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United States

Submission to the Universal Periodic Review
of the United Nations Human Rights Council
Ninth Session: November 22-December 3, 2010
International Center for Transitional Justice (ICTJ)

April 16, 2010

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Executive Summary

1. In dealing with counterterrorism detainees after 2001, the United States breached its obligations under the UN Convention Against Torture (CAT) and other sources of international human rights and humanitarian law. Although the current administration has turned away from some former policies, areas of concern still exist. Most importantly, the period covered by this periodic review is characterized by a failure of accountability for serious past breaches. Accountability measures should include:

- Full disclosure, collection of, and analysis of the facts pertaining to the nature and extent of counterterrorism detainee abuses, identifying their cause and consequences, and the individuals and institutions responsible for them.
- Complete investigations of instances of torture and other serious human rights violations in the context of counterterrorism operations and prosecution of those responsible for these crimes.
- Meaningful access to redress for victims, including improved access to civil judicial remedies and administrative mechanisms, and a more integrated approach that includes rehabilitation of health and reputation, acknowledgment of violations and harms, and measures of satisfaction and prevention of future violations, as well as compensation.
- Institutional reforms ensuring restoration of due process, a transparent rendition policy, responsible use of contractors, and explicit recognition that past policies resulted in torture and were in contravention of applicable civil and criminal legal standards.

Background

2. After the terrorist attacks of September 2001, the United States began large-scale counterterrorism efforts. In part, these included the imprisonment and interrogation of suspected terrorists. Tens of thousands of individuals have been imprisoned in U.S. facilities in Afghanistan, Iraq, Guantánamo Bay, Cuba, and secret CIA prisons throughout the world. Some prisoners were transferred for interrogation to the custody of nations known to have committed grave and repeated human rights abuses. U.S. detention and interrogation policies have resulted in systematic human rights violations, including torture and cruel, inhuman, and degrading treatment.

3. The United States ratified the CAT in 1994. 18 U.S. Code § 2340A criminalizes acts of torture and conspiracy to commit torture. In 2002, the U.S. Department of Justice issued a series of memos authorizing specific “enhanced interrogation techniques” and a contorted analysis of the law that seemed devised to provide CIA, military, and civilian contractor interrogators with defenses to charges under U.S. law. Officials at the highest levels of civilian and military

authority authorized the use of these “techniques,” amounting to torture and cruel, inhuman, and degrading treatment under international and domestic law.

4. The United States sought to justify the prolonged detention of terrorist suspects outside the United States without charges or trial by classifying prisoners as “unlawful enemy combatants” who, the United States claimed, were not subject to regulation under the Geneva Conventions or international humanitarian law. One result of this policy was that the United States authorized the CIA to operate “black sites” where prisoners were effectively “disappeared,” in some cases for years, and neither the International Committee of the Red Cross nor family members were informed of their whereabouts.

5. The United States has an obligation to undertake a full, transparent accounting of what occurred, to prosecute those responsible for abuses, and to provide some measure of reparative justice to the victims of serious human rights violations. The country’s failures of accountability for past crimes raise concerns about the reliability of President Barack Obama’s stated commitments to fulfill human rights obligations.

Substantive Concerns

6. *Abuse of counterterrorism detainees occurred at a systematic level in Afghanistan, Iraq, Guantánamo Bay, and in secret CIA detention sites.* High-level civilian and military officials, in collaboration with government lawyers, officially authorized torture and other abuses. Abusive techniques were used in combination during interrogation and imprisonment to “break” detainees by dehumanizing them and producing extreme mental and physical pain and suffering. Officials authorized such practices as sleep deprivation and waterboarding; put prisoners in stress positions, including hanging and short shackling; and made them endure temperature extremes. This policy was implemented throughout military and CIA detention sites around the world. The practices the United States condoned constitute torture and cruel, inhuman, and degrading treatment in violation of Common Article 3 of the Geneva Conventions, the CAT, and U.S. law.

7. *Specific abusive interrogation techniques have not been outlawed.* An executive order issued by President Obama in January 2009 ended the authorized use of torture. However, the door is not fully closed on the possible use of these techniques. Political pressure continues in some quarters to revive the use of “enhanced interrogation techniques.” Because the specific techniques, as authorized and implemented by George W. Bush’s administration, have yet to be declared illegal by U.S. courts, Congress, a commission of inquiry, or by an explicit executive order, their future use is not adequately barred should the political climate shift. Moreover, the failure of accountability sends the implicit signal that future abuses may likewise remain uninvestigated and unpunished.

8. *The use of rendition has created a proxy system of secret detention.* The Bush administration developed a system of secret, so-called “extraordinary” rendition, whereby prisoners were transferred for interrogation to CIA black sites or to countries known to commit human rights violations. Many former detainees say they were tortured during interrogation at the hands of CIA interrogators and foreign governments. While the current administration has disavowed the ongoing use of a secret CIA detention system, accurate information is not available on the names

and status of people who were turned over or presently are being turned over to foreign governments. The current administration publicly acknowledges that it will rely on diplomatic assurances from recipient countries that prisoners will not be tortured. Article 3 of the CAT prohibits rendition to torture. Relying on diplomatic assurances is inadequate to ensure that prisoners will not be tortured, especially given the extreme secrecy surrounding the ongoing rendition program, which prevents any independent monitoring.

9. *Most prisoners in Guantánamo have been held, without ever being charged with a crime, over a period of years.* The system of indefinite detention the Bush administration developed has yet to be fully dismantled. While U.S. Supreme Court decisions forced the administration to concede that these detainees had the right to contest their detention through *habeas corpus* proceedings, less than a quarter of the remaining detainees have had such a hearing. Even cases in which courts have found the detainees' incarceration unlawful have not always led to their release. Furthermore, the Obama administration is reportedly contemplating the continued preventive detention of some detainees. Continued or permanent preventive detention violates Article 9 of the International Covenant on Civil and Political Rights' (ICCPR) assurance of fair, impartial hearings and U.S. constitutional standards of due process.

10. *There has been a failure to investigate and prosecute violations of the U.S. law against torture and international obligations to treat prisoners humanely.* Investigations into abuse and mistreatment have resulted in a limited number of convictions within the U.S. military justice system and one federal criminal conviction. Charges in courts-martial often have been reduced, and sentences have generally been very low. Several trials have resulted in acquittals because of failure to preserve evidence. Investigations have focused on low-ranking soldiers, and officers and officials have escaped legal scrutiny. The pervasiveness and similarity of abuse across locations and documented proof that high-ranking officials set and approved such policies indicate that torture and abuse of detainees operated as a "system crime." Article 6 of the CAT requires effective investigations of instances of torture and many abusive techniques violate U.S. law. The systematic nature of U.S. detainee abuse requires that the investigation extend to high-level officials responsible for the policy.

11. *Counterterrorism detainees who have been harmed by torture and inhuman treatment, "extraordinary rendition," prolonged detention without trial, or other serious violations have inadequate access to redress.* Civil cases in U.S. courts seeking compensation for torture, other mistreatment, and detention without charge have been routinely quashed through use of the state secrets doctrine, classified evidence, and legally sanctioned immunities. Furthermore, U.S. courts have exhibited extreme deference to executive decisions where national security, military information, or foreign policy is allegedly implicated. Some lawsuits against civilian security contractors involved in detainee abuse have been dismissed because governmental protections are extended to them. As a result, government officials or military contractors responsible for policies resulting in abuse, as well as the direct perpetrators of abuse, have been able to escape liability. A limited number of victims have recourse under the U.S. Foreign Claims Act to a military administrative process for monetary compensation for some harms; however, the process and results are uneven and inadequate. Components of redress such as satisfaction, rehabilitation, and restoration of reputation are not available. Article 14 of the CAT and Article 2(3) of the ICCPR ensure the right to remedy and redress for victims. The United States has not

established a system that victims of torture and other serious abuses or their families can use to seek meaningful redress.

12. *No comprehensive inquiry into the facts surrounding U.S. detainee policy has taken place.* Information has come out piecemeal as a result of congressional and military inquiries, successful Freedom of Information Act litigation, whistleblower actions, investigative journalism, and—especially since 2009—limited government disclosures. However, the government has shielded photographic evidence of abuses, failed to document the experience of those held in U.S. custody, and refused to commission a full inquiry into abuses and responsibilities. There is no comprehensive record of what detainees experienced and the on-going impact on their lives. Therefore, attempts to identify problems and prevent renewed human rights violations are not fully informed. The right to know the truth about serious violations of human rights is established under international law and has been described in the 2006 report of the UN High Commissioner for Human Rights (E/CN.4/2006/91). The United States must make all relevant documents available publicly, within strictly construed imperatives of national security, and should engage in an official inquiry into the abuses that occurred.

Achievements

13. One of President Obama's first crucial executive orders ended the authorization of "enhanced interrogation techniques." All officials now must comply with the parameters of the Army Field Manual, the Geneva Conventions, and other U.S. treaty obligations. The administration has stated its commitment to end the use of torture. The president also issued an executive order pledging to close Guantánamo and appointed a special team to review the appropriate status of each detainee, which has now completed its task. The administration has negotiated the release and resettlement of some detainees. Detention reviews have also begun in prisons in Afghanistan to help combat prolonged and arbitrary detention.

14. In 2009 the attorney general requested that a federal prosecutor already investigating the destruction of videotapes of CIA interrogations of terror suspects also conduct a preliminary inquiry into detainee abuse during interrogations. The particulars of the inquiry, including its scope, remain secret. According to public reports, the inquiry may be limited to instances in which interrogators overstepped the boundaries of legal guidance, and thus fail to investigate acts covered by the illegal "enhanced interrogation" policy. However, the present inquiry could result in recommendations for a more far-reaching criminal investigation.

15. Government agencies, congressional committees, and the military have conducted numerous investigations into particular aspects of detainee policy, including interrogation and abuse. Many of these have been made public, providing insight into decision-making events in the development of detainee policy and the use of abusive treatment. The government also has released key documents as a result of Freedom of Information Act litigation. These include the Department of Justice Office of Legal Counsel (OLC) memos providing legal justification for torture and indefinite detention, as well as a report of the Inspector General of the CIA, and a lengthy review of the ethics of two OLC attorneys, conducted by the Department of Justice's Office of Professional Responsibility. Making such information public is a crucial step in the

accountability process and is needed to inform criminal investigations and prosecution, institutional reform, and redress for victims.

Recommendations

16. *A range of complementary measures is necessary to achieve accountability for detainee-related human rights abuses.* These should include public disclosure of the truth, prosecution of those most responsible, institutional reforms, and reparation for victims. Each of these components is mutually reinforcing, and together they should serve to ensure that the past is understood, justice is achieved, and similar abuses will not occur in the future.

17. *Truth-seeking.* The United States should launch a full inquiry into the nature and extent of abuses, identifying their causes and consequences and examining institutional responsibility as well as that of individuals involved. Evidence of the abuses and policies that led to them must be guarded against destruction, declassified, and disclosed. In order to begin to guarantee non-repetition and to implement other accountability mechanisms, the full facts must be collected, examined, analyzed, and made publicly available.

18. *Prosecution.* The United States has a duty under international and domestic law to investigate and prosecute torture and other crimes to the fullest extent. Investigation and prosecution of these crimes up to high-level policymakers is necessary to achieve full accountability for the systemic perpetration of torture and cruel, inhuman, and degrading treatment of counterterrorism detainees.

19. *Reparation.* The United States must ensure an adequate process for determining and delivering appropriate measures for redress, to fulfill its obligation to provide some combination of compensation, rehabilitation, restoration of reputation, acknowledgement of violations and harms caused, and other forms of reparation. Congress should pass legislation in order to eliminate impediments to recovery through civil litigation in the United States, and courts should favor narrowly tailored mechanisms for protecting truly sensitive information, while also providing victims meaningful access to the courts. At the same time, the United States should create an accessible administrative remedy to facilitate appropriate and fairly determined responses to claims for redress from detainees beyond the limited Foreign Claims Act and extend any limitations periods as needed to make this possible.

20. *Institutional Reform.* Ongoing institutional reforms to prevent abuses and to ensure accountability should be continued and expanded. There must be official recognition that previously sanctioned interrogation techniques constituted torture and were illegal. The United States should commit to charging and trying detainees where appropriate, and to do so within a reasonably short time period; other detainees who cannot legitimately be considered prisoners of war should be released. The government should increase transparency regarding rendition of detainees and end transfers to countries known for human rights abuses. It should also stop using contractors to perform essential governmental security functions such as intelligence-gathering and prisoner interrogations.