serious violations of human rights;
- Not transferring anyone to the custody of the agents of another state, or facilitating such transfers, unless the transfer is carried out under judicial supervision and is in line with international standards;
- Ensuring that no one is forcibly returned or transferred to any place where there are substantial grounds to believe that the person would be at risk of serious human rights violations or the death penalty; and not seeking or accepting "diplomatic assurances" where there are substantial grounds for believing that a person for whom a forcible return or transfer is contemplated would be at risk of serious human rights violations, including torture or other ill-treatment.

5. Accountability: Part of the whole, part of a new start

There is not a single fix that will bring the USA's actions on counterterrorism into compliance with international law. The violations in the "war on terror" have been many and varied, and the government has exploited a long-standing reluctance of the USA to commit itself fully to international law, including in relation to recognising the full range of its international obligations with respect to torture or other cruel, inhuman or degrading treatment or punishment. The question of accountability and remedy for violations in the "war on terror" must therefore be part of a new commitment by the USA to international law.

As was noted above, a holistic approach is necessary following a period of widespread human rights violations. Punishment can be viewed as political revenge if it is not accompanied by truth-telling and reparation. Truth-telling without criminal responsibility and institutional reform may be seen as words without action. Reparations without prosecutions and revelation of the truth may be seen as an attempt to buy silence. Reform of institutions without justice, truth and reparation, is unlikely to succeed and ignores accountability. All aspects are needed.

Ending unlawful detentions, including by terminating the CIA's secret detention program and closing the Guantánamo detention facility; bringing all interrogation techniques and detention conditions into full compliance with international law and standards; ensuring access by detainees to lawyers and the courts; and ending the use of diplomatic assurances to facilitate the transfer of detainees to situations of real risk of serious violations of human rights are among the steps that must be taken to ensure present and future compliance with international law. Such steps must accompany the measures, outlined in this report, necessary to ensure full accountability for past violations.

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[4] UN Human Rights Council, res. 9/11 'Right to the truth', A/HRC/RES/9/11, 24 September 2008, para. 1 and preamble; see also Human Rights Commission, res. 2005/66 'Right to the truth', E/EN.4/RES/2005/66, 20 April 2005.
[5] UN Doc.: E/CN.4/2005/102/Add.1, 8 February 2005, Updated set of principles for the protection and promotion of human rights through action to combat impunity. Preamble.
[6] What is transitional justice? see http://www.ictj.org/en/tj/.
[7] See, generally, USA: Human dignity denied: Torture and accountability in the 'war on terror', October 2004, http://www.amnesty.org/en/library/info/AMR51/145/2004.
[8] Radio Interview with Secretary Rumsfeld on the Eileen Byrne Show, WLS Chicago, 7 July 2006, http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=42.
[9] Physicians for Human Rights, Broken Laws, Broken Lives: Medical Evidence of Torture by US personnel and its impact, June 2008, available at http://brokenlives.info/.
[10] Remarks prepared for delivery by Attorney General Michael B. Muksasey at the 2008 Annual Meeting of the Federalist Society, Washington, DC, 20 November 2008.
[11] Jack Goldsmith, No new torture probes. Washington Post, 26 November 2008.
[12] See http://www.hrw.org/en/news/2008/12/01/letter-president-bush.
[13] See, e.g., Human Rights Committee (HRC), General Comment 31 (2004), para. 18, stating with respect to violations of the prohibition of torture and cruel, inhuman, or degrading treatment or punishment under article 7 of the ICCPR: "States Parties concerned may not relieve perpetrators from personal responsibility, as has occurred with certain amnesties and prior legal immunities and indemnities." See also HRC General Comment 20 (1992), para. 15. The Committee against Torture has also emphasised that "amnesties or other impediments which preclude or indicate unwillingness to provide prompt and fair prosecution and punishment of perpetrators of torture or ill-treatment violate the principle of non-derogability" under the UNCAT: General Comment no. 2 (2008), para. 5.
[14] Indeed, a question that prospective US citizens face in their naturalization exam, under the heading "Principles of American Democracy", is "What is the rule of law?" The answers provided by the US Department of Homeland Security's Citizenship and Immigration Services are: "Everyone must obey the law. Leaders must obey the law. Government must obey the law. No one is above the law." Question 12, Civics (History and Government) Questions for the Redesigned (New) Naturalization Test, revised August 2008, US Citizenship and Immigration Services, http://www.uscis.gov/files/nativedocuments/100q.pdf.
[15] For example, see Obama, McCain begin four-month courtship of Hispanic voters, Boston Globe, 29 July 2008.
[16] President Bush holds press conference following the G8 Summit, Savannah, Georgia, 10 June 2004, http://www.whitehouse.gov/news/releases/2004/06/20040610-36.html.
[17] See, for example, Articles 7 and 10.1, International Covenant on Civil and Political Rights; and Article 3 common to the four Geneva Conventions of 1949.
[18] Human Rights Committee, General Comment no. 31 (2004), para. 15. See also General Comments no. 7 (1982) and 20 (1992). UNCAT, articles 12 and 13.
[19] General Comment no. 31 para. 18.
[20] Human Rights Committee, General Comment no. 20 (1992), para. 13. UNCAT, articles 1 and 4. Committee against Torture, General Comment no. 2 (2008), para. 26.
[21] General Comment no. 31 para. 18.
[22] UNCAT article 4.
[23] UNCAT articles 5-7.
[24] UNCAT article 2; Committee against Torture, General Comment no. 2 (2008), para. 5.
[25] See Geneva Convention III, articles 129-131 and IV, articles 146-248; ICRC Study on Customary International Humanitarian Law (2005).

[26] The sections cited here are most relevant to accountability, but other sections of these enactments also need urgently to be repealed – for instance regarding trial by military commission rather than in the ordinary federal courts, and purporting to limit or eliminate *habeas corpus* rights of detainees.
[27]Added in 2000 by section 308 of the Intelligence Authorization Act for Fiscal Year 2001.
[28] See e.g. UNCAT article 13.
[29] See e.g. UNCAT article 4.
[30] See e.g. UNCAT articles 5-7, 9.
[31] Article 27, Vienna Convention on the Law of Treaties ("A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty"). The USA signed the Vienna Convention in 1970, thereby binding itself not to do anything to undermine the object and purpose of the treaty. The USA considers many of the Vienna Convention's provisions to constitute customary international law on the law of treaties (see http://www.state.gov/s/l/treaty/faqs/70139.htm).
[32] On this and the following paragraphs, see UN General Assembly, "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law", Resolution A/RES/60/147 (21 March 2006); ICCPR, article 2(3); Human Rights Committee, General Comment no. 31 (2004), paras. 15 & 16; UNCAT, article 14; Committee against Torture, Dzemajl v Yugoslavia (161/2000), 21 Nov. 2002, para. 9.6.