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Obama refuses to close door on torture

By resisting release of Senate report and speaking in legalese, White House disappoints international community

By: Faiza Patel

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This year President Barack Obama rejected two excellent opportunities to close the door on the shameful use of torture and cruelty by the United States. First, his administration has resisted attempts by Senate investigators to release a coherent version of their report on torture by the Central Intelligence Agency. Such refusals have led to speculation that they have sought to delay matters so that Republicans can block its release after they take control of the chamber in January. Second, the Obama State Department said last week that the Convention Against Torture requires it to prevent torture only in places that the U.S. “controls as a governmental authority.”

The media made much of the U.S. declaration that “torture and cruel, inhuman and degrading treatment and punishment are forbidden in all places, at all times, with no exceptions.” But this statement of principle is not new. Starting with President Ronald Reagan, the U.S. has taken the position that torture and cruel treatment are banned. President George W. Bush departed from this principle — although even he paid lip service to the ideal.

More strikingly, the U.S. didn’t explain whether it believed that torture and cruel treatment was forbidden worldwide under domestic law or under the torture treaty. This distinction is important. The brutal tactics employed by the U.S. after 9/11 have led many observers to question its commitment to postwar human rights treaties. Both allied and hostile nations were

watching to see if Obama acknowledged that the U.S. was bound by global torture standards. His answer did not reassure them.

The goal of the torture treaty is twofold: to reiterate the absolute ban on torture and to effect the ban by requiring countries to take practical measures to prevent and punish torture, no matter where it takes place.

The Obama administration, however, has taken the position that only people within its governmental authority — for example, at the Guantánamo Bay detention facility or aboard U.S.-flagged aircraft and ships — are covered by legal restrictions against torture and cruel treatment. This stance is better than that of the previous administration, which argued that the ban simply didn't apply to operations abroad. But it provides little comfort to those over whom the U.S. exercises control but who are technically under the authority of another country. For instance, the prisoners held at the U.S. air base in Bagram, Afghanistan, where the United States calls the shots even though it exercises only partial legal control, may be out of luck. The CIA black sites that Obama shut down? Probably not covered either.

The administration's legal parsing is somewhat hard to accept, because under domestic law, including the 2005 Detainee Treatment Act, the U.S. is forbidden from subjecting any person under its "physical control" to cruel, inhuman or degrading treatment, no matter where they are. As the president's own former top international lawyer has argued, it requires no change in law or policy to acknowledge that such conduct is forbidden under the torture treaty as well.

Perhaps Obama dithered because the treaty obliges countries to prevent torture and cruelty. In addition to ensuring that U.S. soldiers and spies don't torture people, the U.S. is not allowed to use proxies to get around the rules. In conducting the war on terrorism, the U.S. sent people to be interrogated by security agencies notorious for their use of torture, in countries such as Egypt and Jordan. Just last week the U.S. asked Congress to exempt its operations against the Islamic State of Iraq and the Levant from the 1997 law that bars funding military units suspected of "gross human rights violations" such as murder, torture and extrajudicial imprisonment.

A clean break from Bush's legacy requires the Obama administration to renounce the country's direct use of torture as well as its use by those whose conduct we control. The risks of equivocating are great. By not taking a firm stance, Obama leaves the door open for future presidents — as well as other countries — to claim the authority to abuse people who are held in foreign territory or to use proxies to do so.

The president has been too timid to bring the country back from the dark side. Instead, he has left the national debate in a gray area where the morality and efficacy of torture and cruelty continue to be up for discussion. As a result, he has left the world insecure about the U.S. stance, wondering whether his administration wishes to maintain some wiggle room on the universal ban against brutality.