

USA

**ANOTHER YEAR,
SAME MISSING
INGREDIENT**

**HUMAN RIGHTS STILL ABSENT FROM COUNTER-
TERRORISM POLICY A YEAR AFTER PRESIDENT
OBAMA PROCLAIMED 'AMERICA AT CROSSROADS'**

**AMNESTY
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ANOTHER YEAR, SAME OLD DIRECTION

So America is at a crossroads. We must define the nature and scope of this struggle, or else it will define us

President Barack Obama, 23 May 2013

For a speech seen as signalling a turning point, the direction travelled since it was delivered has been frustratingly familiar.

It is now one year since President Barack Obama revisited his administration's framework for the USA's counter-terrorism strategy, four years after a similar address he had given early in his first term.¹ "From our use of drones to detention of terrorism suspects", President Obama proclaimed on 23 May 2013, "the decisions that we are making now will define the type of nation – and world – that we leave to our children".²

At the time, Amnesty International expressed some cautious optimism at signs of a possible change for the better heralded by the speech, while noting that international human rights law was the ingredient still missing from the framework. The organization noted:

"Words are one thing, actions another. Despite their positive aspects, President Obama's words leave a lot to be desired, and it remains to be seen how much will change, and how quickly, after this latest national security speech."³

One year on, little has changed. Why? Because the USA, a country not averse to promoting itself as a, or even *the* global human rights champion, continues in its singular failure to put respect for human rights at the centre of its counter-terrorism policies, despite a stated commitment to do so by successive administrations.⁴

Various outcomes are now long past familiar. Scores of men held without charge or trial at the US Naval Base at Guantánamo Bay; trial proceedings being run against a few detainees there under a military commission system that does not meet international fair trial standards, and still only one trial of a Guantánamo detainee in ordinary federal court in 12 years of detentions; truth, remedy and accountability for torture, enforced disappearances and other human rights violations blocked; and serious questions about the lawfulness of US killings by drone unanswered.

That there is a human rights deficit in the USA's counter-terrorism policies and in addressing violations, including crimes under international law committed by US personnel in this context, was again made clear in March 2014. This was when the USA appeared before the UN Human Rights Committee, the expert body established under the International Covenant on Civil and Political Rights (ICCPR) to monitor implementation of and compliance with that core human rights treaty, which the USA ratified in 1992. All of the above issues raised the Committee's serious concern in its concluding observations finalized in April.

TOO LITTLE MOVEMENT: 'GLOBAL WAR' THEORY, INDEFINITE DETENTION, MILITARY COMMISSIONS

At the core of the USA's human rights failure is its flawed theory that it has been engaged in a "global war" since the attacks of 11 September 2001. President Obama re-endorsed this theory in his May 2013 address: "We were attacked on 9/11. Within a week, Congress overwhelmingly authorized the use of force. Under domestic law, and international law, the United States is at war with al Qa'ida, the Taliban, and their associated forces." Here President Obama was referring to the Authorization for Use of Military Force (AUMF), passed on 14 September 2001 after little substantive debate as well as apparent confusion among

members of Congress about what they were voting for.⁵ The AUMF has been exploited over the years to justify a range of human rights violations.

On 21 May 2014, the General Counsel for the US Department of Defense told the Senate Foreign Relations Committee that the Pentagon currently “relies upon the AUMF in three contexts: for ongoing US military operations in Afghanistan; for our ongoing military operations against al-Qa’ida and associated forces outside of the United States and the theatre of Afghanistan; and for associated detention operations in Afghanistan and at the detention facility at Guantánamo Bay, Cuba”.⁶

It should come as no surprise then, that in the year since President Obama’s re-endorsement of the AUMF, administration officials have continued to cite this in defending indefinite detentions at Guantánamo as well as military commissions there.

In late 2013, for example, the Department of Justice filed a brief in which, for the umpteenth time, the Department pointed to the AUMF as providing the legal justification for the continued detention of a Guantánamo detainee. At the same time, even as it was preparing to defend its record under the ICCPR to the UN Human Rights Committee, the administration’s brief expressly argued that the detainee could not rely upon the ICCPR for relief as the “ICCPR was signed by the President with the advice and consent of the Senate on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts.” So, the Justice Department argued, “it would be flatly inconsistent with the decisions of the political branches for a court to permit an individual to enforce the terms of the ICCPR in a US court”.⁷ On 4 April 2014, the Court of Appeals ruled in favour of the government. The detainee, Yemeni national Hani Saleh Rashid Abdullah, the judges noted, “remains detained at Guantánamo as an enemy combatant pursuant to the Authorization for Use of Military Force (AUMF)”.⁸ He has been held without charge or trial at Guantánamo since 28 October 2002, and there is still no apparent prospect of his situation changing any time soon.

In its recent conclusions on US compliance with the ICCPR, the Human Rights Committee called on the USA to ensure that detainees held at Guantánamo were either brought to trial in the ordinary criminal justice system or immediately released. It called for “the closure of the Guantánamo Bay facility.”

In his May 2013 speech, President Obama had restated his commitment to closing the Guantánamo detention facility which he said “has become a symbol around the world for an America that flouts the rule of law”. To this end, he called on Congress to “lift the restrictions on detainee transfers” from Guantánamo, promised that “to the greatest extent possible, we will transfer detainees who have been cleared to go to other countries”, announced that he was appointing “a new senior envoy at the State Department and Defense Department whose sole responsibility will be to achieve the transfer of detainees to third countries”, and that he was “lifting the moratorium on detainee transfers to Yemen so we can review them on a case-by-case basis”.

While the two envoys were subsequently appointed, and there have been 12 detainees transferred from Guantánamo to other countries in the 12 months since President Obama’s speech, as of 21 May 2014 more than 140 detainees remained held at the base without charge or trial, and not a single live Yemeni national had been repatriated or transferred elsewhere since the President’s speech (or indeed since July 2010).⁹ Meanwhile, an official penchant for secrecy is illustrated by a clampdown in the past year on information about the numbers of detainees on hunger strike and how the military deals with them.¹⁰ It was against the backdrop of a hunger strike in which by then some 100 Guantánamo detainees were participating that President Obama’s speech of 23 May 2013 was delivered.¹¹

Since the speech, charges under the Military Commissions Act of 2009 have been referred against one more detainee, Ahmed Mohammed Ahmed Haza al Darbi. This Saudi Arabian

man pled guilty to those charges at a hearing before a military commission judge at Guantánamo in February 2014, while agreeing not to sue the USA in relation to his prior treatment in custody after his rendition from Azerbaijan in 2002. His conviction brought to eight the number of detainees convicted by military commission since detentions began at Guantánamo in January 2002. Six of these eight men were convicted under pre-trial plea bargains.¹² Six of the seven detainees currently charged for military commission trials (all but Ahmed al Darbi) are facing a government intending to seek the death penalty. The Human Rights Committee has emphasised that fair trial guarantees are particularly important in cases leading to death sentences, and that any trial not meeting international fair trial standards that results in a death sentence would constitute a violation of the right to life under the ICCPR. Military commissions do not meet these standards.

Meanwhile the chief prosecutor at Guantánamo has been echoing the presidential lead when defending the military commission system, now in its third incarnation since November 2001.¹³ For example, on 13 April 2014, the eve of further pre-trial proceedings against five detainees facing capital trial on charges of “serious violations of the law of war” relating to the 9/11 attacks, Chief Prosecutor Mark Martins noted that “all three coordinate branches of our government have formally acknowledged that a state of hostilities exists with those who ‘planned, authorized, committed, or aided the terrorist attacks that occurred’ on 9/11”.¹⁴ He then went on to take issue with critics of the military commission system. Even if federal courts are “objectively” the “appropriate trial forum in many instances”, he said, “military commissions will sometimes be the better choice – or even the only lawful choice”.

For “many instances”, read one. In the more than 12 years of detainee operations at Guantánamo, only one detainee has been transferred to the USA for prosecution in federal court, in the face of congressional blocking of such transfers in recent years.¹⁵ President Obama has blamed the failure to close the Guantánamo detention facility within his one-year deadline (that is, by 22 January 2010) on the “difficult” politics surrounding “an issue that has generated a lot of political rhetoric” and made people “fearful”.¹⁶ Seven months later his Attorney General blamed members of Congress for the administration’s U-turn on the trial of the five “9/11 defendants” who he said would now be prosecuted before military commissions in Guantánamo rather than in US federal court as he had announced 18 months earlier.¹⁷

Under international law, domestic law and politics may not be invoked to justify failure to comply with treaty obligations.¹⁸ It is an inadequate response for one branch of government to blame another for a country’s human rights failure. International law demands that solutions be found, not excuses. The US administration continues to tell the world, in effect, “we will resolve the Guantánamo detentions when the domestic political climate is right”. The USA has not been willing to accept such excuses from other governments seeking to justify their systemic human rights failures, and it should not be accepted when it is put forward by the USA.

The UN Human Rights Committee has stated that the trial of civilians (anyone who is not a member of a state’s armed forces) by special or military courts must be strictly limited to exceptional and temporary cases where the government can show that resorting to such trials is “necessary and justified by objective and serious reasons”, and where “with regard to the specific class of individuals and offences at issue the regular civilian courts are unable to undertake the trials”.¹⁹ The US government cannot point to any such rationale. It can only point to domestic politics. The military commissions are not by any measure tribunals of demonstrably legitimate necessity, but creations of political choice.

In its recent findings, the Human Rights Committee called on the USA to “end the system of administrative detention without charge or trial and ensure that any criminal cases against detainees held in Guantánamo and in military facilities in Afghanistan are dealt with through the criminal justice system rather than military commissions, and that those detainees are

afforded the fair trial guarantees enshrined in article 14 of the Covenant.” Amnesty International would reiterate that any pre-trial treatment and trial in civilian court must, of course, fully meet international standards,²⁰ and re-emphasizes the organization’s opposition to any pursuit of the death penalty, whatever the trial forum.²¹

Despite such calls from the UN Human Rights Committee and others, interactions between the executive and Congress on the Guantánamo question remain light or altogether silent on international human rights principles. What this means is that the now long-stated goal to close the Guantánamo detention facility will continue to remain elusive – or achieved only at the cost of relocating the violations – unless the US government – all three branches of it – addresses the detentions as an issue that squarely falls within the USA’s international human rights obligations.

This failure to look to human rights principles was illustrated in a report, dated 14 May 2014, from the Office of Legislative Affairs at the US Department of Justice to the Chairperson of the Senate and House Committees on Armed Services and the Judiciary. This report was required under Section 1039 of the National Defense Authorization Act for Fiscal Year 2014 (NDAA) – legislation that has stymied detainee transfers – and provides the administration’s take on whether a Guantánamo detainee relocated to a prison inside the USA could become eligible because of such a transfer for asylum, for relief from removal from the USA, including under the UN Convention against Torture (UNCAT), or for “any additional constitutional right”, and whether he could be released into the USA.

The administration’s report under NDAA §1039 sought to assure the congressional recipients that relocation to the USA of a Guantánamo detainee would be unlikely to lead to any such outcome as “existing statutory safeguards and executive and congressional authorities provide robust protection of the national security”, and because “the AUMF provides authority to detain these individuals within the United States and transfer them out of the United States”. It added that “we are not aware of any case law, statute, or constitutional provision that would require the United States to grant any Guantánamo detainee the right to remain permanently in the United States, and Congress could, moreover, enact legislation explicitly providing that no such statutory right exists.”²²

It is unsurprising that the Obama administration takes this position given that it previously proposed, as part of its plan for closing the Guantánamo detention facility, purchasing and refitting Thomson Correctional Center in Illinois for detention in military custody of Guantánamo detainees awaiting trial by military commission or in federal court, those whom the USA determined it could neither prosecute nor release, and those awaiting transfer or release.²³ Congress blocked such proposals. The establishment of “Guantánamo North” is still on the cards, this NDAA §1039 report would seem to be saying, if the administration has its way.

Meanwhile, the USA continues to seek to have other countries step up and do what it, the creator of the Guantánamo detention “problem”, refuses to do: namely, to accept detainees that the USA decides no longer to detain but who cannot be immediately repatriated for whatever reason. Among the releases of detainees from Guantánamo since President Obama’s speech last year were those of three Chinese ethnic Uighur men, transferred to Slovakia more than five years after a federal judge ruled their detention unlawful under US law. Announcing the transfers on 31 December 2013, the Department of Defense said that “The United States is grateful to the government of Slovakia for this humanitarian gesture and its willingness to support US efforts to close the Guantánamo Bay detention facility.”²⁴

While Slovakia’s move was indeed welcome, what the Pentagon failed to mention was that the three detainees could have been released immediately following the federal court ruling in October 2008 if the US government had been willing to allow them into the USA. The

USA is now looking, among others, to Uruguay to take a number of released Guantánamo detainees who cannot be repatriated and whom the USA itself refuses to accept.

In an interview with the Wall Street Journal on 7 May 2014, Uruguayan President José Mujica said that he would accept Guantánamo detainees transferred to his country, but not as detainees: “We are never going to be the jailer for the United States”, he said. “But we are prepared to take in the people over here, and allow them to live in our country, like any other citizen.” Noting that such a decision would not necessarily be universally popular in Uruguay, President Mujica said: “One shouldn’t always be bound by public opinion. Sometimes you have to help people open their minds and be generous. It’s possible that in the beginning they don’t understand, but they will over time”.²⁵

In his speech a year earlier on 23 May 2013, President Obama had suggested that leadership in the USA “has always been elevated by our ability to connect with people’s hopes, and not just their fears”. In his other key national security speech four years before that, he had suggested that in the wake of the 9/11 attacks, “all too often our government made decisions based on fear rather than foresight; that all too often our government trimmed facts and evidence to fit ideological predispositions...”. Yet the Guantánamo detainees remain prisoners of the domestic politics of fear and the failure of the US government to abide by human rights principles.

Shortly before a meeting with President Mujica in the White House on 12 May 2014, President Obama praised his Uruguayan counterpart’s “extraordinary credibility” on human rights.²⁶ The USA’s own credibility on human rights is further corroded every day that the Guantánamo detentions and military commission proceedings continue.

Aside from finding other countries to take detainees whom the USA is willing to release from its custody, if the administration’s plan is merely to relocate other detainees to detention elsewhere and to continue to hold them in indefinite detention without charge or trial, and to relocate military commission trials into the USA, the human rights rot would not be stopped.

What would help to stop this rot is rescinding the AUMF. A year ago, President Obama said that he was looking forward to “engaging Congress and the American people in efforts to refine, and ultimately repeal, the AUMF’s mandate”, given what he said was the changing nature of the terrorist threat.²⁷ At a hearing on the AUMF before the Senate Committee on Foreign Relations on 21 May 2014, the Principal Deputy Legal Adviser for the US Department of State said that among the principles that should guide “our efforts to identify a future legal framework” would be that “any authorization to use military force, including any detention operations, must be consistent with international law”.²⁸ Without a change in approach, however, what the USA means by “consistent with international law” in this context apparently will not include extraterritorial application of the ICCPR.

This is part of an approach taken by the USA towards this international human rights treaty which the UN Human Rights Committee said in its April 2014 findings on US compliance “considerably limit[s] the legal reach and practical relevance of the Covenant”. In addition to noting the USA’s declaration upon ratification of the ICCPR that its provisions would be non-self-executing (see endnote 7 below), the Committee expressed its regret that the USA “continues to maintain the position that the Covenant does not apply with respect to individuals under its jurisdiction, but outside its territory, despite the interpretation to the contrary of article 2, paragraph 1 [of the ICCPR], supported by the Committee’s established jurisprudence, the jurisprudence of the International Court of Justice and State practice.” The Committee called on the USA to “interpret the Covenant in good faith” and “review its legal position so as to acknowledge the extraterritorial application of the Covenant”.²⁹

Another of the principles for a post-AUMF framework pointed to by the State Department’s Principal Deputy Legal Adviser was that “the President’s authority to defend the United States would remain part of any framework that emerges”. Here one might recall a

memorandum signed on 25 September 2001 by then Deputy Assistant Attorney General John Yoo, in which the Office of Legal Counsel at the US Department of Justice advised the White House that the AUMF could not “place any limits on the President’s determinations as to any terrorist threat, the amount of military force to be used in response, or the method, timing, and nature of the response”.³⁰ As broad as the AUMF’s wording was, the Bush administration (which had wanted an even broader resolution) did not consider that it placed any limits on the President. To date, this memorandum has not been withdrawn.

President Obama could immediately and publicly announce that the administration will henceforth fully meet the USA’s international human rights obligations under a legal framework consistent with international law that should have been applied from the outset of the post-9/11 response. No such announcement has been forthcoming since President Obama’s 23 May 2014 speech; we are essentially where we were a year ago.

‘TARGETED KILLINGS’: FACTS STILL IN SHORT SUPPLY

Amnesty International has long expressed concern about the USA’s “targeted killing” policy, particularly in relation to secrecy and accountability and, as with detentions, the legal consequences of conducting such attacks under a “global war” framework.³¹ The lack of official disclosures and investigations about individual attacks has made it difficult to reach firm conclusions about the legality under international law of individual attacks.

Since the speech, concerns have continued. Amnesty International’s own review of a number of drone attacks in Pakistan, for example, led the organization to conclude that such strikes have resulted in unlawful killings that may constitute extrajudicial executions or war crimes.³²

President Obama devoted a substantial portion of his May 2013 address to his administration’s resort to “targeted killings”, in particular by drones. He acknowledged that there were “profound questions” raised by this policy, including about “who is targeted, and why; about civilian casualties, and the risk of creating new enemies; about the legality of such strikes under US and international law; about accountability and morality”.

In his May speech, President Obama spelled out his administration’s policies on the use of drones in more detail than previously. Among other things, he said his administration had put in place a standard for using lethal force that “respects the inherent dignity of every human life.” The same day, the White House issued a “fact sheet” outlining “counterterrorism policy standards and procedures that are either already in place or will be transitioned into place over time” with regard to US use of force in operations outside of “areas of active hostilities.”

These policy disclosures, even if in place now, fall far short of satisfying the USA’s international human rights obligations and they do not adequately ensure that the use of drones does not result in unlawful killings. The information is framed as “policy standards” rather than the USA’s international legal obligations. The fact sheet also states that the standards and procedures it describes may not apply in “extraordinary circumstances”, yet it does not define this term or set out limits. Malleable “policy standards” leave the door open to abuse.

The Human Rights Committee devoted a substantial part of its recent concluding observations on US compliance with the ICCPR to concerns about this lethal program, urging the USA to “revisit its position regarding legal justifications for the use of deadly force through drone attacks” and to:

“(a) Ensure that any use of armed drones complies fully with its obligations under article 6 of the Covenant, including, in particular, with respect to the principles of precaution, distinction and proportionality in the context of an armed conflict;

- (b) Subject to operational security, disclose the criteria for drone strikes, including the legal basis for specific attacks, the process of target identification and the circumstances in which drones are used;*
- (c) Provide for independent supervision and oversight of the specific implementation of regulations governing the use of drone strikes;*
- (d) In armed conflict situations, take all feasible measures to ensure the protection of civilians in specific drone attacks and to track and assess civilian casualties, as well as all necessary precautionary measures in order to avoid such casualties;*
- (e) Conduct independent, impartial, prompt and effective investigations of allegations of violations of the right to life and bring to justice those responsible;*
- (f) Provide victims or their families with an effective remedy where there has been a violation, including adequate compensation, and establish accountability mechanisms for victims of allegedly unlawful drone attacks who are not compensated by their home governments."*

Amnesty International has been particularly concerned by the USA's radical reinterpretation of the concept of "imminence" when invoking the right to use lethal force in self-defence. A leaked Department of Justice "white paper" claimed an individual could be designated as posing an "imminent threat" (and therefore subject to "targeted" killing) in the absence of intelligence about a specific planned attack or the individual's personal involvement in planning or carrying out a specific attack. This notion stretches the concept of imminence in a manner that is potentially disastrous for the protection of human rights and the international rule of law.³³

Under international human rights law, the intentional use of lethal force is lawful only if it is "strictly unavoidable" in order to meet an "imminent threat of death" in self-defence or defence of others. The only exception to the ordinary "law enforcement" rules in relation to the use of lethal force and the right to life is in the exceptional situation of zones of armed conflict. In the context of an international armed conflict, a person who is a member of the armed forces of a state, or a civilian who is at the relevant time directly participating in hostilities, may be lawfully targeted for attack (and killed), if the attack complies with the rules of international humanitarian law. Applying this rule to non-international armed conflict may, at least in some circumstances, require attempting to capture, rather than kill, members of armed groups wherever practically possible.

In terms of international law compliance, the devil remains in the detail, but the detail remains obscured a year after the President's speech. Thus, while the "targeted killing" policy is a cause for concern including as a result of the "global war" framework, the question of the legality of individual drone strikes and the extent to which the concept of imminence is or is not being stretched beyond international legal limits in individual cases has to be examined on the specific facts of each case.

However, facts remain in short supply. The White House pledged in May 2013 to "share as much information as possible" about drone strikes and the President said he looked "forward to actively engaging Congress to explore these and other options for increased oversight."³⁴ However, a year after the speech, it is apparently impossible for the administration to disclose even the most basic facts, including the number of people killed, their identities, or the administration's own detailed rationale for the legality of such killings. The administration's only public engagement with Congress was to send a letter implying that the legislative branch should not pass a law requiring disclosure of the number of people killed.

We are left with promises of transparency, reform, accountability and oversight, and little or no way to verify such promises.

TORTURE AND OTHER HUMAN RIGHTS VIOLATIONS: TRUTH, REMEDY AND ACCOUNTABILITY LONG OVERDUE

The Obama administration is “the most transparent administration in history”, according to President Obama in February 2013.³⁵ Transparency had been a theme in his May 2009 national security speech – he recalled among other things that “I ran for President promising transparency, and I meant what I said”. After four years in which the government’s use of secrecy had continued to block accountability and remedy for human rights violations, the question of transparency was given a lower profile in the President’s May 2013 speech.

Linked to transparency, accountability had also been one of the subjects addressed in President Obama’s May 2009 speech. Even in “war”, he said, accountability for government actions was a central component:

“We are indeed at war with al Qaeda and its affiliates. We do need to update our institutions to deal with this threat. But we must do so with an abiding confidence in the rule of law and due process; in checks and balances and accountability.”

While needing to “update our institutions” to deal with threats to security, the President expressed confidence in the status quo to provide accountability, asserting his belief that an independent commission of inquiry was unnecessary because “our existing democratic institutions are strong enough to deliver accountability”. Clearly his confidence was misplaced. Accountability for the crimes under international law committed against detainees held in secret custody, for example, has remained absent without the political will to see it through.

In his May 2013 speech, perhaps unsurprisingly given his earlier stated future-oriented stance, the President was silent on the question of accountability for human rights violations committed against detainees in US custody (keeping references to accountability to the “targeted killing” program). Moreover, in last year’s speech he referenced the torture that had been authorized and carried out before 2009, not as a crime, but as a question of undermining domestic values: “we compromised our basic values – by using torture to interrogate our enemies, and detaining individuals in a way that ran counter to the rule of law”.

Since his May 2013 speech, the Senate Select Committee on Intelligence (SSCI) has voted to submit for declassification the summary and findings of its review into the secret detention programme operated by the Central Intelligence Agency (CIA) under authorization granted by President Bush in September 2001 and terminated by President Obama in January 2009.³⁶ The review “exposes brutality” committed in the program, according to the SSCI chairperson, Senator Dianne Feinstein.³⁷ On 7 April 2014, Senator Feinstein sent a copy of the summary and findings to President Obama with a request that they be declassified “quickly and with minimal redactions”. In a letter dated 18 April, the Counsel to President Obama told her that:

“the President and this Administration are committed to working with you to ensure that the 500-plus page executive summary, finding, and conclusions of the report on the former RDI [rendition, detention and interrogation] program undergo a declassification review as expeditiously as possible, consistent with our national security interests... As I know you appreciate, declassification decisions, even with respect to discontinued programs, are fact-based and must be made with the utmost sensitivity to our national security. As such, the CIA, in consultation with other agencies, will conduct the declassification review.”³⁸

For its part, the CIA has emphasised that:

“Information related to the CIA’s former rendition, detention, and interrogation program is extraordinarily sensitive. Likewise, the fact-based declassification review of the SSCI Report’s executive summary, findings and conclusions, must be made with the utmost sensitivity to our national security”.³⁹

Amnesty International has called for the entire SSCI report to be made public, as did the Human Rights Committee in its recent conclusions on the USA’s compliance with the ICCPR. President Obama should ensure that no information concerning human rights violations is obscured from public view, and that no agency is allowed to prevent publication of such information. No redactions of the truth about torture or other gross human rights violations can ever be justified on grounds of ‘national security’.

Amnesty International continues to call for the USA to meet its international obligations on truth, accountability and remedy. The USA is required by international law not only to respect and ensure human rights, but 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. In its recent findings on the USA, the Human Rights Committee said:

“The State party should ensure that all cases of unlawful killing, torture or other ill-treatment, unlawful detention or enforced disappearance are effectively, independently and impartially investigated, that perpetrators, including, in particular, persons in positions of command, are prosecuted and sanctioned, and that victims are provided with effective remedies. The responsibility of those who provided legal pretexts for manifestly illegal behaviour should also be established.”

Part of the solution means accounting with the past. Failure to do so will leave the USA not only stained by this part of its history, but more susceptible to repeating it.

It is not just the impunity that causes concern. Current interrogation standards in the Army Field Manual as well as the USA’s longstanding reservations and understandings to UNCAT and the ICCPR underscore concerns that the door to the torture chamber has not been bolted shut by the US authorities.⁴⁰

In his statement to the Senate Committee on Foreign Relations on 21 May 2014, the General Counsel for the Department of Defense noted the case of Abu Anas al Libi, who was abducted from Tripoli in Libya by US forces on 5 October 2013 and held and interrogated aboard a ship, the *USS San Antonio*, in the Mediterranean before being taken to the USA.⁴¹ The General Counsel referenced the case as an example of an operation undertaken “in reliance on the AUMF”.⁴² At the time of the abduction and subsequent incommunicado detention, Amnesty International had expressed concern about Abu Anas al Libi’s treatment during the interrogation process – given that methods authorized for use in such cases under Appendix M of the Army Field Manual can include prolonged isolation and sleep deprivation. Prolonged incommunicado detention can itself amount to cruel, inhuman or degrading treatment.

Abu Anas al Libi has since told his US lawyer that on the ship he was interrogated by a CIA agent, was not told during the time he was held on the vessel where he would be taken, and also that things could only get worse, raising the fear in his mind of transfer to Guantánamo or of rendition elsewhere. He said that he was held in some sort of “pod” located, he thought, on the deck. All he had in the way of facilities in that pod was a blanket – no bed and no toilet. The lights were on the whole time. He said he was cold. When interrogated, he was taken to another pod, and during transfer there was made to wear ear muffs and was blindfolded and handcuffed. He thinks this pod, too, was located on the deck of the ship. He has alleged that his treatment did indeed include, effectively, sleep deprivation, through the use of prolonged back-to-back interrogations. He was eventually held on the ship for about a week, with his incommunicado detention and interrogation cut short due to his ill-health.⁴³

CONCLUSION

Every war, President Obama said on 23 May 2013, “has to come to an end” and in this regard the USA was “at a crossroads” requiring it to “define the nature and scope of this struggle, or else it will define us”. Yet what President George W. Bush dubbed the “war on terror”, and the Obama administration effectively endorsed in all but name, has already come to define the USA’s approach to national security. Guantánamo, military commissions, drone attacks, impunity, and lack of truth and remedy are part of this synonymy.

In the year since President Obama pointed to his country being at a “crossroads”, the USA has continued to travel in the same direction in relation to these detention and drone issues, failing to follow the signpost marked “human rights”, most recently pointed to by the UN Human Rights Committee. The USA has, of course, been on the wrong side of its international human rights obligations in relation to its counter-terrorism policies for a lot longer than the past year. It will remain so until respect for such international human rights principles, rather than its “global war” theory, underpins its actions.

On 23 May 2013, President Obama said that in the context of his country’s national security policies, whether in relation to drones or detentions, “the decisions we are making now will define the type of nation – and world – that we leave to our children”.

A decision made 65 years earlier by the international community, namely to adopt the Universal Declaration of Human Rights, recognized that “the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”.⁴⁴ Reporting to the Human Rights Committee about US compliance with the core civil and political rights treaty codifying UDHR principles, the USA recalled what President Obama had said in a speech in Moscow in 2009:

“By no means is America perfect. But it is our commitment to certain universal values which allows us to correct our imperfections, to improve constantly, and to grow stronger over time.”⁴⁵

In that same speech, President Obama had said that

“America seeks an international system...where the universal rights of human beings are respected, and violations of those rights are opposed; a system where we hold ourselves to the same standards that we apply to other nations”.⁴⁶

Today, the USA continues to undermine the Universal Declaration in the name of national security. Is that the action of a country “committed to promoting and protecting human rights”, as it described itself to the Human Rights Committee?⁴⁷

RECOMMENDATIONS

Amnesty International once again urges the US government to:

- **Immediately drop the “global war” framework.** The message sent by the USA’s global war framework is that a government can ignore or jettison its human rights obligations and replace them with rules of its own whenever it decides that the circumstances warrant it. Under its global war framework, the USA has at times resorted to enforced disappearance, torture, secret detainee transfers, indefinite detention, and unfair trials, as well as a lethal force policy that plays fast and loose with the concept of “imminence” and appears to permit extrajudicial executions. At the same time, truth, accountability and remedy have been sacrificed. Congress and the administration should commit to a framework for US counter-terrorism strategy – from detentions to the use of force – that fully

complies with international human rights law and standards. The 2001 Authorization for Use of Military Force (AUMF) should be repealed.

- **Ensure necessary investigations.** Ensure prompt, thorough, independent, effective and impartial investigations into all credible allegations of human rights violations, with the methodology and findings of such investigations made public.
- **Ensure full accountability.** Ensure that anyone responsible for crimes under international law, including torture and enforced disappearance, committed in the post-9/11 counter-terrorism context is brought to justice, regardless of their level of office or former level of office.
- **Guarantee access to remedy.** Ensure that all victims of US human rights violations are recognised, and have genuine access to meaningful remedy, as required under international law.
- **End any use of secrecy that obscures truth about human rights violations or blocks accountability or remedy for violations.** Any information that describes or details human rights violations for which the USA is responsible must be made public. Among other things, such information relating to the identity, detention, interrogation and transfers of those held in the now terminated CIA programmes of rendition and secret detention should be declassified and disclosed, including in the context of trial proceedings being conducted against detainees currently held at Guantánamo, and in relation to the report on the CIA detention programme by the Senate Select Committee on Intelligence. The USA must end any use of the state secrets doctrine that blocks remedy or accountability.
- **Address the Guantánamo detentions as a human rights issue.** The detentions must be resolved and the detention facility closed in a way that full complies with international human rights law. Specifically:
 - Pending resolution of the detentions, and without delaying that goal in any way, there should be an immediate detailed review of conditions of detention and of policies implemented in response to the hunger strike, including assessing cell-search, force-feeding and comfort item policies, facilitating continuing access for legal representatives to detainees, allowing full access to independent medical professionals, UN experts, and human rights organizations, and ensuring all policies comply with international human rights law and standards and medical ethics. Information about hunger strikes should be made public – including a resumption of regular bulletins on how many detainees are on hunger strike, how many are being force fed, and how many have been hospitalized. A full un-redacted version of the current hunger strike protocol should be made public.⁴⁸
 - Expedite safe detainee transfers: Dozens of the Guantánamo detainees have long been “approved for transfer” by the US authorities. The administration and Congress should bring about lawful and safe detainee transfers as a matter of priority. The USA should not place any conditions on transfers of detainees that would, if imposed by the receiving government, violate international human rights law and standards.
 - Charge and try in civilian courts: Detainees who are to be prosecuted should be charged and tried without further delay in ordinary federal civilian court, applying fair trial standards fully consistent with international law. There should be no recourse to the death penalty. Any detainees who are not to be charged and tried should be immediately released – if repatriation is not possible then into the USA or any safe alternative.

- Ensure safeguards against torture and other ill-treatment. Among other things, Appendix M of the Army Field Manual should be removed, US reservations and understandings to the Convention Against Torture (UNCAT) should be withdrawn, and the Optional Protocol to UNCAT should be ratified.
- **Ensure full compliance with international law in the use of lethal force**
 - Consistent with the first recommendation above, the USA must end claims that it is authorized by international law to use lethal force anywhere in the world under the theory that it is involved in a “global war” against al-Qa'ida and other armed groups and individuals.
 - Recognize the application of international human rights law to all US counterterrorism operations, including those outside US territory, and bring US policies and practices in line with the USA's international human rights obligations.
 - Ensure that any use of lethal force outside of specific recognized zones of armed conflict complies fully with the USA's obligations under international human rights law, including by limiting the use of force in accordance with UN standards for the use of force in law enforcement.
 - Ensure that any use of lethal force within a specific recognized zone of armed conflict complies fully with the USA's obligations under international human rights and humanitarian law, including by recognizing and respecting the rule that if there is doubt as to whether a person is a civilian, the person is to be considered a civilian.
 - Declassify and publish the Presidential Policy Guidance signed by President Obama on 22 May 2013, and other policy and legal memorandums on the use of lethal force.
 - Declassify and disclose key information relating to all other such use of lethal force in the counter-terrorism context, including the names and locations of individuals killed.
 - Ensure independent and impartial investigations in all cases of alleged extrajudicial executions or other unlawful killings, respect for the rights of family members of those killed, and effective redress and remedy where killings are found to have been unlawful.

ENDNOTES

¹ President Obama's speech of 21 May 2009 is at <http://www.whitehouse.gov/the-press-office/remarks-president-national-security-5-21-09>

² President Obama's speech of 23 May 2013 is available at <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>

³ USA: Words, war and the rule of law, <http://www.amnesty.org/en/library/info/AMR51/032/2013/en>; Amnesty International's response to the 2009 speech – President Obama defends Guantánamo closure, but endorses 'war' paradigm and indefinite preventive detention – is available at <http://www.amnesty.org/en/library/info/AMR51/072/2009/en>

⁴ On the Bush administration, see for example, USA: Undermining security: violations of human dignity, the rule of law and the National Security Strategy in "war on terror" detentions, 8 April 2004, <http://www.amnesty.org/en/library/info/AMR51/061/2004/en>. The Obama administration's National Strategy for Counterterrorism put "respect for human rights" as a "core value" underlying all counterterrorism policies. See National Strategy for Counterterrorism, June 2011, http://www.whitehouse.gov/sites/default/files/counterterrorism_strategy.pdf

⁵ See, for example, USA: Doctrine of pervasive 'war' continues to undermine human rights, 15 September 2010, <http://www.amnesty.org/en/library/info/AMR51/085/2010/en>

⁶ Prepared statement of Stephen W. Preston, General Counsel, Department of Defense, on the framework under US law for current military operations. Committee on Foreign Relations, United States Senate, 21 May 2014.

⁷ *Abdullah v. Obama*, Brief for Appellees, In the US Court of Appeals for the DC Circuit, 31 October 2013. In its concluding observations on US compliance with the ICCPR, the Human Rights Committee said: "Taking into account its declaration that provisions of the Covenant are non-self-executing", the USA should "ensure that effective remedies are available for violations of the Covenant, including those that do not, at the same time, constitute violations of the domestic law of the United States of America, and undertake a review of such areas with a view to proposing to Congress implementing legislation to fill any legislative gaps." UN Doc.: CCPR/C/USA/CO/4, 23 April 2014, ¶ 4(c).

⁸ *Abdullah v. Obama*, US Court of Appeals for the DC Circuit, 4 April 2014.

⁹ See US Department of Defence news release, Detainee transfer announced, 13 July 2010, <http://www.defense.gov/Releases/Release.aspx?ReleaseID=13708>. See also, USA: Another detainee dies at Guantánamo, 11 September 2012, <http://www.amnesty.org/en/library/info/AMR51/077/2012/en>

¹⁰ See 10 April 2014 letter from US organizations, including Amnesty International USA at, <http://www.constitutionproject.org/wp-content/uploads/2014/04/140410-Coalition-Letter-GTMO-Hunger-Strikes-2.pdf>

¹¹ See USA: 'I have no reason to believe that I will ever leave this prison alive', 3 May 2013, <http://www.amnesty.org/en/library/info/AMR51/022/2013/en> and 'I am fallen into darkness': The case of Obaidullah, Guantánamo detainee now in his 12th year without trial, 25 July 2013, <http://www.amnesty.org/en/library/info/AMR51/051/2013/en>

¹² See USA: 12 years of Guantánamo detentions, 12 years of double standards, 9 January 2014, <http://www.amnesty.org/en/library/info/AMR51/001/2014/en>

¹³ See USA: Trials in error: Third go at misconceived military commission experiment, 16 July 2009, <http://www.amnesty.org/en/library/info/AMR51/083/2009/en>

¹⁴ Chief Prosecutor Mark Martins, Remarks at Guantánamo Bay, 13 April 2014.

¹⁵ Ahmed Khalfan Ghailani, a Tanzanian national, was convicted in US District Court in New York in 2010 and sentenced to life imprisonment in January 2011. See USA: Shadow over justice: Absence of accountability and remedy casts shadow over opening of trial of former secret detainee accused in embassy bombings, 1 October 2010, <http://www.amnesty.org/en/library/info/AMR51/094/2010/en>

¹⁶ Press conference by President Obama, 10 September 2010, transcript available at <http://www.whitehouse.gov/the-press-office/2010/09/10/press-conference-president-obama>

¹⁷ See <http://www.amnesty.org/en/for-media/press-releases/usa-u-turn-trial-forum-911-suspects-betrays-human-rights-2011-04-05>

¹⁸ This general rule is reflected in Article 27 of the 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".

¹⁹ UN Human Rights Committee, General Comment No 32, Article 14: Right to equality before the courts and tribunals and to a fair trial, UN Doc CCPR/C/GG/32, 23 August 2007, para. 22.

²⁰ See, for example, Cruel conditions for pre-trial prisoners in US federal custody, 12 April 2011, <http://www.amnesty.org/en/library/info/AMR51/030/2011/en>

²¹ See, for example, USA: Capital deficit: A submission on the death penalty to the UN Human Rights Committee for the 109th Session of the Committee (14 October to 1 November 2013), 16 September 2013, <http://www.amnesty.org/en/library/info/AMR51/062/2013/en>

²² Report pursuant to Section 1039 of the National Defense Authorization Act for Fiscal Year 2014, 14 May 2014.

²³ See Memorandum for the Secretary of Defense and the Attorney General. Subject: Directing Certain Actions with Respect to Acquisition and Use of Thomson Correctional Center to Facilitate Closure of Detention Facilities at Guantánamo Bay Naval Base. President Barack Obama, 15 December 2009, <http://www.whitehouse.gov/the-press-office/presidential-memorandum-closure-detention-facilities-guantanamo-bay-naval-base>

²⁴ Detainee Transfer Announced. US Department of Defence news release, 31 December 2013, <http://www.defense.gov/Releases/Release.aspx?ReleaseID=16457>

²⁵ Uruguay leader agrees to take up to six Guantánamo prisoners, Wall Street Journal, 7 May 2014. The Uruguayan Presidential website subsequently provided a link to this article, at http://issuu.com/presidenciauy/docs/the_wall_street_journal

²⁶ Remarks by President Obama and President Mujica of Uruguay Before Bilateral Meeting, 12 May 2014, White House transcript, <http://www.whitehouse.gov/the-press-office/2014/05/12/remarks-president-obama-and-president-mujica-uruguay-bilateral-meeting>

²⁷ From a trans-national al-Qa'ida capacity to more localized affiliates operating within specific countries and regions, as well as the threat posed by "homegrown extremists" in the USA.

²⁸ US Senate Committee on Foreign Relations. Authorization for Use of Military Force after Iraq and Afghanistan, Statement of Mary E. McLeod, Principal Deputy Legal Adviser, US Department of State, 21 May 2014.

²⁹ UN Doc.: CCPR/C/USA/CO/4, 23 April 2014.

³⁰ The President's constitutional authority to conduct military operations against terrorists and nations supporting them. Memorandum opinion for Timothy Flanigan, the Deputy Counsel to the President, from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 25 September 2001, <http://www.justice.gov/olc/warpowers925.htm>

³¹ For further information, see USA: 'Targeted killing' policies violate the right to life, June 2012, <http://www.amnesty.org/en/library/info/AMR51/047/2012/en>; USA: Joint letter to President Obama re: Shared concerns regarding US drone strikes and 'targeted killings', April 2013, <http://www.amnesty.org/en/library/info/AMR51/017/2013/en>

³² Will I be next? US drone strikes in Pakistan, 23 October 2013, <http://www.amnesty.org/en/library/info/ASA33/013/2013/en>

³³ USA: The devil in the (still undisclosed) detail: Department of Justice 'white paper' on use of lethal force against US citizens made public, February 2013, <http://www.amnesty.org/en/library/info/AMR51/006/2013/en>;

³⁴ See also, Memo approving targeted killing of US citizen to be released, New York Times, 20 May 2014, <http://www.nytimes.com/2014/05/21/us/politics/memo-approving-targeted-killing-of-us-citizen-to-be-released.html>

³⁵ See <http://thehill.com/blogs/blog-briefing-room/news/283335-obama-this-is-the-most-transparent-administration-in-history>

³⁶ See USA: A step in the rights direction, 3 April 2014
<http://www.amnesty.org/en/library/info/AMR51/021/2014/en>

³⁷ Intelligence committee votes to declassify portions of CIA study, Senator Feinstein news release, 3 April 2014, <http://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=de39366b-d66d-4f3e-8948-b6f8ec4bab24>

³⁸ Letter from Kathryn H. Ruemmler, Counsel to the President, to Senator Dianne Feinstein (in her role as chairperson of the Senate Select Committee on Intelligence), 18 April 2014.

³⁹ *ACLU v CIA*, Defendant's motion for extension of time. US District Court for DC, 15 May 2014.

⁴⁰ See USA: Life, liberty and the pursuit of human rights: A submission to the UN Human Rights Committee for the 109th session of the Committee (14 October to 1 November 2013), 16 September 2013, <http://www.amnesty.org/en/library/info/AMR51/061/2013/en>, particularly §§B and E.

⁴¹ See USA: Abduction in Libya violates human rights, undermines rule of law, 7 October 2013, <http://www.amnesty.org/en/library/info/AMR51/065/2013/en> and USA: 'I'm not sure what they're basing that on', 11 October 2013, <http://www.amnesty.org/en/library/info/AMR51/069/2013/en>

⁴² Prepared statement of Stephen W. Preston, General Counsel, Department of Defense, on the framework under US law for current military operations. Committee on Foreign Relations, United States Senate, 21 May 2014 ("In Libya, in October 2013, in reliance on the AUMF, US forces captured longtime al-Qa'ida member Abu Anas al Libi").

⁴³ See Amnesty International Urgent Action, <http://www.amnesty.org/en/library/info/AMR51/066/2013/en> and update, <http://www.amnesty.org/en/library/info/AMR51/071/2013/en>

⁴⁴ Universal Declaration of Human Rights, preamble.

⁴⁵ UN Doc.: CCPR/C/USA/4. 22 May 2012. Consideration of reports submitted by States parties under article 40 of the Covenant. Fourth periodic report: United States of America.

⁴⁶ Remarks by the President at the New Economic School Graduation, Moscow, Russia, 7 July 2009, <http://www.whitehouse.gov/the-press-office/remarks-president-new-economic-school-graduation>

⁴⁷ UN Doc.: CCPR/C/USA/4, *op. cit.*

⁴⁸ See 10 April 2014 letter from US organizations, including Amnesty International USA, *op. cit.*