

REDRESS

Seeking Reparation for Torture Survivors

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U.S. Attorney-General, Mr. Eric Holder
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Sent by post and by email to: AskDOJ@usdoj.gov

This [Open Letter](http://www.redress.org/reports.html) is also available at: <http://www.redress.org/reports.html>

28 August 2009

Dear Mr. Holder,

Re: Accountability for CIA Abuses

The Redress Trust (REDRESS) is an international human rights non-governmental organisation based in the United Kingdom with a mandate to assist torture survivors to gain both access to the courts and redress for their suffering. REDRESS advocates on behalf of victims from all regions of the world, regularly takes up cases on behalf of torture survivors at the national and international level, and provides assistance to representatives of torture survivors worldwide.¹

We note the release on Monday 24 August 2009, as part of a number of Freedom of Information Act cases, of "CIA materials includ[ing] the 2004 report from our [the CIA's] Office of Inspector General and two papers—one from 2004 and the other from 2005—that discuss the value of intelligence acquired from high-level detainees".²

On the same day, you stated that the Office of Professional Responsibility had submitted to you its report regarding the Office of Legal Counsel memoranda related to so-called "enhanced interrogation techniques".³ You also noted that this report recommended that "the Department reexamine previous decisions to decline prosecution in several cases related to the interrogation of certain

¹ You can find further details on our website www.redress.org.

² Statement to Employees by Director of the Central Intelligence Agency Leon E. Panetta on Release of Material on Past Detention Practices (24 Aug. 09).

³ Statement of Attorney General Eric Holder Regarding a Preliminary Review into the Interrogation of Certain Detainees (24 Aug. 2009).

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THE REDRESS TRUST

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detainees"⁴ and concluded that you were warranted in opening a preliminary review, appointing Mr. John Durham to conduct this review.⁵

REDRESS welcomes your decision to appoint Mr. Durham to conduct this preliminary review of allegations of abuse of "terror suspects" as part of the CIA's interrogation programme. We see this as one of a series of important first steps taken by the US Government to deal with the legacy of abuses. However, we would also urge you to consider the following:

1. Criminal Prosecutions

We note that you have framed Mr. Durham's mandate as follows: "a preliminary review into whether federal laws were violated in connection with the interrogation of specific detainees at overseas locations".⁶ In particular, you have asked Mr. Durham to recommend "whether there is sufficient predication for a full investigation into whether the law was violated in connection with the interrogation of certain detainees".⁷ In particular, you "emphasize that neither the opening of a preliminary review nor, if evidence warrants it, the commencement of a full investigation, means that charges will necessarily follow".⁸

First, we would remind that serious breaches of international human rights law give rise both to a duty to conduct an independent investigation capable of identifying, prosecuting and punishing those responsible and to the right to a remedy and reparation for victims. Certainly, a preliminary review would not necessarily mean that a full investigation or prosecutions will follow; however, the Department of Justice should ensure that all procedural and other steps are taken to ensure that its investigation is capable of arriving at the truth, and that where information is adduced indicating that crimes have been committed, that an independent decision whether or not to pursue criminal charges is taken.

Second, it is of course important that the cases of these "specific detainees" are now thoroughly reviewed. However, we note with concern your statement on August 24th that you "share the President's conviction that as a nation, we must, to the extent possible, look forward and not backward when it comes to issues such as these".⁹ We are concerned that when the Attorney General provides broad statements about the political merits of revisiting the past, this may fetter the discretion of prosecutors to determine whether certain alleged criminal acts merit prosecution. Whether a particular case should be prosecuted, should depend on the individual circumstances of the case, considering among other factors, the gravity of the alleged crimes and the sufficiency of the evidence. Therefore, beyond these cases relating to "specific detainees", we would note that there are other allegations of CIA abuse that require investigation, many of which are just as pressing.

We would, similarly remind you that the Department of Justice is not limited by the mandate given to Mr. Durham; rather in light of the widely-reported crimes committed since September 11, it continues to have an

⁴ Statement of Attorney General Eric Holder Regarding a Preliminary Review into the Interrogation of Certain Detainees (24 Aug. 2009).

⁵ This represents an extension of his current mandate (to investigate the destruction of CIA videotapes of detainee interrogations) to encompass this related review.

⁶ Statement of Attorney General Eric Holder Regarding a Preliminary Review into the Interrogation of Certain Detainees (24 Aug. 2009) [underline added].

⁷ Statement of Attorney General Eric Holder Regarding a Preliminary Review into the Interrogation of Certain Detainees (24 Aug. 2009) [underline added].

⁸ Statement of Attorney General Eric Holder Regarding a Preliminary Review into the Interrogation of Certain Detainees (24 Aug. 2009).

⁹ Statement of Attorney General Eric Holder Regarding a Preliminary Review into the Interrogation of Certain Detainees (24 Aug. 2009).

obligation in accordance with the UN Torture Convention, to ensure that there are no impediments to investigations of torture allegations, prosecutions or punishments.¹⁰

The continued failure to investigate such crimes may be considered as if the US Government is effectively granting *de facto* amnesties to the perpetrators, which have been universally outlawed as being inconsistent with the duty to prosecute the most serious crimes.¹¹ We would, therefore, urge the Department of Justice to put in place systems to investigate and prosecute the full spectrum of alleged crimes, without seeking to protect certain officials from liability, or certain practices from prosecutorial scrutiny.

2. Command Responsibility

REDRESS is concerned by your statement on August 24th that,

...they [the men and women in your intelligence community] need to be protected from legal jeopardy when they act in good faith and within the scope of legal guidance. That is why I have made it clear in the past that the Department of Justice will not prosecute anyone who acted in good faith and within the scope of the legal guidance given by the Office of Legal Counsel regarding the interrogation of detainees. I want to reiterate that point today, and to underscore the fact that this preliminary review will not focus on those individuals [underline added].¹²

As currently framed, the preliminary review targets only low-ranking officials acting outside of legal guidance. This is particularly objectionable given the numerous indications of involvement of senior officials, and the very questionable and cynical legal guidance that was provided at the time. As you will know, the doctrine of "command responsibility" is the concept that senior officials can be held criminally responsible for the acts of their subordinates, where they were in a position to prevent or punish the subordinates' crimes and failed to do so, irrespective of whether the senior official himself gave an order to the commit the crime in question. The Department of Justice, therefore, needs to ensure that those giving the orders, whoever they are and wherever they are placed, are investigated and prosecuted where appropriate.

Therefore, investigations should not be restricted to the individual agents alleged to have carried out the abuse, but should also extend to senior officials, including those in the military, the CIA and the Administration. The UN Committee against Torture has, for example, called on the US Government to "ensure that perpetrators of acts of torture are prosecuted and punished appropriately" and, in particular, to "promptly, thoroughly, and impartially investigate any responsibility of senior military and civilian officials authorizing, acquiescing or consenting, in any way, to acts of torture committed by their subordinates" [underline added].¹³ To emphasise again, this question of responsibility for the ill-treatment/abuse should be conceived of differently from and more widely than who was directly and immediately responsible for inflicting the abuse.

Equally, low-ranking officials cannot evade criminal liability by relying on "superior orders" – as the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (which the US

¹⁰ Article 4 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), states: "[e]ach State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture. 2. Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature".

¹¹ See, for example, UN Human Rights Committee, 'General Comment No. 20 (Article 7)', UN Doc. No. HRI/GEN/1/Rev.1 at 30 (1994) at para. 15; and *Barrios Altos v. Peru*, Inter-American Court of Human Rights, Series C No. 75, (14 March 2001), at para. 41.

¹² Statement of Attorney General Eric Holder Regarding a Preliminary Review into the Interrogation of Certain Detainees (24 Aug. 2009).

¹³ Committee against Torture, 'Concluding Observations: USA', UN Doc. CAT/C/USA/CO/2 (25 Jul. 06), at para. 19.

ratified in October 1994) clearly states “[a]n order from a superior officer or a public authority may not be invoked as a justification of torture”.¹⁴

3. *The Need to Tackle Other Crimes Including Extraordinary Renditions*

We would also stress that allegations of serious crimes under international law, including torture committed by or with the complicity or other involvement of US officials in the name of the so-called “War on Terror” extend beyond Afghanistan and Guantanamo Bay to include, for example, the CIA’s “extraordinary rendition” programme and abuses at Abu Ghraib prison in Iraq. The vast majority of these crimes have yet to be investigated or remedied.

The Parliamentary Assembly of the Council of Europe referred to the CIA’s practice of “extraordinary rendition” as a “reprehensible network”¹⁵ and “a clandestine “spider’s web” of disappearances, secret detentions and unlawful inter-state transfers, often encompassing countries notorious for their use of torture” in which “[h]undreds of persons have become entrapped ..., in some cases merely suspected of sympathising with a presumed terrorist organisation”.¹⁶ The Parliamentary Assembly explicitly “condemn[ed] the systematic exclusion of all forms of judicial protection and regrets that, by depriving hundreds of suspects of their basic rights, including the right to a fair trial, the United States has done a disservice to the cause of justice and has tarnished its own hard-won reputation as a beacon of the defence of civil liberties and human rights”.¹⁷

We find it deeply regrettable that the Obama Administration is, according to certain news reports, considering continuing with the practice of “extraordinary rendition”.¹⁸ The fact that this practice is apparently still in use by the Administration should not deter the investigation of crimes associated with it. The practice of extraordinary rendition has had a devastating effect on the rule of law internationally and, the treatment of the individual in preparation for and/or during the rendition flight itself may constitute torture or other ill-treatment, the prohibition of which is absolute under international law.¹⁹ We would further remind that this practice of sending detainees to other countries for interrogation does not release the US Government from its obligations under international human rights law, and if an official willfully exposed the individual to the risk of torture or other ill-treatment, would also potentially constitute a criminal offence worthy of investigation and prosecution.²⁰

As a matter of urgency, the Department of Justice should, therefore, ensure the independent investigation of crimes allegedly committed by its officials, at home and abroad.

Furthermore, one of the consequences of the *jus cogens* character bestowed upon the prohibition of torture is that states are entitled to exercise universal jurisdiction over such crimes, and in accordance with the UN Torture

¹⁴ Article 2(3) of the UNCAT.

¹⁵ Council of Europe, Parliamentary Assembly, ‘Alleged Secret Detentions and Unlawful Inter-State Transfers of Detainees Involving Council of Europe Member States’, Doc. 10957, (12 June 2006), at 1.

¹⁶ Council of Europe, Parliamentary Assembly, ‘Alleged Secret Detentions and Unlawful Inter-State Transfers of Detainees Involving Council of Europe Member States’, Doc. 10957, (12 June 2006), both at para. 5 of the draft resolution.

¹⁷ Council of Europe, *ibid.*, at para. 8 of the draft resolution.

¹⁸ Brian Knowlton and Maria Newman, ‘Renditions May Continue Under Interrogation Unit’, *New York Times Online*, (24 Aug. 2009) available at: www.nytimes.com/2009/08/25/us/politics/25interrogate.html?_r=1

¹⁹ *See*, Articles 1 and 16 of the UNCAT and Articles 7 and 10 of the International Covenant on Civil and Political Rights (ICCPR).

²⁰ *See*, Article 3 of the UNCAT, and Article 7 of the ICCPR as interpreted by the HRC, ‘General Comment No. 20 (Article 7)’, UN Doc. No. HRI/GEN/1/Rev.1 at 30 (1994) at para. 9. The absolute principle of *non-refoulement* forms an integral part of the absolute prohibition of torture and other ill-treatment, *see e.g.* *Soering v. United Kingdom*, Eur. Ct. H.R., App. No. 14038/88 (7 Jul. 1989) at para. 88.

Convention are required to investigate with a view to prosecuting suspects found on their territories, in the absence of an extradition request. Such cases are important, given the transnational aspects of such crimes, the presence of suspects in territories outside of the states where the crimes are said to have taken place, and the failure of many states to impartially investigate torture cases whether by reason of state inaction, the application of amnesties, immunities or other barriers impeding trials (particularly in countries where torture is state-sanctioned or endemic).

You will be aware of a number of indictments issued against US officials. For example, we note the indictment in Italy in February 2007 of 25 CIA agents, a US Air Force official, and seven Italians (including the former head of Italian military intelligence) for their alleged involvement in the "extraordinary rendition" of Mr. Abu Omar, an Egyptian national residing in Italy, from Milan to Egypt where he was allegedly tortured.²¹

The Department of Justice should ensure that it either enters discussions with these foreign prosecution services with a view to taking over the prosecution of US agents and officials in the US; or fully cooperates and engages with these foreign proceedings to bring those responsible to account, by agreeing to extradite these individuals for trial and information-sharing.

4. "State Secrecy & "Extraordinary Rendition"

The Department of Justice's claims of "state secrets" in lawsuits seeking redress for human rights violations committed since September 11, seems at odds with the steady release of further information about these abuses. For example, as Director of the Central Intelligence Agency Leon E. Panetta noted in a recent statement to employees on the release of material on past detention practices, "[t]his is in many ways an old story. The outlines of prior interrogation practices, and many of the details, are public already".²²

REDRESS has intervened in several such cases before the US courts, in which victims of "extraordinary rendition" are seeking reparation from the US government and others.²³ While the protection of national security interests may reflect a legitimate aim, the application of the "state secrets" privilege cannot extinguish the right to a remedy completely but must only constrain the right in a proportionate and least restrictive manner. In light of the Department of Justice's recognition of the need to investigate CIA abuses, and the slow trickle of new information coming to light, we would encourage you to re-consider your assertions of "state secrecy" in such cases.

In particular, we note that the case of *El-Masri v. United States*, which failed in its efforts to get redress before the US domestic courts, has recently been referred to the US by the Inter-American Commission of Human Rights, and would urge the Department of Justice to fully engage with the Commission in this process.

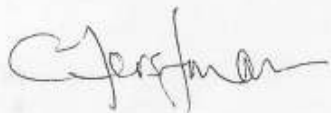
²¹ See e.g., International Commission of Jurists, 'Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights', (2009) at 86-87.

²² Statement to Employees by Director of the Central Intelligence Agency Leon E. Panetta on Release of Material on Past Detention Practices (24 Aug. 09).

²³ For example, REDRESS and the World Organisation Against Torture (OMCT) intervened in *Khuzami v. Michael Chertoff, Secretary, Department of Homeland Security, et. al.*, before the US Court of Appeals for the Third Circuit in April 2008; REDRESS and the International Commission of Jurists intervened in *Binyam Mohamed et. al. v. Jeppesen Dataplan Inc.*, before the US Court of Appeals for the Ninth Circuit in July 2008; and REDRESS intervened in *Arar v. Ashcroft*, before the US Court of Appeals for the Second Circuit in October 2008. Finally, REDRESS has also intervened in *El-Masri v. United States*, before the Inter-American Commission on Human Rights in March 2009. These *amicus curiae* briefs are available at: http://www.redress.org/casework_and_other_submissions.html

We hope this letter will be useful to the preliminary review. We are available to assist further on anything arising, and look forward to hearing from you.

Yours Sincerely,

A handwritten signature in cursive script, appearing to read "C. Ferstman".

Carla Ferstman
Director
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