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Shadow Report

Submission to the United Nations Committee on the
Convention Against Torture and
Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)

by the

The Center for Constitutional Rights

March 1, 2016

Responding to a Follow-Up Report that the
United States of America
filed November 28, 2015 with the
Committee Against Torture

I. Reporting Organization

The Center for Constitutional Rights (CCR) is a U.S.-based nongovernmental legal and educational organization dedicated to advancing and protecting the rights guaranteed by the U.S. Constitution and the UDHR. CCR makes this submission in regard to follow-up issues on which it has direct involvement and expertise. CCR has been at the forefront of defending the rights of men detained at Guantánamo since 2002. It was counsel in *Rasul v. Bush*, and has coordinated the legal representation of detainees by hundreds of pro bono counsel for over a decade. CCR has directly represented dozens of current and former detainees in their efforts to ensure humane treatment during detention, timely release, reintegration, and rehabilitation after release. CCR has also pursued redress for victims of torture in U.S.-run detention facilities through civil actions in U.S. courts and criminal proceedings in foreign courts. Moreover, CCR successfully challenged unlawful and discriminatory policing practices in our advocacy, movement support and litigation work in New York City, Ferguson and beyond.

II. Assessment of the Action by the United States on the Committee's Recommendations

Issue 1: Inquiries into Allegations of Torture Overseas/Redress (para. 12(a) and 14(c))

The U.S. has utterly failed in its obligations to investigate the high-level responsibility for torture and cruel treatment in the course of U.S. detention and interrogations. Even after President Obama admitted "we tortured some folks,"[1] no independent, *thorough* criminal investigation has been opened or conducted. The legal framework is sufficient to provide jurisdiction for prosecutions; the absence of accountability stems from a lack of political will.

In December 2014, after the Senate Select Committee on Intelligence (SSCI) released the summary[2] of its scathing report on some of the most brutal torture methods used by the CIA, the Justice Department doubled down on its refusal to hold officials accountable. The Justice Department said that its investigators "did not find any new information [in the Senate torture report] that they had not previously considered in reaching their determination," adding that AUSA Durham's "inquiry was extraordinarily thorough and we stand by our previously

[1] Press Conference by the President, Aug. 1, 2014: https://www.whitehouse.gov/the-press-office/2014/08/01/press-conference-president

[2] The bulk of information on CIA torture remains buried in the 6,700 still-classified documents of the Senate Committee report and in the classified findings of the Durham inquiry. "U.S. Tells Court That Documents From Torture Investigation Should Remain Secret," *New York Times*, Dec. 10, 2014: http://www.nytimes.com/2014/12/11/us/politics/us-tells-court-that-documents-from-torture-investigation-should-remain-secret.html?_r=2

announced decision not to initiate criminal charges."[3] It is recalled that Durham did not interview any alleged torture victims as part of his investigation.[4] President Obama re-invoked his "look forward, not backwards" sentiment after the SSCI Report release: "No nation is perfect. ... Rather than another reason to refight old arguments, I hope that today's report can help us leave these techniques where they belong—in the past."[5]

Current U.S. Attorney General Loretta Lynch is continuing to implement the policy of impunity embraced by her predecessors. AG Lynch's Justice Department responded to a request to appoint a Special Prosecutor to investigate CIA torture with a statement reiterating exactly what it had said under AG Holder– that DOJ investigators had "reviewed the Senate Committee's full report and did not find any new information that they had not previously considered in reaching their determination" and that the DOJ inquiry "was extraordinarily thorough and we stand by our previously announced decision not to initiate criminal charges."[6]

Moreover, the Obama administration – like the Bush administration - has actively sought to block efforts on behalf of victims for a remedy, whether in the context of habeas proceedings (see below) or civil actions. Not only has no victim of post-9/11 policies been allowed his day in court, no victim has even received an apology from the executive branch. Rather, the Obama Administration's Justice Department has opposed every case brought by a former detainee or rendition-to-torture victim against a former U.S. official in U.S. courts.

While refusing to pursue criminal investigations and prosecutions domestically, the U.S. attempted to subvert the cause of justice in Spain,[7] and just today, the former commander of Guantanamo failed to appear in France to answer questions in an ongoing criminal investigation into torture at Guantanamo; the U.S. has long failed to respond to letters rogatory in that case.[8]

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[3] "U.S. Tells Court That Documents From Torture Investigation Should Remain Secret," *New York Times*, Dec. 10 2014: http://www.nytimes.com/2014/12/11/us/politics/us-tells-court-that-documents-from-torture-investigation-should-remain-secret.html?_r=2

[4] Indeed, former detainees who have described being waterboarded, locked in small boxes, and subjected to other forms of torture claim that U.S. torture investigators never spoke to them. "Former CIA detainees claim US torture investigators never interviewed them," *Guardian*, Nov. 11 2014: http://www.theguardian.com/us-news/2014/nov/11/libyan-cia-detainees-torture-inquiry-interview

[5] Statement by the President Report of the Senate Select Committee on Intelligence, Dec. 9, 2014: https://www.whitehouse.gov/the-press-office/2014/12/09/statement-president-report-senate-select-committee-intelligence

[6] "CIA Torture Report: Human Rights Groups Write Letter Urging Attorney General Loretta Lynch to Pursue Criminal Investigations," *International Business Times*, June 23, 2015: http://www.ibtimes.com/cia-torture-report-human-rights-groups-write-letter-urging-attorney-general-loretta-1980488

[7] *See* http://ccrjustice.org/home/what-we-do/our-cases/accountability-us-torture-spain.

[8] *See* http://ccrjustice.org/home/what-we-do/our-cases/accountability-us-torture-france.

We request that the Committee urge the U.S. government to appoint a Special Prosecutor empowered to conduct independent, thorough and credible investigations into allegations of torture and cruel treatment, wherever the evidence leads, and to support – not thwart – the efforts of other States Parties to fulfill their obligations to investigate and prosecute torture under the principle of universal jurisdiction.

Issues 2-3: Guantánamo Bay/Interrogation Techniques (paras. 14(c) & 17)

The Committee expressed its deep concern about the continued indefinite detention without charge at Guantánamo—raising specific concerns about the cumulative effects of prolonged detention and conditions of confinement on the psychological health of detainees; the force-feeding of hunger-striking detainees; and the lack of effective legal or administrative review.

The actions taken and described in U.S. government's responses to the Committee's recommendations are wholly inadequate to assuage these concerns. As Guantánamo enters its 15th year of operation, core aspects of the prison—indefinite and arbitrary detention, the military commissions system, and inhumane conditions of confinement and treatment of detainees—continue with no end in sight.

Habeas Review (U.S. Follow-up, ¶¶27, 31 and 38)

Habeas review of detention in federal courts is available in name only. An early ruling from the Court of Appeals for the D.C. Circuit has been read by lower courts to mean that they lack the power to order outright release. Consequently, successful habeas cases have resulted only in orders that "the Government to take all necessary and appropriate diplomatic steps to facilitate Petitioner's release forthwith." This toothless relief has in turn resulted in stays in the cases of nearly all men cleared for release: once the government has already decided to (eventually) release a detainee, the courts see nothing further they can add to the relief.

The D.C. Circuit Court of Appeals, which establishes the governing law in these habeas cases in the absence of further rulings from the Supreme Court, has ruled that hearsay statements are broadly admissible into evidence.[9] As the WikiLeaks Guantánamo files have demonstrated, a small number of prisoners at Guantánamo lodged accusations against hundreds of fellow detainees (often while suffering clear symptoms of mental illness or post-abuse trauma, and reportedly receiving benefits like video game systems). Nearly every detainee ever held at Guantánamo faces hearsay allegations that they were, for example, seen at one of the numerous

[9] Nearly every habeas case involved hearsay allegations contained in past statements allegedly made by other detainees or witnesses for the government who themselves have not been made available for cross-examination or any other method of challenging the veracity of the statements, including the conditions under which they were taken.

hostels where other foreigners with ties to the Taliban also stayed. The Court of Appeals has opined that that in itself is "overwhelming" evidence of detainability. And it has robbed the district courts of an age-old prerogative—to judge the testimony of the accused more trustworthy that the hearsay from his accusers—by ruling in one case (*Al Adahi v. Obama*) that a mass of such hearsay must outweigh the district judge's determination that the accused was telling the truth. The net effect is that it is now next to impossible to win a case through appeal—a fact confirmed by a concurring opinion in *Esmail v. Obama* from D.C. Circuit Judge Laurence Silberman stating baldly that he doubted "any of [his Court of Appeals] colleagues will vote to grant a petition" if the government could "muster even 'some evidence'" (no matter how dubious the source) against the detainee.[10]

The Supreme Court has not heard a Guantánamo case since it overturned the provisions of the Military Commission Act that purported to strip the federal courts of the power to hear such cases in *Boumediene v. Bush* in 2008. In the absence of further intervention from the Supreme Court, it is likely that the courts will not provide an effective forum for vindicating the right to release of any Guantánamo detainees.

Military detention under the laws of war paradigmatically may last only so long as the hostilities in which a detainee is alleged to have taken part. DOJ takes the position that the "end of hostilities" only occurs when the executive so certifies. A number of cases challenging this position are currently being litigated, though DOJ's position, if accepted by the courts, would leave the courts as passive participants in deciding when or whether hostilities will ever end.

Access to Counsel (U.S. Follow-up, ¶37)

Access to counsel has been interfered with since the start of the Guantánamo litigation.[11] In February and March 2016 several visits, planned weeks in advance in accordance with counsel access rules, were cancelled due to a "lack of [living] accommodations" at the base. Counsel continue to encounter difficulties both minor (e.g. the withdrawal of longstanding permission to bring food into meetings with detainees) and serious (e.g. the military's continued practice of asking detainees to leave their cells for meetings or calls with lawyers by simply stating that they have a "reservation" (which is also the term used for interrogation sessions and other official meetings at Guantánamo that detainees may want to avoid)).

Department of Defense Policy (U.S. Follow-up, ¶28)

[10] The government notes in ¶ 38 that every detainee whose habeas victory in the trial courts was not appealed by the government was eventually transferred out of the prison. The government fails to note that every case where the government appealed (to the D.C. Circuit) resulted in a ruling against the detainee.

[11] See generally Kadidal, *Confronting Ethical Issues in National Security Cases: The Guantánamo Habeas Litigation*, 41 Seton Hall L. Rev. 1397 (2011).

A "high standard of humane care and custody" has not been extended to the detainees at Guantánamo, in any number of ways too numerous to review here. However, one standout example of ongoing abuse is the continued force-feeding of detainees on hunger strike to peacefully protest their continued detention without charge, an action which the Committee considers ill-treatment in violation of the Convention.

CCR has previously provided information to the Committee about this brutal practice and its effects on our client, Tariq Ba Odah,[12] who has been on hunger strike since February 2007. Mr. Ba Odah now weighs approximately 74 pounds (33.5kg), and seems unable to gain weight even though he is enterally force-fed up to 2600 calories per day.

One medical expert,opined that Ba Odah's "consistent weight range of 74 pounds is certainly not a sign of clinical stability; rather it is the opposite" and should Ba Odah's weight decline further "there will likely be very few remaining medical options available to spare his life."

We have argued that Ba Odah is entitled to release under the Geneva Conventions and section 3-12 of Army Regulation 190-8, which allows for the humanitarian release and repatriation of gravely ill prisoners. DOJ rejected both claims, arguing that the court does not have the authority to consider whether Ba Odah meets the standards for medical repatriation under the regulation and that the regulation does not even apply because Ba Odah's condition is "self-inflicted" and because, in any event, he does not have prisoner-of-war status. Because Mr. Ba Odah is cleared for release, DOJ contends that the U.S. is committed to securing his transfer, all while it continues to fight his motion for release in federal court.

Closure of the Guantánamo Bay Facility (U.S. Follow-up, ¶33)

On February 23, 2016, President Obama announced the delivery of a long-awaited plan[13] to close Guantánamo. Nearly nothing in the plan deviates from the plan implicit in the January 22, 2009 executive order mandating closure of the prison. Both documents contemplate continued indefinite detention without charge into the distant future and the continued reliance on the military commission system, even though the President (in introducing his new plan) acknowledged that the commissions have functioned inefficiently and lack credibility, and even though there would presumably be no logistical barriers to charging and trying them in ordinary civilian criminal courts.

[12] Center for Constitutional Rights, The United States' Compliance with the United Nations Convention Against Torture with Respect to Arbitrary Detention at Guantánamo 53rd Session, Geneva, 3 November – 28 November 2014, https://ccrjustice.org/sites/default/files/assets/files/CCR_GuantánamoCATShadowReportUS_2014.pdf. For information on this case, see http://ccrjustice.org/home/what-we-do/our-cases/ba-odah-v-obama.
[13] http://www.defense.gov/Portals/1/Documents/pubs/GTMO_Closure_Plan_0216.pdf.

Finally, notwithstanding Congressional restrictions on transfers out of the prison, there are many measures President Obama could implement unilaterally to accelerate the pace. Firstly, the President could instruct DOJ to concede that release is appropriate in habeas cases brought by those detainees who already cleared for transfer, like Mr. Ba Odah. That would allow their release within the terms spelled out by Congress, which broadly license transfers to effectuate judicial orders. Secondly, the government could also negotiate guilty pleas with some of the remaining detainees in federal court. Those pleas would then present an opportunity for the courts to rule that the existing transfer restrictions were not intended by Congress to apply to (and interfere with) such cases.

Periodic Review Boards (U.S. Follow-up, ¶36)

In March 2011, President Obama established Periodic Review Boards (PRB) to evaluate the continued detention of Guantánamo detainees slated for indefinite detention. Executive Order 13567 held that the initial review for each detainee in this category "shall commence as soon as possible but no later than 1 year from the date of this order"; however, not a single detainee review was conducted until November 2013. The pace of hearings since then has been glacial.

Additional resources and supervision of the PRB process are required to accelerate the pace of reviews and ensure that initial reviews for the remaining 45 men currently not charged or cleared take place promptly.[14] Four years after the president ordered the initial PRB reviews of men in the indefinite detention category, dozens await their initial reviews. At the current rate of proceedings, many men in this group will not have their initial hearings before the end of 2016. The slow pace has been especially unfortunate given the very high rate at which detainees under review have been granted clearance for transfer: as of February 23, 2016, 18 of 21 men reviewed have been cleared.

Lack of Redress: Failure to Return Property

The U.S. has failed to provide any remedy to individuals who suffered torture and cruel, inhuman and degrading treatment at U.S-run detention facilities, including Guantánamo. Herein, we spotlight one example of the failure to provide even a measure of redress.

In December 2013, CCR client Djamel Ameziane was forcibly transferred to Algeria by the U.S. government. Mr. Ameziane continues to suffer economic and social hardship resulting from his prior detention. He is unable to afford basic living expenses, and the Algerian government has also indicated to him that he is not eligible for aid or public assistance. The U.S. has refused to return to Mr. Ameziane property – specifically, money – that was taken from him before entering

[14] There have also been significant problems with civilian lawyer participation in the PRB process. Most notably, civilian teams are limited to three people, including any interpreter retained to translate during meetings and/or the hearing itself.

Guantánamo. At the time of his capture, Mr. Ameziane had a small amount of savings from his time working in Canada. This money is currently in the possession of the U.S. government, which has refused to return it on the ground that money belonging to former detainees could be used for terrorist activities (because, the government claims, all men held at Guantánamo were properly detained as terrorists, even if they successfully challenged their detention). CCR brought civil suit in the U.S. to recover his belongings, but the suit was deemed inadmissible.

We request that the Committee urge the U.S. government to end the regime of indefinite detention without charge or trial and abandon the failed military commissions in favor for fair trials in federal courts. Additionally, the Committee should urge the U.S. to fulfill its commitment to repatriate and release all cleared detainees immediately and accelerate the Periodic Review Board process so that all initial reviews are completed within the year, as set out in its closure plan. Absent these critical steps, men who have been imprisoned without charge for 14 years will continue to languish and Guantanamo will continue to be a stain on the US's human rights legacy.

Issue 4: Excessive use of force and police brutality (para. 26(c))

Across the U.S., it is extremely difficult and frighteningly rare to charge a police officer, even when the acts of violence in question appears to contradict police department policy and is caught on video. Many officers stay on the force even after notorious incidents of violence or brutality, and at times, are even allowed promotions.[15] Moreover, inadequate internal police department disciplinary systems[16] and repeat failures by local judicial systems to hold officers

[15] On February 2, 2012, after NYPD officers unlawfully entered into his home without a warrant, probable cause, or any other legal justification, NYPD officer Richard Haste shot and killed 18-year-old Ramarley Graham in front of his grandmother and 6-year-old brother. Meanwhile, Officer Haste is still employed by the NYPD and has reportedly received $25,000 in raises since Ramarley was killed, *See* Mathias, Christopher, Cop who Gunned Down Ramarley Graham Gets a Raise, Huffington Post, December 21, 2015: *http://www.huffingtonpost.com/entry/ramarley-graham-nypd-richard-haste_us_567455d4e4b0b958f6567aa0*. Though a Bronx grand jury indicted Haste in 2012, a judge dismissed the indictment due to a prosecutorial error by the Bronx District Attorney's office. After the Bronx District Attorney failed to re-indict Haste in August 2013, Ramarley's family successfully pressured the DOJ and United States Attorney's Office for the Southern District of New York to open an investigation into Ramarley's murder. The investigation currently remains open. In February 2016, NYPD Officer Peter Liang was convicted on charges of 2nd degree manslaughter and official misconduct for the killing of Akai Gurley – the first officer to be found guilty in NYC in 11 years, despite hundreds of police-involved killings of mostly Black and Latino civilians. Other officers such as Daniel Pantaleo and those involved in killing of Eric Garner have not been held accountable.

[16] Communities United for Police Reform, Priorities for the New NYPD Inspector General: Promoting Safety, Dignity and Rights for all New Yorkers, June 2014, pages 9-11: http://changethenypd.org/resources/priorities-new-nypd-inspector-general-promoting-safety-dignity-and-rights-all-new-yorkers

accountable for illegal conduct through their grand jury processes[17] -- ensures impunity for incidents of police violence and brutality. This is especially disturbing given that, excessive use of force disproportionately targets communities of color.[18] As such, access to remedies or redress for police violence victims and their families is more than often hindered. This dangerous dynamic has become all the more clear by the incidents in recent years, fueling an intense and necessary national debate on police violence and racial justice.

We request that the Committee urge the U.S. government to allow for truly independent investigations of incidents of lethal police violence as this is an imperative step in holding police accountable for their actions, delivering justice to the families of those killed and ultimately ending police violence.

[17] Madar, Chase, "Why It's Impossible to Indict a Cop: It's not just Ferguson-here's how the system protects police," THE NATION, November 24, 2014: http://www.thenation.com/article/190937/why-its-impossible-indict-cop Local district attorneys and prosecutors are called upon to prosecute the same officers whom they depend on and cooperate with during their other investigations and prosecutions. This conflict of interest leads to repeat failures to indict officers for such acts. This was, up till recently, the norm in New York as well. While we recently welcomed the announcement of the passage of an executive order in July 2015 by New York State Governor Andrew Cuomo creating the office of a special prosecutor to investigate killings by police of unarmed civilians and with the discretion to investigate police killings of allegedly armed civilians, this is far from a nationwide phenomenon – which would act as one form of remedy and redress for families who have lost their loved ones to acts of police violence.

[18] In New York City for example, Black people represent 54% of all alleged victims in police misconduct complaints received by the New York City Civilian Complaint Review Board (CCRB); another 26% are Hispanic. Civilian Complaint Review Board, 2014 Annual Report, published May 2015: http://www.nyc.gov/html/ccrb/downloads/pdf/2014-annual-report-rev2layout.pdf