

STATEMENT ON BEHALF OF AMNESTY INTERNATIONAL USA

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Closing Guantanamo: The National Security, Fiscal, and Human Rights Implications

Hearing Before the Senate Judiciary Subcommittee on the
Constitution, Civil Rights, and Human Rights

UNITED STATES SENATE
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1. INTRODUCTION

Mr. Chairman and members of the Subcommittee, I am honored to submit this statement for the record on behalf of Amnesty International USA. For more information about Amnesty International's concerns and recommendations please refer to our report, *"Guantánamo: A Decade of Damage to Human Rights."*

Amnesty International is a worldwide human rights movement with more than 3 million members and supporters in more than 150 countries and territories. Amnesty International's vision is for every person to enjoy all of the human rights enshrined in the Universal Declaration of Human Rights and other international human rights standards.

Amnesty International's mission is to conduct research and take action to prevent and end grave abuses of all human rights. Amnesty International is independent of any government, political ideology, economic interest or religion. The organization is funded by individual members; no funds are sought or accepted from governments for investigating and campaigning against human rights abuses.

2. "GLOBAL WAR" & GUANTÁNAMO

"From our use of drones to detention of terrorism suspects, the decisions that we are making now will define the type of nation – and world – that we leave to our children."

-President Barack Obama, 23 May 2013

In a landmark speech delivered on May 23, 2013, President Barack Obama revisited his administration's framework for US counter-terrorism strategy four years after a similar address he gave early in his first term. While there were encouraging signs in the recent speech, the continuing absence of international human rights law from this framework remains a cause for concern.

In neither speech did President Obama make any express reference to human rights. This is regrettable, not least given that his administration's National Strategy for Counterterrorism has "respect for human rights" as a "core value" underlying all counterterrorism policies. The National Security Strategy and the National Strategy for Combating Terrorism issued during the administration of George W. Bush had said much the same thing, but the human rights of

detainees in US custody were systematically violated nonetheless. 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.

In his 2009 address, President Obama fully endorsed the flawed theory that the USA had been engaged in a "global war" since the attacks of September 11, 2001: "Let me be clear," he said then, "we are indeed at war with al Qa'ida and its affiliates." In his latest speech, he did so again: "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." As Amnesty International has long pointed out, the broad congressional authorization to which he refers – the Authorization for Use of Military Force (AUMF) – was passed after little substantive debate as well as apparent confusion among members of Congress about what they were voting for, and the resolution has been exploited over the years to justify a range of human rights violations.

In his latest speech, however, President Obama did raise the prospect of a change in approach to meet what he said was the changing nature of the terrorist threat, 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. As an additional reason for a rethink, President Obama pointed to the 2014 withdrawal from Afghanistan of US combat troops after a dozen years there. Beyond Afghanistan, he asserted, "we must define our effort not as a boundless 'global war on terror,' but rather as a series of persistent, targeted efforts to dismantle specific networks of violent extremists that threaten America." Every war, he said, "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."

Amnesty International has long called for the USA to jettison its flawed "global war" framework (and for withdrawal of the AUMF as a clear congressional message of the need for a fresh start). The organization urges that this happen now, not at some still undetermined point in the future. 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. And I will not sign laws designed to expand this mandate further." However, the administration does not need to wait for Congress to act, but can immediately and publicly announce that it will from now on 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.

But the "war on terror" – whether in name or notion – has already come to define the USA's approach to national security, and this slate cannot be wiped clean so easily. For the USA to redefine itself – to begin to live up to its own ideal of a global human rights champion – will require more than just redefining the nature and scope of the struggle against terrorism. There must also be truth, accountability and remedy in relation to the human rights violations, including crimes under international law, that have been committed by US forces in the name of this "global war." Failure to account for the past will leave the USA not only stained by this part of its history, but more susceptible to repeating it.

President Obama referred to "the rule of law" several times in his 2009 and 2013 speeches. In the latter, for example, he reiterated that under his predecessor, "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." He repeated that his administration, in contrast, had "unequivocally banned torture" and had "worked to align our policies with the rule of law." What the world has

learned since 2009 (as it had learned once before during the Bush administration) is that a promise by the USA to abide by the rule of law should not yet be taken as a commitment that it will meet its international human rights obligations in the counter-terrorism context. For here, it seems, the rule of law is a flexible domestic concept, the parameters of which depend on who is in the White House and how much cooperation Congress feels inclined to provide.

In May 2009, President Obama explained that he had ordered an end to the use of “brutal methods like waterboarding” for interrogating detainees because “they undermine the rule of law.” From a human rights perspective, his decision to ban the use of what the previous administration had called “enhanced interrogation techniques” – employed by the Central Intelligence Agency (CIA) against detainees subjected to enforced disappearance in a secret detention program operated under presidential authority – was a welcome step. It would have been even better if the President had made clear that torture and enforced disappearance had been crimes under international law long before September 2001 and that anyone responsible for their use would be brought to justice. His failure to use a human rights framework was not just a rhetorical failure, but the reflection of a broader policy failure and ongoing violations of international law.

In the 2009 speech, President Obama had opposed an independent commission of inquiry into the abuses against detainees committed under the Bush administration on the grounds that “our existing democratic institutions are strong enough to deliver accountability.” The intervening years have proved him wrong, but he did not revisit this matter in his recent address. Instead he altogether ignored the question of accountability for these violations. Today, the absence of accountability for crimes under international law committed by US forces during the Bush administration, and the blocking of remedy for the victims of these and other human rights violations, has left the USA in breach of its international legal obligations. This is not the rule of law. This is injustice.

The detention facility at the US naval base in Guantánamo Bay has become a byword for injustice. In 2009, President Obama endorsed the use of military commissions to prosecute some of the detainees held at Guantánamo. These would not be the “flawed commissions of the last seven years,” he said, but revised commissions brought into line with “the rule of law.” In his recent speech President Obama again endorsed military commission trials as an option for prosecutions. This time, he appeared to make this endorsement consistent with closing the Guantánamo facility – though of course still not consistent with human rights – when he said that he had asked the Department of Defense to “designate a site in the United States where we can hold military commissions.” Military commission trials held in the USA will be as unacceptable as those held at Guantánamo, as would indefinite detentions if they were to be merely relocated rather than resolved. The military commission system does not comply with international fair trial standards. Moreover, imposition of the death penalty at such trials (the Obama administration is currently pursuing death sentences against six detainees facing trial by military commission) would violate international human rights law.

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.” The US government cannot point to any such rationale. It can only point to domestic politics, the same domestic politics that the administration blames for the Guantánamo

gridlock. The military commissions are not by any measure tribunals of demonstrably legitimate necessity, but creations of political choice.

In 2009, President Obama said that the standards governing the continued detention of those Guantánamo detainees whom he suggested could neither be prosecuted nor released would be brought into line with “the rule of law.” Then in 2010, the administration revealed that it had decided that there were some four dozen detainees who fell into this category, as “law of war” detainees held under the AUMF. In his 2013 address, President Obama revisited this issue a little more cautiously than he had four years earlier, and this could herald a welcome change in approach. The President referred to those detainees who “cannot be prosecuted,” including “because the evidence against them has been compromised or is inadmissible in a court of law.” He said that “once we commit to a process of closing Guantánamo I am confident that this legacy problem can be resolved, consistent with our commitment to the rule of law.” Without a commitment from Congress and the administration to abide by and implement human rights principles and law, his own legacy will remain one of detentions and military commission trials – either still at Guantánamo or relocated to the US mainland – that flout the USA’s international human rights obligations.

If President Obama’s references to the rule of law in 2009 had incorporated international human rights law, the US administration would have long ago abandoned its endorsement of indefinite detention of Guantánamo detainees and military commissions as the forum in which to prosecute any of them (and an approach consistent with human rights would also have led the USA to drop its pursuit of the death penalty). Moreover, if the USA had applied human rights law from the outset, the reason Guantánamo was chosen as the location for this detention facility – to seek to keep the detainees from the US courts – would never have been countenanced. President Obama was right when he said in his latest speech that the Guantánamo detention facility “should never have been opened.” He should now recognize that in closing it, the USA should apply the long missing ingredient – international human rights law.

In his May 2013 speech, the President 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 these moves should be cautiously welcomed, the coming days and weeks will begin to show whether or not this is another false dawn.

After all, for more than five years the US administration has been saying that it intends to close the 11-year-old detention facility. It is no surprise that many of the detainees feel a sense of hopelessness and despair at their situation of indefinite detention. As the UN Special Rapporteur on torture said on May 1, 2013:

“At Guantánamo, the indefinite detention of individuals, most of whom have not been charged, goes far beyond a minimally reasonable period of time and causes a state of suffering, stress, fear and anxiety, which in itself constitutes a form of cruel, inhuman, and degrading treatment.”

Shaker Aamer, who has been held for over 11 years without charge despite being cleared for transfer and despite UK Prime Minister David Cameron calling for him to be free with his wife and children in London, said back in 2005: *"I am dying here every day, mentally and physically... We have been ignored, locked up in the middle of the ocean for four years."*

Each day that passes without resolution of this situation compounds the cruelty to detainees and their families.

President Obama has blamed the failure to close the Guantánamo detention facility within his one-year deadline on the "difficult" politics surrounding "an issue that has generated a lot of political rhetoric" and made people "fearful." Attorney General Holder blamed members of Congress for the administration's U-turn on the trial of five detainees accused of involvement in the 9/11 attacks.

Under international law, domestic law and politics may not be invoked to justify failure to comply with treaty obligations. 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 is currently telling 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.

3. RECOMMENDATIONS TO THE US GOVERNMENT

- **Ensure justice and security with human rights:** Those responsible for the attacks in the USA on September 11th, 2001, attacks that deliberately targeted civilians and which Amnesty International has repeatedly condemned as a crime against humanity, should be brought to justice through fair criminal trials without recourse to the death penalty, as should anyone responsible for carrying out or planning further such attacks. This is a realistic aim that can and should be achieved through cooperation between states in accordance with their international obligations.
- **Address the Guantánamo detentions as a human rights issue.** The detentions must be resolved and the detention facility closed in a way that fully 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.
 - Expedite safe detainee transfers: Dozens of the Guantánamo detainees have long been "approved for transfer" by the US authorities. Particularly now that President Obama has lifted the moratorium on repatriation of Yemeni nationals, as the Chairperson of the Senate Intelligence Committee had recently urged, 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, without recourse to the death penalty. Any detainees who are not to be charged and tried should be immediately released.
- **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 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 recognized, 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 programs 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 program finalized by the Senate Select Committee on Intelligence in December 2012. The USA must end any use of the state secrets doctrine that blocks remedy or accountability.