



MIXED MESSAGES

COUNTER TERROR AND
HUMAN RIGHTS – PRESIDENT
OBAMA'S FIRST 100 DAYS

COUNTER TERROR
WITH JUSTICE

AMNESTY
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Amnesty International is a global movement of 2.2 million people in more than 150 countries and territories who campaign to end grave abuses of human rights. Our vision is for every person to enjoy all the rights enshrined in the Universal Declaration of Human Rights and other international human rights standards. We are independent of any government, political ideology, economic interest or religion – funded mainly by our membership and public donations.

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Cover photo: President Barack Obama caps his pen after signing an executive order to close the prison at Guantánamo Bay within a year, 22 January 2009, the Oval Office of the White House in Washington. © Charles Dharapak/AP

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Counter Terror and Human Rights: President Obama's first 100 days

PREFACE

This report assesses the words and actions of the US administration, led by US President Barack Obama, in its first 100 days against specific recommendations Amnesty International made to the incoming President on countering terrorism and human rights. In essence, Amnesty International called on the new administration to undo the damage caused by US policies developed in what the previous administration dubbed the "war on terror", policies that undermined the framework of international human rights law. This report does not cover the actions of other branches of the US government - Congress or the courts – except when related to steps taken by administration in this area.

Neither does this report address the numerous other human rights concerns that Amnesty International has in relation to the USA. The organization continues to raise such concerns – whether in relation to issues inside the USA such as the death penalty, prison conditions, discrimination, policing, violence against women, or in relation to the US foreign policy agenda. For further information on these concerns and Amnesty International's recommendations please visit our website at www.amnesty.org.

INTRODUCTION

When he took office on 20 January 2009, President Barack Obama inherited a legacy of torture, impunity and unlawful detention. The legacy is the result of the USA's response to the attacks of 11 September 2001, a response that has been marked by an assault on the framework of international human rights law. Human rights violations – including the crimes under international law of torture and enforced disappearance – were not only committed but were also justified by the US government as necessary and legal.

Images of caged, shackled detainees in the US naval base at Guantánamo Bay in Cuba, of torture and other ill-treatment at Abu Ghraib prison in Iraq, of Gulfstream jets used to transfer detainees to secret prisons around the world, have been seared into the public consciousness and become indelibly linked to USA's response to the attacks of 11 September 2001.

During his campaign for the presidency, Barack Obama committed himself to closing the Guantánamo detention facility and ending torture by US personnel. To what extent these commitments would mark a real shift towards bringing the USA into compliance with its international human rights obligations in the struggle against terrorism remained to be seen.

Amnesty International issued a checklist against which to assess the progress made towards this goal in the new administration's first 100 days¹. After the election, the organization called on President-elect Obama to take 17 concrete steps during his first 100 days in office towards:

- closing Guantánamo and ending illegal detention;
- eradicating torture and ill-treatment;
- ending impunity.

At the end of the 100 days it is clear that significant steps have been taken by the new administration, including some to undo the damaging detention and interrogation policies developed under the previous administration. However, other changes have been more symbolic than substantial, and the little action taken by the new administration on accountability for past human rights violations has cemented the impunity nurtured in the past, for at least some of the perpetrators. Further change is urgently needed.

Using Amnesty International's checklist as a guide, this report reviews the words and deeds of the new administration to evaluate the USA's progress towards meeting its international obligations on detainees in the context of countering terrorism.

¹ Due to publishing timelines, this report covers events up until 27 April 2009, the 98th day of the new administration.

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1. AN AUSPICIOUS START

POSITIVE EARLY STEPS

On his third day in office President Obama signed three executive orders and a memorandum that marked a break with his predecessor's approach to detention and interrogation policies in the name of countering terrorism, an approach that had been marked by abuse, injustice and impunity. It was an auspicious start, welcomed in large part by Amnesty International and other human rights organizations, as well as by people in the USA and around the world who had campaigned for years for an end to the human rights violations associated with what the US administration then called the "war on terror".

The executive orders on the closure of Guantánamo, on interrogations, and on a review of detention policy, as well as the memorandum on the case of Ali al-Marri – the only "enemy combatant" still held on the US mainland – marked substantial steps forward.

GUANTÁNAMO AND ILLEGAL DETENTION

Since 11 January 2002 the USA has operated an offshore detention and interrogation facility at the US naval base at Guantánamo Bay, Cuba. For over seven years it has been the visible – although far from transparent – tip of the iceberg of indefinite and secret detentions, renditions (transfers, in this case secret, of detainees between countries using means that bypass judicial and administrative due process) and torture and other cruel, inhuman or degrading treatment. The base became a powerful symbol of the USA's disregard for human rights in the name of countering terrorism.

The executive order entitled "Review and Disposition of Individuals Detained at the Guantánamo Naval Base and Closure of Detention Facilities" signed by President Obama on 22 January 2009 directs closure of the Guantánamo detention centre "as soon as practicable" and no later than one year from the date of the order.

The order required the Attorney General to coordinate an interagency review to determine who from among the Guantánamo detainees could be released or transferred from US custody; who could be prosecuted by the USA, and in which jurisdiction; and what other lawful options there were for detainees the review determined could neither be released nor brought to trial.² The executive order asserted that "new diplomatic efforts" could be fruitful in resolving a "substantial number" of cases and instructed the US Secretary of State to pursue such efforts.

² On 15 April, the new Attorney General, Eric Holder, stated: "There are some detainees who we will likely conclude no longer pose a threat to the United States and can be released or transferred to the custody of other countries. There are others who we will decide to prosecute in federal court. But a third category of detainees poses a harder question – much harder. If a detainee is too dangerous to release, yet there are insurmountable obstacles to prosecuting him in federal court, what shall we do?"

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The order also instructed the Secretary of Defense to take the necessary steps to ensure that all military commission proceedings at Guantánamo were halted and no more charges under the Military Commissions Act were sworn against detainees or referred on for trial during the interagency review.

Amnesty International's checklist included an appeal to the new administration to abandon trials by military commission and to turn to the existing federal courts for the trial of any detainee promptly charged. Signs of a new openness to the possibility of conducting trials of Guantánamo



detainees in US civilian federal courts are welcome, but after 100 days there had been no substantive commitment of any kind to this. The executive order itself only requires evaluation of "whether it is feasible to prosecute such individuals before a court established pursuant to Article III of the United States Constitution". It does not rule out court martial or trial by military commission.

The executive order also instructed the Secretary of Defense to review

conditions of detention at Guantánamo to ensure that conditions fully complied with Article 3 common to the Geneva Conventions and all other "applicable laws".³

That the Guantánamo detention facility, a symbol of injustice and abuse, will no longer be operating by 22 January 2010 is to be welcomed. Nevertheless, President Obama's order left open the possibility of detainees being held without charge in the base for up to another year. Amnesty International repeats its call on the new administration to speedily resolve all the detainee cases in ways fully consistent with the USA's international obligations.⁴

INTERROGATIONS, TORTURE AND TRANSFERS

Since late 2001 the USA has operated a programme, run mainly by the CIA, of secret detention and interrogation. Torture and enforced disappearance – crimes under international law – have been among the human rights violations committed as part of this programme.

³ The subsequent review concluded that conditions did comply with Common Article 3, while making a number of recommendations for improvements. Neither the order nor the review, however, expressly recognized international human rights law other than the Convention against Torture as being among those "applicable laws".

⁴ USA: *The promise of real change – President Obama's executive orders on detentions and interrogations* (Index: AMR 51/015/2009), 30 January 2009, <http://www.amnesty.org/en/library/info/AMR51/015/2009/en>.

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CIA officials have said that fewer than 100 people were subjected to this programme; the names and whereabouts of many of them remain unknown. Where they were held and how they were treated remains classified top secret. At least 16 of the programs "high value detainees" are now in Guantánamo, held incommunicado for up to four and a half years in solitary confinement before being transferred to the naval base. At least three of these 16 were subjected to the form of torture known as waterboarding, simulated drowning. According to a newly released Department of Justice memorandum, one of these men was subjected to this technique 83 times in August 2002, and in March 2003 another of them was subjected to it 183 times. Other interrogation techniques authorized for use in the secret programme included forced nudity, stress positions, sleep deprivation, dousing with cold water, deprivation of solid food, and confinement in small dark spaces.

The executive order "Ensuring Lawful Interrogation", also signed by President Obama on 22 January 2009, marks a substantial step towards ending this programme and the violations associated with it. The order revokes the executive order signed by President George W. Bush on 20 July 2007, which had authorized the CIA's programme to continue. This was one of the recommendations on Amnesty International's checklist.

Other executive orders, directives and regulations issued after 11 September 2001, to the extent they were inconsistent with President Obama's order, were also revoked by this executive order. President Obama ordered the CIA to close its long-term secret detention facilities, and prohibited the agency from operating any such facility in the future.⁵

The executive order "Ensuring Lawful Interrogation" also requires that all interrogations of anyone in the custody or effective control of any US government agency in "any armed conflict" must be governed by the Army Field Manual interrogation guidelines. It stated that "from this day forward", and without "further guidance" from the Attorney General, no legal opinion or directive interpreting laws related to interrogation issued by the Department of Justice between 11 September 2001 and 20 January 2009 could be relied upon by US interrogators.

Significant problems remain, however. The executive order left open the possibility of the CIA detaining people on a "short-term, transitory" basis. That the CIA does indeed retain this detention authority was confirmed by the CIA Director on 9 April 2009. What is meant by "short term" remains unclear, as does the legal authority under which the CIA would hold people during such time. The executive order also appears not to prevent the CIA from interrogating detainees held in foreign-controlled secret detention facilities.

Furthermore, reliance on the Army Field Manual is not sufficient protection for detainees. The manual does not cover conditions of detention unrelated to interrogation, and some of its

⁵ On 9 April 2009, the new Director of the CIA, Leon Panetta, stated that the CIA "no longer operates detention facilities or black sites" and had "proposed a plan to decommission the remaining sites".

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provisions could be applied in a manner inconsistent with the international prohibition of torture and other ill-treatment.

In particular, the manual's Appendix M permits techniques such as sleep deprivation and isolation. Elsewhere, the manual allows for manipulation of detainee's fears, which could be used in ways that violate international law. The order does refer to the UN Convention against Torture, but it does not mention the International Covenant on Civil and Political Rights (ICCPR) or other human rights standards. This should be remedied as part of a broader recognition of and adherence to international human rights law by the USA.

The "Ensuring Lawful Interrogation" executive order also sets up a task force, due to report back within 180 days of 22 January 2009. This will evaluate "the practice of transferring individuals to other nations in order to ensure that such practices comply with domestic laws, international obligations, and policies of the United States and do not result in the transfer of individuals to other nations to face torture". This implicitly recognizes that the USA has failed to comply with its international obligations in relation to detainee transfers. The practice of rendition and reliance on "diplomatic assurances" from other states that transferred detainees will be safe despite a clear risk of human rights violations, have resulted in an unknown number of individuals being transferred to secret US custody at unknown locations or to the custody of other governments where they have faced torture and other human rights violations.

Government officials in the new administration have stated that intentionally sending people to be tortured should not happen – as did officials in the Bush administration – but they have also indicated that other types of transfer to states known to practice torture could continue, including on the basis of "diplomatic assurances".

The task force will also "study and evaluate" whether the interrogation practices and techniques in the Army Field Manual, when employed by government agencies outside the military, "provide an appropriate means of acquiring the intelligence necessary to protect the Nation". If the task force deems it necessary, it shall recommend "additional or different guidance" for these other agencies. Amnesty International remains concerned that this might constitute a loophole for the future use of interrogation techniques incompatible with international law banning torture and other ill-treatment.

PRESIDENTIAL MEMORANDUM ON 'ENEMY COMBATANT' ALI AL-MARRI

The presidential memorandum "Review of the Detention of Ali Saleh Kahlah al-Marri" ordered a review of the status of the only "enemy combatant" held on the US mainland. Ali al-Marri, a Qatari national and US resident arrested in Illinois, had been held in indefinite military custody without charge or trial since being removed from the criminal justice system and labelled an "enemy combatant" in June 2003.

In February 2009, Ali al-Marri was charged for trial in US federal court on charges of conspiring to provide material support to a terrorist organization. President Obama ordered his transfer from military to civilian custody. This positive development was tainted by the failure of the new

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administration, in a brief asking the US Supreme Court to dismiss the Ali al-Marri case, to reject the Bush administration's position that Ali al-Marri could be detained indefinitely as an "enemy combatant".

2. FEW RELEASES, NO CHARGES

The firm commitment to close the Guantánamo detention facility, the moves towards ending torture and secret detention by the CIA, and the charging in federal court of Ali al-Marri meant that hopes were high for further positive moves. Subsequent developments, or the lack of them, have dampened these expectations.

One hundred days into the new administration, the future remains uncertain for the approximately 240 detainees still held at Guantánamo as the executive review of their cases and of US detention policy ordered by President Obama continues. The review has so far led to the release of only one detainee. No Guantánamo detainee has been charged by the new administration.

Two processes are under way on the cases of the detainees at Guantánamo: the reviews ordered by President Obama on their release, transfer, prosecution or some other as yet unidentified option; and the detainees' challenges filed in US courts on the lawfulness of their detentions (habeas corpus), their right to which was recognized by the US Supreme Court in its June 2008 ruling in *Boumediene v. Bush*.

While Amnesty International has no reason to doubt President Obama's commitment to closing Guantánamo, it is concerned that the executive review has lacked transparency, and the judicial review continues to face delays and obstacles.

The bottom line is that after 100 days of the new administration, unlawful detentions at Guantánamo Bay continue, and for the vast majority of the detainees, the change in administration has so far meant no change in their situation.⁶

DETAINEES REMAIN IN LIMBO

Despite the commitment of the new administration "on a rolling basis and as promptly as possible" to review cases to determine which detainees can be transferred or released, only one detainee was released in the first 100 days as a result of the executive review. Binyam Mohamed,

⁶ See *USA: Detainees continue to bear costs of delay and lack of remedy* (Index: AMR 51/050/2009), 9 April 2009, <http://www.amnesty.org/en/library/info/AMR51/050/2009/en>.

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an Ethiopian national and UK resident, was released to the UK in February 2009.

Soon after the new administration took office, the quality and integrity of the detainee files became a point of dispute. A "senior administration official" was quoted as saying that the information is "scattered throughout the executive branch"; however, a Pentagon spokesperson said that "the individual files on each detainee are comprehensive and sufficiently organized", although adding that the quantity of information "makes a comprehensive assessment a time consuming endeavour".⁷



U.S. Army Soldiers stand guard on a cell block inside Camp Five at the Guantánamo detention facility, November 2006.
© US DoD

The reason the administration does not have appropriate information to justify particular detentions is irrelevant. If a government does not have readily available information that would establish minimal legal and factual grounds for detaining a person, that person should be released. If such a person is not released, the right to liberty and security of person, to which everyone is entitled, and the international prohibition of arbitrary detention, is violated.

JUDICIAL REVIEW STILL FACING DELAYS

In June 2008 the US Supreme Court ruled in *Boumediene v. Bush* that the

Guantánamo detainees are entitled to prompt hearings in US courts to challenge the lawfulness of their detention. The Bush administration responded to the *Boumediene* ruling with litigation tactics that ensured delays in habeas corpus proceedings. Delays have continued under the new administration, which has sought to justify some of the delays on its executive review. This is not a valid excuse.

For example, the new administration stated in a court filing in March 2009 that "heightened priority" in its executive review was being given to the cases of detainees who had been approved for transfer or release under the review processes operated by the Bush administration. At least 57 detainees had been approved for transfer or release from Guantánamo by the time of the presidential inauguration.

The new administration argued that habeas corpus proceedings in such cases should be stayed while the interagency review determined, "as promptly as possible", what the executive should do with each detainee. In the event that this review resulted in re-approval of transfer, the Justice

⁷ "Guantánamo case files in disarray", *Washington Post*, 25 January 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/01/24/AR2009012401702_pf.html.

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Department argued, the detainee's habeas corpus challenge would probably be rendered moot on the grounds that the court could not order any further remedy beyond that approved by the executive – that is, release from the base (given that the administration opposes the right of courts to order release of detainees into the USA – see below).

In the cases of detainees charged for trial by military commission by the previous administration, the new administration has sought to have their habeas corpus petitions dismissed on the grounds that the charges against them are still pending. This is despite the fact that military commissions have been suspended at the request of President Obama.

Amnesty International, as part of its checklist, sought to have the new administration drop all opposition to full habeas corpus hearings for Guantánamo detainees and those in similar situations. However, after 100 days of the new administration, and more than 10 months after the *Boumediene* ruling, only a handful of Guantánamo detainees had received a hearing and the administration was continuing to oppose jurisdiction for US courts to examine complaints about treatment or conditions.

Even the cases in which judges had ordered the immediate release of detainees they considered to be unlawfully held, the men have remained in indefinite detention in Guantánamo, in some cases for many months.

Further cause for concern is the administration's approach to detentions in the US airbase in Bagram in Afghanistan. On 20 February 2009, responding to an invitation from a federal judge a month earlier to tell him whether the new administration would take a different approach to its predecessor on the Bagram detainees, the Justice Department responded simply that "having considered the matter, the Government adheres to its previously articulated position", that is, the position argued by the Bush administration. The latter had remained totally opposed to effective judicial oversight of detentions outside of US territory (see box).⁸

⁸ See *USA: Out of sight, out of mind, out of court? The right of Bagram detainees to judicial review* (Index: AMR 51/021/2009), 18 February 2009, <http://www.amnesty.org/en/library/info/AMR51/021/2009/en>; *USA: Federal judge rules that three Bagram detainees can challenge their detention in US court* (Index: AMR 51/048/2009), 3 April 2009, <http://www.amnesty.org/en/library/info/AMR51/048/2009/en>.

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RELEASING DETAINEES INTO THE USA?

After the *Boumediene* ruling, an overriding policy priority for the Bush administration was to ensure that no Guantánamo detainees would be released into the US mainland. This is one of the reasons that individuals who were cleared for release or transfer by that administration's executive review, or ordered released by US courts, remained in indefinite detention at Guantánamo. The new administration could have and should have made an immediate clear and decisive break from this indefensible stance. After 100 days it has made no concrete commitment or action to change this policy.

Seventeen ethnic Uighur men from the Xinjiang Uighur Autonomous Region in north-west China are being unlawfully held by the USA at Guantánamo. At various times between 2003 and 2008, the Bush administration decided that each of them was not an "enemy combatant" and could be released. The USA could not transfer them to China, however, as they would be at real risk of torture or execution after unfair trial. The previous administration reportedly asked over 100 countries to accept the detainees, apparently without success.

On 8 October 2008 a US District Court judge ruled that the indefinite detention of the Uighur men was unlawful and ordered their release into the USA. The previous administration appealed against this decision and the new administration did not move to dismiss the appeal. On 18 February 2009, in *Kiyemba v. Obama*, the US Court of Appeals overturned the District Court's order. The new administration, like its predecessor, has refused so far to release the Uighur men into the USA.⁹

JUDICIAL REVIEW FOR BAGRAM DETAINEES?

All detainees except those held as prisoners of war in an international armed conflict have in principle the right to fair proceedings before an independent court to challenge the lawfulness of their detention, to effective remedies in relation to their treatment and conditions of detention, and to meaningful access to legal counsel.

On 2 April 2009, a US federal judge ruled that three detainees held by the US military at Bagram airbase in Afghanistan, who were transferred there by US forces after being seized in other countries, could challenge the lawfulness of their detention in US court, noting that "aside from where they are held, Bagram detainees are no different than Guantánamo detainees". The ruling is narrow and leaves numerous questions unanswered – not least, what will happen to the majority of the more than 500 detainees currently held there who were initially detained in Afghanistan. Nonetheless, it was a positive step by a federal judge towards the rule of law at Bagram and against the position developed by the Bush administration and adopted by its successor. However, on 11 April, the Obama administration stated that it would appeal against this ruling. Given that Bagram detainees do not have access to effective judicial review in Afghanistan, the administration's appeal essentially means that, like its predecessor, it seeks to deny detainees held by the USA outside its territory or Guantánamo any effective means of challenging the lawfulness of their detention, thereby continuing the arbitrary nature of the detentions in violation of international human rights law.

⁹ Other detainees remain at Guantánamo after being ordered released by US courts. For example, Mohammed el Gharani, a Chadian national who was 14 years old, a child, when taken into US custody, was ordered released by a US federal judge on 14 January 2009. He remains at Guantánamo.

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Diplomatic efforts ordered by President Obama appear to have met with some success. France and Ireland have agreed to offer protection to individuals held at Guantánamo who cannot be returned to their home country for fear of human rights violations, and a number of other European states have agreed in principle if it is part of a European Union-wide agreement. A number of government officials, in public statements and in meetings with Amnesty International have welcomed a change in attitude by the US administration towards ending the detentions at Guantánamo and reform of its counter-terrorism detention policies. This has contributed to a new willingness on their part to consider accepting released detainees.

Amnesty International urges the administration of President Obama to charge or release immediately all detainees at Guantánamo. Those being released, including the Uighur men, should be offered release into the USA if no other country is presently willing to take them.

NO CHARGES, NO TRIALS, NO JUSTICE

The USA has alleged that some of those detained at Guantánamo have committed or conspired to commit serious crimes, including the attacks of 11 September 2001, attacks which Amnesty International called crimes against humanity. Military commission proceedings have been suspended, but it remains unclear if this substandard and discriminatory system of justice will ultimately be abandoned, and what will happen to the detainees the USA wants to bring to trial.

The USA may face difficulties in building cases against individuals given the regime of torture and other human rights violations, not to mention sweeping secrecy, under which evidence was collected in the past. However, this is a problem of the USA's own making that cannot be used to justify further human rights violations. It should not be used as an excuse to construct some new form of arbitrary detention – Guantánamo in everything but name – in order to hold those it cannot charge but considers too dangerous to release. The fact that the international prohibition against the use of evidence obtained by torture or other ill-treatment might mean that no case can be made against a detainee, cannot be used as an excuse to continue to hold the detainee without trial, or to ignore the prohibition itself.

There were some worrying signs in the first 100 days that the new administration had not yet rejected the possibility of continuing with the discredited military commission system. As mentioned above, it sought dismissal of the habeas corpus petitions of some of those previously charged for trial by military commission on the basis that the charges against them are still pending, even though the commissions had been suspended. Also, a government court filing in March 2009 noted that “at the direction of the Secretary of Defense, the Department of Defense continues to investigate and evaluate cases for potential trial by military commission”.

Ordinary US civilian courts have successfully tried numerous terrorism cases in the past, and the US legal system already has procedures for protecting the confidentiality of state secrets to the extent compatible with fair trials. The detainees in Guantánamo have been held without charge or trial for years, during which intensive information collection apparently took place. It was not unreasonable to expect that these detainees would be charged to face trial in existing US courts within 100 days of the new administration taking office. That this has not happened is cause for

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serious concern and represents a continued violation of detainees' rights.

In sum, Amnesty International called on the new administration to ensure that all individuals detained as part of counter-terrorism operations have access to effective judicial review, and for all Guantánamo detainees to be either charged or safely released. The decision to transfer Ali al-Marri from indefinite military detention to the ordinary criminal justice system was a significant step that points the way forward for other cases. However, for Guantánamo detainees, there has been minimal progress during the first 100 days of the new administration, and for Bagram detainees, the new administration's position is substantially the same as its predecessor's. This must change.

3. LANGUAGE MATTERS, SO DOES SUBSTANCE

The Bush administration invented or popularized a number of terms – “unlawful enemy combatant”, “war on terror”, “extraordinary rendition”, “enhanced interrogation technique” – that have become indelibly associated with human rights violations. President Obama has moved away from some of these terms. Soon after taking office, President Obama was asked about President Bush's broad framing of the “war on terror”. President Obama responded that “the language we use matters”.

A change in language was presented with the filing by the new administration of a legal argument in US District Court on 13 March 2009 concerning the new administration's view of its authority to detain those held at Guantánamo. In an accompanying press release, the Justice Department emphasized that it was dropping the “enemy combatant” label attached to the detainees by the Bush administration.

The administration also appears to have moved away from the term “war on terror”. For example, in March 2009, US Secretary of State Hillary Clinton said that “the administration has stopped using the phrase and I think that speaks for itself”.¹⁰

¹⁰ See “Obama team drops ‘war on terror’ rhetoric”, Reuters, 31 March 2009, <http://uk.reuters.com/article/worldNews/idUKTRE52T7N920090330>.

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CHANGE MUST GO BEYOND SHIFT IN RHETORIC

It is, however, the global war framework developed by the Bush administration, not just the terminology used within it, that needs to be changed. It is that framework and the associated policies that have had such a fundamental impact on the USA's interpretation of its international obligations and its treatment of detainees. It is the war paradigm that has distorted and continues to distort the relationship between human rights and measures taken in the name of countering terrorism.

The previous administration relied on the global war doctrine to try to justify the denial, to detainees accused of involvement of terrorism, of the range of rights and protections to which they were entitled under international human rights law (as well as ordinary US laws) and the international law of armed conflict. This is particularly true of the treatment and conditions of detention, and the secret and indefinite nature of the detentions, as well as limitation or total exclusion of judicial oversight. Detainees at Guantánamo, in Afghanistan, and in CIA secret sites in other places around the world have suffered the effects directly.

Unfortunately, despite the shift in rhetoric there is reason to believe that the global war paradigm may persist. Two of the most senior legal officials in the Obama administration – the Attorney General and the Solicitor General – apparently take the view that the USA is involved in a global “war”.

At his confirmation hearing in front of the Senate Judiciary Committee in January 2009, Attorney General-designate Eric Holder stated categorically that the USA is “at war”. He went on to say that, looking back at the 1990s, specifically the bombings of two US embassies in East Africa in 1998 and the bombing of the USS Cole in Yemen in 2000, “we as a nation should have realized that, at that point, we were at war. We should not have waited until September the 11th of 2001, to make that determination.”

He was then asked: “If our intelligence agencies should capture someone in the Philippines that is suspected of financing Al Qaida worldwide, would you consider that person part of the battlefield, even though we're in the Philippines, if they were involved in an Al Qaida activity?” The Attorney General-designate responded that he would.

Elana Kagan, confirmed to the post of US Solicitor General on 19 March 2009, was asked the same question at her confirmation hearing in February 2009, and gave the same answer.

While the laws of war and human rights law share important fundamental protections – such as the absolute prohibition of torture – in other important respects they offer differing levels of protection. To invoke the laws of war in situations that do not constitute armed conflicts gravely undermines the framework of human rights and the ordinary criminal justice system, and distorts the application of the rule of law itself. The US government must recognize that human rights law and the ordinary system of US justice – not the laws of war – constitute the overarching legal framework for counter-terrorism measures in situations that do not constitute ongoing armed conflicts.

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RELIANCE ON AUTHORIZATION FOR USE OF MILITARY FORCE

In its 13 March 2009 memorandum filed in federal court, the new administration stated that, at least in relation to the current Guantánamo detainees, it was not seeking to rely on the President's constitutional authority as Commander-in-Chief of the Armed Forces to justify the detentions.¹¹ Instead, it was basing its detention authority on the Authorization for Use of Military Force (AUMF), a resolution passed by US Congress in the immediate aftermath of the attacks of 11 September 2001, and "analogies" to the laws of war. This closely resembled the substantive positions taken by the previous administration. The AUMF authorized the President to "use all necessary and appropriate force" against anyone involved in the attacks "in order to prevent any future acts of international terrorism against the United States". The Bush administration had likewise sought to rely on the AUMF in the post-*Boumediene* Guantánamo litigation.

The Justice Department's position on the AUMF may go some way to assuaging domestic concern about the health of the constitutional "checks and balances" system of the USA's three-branch government after a period in which some startling claims to presidential authority were made. However, the retention by the new administration of the "laws of war" as the fundamental point of reference for counter-terrorism detentions, and the continuing lack of acknowledgement of the applicability of human rights and the ordinary system of criminal justice to such detentions, continue the distortions of the previous administration.

The withdrawal of the "enemy combatant" label and the dropping of the "war on terror" catchphrase appear to be prompted more by public relations and diplomatic imperatives than by a meaningful attempt to reform counter-terrorism policies that have facilitated human rights violations.

Reliance on the AUMF to justify detentions outside of an ongoing international armed conflict is inconsistent with the USA's human rights obligations under international law. A new approach is needed.

As Amnesty International called for in its checklist, President Obama should confirm that the 13 November 2001 military order on the "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism" is fully revoked, that is, in any respect not covered by the executive order on interrogations. The administration should invoke ordinary criminal justice or other relevant civilian laws, and not the laws of war, as a possible legal basis for detention of individuals outside of the context of an ongoing international armed conflict. It should also clarify that it will not interpret the AUMF as representing any intent on the part of Congress to authorize violations of international human rights or humanitarian law.

¹¹ It is unclear whether the administration will rely on this same authority with regard to detentions in Bagram.

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4. TRANSPARENCY AND SECRECY: LIMITED PROGRESS

GREATER TRANSPARENCY: THE NEW ADMINISTRATION'S WATCHWORD

Even before issuing the executive orders on Guantánamo, interrogations and detainee policy review, President Obama signalled that he would be moving away from the level of executive secrecy for which the Bush administration had been widely criticized. On 21 January 2009, for example, the President issued two memorandums for heads of executive departments and agencies, one on the Freedom of Information Act (FOIA) and another entitled "Transparency and Open Government". In these documents, President Obama stressed that "a democracy requires accountability, and accountability requires transparency", and committed his administration to "creating an unprecedented level of openness in government".

On 19 March, building on the principles asserted in President Obama's FOIA memorandum, Attorney General Holder issued revised FOIA guidelines, replacing those issued on 12 October 2001. The Attorney General said that the new guidelines would "restor[e] 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".

The new administration has taken other steps towards greater transparency, a key component in ensuring effective human rights protection and accountability.

On 2 March 2009 the US Department of Justice released seven previously undisclosed legal opinions prepared in 2001 and 2002 by the Department's Office of Legal Counsel (OLC) which, among other things, provided legal advice on questions of presidential authority with regard to the use of force, the detention and trial of individuals designated as "enemy combatants", and the transfer to third countries of al-Qa'ida and Taleban detainees captured outside the USA.

On 16 April 2009, the Justice Department released four other legal opinions written in 2002 and 2005 by the OLC. The four documents discussed in detail, and gave legal clearance for, interrogation techniques that the CIA had used or was seeking to use in the secret detention programme, including waterboarding, slapping, stress positions, cramped confinement, exploitation of phobias, dousing with cold water, forced nudity, and sleep deprivation.

On 21 April 2009, the Department of Defence declassified an expanded report of the Senate Armed Services Committee on its Inquiry Into the Treatment of Detainees in US Custody (albeit still with redactions). This version, released to the public on 22 April 2009, added further considerable evidence of a framework of authorizations for, as well as the intensity and spread of, torture and other ill-treatment of detainees under the previous administration. The version of the

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report that had been published on 20 November 2008 omitted much of this detail, censored as "classified" at that time.

In its checklist, Amnesty International had called on the new administration to declassify and release all such legal opinions and documents authorizing or approving interrogation techniques and detention conditions that discuss whether the techniques or conditions are consistent with the national or international prohibition of torture or other ill-treatment. The previous administration had steadfastly refused to publish these and other opinions that included the purported legal justification for policies that led to widespread human rights violations. The organization welcomes the increased commitment to openness of President Obama's administration and urges that it be pursued with the necessary vigour.

In other respects, as described below, the new administration has adopted the stance of its predecessor. The messages are again mixed.

BAGRAM DETENTIONS SHROUDED IN SECRECY

As of March 2009, there were approximately 550 detainees held in US custody in Bagram airbase in Afghanistan, according to the International Committee of the Red Cross (ICRC), the only international organization with access to these detainees. The detentions there remain shrouded in secrecy.



Afghan prisoners at Supreme Court after leaving US base at Bagram, Kabul, Afghanistan, 2005. © AP/PA Photo/Emilio Morenatti

A US federal judge asked the Bush administration in January 2009 to disclose the number of people being held in Bagram, how many of them were taken into custody outside of Afghanistan, and how many of them were Afghan nationals. The Bush administration responded by classifying the key details as secret and redacting them from the unclassified version of the filing. In a follow-up order in March, the same judge asked the same questions to the new administration, which took the same approach as its predecessor, redacting from the public

record the details of its response to the judge.¹²

The need for transparency was highlighted when the UK government revealed on 26 February

¹² See *USA: Administration opts for secrecy on Bagram detainee details* (Index: AMR 51/034/2009), 12 March 2009, <http://www.amnesty.org/en/library/info/AMR51/034/2009/en>.

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2009 that two individuals it had handed over to the USA in Iraq in 2004 had subsequently been transferred to US custody in Afghanistan, where they remained five years later. It is unclear whether the two are held in Bagram, but the USA's transfer of these individuals to Afghanistan may have constituted a war crime.¹³

More generally, given the history of abuse at Bagram – including torture and other ill-treatment and secret detention – and the ongoing detention of individuals by the USA as part of the non-international armed conflict in Afghanistan, the continuing secrecy is a matter of serious concern. Secrecy facilitates human rights violations. As the USA increases its troop levels in Afghanistan, transparency and clarity on US detention policy there is needed more than ever in order to protect detainees and ensure accountability for human rights violations.

STATE SECRETS DOCTRINE INVOKED

In a case before the US Court of Appeals, the administration's stance is also cause for serious concern. The case, *Mohamed v. Jeppesen Dataplan, Inc.*, has been filed on behalf of five men – Binyam Mohamed, Abou Elkassim Britel, Ahmed Agiza, Muhammad Faraj Ahmed Bashmilah and Bisher al Rawi – who say they were subjected to rendition by the CIA, transported to and from a variety of countries and subjected to serious violations of their human rights. At the heart of the case is the question of the use of secrecy to block judicial scrutiny of human rights violations.¹⁴

The lawsuit alleges that Jeppesen Dataplan, a transportation firm and subsidiary of the Boeing company, provided logistical support, pilots and aircraft to the CIA for rendition flights and that the company “knew or reasonably should have known that Plaintiffs would be subjected to forced disappearance, detention, and torture in countries where such practices are routine”. The plaintiffs are therefore claiming damages from the company.

The Bush administration intervened in the case, asserting “state secrets privilege” on behalf of itself and Jeppesen Dataplan, and moved to have the case dismissed on that basis. The District Court ruled in favour of the government.

The decision was appealed to the US Court of Appeals for the Ninth Circuit. Two and a half weeks after the new administration took office, a hearing was held in the court. Asked by one of the three judges whether President Obama's administration would be adopting a different stance on the case than its predecessor, the Justice Department lawyer appeared to surprise the judges by replying that it would not.

Another judge asked: “The change in administration has no bearing?” The Justice Department

¹³ See USA: *Urgent need for transparency on Bagram detentions* (Index: AMR 51/031/2009), 6 March 2009, <http://www.amnesty.org/en/library/info/AMR51/031/2009/en>.

¹⁴ See USA: *Detainees continue to bear costs of delay and lack of remedy*, 9 April 2009, op. cit.

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official replied: "No, Your Honour". The matter had been "thoroughly vetted with the appropriate officials within the new administration", he said, and "these are the authorized positions".

The "state secrets privilege" had initially been invoked on the grounds that while the existence of the secret CIA program had been acknowledged, the details remained highly classified, and revealing those details could compromise national security. In a letter to the Court of Appeals dated 21 April 2009, counsel for the plaintiffs-appellants noted: "That rationale no longer exists, because the methods are now public and because they have been expressly prohibited."

By 27 April, there had been no ruling by the Court of Appeals.

Amnesty International urges the new administration not to let secrecy trump accountability and to ensure that all victims of human rights violations have access to full and fair remedy and reparation for the violations they have suffered.

5. PROSECUTION, INQUIRY, REMEDY: IMPUNITY ENTRENCHED

In an interview a little over a week before he took office, President-elect Obama was asked whether he would move to investigate and prosecute crimes committed under the Bush administration, including torture. He responded:

"Obviously we're going to be looking at past practices and I don't believe that anybody is above the law. On the other hand I also have a belief that we need to look forward as opposed to looking backwards... We have not made any final decisions, but my instinct is for us to focus on how do we make sure that moving forward we are doing the right thing... my orientation's going to be to move forward."

There is no denying that US agents committed crimes under international law and that the widespread violations of human rights in the context of countering terrorism – including torture and enforced disappearance – were authorized at the highest levels of the US government. The question was what the new administration would do about it.

Amnesty International called on President Obama to take five immediate steps in his first 100 days to reject and end impunity for human rights violations committed in the name of countering

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terrorism.¹⁵ These were to ensure that a commission of inquiry is set up, that criminal investigations and prosecutions were initiated, that victims could access effective remedies, and that all relevant information about violations be fully disclosed.

Regrettably, the only firm commitments during the new administration's first days on the question of accountability for past human rights violations has had the effect of entrenching impunity for some perpetrators of torture and other similarly criminal violations of human rights. This is incompatible with the USA's international obligations.

MOUNTING EVIDENCE OF CRIMES, NO ACTION

A confidential report by the ICRC, leaked in March 2009, describes the treatment of 14 "high value detainees" who had been held in secret CIA custody before being transferred to Guantánamo in September 2006. The report paints a bleak picture and adds further detail to existing allegations of torture and other ill-treatment in the USA's secret detention programme. It is damning in its conclusions.¹⁶

Three of the 14 detainees told the ICRC that they repeatedly suffered waterboarding. In the report, detainee Abu Zubaydah describes being:

"put on what looked like a hospital bed, and strapped down very tightly with belts. A black cloth was then placed over my face and the interrogators used a mineral water bottle to pour water on the cloth... I struggled without success to breathe. I thought I was going to die. I lost control of my urine. Since then I still lose control of my urine when under stress."¹⁷

The 14 detainees told the ICRC that they had been variously subjected to prolonged standing, punched, kicked, beaten, deprived of sleep and forced to listen to loud music constantly. None had access to lawyers, the ICRC or their families. None had meaningful contact with other detainees or even access to the open air for prolonged periods, in some cases years.

The conclusions of the ICRC report are unequivocal:

- "In the ICRC's view... [t]he totality of circumstances in which they were held effectively

¹⁵ See also *USA: Investigation, prosecution, remedy – Accountability for human rights violations in the 'war on terror'* (Index: AMR 51/151/2008), December 2008, <http://www.amnesty.org/en/library/info/AMR51/151/2008/en>.

¹⁶ *ICRC report on the treatment of fourteen 'high value detainees' in CIA custody*, February 2007. The full report is available at <http://www.nybooks.com/icrc-report.pdf>.

¹⁷ For further information on the case of Abu Zubaydah, see Appendix 1 of *USA: Detainees continue to bear costs of delay and lack of remedy*, 9 April 2009, op. cit.

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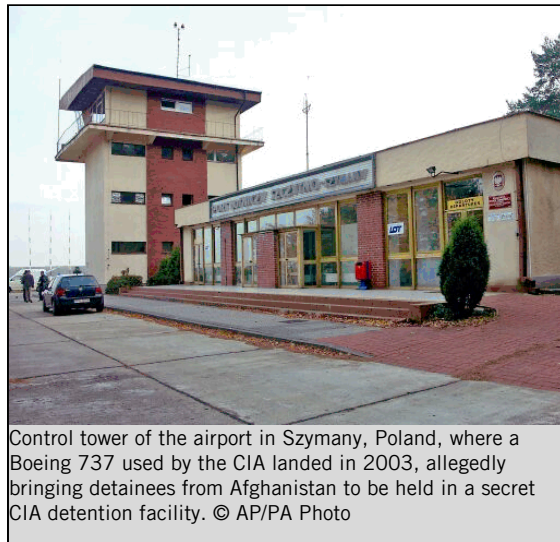
amounted to an arbitrary deprivation of liberty and enforced disappearance.”

- “[T]he ICRC clearly considers that the allegations of the fourteen include descriptions of treatment and interrogation techniques – singly or in combination – that amounted to torture and/or cruel, inhuman or degrading treatment.”

The ICRC stressed that the “consistency of the detailed allegations provided separately by each of the fourteen adds particular weight” to the allegations of ill-treatment. Further weight was added by the release of the OLC legal opinions on 16 April and the expanded Senate Armed Services Committee report on 22 April.

Amnesty International has called for criminal investigations into the programmes of rendition and secret detention, and is disappointed that this apparently has not been initiated in the new administration's first days. The ICRC report, release of the OLC legal opinions, and the expanded Armed Services Committee report only add urgency to this call. Amnesty International notes that although the ICRC report has been in the public domain for only a matter of weeks, it was sent to the US government more than two years ago. The OLC opinions and the information in the Armed Services Committee report have also obviously been known to decision-makers within the government for a long time.

The Bush administration admitted that it had waterboarded three detainees. Both President Obama and Attorney General Holder have said that waterboarding is a form of torture. Torture is a crime under US and international law. The USA therefore now has a President and a chief law enforcement officer who consider that torture has been committed by US officials. They are obliged to ensure full individual and institutional accountability for these crimes.¹⁸



On 16 April 2009, however, when the Department of Justice released four legal opinions written

¹⁸ As the UN Special Rapporteur on Torture, Manfred Nowak, specifically insisted in response to the administration's promise of non-prosecution, the UN Convention against Torture, to which the USA is a party, unequivocally requires that all cases of alleged torture be investigated and submitted to competent authorities for the purpose of prosecution unless the alleged perpetrator is extradited for trial in another state. see Der Standard, 17 April 2009.

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by the OLC for the CIA in 2002 and 2005, both President Obama and Attorney General Holder said that anyone who had relied "in good faith" upon the legal advice offered in the opinions would not be prosecuted. Among other interrogation techniques, the opinions approved the techniques described in the ICRC report: waterboarding, sleep deprivation, stress positions, exploitation of phobias, forced nudity, and dousing with cold water against detainees held in secret incommunicado detention.

On 21 April 2009, while reaffirming his commitment not to prosecute certain officials who relied on the legal opinions, President Obama clarified that he regarded possible prosecution of "those who formulated the legal decisions" as a separate matter that would be "more of a decision for the Attorney General within the parameters of various laws", which he did not want to "prejudge".

The new administration must immediately initiate effective, independent criminal investigations into all those potentially responsible for acts committed as part of the CIA's rendition and secret detention programme, including not only the direct perpetrators but those who authorized, ordered, or otherwise participated in, were complicit in, or were ultimately responsible for the crimes.

NEED FOR BROADER ACCOUNTABILITY

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.

Criminal investigations are part of ensuring accountability for these violations, as is increased transparency, but other equally important steps must be taken. The full truth of what has occurred and how it came to pass should be publicly disclosed, and there must be effective remedy and rehabilitation for all those whose human rights have been violated.

As with criminal investigations, however, the new administration has failed to take the necessary action on this issue in its first 100 days. Where it has acted – in litigation – it has continued the pattern of blocking accountability and fostering impunity that came to characterize the Bush administration's response to allegations of serious human rights violations in the context of countering terrorism.

NO FIRM COMMITMENT TO A COMMISSION OF INQUIRY

Under the Bush administration, a number of investigations and reviews were held into allegations of abuses in Guantánamo, Iraq and Afghanistan and elsewhere. Most of these, however, were piecemeal, generally lacked independence or the mandate to reach up the chain of command or outside the military, and failed to interview victims or apply international standards. Many of their findings remain classified as secret. Much has still not been investigated. Much is still obscured from public view.

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Amnesty International first called for a commission of inquiry into all aspects of the USA's detention and interrogation policies and practices in 2004. It reiterated this call to the new administration in its checklist of November 2008, asking that the new President make the setting up of such an independent commission a priority for his first 100 days. Regrettably, the administration has made no firm public commitment to support the establishment of such an inquiry. The closest he had come was to say at a press conference on 21 April:

"...so if and when there needs to be a further accounting of what took place during this period, I think for Congress to examine ways that it can be done in a bipartisan fashion, outside of the typical hearing process that can sometimes break down and break it entirely along party lines, to the extent that there are independent participants who are above reproach and have credibility, that would probably be a more sensible approach to take.

I'm not suggesting that should be done, but I'm saying, if you've got a choice, I think it's very important for the American people to feel as if this ... is being done in order to learn some lessons so that we move forward in an effective way."

While this statement represented some progress from the President's earlier reluctance to support in any manner the concept of a public commission of inquiry into the USA's detention and interrogation policies and practices in the context of counter terrorism, it still falls far short of the firm and specific commitment to a properly empowered commission of inquiry that remains so sorely missing.

BLOCKING JUSTICE FOR VICTIMS – ADMINISTRATION SEEKS DISMISSAL OF DETAINEE LAWSUIT

The Obama administration has sought to rely on secrecy and national security arguments in court in a manner that would effectively block accountability for human rights violations (such as in the Jeppesen Dataplan case mentioned above). Another court case is a particular cause for concern.

The case, currently before the US Court of Appeals for the DC Circuit, concerns Shafiq Rasul, Asif Iqbal, Ruhuul Ahmed and Jamal al-Harith, four UK nationals held without charge or trial in Guantánamo for two years from 2002 to 2004.¹⁹ Seven months after their repatriation in March 2004 they filed a lawsuit in a US district court in which they sought damages for their unlawful treatment at Guantánamo. Their complaint stated that they had suffered prolonged arbitrary detention, torture and other cruel, inhuman or degrading treatment in violation of the Geneva Conventions, customary international law and the US Constitution, and discriminatory treatment on the basis of their religious beliefs in violation of US federal law.

In a 13 March 2009 brief, the Justice Department effectively sought a blanket ban on lawsuits brought by foreign nationals claiming constitutional violations against US military officials. They sought the ban on the grounds that such lawsuits "for actions taken with respect to aliens

¹⁹ See *USA: Detainees continue to bear costs of delay and lack of remedy*, 9 April 2009, op. cit.

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detained during wartime would enmesh the courts in military, national security, and foreign affairs matters that are the exclusive province of the political branches". Allowing such lawsuits might, the Department claimed, lead officials to "make decisions based upon fear of litigation rather than appropriate military policy". On 24 April 2009, the Court of Appeals dismissed the *Rasul* lawsuit, as it had in January 2008 before the US Supreme Court asked it to reconsider that decision in the light of the *Boumediene v. Bush* ruling of June 2008 on the Guantánamo detentions.

The administration should abandon this approach. To allow such impunity to reign in alleged cases of human rights violations would be manifestly incompatible with any notion of justice for victims or with US obligations under international law.

CONCLUSION

Following the attacks of 11 September 2001, the USA embarked on a counter-terrorism programme that flew in the face of its international human rights obligations. Brutal practices and broken lives were the inevitable result.

The USA's approach also had serious knock-on effects around the world both directly, as some governments became complicit in the USA's violations, and indirectly through the creation of a permissive atmosphere that gave new cover for old repressive practices. The framework of international human rights creaked under this assault.

That much of this programme originated from within the US executive, with the President at its head, meant that Barack Obama inherited not only a legacy of abuse, but also a unique opportunity to undo some of the damage to the rule of law wrought during his predecessor's term in office.

In important ways, President Obama's administration has taken steps to begin to address this legacy. Such moves are to be welcomed. The Guantánamo detention facility will be consigned to history, as will, it is to be hoped, the "enhanced" interrogation techniques and the secret CIA prisons. Importantly, the new administration recognizes that the approach of its predecessor was unacceptable, even damaging to the national security interests of the USA. This realisation has driven some of the positive measures seen in the first 100 days.

But these positive changes do not obscure the fact that over 240 men remain unlawfully detained at Guantánamo, that hundreds of others languish in US custody in Afghanistan with no means to challenge their detention, and that the USA continues to reserve the right to use rendition and allow the CIA to hold individuals on a short-term and transitory basis without the legal framework

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governing such detentions being made clear.

Nor can the positive changes mask the reality that the US administration continues to invoke the spectre of an ill-defined and perpetual "war", where the battlefield could be anywhere from Peshawar to Peru, with the USA apparently continuing to claim the right to detain people as part of this "war" until hostilities have ended, whenever, if ever, that may be.

The auspicious start of the first few days of the Obama administration must not tail off into a repetition of the pattern of human rights violations, secrecy and impunity fostered by the previous administration.

WHAT NEXT?

In its checklist, Amnesty International urged 17 steps to be taken in three areas – Guantánamo and illegal detention; torture and other ill-treatment; and impunity. The executive orders on President Obama's third day in office marked significant steps forward on the first two areas, but failed to address the impunity for human rights violations already committed in the name of countering terrorism. Regrettably, the initial positive indications on Guantánamo and illegal detention have not led to any substantive progress, at least publicly, and a marked tolerance for impunity has extended throughout President Obama's first 100 days in office.

Amnesty International's checklist identified five action points for the administration to take in its first 100 days to end impunity and ensure accountability. At the end of 100 days, under each point it reads "no action taken", and notes that if anything impunity has been reinforced for at least some of those responsible for serious abuses. President Obama must begin to address the crimes and widespread violations of human rights that have stained the USA's response to the 11 September 2001 attacks.

The administration must follow through on the promise of the first days with regard to unlawful detentions, trials and torture and other ill-treatment. It must ensure that the military commissions are abandoned entirely, that the practice of rendition is ended, that all loopholes on torture and other ill-treatment are closed. There must be fair trials in US courts for those who are charged with recognizable criminal offences, and there must be a safe, durable and lawful solution for each detainee who is not so charged. Anyone held by US authorities outside a situation of a recognised and ongoing international armed conflict must be able to effectively challenge their detention in court, including where necessary unimpeded access to habeas corpus review in US courts.

In short, the closure of Guantánamo must mark the end of the policies and practices it embodies, not merely shift those violations elsewhere, whether to Bagram airbase in Afghanistan or anywhere else.

Above all, a sense of urgency must be injected into this process. The assault on the framework of human rights led by the USA when it launched its "war on terror" had serious consequences for the rule of law in the USA and significant knock-on effects on human rights around the world.

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Symbolic gestures and half measures are not enough.

Amnesty International developed its checklist of 17 measures while keeping in mind the question of how much the new administration could realistically achieve within 100 days. It is disappointing that even these measures were not all achieved. Looking to the coming months and years, Amnesty International considers that the US authorities must go beyond ambitious goals, and commit themselves to concrete action to prevent the recurrence of human rights violations in the context of countering terrorism.²⁰

Amnesty International appeals to President Obama to follow through on the promise he made at his inauguration – to reject as false the choice between security and ideals. Transparency, accountability and respect for international human rights must be the hallmarks of his term in office.

²⁰ For example, ratification of other treaties such as the Optional Protocol to the Convention against Torture, establishing independent monitoring mechanisms for all places of detention, and the Rome Statute of the International Criminal Court should also be priorities of the USA, in addition to removing the reservations to treaties to which the USA is a signatory as asked for in Amnesty International's checklist.

COUNTER TERROR WITH JUSTICE CHECKLIST: ASSESSING PRESIDENT OBAMA'S FIRST 100 DAYS

CLOSE GUANTÁNAMO AND END ILLEGAL DETENTION

1. Confirm that the USA will permanently close the detention facility at Guantánamo and set a relatively short deadline for the closure.

- **ACHIEVED:** Executive Order of 22 January 2009 "Review and Disposition of Individuals detained at Guantánamo Bay Naval Base and Closure of Detention Facilities".

2. Issue an executive order ending any use of rendition, secret detention or prolonged incommunicado detention by or on behalf of the US authorities anywhere.

- **PROGRESS:** The Executive Order "Ensuring Lawful Interrogations" ends the CIA's programme of long-term secret detention and guarantees access to the ICRC to detainees held by the USA. **However**, the order does not end the practice of rendition and leaves open the possibility for the CIA to use detention facilities on a short-term, transitory basis, or to use foreign-controlled facilities to detain and interrogate individuals at its behest (proxy detention).

3. Revoke the 20 July 2007 Executive Order which authorized the continuation of the CIA's programme of secret detention and interrogation.

- **ACHIEVED:** This order is revoked by Section 1 the Executive Order "Ensuring Lawful Interrogations".

4. Revoke the 13 November 2001 Military Order on the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism.

- **UNCLEAR:** All executive orders between 2001 and 2009, to the extent that they are inconsistent with the Executive Order "Ensuring Lawful Interrogations", have been revoked, although particular orders are not specified. It is unclear if the 13 November 2001 order is fully revoked, particularly as a potential authority for detaining individuals.

5. End trials by military commission and the system of Combatant Status Review Tribunals and Administrative Review Boards.

- **PROGRESS:** The military commissions have been suspended. **However**, the military commissions have not been permanently ended, and the US administration has relied on charges pending under the Military Commissions Act to oppose particular habeas corpus review applications.

6. Announce a plan to promptly charge Guantánamo detainees and send them for trial before US federal courts or to release them with full protection against further violations of their human rights, and ensure that the plan is adequately resourced.

- **NO ACTION TAKEN**

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7. Ensure Guantánamo detainees who would be at risk of serious human rights violations if returned to their country of origin are offered the opportunity to live in the USA, if they wish to do so, and work with other governments to ensure that other such detainees are offered protection.

- **MIXED:** Other governments, including France and Ireland, have said they will offer protection to detainees that cannot be returned to their home countries. The US administration has not publicly committed to allow any Guantánamo detainee an opportunity to live in the USA, including those whose release has been ordered by US courts.

8. Commit the US administration not to arbitrarily deprive anyone of their liberty (including by denying or interfering with effective judicial review), and immediately end the US government's opposition to full habeas corpus hearings for detainees in Guantánamo and other similar situations.

- **SETBACK:** The administration adopted its predecessor's approach to the detentions in the US airbase in Afghanistan, and has appealed against a decision granting habeas corpus rights to some detainees held there.

While recognizing rights of Guantánamo detainees to habeas corpus review, this judicial review has continued to face delays under the new administration. The administration continues to oppose inclusion of detainee treatment or detention conditions in habeas corpus reviews.

ERADICATE TORTURE AND OTHER ILL-TREATMENT

9. Issue an executive order that the USA will not, under any circumstances, resort to torture or other cruel, inhuman or degrading treatment, as defined under international law.

- **PROGRESS:** The Executive Order "Ensuring Lawful Interrogations" is a major step forward, directing an end to the euphemistically named "enhanced interrogation techniques" as used in the secret detention programme. **However**, Amnesty International is concerned about reliance on the Army Field Manual, which contains loopholes for torture and other ill-treatment, and there is no mention of the need for compliance with the ICCPR or other human rights standards other than the Convention against Torture.

10. Announce that the administration will not use any information obtained under torture or other ill-treatment in any proceedings, except against an alleged perpetrator of the abuse.

- **NO ACTION TAKEN**

11. Commit to work with Congress to withdraw all reservations and limiting understandings relating to torture and other ill-treatment attached to US ratification of human rights treaties, including the International Covenant on Civil and Political Rights and the UN Convention against Torture.

- **NO ACTION TAKEN**

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12. Order the declassification of all legal opinions and other documents authorizing or approving interrogation techniques and detention conditions that discuss whether the techniques or conditions are consistent with the national or international prohibition of torture or other cruel, inhuman or degrading treatment or punishment.

- **PROGRESS:** A number of previously undisclosed or classified legal opinions of the US Justice Department's Office of Legal Counsel have been published. Declassification of the expanded Senate Armed Services Committee report also revealed further relevant information.

END IMPUNITY

13. Ensure that criminal investigations into the programmes of rendition and secret detention operated by or on behalf of the US authorities are initiated.

- **NO ACTION TAKEN**

14. Reject impunity for crimes under international law such as torture and other ill-treatment of detainees, and enforced disappearance.

- **NO ACTION TAKEN:** The President and the Attorney General, as well as the CIA Director, appear willing to accept impunity for at least some perpetrators of crimes under international law, including torture and other similar abuse of detainees, and enforced disappearance.

15. Ensure that an independent commission of inquiry is established into all aspects of the USA's detention and interrogation practices in the "war on terror".

- **NO ACTION TAKEN:** President Obama stated that "if and when" there needs to be further accountability that Congress could examine ways that this could be done in a bipartisan fashion. Beyond this, however, no commitment was made on the part of the administration to ensure a properly empowered commission of inquiry is set up.

16. Make known the name, nationality, present whereabouts, status and circumstances of detention of all those who are or have been detained as part of the programmes of rendition and secret detention.

- **NO ACTION TAKEN**

17. Announce that his administration will work to ensure that victims of human rights violations for which the US authorities may be responsible will have meaningful access to redress and remedy.

- **NO ACTION TAKEN:** If anything there has been a setback. The Department of Justice has invoked state secrecy and military immunity laws in a manner that would block the victims of human rights violations from obtaining effective redress and remedy.



**I WANT
TO HELP**

WHETHER IN A HIGH-PROFILE
CONFLICT OR A FORGOTTEN
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AMNESTY INTERNATIONAL
CAMPAIGNS FOR JUSTICE AND
FREEDOM FOR ALL AND SEEKS TO
GALVANIZE PUBLIC SUPPORT
TO BUILD A BETTER WORLD

WHAT CAN YOU DO?

Activists around the world have shown that it is possible to resist the dangerous forces that are undermining human rights. Be part of this movement. Combat those who peddle fear and hate.

- Join Amnesty International and become part of a worldwide movement campaigning for an end to human rights violations. Help us make a difference.
- Make a donation to support Amnesty International's work.

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1 Easton Street, London WC1X 0DW, United Kingdom

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MIXED MESSAGES

COUNTER TERROR AND HUMAN RIGHTS – PRESIDENT OBAMA'S FIRST 100 DAYS

In the aftermath of the 11 September 2001 attacks, the US administration declared a global “war on terror”, implementing policies and practices – including the use of torture, illegal detention, enforced disappearance and rendition – that have undermined the international human rights framework. Other countries have followed suit, sometimes citing US actions as justification for the continuation or introduction of similar practices.

Amnesty International called on the new US President Barack Obama to reverse the cycle and put human rights at the centre of his administration’s approach to counter-terrorism.

We asked President Barack Obama, during his first 100 days, to take 17 concrete steps towards:

- Closing Guantánamo and ending illegal detention
- Eradicating torture and other ill-treatment
- Ending impunity

This report assesses how far the new administration’s initial steps have gone towards meeting Amnesty International’s appeal to counter terror with justice.

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COUNTER TERROR
WITH JUSTICE
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