



International  
Commission  
of Jurists



## Submission to the United Nations Committee Against Torture in relation to the United States of America's One-Year Follow-up Response to the Committee's Concluding Observations and Recommendations

1 March 2016

### I. Introduction

1. The Redress Trust (REDRESS), the International Commission of Jurists (ICJ), and the World Organisation against Torture (OMCT)<sup>1</sup> (the organisations) are making this submission in response to the United States of America (State party)'s One-Year Follow-up response to the Recommendations of this Committee (follow-up response).<sup>2</sup> In advance of the 2014 State examination, we submitted a report to this Committee expressing profound concern at the fact that the State party had compounded far-reaching violations of international law by constructing an unprecedented system of secrecy around certain detainees, including those facing capital charges in military trials at Guantánamo Bay, thereby silencing a category of victims of torture and other ill-treatment through detention, isolation and classification of information.<sup>3</sup>
2. This Committee identified four "principal subjects of concern and recommendations" for follow up in its Concluding Observations.<sup>4</sup> In this submission we focus on two of these subjects: "Inquiries into allegations of torture overseas" and "Guantánamo Bay detention facilities", which are most closely linked to the original submission we made jointly in advance of the State party's examination.
3. The organisations note the reiteration in the State party's follow up response of its understanding "that where the text of the Convention provides that obligations apply to a State Party in 'any territory under its jurisdiction,' such obligations extend to certain places beyond the sovereign territory of the State Party, and more specifically, 'territory under its jurisdiction' extends to 'all places that the State Party controls as a governmental authority.'"<sup>5</sup> We would recommend to the Committee to urge the United States (U.S.)

<sup>1</sup> Please see Annex 1 for an overview of each of the organisations.

<sup>2</sup> "Information received from the United States of America on follow-up to the concluding observations", CAT/C/USA/CO/3-5/Add.1, 14 January 2016. ('Follow up response').

<sup>3</sup> Redress, ICJ and OMCT, Submission to the Committee against Torture, *Rendered Silent: Ongoing violations arising from the denial of "High Value Detainees" right to complain of torture and other ill-treatment*, October 2014.

<sup>4</sup> They were "Inquiries into allegations of torture overseas"; "Guantánamo Bay detention facilities"; "Interrogation techniques"; and "Excessive use of force and police brutality", see UN Committee against Torture, *Concluding Observations on the combined third to fifth periodic reports of the United States of America*, CAT/C/USA/CO/3-5, 19 December 2014. ('2014 Concluding Observations'), para. 33; UN Committee against Torture, Concluding observations of the Committee against Torture (Extracts for follow-up) of CAT/C/USA/CO/3-5), United States of America ('Extracts for follow-up').

<sup>5</sup> Follow up response, above n. 2, para. 4.

Government to acknowledge that obligations apply to all areas over which it exercises “effective control”, not only those controlled “as a governmental authority” and that the State party’s jurisdiction, and thus State responsibility, is engaged where the State in any matter exercises or engages in conduct pursuant to its authority (State agent authority) on the territory of another State. Such a position has been endorsed by this Committee,<sup>6</sup> the International Court of Justice,<sup>7</sup> and the Inter-American Commission on Human Rights (IACHR).<sup>8</sup>

## II. Inquiries into allegations of torture overseas

4. In its 2014 Concluding Observations this Committee expressed concern over the on-going failure “to fully investigate allegations of torture and ill-treatment of suspects held in United States custody abroad, evidenced by the limited number of criminal prosecutions and convictions.”<sup>9</sup> The Committee urged the State Party to: “Carry out prompt, impartial and effective investigations wherever there is reasonable ground to believe that an act of torture and ill-treatment has been committed in any territory under its jurisdiction, especially in those cases resulting in death in custody.”<sup>10</sup>
5. Instead of providing information regarding follow up action taken to address this “Principal Subject of Concern,”<sup>11</sup> the State party refers primarily to information it previously provided, including regarding the criminal investigation undertaken by Assistant U.S. Attorney Durham into allegations of detainee mistreatment while in U.S. custody at overseas locations (the ‘Durham Investigation’). The follow up response identified individuals prosecuted in relation to crimes committed in Liberia and during the Bosnian conflict, sexual assault of a woman in Germany and a minor in Japan, and the conviction of contractors in connection with civilian deaths in Iraq. None of the cases mentioned relates to “suspects held in United States custody abroad”. This paucity of concrete information undermines the veracity of the assertion that:

“The United States prohibits its personnel from engaging in acts of torture or cruel, inhuman, or degrading treatment of any person in its custody wherever they are

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<sup>6</sup> UN Committee against Torture, General Comment No. 2, Implementation of article 2 by States Parties, CAT/C/GC/2, 24 January 2008, para. 7.

<sup>7</sup> Provisional Measures in the case of *Georgia v. Russian Federation*, 2008, No. 35/2008, where the International Court of Justice held: “there is no restriction of a general nature in CERD [Convention on the Elimination of Racial Discrimination] relating to its territorial application [...] [T]he Court consequently finds that these provision of CERD generally appear to apply, **like the other provisions of instruments of that nature**, to the **actions** of a State party **when it acts beyond its territory**”, I.C.J. para. 109 (15 October 2008). The International Court of Justice had of course previously discussed and affirmed the extraterritorially application of the International Covenant on Civil and Political Rights in other cases, see, e.g., *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, para. 109 (9 July 2004); *Armed Activities on the Territory of the Congo (DRC v Uganda)*, 2005 I.C.J. 26 (19 December 2005).

<sup>8</sup> *Detainees in Guantánamo Bay, Cuba, Request for Precautionary Measures*, IACHR (March 13, 2002); *Djamel Ameziane v. United States*, Report No. 17/12, Petition P-900-08, IACHR (March 20, 2012), para. 33; *Decision of the Commission as to the admissibility [of Haitians to the United States]*, Case 10.675, Report No. 28/93, IACHR, Annual Report 1993, OEA/Ser.L/V.85 Doc. 9 rev. (1994).

<sup>9</sup> 2014 Concluding Observations, above n. 4, para. 12.

<sup>10</sup> *Ibid.*

<sup>11</sup> Extracts for follow-up, above n. 4.

held. The United States takes vigilant action to prevent any such unlawful conduct by its personnel and to hold accountable any persons responsible for such acts.”<sup>12</sup>

6. In light of the failure to ensure accountability,<sup>13</sup> a group of six United Nations human rights experts stressed in February 2016 that U.S. authorities must ensure independent and impartial investigations and prosecutions into all credible allegations of violations carried out in the aftermath of the September 11 attacks, “during the chapter of the ‘global war on terrorism’,” such as extraordinary rendition, torture and secret detention.<sup>14</sup>

### **II.1. State Party’s failure to address the findings of the SSCI Study**

7. In responding to the Committee’s recommendation regarding inquiries into allegations of torture overseas the State party fails to address the fact that since the conclusion of the Durham Investigation in 2012, and the 2014 State examination by the Committee, the Senate Select Committee on Intelligence Study of the Central Intelligence Agency’s Detention and Interrogation Program has revealed extensive additional information. The Executive Summary of this Study was released in redacted form to the public (SSCI Summary),<sup>15</sup> and the full Study was provided in classified form to the Department of Justice and other Government agencies.<sup>16</sup>
8. The full Study, which remains classified, describes the history of the CIA’s Rendition, Detention and Interrogation (RDI) Program from its inception to its termination, including a review of each of the 119 known individuals who were held in CIA custody.<sup>17</sup> Despite the fact that highly significant information regarding criminal activity and identifying perpetrators has been made available to it in the classified version of the Study, the Department of Justice has reportedly not yet read it.<sup>18</sup>

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<sup>12</sup> Follow up response, above n. 2, para. 25.

<sup>13</sup> To date, implicated officials have not been prosecuted by the State party for participation in the human rights abuses, including torture and other ill-treatment, committed in the course of the CIA’s rendition, detention and interrogation (RDI) program between 2001 and 2006.

<sup>14</sup> UN OHCHR, “It’s not just about closing Guantanamo, but also ensuring accountability,” UN rights experts say, 26 February 2016. Available at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=17097&LangID=E>. The ongoing failure to ensure accountability includes a failure to bring criminal prosecutions as well as thwarting of judicial or administrative channels that would allow victims to access civil remedies, including through claims of State secrecy. See for example, Human Rights Watch, *No More Excuses: A Roadmap to Justice for CIA Torture*, 2015.

<sup>15</sup> US Senate Select Committee on Intelligence, Committee Study of the Central Intelligence Agency’s Detention and Interrogation Program, Executive Summary, December 3, 2014 (‘SSCI Summary’). Available at: [http://www.feinstein.senate.gov/public/index.cfm/files/serve?File\\_id=7c85429a-ec38-4bb5-968f-289799bf6d0e&SK=D500C4EBC500E1D256BA519211895909](http://www.feinstein.senate.gov/public/index.cfm/files/serve?File_id=7c85429a-ec38-4bb5-968f-289799bf6d0e&SK=D500C4EBC500E1D256BA519211895909).

<sup>16</sup> See for example, Letter from Senators Dianne Feinstein and Patrick Leahy to Attorney General Loretta Lynch and FBI Director James Comey, November 5, 2015. (‘Feinstein and Leahy Letter’) Available at: <https://assets.documentcloud.org/documents/2510385/report-letter.pdf>.

<sup>17</sup> US Senate Select Committee on Intelligence, Committee Study of the Central Intelligence Agency’s Detention and Interrogation Program, Foreword, December 3, 2014 (‘SSCI Foreword’), p. 3. This Study is based on a review of “more than six million pages of CIA materials, to include operational cables, intelligence reports, internal memoranda and emails, briefing materials, interview transcripts, contracts, and other records.” p.5.

<sup>18</sup> The Intercept, *One Year After the Senate Torture Report, No One’s Read It and It Might be Destroyed*, 9 Dec, 2015. Available at: <https://theintercept.com/2015/12/09/one-year-after-the-senate-torture-report-no-ones-read-it-and-it-might-be-destroyed/>. In November 2015 Senators Feinstein and Leahy wrote to the U.S. Attorney General and the Director of the Federal Bureau of Investigation (FBI) urging that “appropriate DOJ and FBI officials must read the full 6,700-page Senate Intelligence Committee Study of the CIA’s Detention and Interrogation Program in order to understand what happened and draw appropriate lessons.” Feinstein and Leahy Letter, above n. 16.

9. Even the declassified version of the SSCI Summary<sup>19</sup> and its findings and conclusions contain information that clearly requires the State party, pursuant to its obligations under the Convention, to take immediate measures to hold officials accountable for acts of torture, enforced disappearance and other gross human rights violations, and to provide redress to victims. The findings and conclusions of the SSCI Summary include:
- “The interrogations of CIA detainees were brutal and far worse than the CIA represented to policymakers and others”;<sup>20</sup>
  - “The conditions of confinement for CIA detainees were harsher than the CIA had represented to policymakers and others”;<sup>21</sup>
  - “CIA detainees were subjected to coercive interrogation techniques that had not been approved by the Department of Justice or had not been authorized by CIA Headquarters”;<sup>22</sup>
10. Of further concern are references contained in the SSCI Summary discussing: a) conscious recognition that future interrogation methods could constitute torture; and b) suggestions about how accountability could be avoided in the future.<sup>23</sup> The SSCI Summary notes that “by the end of November 2001 CIA officers had begun researching potential legal defences for using interrogation techniques that were considered torture by foreign governments and a non-governmental organisation.”<sup>24</sup> The SSCI Summary refers to a letter that was circulated internally at the CIA and which requested from the Department of Justice “a formal declination of prosecution, in advance, for any employees of the United States, as well as any other personnel acting on behalf of the United States, who may employ methods in the interrogation of Abu Zubaydah that otherwise might subject those individuals to prosecution... these ‘aggressive methods’ [to be used against Abu Zubaydah] would otherwise be prohibited by the torture statute, ‘apart from potential reliance upon the doctrines of necessity or of self-defense.’”<sup>25</sup>

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<sup>19</sup> The Prosecutor in the Military Commissions at Guantánamo Bay, has confirmed that the facts outlined in the SSCI Summary occurred. See, The Washington Post, *Military prosecutor: Senate report on CIA interrogation program is accurate*, 10 Feb, 2016. Available at: [https://www.washingtonpost.com/world/national-security/military-prosecutor-senate-report-on-cia-interrogation-program-is-accurate/2016/02/10/d75d51a8-cf47-11e5-88cd-753e80cd29ad\\_story.html](https://www.washingtonpost.com/world/national-security/military-prosecutor-senate-report-on-cia-interrogation-program-is-accurate/2016/02/10/d75d51a8-cf47-11e5-88cd-753e80cd29ad_story.html).

<sup>20</sup> United States Senate Select Committee on Intelligence, Committee Study of the Central Intelligence Agency’s Detention and Interrogation Program, Findings and Conclusions, December 3, 2014 (‘SSCI Findings and Conclusions’), p. 3.

<sup>21</sup> *Ibid*, p. 4.

<sup>22</sup> *Ibid*, p.12. Furthermore, “The CIA rarely reprimanded or held personnel accountable for serious and significant violations, inappropriate activities, and systemic and individual management failures”. p. 14

<sup>23</sup> SSCI Summary, above n. 15, p. 19: “On November 26, 2001, attorneys in the CIA’s Office of General Counsel circulated a draft legal memorandum describing the criminal prohibition on torture and a potential ‘novel’ legal defense for CIA officers who engaged in torture. The memorandum stated that the ‘CIA could argue that the torture was necessary to prevent imminent, significant, physical harm to persons, where there is no other available means to prevent the harm,’ adding that ‘states may be very unwilling to call the U.S. to task for torture when it resulted in saving thousands of lives.’ An August 1, 2002, OLC memorandum to the White House Counsel includes a similar analysis of the ‘necessity defense’ in response to potential charges of torture.”

<sup>24</sup> *Ibid*, p. 19.

<sup>25</sup> *Ibid*, pp. 32-33.

## II.2. High Value Detainees

11. As outlined in our 2014 submission, the specific procedures and treatment which so-called High Value Detainees (HVDs) were subjected to in the CIA's RDI Program,<sup>26</sup> as well as the detention and classification regimes which have been imposed at Guantánamo Bay, have hampered the ability of these individuals to exercise their rights under the Convention to complain about, and seek redress for, torture and other ill-treatment. In responding to this Committee's recommendation regarding inquiries into allegations of torture overseas, setting out "numerous laws in place",<sup>27</sup> the State party fails to mention the significant difficulties in utilising these laws that the regimes to which these individuals have been subjected have caused.
12. As this Committee is aware, in August 2002 the U.S. Justice Department's Office of Legal Counsel purported to authorise the CIA to use a range of "physical and mental abuse"<sup>28</sup> on terrorist suspects; so-called enhanced interrogation techniques.<sup>29</sup> Mr. Abu Zubaydah was the first of the so-called HVDs to be detained.<sup>30</sup> His and their detention amounted to enforced disappearance as defined by international law.<sup>31</sup> Whilst in detention he was the first person to be subjected to the so-called enhanced interrogation techniques.<sup>32</sup>
13. The SSCI Summary has revealed CIA cables in July 2002, in which the interrogation team discussed the "proposed interrogation phase" to which Mr. Abu Zubaydah was to be subjected and "especially in light of the planned psychological pressure techniques to be implemented" requested "reasonable assurances that [Mr. Abu Zubaydah] will remain in

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<sup>26</sup> Central Intelligence Agency Office of the Inspector General, "Special Review", 7 May 2004, Available at: [http://www.therenditionproject.org.uk/pdf/PDF%2020%20CIA%20IG%20Investigation%20EITS%202004\].pdf](http://www.therenditionproject.org.uk/pdf/PDF%2020%20CIA%20IG%20Investigation%20EITS%202004].pdf), ('CIA OIG Review') pp.3-4; CIA, "Background Paper on CIA's Combined Use of Interrogation Techniques (undated) (redacted)", Fax from [redacted], Central Intelligence Agency, to Dan Levin, Office of Legal Counsel, Department of Justice, 30 December 2004 (released 24 August 2009), Available at: <http://www.aclu.org/files/torturefoia/released/082409/olcremand/2004olc97.pdf>, p. 1; Stephen G. Bradbury, "Memorandum re: application of United States obligations under article 16 of the Convention against Torture to certain techniques that may be used in the interrogation of high value al-Qaida detainees", 30 May 2005, <http://www.therenditionproject.org.uk/pdf/PDF%2016%20Bradbury%20Memo%20to%20Rizzo%20Certain%20Techniques%2010%20May%202000.pdf>, p. 6.

<sup>27</sup> Follow up response, above n. 2, para. 3.

<sup>28</sup> United Nations, "Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson: Framework Principles for securing the accountability of public officials for gross or systematic human rights violations committed in the context of State counter-terrorism initiatives", A/HRC/22/52, 1 March 2013, [http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A-HRC-22-52\\_en.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A-HRC-22-52_en.pdf), para. 15.

<sup>29</sup> *Ibid*; CIA OIG Review, above n. 26, p. 15. See also Jay Bybee, Office of Legal Counsel, Department of Justice, "Memo for Alberto Gonzales, Counsel to the President Re: Standards of Conduct for Interrogation under 18 USC §§2340-2340A", 1 August 2002, Available at:

<http://www.therenditionproject.org.uk/pdf/PDF%2019%20Bybee%20Memo%20to%20Gonzales%20Standards%20Interrogation%201%20Aug.pdf>; Jay Bybee, Office of Legal Counsel, Department of Justice, "Memo for John Rizzo, Acting General Counsel to the CIA: Interrogation of an Al Qaeda Operative", 1 August 2002, [http://www.therenditionproject.org.uk/pdf/PDF%2015%20Bybee%20Memo%20to%20CIA%201%20Aug%202002\].pdf](http://www.therenditionproject.org.uk/pdf/PDF%2015%20Bybee%20Memo%20to%20CIA%201%20Aug%202002].pdf).

<sup>30</sup> See ECtHR, *Abu Zubaydah v Poland* (2014) App. No. 7511/13, 24 July 2014; SSCI Summary, above n. 16, pp. 17-49.

<sup>31</sup> See, *inter alia*, *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], application no. 39630/09, European Court of Human Rights, judgment, 13 December 2012, para. 240; ECtHR, *Abu Zubaydah v Poland* (2014) App. No. 7511/13, 24 July 2014; SSCI Summary, above n. 15.

<sup>32</sup> See ECtHR, *Abu Zubaydah v Poland* (2014) App. No. 7511/13, 24 July 2014; SSCI Summary, above n. 15, pp. 17-49.

isolation and incommunicado for the remainder of his life.”<sup>33</sup> Officers from the CIA’s ALEC Station<sup>34</sup> responded several days later indicating that:

“There is a fairly unanimous sentiment within HQS that [Abu Zubaydah] will never be placed in a situation where he has any significant contact with others and/or has the opportunity to be released. While it is difficult to discuss specifics at this point, all major players are in concurrence that [Abu Zubaydah] should remain incommunicado for the remainder of his life. This may preclude [Abu Zubaydah] from being turned over to another country, but a final decision regarding his future incarceration condition has yet to be made.”<sup>35</sup>

14. This response, discussing Mr. Abu Zubaydah’s future deprivation of liberty and restrictions on his ability to communicate, is remarkably close to the reality in which so-called HVDs have been held by the U.S. Government.
15. As outlined in our October 2014 submission, so-called HVDs were subjected to enforced disappearance and torture and completely cut off from the outside world during their secret detention in the RDI Program. They did not have access to independent observers such as the International Committee of the Red Cross (ICRC) until 2006. In the case of Mr. al-Hawsawi, for example, this was more than three and a half years after his detention had begun.<sup>36</sup> It was not until 2008 that these so-called HVDs were first allowed “controlled and limited” access to defense counsel with very high level security clearance.<sup>37</sup> With the exception of ICRC officials, limited contact with security-cleared defense lawyers, and restricted security-cleared correspondence, the so-called HVDs in Camp 7, including six among them who face capital charges in military trials, remain largely isolated from the outside world today.<sup>38</sup>
16. Camp 7 is a separate, purpose-built section of the detention facility.<sup>39</sup> Sixteen of the so-called HVDs, including Mr. al-Hawsawi, remain at Guantánamo Bay.<sup>40</sup> Apart from one individual who has pleaded guilty to charges brought against him, all are held at Camp 7. The location, as well as much of the operation and conditions of confinement of Camp 7, remain classified, and only a strictly limited number of government agents are allowed access.
17. One defense counsel in the Military Commissions argued that the United States has “tortur[ed] our victims and then construct[ed] an elaborate scheme of incommunicado

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<sup>33</sup> SSCI Summary, above, n. 15, p. 35.

<sup>34</sup> ALEC Station was “the office within the CIA with specific responsibility for al-Qa’ida.” SSCI Summary, above, n. 15, p. 21.

<sup>35</sup> *Ibid*, p. 35.

<sup>36</sup> Department of Defense, Joint Task Force Guantánamo, JTF-GTMO Detainee Assessment, Mustafa al-Hawsawi, 8 December 2006 (JTF-GTMO Detainee Assessment), p. 4; International Committee of the Red Cross (ICRC), “Report on the Treatment of Fourteen ‘High Value Detainees’ in CIA Custody”, February 2007, (‘ICRC HVDs Report’).

<sup>37</sup> Military Commissions Trial Judiciary: Guantanamo Bay, *USA v Khalid Shaykh Mohammad et. al.*, AE303 (MAH), ‘Defense Motion for Appropriate Relief to Require Confinement Conditions that Comply with International Humanitarian Law standards’, 29 May 2014, p. 13.

<sup>38</sup> *Ibid*, p. 11.

<sup>39</sup> *Ibid*, p. 3.

<sup>40</sup> Ibn Sheikh al-Libi died in Libyan custody. See, the Rendition Project, High Value Detainees, <http://www.therenditionproject.org.uk/prisoners/hvd.html>.

detention and ‘classification’ designed to silence them forever...”<sup>41</sup> This not only perpetuates the original torture and other ill-treatment but leads to impunity as it ensures that perpetrators are not investigated or prosecuted and prevents effective redress for the victims.

18. Furthermore, the detention and classification regimes also hinder investigations concerning the complicity of other States in the CIA rendition programme, including, for example, through hosting secret detention sites.<sup>42</sup> In violation of its obligations under Article 9 of the Convention the U.S. Government refuses to cooperate with other governments conducting such criminal investigations.<sup>43</sup>

19. The follow up response notes the publication of the SSCI Summary but instead of recognising the resulting obligations on the U.S. Government and providing detailed information about the steps the State party will take to address the abuses detailed, the State party seeks to draw a line under these abuses stating:

“The decisions following the attacks of September 11, 2001, relating to this former program are part of our history and are not representative of the way we deal with the threat from terrorism we still face today.”<sup>44</sup>

20. While these limited acknowledgements of wrongdoing and efforts to prevent torture are important steps, the organisations recall that violations of the Convention trigger important obligations, which must be fulfilled, including the obligation to investigate and prosecute torture and other ill-treatment and ensure full reparation for the victims.

### III. Guantánamo Bay detention facilities

21. In the context of the Guantánamo Bay detention facilities the Committee called upon the United States “**to take immediate and effective measures to: ... investigate allegations of detainee abuse, including torture and ill-treatment, appropriately prosecute those responsible, and ensure effective redress for victims.**”<sup>45</sup>

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<sup>41</sup> Military Commissions Trial Judiciary: Guantanamo Bay, *USA v Khalid Shaykh Mohammad et. al.*, AE200 (KSM), ‘Defense Notice of Joinder, Factual Supplement & Argument’, 2 September 2013, p. 17.

<sup>42</sup> See for example, Amnesty International, *USA Crimes and Impunity: Full Senate Committee Report on CIA Secret Detentions Must be Released and Accountability for Crimes under International Law Ensured*, April 2015; Human Rights Watch, *No More Excuses: A Roadmap to Justice for CIA Torture*, 2015.

<sup>43</sup> For example, in relation to the European Court of Human Rights case of *Al Nashiri v. Poland* (ECtHR, *Al Nashiri v. Poland*, App. No. 28761/11, 24 July 2014) Polish prosecutors state that they have submitted six requests for legal assistance to the United States Justice Department. One request was refused in 2009; the remaining five were refused in November 2015. Available at:

[http://www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases\\_en.asp?CaseTitleOrNumber=abu+zubaydah&StateCode=&SectionCode=](http://www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases_en.asp?CaseTitleOrNumber=abu+zubaydah&StateCode=&SectionCode=); See also, Scott Horton, Justice Department Refuses Cooperation with Polish Prosecutors Investigating Torture at CIA Black Site, 30 Dec 2010. Available at: <http://harpers.org/blog/2010/12/justice-department-refuses-cooperation-with-polish-prosecutors-investigating-torture-at-cia-black-site/>

<sup>44</sup> Follow up response, above n. 2, para. 9.

<sup>45</sup> 2014 Concluding Observations, above n. 4, para. 14(c).



22. Despite the fact that allegations of detainee abuse, including torture and ill-treatment, at the Guantánamo Bay detention facilities have been well documented for many years,<sup>46</sup> the follow up response failed to adequately address the Committee's recommendation. The State party further claims that "Individuals at Guantanamo who were captured as enemy belligerents are detained lawfully under the Authorization for Use of Military force (AUMF)..."<sup>47</sup>
23. This response ignores the additional information that has come to light since the Committee's recommendations were adopted: human rights violations were documented once more in reports issued by the IACHR<sup>48</sup> and the Office for Democratic Institutions and Human Rights of the Organisation for Security and Cooperation in Europe (OSCE-ODIHR) in 2015.<sup>49</sup>
24. This response also ignores the determination of international human rights bodies, including the UN Working Group on Arbitrary Detention,<sup>50</sup> the European Court of Human Rights,<sup>51</sup> the UN Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment,<sup>52</sup> the OSCE-ODIHR, and the IACHR, consistently identifying "that the continuing and indefinite detention of individuals without the right to due process in Guantánamo is arbitrary and constitutes a clear violation of international law."<sup>53</sup> This Committee has noted that indefinite detention constitutes *per se* a violation of the Convention.<sup>54</sup>

### **III.1. Failure to investigate and prosecute**

25. In its follow up response the Government sets out various policies and commitments to accountability in cases of detainee abuse and states that: "The Department of Defense has conducted thousands of investigations since 2001, and it has prosecuted or disciplined hundreds of service members for misconduct, including mistreatment of detainees."<sup>55</sup>

<sup>46</sup> See for example, The Constitution Project, *The Report of the Constitution Project's Task Force on Detainee Treatment*, 2013; The New York Times, *Red Cross Finds Detainee Abuse in Guantánamo*, 30 Nov 2004. Available at: [http://www.nytimes.com/2004/11/30/politics/red-cross-finds-detainee-abuse-in-guantanamo.html?\\_r=0](http://www.nytimes.com/2004/11/30/politics/red-cross-finds-detainee-abuse-in-guantanamo.html?_r=0)

<sup>47</sup> Follow up response, above n. 2, para. 34.

<sup>48</sup> Organization of American States: Inter-American Commission on Human Rights, *Towards the Closure of Guantánamo*, 2015. ('Towards the Closure of Guantánamo') Available at: <http://www.oas.org/en/iachr/reports/pdfs/Towards-Closure-Guantanamo.pdf>.

<sup>49</sup> OSCE-ODIHR, *Report: Human Rights Situation of Detainees at Guantánamo*, Warsaw, 2015. ('OSCE-ODIHR Guantánamo Report') Available at: <http://www.osce.org/odihr/198721>.

<sup>50</sup> UN Working Group on Arbitrary Detention (WGAD), *Communication addressed to the Government of the United States of America on 25 August 2014 and to the Government of Cuba on 15 September 2014, Concerning Mustafa al Hawsawi*, UN Doc. A/HRC/WGAD/2014, 23 January 2015.

<sup>51</sup> ECtHR, *Abu Zubaydah v Poland* (2014) App. No. 7511/13, 24 July 2014.

<sup>52</sup> Statement of the United Nations Special Rapporteur on Torture at the Expert Meeting on the situation of detainees held at the U.S. Naval Base at Guantánamo Bay, Inter-American Commission on Human Rights, 3 Oct 2013. ('UNSR Torture Statement re detainees at Guantánamo') Available at:

<http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=13859&LangID=E>

<sup>53</sup> *Towards the Closure of Guantánamo*, above n. 48, para. 93. See also, para. 96.

<sup>54</sup> UN Committee Against Torture (CAT), *Conclusions and Recommendations*, United States of America, 25 July 2006, UN Doc. CAT/C/USA/CO/2, para. 22.

<sup>55</sup> Follow up response, above n. 2.



26. However, like the statements of policies and laws identified in relation to allegations of torture overseas, the policies and commitments set out in relation to Guantánamo Bay are not supported by facts.

27. The response provided by the U.S. authorities to this Committee is similar to their submissions to the IACHR<sup>56</sup> and OSCE-ODIHR. While the follow up response seems to suggest that some investigations may have led to prosecutions there are no figures provided on the number of convictions, if any. In 2015 the IACHR noted “with deep concern” that “no criminal actions have been brought against persons involved in acts of torture in Guantánamo.”<sup>57</sup> Similarly OSCE-ODIHR found that:

“Although US officials informed ODIHR that individuals who did not follow procedures were held accountable, ODIHR is unaware of any prosecutions of US officials alleged to have committed torture or ill-treatment at Guantánamo except for [a] case involving the use of pepper spray... Additionally ODIHR is not aware of any prosecutions of US officials for acts of torture or ill-treatment against Guantánamo detainees at the federal level. No prosecutions have been conducted under the Torture Convention Implementation Act regarding treatment at Guantánamo.”<sup>58</sup>

28. The State party’s response to the Committee’s recommendation makes several references to *habeas corpus* relief. The apparent belief or suggestion that a *habeas corpus* writ could fulfil the State party’s obligations as outlined in the Committee’s recommendation appears to indicate a misunderstanding of that recommendation and the State’s obligations. This recommendation was in reference to positive obligations on the State party to take action to investigate, prosecute and provide effective redress *proprio motu* in the face of credible allegations, while a *habeas* petition gives effect to the rights of individuals to have the legality of their detention reviewed. Aside from on-going issues surrounding the true availability of *habeas* relief to Guantánamo detainees,<sup>59</sup> the follow up response fails to provide an appropriate response.

29. In light of the failures to conduct effective investigations and prosecutions outlined above in the context of torture overseas, and in this section regarding abuses at the Guantánamo Bay detention facilities, it is important to recall that a State’s failure to investigate, criminally prosecute, when warranted by the evidence, and/or to allow civil proceedings related to

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<sup>56</sup> Towards the Closure of Guantánamo, above n. 48, para. 117: “In its response to this report, the U.S. Government indicated that investigations on the conditions of detention in Guantánamo conducted by, among others, the Inspector General of the Army, Navy, and CIA; and by Major General Ryder, the general Officer appointed by the Commander, U.S. Southern Command, led to hundreds of recommendations on ways to improve detention and interrogation operations, and the Department of Defense and the Cia have allegedly instituted processes to address these recommendations. The State also claimed that the Department of Justice conducted preliminary reviews and criminal investigations into the treatment of individuals alleged to have been mistreated while in U.S. Government custody subsequent to the September 2011 terrorist attacks, brought criminal prosecutions in several cases, and obtained the conviction of a CIA contractor and a Department of Defense contractor for abusing detainees in their custody.”

<sup>57</sup> Towards the Closure of Guantánamo, above n. 48, para. 118.

<sup>58</sup> OSCE-ODIHR Guantánamo Report, above n. 49, para. 540, p. 237.

<sup>59</sup> See for example, Towards the Closure of Guantánamo, above n. 48, paras 163- 189.

allegations of acts of torture in a prompt manner, may, beyond a breach of articles 12 and 13 of the Convention, also result in a violation of the State's obligations under article 14 as it may constitute a *de facto* denial of redress.<sup>60</sup>

### **III.2. Failure to provide effective redress**

30. In its follow up response the U.S. Government has failed to provide any information to indicate actions taken to "ensure effective redress" as requested by this Committee in light of the State party's obligations under the Convention.<sup>61</sup>

31. The failure to provide effective redress is of particular concern in relation to the lack of access to rehabilitation at Guantánamo Bay, including access to medical care. Under Article 14 of the Convention, U.S. authorities have an obligation to address the therapeutic and other rehabilitative needs of those victims of official mistreatment who remain in custody and who, due to their continued incarceration at Guantánamo Bay, are unable to proactively attend to their own physical and psychological rehabilitation.<sup>62</sup>

32. Many of the detainees at Guantánamo Bay were subjected to torture and cruel, inhuman or degrading treatment, at times both prior to their arrival at Guantánamo Bay and during their detention there.<sup>63</sup> The long-term effects of these abuses have resulted in conditions which require both medical and psychological care.<sup>64</sup>

#### *Medical care*

33. Numerous organisations, including Physicians for Human Rights and OSCE-ODIHR, have raised concerns regarding the adequacy of medical care provided to detainees at Guantánamo.<sup>65</sup> Issues affecting the provision of adequate medical care relate both to past practices - such as the involvement of medical personnel in interrogations - and current issues, including the classification regime and the rapid rotation of medical personnel.<sup>66</sup>

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<sup>60</sup> UN Committee against Torture, General Comment No. 3, *Implementation of article 14 by States parties*, UN. Doc. CAT/C/GC/3, 13 December 2012, ('CAT General Comment No. 3') para. 17.

<sup>61</sup> Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 14; CAT General Comment No. 3, above n. 60, paras 2 and 6: the term 'redress' "encompasses the concepts of 'effective remedy' and 'reparation'." Redress includes five forms of reparation: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. Further, the means for as full rehabilitation as possible "should be holistic and include medical and psychological care as well as legal and social services."

<sup>62</sup> CAT General Comment No. 3, above n. 60, para. 13: specialised services for the victim of torture or ill-treatment should be "available, appropriate and promptly accessible."

<sup>63</sup> See for example, SSCI Summary, above n. 15; The Constitution Project, *The Report of the Constitution Project's Task Force on Detainee Treatment*, 2013; The New York Times, *Red Cross Finds Detainee Abuse in Guantánamo*, 30 Nov 2004. Available at: [http://www.nytimes.com/2004/11/30/politics/red-cross-finds-detainee-abuse-in-guantanamo.html?\\_r=0](http://www.nytimes.com/2004/11/30/politics/red-cross-finds-detainee-abuse-in-guantanamo.html?_r=0)

<sup>64</sup> See for example, Physicians for Human Rights, *Broken laws, Broken Lives: Medical Evidence of Torture by US Personnel and Its Impact*, June 2008, p. 90; Interim Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 10 August 2010, UN Doc. A/65/273, para. 63, p. 14. See also, Human Rights Council, *Torture and other cruel, inhuman or degrading treatment or punishment: rehabilitation of torture victims*, UN Doc. A/HRC/22/L.11/Rev.1, 19 March 2013, para. 13.

<sup>65</sup> See for example, OSCE-ODIHR Guantánamo Report, above n. 49, p.114-123; Physicians for Human Rights, *Ethics Abandoned: Medical Professionalism and Detainee Abuse in the War on Terror*, November 2013; The Constitution Project and Global Lawyers and Physicians, *Conference Summary, Medical Care and Medical Ethics at Guantánamo*, December 2, 2013. Available at: <http://detainee-taskforce.org/wp-content/uploads/2013/12/12-2-Conference-Summary-FINAL.pdf>.

<sup>66</sup> See for example, OSCE-ODIHR Guantánamo Report, above n. 49, paras 263-284; *Towards the Closure of Guantánamo*, above n. 48.

34. The case of Mr. al-Hawsawi provides a graphic illustration of these concerns: he is suffering from a number of serious medical conditions, including Hepatitis C, cervical degenerative disk disease, chronic haemorrhoids, anal fissures and rectal prolapse. In July 2015 the Inter-American Commission on Human Rights adopted precautionary measures in relation to Mr. al-Hawsawi requesting that the U.S.:

- Adopt the necessary measures to protect the life and personal integrity of Mr. al-Hawsawi;
- Adopt the necessary measures to guarantee that the detention conditions are adequate in accordance with applicable international standards;
- Adopt the necessary measures to ensure access to medical care and treatment; and
- Report on the actions taken to investigate the presumed facts that led to the adoption of the precautionary measures in order to avoid the repetition of the alleged circumstances.<sup>67</sup>

35. However, to date, Mr. al-Hawsawi's military legal team have not seen any improvement in his conditions of confinement and access to and standard of medical care. Instead, his medical situation has deteriorated significantly in recent months.<sup>68</sup>

#### *Guarantees of Non-Repetition*

36. This Committee has recognised that "effective redress" includes guarantees of non-repetition.<sup>69</sup> However, it appears that some of the conditions of detention at Guantánamo Bay continue to constitute ill-treatment, which in some cases may rise to the level of torture. In 2013 the Special Rapporteur on Torture noted that he considers "the practice of indefinite detention, other conditions applied to [Guantánamo detainees] such as solitary confinement, as well as the use of force feeding as forms of ill-treatment that in some cases can amount to torture."<sup>70</sup>

37. It is known that the conditions at Camp 7 are far more oppressive than those in other sections of Guantánamo Bay. The secrecy surrounding the conditions of confinement only adds to their oppressiveness. Each HVD is held in segregated cells. While the U.S. Government claims that solitary confinement is not allowed at Guantánamo, various sources, including recently the OSCE-ODIHR, have challenged this position. The OSCE-ODIHR notes that "[A]t a minimum, all detainees who spend 22 hours a day in segregated cells are

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<sup>67</sup> IACHR, Resolution 24/2015, Precautionary Measure No. 422-14, *Matter of Mustafa Adam Al-Hawsawi regarding the United States of America*, July 7, 2015. Available at: <http://www.redress.org/downloads/resolution-24-2015---precautionary-measures-al-hawsawi.pdf>.

<sup>68</sup> REDRESS, Request for Urgent action in respect of medical situation of Mr. Mustafa al-Hawsawi, detained in Guantánamo Bay, 19 February 2016. Available at: <http://www.redress.org/downloads/urgent-appeal-alhawsawi.02.19.2016.pdf>. See also, Request for an Individual Complaint Hearing During the 157<sup>th</sup> Period of Sessions on the Petition of Mr. Mustafa al-Hawsawi (No. 1385-14) and, particularly, the United States Government's Non-Performance of the Inter-American Commission on Human Rights' ("IACmHR") Precautionary Measures (MC-422-14) Deeming Mr. al-Hawsawi's Situation "Serious," "Urgent," and Indicative of "Irreparable Harm.", 20 January 2016 (Request for Individual Complaint Hearing).

<sup>69</sup> CAT General Comment No. 3, above n. 60.

<sup>70</sup> UNSR Torture Statement re detainees at Guantánamo, above n. 52; See also, OSCE-ODIHR Guantánamo Report, above n. 49, paras 218-236.

thus undoubtedly held in solitary confinement.”<sup>71</sup> The significant negative impact of solitary confinement, in particular its cumulative effect, and its incompatibility with international human rights protections, is well documented.<sup>72</sup> In February 2016 UN Rights Experts calling for the close of the Guantánamo Bay detention facility stressed that “detainees must be held under the conditions that respect international standards” emphasising “in particular, no individual must be held incommunicado, or in prolonged or indefinite solitary confinement.”<sup>73</sup>

**38. In light of the inadequate responses provided by the State party, the organisations urge the Committee, as part of its follow up procedure, to seek that additional information be provided within 6 months in relation to compliance with its recommendations regarding “Inquiries into allegations of torture overseas” and “Guantánamo Bay detention facilities”. In this regard we suggest that the Committee may wish to highlight urgent matters outlined in this submission, including lack of access to adequate medical care.**

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<sup>71</sup> OSCE-ODIHR Guantánamo Report, above n. 49, para. 226, p. 97.

<sup>72</sup> See for example, UNGA, Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment, 5 August 2011, UN Doc. A/66/268; *Montero Aranguren et al v. Venezuela*, Judgment of July 5, 2006, IACtHR, (Series C) No. 150, para. 94; UN Human Rights Committee, General Comment No. 20, para. 6; UN Human Rights Committee, *Polay Campos v. Peru*, Comm. No. 577/1994, para. 8.7.

<sup>73</sup> UN OHCHR, “It’s not just about closing Guantanamo, but also ensuring accountability,” UN rights experts say, 26 February 2016. Available at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=17097&LangID=E>. See also, United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), Resolution adopted by the General Assembly on 17 December 2015, UN Doc. A/Res/70/175.

## Annex I

### Organisations making the submission

1. **The Redress Trust (REDRESS)** is an international human rights organisation based in the United Kingdom with a mandate to assist torture survivors to seek justice and other forms of reparation. REDRESS has taken part as an intervener in litigation in the United States, Canada and Europe concerning violations committed in the CIA's RDI Program. In addition, REDRESS has been working on a case illustrative of some of the concerns set out in this submission – that of Mr. Mustafa al-Hawsawi – since 2012, and has filed criminal complaints in several countries seeking investigations into allegations that he may have been detained and tortured in those countries as a result of their complicity in the CIA's RDI Program.
2. Composed of some 60 eminent judges and lawyers from all regions of the world, the **International Commission of Jurists (the ICJ)** promotes and protects human rights through the Rule of Law, by using its unique legal expertise to develop and strengthen national and international justice systems. Established in 1952, in consultative status with the Economic and Social Council since 1957, and active on five continents, the ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and the legal profession. Among other things the ICJ commissioned and published the report of an independent panel of eight distinguished jurists from different parts of the world on the global impact of counter-terrorism measures taken in response to the events on 11 September 2001 on human rights; *Assessing Damage and Urging Action*, and has submitted on its own and jointly a number of amicus briefs to courts on the duty of states to ensure the rights to redress and reparation for torture and other ill-treatment, including in relation to individuals who were subject to the RDI program.
3. Created in 1986, the **World Organisation against Torture (OMCT)** is a key coalition of international non-governmental organisations fighting against torture, summary executions, enforced disappearance and other cruel, inhuman or degrading treatment. OMCT has 297 affiliated organisations in its SOS-Torture Network and many tens of thousands correspondents in every country. Based in Geneva, OMCT's International Secretariat provides personalised medical, legal and /or social assistance to hundreds of torture victims and ensures the daily dissemination of urgent appeals across the world, in order to protect individuals and to fight against impunity. Specific programmes allow it to provide support to specific categories of vulnerable people, such as women, children and human rights defenders. In the framework of its activities, OMCT also submits individual communications and alternative reports to the special mechanisms of the United Nations, and actively collaborates in the development of international norms for the protection of human rights.