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USA: Transparency and accountability dealt another blow

Administration reversal on release of detainee abuse photos

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In a sharp policy U-turn, the US administration has decided to seek to block publication of photographs depicting abuse of detainees in US custody in Afghanistan and Iraq. The photos in question were due to be released by 28 May 2009 under Freedom of Information Act (FOIA) litigation.

The FOIA case, brought in 2004 by the American Civil Liberties Union, led in June 2006 to orders by District Court Judge Alvin Hellerstein in New York for the government to release 21 photographs of detainee ill-treatment in Iraq and Afghanistan. The government's appeal against these orders to the Court of Appeals for the Second Circuit finally failed in March 2009. The following month, the administration announced that it would not be appealing to the US Supreme Court, but rather that it would release the 21 photos and a further 23 pictures identified as relevant to the FOIA litigation. On 23 April 2009, the Department of Justice wrote to Judge Hellerstein to report that the parties had "reached an agreement that the Department of Defense will produce all the responsive images by May 28, 2009". It also said that it was "processing for release a substantial number of other images" relevant to the litigation.

This seemed to herald a step towards President Barack Obama's promised commitment to transparency in government, made in memorandums to heads of executive departments and agencies on his second day in office. This commitment was made on the grounds that "transparency promotes accountability and provides information for citizens about what their Government is doing". On 19 March 2009, Attorney General Eric Holder issued revised FOIA guidelines, to "restore the presumption of disclosure that is at the heart of the Freedom of Information Act". The Attorney General's memorandum reiterated President Obama's instruction, namely that the FOIA should be administered with the clear presumption that "in the face of doubt, openness prevails".

On 13 May, however, the Justice Department wrote to Judge Hellerstein to explain that the administration had changed its mind about the release of the photographs. "Upon further reflection at the highest level of Government", the letter states, "the Government has decided to pursue further options", including but not limited to an appeal to the Supreme Court.

In a press briefing on 13 May, President Obama explained his decision. The "most direct consequence" of releasing the photos, he emphasized, would be "to further inflame anti-American opinion and to put our troops in greater danger". This appears to have been the principal reason for the change in policy. According to the American Forces Press Service (AFPS), "intense pressure by military commanders concerned over a possible backlash against US troops in Iraq and Afghanistan caused the President to reconsider". The "most vocal" was General Raymond Odierno, the US military commander in Iraq, but officials also said that release of the photos at this time would be "particularly threatening" in relation to US operations in Afghanistan. Secretary of Defense Robert Gates "stands behind" the decision to "fight releasing hundreds of photos of prisoners in Iraq and Afghanistan", the AFPS emphasized.¹

¹ Defense officials support Obama's decision to fight photo release. American Forces Press Service, 13 May 2009, <http://www.defenselink.mil/news/newsarticle.aspx?id=54337>.

The US government has a duty to uphold the USA's international human rights obligations, obligations which may be implicated by the President's reversal of policy and decision to seek to block release of the photos. The right of the general population of the USA, and victims and their families in particular, to know the truth about the human rights violations perpetrated by the USA against detainees, is also undermined by the reversal.

President Obama emphasized that the photographs were "not particularly sensational", especially if compared to the "painful images" leaked in 2004 of the torture and other ill-treatment by US personnel at Abu Ghraib prison in Iraq. Presumably, however, what they depict is perceived to be "sensational" enough to stoke anti-US violence. He further stressed that "this is not a situation in which the Pentagon has concealed or sought to justify inappropriate action". Rather, the conduct depicted in the photos – conduct that "did not conform with the [US] Army [Field] Manual" – had been investigated, the individuals involved identified, and "appropriate actions" taken. He added that the photos in question were associated with "closed investigations", investigations that took place "long before I took office".

After the Abu Ghraib photographs became public in 2004 – finally triggering some official reviews of detainee policies after blanket denials in response to earlier evidence of torture and other ill-treatment – President George W. Bush had not only said that the actions of the perpetrators did "not represent the values of the United States of America" 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."² Transparency, truth and justice never became the hallmarks of the Bush administration's counter-terrorism policies, however.

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, and unfair trials by military commission. Official investigations 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. Much is still un-investigated. Much is still obscured from public view. Accountability is still largely absent, as is remedy for the victims. It is against this backdrop that the new administration's reversal on publication of these photos should be assessed.

President Obama said that the abuse of detainees "is against our values" and any future abuses would be "swiftly" investigated and any perpetrators "appropriately sanctioned". He explained, however, that publication of the photos "would not add any additional benefit to our understanding of what was carried out in the past by a small number of individuals". Here, disturbingly, the President seems to be reviving the "few bad apples" myth perpetuated by the previous administration, a myth debunked by, among others, the US Senate Armed Services Committee in the recently released report of its inquiry into the treatment of detainees in US custody in Iraq, Afghanistan and Guantánamo. Releasing the summary and conclusions of this report in December 2008, the Chairman of the Committee, Senator Carl Levin, said: "The abuses at Abu Ghraib, GTMO [Guantánamo] and elsewhere cannot be chalked up to the actions of a few bad apples. Attempts by senior officials to portray that to be the case while shrugging off any responsibility for abuses are both unconscionable and false."

² Interview With Al Arabiya Television, 5 May 2004 and News Conference with King Abdullah II of Jordan, 6 May 2004. See Public Papers of the Presidents, George W. Bush – 2004, Vol. 1, pages 770 and 784.

Indeed, President Obama's welcome decision last month to release Justice Department memorandums from 2002 and 2005 which facilitated the systematic, deliberate, and officially-sanctioned use of torture and other cruel, inhuman or degrading treatment against detainees held in secret custody, itself further holed the theory that detainee ill-treatment has been the action of a few aberrant individuals. Even then, however, the release of the memorandums was accompanied by a cementing of impunity for at least some of those responsible.³

President Obama suggested that publication of the abuse photographs could have "a chilling effect" on investigations. In contrast to this position, Amnesty International is concerned that a chill has already descended on accountability for human rights violations committed by the USA, and that suppression of photographs only undermines the effort to finally see independent investigation and public accountability of the gross and systemic human rights violations – including crimes under international law – authorized at the highest levels of his predecessor's administration.

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 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 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". It has also said that states should "provide appropriate and effective mechanisms for society as a whole and, in particular, for relatives of the victims, to know the truth regarding gross violations of human rights and serious violations of international humanitarian law".⁴

Many of the victims of torture and other ill-treatment at the hands of the USA, as well as other similarly grave human rights violations, remain without remedy. Many of those responsible for these abuses, and especially those at higher levels of authority, have not been brought to justice. To any extent that continued concealment of photographic evidence of these violations perpetuates that situation, it would be inconsistent with the USA's obligations under international human rights law. Further, the right of society as a whole to know the full truth of gross and systemic violations, as a prerequisite to public accountability and as a measure against recurrence, is also undermined by continued suppression of evidence of the abuses.

Amnesty International urges the US administration to recognise that a U-turn on this issue sets it on a path not to a better future, but rather back towards past mistakes. The organization appeals to the administration not to appeal to the US Supreme Court on this issue and to release the photographs as previously promised.

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³ USA: Torture in black and white, but impunity continues: Department of Justice releases interrogation memorandums, 17 April 2009, <http://www.amnesty.org/en/library/info/AMR51/055/2009/en>.

⁴ See USA: Investigation, prosecution, remedy. Accountability for human rights violations in the 'war on terror', December 2008, <http://www.amnesty.org/en/library/info/AMR51/151/2008/en>