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Doctrine of pervasive 'war' continues to undermine human rights

A reflection on the ninth anniversary of the AUMF

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We have succeeded on delivering a lot of campaign promises that we made. One where we've fallen short is closing Guantánamo. I wanted to close it sooner. We have missed that deadline. It's not for lack of trying. It's because the politics of it are difficult.
President Barack Obama, 10 September 2010

It is clear that the USA is having difficulty letting go of the sweeping "war" doctrine it adopted immediately after the attacks in the USA on 11 September 2001 (9/11). That doctrine has, over the past nine years, been invoked to justify a range of human rights violations, while failing (indeed, actually impeding efforts) to bring those alleged to be responsible for the attacks to justice.

It is now more than 10 months since US Attorney General Eric Holder announced that five men held at the US Naval Base at Guantánamo Bay in Cuba, accused of involvement in the 9/11 attacks, would be transferred to the US mainland for trial in federal civilian court. The five are still in indefinite military custody in Guantánamo.

It is also nearly eight months past President Barack Obama's one-year deadline for closure of the Guantánamo detention facility. More than 170 men remain held there without criminal trial.

At a press conference on the eve of the ninth anniversary of the 9/11 attacks, President Obama attributed his administration's failure to end the Guantánamo detentions to 'difficult' politics. The gridlock over the trials, he suggested, was the result of "a lot of political rhetoric", adding that "people, understandably, are fearful".[1]

Under international law, internal laws and domestic politics are no excuse for a country's failure to meet its international treaty obligations. From Amnesty International's perspective, the current impasse over the Guantánamo detentions and trials results in large part from the combined failure of all three branches of the US government – executive, legislative, and judicial – to insist on respect for a human rights framework in the USA's counter-terrorism policies and actions.[2] Instead, the lens these institutions have chosen to apply has been that of a doctrine of a pervasive global "war", without identifiable geographic or temporal limits, in which broad executive discretion and secrecy are the rule.

The phrase "we are at war" or its ilk has become something of a mantra for US officialdom since 11 September 2001. On that day, President George W. Bush opened a meeting with his advisers with the words "we're at war". Five days later, the CIA Director issued a memorandum to CIA leaders headed "We're at war", stating that "All the rules have changed" for this "worldwide war against al-Qa'ida and other terrorist organizations". Five years later, the USA's National Security Strategy and its National Strategy for Combating Terrorism both opened with the words "America is at war". Today, the National Security Strategy released by President Obama in May 2010 states that "We are at war with a specific

network, al-Qa'ida, and its terrorist affiliates". Three months later, in August 2010, the administration's submission to the UN High Commissioner for Human Rights for the forthcoming scrutiny of the USA's human rights record under the Universal Periodic Review process asserts that "the United States is currently at war with Al Qaeda and its associated forces".

A bill introduced in Congress in August 2010 aimed at legislating for habeas corpus review for "certain unprivileged enemy belligerents" would have Congress reaffirm that the USA "is in an armed conflict with the Taliban, al Qaeda, and associated forces" and that "the President is authorized to detain unprivileged enemy belligerents" in connection with this armed conflict "regardless of the place of capture, until the termination of hostilities".[3] In the aftermath of 11 September 2001, there is no doubt the USA has been involved in specific armed conflicts recognised under international law, in Iraq and Afghanistan. However, there is no place in international humanitarian and human rights law for a legal category of global and pervasive but non-international armed conflict, suspending the ordinary rule of law and human rights whenever and wherever an individual state deems necessary, as distinct from a series of specific geographic zones of international or non-international armed conflict. Propagating such a theory distorts international human rights and humanitarian law and other basic rules of public international law, and fundamentally undermines the crucial protections of civilians that have been painstakingly developed over more than a century of international law-making.

If politics are "difficult" now, they could be said to have been "easy" nine years ago in the immediate aftermath of the 9/11 attacks. Then, as now, however, the result was detrimental to human rights. On 14 September 2001, Congress passed a joint resolution – the Authorization for Use of Military Force (AUMF) – by 518 votes to 1. President Bush signed the resolution into law on 18 September 2001, stating that he would "consult closely" with members of Congress "as our Nation responds to this threat to our peace and security". Passage of the AUMF through Congress was less the result of a debate than, as one member of the House of Representatives put it before pledging his support to the resolution, a question of "join[ing] the choir". Both the Bush and Obama administrations have since sung from the same hymn sheet. It is the AUMF to which both have turned for legal backing for actions in the USA's global "war".

The AUMF authorized the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." The resolution gave the president the freedom to decide who was connected to the attacks, who might be implicated in future attacks, and what level of force could be used against them. At the same time, he was unconfined by any geographical limits.

The Military Order signed by President Bush on 13 November 2001, providing for unfair trials by military commission as well as indefinite detention without charge, trial or judicial review, cited the AUMF as a supporting authority. A Justice Department memorandum from August 2002 argued that if a US agent "were to harm an enemy combatant during an interrogation in a manner that might arguably [amount to torture under US law], he would be doing so in order to prevent further attacks on the United States by the al Qaeda network". The memorandum cited the AUMF as among those authorities that "recognized" the President's constitutional power to use force to defend the USA. When President Bush re-authorized the CIA's secret detention and interrogation program in July 2007 – a program in which the crimes under international law of enforced disappearance and torture had already occurred and for which to this day those responsible in the USA still have not been brought to justice – he cited the AUMF as supporting law. The AUMF was also cited in defence of his authorization of a secret wiretapping program by the National Security Agency.

While the Obama administration has dropped certain terminology used by its predecessor, such as "war on terror" and "enemy combatant", and has ended the CIA's long-term secret detention program and use of "enhanced interrogation techniques" as implemented under the Bush administration, it has retained the position that the USA is engaged in a global war with no foreseeable end, and on this basis has

continued to invoke a "law of war" framework that has distorted notions of due process and undermined human rights. It continues to use indefinite military detention without charge or trial at Guantánamo, and has resumed unfair military commission proceedings against a number of detainees there, although its strategy on these prosecutions appears also to have somewhat unravelled.[4]

The Obama administration has said that its authority to detain individuals in Afghanistan is based on the AUMF – the USA is currently holding about 900 people without charge, access to lawyers or courts in its Parwan facility in Bagram air base north of Kabul, including a number of individuals taken into custody in countries other than Afghanistan, unrelated to the particular armed conflict in Afghanistan and brought there only because the USA considered it expedient to do so. The administration has also cited the AUMF as the domestic law underpinning the USA's use of targeted killing in its "armed conflict with al-Qaeda, as well as the Taliban and associated forces".[5] Its invocation here of a theory of a *global* armed conflict between the USA and al-Qa'ida and other armed groups seems to indicate that the US administration believes it is legally entitled to use lethal force *anywhere* in the world at *anytime* and regardless of the circumstances, limited *only* by the laws of armed conflict.

In seeking to distance itself from its predecessor, the Obama administration has asserted that it does not seek to rely on the President's constitutional authority as Commander-in-Chief of the Armed Forces to justify the detentions at Guantánamo. Instead, it is basing its detention authority on the AUMF. Yet the Bush administration had also latterly sought to justify the Guantánamo detentions by reference to the AUMF, emphasising in habeas corpus litigation that "the AUMF is extremely broad. Its sweeping scope does not limit the use of force against state actors, and it also authorizes force against 'organizations'. It does not limit the geographic scope or duration of the authorizations".

It is true that the AUMF is broad and sweeping. In May 2008, a federal judge described it as "the most far-reaching bestowal of power upon the Executive since the Civil War… The broad language of the AUMF, literally construed, gives the President *carte blanche* to take any action necessary to protect America against any nation, organization, or person associated with the attacks on 9/11 who intends to do future harm to America."[6] This is the problem with the resolution, not a positive attribute. Moreover, at least some of the legislators who voted for the AUMF had not intended this consequence. A number of them expressly stressed that they did not believe that the AUMF would constitute a "blank check" before voting for it.

In the AUMF debate nine years ago, there seemed to be considerable confusion among legislators as to what they were voting for, including whether it amounted to a declaration of war or not. A number of legislators referred to bringing those responsible for the attacks to "justice", but with little or no elaboration – and the AUMF itself makes no reference to detention or trials, or indeed to human rights. Some felt the resolution did not go far enough, others felt it went too far; some opined that the President had all the power he needed without a resolution; others stressed the limiting effect of the resolution and the need for continuing congressional oversight. One legislator said that she would be voting for the resolution "with great reservations" because "to be honest, I do not know what this means. The language of this resolution can be interpreted in different ways". Another who voted for the resolution admitted that "the literal language of this legislation can be read as broadly as executive interpreters want to read it, which gives the President awesome and undefined power". Despite the apparent concerns and confusion, legislator after legislator voted in favour of it.

During the debate, legislators variously referred to the USA as "the rock of freedom in the world", "the brightest beacon of liberty and freedom", "a nation of laws", "a nation that follows the rule of law", "the leader in freedom and democracy and human rights in the world", and "the embodiment of freedom, the beacon of hope and in a very real sense, the guardians of justice – a justice shaped and honed by our values and morals". Yet the AUMF has been used to endorse actions clearly incompatible with international human rights and justice.

In his press conference on 10 September 2010, President Obama suggested that the ninth anniversary of the 9/11 attacks would be an opportunity to commemorate the "enduring values" of the USA, and pursued this theme when asked about the Guantánamo detentions and trials. His administration, he said, would "work with members of Congress – and this is going to have to be on a bipartisan basis – to move this forward in a way that is consistent with our standards of due process, consistent with our Constitution, consistent also with our image in the world of a country that cares about rule of law".

Nine years earlier, the only member of the US House of Representatives to refer to international law during the AUMF debate (Congressman Clayton), had suggested that "Congress will… work with the President to ensure that our actions under this resolution are necessary and appropriate, consistent with our values… and in accordance with international laws". The administration and Congress should now reflect upon how reliance upon the AUMF, passed with little real discussion or scrutiny, has been inimical to human rights and has left the USA on the wrong side of its international obligations. The resolution, revocation of which Amnesty International first called for in 2006, became a central part of establishing a legal vacuum in which individuals were denied the rights to which they would ordinarily be entitled under national and international laws. Assisted by the AUMF, the notion that the USA is engaged in a global war unbounded by time or location has taken root across the US government. At the same time, the government's assertions that it is committed to its human rights obligations appear to be planted on shallow ground in the counter-terrorism context.

In a recent statement delivered at the UN General Assembly's Review of the UN Global Counter-Terrorism Strategy, Ambassador Susan Rice, US Permanent Representative to the United Nations, said:

> "It's clear that respect for human rights and fundamental freedoms and the rule of law is an essential part of a successful counterterrorism effort. That's why the United States has ended practices that were morally repugnant and counterproductive such as enhanced interrogation techniques and the use of secret detention sites, and it is why President Obama ordered that the prison at Guantánamo Bay be closed."[7]

The administration's fine words on human rights have meant little change for those still held in Guantánamo, including those held there who were previously subjected to years in the CIA's secret detention program and subjected to torture and other cruel, inhuman or degrading treatment. Its failure to incorporate respect for human rights in its efforts to end the Guantánamo detentions has allowed the politics of fear to infect the situation, contributing to indecision by the authorities and further uncertainty for the detainees and their families.

Continuing resort to a global war framework – not merely as a rhetorical device but to the exclusion of human rights principles – is ultimately why the Guantánamo detentions and trials remain issues mired in "difficult" politics rather than having long since been resolved in the ordinary criminal justice system, consistent with international law.

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[1] Transcript of 10 September 2010 press conference available at http://www.whitehouse.gov/the-press-office/2010/09/10/press-conference-president-obama

[2] Amnesty International provided the Obama administration with such a framework soon after President Obama ordered his administration to close the Guantánamo detention facility by 22 January 2010. See USA: The promise of real change. President Obama's executive orders on detentions and interrogations, 30 January 2009, http://www.amnesty.org/en/library/info/AMR51/015/2009/en

[3] Terrorist Detention Review Reform Act, introduced by Senator Lindsey Graham, 4 August 2010.

[4] The military commission trial of Abd al-Rahim Hussein al-Nashiri, a detainee who was held in secret US custody for four nearly four years before being transferred to Guantánamo in 2006, has apparently been shelved indefinitely. Abd all-Nashiri's prosecution by military commission was one of those announced by the US Attorney General on 13

November 2009, at the same time as he announced that the five detainees accused of involvement in the 9/11 attacks would be prosecuted in federal court in New York. Meanwhile, the military commission trial of Omar Khadr, a Canadian national held in US military custody since he was 15 years old is due to resume at Guantánamo next month. See USA: Denying human rights, failing justice: Omar Khadr's military commission trial set to start at Guantánamo, 11 August 2010, http://www.amnesty.org/en/library/info/AMR51/069/2010/en.

[5] The Obama administration and international law. Harold Hongju Koh, Legal Adviser, US Department of State, 25 March 2010, http://www.state.gov/s/l/releases/remarks/139119.htm

[6] *Al-Marri v. Pucciarelli*, US Court of Appeals for the Fourth Circuit, 15 July 2008, Judge Gregory, concurring.

[7] Statement by Ambassador Susan E. Rice, US Permanent Representative to the United Nations, at the United Nations General Assembly Review of the UN Global Counter-Terrorism Strategy, 8 September 2010, http://usun.state.gov/briefing/statements/2010/146902.htm