



21 September 2015

U.S. Department of Justice
Office of the Inspector General
950 Pennsylvania Avenue, N.W.
Room 4706
Washington, D.C. 20530

To the Inspector General:

On behalf of Amnesty International USA,¹ I am writing to file a complaint and request an immediate review of the conduct of Department of Justice officials in response to the Senate Select Committee on Intelligence's study of the Central Intelligence Agency (CIA)'s Detention and Interrogation Program, including its allegations of conduct constituting torture and other forms of cruel, inhuman and degrading treatment or punishment, enforced disappearance and other human rights violations.

From 2002 to 2008, the United States government subjected at least 119 individuals to a program of unlawful detention, secret transfers and unacknowledged prisons, where torture and other cruel, inhuman or degrading treatment and enforced disappearances

¹ Amnesty International is a global movement of more than 7 million people who campaign for a world where human rights are enjoyed by all. Our vision is for every person to enjoy all the rights enshrined in the Universal Declaration of Human Rights and other international human rights standards. Amnesty International USA is the U.S. section of Amnesty International. For more than a decade, Amnesty International has documented and reported human rights violations committed in the CIA secret detention program. We have also monitored developments related to investigations and accountability for those violations. The following is a non-exhaustive list of our reports on these matters: *See* 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 14 (2015), <http://www.amnestyusa.org/research/reports/usa-crimes-and-impunity>; AMNESTY INTERNATIONAL, USA: "We tortured some folks": The wait for truth, remedy and accountability continues as redaction issue delays release of Senate report on CIA detentions (2014), <http://www.amnesty.org/en/library/info/AMR51/046/2014/en>; AMNESTY INTERNATIONAL, BRINGING GEORGE W. BUSH TO JUSTICE: INTERNATIONAL OBLIGATIONS OF STATES TO WHICH FORMER US PRESIDENT GEORGE W. BUSH MAY TRAVEL (2011), <http://www.amnesty.org/en/library/info/AMR51/097/2011/en>; AMNESTY INTERNATIONAL, USA: FORMER PRESIDENT'S DEFENCE OF TORTURE HIGHLIGHTS NEED FOR CRIMINAL INVESTIGATIONS (2010), <https://www.amnesty.org/en/documents/AMR51/103/2010/en/>; <https://www.amnesty.org/download/Documents/80000/amr511772005en.pdf>; AMNESTY INTERNATIONAL, USA: Torture in black and white, but impunity continues: Department of Justice releases interrogation memorandums (2009), <http://www.amnesty.org/en/library/info/AMR51/055/2009/en>; AMNESTY INTERNATIONAL, USA: TORTURE ACKNOWLEDGED, QUESTION OF ACCOUNTABILITY REMAINS (2009), <http://www.amnesty.org/en/library/info/AMR51/003/2009/en>; AMNESTY INTERNATIONAL INTERNATIONAL SECRETARIAT, USA: A CASE TO ANSWER. FROM ABU GHRAIB TO SECRET CIA CUSTODY: THE CASE OF KHALED AL-MAQTARI (2008), <http://www.amnesty.org/en/library/info/AMR51/013/2008/en>; AMNESTY INTERNATIONAL ET AL., USA: OFF THE RECORD. US RESPONSIBILITY FOR ENFORCED DISAPPEARANCES IN THE "WAR ON TERROR" (2007), <http://www.amnesty.org/en/library/info/AMR51/093/2007/en>.



were inflicted. The goal of this program was to collect intelligence through long-term interrogation, free from certain constitutional limits, judicial or other independent oversight, legal representation for detainees, or access to the International Committee of the Red Cross. The CIA carried out these operations in “black site” detention facilities overseas, including, it is believed, in Guantánamo Bay, Cuba, Afghanistan, Thailand, Morocco, Lithuania, Poland, and Romania.

US personnel have evaded accountability for these crimes under international law, and may have committed additional crimes in facilitating and perpetuating this impunity, such as by destroying videotapes that provided direct evidence of specific acts of torture and other cruel, inhuman or degrading treatment being committed against detainees at the same time being subjected to enforced disappearance.

The U.S. Department of Justice (“Justice Department”) is charged with enforcing the law, identifying misconduct by federal officials, and investigating and prosecuting crimes including torture.² Nine months have passed since the publication of the Senate Committee summary and the Senate’s transmittal of the full report to the Justice Department. In that time, the Justice Department has provided inconsistent accounts of its review of the full Senate report to the public, Congress and a U.S. court. It has apparently failed to review the report. It has not established a process for assessing any new evidence of criminal wrongdoing that the full report provides.

The effect, if not the purpose, of the Justice Department’s action or inaction has been to evade public accountability and conceal its institutional failures. In particular, the Justice Department failed to review evidence in the Senate report of human rights violations and has to date failed to address evidence in the Senate report of the complicity of Justice Department officials and the institutional failure to prevent human rights violations.

We do not have access to the full Senate report due to continuing government secrecy, including the Obama administration’s recent efforts to block a Freedom of Information Act request for the full Senate report.³ Due to the Justice Department’s refusal to provide information about the scope of its investigations to UN human rights bodies and the public, we also do not know precisely what information the Justice Department reviewed during its earlier reviews and investigations.⁴ However, facts in the public record and

² See *Organization, Mission and Functions Manual: Overview*, U.S. DEPARTMENT OF JUSTICE (Sept. 2, 2014), <http://www.justice.gov/jmd/organization-mission-and-functions-manual>.

³ *Am. Civil Liberties Union v. Cent. Intelligence Agency*, No. 1:13-cv-01870, 2015 WL 2406825 (D.D.C. May 20, 2015).

⁴ See, e.g., UN Committee Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Concluding observations of the Committee against Torture (Extracts for follow-up of CAT/C/USA/CO/3-5), Nov. 3-28 2014, http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/USA/INT_CAT_FUI_USA_19925_E.pdf (noting that the investigative methods employed, identities of witnesses interviewed, and other details have not been disclosed and raising concerns about whether the inquiries were “properly conducted”); UN Human Rights Committee, Concluding observations on the fourth report of the United States of America, ¶ 5, Apr. 23, 2014, U.N. Doc CCPR/C/USA/CO/4,



alleged in this complaint are sufficient to warrant an Inspector General review of misconduct by Justice Department employees. This complaint alleges the following:

1. Justice Department officials have made contradictory statements to the public, Congress and the courts regarding whether anyone in the Department has opened or reviewed the Senate report, with the effect, if not the purpose, of evading public accountability and concealing its failures.
2. The Justice Department apparently failed to review evidence of human rights violations in the Senate Report. The Department's failure now to review the full report and establish a process for assessing that evidence is contrary to its legal obligations. If the Justice Department previously had access to the evidence, its earlier failure to conduct criminal investigations into all but two cases or to bring any criminal charges at all raises the concern that it did not regard the CIA's activities as unlawful, when they unequivocally were.
3. The Justice Department apparently failed to review evidence in the Senate Report regarding its role in the commission of human rights violations in the CIA's secret detention program, and has failed to develop reforms to address its institutional failures.

I. THE JUSTICE DEPARTMENT GAVE CONTRADICTORY ACCOUNTS OF ITS HANDLING OF THE SENATE TORTURE REPORT

The Inspector General should review the Justice Department's contradictory statements regarding its review and handling of the U.S. Senate Select Committee on Intelligence ("Senate Committee") report on the CIA secret detention program.

On December 9, 2014, the Senate Committee published the 500-page Executive Summary of its report ("Senate Committee summary") on the CIA-operated secret detention program. The full 6,900-page Senate Committee report ("Senate report" or "full report") was also provided, inter alia, to the Justice Department.⁵

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fUSA%2fCO%2f4&Lang=en (noting with concern that all investigations into the CIA secret rendition, interrogation and detention programs were closed in 2012 and that the continued secrecy of the programs creates "barriers to accountability and redress for victims").

⁵ See SSCI Executive Summary, Foreword by Senator Dianne Feinstein; Letter, Sen. Dianne Feinstein to Sen. Patrick Leahy, President Pro Tempore, United States Senate, Dec. 9, 2014, <http://1.usa.gov/1wy9dw9> ("The entire classified report will be provided to the Executive Branch for dissemination to all relevant agencies. The full report should be used by the Central Intelligence Agency and other components of the Executive Branch to help make sure that the system of detention and interrogation described in this report is never repeated.")



On the same day that the report summary was published, the Justice Department reportedly issued a statement reaffirming its decision not to bring any criminal charges for torture or other crimes committed.⁶ An unnamed Justice Department official told multiple leading U.S. news outlets that a team of investigators had reviewed the full Senate report but “did not find any new information that they had not previously considered in reaching their determination” that the Justice Department’s prior criminal investigation into the CIA program was adequate.⁷

The Justice Department repeated this in nearly verbatim terms on June 23, 2015, providing the *Miami Herald* a response to a joint letter from Amnesty International, Human Rights Watch and the ACLU. It stated that Justice Department investigators “have also reviewed the Senate Committee’s full report and did not find any new information they had not previously considered in reaching their determination.”⁸

These statements contradict representations made by the Justice Department in ongoing litigation. According to a January 2015 declaration in *ACLU v. CIA*, the Justice Department’s copies of the full report have remained unopened and have not been reviewed by Justice Department staff or distributed in any way.

In particular, the Justice Department’s declaration states that two copies of the full report were sent to the Office of Legislative Affairs (OLA), Justice Department (DOJ) – one for the Justice Department and one for the Federal Bureau of Investigation (FBI):

“The package was classified as ‘Top Secret/Sensitive Compartmented Information (TS/SCI) with additional classification markings for the applicable codeword... SCI

⁶ See *DOJ Stands By No-Charges Ruling After Torture Report*, NBC NEWS, Dec. 9, 2014, <http://www.nbcnews.com/storyline/cia-torture-report/doj-stands-no-charges-ruling-after-torture-report-n264711>. The Justice Department Office of Public Affairs did not respond to Amnesty International USA’s requests for a copy of the reported statement.

⁷ See Charlie Savage, *U.S. Tells Court That Documents From Torture Investigation Should Remain Secret*, N.Y. TIMES, Dec. 10, 2014, <http://nyti.ms/1qA77zw> (“The Justice Department said in a statement on Tuesday that its investigators had looked at the full version of the Senate Intelligence Committee report ‘and did not find any new information that they had not previously considered in reaching their determination’” that the DOJ’s prior criminal investigation into the CIA’s torture program was adequate); Kevin Johnson, *Justice Department Will Not Reopen Torture Inquiry*, USA TODAY, Dec. 10, 2014, <http://www.usatoday.com/story/news/politics/2014/12/09/justice-cia-torture/20138065/> (“The same investigators involved in the previous four-year Justice inquiry ‘reviewed the committee’s full report and did not find any new information that they had not previously considered in reaching their determination,’ a Justice official said Tuesday. The official was not authorized to speak publicly about criminal investigations and spoke on condition of anonymity”); Jennifer Bendery and Ali Watkins, *Despite Torture Uproar, DOJ Still Says No To Prosecutions*, HUFFINGTON POST, Dec. 9, 2014, http://www.huffingtonpost.com/2014/12/09/doj-torture_n_6298276.html?1418178014 (“That team of investigators has since reviewed the full Senate report, said the spokesman on Tuesday, but ‘did not find any new information’ they hadn’t previously considered in determining illegal activity”).

⁸ Carol Rosenberg, *Human rights groups ask attorney general to order new CIA torture probe*, MIAMI HERALD, June 23, 2015, <http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article25313905.html>.



is sometimes referred to as ‘codeword’ information, and its sensitivity requires that it be protected in a much more controlled environment than other classified information.... The two copies of the Full Report were delivered in a single package containing two discs... [The recipient] rewrapped the copy for the FBI in the original wrapping, the interior of which was marked TS/SCI with the applicable codeword, placed the DoJ copy in another envelope, marked it with the same classification markings, as well as ‘Senate Intel RDI Report’, and immediately placed both copies into OLA’s SCIF... The copies of the Full Report... were not distributed further... and the FBI has neither retrieved nor reviewed its copy of the Full Report, which remains in the OLA SCIF...The DOJ copy of the Full Report also remains unopened in the OLA SCIF ...The disc itself has not been integrated into any agency records system.”⁹

In a brief filed on March 4, 2015, the government reiterated, “neither the Department of Justice nor the Department of State has ever opened the December 2015 package with the disc containing the updated version of the Full Report.”¹⁰

These statements contradict earlier statements that Justice Department officials made to press regarding the Justice Department’s review of the Senate report. They also contradict the Justice Department’s sworn testimony and responses to Congress about a week following the government’s March 4, 2015 brief in *ACLU v. CIA*. On March 12, 2015, FBI Director James Comey testified that FBI officials had reviewed the report. In particular, Senator Dianne Feinstein, vice chair of the Senate Intelligence Committee, questioned Director Comey about the Justice Department’s failure to read the full report, implicitly referencing the Justice Department’s representations in court:

SEN. FEINSTEIN: ...I want to ask you yes or no. One of my disappointments was to learn that the six-year report of the Senate Intelligence Committee on detention and interrogation program sat in a locker and no one looked at it. And let me tell you why I’m disappointed. The report, the 6,000 pages and the 38,000 footnotes, which has been compiled, contains numerous examples of a learning experience of cases of interrogation, of where the department could learn, perhaps, some new things from past mistakes. And the fact that it hasn’t been opened—at least that’s what’s been reported to me—is really a great disservice. It’s classified. It’s meant for the appropriate department. You are certainly one of them. I’d like to ask if you’d open that report and designate certain people to read it and maybe even have a discussion how things might be improved by suggestions in the report.

⁹ Declaration of Peter J. Kadzik, *ACLU v. CIA*, No. 1:13-cv-01870, (D.D.C. Jan. 21, 2015), ECF No. 39-4, https://www.aclu.org/sites/default/files/field_document/SSCI%20FOIA_Kadzik%20Decl..pdf; See also Julian Hatter, *FBI chief is not sure where ‘torture report’ is*, THE HILL, March 12, 2015, <http://thehill.com/policy/defense/235567-fbi-head-i-dont-know-location-of-controversial-spy-doc>.

¹⁰ Government’s Reply in Further Support of Motion to Dismiss, *ACLU v. CIA*, No. 1:13-cv-01870, (D.D.C. Mar. 4, 2015), ECF No. 49, https://www.aclu.org/sites/default/files/field_document/ssci_foia_gov_mtd_reply.pdf.



DIR. COMEY: And -- and I will do that, Senator. As you know, I have read the executive summary. You asked me to do it during my confirmation hearing. I kept my promise and read it. *There is [sic] a small number of people at the FBI who have read, as I understand, the entire thing.* But what we have not done—and I think it's a very good question—is, have we—have we thought about whether there are lessons learned for us. There's a tendency for me to think, we don't—we don't engage in interrogation like that, so what's there to learn?

SEN. FEINSTEIN: You did, and Bob Mueller pulled your people out, which is a great tribute to him.

DIR. COMEY: Yeah. So the answer is yes. I will think about it better, and I will figure out where we are in terms of looking at the entire thing. I don't know enough about where the document sits at this point this time. You mentioned a locked box. I don't -- I don't know that well enough to comment on it at this point.¹¹

Likewise, the Justice Department's representations to the media and to a U.S. court are in tension with statements by Attorney General Loretta Lynch prior to her confirmation in response to a question for the record submitted by Senator Sheldon Whitehouse regarding the Senate report. In February 2015, Senator Whitehouse requested that Attorney General Lynch commit to reading the "executive summary as well as those portions of the full report discussing the role of Justice Department attorneys."¹² Attorney General Lynch replied that she would "review the executive summary and other appropriate materials to help ensure that the Department lives up to the high standards of conduct and legal rigor that are essential to its mission."¹³ However, to date, we are not aware of any steps the Attorney General or her staff has taken to review the full report, including by unsealing the Justice Department's copies of it.

We have outlined the evident contradictions in the Justice Department's statements to the media, a U.S. court and Congress. We are not in a position to conclusively establish the Justice Department's conduct, nor discern its reasons. Absent the necessary information, the Justice Department's representation to a U.S. court regarding its failure to open and review the full report opens the Department up to the accusation that it has been engaging in a cynical and hyper-technical effort to circumvent open records law (the Freedom of Information Act) and prevent the release of the full report to the public.

¹¹ *Hearing on Fiscal Year 2016 Budget for the FBI, U.S. Marshals Service, DEA & ATF before the S. Subcomm. on Commerce, Justice, Sci. & Related Agencies*, 114th Cong. (2015) (Statement of Sen. Diane Feinstein) (emphasis added); see also *Feinstein implores Comey to read the torture report*, C-SPAN, Mar. 12, 2015, <http://www.c-span.org/video/?c4531068/feinstein-implores-comey-read-torture-report>.

¹² Nomination of Loretta E. Lynch to be Attorney General of the United States, Question for the Record from Senator Whitehouse, Submitted Feb. 9, 2015, <http://www.judiciary.senate.gov/imo/media/doc/Lynch%20QFR%202-9-15.pdf>.

¹³ *Id.*



Whatever the reason for its conduct on this matter, the Justice Department does not have license to mislead the public and Congress regarding its review of the report, or to make commitments to review the report that appear wholly contradicted by its sworn declaration to a U.S. court. On the one hand, the U.S. government has repeatedly represented in court that no one has opened (let alone reviewed) the full Senate report; on the other hand, it has responded to public and congressional concern by stating it has already read or will review the full report. It cannot plausibly claim to have both read the report and never opened it.

The effect, if not the purpose, of the Justice Department's conduct is to evade public accountability for at least two serious failures: its failure to review evidence in the Senate report of human rights violations that could warrant prosecution (see Part II *infra*); and its failure to reckon with evidence in the Senate report regarding the role of Justice Department officials in the commission of human rights violations (see Part III *infra*).

II. THE JUSTICE DEPARTMENT IS OBLIGATED TO REVIEW EVIDENCE OF HUMAN RIGHTS VIOLATIONS IN THE SENATE REPORT BUT HAS APPARENTLY FAILED TO DO SO.

The Inspector General should review the Justice Department's apparent failure to establish a process for assessing evidence of human rights violations and criminal wrongdoing provided in the Senate Committee summary and full report.

A. The Durham Review Does Not Excuse the Justice Department's Failure to Review the Senate Report

As a threshold matter, the Justice Department's previous investigations and reviews do not excuse its failure to review evidence provided by the Senate report. In August 2009, Attorney General Eric Holder expanded Assistant US Attorney Durham's mandate from a review of the CIA's destruction of the videotapes it had made of detainees being abused to include a "preliminary review" into whether federal laws were violated in connection with the interrogation of "specific detainees at overseas locations."¹⁴ The Durham review

¹⁴ In 2005, the CIA destroyed videotapes it had made of detainees being subjected to so-called "enhanced interrogation" techniques— in other words, direct evidence of specific acts of torture and other cruel, inhuman or degrading treatment. In 2010, the Justice Department closed its investigation into the CIA's destruction of videotapes without bringing any criminal charges, stating without elaboration that after an "exhaustive investigation" into the matter Assistant US Attorney John Durham had concluded that he would "not pursue criminal charges for the destruction of the interrogation tapes." *See Department of Justice Statement on the Investigation into the Destruction of Videotapes by CIA Personnel*, U.S. DEPARTMENT OF JUSTICE (NOV. 9, 2010). For announcement of an expansion of Durham's review, *see Attorney General Eric Holder Regarding a Preliminary Review into the Interrogation of Certain Detainees*, U.S. DEPARTMENT OF JUSTICE (Aug. 24, 2009), <http://www.justice.gov/opa/speech/attorney-general-eric-holder-regarding-preliminary-review-interrogation-certain-detainees>.



resulted in “full criminal investigation” into only two cases,¹⁵ which were closed in 2012 with no charges referred against anyone.¹⁶ Moreover, Durham’s preliminary investigation was narrowly (and incorrectly) framed and set against a promise of immunity from prosecution for anyone who acted in “good faith” on official legal advice in conducting interrogations.¹⁷

The full Senate report remains classified. Moreover, the government has withheld basic information about the parameters and conduct of the Durham review. As a result of this government secrecy, we are not in a position to know the extent to which either the Senate committee summary or the full Senate report provide evidence of human rights violations not previously available to the Justice Department and reviewed by the Durham team.

The publicly available summary of the report, however, provides evidence of numerous human rights violations that characterized the CIA’s secret detention program. It adds to evidence of human rights violations collected by Amnesty International and other human rights organizations over more than a decade. It includes significant new information relating to the commission of serious federal crimes, including torture, homicide, conspiracy, and sexual assault.

As the president of the American Bar Association recently stated in a letter to the Attorney General, “the conclusions of the 2009 special investigation and subsequent

¹⁵ *Statement of the Attorney General Regarding Investigation into the Interrogation of Certain Detainees*, U.S. DEPARTMENT OF JUSTICE (Jun. 30, 2011), <http://www.justice.gov/opa/pr/statement-attorney-general-regarding-investigation-interrogation-certain-detainees> (“Mr. Durham has advised me of the results of his investigation, and I have accepted his recommendation to conduct a full criminal investigation regarding the death in custody of two individuals. Those investigations are ongoing. The Department has determined that an expanded criminal investigation of the remaining matters is not warranted.”).

¹⁶ *Statement of Attorney General Eric Holder on Closure of Investigation into the Interrogation of Certain Detainees*, U.S. DEPARTMENT OF JUSTICE, Aug. 30, 2012, <http://www.justice.gov/opa/pr/statement-attorney-general-eric-holder-closure-investigation-interrogation-certain-detainees>.

¹⁷ *Statement of the Attorney General Regarding Investigation into the Interrogation of Certain Detainees*, U.S. DEPARTMENT OF JUSTICE (June 30, 2011), <http://www.justice.gov/opa/pr/statement-attorney-general-regarding-investigation-interrogation-certain-detainees>. The “preliminary review” ordered by the Attorney General was narrowly framed and set against a promise of immunity from prosecution for anyone who acted in “good faith” on official legal advice in conducting interrogations. *Id.* This falls far short of the scope of investigations and prosecutions required by binding legal obligations to which the U.S. is subject under international law, including under the explicit provisions of treaties the U.S. has entered into such as the Geneva Conventions and UN Convention Against Torture. In Amnesty International’s view, it also amounts to a de facto amnesty for crimes under international law. It constitutes an executive usurpation of judicial power, in contravention of basic principles guaranteeing independence of the judiciary. Granting immunity for crimes under international law, or any other measure that prevents the emergence of truth, a final judicial determination of guilt or innocence before an ordinary civilian court and full reparation for victims, by design or effect, by legislation or by executive policy, violates international law. *See* 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 14 (2015), <http://www.amnestyusa.org/research/reports/usa-crimes-and-impunity>.



decision not to pursue any prosecutions for allegations of torture have been called into question by the extensive documentation collected on the CIA’s interrogation program by the Senate Select Committee on Intelligence.”¹⁸

After the release of the Senate Committee summary and the Senate’s transmittal of the full Senate report, the Justice Department should have established a process for reviewing allegations and evidence of human rights violations and criminal wrongdoing in the report. It should have assessed whether the Senate report’s evidence and allegations substantially differed from that which it had previously reviewed, or would otherwise warrant reopening and expanding investigations into torture, enforced disappearances and other crimes committed in the CIA secret detention program. It has apparently failed to do so.

The Justice Department has sometimes implied that it previously had access to the information presented in the Senate report summary, which may be further detailed in the classified full report. If that is the case, then its failure to conduct a criminal investigation beyond two cases involving deaths in custody or to bring any criminal charges in any case raises the concern that it did not regard the CIA’s activities as unlawful, when they unequivocally were.

A. The Justice Department Is Obligated to Assess the Evidence and Investigate Human Rights Violations

To date, the U.S. government’s response to the overwhelming evidence—including information contained in the Senate Committee summary and the full report—that crimes under international law and other human rights violations were committed in the CIA-operated secret detention program, has been entirely inadequate, leaving the United States in serious violation of its human rights obligations.

The U.S. government is obligated under international human rights law to assess and act on evidence of human rights violations, including any evidence in the Senate report summary and the full report. The United States ratified the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UN Convention Against Torture) in 1994.¹⁹ Under the UN Convention Against Torture, in every case where an investigation reveals that there is evidence against a person of their having committed or attempted to commit torture, or of having committed acts that constitute complicity or participation in torture, the case must be submitted to its competent authorities for the purpose of prosecution if the individual is not extradited for

¹⁸ Letter from William C. Hubbard, President of the American Bar Association, to Attorney General Loretta Lynch (June 23, 2015), http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2015june23_letter DOJ_authcheckdam.pdf.

¹⁹ United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.



prosecution.²⁰ The authorities must take their decision whether to prosecute in the same manner as in the case of any ordinary offense of a serious nature under the law of the state.²¹

Failing to proceed with an investigation and a prosecution on the basis that the suspected perpetrator held public office of any rank, or citing justifications based in “exceptional circumstances,” whether states of war or other public emergencies, is not permitted by the UN Convention Against Torture.²² Torture is also a war crime under the 1949 Geneva Conventions and customary international humanitarian law, meaning that investigation and submission for prosecution of all cases of torture in situations of armed conflict is an express obligation under international law.

U.S. obligations under international human rights law are discussed in greater detail in the annex to this complaint (see *infra*).

B. The Senate Committee Summary Contains Evidence of Human Rights Violations

The Senate Committee summary rightly states that the Committee’s study – begun in March 2009, completed in December 2012, and updated in 2014 – is “the most comprehensive review ever conducted of the CIA’s Detention and Interrogation Program.”²³ The summary reveals only a small part of what the Committee found in relation to the abuse of detainees. The full 6,700 page report provides “substantially more detail” and is “far more extensive.”²⁴ The full “excruciating” details on “each of the 119 known individuals who were held in CIA custody” are contained in Volume III of the full report.²⁵ Yet the Justice Department, by failing to take any action, is suggesting that it knew it all already. That is hard to believe.

Below, we set out a non-exhaustive list of allegations and evidence in the Senate Committee summary of human rights violations, including evidence that may go beyond what was previously available to the Justice Department. In sum, the Senate Committee summary provides significant new information about the nature of abuse inflicted on the CIA’s detainees; the number of detainees subjected to that abuse; and the decisions that led to infliction of that abuse.²⁶

²⁰ United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, arts. 7, 12, Dec. 10, 1984, 1465 U.N.T.S. 85.

²¹ United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 7, Dec. 10, 1984, 1465 U.N.T.S. 85.

²² United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 2, Dec. 10, 1984, 1465 U.N.T.S. 85.

²³ SSCI Executive Summary, 9.

²⁴ SSCI Executive Summary, Foreword by Senator Dianne Feinstein.

²⁵ *Id.*

²⁶ See Letter from Amnesty International, ACLU and Human Rights Watch to Attorney General Loretta Lynch (June 23, 2015), http://www.hrw.org/sites/default/files/related_material/Letter-to-AG-Lynch-Special-Prosecutor-Torture.pdf.



Following the transmittal of the full, classified Senate report, the Justice Department should have begun a review of the report, assessed the evidence therein, and established a process for determining whether to reopen and expand its investigations into human rights violations committed in the CIA secret detention program—all of this is even more so if the Justice Department did not previously have access to these allegations and this evidence.

1. *The Senate reviewed the treatment of at least 18 individuals apparently not reviewed by the Justice Department.*

The Senate Committee determined that there were at least 119 detainees in CIA custody. In contrast, the Justice Department’s “preliminary review” led by Assistant U.S. Attorney (AUSA) John Durham had as its starting point 101 detainees, some of whom were determined as not having been in CIA custody.²⁷ In other words, the cases of at least 18 detainees were apparently not even considered by the Justice Department’s prior review. If the Justice Department was not aware of these cases, its failure to reopen and expand its review suggests a failure to fulfill its responsibilities. These were 18 people some or all of whom would appear to have been at minimum subjected to enforced disappearance, a crime under international law, as well as possibly to other detention conditions and interrogation methods that violated the prohibition of torture and other cruel, inhuman or degrading treatment.

2. *The summary provides examples of “unauthorized” techniques used in the CIA program that amount to torture or other forms of cruel, inhuman or degrading treatment.*

As we have already noted, AUSA Durham’s preliminary investigation was narrowly (and incorrectly) framed and set against a promise of immunity from prosecution for anyone who acted in “good faith” on official legal advice in conducting interrogations. It was ostensibly limited to “whether any unauthorized interrogation techniques were used.”²⁸ Conduct described in the Senate committee summary would amount to torture or other cruel, inhuman or degrading treatment (CIDT), regardless of whether it was “authorized” under the legal guidance produced by the Office of Legal Counsel (OLC) at the Justice Department, and would warrant prosecution if sufficient evidence were available.

²⁷ See *Statement of the Attorney General Regarding Investigation into the Interrogation of Certain Detainees*, U.S. DEPARTMENT OF JUSTICE (June 30, 2011), <http://www.justice.gov/opa/pr/statement-attorney-general-regarding-investigation-interrogation-certain-detainees> (“In carrying out his mandate, Mr. Durham examined any possible CIA involvement with the interrogation of 101 detainees who were in United States custody subsequent to the terrorist attacks of September 11, 2001, a number of whom were determined by Mr. Durham to have never been in CIA custody”).

²⁸ See *Statement of the Attorney General Regarding Investigation into the Interrogation of Certain Detainees*, U.S. DEPARTMENT OF JUSTICE (June 30, 2011), <http://www.justice.gov/opa/pr/statement-attorney-general-regarding-investigation-interrogation-certain-detainees>.



Yet even within the narrow, incorrect mandate of the Durham investigation, the allegations and evidence from the Senate Committee summary noted below would now warrant an extensive review by the Justice Department. The following “techniques” were not authorized by the Justice Department, as far as we know:

- a) **Forced “rectal feeding” and hydration:** At least five detainees were subjected to forced “rectal feeding” and “rectal hydration” and others were threatened with it, according to CIA records.²⁹
- b) **Rectal exams “with excessive force”:** Senior CIA personnel, including General Counsel Scott Muller and Deputy Director of Operations James Pavitt, were told of allegations of rectal exams conducted with “excessive force” against two detainees held at Detention Site Cobalt, believed to be in Afghanistan—information that appears not to have resulted in any sanction.³⁰ One of the detainees, Mustafa al-Hawsawi was later diagnosed with “chronic hemorrhoids, an anal fissure, and symptomatic rectal prolapse.”³¹
- c) **Threats of execution and sexual assault:** As documented in a 2004 CIA Office of Inspector General report, the CIA used multiple unauthorized techniques on Abd al-Rahim al Nashiri, including blindfolding him with a pistol near his head and a cordless drill near his body and threatening to sexually assault his mother in front of him.³² The Senate report summary states that Volume III of the full Senate report provides further details of al Nashiri’s interrogation, and it may include evidence beyond that which the Justice Department had access during the Durham review.

3. The Senate report summary describes CIA use of “authorized techniques” in ways that are inconsistent with the Justice Department’s legal advice or its representations to the Justice Department.

The Senate Committee summary makes public for the first time details of the CIA’s conduct in departing from the techniques “authorized” by the Justice Department Office of Legal Counsel, including that the CIA’s description of techniques was “inconsistent with how the techniques would later be applied”³³ and that the techniques “diverged from the specific authorization.”³⁴ This alleged conduct would amount to torture or other forms of cruel, inhuman or degrading treatment, regardless of whether it was “authorized” by the contrived Justice Department legal guidance; if sufficient evidence were available it would warrant prosecution.

²⁹ SSCI Executive Summary, xiii, 100.

³⁰ SSCI Executive Summary, nn.584, 2655.

³¹ SSCI Executive Summary, n.584.

³² SSCI Executive Summary, 69-70.

³³ SSCI Executive Summary, xiv.

³⁴ SSCI Executive Summary, xxi.



Even within the narrow, incorrect mandate of the Durham investigation, these allegations warrant review:

- a) **Waterboarding** With regard to Khalid Sheikh Mohammed’s waterboarding: “The first waterboarding session, which lasted 30 minutes (10 more than anticipated in the Office of Legal Counsel’s August 1, 2002 opinion), was followed by the use of a horizontal stress position that had not previously been approved by CIA headquarters. The chief of Base, worried about the legal implications, prohibited the on-site medical officer from reporting on the interrogation directly to OMS outside of official CIA cable traffic.”³⁵
- b) **Stress Positions:** CIA’s reported conduct departed from the description of “stress positions” that it provided to the Justice Department. For example, Abd al-Rahim al-Nashiri was left “‘in a standing position’ with ‘his hands affixed over his head’ for approximately two and a half days,” contrary to the CIA’s representations to Congress that stress positions did not include shackling above the head and contrary to the Justice Department legal advice specifying that a detainee’s hands “may be raised above the head for a period not to exceed two hours.”³⁶
- c) **Continuous standing:** “Bashir Nasri Ali al-Marwalah told debriefers at Guantanamo Bay that he was ‘tortured’ at DETENTION SITE COBALT with five days of continual standing and nudity.”³⁷ According to one interrogator, a team once “found” a detainee who, “as far as [they] could determine, had been chained to the wall in a standing position for 17 days.”³⁸

4. *The Senate Committee summary describes CIA activities that were not only unlawful, but also apparently not authorized by CIA headquarters with regard to the particular detainees at the time they were inflicted.*³⁹ *It finds that under a “conservative estimate,”⁴⁰ “[a]t least 17 detainees were subjected to CIA enhanced interrogation techniques without authorization from CIA headquarters.”⁴¹*

These activities are unlawful even if they would have been authorized by CIA headquarters. The Senate Committee summary describes, inter alia:

³⁵ SSCI Executive Summary, 85-86.

³⁶ See SSCI Executive Summary, n. 349 and accompanying text; Memorandum from Steven G. Bradbury, Principal Deputy Assistant Attorney General to John A. Rizzo, CIA Senior Deputy General Counsel 13 (May 30, 2005).

³⁷ SSCI Executive Summary, n. 610.

³⁸ SSCI Executive Summary, n. 240 (internal quotations omitted).

³⁹ While the distinction between “authorized” and “unauthorized” techniques is meaningless under international law, it is relevant insofar as the Justice Department’s review was confined to CIA conduct that went beyond “authorized” techniques.

⁴⁰ SSCI Executive Summary, n. 589.

⁴¹ SSCI Executive Summary, 99.



- a) **Ice water baths and dousing.** “Cables reveal[ed] that the CIA’s chief of interrogations used water dousing against detainees, including with cold water and/or ice water baths, as an interrogation technique without prior approval from CIA Headquarters.”⁴² For example, “Majid Khan has claimed that, in May 2003, he was subjected to immersion in a tub that was filled with ice and water...Chief of Interrogations [redacted], subjected Abu Hudhaifa to an (unauthorized) ‘icy water’ bath at the same [redacted] where Majid Khan was held.”⁴³
- b) **Rafiq Bashir al-Hami.** “Rafiq Bashir al-Hami was subjected to 72 hours of sleep deprivation between his arrival at DETENTION SITE COBALT and his October [redacted], 2002, interrogation.”⁴⁴
- c) **Tawfid Nasir Awad al-Bihani.** “Tawfid Nasir Awad al-Bihani was subjected to 72 hours sleep deprivation between his arrival at DETENTION SITE COBALT and his October [redacted], 2002, interrogation.”⁴⁵
- d) **Abu Badr.** “Abu Badr was subjected to forced standing, attention grasps, and cold temperatures without blankets in 2002.”⁴⁶
- e) **Gul Rahman.** “CIA interrogators used sleep deprivation, facial slap, use of cold (including cold cells and cold showers), “hard takedowns,” dietary manipulation, nudity, and light deprivation on Gul Rahman.”⁴⁷
- f) **Abd al-Rahim al-Nashiri.** “Abd al-Rahim al-Nashiri was subjected to unapproved nudity and approximately two-and-a-half days of sleep deprivation in December 2002, with his arms shackled over his head for as long as 16 hours.”⁴⁸
- g) **Ramzi bin al-Shibh.** “The facial hold was used against Ramzi bin al-Shibh multiple times without approval.”⁴⁹
- h) **Asadallah.** “Interrogators used water dousing, nudity, and cramped confinement on Asadallah without having sought or received authorization from CIA Headquarters.”⁵⁰
- i) **Mustafa al-Hawsawi.** “Mustafa al-Hawsawi was subjected to water dousing without approval from CIA Headquarters.”⁵¹
- j) **Abu Khalid.** “Interrogators used sleep deprivation against Abu Khalid prior to seeking authorization from CIA Headquarters, and then failed to obtain such authorization.”⁵²

⁴² SSCI Executive Summary, xxi, 99.

⁴³ SSCI Executive Summary, n. 610.

⁴⁴ SSCI Executive Summary, n.591.

⁴⁵ SSCI Executive Summary, n.592.

⁴⁶ SSCI Executive Summary, n. 595.

⁴⁷ SSCI Executive Summary, n.596.

⁴⁸ SSCI Executive Summary, n. 597.

⁴⁹ SSCI Executive Summary, n. 598.

⁵⁰ SSCI Executive Summary, n. 599.

⁵¹ SSCI Executive Summary, n. 600.

⁵² SSCI Executive Summary, n. 601.



- k) **Abu Hudhaifa.** “Abu Hudhaifa was subjected to baths in which ice water was used, standing sleep deprivation for 66 hours that was discontinued due to a swollen leg attributed to prolonged standing, nudity, and dietary manipulation...No request for the use of standard or enhanced interrogation techniques could be located in CIA records.”⁵³
 - l) **Abd al-Karim.** “Abd al-Karim...was subjected to cramped confinement, stress positions, and walling despite CIA Headquarters having not approved their use.”⁵⁴
 - m) **Abu Hazim.** “Abu Hazim...was subjected to cramped confinement, stress positions, and walling despite CIA Headquarters having not approved their use.”⁵⁵
 - n) **Sayyid Ibrahim.** “CIA cables indicate that Sayyid Ibrahim was subjected to sleep deprivation from January 27, 2004, to January 30, 2004, which exceeded the 48 hours approved by CIA Headquarters.”⁵⁶
 - o) **Abu Yasir al-Jaza’iri.** “Abu Yasir al-Jaza’iri was ‘bathed,’ a term used to describe water dousing, which was considered at the time to be an enhanced interrogation technique...Water dousing had not been approved, and the subsequent request...to use the CIA’s enhanced interrogation techniques on al-Jaza’iri, did not include water dousing.”⁵⁷
 - p) **Suleiman Abdullah.** “Interrogators requested approvals to use the CIA’s enhanced interrogation techniques on Suleiman Abdullah, including water dousing. CIA Headquarters then approved other techniques, but not water dousing...Suleiman Abdullah was nonetheless subjected to water dousing.”⁵⁸
- 5. *The Senate report summary provides numerous details of abuses that were previously unknown to the public and which are “harsher than the CIA had represented to policymakers and others”***

They include the following:

- a) **Hallucinations from extensive sleep deprivation:** “[M]ultiple CIA detainees subjected to prolonged sleep deprivation experienced hallucinations, and CIA interrogation teams did not always discontinue sleep deprivation after the detainees had experienced hallucinations;”⁵⁹
- b) **Edema from extensive standing sleep deprivation:** “[N]umerous detainees subjected to standing sleep deprivation suffered from edema.”⁶⁰
Detainees were subjected to “the CIA’s enhanced interrogation techniques,

⁵³ SSCI Executive Summary, n. 602.

⁵⁴ SSCI Executive Summary, n. 603.

⁵⁵ SSCI Executive Summary, n. 604.

⁵⁶ SSCI Executive Summary, n. 605.

⁵⁷ SSCI Executive Summary, n. 606.

⁵⁸ SSCI Executive Summary, n. 607.

⁵⁹ SSCI Executive Summary, 412, n. 2510.

⁶⁰ SSCI Executive Summary, n.2357.



notwithstanding concerns that the interrogation techniques could exacerbate their injuries.”

- c) **Use of extreme cold:** “Less than a month after the death of Gul Rahman from suspected hypothermia, the plans also called for detainees’ clothes to be removed in a facility that was described to be 45 degrees Fahrenheit.”⁶¹
- d) **Waterboarding as “near drowning”:** While the waterboard technique was represented to OLC as inducing the “sensation of drowning,”⁶² its use in the interrogation of Khalid Sheik Mohammed evolved past that, to a “series of near drownings.”⁶³

By failing to establish a process for assessing this evidence, the Justice Department has not only acted contrary to its obligations to investigate human rights violations, it has set a dangerous example of impunity with far-reaching implications. Abusive governments around the world will use U.S. inaction on torture as an excuse for their own cruel and unlawful actions, including their refusal to investigate and prosecute human rights violations. With a record of no charges, no prosecutions, no trials, no punishment, and no redress for CIA torture, the United States will continue to lose credibility when it speaks out on human rights.

III. THE JUSTICE DEPARTMENT FAILED TO REVIEW THE SENATE REPORT’S EVIDENCE OF ITS ROLE IN THE COMMISSION OF HUMAN RIGHTS VIOLATIONS IN THE CIA’S SECRET DETENTION PROGRAM AND TO DEVELOP REFORMS TO ADDRESS INSTITUTIONAL FAILURES

The Justice Department’s failure to review the Senate report also merits Inspector General review because the report contains evidence of the Justice Department’s role in the commission of human rights violations in the CIA secret detention program, including its institutional failures to prevent those violations. While we are not in a position to conclusively establish what actions the Justice Department has taken to address these failures previously, we are concerned that to date it has not taken all necessary steps.

A. Justice Department Lawyers Provided Legal Cover for Torture, CIDT and Enforced Disappearances

The Senate report summary adds to significant evidence already in the public domain that the Justice Department repeatedly provided legal cover for CIA activities that amounted to crimes under international law and other human rights violations.⁶⁴ In sum, the OLC

⁶¹ SSCI Executive Summary, 60.

⁶² SSCI Executive Summary, 422.

⁶³ SSCI Executive Summary, 423.

⁶⁴ For Amnesty International’s description and analysis of these legal memos, see AMNESTY INTERNATIONAL, USA: HUMAN DIGNITY DENIED: TORTURE AND ACCOUNTABILITY IN THE ‘WAR ON



provided legal guidance with “assertions about the state of the law [] so inaccurate that they seem to be arguments about what the authors (or the intended recipients) wanted the law to be rather than assessments of what the law actually is.”⁶⁵ Then-Attorney General John Ashcroft and other lawyers provided legal advice on how the White House could ensure that “no court could subsequently entertain charges that American military officials, intelligence officials, or law enforcement officials violated Geneva Convention rules relating to field conduct, detention conduct or interrogation of detainees.”⁶⁶

The Senate report summary and other reports show that the Justice Department faced demands from other agencies to provide immunity for criminal wrongdoing, and that in response its systems broke down or failed to act effectively. For example, at a meeting on July 13, 2002, CIA Acting General Counsel John Rizzo asked whether the Justice Department could issue an “advance declination of prosecution” of any CIA employee involved in the interrogation program. Assistant Attorney General (AAG) Chertoff allegedly said that the Department would not grant such immunity. Later that month, a letter to John Rizzo from John Yoo, drafted at the request of AAG Chertoff, was reviewed and approved by the OLC and the Justice Department’s Criminal Division. The letter included: “You have inquired as to whether the Department of Justice issues letters declining to prosecute future activity that might violate federal law... It is our understanding...after consultation with the Criminal Division, that the Department does not issue letters of declination for future conduct that might violate federal law.”⁶⁷

The Justice Department’s Office of Professional Responsibility (OPR) found no record of the letter having been sent. John Rizzo told the OPR that he did not remember receiving it. The OPR concluded that “Yoo does not appear to have signed or transmitted the letter.”⁶⁸

B. The Senate Committee Summary Provides Evidence that Justice Department Officials Witnessed But Failed to Act to Prevent the Commission of Human Rights Abuses

The Senate committee summary reports that senior Justice Department officials failed to prevent or halt the CIA’s activities, despite receiving reports from mid- and lower-level

TERROR,’ 2004, <https://www.amnesty.org/download/Documents/92000/amr511452004en.pdf>.

⁶⁵ Kathleen Clark, “Ethical Issues Raised by the OLC Torture Memorandum,” 2005, <http://graphics8.nytimes.com/images/blogs/roomfordebate/Clark-Torture-Memo-2005.pdf>.

⁶⁶ Letter from the Office of the Attorney General to President George W. Bush, Feb. 1, 2002. <http://nsarchive.gwu.edu/torturingdemocracy/documents/20020201.pdf>.

⁶⁷ Office of Professional Responsibility, US Department of Justice, INVESTIGATION INTO THE OFFICE OF LEGAL COUNSEL (OLC)’S MEMORANDA CONCERNING ISSUES RELATING TO THE CENTRAL INTELLIGENCE AGENCY’S USE OF ‘ENHANCED INTERROGATION TECHNIQUES’ ON SUSPECTED TERRORISTS, July 29, 2009, <http://nsarchive.gwu.edu/news/20100312/OPRFinalReport090729.pdf>.

⁶⁸ *Id.*



Justice Department and FBI officials informing them of their misgivings. As early as spring 2002, FBI interrogators conveyed to FBI headquarters that CIA personnel had started employing harsh “interrogation techniques.”⁶⁹ The response from FBI headquarters was instruction to not participate in the interrogations and to return to the United States.⁷⁰ This response indicates an awareness of wrongdoing or improper conduct, but coupled with a purposeful disregard and failure to intervene. Such omissions and failures to act may amount to conduct in violation of international human rights law.⁷¹

Moreover, the Senate Committee Summary shows the Justice Department failed to act in the face of the CIA’s calculated attempts to conceal information. The Senate Committee study suggests the CIA made calculated attempts at concealing from the Justice Department information about its programs that would call into question their legality even under the OLC’s contrived legal memos. The Justice Department should review this evidence to assess its own failings.

The summary states, “[t]he CIA repeatedly provided inaccurate information to the Department of Justice, impeding a proper legal analysis of the CIA’s Detention and Interrogation Program.”⁷² This includes:

- 1) ***Denying exposure of detainees to extreme cold and heat:*** The CIA responded to an inquiry from Acting Assistant Attorney General Steven Bradbury referencing medical journals, stating that any lowering of the threshold of pain caused by sleep deprivation was “not germane” to the program because studies had only identified differences in sensitivity to heat, cold, and pressure, which are not included in the CIA’s enhanced interrogation techniques.⁷³ However, techniques that went unreported in CIA cables include both exposure to cold temperatures and cold showers (in addition to standing sleep deprivation, nudity, dietary manipulation, “rough takedowns,” and mock executions).⁷⁴

⁶⁹ See Dep’t of Justice Office of Inspector General, *A Review of the FBI’s Involvement in and Observations of Detainee Interrogation in Guantanamo Bay, Afghanistan, and Iraq* 323, May 2008.

⁷⁰ See *id.*

⁷¹ For a legal analysis, see *Al Nashiri v. Romania*, App. No. 33234/12, *Written Submissions on Behalf of Amnesty International and the International Commission of Jurists Interveners* ¶ 32 (Mar. 13, 2013), <https://www.amnesty.org/download/Documents/12000/eur390052013en.pdf>; *El-Masri v. Macedonia*, App. No. 39630/09, *Written Submissions on behalf of Amnesty International and the International Commission of Jurists* ¶¶ 27-30 (Mar. 29, 2012), [http://www.therenditionproject.org.uk/pdf/PDF%20204%20\[AI%20and%20ICJ%20submission%20in%20el%20Masri%20v%20Macedonia,%20May%202012\].pdf](http://www.therenditionproject.org.uk/pdf/PDF%20204%20[AI%20and%20ICJ%20submission%20in%20el%20Masri%20v%20Macedonia,%20May%202012].pdf); *Al Nashiri v. Poland*, App. No. 28761/11, *Written Submissions on Behalf of Amnesty International and the International Commission of Jurists Interveners* ¶ 15 (Nov. 5, 2012), <https://www.amnesty.org/download/Documents/20000/eur370022012en.pdf>.

⁷² SSCI Executive Summary, xiii.

⁷³ SSCI Executive Summary, 448.

⁷⁴ SSCI Executive Summary, 56.



- 2) ***Denying any outward physical signs of severe pain:*** Acting Assistant Attorney General Bradbury further inquired about the ability of interrogators and medical officers to “tell reliably (e.g. from outward physical signs like grimaces) whether a detainee is experiencing severe pain” and whether monitoring will effectively “avoid severe physical pain or suffering for detainees.” CIA’s response was that “all pain is subjective, not objective” and that “the program in place has effectively avoided severe physical pain and suffering and should continue to do so . . .”⁷⁵ These representations to the Justice Department occurred almost three years after daily cables from interrogators to CIA Headquarters indicating that Abu Zubaydah frequently “cried,” “begged,” “pleaded,” and “whimpered” during interrogations, and records that describe interrogation techniques causing him to become “hysterical” and “distressed to the level that he was unable to effectively communicate,” inducing “hysterical pleas.”⁷⁶
- 3) ***Misrepresentation about following medical opinions and giving precedence to medical conditions:*** The CIA repeatedly disregarded the opinions of medical officers while assuring the Justice Department that medical officers’ recommendations were “always followed.”⁷⁷ Abu Hazim and Abd al-Karim were each diagnosed with a broken foot, and medical officers recommended several weeks of no weight bearing, yet both were subsequently subjected to hours of standing sleep deprivation.⁷⁸ The CIA also misrepresented to the Justice Department that detainees’ medical conditions would be prioritized over interrogations. CIA Headquarters expressly stated to the Justice Department that “steps would be taken to ensure that [Abu Zubaydah’s] injury [would not be] in any way exacerbated by the use of [enhanced interrogation] methods,” while simultaneously instructing interrogators to “give precedence” to the interrogations over Zubaydah’s medical care.⁷⁹

Justice Department officials were among the only individuals with access to information about the CIA’s secret prisons, and operated in a context where detainees had no access to any court, lawyer or human rights monitor. Particularly in this context, they had a responsibility to look behind the CIA’s representations and weigh carefully the implications of their conduct.⁸⁰

C. The Justice Department Appears to Have Failed to Comprehensively Review its Conduct and Adopt Institutional Reform

In a December 2015 letter to President Obama, Senator Feinstein urged that the full Senate report be made available “as broadly as appropriate to help make sure that this

⁷⁵ SSCI Executive Summary, 420-21.

⁷⁶ SSCI Executive Summary, 420-21.

⁷⁷ SSCI Executive Summary, 419.

⁷⁸ SSCI Executive Summary, 112-13.

⁷⁹ SSCI Executive Summary, 111.

⁸⁰ See generally THE TORTURE MEMOS: RATIONALIZING THE UNTHINKABLE (David Cole ed. 2009).



experience is never repeated.”⁸¹ She encouraged use of the report to develop “future guidelines and procedures for all Executive Branch employees.”⁸²

In fact, as far as we are aware, no report or review to date has resulted in the Justice Department engaging in a comprehensive, institution-wide process of developing lessons learned and commit to follow up on specific recommendations for reform.

One of the most important review processes, conducted by the Office of Professional Responsibility (OPR) at the Department of Justice, should have resulted in some form of internal accountability, but its findings were rejected.

In particular, OPR initiated a formal investigation into the OLC legal memoranda to the CIA that authorized the use of “enhanced interrogation techniques” on detainees. This investigation included an extensive review of the drafting process and content of the memoranda. OPR made findings of professional misconduct committed by two individuals and indicated its intent to refer its findings to the state bar disciplinary authorities.⁸³ The OPR specifically recommended that DOJ review “declinations of prosecution regarding incidents of detainee abuse.”⁸⁴ The OPR also identified “managerial concerns,” including insufficient review and internal circulation of the memoranda.⁸⁵

However, despite this recognition of the need for reform, it does not appear that the Justice Department has taken any steps to prevent similar misconduct from happening again. To the contrary, in 2010 Associate Deputy Attorney General David Margolis rejected the OPR’s findings of professional misconduct and refused to authorize OPR’s referral of its findings to the state bar disciplinary associations.⁸⁶

Evidence of the Justice Department’s conduct in relation to the commission of human rights violations should have led to a process of comprehensive reform within the Justice Department. Yet, while the Justice Department has taken some steps to change its processes since the end of the Bush administration, we are not aware of any

⁸¹ Letter, Sen. Dianne Feinstein to The Hon. Barack Obama, Dec. 10, 2014, http://www.feinstein.senate.gov/public/index.cfm/files/serve/?File_id=be9d4494-383c-44c2-97ba-085033357ab6; see also Letter, Sen. Dianne Feinstein to Sen. Patrick Leahy, President Pro Tempore, United States Senate, Dec. 9, 2014, <http://1.usa.gov/1wy9dw9>.

⁸² Letter, Sen. Dianne Feinstein to The Hon. Barack Obama, Dec. 10, 2014, http://www.feinstein.senate.gov/public/index.cfm/files/serve/?File_id=be9d4494-383c-44c2-97ba-085033357ab6.

⁸³ The OPR concluded that former Deputy AAG John Yoo had engaged in intentional professional misconduct when he knowingly failed to provide a thorough, objective and candid interpretation of the law. It concluded that former AAG Jay Bybee committed professional misconduct when he acted in reckless disregard for his professional obligations. Office of Professional Responsibility, *Report: Investigation into the Office of Legal Counsel’s Memoranda Concerning Issues Relating to the Central Intelligence Agency’s Use of Enhanced Interrogation Techniques on Suspected Terrorists* 11, 251, 256 (July 29, 2009).

⁸⁴ *Id.* At 11.

⁸⁵ *Id.* at 259-60.

⁸⁶ Associate Deputy Attorney General David Margolis, *Memorandum for the Attorney General* (Jan. 5, 2010), <https://fas.org/irp/agency/doj/opr-margolis.pdf>.



comprehensive agency review of its institutional failures with regard to the CIA secret detention program in particular. Nor do we know of any measures the Justice Department has taken in response to the Senate report or recommendations for Justice Department reform outlined by Senator Feinstein in a December 2015 letter.⁸⁷

These failures suggest an unwillingness to reckon with the Justice Department's recent history. The effect is that the Justice Department is leaving the door open to possible future involvement in human rights violations including torture.

Respectfully submitted,

A handwritten signature in black ink that reads "Naureen Shah".

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⁸⁷ See Letter from Sen. Dianne Feinstein to President Barack Obama, Dec. 30, 2015, <http://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=0084e644-a5ed-46e1-8649-762df3ffcf4f>.



ANNEX: FURTHER DETAIL ON U.S. INTERNATIONAL LEGAL OBLIGATIONS TO REVIEW EVIDENCE OF TORTURE AND ENFORCED DISAPPEARANCES

A. US Legal Obligations to Conduct Investigations

The U.S. is required by international law, including the ICCPR and the UN Convention Against Torture (UNCAT), to respect and ensure human rights, to thoroughly investigate evidence of violation of rights, such as those which occurred during the CIA secret detention program, and to bring perpetrators to justice, no matter their level of office or former level of office. In particular:

- Torture and other cruel, inhuman or degrading treatment or punishment are prohibited at all times and in all circumstances.
- All suspected violations must be promptly, thoroughly and effectively investigated through independent and impartial bodies.⁸⁸
- Where violations against the prohibition of torture and other ill-treatment or enforced disappearance are revealed, states must ensure that “those responsible are brought to justice”.⁸⁹ This includes not only those who directly perpetrated the acts, but also those who encouraged, ordered or tolerated them.⁹⁰ States may not relieve those responsible for such violations from personal responsibility through general amnesties, legal immunities or indemnities or other similar measures. Impediments such as immunities arising from official status, defenses of obedience to superior orders or statutes limitation must be removed.⁹¹
- UNCAT specifically requires that each state ensure that “all acts of torture”,⁹² any attempt to commit torture, and any “act by any person which constitutes

⁸⁸ Hum. Rts. Comm., Gen. Comment no. 31 U.N. Doc. CCPR/C/21/Rev.1/Add. 13 (March 29, 2004), para. 15. *See also* Hum. Rts. Comm., Gen. Comment no. 20 (Sept. 30, 1992); United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 12-13, Dec. 10, 1984, 1465 U.N.T.S. 85.

⁸⁹ Hum. Rts. Comm., Gen. Comment no. 31 U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004), para. 18.

⁹⁰ Hum. Rts. Comm., Gen. Comment no. 20 (Sept. 30, 1992), para. 13; United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1, 4; Comm. against Torture, Gen. Comment no. 2 U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008), para. 26.

⁹¹ *See* Hum. Rts. Comm., Gen. no. 31 U.N. Doc. CCPR/C/21/Rev.1/Add. 13 (May 26, 2004) para. 18; Comm. against Torture, Gen. Comment no. 2 U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008), para 5.

⁹² Torture is defined in article 1 of the treaty as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity”. United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1.



complicity or participation in torture” are offences under its criminal law.⁹³ Any state party to UNCAT where a person alleged to have committed any of these offences (anywhere in the world) is found must “submit the case to its competent authorities for the purpose of prosecution” unless it extradites him or her to another state for prosecution.⁹⁴ The UNCAT expressly precludes defenses such as “exceptional circumstances”, superior orders, or public authority from ever being capable of being invoked in justification of acts of torture.⁹⁵

Victims of human rights violations have the right under international law to effective access to remedy and reparation. The struggle against impunity is linked to this, too. In its General Comment on article 14 of UNCAT issued in 2012, for example, the UN Committee against Torture stated:

“When impunity is allowed by law or exists de facto, it bars victims from seeking full redress as it allows the violators to go unpunished and denies victims full assurance of their rights under article 14”.⁹⁶

The Committee against Torture affirmed that “under no circumstances may arguments of national security be used to deny redress for victims”.⁹⁷ International law requires the U.S. to provide the victims of human rights violations with remedies that are not only available in law, but are accessible and effective in practice.⁹⁸ Victims are entitled to equal and effective access to justice; adequate, effective and prompt reparation for harm suffered; and access to relevant information concerning violations and reparation mechanisms. Full and effective reparation includes restitution, compensation, rehabilitation, satisfaction and non-repetition guarantees.

In addition, there is a collective and individual right to the truth about human rights violations such as those committed during the CIA-operated secret detention program. The United Nations, among others, has formally recognized “the importance of respecting and ensuring the right to the truth so as to contribute to ending impunity and to

⁹³ United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 4.

⁹⁴ United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 5-7.

⁹⁵ United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 2; Comm. against Torture, Gen. Comment no. 2 UN Doc. CAT/C/GC/2 (Jan. 24, 2008), para. 5.

⁹⁶ Comm. against Torture, Gen. Comment no. 3, Implementation of article 14 by States parties, UN Doc. CAT/C/GC/3 (Dec. 13, 2012), para. 42. Article 14 states: “Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.” United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 14.

⁹⁷ *Id.*

⁹⁸ See UN General Assembly, Res. 60/147 (March 21, 2006); International Covenant on Civil and Political Rights art. 2(3), Dec. 16, 1966, 999 U.N.T.S. 171; Hum. Rts. Comm., Gen. Comment no. 31 (2004), paras. 15-16; United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 14; *Dzemajl v. Yugoslavia*, Complaint No. 161/2000, Comm. against Torture, para. 9.6 (Nov. 21, 2002), <http://www.ohchr.org/Documents/Publications/SDecisionsCATVollen.pdf>.



promote and protect human rights”, referring in part to “the right of victims of gross violations of human rights and serious violations of international humanitarian law, and their families and society as a whole, to know the truth regarding such violations, to the fullest extent practicable, in particular, the identity of the perpetrators, the causes and facts of such violations, and the circumstances under which they occurred”.⁹⁹

B. Enforced Disappearances

Enforced disappearances occur when there is an:

...arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.¹⁰⁰

Enforced disappearances result in violations of treaties binding on the United States, including the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.¹⁰¹

⁹⁹ Hum. Rts. Council, res. 9/11 ‘Right to the truth’, A/HRC/RES/9/11 (Sept. 24, 2008), preamble, para. 1.. See also Hum. Rts. Commission, res. 2005/66 ‘Right to the truth’, E/EN.4/RES/2005/66, (April 20 2005).

¹⁰⁰ International Convention for the Protection of All Persons from Enforced Disappearance, art. 2, *opened for signature* Feb. 6, 2007, 2716 U.N.T.S. 3.

¹⁰¹ Enforced Disappearances violate human rights guaranteed under articles 6 (right to life), 7 (prohibition of torture and other ill-treatment) and 9 (right to liberty and security of person) of the International Covenant on Civil and Political Rights, see Hum. Rts. Comm., Gen. Comment no. 31 U.N. Doc. CCPR/C/21/Rev.1/Add. 13 (May 26, 2004) para. 18; Hum. Rts. Comm., Gen. Comment no. 35 U.N. Doc. CCPR/C/GC/35 (December 16, 2014) paras 17 and 55; Hum. Rts. Comm., Gen. Comment no. 29 U.N. Doc. CCPR/C/21/Rev.1/Add. 11 (August 21, 2001) para. 13(b). Enforced Disappearances also violate the prohibition of torture and other cruel, inhuman, or degrading treatment under the UN Convention Against Torture. See Hum. Rts. Comm., Gen. Comment no. 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13, para. 18; Hum. Rts. Comm., *Chihoub v Algeria*, Communication No. 1811/2008, para. 8.5; Hum. Rts. Comm., *Aboufaied v Libya*, Communication No. 1782/2008, para. 7.4; Hum. Rts. Comm., *Berzig v Algeria*, Communication No. 1781/2008, para. 8.5; Hum. Rts. Comm., *Zarzi v. Algeria*, Communication No. 1780/2008, para. 7.5; Hum. Rts. Comm., *El Abani v. Libya*, Communication No. 1640/2007, para. 7.3; Hum. Rts. Comm., *Benaziza v. Algeria*, Communication No. 1588/2007, para. 9.3; Hum. Rts. Comm., *El Hassy v. Libya*, Communication No. 1422/2005, para. 6.8; Hum. Rts. Comm., *Cheraitia and Kimouche v. Algeria*, Communication No. 1328/2004, para. 7.6. See also UN Declaration on the Protection of all Persons from Enforced Disappearance, UNGA resolution 47/133, art. 2; Comm. against torture, *Concluding observations on the Unites States of America*, CAT/C/USA/CO/2, para. 18 (“The State party should adopt all necessary measures to prohibit and prevent enforced disappearance in any territory under its jurisdiction, and prosecute and punish perpetrators, as this practice constitutes, per se, a violation of the Convention.”). The Inter-American Court of Human Rights has considered that the prohibition of enforced disappearance, and the corresponding obligation to investigate and punish those responsible, has attained the status of a peremptory norm of international law (*jus cogens*), see Inter-American Court of Human Rights, *Goiburú and others v. Paraguay*, Judgment of 22 September 2006, para. 84; Inter-American Court of Human Rights,



U.S. obligations to investigate and provide effective remedy in cases of enforced disappearances arise, among others, from its obligations under articles 2, 6, 7 and 9 ICCPR as well as its obligations under articles 2, 12, 13 and 14 UNCAT.¹⁰² They also violate international humanitarian law.¹⁰³

García and family members v. Guatemala, Judgment of 29 Nov. 2012, para. 96; Inter-American Court of Human Rights, Tiu Tojin v. Guatemala, Judgment of 26 Nov. 2008, para. 91; Inter-American Court of Human Rights, Anzualdo Castro v. Peru, Judgment of 22 Sept. 2009, para. 59.

¹⁰² United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 12; International Covenant on Civil and Political Rights art. 2.

¹⁰³ Enforced disappearances amount to war crimes under customary international humanitarian law, see ICRC, *Customary International Humanitarian Law*, Volume I, Rules 98 and 156. They also result in serious violations of Common article 3 of the Geneva Conventions and in grave breaches of the Geneva Conventions, see article 147 of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, and article 130 of the Third Geneva Convention Relative to Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.