

Mr. Emilio Álvarez Icaza
Executive Secretary
Inter-American Commission on Human Rights
Organization of American States
1889 F Street, NW Washington, DC 20006

23 October 2015

**Re: Hearing on the Human Rights Situation of Persons Affected by the U.S.
Rendition, Detention, and Interrogation Program**

Dear Mr. Emilio Álvarez Icaza:

Introduction

I would like to thank the honorable Inter-American Commission Human Rights and the American Civil Liberties Union (ACLU) and the New York University School of Law Center for Human Rights and Global Justice for inviting me to testify in this hearing to address matters related to the situation of human rights of persons affected by the United States rendition, detention, and interrogation program, during the Commission's 156th ordinary session.

The CIA Secret Detention and Extraordinary Rendition Programs

The recently released excerpts of the Senate Select Committee on Intelligence on the Central Intelligence Agency (CIA) Detention and Interrogation Program Report (“the Report”) establishes that between 2002 and 2007, the CIA forcibly disappeared, detained, interrogated and subjected more than 100 persons to torture and other forms of ill-treatment as part of the Rendition, Detention, and Interrogation Program, in collaboration with a global network of more than 50 other States. The use of overseas detention facilities (“black-sites”) in locations around the world, including Afghanistan, Eastern Europe, Thailand, and Guantánamo Bay, is well documented. In addition, the CIA rendered other individuals to third countries for detention and interrogation. Despite the fact that these practices were approved and coordinated by high-level Government officials and carried out by State agents, criminal and civil accountability for the abuses committed is lacking.

The acts of torture and other ill-treatment perpetrated as part of the programs were designed to take place extraterritorially and clandestinely, leading directly to the present lack of accountability and extant impunity for the violations committed. In this context, the Report and its findings have significant potential for compiling evidence that may be used by the State to fulfill its fundamental international legal obligations to investigate, prosecute, and punish those responsible for committing, ordering, or tolerating acts of torture and other ill-treatment. The so-called “enhanced interrogations techniques,” such as water boarding, stress positions, sleep deprivation, forced nudity, insults, and violence, and dietary manipulation, among others, that have been documented in the Report amount to torture or cruel, inhuman and degrading treatment or punishment (“other ill-treatment”)—if not on their own, when used in combination and, specially, when coupled with arbitrary detention, lack of due process, and incommunicado

and secret detention.

The release of the Report contributes to the United States fulfilling its obligations with respect to telling the truth. However, truth-telling does not simply entail revealing facts; there needs to be an official acknowledgement and acceptance of responsibility. Additionally, it is only a first step in the direction of fulfilling other US obligations under international law and specifically under the [Convention Against Torture](#) (“the Convention”), namely to combat impunity and ensure accountability by investigating and prosecuting those responsible. The Report unequivocally concludes that US high officials have promoted, encouraged and allowed the use of torture after September 11, 2001. The serious abuses detailed in the report constitute basic violations of international human rights law.

The United States Government has a responsibility under international law to let the American people know what happened during the years when extraordinary rendition, secret detention, and so-called enhanced interrogation techniques were practiced, and to ensure accountability and transparency to the fullest extent possible. The Government’s reluctance to work with international authorities on the issue of accountability for human rights violations has made it easier for other nations to shirk their responsibilities. In my work around the world I have regrettably found that the example set by the United States on the use of torture has been a big draw-back in the fight against such practice elsewhere. As a party to the Convention the Government has an obligation to thoroughly and promptly investigate credible reports of torture, ensure accountability, and provide adequate remedies to victims.

The International Legal Prohibition of Torture and Other Ill-Treatment—Including Extraterritorially

In my interim report to the General Assembly dated 7 August 2015 ([A/70/303](#)), I elaborated on the extraterritorial application of the prohibition of torture and other ill-treatment and attendant obligations under international law. In this report I reminded States that the *jus cogens* non-derogable prohibition against torture and other ill-treatment in international law, which is applicable to all states, cannot be territorially limited, and that any jurisdictional references found in the Convention cannot be read to restrict or limit States’ obligations to respect all individuals’ rights to be free from torture and ill-treatment, anywhere in the world. This prohibition and attendant obligations—such as the obligation to investigate, prosecute, and punish every act of torture and ill-treatment, to exclude evidence obtained by torture and other ill-treatment from all proceedings, and to refrain from enabling refoulement to torture or other ill-treatment—are norms of customary international law and are also codified in legal instruments like the Convention.

The impetus for my report was my serious concern over States’ growing attempts to undermine the absolute legal prohibition of torture and other ill-treatment by evading or limiting responsibility for extraterritorial acts or effects produced by their agents that contravene their fundamental legal obligations. The legal prohibition against torture would be meaningless if States are in practice able to mistreat victims outside their borders with the complicity of other States. States cannot be allowed to avoid responsibility contravening fundamental norms on technical grounds pertaining to the territorial locus of the violations and other jurisdictional

loopholes. This is particularly relevant to the cases of extraordinary rendition, secret detention, and torture conducted by or with the involvement of the CIA in the aftermath of September 11, 2001 abroad.

In this context, it is clear that the applicability of extant legal standards to torture or other ill-treatment committed, sponsored, aided or effectively controlled or influenced by States outside their territories can create incentives for States to avoid absolute legal obligations and amount to serious breaches of international law. Whenever States bring a person within their jurisdiction by exercising control or authority over an area, place, individual or transaction they are bound by their fundamental obligation not to engage in or contribute to such acts. States moreover have an obligation to protect persons from torture and other ill-treatment and to ensure a broad range of attendant human rights obligations whenever they are in a position to do so by virtue of their control or influence extraterritorially over an area, place, transaction or persons.

The Obligation to Investigate, Prosecute, and Punish All Acts of Torture and Other Ill-Treatment

The prohibition of torture is a customary international norm that admits no exception or derogation. It is a *jus cogens* norm. States cannot recur or tolerate torture under any circumstance, including war, threats to national security, or the fight against terrorism. From this obligation, instruments like Convention and [International Covenant on Civil and Political Rights](#) (“the Covenant”) derive another fundamental obligation, which is the obligation to investigate all allegations of torture and other ill-treatment and to, when appropriate, prosecute, and punish those responsible for the violations. In compliance with this obligation, States have no discretion and are obliged to diligently and effectively investigate all allegations in which there are reasonable grounds to believe that torture may have occurred.

The core purpose of the Convention was the universalization of a regime of criminal punishment for perpetrators of torture, building upon the regime already in existence under international human rights, customary international law, and international humanitarian law. Article 5 (1) obliges States to establish jurisdiction over all acts of torture on the territoriality, flag, active nationality and passive nationality principles. All States have a customary international law obligation to investigate, prosecute and punish all acts of torture and other ill-treatment as codified, inter alia, in the Convention.

Article 12 of the Convention requires the competent authorities to undertake a prompt and impartial investigation wherever there are reasonable grounds to believe that torture has been committed, and article 7 requires State parties to prosecute suspected perpetrators of torture. Paragraph 7b of Human Rights Council Resolution 16/23 ([A/HRC/RES/16/23](#)), urges States “(t)o take persistent, determined and effective measures to have all allegations of torture or other cruel, inhuman or degrading treatment or punishment investigated promptly, effectively and impartially by an independent, competent domestic authority, as well as whenever there is reasonable ground to believe that such an act has been committed; to hold persons who encourage, order, tolerate or perpetrate such acts responsible, to have them brought to justice and punished in a manner commensurate with the gravity of the offence, including the officials in

charge of the place of detention where the prohibited act is found to have been committed; and to take note, in this respect, of the Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the updated set of principles for the protection of human rights through action to combat impunity as a useful tool in efforts to prevent and combat torture.”

The United States and all other States involved or that collaborated in the execution of these programs need not only to initiate independent and effective investigations, but also disclose all information related to them, much of which remain kept secret and confidential, reinforcing the clandestine nature of the programs. Under the [Draft Articles on State Responsibility for Internationally Wrongful Acts](#), States may never recognize as lawful a situation created by a serious breach of their obligations under peremptory norms of international law, like the prohibition against torture, and should cooperate to bring the breach to an end rather than provide aid or assistance to its continuation. Under the Convention, States are required to cooperate with criminal and civil legal proceedings involving claims of torture, rather than seek to block, otherwise hinder or ignore those proceedings, for instance in terms of providing evidence and other forms of mutual legal assistance. Competent courts in States parties to the Convention are obligated to exercise jurisdiction over acts of torture and ill-treatment, irrespective of the locus where wrongfulness took place. In this context, States may not employ restrictive doctrines, such as State secrets or political questions in an effort to obstruct investigations or prosecutions and evade responsibility for grave breaches of international law, such as the commission of torture and other ill-treatment.

The Right to Redress for Victims of Torture and Other Ill-Treatment in International Law

The right of redress¹ for victims of torture and ill-treatment has always been a fundamental issue for my mandate, during which I have advocated for a victim-centered perspective that seeks an integrated, long-term approach to adequate redress and reparations, which in particular focuses on compensation, redress, reparations, and rehabilitation for victims of torture and ill-treatment and their families. Denying torture victims access to effective judicial remedies is a violation of State obligations under article 14 of the Convention and undermines the international community’s commitment to the elimination of torture.

In March 2013, the UN Human Rights Council adopted an important resolution on redress for victims of torture ([Resolution A/HRC/22/L.11](#)) that calls upon States to provide equal and effective remedy and reparation to victims of torture and ill-treatment and encourages putting victims and their needs at the center of redress procedures. In its third General Comment ([CAT/C/GC/3](#)), the Committee Against Torture (“the Committee”) states that all States parties are required to “ensure in [their] legal system[s] that the victim of an act of torture obtains

¹ Article 2 (3) of the ICCPR states that “[e]ach State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted.”

redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible.” The Committee considers that article 14 is applicable to all victims of torture and other ill-treatment without discrimination of any kind, in line with the Committee’s General Comment No. 2. The Committee furthermore identifies the *restoration of the victim’s dignity* as the main objective of the provision of redress. The term “redress” in article 14 encompasses the concepts of “effective remedy” and “reparation.”

The approach to redress needs to be comprehensive. States need to ensure the right of victims to obtain reparation, including redress, fair and adequate compensation, and the means for as full rehabilitation as possible. The comprehensive reparative concept therefore entails restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition, and refers to the full scope of measures required to redress violations under the Convention. General Comment No. 3 additionally highlights that solely monetary compensation is insufficient, and that full rehabilitation should include medical and psychological care, as well as social and legal assistance, including costs associated with bringing claims for redress. States need to ensure access to rehabilitation services either through state healthcare systems or through civil society-based centers, and, fundamentally, rehabilitation needs to be holistic, meaning that it has to be appropriate and tailored to the needs of the victim and the particular experience they went through. Rehabilitation hence may include medical and psychological treatment as well as community and family-based care and social, educational and vocational services.

Access to rehabilitation programs should not be dependent on the victim’s pursuit of judicial remedies. International law imposes on States an obligation to prevent torture. When this obligation is not met, it is the States’ obligation to provide redress by first conducting the necessary investigation and prosecutions, but also by putting into place all the legislative, judicial and administrative measures and institutions that will ensure access to remedies, reparations and rehabilitation, and also by removing all obstacles, legal or otherwise. Failure to comply with these obligations constitutes a violation of article 14 of the Convention because access to redress is not sufficiently assured.

I have consistently called for Article 14 to be interpreted in light of the [Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law](#) (“the Principles”) The Principles make clear that “*the obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, inter alia, the duty to:*

- (b) Investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law;*
- (c) Provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, as described below, irrespective of who may ultimately be the bearer of responsibility for the violation; and*
- (d) Provide effective remedies to victims, including reparation.”*

In addition, the Principles state that in cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, such as torture, “*States have the duty to investigate and, if there is sufficient evidence, the*

duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him. Moreover, in these cases, States should, in accordance with international law, cooperate with one another and assist international judicial organs competent in the investigation and prosecution of these violations.”

As explained in my report, Article 14 is not geographically limited on its face and will apply no matter where the torture takes place. The Committee authoritatively considers that the application of article 14 is not limited to victims who were harmed in the territory of the State party or by or against nationals of the State party. The understanding submitted by the United States that article 14 was limited to territory under a State’s jurisdiction is at odds with its legislation (i.e. Alien Tort Claims Act) and jurisprudence. It has been rejected by subsequent action, such as the enactment of the Torture Victim Protection Act, and in any event indicates the otherwise comprehensive extraterritorial applicability of the article. Under customary international law a State’s duty to make reparation for an injury is inseparable from its responsibility for commission of an internationally wrongful act and, as such, the right to an effective remedy is applicable extraterritorially.


The right to a remedy is fundamental under international law and must be accessible to victims irrespective of where the violation occurred. Under article 14, a State party shall ensure that victims of any act of torture or ill-treatment under its jurisdiction access a remedy and obtain redress, the right to which underpins the entire Convention. In this context, and as explained by the Committee, State parties have an obligation to take all necessary and effective measures to ensure that all victims of these acts obtain redress, including to promptly initiate a process to ensure that victims obtain redress, even in the absence of a complaint, when there are reasonable grounds to believe that torture or ill-treatment has taken place. Securing the victim’s right to redress requires that a State Party’s competent authorities promptly, effectively and impartially investigate and examine the case of any individual who alleges she or he has been subjected to torture or other ill-treatment. Accordingly, The Committee authoritatively states that undue delays in initiating or concluding legal investigations into complaints of torture or ill-treatment compromise victims’ rights under article 14.

In addition, State parties to the Convention have an obligation to ensure that the right to redress is effective. According to the Committee, specific obstacles that impede the enjoyment of the right to redress and prevent effective implementation of article 14 include discrimination in accessing complaints and investigation mechanisms and procedures for remedy and redress; inadequate measures to secure the custody of alleged perpetrators; state secrecy laws; evidential burdens and procedural requirements that interfere with the determination of the right to redress; statutes of limitations; amnesties and immunities; the failure to provide sufficient legal aid and protection measures for victims and witnesses; as well associated stigma, and the physical, psychological and other related effects of torture and ill-treatment.

The Committee has further stated that 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 the full insurance of their rights under article 14, and has affirmed that under no circumstances may arguments of national security be used to deny redress for victims.

I find that a State's failure to investigate, criminally prosecute, or allow civil proceedings—or efforts to block or hinder such proceedings—relating to allegations of torture or other forms of ill-treatment constitutes de facto denial of an effective remedy. An essential component of the obligation to provide redress under international law is the obligation not to obstruct redress or obstruct access of an individual to an effective remedy by invoking “State secrets” to dismiss lawsuits *in limine litis*. This has regrettably been the case regarding victims of rendition and other extraterritorial acts of torture and ill-treatment seeking redress from the Government.

I thank the honorable Commission for the opportunity to present this testimony.

A handwritten signature in black ink, appearing to read "J. Méndez". The signature is written in a cursive style with a horizontal line underneath the name.

Juan E. Méndez
Special Rapporteur on torture and other cruel, inhuman, or degrading treatment or punishment