United States of America: NGO assessment of the implementation of the Committee Against Torture follow-up recommendations
March 1, 2016

Follow-up Recommendation Report will assess: Paragraphs 12(a) (Inquiries into allegations of torture overseas), 14 (c) (Guantanamo Bay detention facilities), and 17 (Interrogation techniques)

The Center for Victims of Torture (CVT) is an international non-governmental organization dedicated to healing survivors of torture and to work for a world without torture. We provide direct care for those who have been tortured, build the capacity of partners who work to prevent and treat torture, and advocate for an end to torture. CVT is headquartered in Minneapolis, MN with offices in Washington, D.C., Jordan, Ethiopia, and Kenya. For further information, please consult CVT’s website at www.cvt.org. For inquiries about this submission please contact Melina Milazzo, Senior Policy Counsel, mmilazzo@cvt.org.

I. Paragraph 12 (a) (Inquiries into allegations of torture overseas)
In its 2014 Concluding Observations on the Third to Fifth periodic reports of United States of America the Committee expressed concern over the ongoing failure on the part of the United States to fully investigate allegations of torture and ill-treatment of suspects held in U.S. custody abroad. The Committee urged the United States to: (a) 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.

In its follow up report, the United States provides a list of criminal, civil, and military laws as well as mechanisms and entities in place to conduct investigations and prosecutions for the crime of torture. However, it does not provide any new information on steps taken towards implementing the Committee’s recommendation. Rather, the U.S. once again cites the Durham investigation as evidence that it has carried out its obligations to investigate credible allegations of torture and ill-treatment of detainees in U.S. custody. However, the Durham investigation only reviewed cases where the CIA went beyond the legal authorizations to torture, and appears to have serious
limitations including whether any detainees in CIA custody were ever interviewed.\footnote{Spencer Ackerman, The Guardian, “Former CIA detainees claim US torture investigators never interviewed them,” Nov. 11, 2014 available at \url{http://www.theguardian.com/us-news/2014/nov/11/libyan-cia-detainees-torture-inquiry-interview}.} Moreover, in a court declaration for a lawsuit brought by the \textit{New York Times}, Durham stated that there were evidentiary and jurisdictional limitations to the investigation.\footnote{Declaration of John Durham, \textit{The New York Times v. U.S. Department of Justice} (“Durham Declaration”), December 8, 2014, 1:14-cv-03777-JPO (S.D.N.Y. 2014), para. 13, \url{http://pdfserver.amlaw.com/nlj/durham_declaration_20141209.pdf}.} According to the Istanbul Protocols, the fundamental principles of any viable investigation into incidents of torture are “competence, impartiality, independence, promptness and thoroughness.”\footnote{Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“Istanbul Protocol”), para. 74, August 9, 1999, available at \url{http://www.ohchr.org/Documents/Publications/training8Rev1en.pdf}.} It also says that those carrying out an investigation “must, at a minimum, seek to obtain statements from the victims of alleged torture; to recover and preserve evidence, including medical evidence, related to the alleged torture to aid in any potential prosecution of those responsible; and to identify possible witnesses and obtain statements from them concerning the alleged torture.”\footnote{\textit{Id.} at para. 77.} As such, the scope and thoroughness of the Durham investigation is called into question.

On December 9, 2014, the executive summary, findings and conclusions of the Senate Select Committee on Intelligence’s (SSCI) report on CIA torture was publically released with redactions.\footnote{Senate Select Committee on Intelligence, Study on CIA Detention and Interrogation Program, Dec. 9, 2014, available at \url{http://www.feinstein.senate.gov/public/index.cfm?p=senate-intelligence-committee-study-on-cia-detention-and-interrogation-program}.} The 500 page report offered new information about the CIA’s secret detention and interrogation program. The SSCI also transferred copies of the full 6,700-page classified report to relevant government agencies to fully review and ensure that the same mistakes are not repeated.

Despite the information released that detailed practices that undoubtedly amounted to torture, the Department of Justice reiterated its intention not to reopen an investigation into the CIA’s conduct.\footnote{Kevin Johnson, “Justice Department will not reopen torture inquiry,” USA Today, Dec. 10, 2014, \url{http://www.usatoday.com/story/news/politics/2014/12/09/justice-cia-torture/20138065/}.} Although the investigators that carried out the Department of Justice’s investigation into CIA interrogations said that they reviewed the full Senate report and did not find anything new, this contradicts reports that surfaced in January 2015 that some agencies have not even opened the full report. In response to a Freedom of Information Act lawsuit in U.S. federal court, a government filing claimed that the Department of Justice and Department of State have not opened the package with the disc containing the full report, while the Federal Bureau of Investigation has not picked up its copy from the DOJ’s Office of Legislative Affairs.\footnote{“SSCI Chairman to CIA: We’ll Hide Your Documents if You Hide Ours,” Open the Government, Jan. 23, 2015, \url{http://www.openthegovernment.org/node/4778}.} The Department of Defense and Central
Intelligence Agency have both allowed only limited access and made “very limited” use of the report, according to the filing.\(^8\)

The decision by some agencies, including the Departments of State and Justice, not to read the full CIA torture report impedes both accountability and non-repetition. Without reading the report, the agencies cannot know the full scope of the Senate’s findings and will not know whether the Department of Justice’s (DOJ) own investigations were based on a complete record. As the DOJ’s investigative record remains classified, there is no public accounting for its thoroughness and impartiality.

In March 2015, the Supreme Court of the United States rejected hearing the civil cases of detainees alleging torture against the U.S. government. One of the cases allowed the lower court conclusion that so-called enemy combatants could not sue the government to stand.\(^9\) Moreover, the January 2015 filing in the Freedom of Information Act lawsuit that claims several agencies have not opened their copies of the full report indicates an intention to ensure that the public cannot obtain the report through such lawsuits. Such moves would impede the right to an effective remedy by obscuring the full details of CIA torture from the public and perpetuate the use of the state secrets doctrine to obstruct lawsuits.

In October 2015, the American Civil Liberties Union (ACLU) filed a civil lawsuit on behalf of three victims of CIA torture against the two CIA contracted psychologists who designed and implemented the CIA’s torture program.\(^10\) In previous lawsuits, the U.S. government has invoked the state secrets privilege, denying victims an effective right to a remedy. But with so much information about the CIA’s detention and interrogation program now in the public domain, the U.S. government should not act to bar victims of that program from seeking redress in U.S. courts.\(^11\)

Furthermore, some agencies claim to not have opened or read the full report, which remains classified.\(^12\) Meanwhile, the new chair of the Senate Select Committee on Intelligence, Senator Richard Burr, claimed that the previous chair, Senator Dianne Feinstein improperly transferred the report on CIA torture to various agencies and demanded its return.\(^13\) The decision by some agencies to completely ignore the existence of the full report, as well as Senator Burr’s demand that it be returned to the Senate, are an apparent move to impede the right to an effective remedy and judicial redress.

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\(^12\) “SSCI Chairman to CIA: We’ll Hide Your Documents if You Hide Ours,” Open the Government, Jan. 23, 2015, http://www.openthegovernment.org/node/4778.

\(^13\) Id.
Thus far, no senior officials have been held accountable for involvement in the torture program and victims’ right to remedies through the courts have been rejected.\(^{14}\)

## II. **Paragraph 14 (c) (Guantanamo Bay detention facilities)**

In its concluding observations, the Committee expressed concern that the U.S. continued to hold a number of individuals without charge in the Guantanamo Bay detention facilities, reiterating that indefinite detention without charge constitutes, per se, a violation of the Convention. The Committee noted the studies received on the cumulative effect of the conditions of detention and treatment in Guantanamo Bay on the psychological health of detainees. The Committee also expressed concern of the repeated suicide attempts and recurrent mass hunger strike protests by detainees, and considers force-feeding of prisoners as constituting ill-treatment in violation of the Convention. The Committee called upon the U.S. to take immediate and effective measures to (c): Investigate allegations of detainee abuse, including torture and ill-treatment, appropriately prosecute those responsible, and ensure effective redress for victims.

In its one year follow up response to the Committee, the United States outlined the laws, policies, and mechanisms in place to investigate allegations of detainee abuse. But it did not offer any meaningful information on investigations and ensuing prosecutions conducted specific to detainee abuse at Guantanamo Bay. Similarly, it did not provide any information on efforts taken to provide redress for victims. In fact, reports indicate that some detainees transferred from Guantanamo are experiencing physical and mental health issues associated with their prolonged detention and torture at the detention facility, and may lack resources to reintegrate into society.\(^{15}\)

In 2015, 15 detainees were transferred from the Guantanamo Bay detention facility to foreign countries and 12 detainees had hearings before the Periodic Review Board. President Obama continued to make public commitments to close the Guantanamo Bay detention facility. He also issued strong veto threats to legislation that threatened to make closing Guantanamo more difficult, and even vetoed the National Defense Authorization Act (NDAA) FY 2016 citing the Guantanamo transfer restrictions as one of his reasons for doing so. Nonetheless, the NDAA was ultimately passed with increased restrictions to transfer detainees from Guantanamo. Despite these hurdles, the Obama administration has transferred 16 detainees abroad in 2016. It has also stepped up the pace of providing notifications for and conducting Periodic Review Board (PRB) hearings for detainees to determine whether detention of those detainees not charged or designated for transfer is still necessary.


In February 2016, pursuant to Congressional mandate, the President sent the U.S. Congress a plan for closing the Guantanamo Bay Detention Facility. The plan calls for continuing to transfer cleared detainees to home or third countries, continuing to review the threat posed by detainees not currently eligible for transfer and who are not currently facing charges, and continuing with ongoing military commission prosecutions. The plan also calls on transferring 30-60 detainees to a U.S. prison for trial, incarceration or continued law of war detention. While the President’s continued commitment to closing Guantanamo should be lauded, the continued policy of indefinite detention on U.S. soil is problematic. UN High Commissioner on Human Rights Zeid Ra’ad Al Hussein welcomed the plan but noted, “It is vital that the implementation of the plan results in no one remaining in indefinite detention without charge or trial.”

At the time of this writing, there are 91 men detained at the Guantanamo Bay prison, 36 have been cleared for transfer, 10 are facing charges or awaiting sentencing before the military commissions or serving sentences, and 45 have not been charged or cleared for transfer. In its follow up report, the U.S. stated that Guantanamo prisoners are being detained lawfully under the Authorization for Use of Military Force (AUMF) (U.S. Public Law 107-40), as informed by the laws of war. While there may be a legal basis under international humanitarian law to detain some individuals for the duration of hostilities, law of war detention must come to an end. The U.S. government failed to address what would mark the end of hostilities. Moreover, custody arrangements that result in detention of an indefinite term, including “continued law of war detention,” may still have serious physical and psychological effects that constitute cruel, inhuman and degrading treatment in violation of U.S. treaty obligations.

The U.S. continues to deny any information to the media, civil society or the public at large on the number of detainees currently on hunger strike, their health conditions, and the military’s protocol in managing hunger strikes. Similarly, no information is provided on the conditions of confinement at secret Camp 7, where so-called “high value” detainees are incarcerated.

Following the release of the Senate Intelligence Committee’s report on CIA torture, the United States made changes in its classification guidance that “conditions of confinement” and the “treatment” of detainees while in CIA custody was no longer classified. While this led to the release of one Guantanamo detainee’s account about his treatment while in CIA custody, the U.S. continues to block the release of other detainees’ accounts.

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18 For more information on the physical and psychological impact of indefinite detention without charge or trial see Center for Victims of Torture shadow report on US compliance with the ICCPR regarding Guantanamo detainees (2014) http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/USA/INT_CCPR_NGO_USA_15238_E.pdf.
Finally, in recent days, current Guantanamo detainee accused of plotting the September 11th attacks testified in a pre-trial hearing before the U.S. military commissions that someone at Guantanamo Bay is intentionally carrying on a systematic campaign of sleep deprivation for years. The judge in the case is waiting to hear testimony from two other detainees during hearings scheduled for April before deciding.  

The United States should end indefinite detention without charge or trial of detainees currently held at Guantanamo Bay, end the forced-feeding of mentally competent detainees on hunger strike, stop classifying detainee’s own accounts of treatment while in CIA custody, and immediately investigate recent allegations of intentional and systematic abuse of detainees held at Camp 7.

III. Paragraph 17 (Interrogation techniques)

The Committee expressed concern about interrogation techniques “physical separation” and “field expedient separation” of Appendix M of U.S. Army Field Manual No. 2-22.3, Human Intelligence Collector Operations. Regarding the “physical separation technique,” the Committee noted the provision which states that “use of separation must not preclude the detainee getting four hours of continued sleep every 24 hours” applicable over an initial period of 30 days, which may be extended upon approval, amounts to sleep deprivation – a form of ill-treatment. The Committee urged the U.S. to abolish the interrogation technique of “physical separation.” It also urged the U.S. to abolish sensory deprivation under the “field expedient separation technique,” which is aimed at prolonging the shock of capture, by using goggles or blindfolds and earmuffs on detainees in order to generate the perception of separation. It noted, based on recent scientific findings, sensory deprivation for long durations has a high probability of creating a psychotic-like state in the detainee, which raises concerns of torture and ill-treatment.

As rightly noted in the U.S. follow-up report, on November 25, 2015 the President signed the NDAA for FY 2016, which included provisions to strengthen the prohibition of torture and cruelty in U.S. law.  

The law places all U.S. government interrogations under the U.S. Army Field Manual, which explicitly bans waterboarding and other torturous so-called enhanced interrogation techniques, and requires access to all wartime prisoners in U.S. custody by the International Committee of the Red Cross. The law also requires the Army Field Manual be reviewed and revised to ensure interrogations are lawful and non-coercive and be kept public. While a “thorough review” of the Manual must be conducted within 3 years, nothing precludes the U.S. from reviewing and revising the Manual to ensure its provisions remain consistent with U.S. law and treaty obligations.

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The U.S. however provides no information on steps taken to implement the Committee’s recommendations in its follow-up report. Rather it continues to defend the use of “physical separation” and “field expedient separation” as not authorizing the use of sleep manipulation or sensory deprivation. The U.S. denies that the use of separation – as written in Appendix M - would allow 40 continuous hours of interrogation with only 4 hours of sleep on either end because that provision must be read consistent with the Manual’s general legal and policy guidelines that all prisoners and detainees will be treated humanely. But the U.S. fails to understand that while its interpretation is welcome, it is leaving the door open for future ill-treatment or torture of a category of detainees for a future administration.23

Ambiguity invites abuse; the U.S. should therefore eliminate Appendix M. But if the use of separation must be retained, it should be folded into the main body of the Manual and rewritten so that it effectively prohibits sensory deprivation and sleep deprivation and limits the isolation of detainees. Language that was in the 1992 version of the Manual but deleted in 2006 stating that “abnormal sleep deprivation” is torture should be restored. And finally, the stated purpose of separation in the Manual to decrease “the detainee’s resistance to interrogation” should be removed because it can be interpreted to permit treatment that is intended to “break” the detainee psychologically.

23 For more information on how Appendix M of the U.S. Army Field Manual authorizes interrogation methods that may amount to cruel treatment or torture see http://www.cvt.org/sites/cvt.org/files/attachments/u10/downloads/CVT-AppendixM-CAT-2014Nov.pdf.