

# **FACTUAL AND LEGAL BASIS FOR PROSECUTION OF GEORGE W. BUSH**

## **PURSUANT TO THE CANADIAN CRIMINAL CODE AND THE CONVENTION AGAINST TORTURE**

### **I. FACTUAL BACKGROUND**

#### **A. George W. BUSH**

1. From January 20, 2001 to January 20, 2009, George W. BUSH served as president of the United States of America and Commander in Chief of the United States Armed Forces. Pursuant to Article II of the United States Constitution, executive power was vested in BUSH, as president of the United States. Upon assuming office, BUSH took an oath to “preserve, protect and defend” the Constitution of the United States.

2. In his capacity as president of the United States and Commander in Chief, BUSH had authority over the agencies of the United States government, including but not limited to, the Central Intelligence Agency (CIA), the Department of Defense (DOD), the Department of Justice (DOJ), including the Federal Bureau of Investigation (FBI), the Department of Homeland Security (DHS), the Department of State (DOS), as well as over the White House and the Office of the Vice President.

3. BUSH chaired the National Security Council (NSC), which advises and assists the president on national security and foreign policies, and serves as the president's principal arm for coordinating these policies among various government agencies.<sup>1</sup>

4. It has been publicly and widely reported that BUSH will be present in Surrey, British Columbia on October 20, 2011, to appear as a paid-speaker at an economic forum to be held at the Sheraton Vancouver Guildford Hotel.<sup>2</sup> It is recalled that BUSH travelled to Toronto, Canada on September 19, 2011 to give a talk at the Hilton Hotel, for which he was reportedly paid between US\$100,000 and \$150,000; the Royal Canadian Mounted Police (RCMP) “facilitated traffic and security” for BUSH's visit.<sup>3</sup>

## **B. Overview of U.S. Detention Policies and Torture Program**

5. On September 14, 2001, BUSH issued the “Declaration of National Emergency by reason of Certain Terrorist Attacks,”<sup>4</sup> following the September 11<sup>th</sup> terrorist attacks.

6. On September 17, 2001,<sup>5</sup> BUSH issued a 12-page directive (known as a “memorandum of notification”) that went to the Director of the CIA and members of the National Security

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<sup>1</sup> See National Security Council, available at <http://www.whitehouse.gov/administration/eop/nsc/>: “Its regular attendees (both statutory and non-statutory) are the Vice President, the Secretary of State, the Secretary of the Treasury, the Secretary of Defense, and the Assistant to the President for National Security Affairs. The Chairman of the Joint Chiefs of Staff is the statutory military advisor to the Council, and the Director of National Intelligence is the intelligence advisor. The Chief of Staff to the President, Counsel to the President, and the Assistant to the President for Economic Policy are invited to attend any NSC meeting. [...]”

<sup>2</sup> Presidents Clinton and Bush at 2011 Surrey Regional Economic Summit, Feb. 1, 2011, available at <http://www.surrey.ca/city-government/8019.aspx>; “Surrey Regional Economic Summit” available at <http://www.surrey.ca/for-business/3580.aspx> (describing BUSH, and former U.S. president Bill Clinton as “two individuals who have, by any measure, played major roles in shaping domestic and international events over the past 20 years” who will be “sharing invaluable perspectives on the new realities facing North America.” (EXHIBIT 1). Registration for the conference is CDN\$599, available at <http://www.sres2011.com/>. See also Letter from Lawyers Against the War to Prime Minister Stephen Harper et al., Re: Visit of George W. Bush on October 20, 2011: Canada must prevent entry or arrest and ensure prosecution for torture, Aug. 25, 2011, available at [http://www.lawyersagainsthewar.org/letters/LAW\\_letter\\_re\\_George\\_Bush\\_20110825.pdf](http://www.lawyersagainsthewar.org/letters/LAW_letter_re_George_Bush_20110825.pdf).

<sup>3</sup> B. Kennedy, *George W. Bush comes and goes, Toronto Barely Notices*, The Toronto Star, Sept. 21, 2011, available at <http://www.thestar.com/printarticle/1057078>.

<sup>4</sup> Available at <http://www.federalregister.gov/articles/2001/09/18/01-23358/declaration-of-national-emergency-by-reason-of-certain-terrorist-attacks>.

Council, in which BUSH authorized the CIA to capture suspected terrorists and members of Al-Qaeda, and to create detention facilities outside the United States where suspects can be held and interrogated.<sup>6</sup> BUSH's directive marked the official launching of the CIA program by vesting the agency with unprecedented power. The document was "a means of granting the CIA important new competences relating to its covert actions: new choices it could make and new ways it could respond if confronted with Al-Qaeda targets in the field."<sup>7</sup> This directive has not been publically released.

7. According to Swiss Senator Dick Marty's 2007 Report to the Council of Europe, BUSH had been personally involved in the conception, discussion, and formulation of this new strategy. The September 17, 2001 directive, referred to by Marty as a "Presidential Finding," is said to

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<sup>5</sup> The following day, the Authorization for the Use of Military Force ("AUMF") (Pub. L. 107-40, 115 Stat. 224 (2001)), was enacted upon BUSH's signature to a joint resolution passed by the U.S. Congress on September 14, 2001, authorizing the use of force by the U.S. Armed Forces against those responsible for the September 11<sup>th</sup> attacks. The AUMF granted BUSH the authority to use all "necessary and appropriate force" against those whom he determined "planned, authorized, committed or aided" the September 11th attacks, or who harbored said persons or groups (EXHIBIT 2).

<sup>6</sup> The directive has yet to be publically released. It has been discussed in numerous news stories (*see, e.g., Timeline: History of Harsh Interrogation Techniques*, available at <http://www.npr.org/templates/story/story.php?storyId=103376537>; G. Kessler, *U.S. Decision on Iraq Has Puzzling Past*, Washington Post, Jan. 12, 2003, available at <http://www.washingtonpost.com/ac2/wp-dyn/A43909-2003Jan11>). *See also* GEORGE TENET, AT THE CENTER OF THE STORM: THE CIA DURING AMERICA'S TIME OF CRISIS 208 (Harper 2007) (written by former CIA director): "The president approved our recommendations on Monday, September 17, and provided us broad authorities to engage al-Qa'ida. As Cofer Black [chief of the CIA Counterterrorist Center] later told Congress, 'the gloves came off' that day." (EXHIBIT 3). It has also been the subject of on-going litigation under the Freedom of Information Act. *See* Eighth Declaration of Marilyn A. Dorn Information Review Officer Central Intelligence Agency, *ACLU, et al. v. Department of Defense, et al.*, No. 04 Civ. 4151 (S.D.N.Y. Jan. 5, 2007), at 33-38, available at [http://www.aclu.org/files/pdfs/natsec/20070105\\_Dorn\\_Declaration\\_8.pdf](http://www.aclu.org/files/pdfs/natsec/20070105_Dorn_Declaration_8.pdf) ("Dorn Declaration") (EXHIBIT 4).

The CIA detention program is discussed in the CIA Inspector General's *Special Review: Counterterrorism, Detention and Interrogation Activities, September 2001 – October 2003*, dated May 7, 2004 and publically released on August 24, 2009 ("CIA IG Report") (EXHIBIT 5). The CIA IG Report was released as part of long-running Freedom of Information Act (5 U.S.C. § 552) litigation. *See* [http://www.aclu.org/human-rights\\_national-security/cia-office-inspector-generals-may-2004-counterterrorism-detention-and](http://www.aclu.org/human-rights_national-security/cia-office-inspector-generals-may-2004-counterterrorism-detention-and) and Report, available at [http://luxmedia.com.edgesuite.net/aclu/IG\\_Report.pdf](http://luxmedia.com.edgesuite.net/aclu/IG_Report.pdf).

<sup>7</sup> Senator Dick Marty (Switzerland), Council of Europe Parliamentary Assembly, *Secret detentions and illegal transfers of detainees involving Council of Europe member States: second report*, CoE Doc. 11302 rev, 11 June 2007, available at <http://assembly.coe.int/Documents/WorkingDocs/Doc07/edoc11302.pdf> ("Marty Report"), at 14, para 58 (EXHIBIT 6)

have “create[d] paramilitary teams to hunt, capture, detain, or kill designated terrorists almost anywhere in the world.”<sup>8</sup> Marty’s Report shed further light on what the directive was intended to achieve:

Our team has spoken with several American officials who have seen the text of the Presidential Finding and participated in the operations that put it into action. Two particularly striking observations have emerged from these discussions. First, by putting “*a lot of stock in Special Activities*” the Finding “*redefined the role of the Agency*,” even in the eyes of some of its own, more conservative senior officials. Second, the “*really broad, not specific*” scope of the covert actions authorised in the Finding meant that the CIA was instantly granted enough room for manoeuvre to design a secret detentions programme overseas.<sup>9</sup>

8. The International Committee of the Red Cross (“ICRC”) was refused access to detainees held in the CIA program.<sup>10</sup> As revealed through a 2007 ICRC report, the ICRC made repeated requests to the United States to grant it access to the detainees generally, including specific detainees whom the ICRC believed to be, and were in fact, held by the CIA in secret detention sites outside of the United States.<sup>11</sup>

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<sup>8</sup> Jane Mayer, *The Black Sites*, *The New Yorker*, Aug. 13, 2007, at 5, available at [http://www.newyorker.com/reporting/2007/08/13/070813fa\\_fact\\_mayer?currentPage=all](http://www.newyorker.com/reporting/2007/08/13/070813fa_fact_mayer?currentPage=all).

<sup>9</sup> Marty Report, *supra* n. 7, at 14, para 59. Marty added “My conclusion that President Bush put the CIA at the forefront of his “war machinery” is corroborated by numerous CIA insiders.” at 16, fn. 29. The work of the “Temporary Committee on the alleged use of European countries by the CIA for the transport and illegal detention of prisoners” (TDIP) led to the adoption by the European Parliament in 2006 of a resolution on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners (2006/2200(INI)). See European Parliament resolution on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners (2006/2200(INI)), available at [http://www.europarl.europa.eu/comparl/tempcom/tdip/final\\_ep\\_resolution\\_en.pdf](http://www.europarl.europa.eu/comparl/tempcom/tdip/final_ep_resolution_en.pdf) (“EP Resolution”) (EXHIBIT 7). The EP Resolution states *inter alia* “imposing or executing or allowing directly or indirectly secret and illegal detentions, which are instruments resulting in people’s ‘disappearance’, constitute serious violations of human rights per se.”

<sup>10</sup> Indeed, the ICRC was not informed by the U.S. government of the CIA detention program.

<sup>11</sup> ICRC, Report to John Rizzo, Acting General Counsel, CIA, *ICRC Report on the Treatment of Fourteen “High Value Detainees” in CIA Custody* (Feb. 14, 2007) (detailing ICRC findings following interviews with 14 “high value detainees” transferred to Guantánamo in September 2006), available at <http://www.nybooks.com/media/doc/2010/04/22/icrc-report.pdf> (“ICRC CIA Detainee Report”) (EXHIBIT 8) .

9. On October 7, 2001, BUSH announced that, on his orders, “the United States military has begun strikes against al Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan.”<sup>12</sup>

10. On November 13, 2001, BUSH authorized the detention of alleged terrorists and subsequent trial by military commissions, which he ordered would not be subject to the principles of law and rules of evidence applicable to trials held in U.S. federal courts.<sup>13</sup> In this order, BUSH vested himself with the power to detain and try by military commission a broad category of persons believed to be linked to acts of international terrorism.<sup>14</sup> In this order, BUSH further vested his Secretary of Defense, Donald Rumsfeld, with certain powers related to the detention of such persons and the establishment of military commissions. BUSH emphasized that tasking his subordinate, Rumsfeld, with these responsibilities related to detention policies “shall not be construed to limit the authority of the President as Commander in Chief of the Armed Forces [...]”<sup>15</sup> Finally, through this order, BUSH purported to strip detainees of the power to seek a remedy not only in U.S. federal courts but also in “any court of any foreign nation, or any international tribunal.”<sup>16</sup>

11. By late 2001, BUSH was planning for the detention of individuals at the U.S. Naval Station at Guantánamo Bay, Cuba (Guantánamo) as evidenced by memoranda addressing the

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<sup>12</sup> See *Bush Announces Strikes Against Taliban*, Washington Post, Oct. 7, 2001, available at [http://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/bushaddress\\_100801.htm](http://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/bushaddress_100801.htm). Pursuant to a request by Bush’s office for a legal opinion regarding the scope of his authority to take military action following the September 11, 2001 attacks, John Yoo, Deputy Assistant Attorney General wrote a memo to Timothy Flanigan, Deputy Counsel to the President, on September 25, 2001, in which he opined that Bush enjoyed “broad constitutional power” related to the use of military force, whether pre-emptively or for retaliatory purposes.

<sup>13</sup> *Military Order of November 13, 2001: Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism*, Federal Register Vol. 66, No. 2, Nov. 16, 2001, pp. 57831-36, available at <http://www.fas.org/irp/offdocs/eo/mo-111301.htm> (EXHIBIT 9).

<sup>14</sup> Section II(a)(1) includes persons who are, or have been members of al Qaeda; engaged in, aided or abetted, or conspired to commit, acts of terrorism, or preparatory acts that have caused, threaten to cause, or have as their aim to cause, injury or adverse effects on the U.S. and its citizens or policies; and has knowingly harbored someone in the first two categories.

<sup>15</sup> *Ibid.* at Sec. VII(a)(2).

<sup>16</sup> *Ibid.* at Sec. VII(b)(2).

question of whether the U.S. federal courts would have jurisdiction over individuals detained in Guantánamo<sup>17</sup> – a prospect which BUSH sought to foreclose through his November 13, 2001 Order.

12. On January 11, 2002, the first detainees arrived in Guantánamo Bay.

13. On January 18, 2002, BUSH decided that the Third Geneva Convention did not apply to the conflict with al Qaeda or members of the Taliban, and that they would not receive the protections afforded to prisoners of war. This decision was taken upon consideration of advice from John Yoo and Robert Delahunty, both of the Department of Justice Office of Legal Counsel (“OLC”),<sup>18</sup> and the additional oral advice of Chief White House Counsel, Alberto Gonzales.<sup>19</sup>

14. On January 19, 2002, Secretary of Defense Rumsfeld transmitted BUSH’s determination regarding the status of the Taliban and al Qaeda to combatant commanders, along with the order that the commanders should treat such individuals in a manner “consistent” with the “principles” of the Geneva Conventions only “to the extent appropriate and consistent with military

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<sup>17</sup> See Patrick Philbin and John Yoo, Memorandum for William J. Haynes II, General Counsel, Department of Defense, *Possible Habeas Jurisdiction over Aliens Held in Guantanamo Bay, Cuba* (Dec. 28, 2001), available at <http://www.torturingdemocracy.org/documents/20011228.pdf> (EXHIBIT 10).

<sup>18</sup> John Yoo and Robert J. Delahunty, Memorandum for William J. Haynes II, General Counsel, Department of Defense, *Application of Treaties and Laws to al Qaeda and Taliban Detainees* (Jan. 9, 2002), at 1, 11, available at [http://upload.wikimedia.org/wikipedia/en/9/91/20020109\\_Yoo\\_Delahunty\\_Geneva\\_Convention\\_memo.pdf](http://upload.wikimedia.org/wikipedia/en/9/91/20020109_Yoo_Delahunty_Geneva_Convention_memo.pdf) (EXHIBIT 11). A follow-up memorandum was completed, upon request, for BUSH’s Counsel, Alberto Gonzales, and William Haynes on January 22, 2002 by Jay Bybee of the DOJ’s OLC, which came to the same conclusion: international treaties including the Geneva Conventions do not apply to the Taliban or Al Qaeda.

<sup>19</sup> See Senate Armed Services Committee, *Inquiry into the Treatment of Detainees in U.S. Custody*, Nov. 20, 2008, at 1 (“Senate Armed Services Report” or “SASC Report”) (EXHIBIT 12). The full text report, with redacted information, was released in April 2009 and is available at: [http://armed-services.senate.gov/Publications/Detainee%20Report%20Final\\_April%2022%202009.pdf](http://armed-services.senate.gov/Publications/Detainee%20Report%20Final_April%2022%202009.pdf). See also Alberto R. Gonzales, Memorandum for the President, *Decision re Application of the Geneva Convention of Prisoners of War to the Conflict with Al Qaeda and the Taliban* (Jan. 25, 2002) (“January 25 Gonzales Memo to Bush”), available at [http://www.washingtonpost.com/wp-srv/politics/documents/chenev/gonzales\\_addington\\_memo\\_jan252001.pdf](http://www.washingtonpost.com/wp-srv/politics/documents/chenev/gonzales_addington_memo_jan252001.pdf) (EXHIBIT 13). In this memo, Gonzales asserted that the “new paradigm” of the “war on terror” makes certain provisions of the Geneva Conventions “quaint” and indeed “renders *obsolete* Geneva’s strict limitations on questioning of enemy prisoners.” Gonzales noted that the positive “consequences” of such a determination included: eliminating the need to determine the prisoner of war status of detainees on a case-by-case basis; leaving open “options for the future”; and reducing the threat of prosecution under the US War Crimes Act.

necessity.”<sup>20</sup> The combatant commanders were ordered to transmit the content of this memo to the subordinate commanders, including the commander of Joint Task Force (JTF) 160 responsible for Guantánamo.<sup>21</sup>

15. On January 25, 2002, the ICRC made its first visit to the detention facility in Guantánamo Bay.<sup>22</sup>

16. On January 27, 2002, BUSH’s Secretary of Defense, Rumsfeld, visited the U.S. detention facility at Guantánamo.

17. On February 7, 2002, pursuant to his “authority as Commander-in-Chief and Chief Executive of the United States,” BUSH issued a memorandum stating that the Geneva Conventions do not apply to the conflict with al Qaeda, and that Common Article 3 of the Geneva Conventions did not apply to either al Qaeda or Taliban detainees.<sup>23</sup> BUSH called only for detainees to be treated humanely and “to the extent appropriate and consistent with military necessity, in a manner consistent with principles of Geneva,” as a matter of policy – not law.<sup>24</sup> In so doing, BUSH rejected Secretary of State Colin Powell’s calls to reconsider and reverse his January 18, 2002 determination regarding the application of the Geneva Conventions,<sup>25</sup> and disregarded the advice of the Legal Advisor to the State Department that the non-application of

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<sup>20</sup> Secretary of Defense, Memorandum for Chairman of the Joint Chief of Staff, *Status of Taliban and Al Qaeda* (Jan. 19, 2002), available at <http://www.defenselink.mil/news/Jun2004/d20040622doc1.pdf> (EXHIBIT 14).

<sup>21</sup> PHILIPPE SANDS, *TORTURE TEAM: RUMSFELD’S MEMO AND THE BETRAYAL OF AMERICAN VALUES* 31-32 (Palgrave Macmillan 2008).

<sup>22</sup> See *US detention related to the events of 11 September 2001 and its aftermath – the role of the ICRC*, Jul. 30, 2008 (ICRC Operational Update), available at <http://www.icrc.org/eng/resources/documents/update/usa-detention-update-121205.htm> (EXHIBIT 15).

<sup>23</sup> The recipients of the memorandum were: the Vice President, Secretary of State, Secretary of Defense, Attorney General, his Chief of Staff, Director of Central Intelligence, Assistant to the President for National Security Affairs, and the Chairman of the Joint Chiefs of Staff. See George Bush, The White House, Memorandum for the Vice President, et al., *Humane Treatment of Taliban and al-Qaeda Detainees* (Feb. 7, 2002), available at [http://www.pegc.us/archive/White\\_House/bush\\_memo\\_20020207\\_ed.pdf](http://www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf) (EXHIBIT 16).

<sup>24</sup> *Ibid.*

<sup>25</sup> See January 25 Gonzales Memo to Bush, *supra* n. 19

the Geneva Conventions to the conflict in Afghanistan was inconsistent with the plain language of the Geneva Conventions and unvaried practice of the United States in the fifty years since becoming a party to the Conventions.<sup>26</sup>

18. In a memorandum dated March 13, 2002, Assistant Attorney General Jay Bybee advised the General Counsel at the Department of Defense, William J. Haynes II, on the legality of rendering detainees captured in the war against al Qaeda and other terrorist organizations. Bybee concluded “that the President has plenary constitutional authority, as the Commander in Chief, to transfer such individuals who are captured and held outside the United States to the control of another country.”<sup>27</sup> Bybee located considerable discretion in the person of the President, explaining that treaties normally governing detainee transfers “generally do not apply in the context of the current war,” and do not constrain presidential power. He opined,

Even if those treaties were applicable to the present conflict, however, they do not impose significant restrictions on the operation of the President's Commander-in-Chief authority. The [Geneva Convention] imposes some limitations on the transfer of United States-held POWs to other nations. These limitations, however, apply only to individuals who are legally entitled to POW status, and leave the President considerable discretion as to when such transfers are permissible...[T]here are no GPW constraints on the President's ability to transfer al Qaeda prisoners to third countries. The Torture Convention also imposes limitations on transfer, but those restrictions have no extraterritorial effect and thus are not applicable to prisoners who are captured and detained abroad.<sup>28</sup>

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<sup>26</sup> William H. Taft, IV, Legal Adviser, Department of State, Memorandum to Counsel to the President, Alberto Gonzales, *Comments on Your Paper on the Geneva Convention* (Feb. 2, 2002), available at <http://www.texscience.org/reform/torture/taft-2feb02.pdf> (EXHIBIT 17).

<sup>27</sup> Memorandum from Jay S. Bybee, Assistant Attorney General, to William J. Haynes II, General Counsel, Department of Defense (Mar. 13, 2002), at 1, available at <http://www.justice.gov/olc/docs/memorandum03132002.pdf> [hereinafter “2002 Bybee Memo”] (EXHIBIT 18).

<sup>28</sup> *Ibid.* at 2. Bybee also stated, “Although the President is free from ex ante constitutional and domestic law constraints on his ability to transfer military detainees held outside the United States to the custody of foreign nations, criminal penalties could apply to such transfers if they were deemed to be part of a conspiracy to commit an act of torture abroad.” *Ibid.* at 25. The March 2002 Bybee memo further advised, “[R]eading the Torture Convention to apply extraterritorially would interfere with the President's powers as Commander in Chief and Chief Executive to direct the operations of the military.” *Ibid.* at 25.

Bybee further stated that “historical practice firmly supports the power of the President to transfer and otherwise dispose of the liberty of *all* individuals captured incident to military operations, and not merely those individuals who may technically be classified as prisoners of war under relevant treaties.”<sup>29</sup> BUSH embraced Bybee’s interpretation of expanded powers as president in regard to the transfer or rendition of individuals in the custody of the United States.

19. BUSH oversaw and approved the creation of a multi-faceted global detention program in which new so-called “enhanced interrogation” techniques were employed – techniques which constitute torture. This program included the CIA detention program directed at so-called high-value detainees who were held in secret sites across the globe; the use of “extraordinary rendition” which entailed sending a person of interest or terrorist-suspect to a third-country known to employ torture to be detained and interrogated under such conditions; and detention by U.S. military and other government agents at locations outside the United States, including Guantánamo Bay. These three facets of the program will be discussed in turn below.

#### 1. CIA “High-Value Detainee” Program

20. In March 2002, the first “high value detainee” Abu Zubaydah, was detained and interrogated by the CIA.<sup>30</sup> His detention “accelerated” the development of the CIA interrogation program.<sup>31</sup> In his memoir *DECISION POINTS*, BUSH explained that the decision was taken to

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<sup>29</sup> *Ibid.* at 20 (emphasis in original).

<sup>30</sup> CIA IG Report, *supra* n. 6, at 2-3. A memo authored by then-OLC Assistant Attorney General Jay Bybee attempted to give the CIA its first written legal approval for ten interrogation tactics, including waterboarding. Memorandum for John Rizzo, Acting General Counsel of the Central Intelligence Agency, *Interrogation of al Qaeda Operative* (Aug. 1, 2002), at 2, 13-14, and 15, available at <http://www.justice.gov/olc/docs/memo-bybee2002.pdf> (EXHIBIT 19). The August 1, 2002 memorandum described in great detail how the techniques should be used, including placing Abu Zubaydah “in a cramped confinement box with an insect” as “he appears to have a fear of insects” as well as the use of water-boarding, which Bybee concluded did not constitute torture. *Ibid.* at 2, 13-14, and 15.

<sup>31</sup> CIA IG Report, *supra* n. 6, at 12.

transfer Abu Zubaydah to CIA custody and to “move him to a secure location in another country where the Agency would have total control over his environment.”<sup>32</sup>

21. Through, among other means, discussions among members of the NSC, which BUSH chaired, BUSH was fully briefed on, and approved as a matter of policy, the indefinite detention of individuals held by the U.S. government, and specifically, the CIA.<sup>33</sup>

22. The CIA interrogation program sanctioned by BUSH included interrogation techniques that were directly inspired by the “Survival Evasion Resistance Escape (SERE)” training program, in which U.S. military members were exposed to, and taught how to resist, interrogation techniques used by enemy forces that did not adhere to the Geneva Conventions.<sup>34</sup> As detailed in the CIA IG Report, the U.S. employed these techniques on CIA detainees, which included waterboarding; confining detainees in a dark box for up to 18 hours at a time and possibly with an insect placed in the confinement box; up to 11 days of sleep deprivation; a facial hold or facial slap; “walling,” which consists of pulling a detainee forward and then pushing him back quickly against “a flexible false wall so that his shoulder blades hit the wall;” and use of stress positions.<sup>35</sup>

23. As described by the ICRC, the CIA detention program “included transfers of detainees to multiple locations, maintenance of the detainees in continuous solitary confinement and incommunicado detention throughout the entire period of their undisclosed detention, and the infliction of further ill-treatment through the use of various methods either individually or in

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<sup>32</sup> GEORGE W. BUSH, DECISION POINTS 169 (Crown Publishing Group 2010) (EXHIBIT 20).

<sup>33</sup> CIA IG Report, *supra* n. 6, at 7-8. Notably, the CIA Inspector General found the continued detention without charge to present “serious long-term political *and legal* challenges.” (emphasis added).

<sup>34</sup> As noted in the CIA IG’s Report, *supra* n. 6, at 21-22, fn. 26, the use of the techniques in SERE training, and specifically waterboarding, was “so different from the subsequent Agency [CIA] usage as to make it irrelevant...there was no *a priori* reason to believe that applying the waterboard with the frequency and intensity with which it was used by the psychologist/interrogators was either efficacious or medically safe.” See also *ibid.* at 37.

<sup>35</sup> A list of techniques is found in the CIA IG Report, *ibid.* at 15.

combination, in addition to the deprivation of other basic material requirements.”<sup>36</sup> The UN Joint Study on secret detentions noted that detainees had been held in Afghanistan, Thailand, Poland and Romania, among other locations.<sup>37</sup> Fourteen individuals previously held as part of the CIA detention program were transferred by BUSH to detention at Guantánamo. BUSH announced the transfers in September 2006. The ICRC later described the fourteen individuals as “missing persons.”<sup>38</sup>

24. The ICRC Report further explained that the program “was clearly designed to undermine human dignity and to create a sense of futility by inducing, in many cases, severe physical and mental pain and suffering, with the aim of obtaining compliance and extracting information, resulting in exhaustion, depersonalisation and dehumanisation.”<sup>39</sup>

25. The interrogation methods used on detainees were euphemistically qualified by the U.S. government as “enhanced,” but the United Nations and the ICRC found that they rose to the level of torture and cruel, inhuman or degrading treatment.<sup>40</sup> The ICRC unequivocally concluded

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<sup>36</sup> ICRC CIA Detainee Report, *supra* n. 11, at 4. The ICRC further found: “The ability of the detaining authority to transfer persons over apparently significant distances to secret locations in foreign countries acutely increased the detainees’ feeling of futility and helplessness, making them more vulnerable to the methods of ill-treatment...these transfers increased the vulnerability of the fourteen to their interrogation, and was performed in a manner (goggles, earmuffs, use of diapers, strapped to stretchers, sometimes rough handling) that was intrusive and humiliating and that challenged the dignity of the persons concerned.” *Ibid.* at 7. It is notable that the ICRC CIA Detainee Report, based solely on interviews with the detainees and prepared without the benefit of the CIA IG Report or any of the legal memoranda prepared by various U.S. government officials, details the same interrogation techniques as those outlined in the CIA IG Report. The ICRC CIA Detainee Report, at 8-9, details the use of waterboarding, prolonged stress positions, beatings, confinement in a box, prolonged nudity, sleep deprivation, exposure to cold temperature, prolonged shackling, forced shaving, and manipulation of diet.

<sup>37</sup> United Nations Human Rights Council, *Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Working Group on Arbitrary Detention, and the Working Group on Enforced or Involuntary Disappearances*, A/HRC/13/42, Feb. 19, 2010, at 45-50, available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A-HRC-13-42.pdf> (“UN Joint Study”) (EXHIBIT 21).

<sup>38</sup> ICRC CIA Detainee Report, *supra* n. 11, at 8.

<sup>39</sup> *Ibid.* 26.

<sup>40</sup> See, e.g., *ibid.* at 5; UN Joint Study, *supra* n. 37.

that, upon the information gathered from interviews with the former CIA detainees, conducted after their transfer to Guantánamo:

The allegations of ill-treatment of the detainees indicate that, in many cases, the ill-treatment to which they were subjected while held in the CIA program, either singly or in combination, constituted torture. In addition, many other elements of the ill treatment, either singly or in combination, constituted cruel inhuman or degrading treatment.<sup>41</sup>

26. The ICRC concluded that the CIA program’s interrogation techniques consisted of: suffocation by water – or waterboarding; prolonged stress in the standing position while arms are shackled above the head; beatings by use of a collar held around the detainees neck and used to forcefully bang the head and body against the wall; beating and kicking; confinement in a box; forced nudity for periods ranging from several weeks to several months; sleep deprivation through use of forced stress positions (standing or sitting), cold water and use of repetitive loud noise or music; exposure to cold temperature; prolonged shackling; threats of ill-treatment to the detainee and/or his family; forced shaving; and deprivation or restricted provision of solid food.<sup>42</sup>

27. The UN Joint Study found that the CIA had taken 94 detainees into custody and had employed “enhanced interrogation techniques to varying degrees in the interrogation of 28 of those detainees.”<sup>43</sup>

28. The CIA interrogations of Abu Zubaydah were videotaped and those videotapes were sent to CIA headquarters.<sup>44</sup> In total there were 92 videotapes, 12 of which included application of so-called “enhanced interrogation techniques.”<sup>45</sup> The videotapes included evidence of torture,

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<sup>41</sup> ICRC CIA Detainee Report, *supra* n. 11, at 26.

<sup>42</sup> *See ibid.* at 8-9.

<sup>43</sup> UN Joint Study, *supra* n. 37, at para. 103.

<sup>44</sup> CIA IG Report, *supra* n. 6, at 36.

<sup>45</sup> *Ibid.* at 36, para. 77.

including the waterboarding of Abu Zubaydah 83 times.<sup>46</sup> Those videotapes were destroyed by the CIA in November 2005.<sup>47</sup> Abu Zubaydah described to the ICRC his waterboarding:

I was put on what looked like a hospital bed, and strapped down very tightly with belts. A black cloth was then placed over my face and the interrogators used a mineral water bottle to pour water on the cloth so that I could not breathe. After a few minutes the cloth was removed and the bed was rotated into an upright position. The pressure of the straps on my wounds caused severe pain. I vomited. The bed was then again lowered to a horizontal position and the same torture carried out with the black cloth over my face and water poured on from a bottle. On this occasion my head was in a more backward, downwards position and the water was poured on for a longer time. I struggled without success to breathe. I thought I was going to die. I lost control of my urine. Since then I still lose control of my urine when under stress.<sup>48</sup>

29. In November 2002, another CIA detainee held in a secret site, Abd al-Rahim Al-Nashiri, was arrested. He was waterboarded twice in November 2002.<sup>49</sup> Although the CIA IG Report is heavily redacted when discussing the interrogation of Al-Nashiri, it confirms that CIA

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<sup>46</sup> *Ibid.* at para. 78.

<sup>47</sup> See Statement by Attorney General Michael B. Mukasey Regarding the Opening of an Investigation Into the Destruction of Videotapes by CIA Personnel, Jan. 2, 2008, available at [http://www.justice.gov/opa/pr/2008/January/08\\_001.html](http://www.justice.gov/opa/pr/2008/January/08_001.html) (EXHIBIT 22). No one has been prosecuted on the destruction of those tapes, and the evidence of torture contained therein. Department of Justice Statement on the Investigation into the Destruction of Videotapes by CIA Personnel, Nov. 9, 2010, available at <http://www.justice.gov/opa/pr/2010/November/10-ag-1267.html> (EXHIBIT 23).

<sup>48</sup> ICRC CIA Detainee Report, *supra* n. 11, at 10. The interrogation of Abu Zubaydah was discussed in a memorandum written in May 2005, signed by then-Acting Assistant Attorney General Steven Bradbury. This was one of three memos written by Bradbury that sought to assure the CIA that its interrogation methods it had been using since 2002 were legal, even when used in combination, and despite the prohibition against torture and cruel, inhuman, or degrading treatment. One 40-page memo cites the CIA's Inspector General Report, indicating that waterboarding had been used "at least 83 times during August 2002" (CIA IG Report, *supra* n. 6, at 90) in the interrogation of Abu Zubaydah, "and 183 times during March 2003 in the interrogation of [Khalid Sheikh Mohammed]," but still comes to the conclusion that these acts did not violate the prohibition against torture. Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, *Re: Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques that May Be Used in the interrogation of High Value al Qaeda Detainees*, May 30, 2005, at 37, available at [http://luxmedia.com.edgesuite.net/aclu/olc\\_05302005\\_bradbury.pdf](http://luxmedia.com.edgesuite.net/aclu/olc_05302005_bradbury.pdf) (EXHIBIT 24). See CIA IG Report, *supra* n. 6, at 91.

<sup>49</sup> CIA IG Report, *supra* n. 6, at 4 and 90. See also ICRC CIA Detainee Report, *supra* n. 11 at 10-11.

headquarters authorized the use of “enhanced interrogation techniques” against him.<sup>50</sup> As discussed below, BUSH authorized and condoned the waterboarding of Al-Nashiri.<sup>51</sup>

30. A third CIA “high value detainee,” Khalid Sheik Mohammed, was subjected to waterboarding 183 times.<sup>52</sup> In his memoir, BUSH specifically acknowledged that, upon request by CIA Director George Tenet, he authorized the use of “enhanced interrogation techniques” on Khalid Sheik Mohammed, including waterboarding.<sup>53</sup> In discussing “haul[ing] out their target,” following a raid on the apartment complex where Khalid Sheik Mohammed was, and the CIA interrogation that followed, BUSH writes in DECISION POINTS:

I was relieved to have one of al Qaeda’s senior leaders off the battlefield. But my relief did not last long. [CIA] Agents searching Khalid Sheik Mohammed’s compound discovered what one official later called a “mother lode” of valuable intelligence. Khalid Sheik Mohammed was obviously planning more attacks. It didn’t sound like he was willing to give us any information about them. “I’ll talk to you,” he said, “after I get to New York and see my lawyer.”

George Tenet asked if he had permission to use enhanced interrogation techniques, including waterboarding, on Khalid Sheik Mohammed. I thought about meeting Danny Pearl’s widow, who was pregnant with his son when he was murdered. I thought about the 2,973 people stolen from their families by al Qaeda on 9/11. And I thought about my duty to protect the country from another act of terror.

“Damn right,” I said.

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<sup>50</sup> CIA IG Report, *supra* n. 6, at 35, para. 76. In addition to being subjected to waterboarding and other “enhanced interrogation techniques,” Al-Nashiri was also threatened with a semi-automatic handgun, which, although unloaded, was held close to his head while he was shackled. A power drill was also used to threaten Al-Nashiri: it was revved while Al-Nashiri stood naked and hooded. *Ibid.* at 42. The Department of Justice declined to prosecute the perpetrators of these acts, although the incident was reported to it. *Ibid.* Interrogators also threatened family members of Al-Nashiri, including his mother, *ibid.*, subjected him to stress positions and standing on his shackles. *Ibid.* at 44.

<sup>51</sup> DECISION POINTS, *supra* n. 32, at 169-171.

<sup>52</sup> CIA IG Report, *supra* n. 6, at 44-45.

<sup>53</sup> See DECISION POINTS, *supra* n. 32, at 170. According to the ICRC CIA Detainee Report, Khalid Sheik Mohammed was kept naked during waterboarding sessions, with female interrogators present. Khalid Sheik Mohammed also told the ICRC that he sustained injuries to his ankles and wrists as he struggled in the panic of not being able to breathe during the waterboarding sessions. See ICRC CIA Detainee Report, *supra* n. 11, at 11.

Other so-called “enhanced interrogation techniques” used upon Khalid Sheik Mohammed were threats to kill his children<sup>54</sup> and the deprivation of sleep for 180 hours.<sup>55</sup>

31. On September 6, 2006, BUSH announced that fourteen individuals had been in CIA custody as a “high value detainee” and were being transferred to Guantánamo under the custody of the Department of Defense.<sup>56</sup>

32. In the September 6th speech, BUSH “officially acknowledged the existence of a CIA terrorist detention and interrogation program.”<sup>57</sup> BUSH stated that “our government has changed its policies,” and admitted to authorizing an “alternative set of procedures” on persons detained “secretly” and “outside the United States” in a program operated by the CIA, while refusing to specify what techniques were authorized.<sup>58</sup> BUSH also discussed Abu Zubaydah, who had been waterboarded at least 83 times. Notably, while BUSH stated that there were no detainees held in the CIA detention program as of September 6, 2006, he explicitly reserved the right to place, again, persons in CIA detention in secret sites beyond the reach of the law.

33. In this speech, BUSH also expressed fear that members of the U.S. military involved in torture might be prosecuted for war crimes, “[S]ome believe our military and intelligence personnel involved in capturing and questioning terrorists could now be at risk of prosecution

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<sup>54</sup> CIA IG Report, *supra* n. 6, at 43.

<sup>55</sup> *Ibid.* at 104.

<sup>56</sup> “So I’m announcing today that Khalid Sheikh Mohammed, Abu Zubaydah, Ramzi bin al-Shibh, and 11 other terrorists in CIA custody have been transferred to the United States Naval Base at Guantanamo Bay. They are being held in the custody of the Department of Defense.” “President Discusses Creation of Military Commissions to Try Suspected Terrorists”, Sept. 6, 2006, <http://georgewbush-whitehouse.archives.gov/news/releases/2006/09/20060906-3.html> [“President Discusses Creation of Military Commissions”] (EXHIBIT 25).

<sup>57</sup> Dorn Declaration, *supra* n. 6, at 33.

<sup>58</sup> President Discusses Creation of Military Commissions, *supra* n. 56. The announcement coincided with the transfer of 14 people from CIA custody to Guantánamo. *See also* CIA IG Report, *supra* n. 6, at 7, finding that the CIA detention program “diverges sharply from previous Agency policy and rules that govern interrogations by U.S. military and law enforcement officers.” *See also, ibid.* at 91: “The EITs [enhanced interrogation techniques] used by the Agency under the CTC Program are inconsistent with the public policy positions that the United States has taken regarding human rights.” *Ibid.* at 101-102.

under the War Crimes Act -- simply for doing their jobs in a thorough and professional way.” He emphasized that he would not allow this to happen and asked Congress to prevent detainees from pursuing civil claims against U.S. military personnel for violations of the Geneva Conventions.<sup>59</sup> Through these measures, BUSH sought to provide complete immunity from justice for any member of the U.S. military who tortured a detainee.

34. Having met with the fourteen “high value detainees” held in the CIA program following their transfer from secret sites to Guantánamo in September 2006, the ICRC concluded that it “clearly considers that the allegations of the fourteen include descriptions of treatment and interrogation techniques – singly or in combination – that amounted to torture and/or cruel, inhuman or degrading treatment.”<sup>60</sup>

35. On June 11, 2007, the Parliamentary Assembly of the Council of Europe published the investigative report authored by Dick Marty on secret detentions and illegal transfers of “high value detainees” by the CIA involving Council of Europe member states.<sup>61</sup> The report confirmed the existence of secret CIA sites in Poland and Romania and found that the interrogation techniques used on detainees were “tantamount to torture.”<sup>62</sup> On June 27, 2007, the Parliamentary Assembly, adopted a resolution in which it unequivocally stated:

The detainees were subjected to inhuman and degrading treatment, which was sometimes protracted. Certain “enhanced” interrogation methods used fulfill the definition of torture and inhuman and degrading treatment in Article 3 of the European Convention on Human Rights (ETS No. 5) and the United Nations

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<sup>59</sup> Congress responded by passing the Military Commissions Act 2006, Public L. 109-366, 120 Stat. 2600, available at [http://www.loc.gov/rr/frd/Military\\_Law/pdf/PL-109-366.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/PL-109-366.pdf) (EXHIBIT 26).

<sup>60</sup> ICRC CIA Detainee Report, *supra* n. 11, at 5. See also *ibid.* at 26: “The allegations of ill-treatment of the detainees indicate that, in many cases, the ill-treatment to which they were subjected while held in the CIA program, either singly or in combination, constituted torture.”

<sup>61</sup> See Marty Report, *supra* n. 7.

<sup>62</sup> See *ibid.* at 8, para 9.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>63</sup>

36. In March 2008, BUSH vetoed legislation that would have banned the CIA from using “enhanced interrogation techniques,” including waterboarding, saying it “would take away one of the most valuable tools in the war on terror.”<sup>64</sup>

## 2. “Extraordinary Rendition”

37. Extraordinary Rendition is considered to be “the transfer of an individual, with the involvement of the United States or its agents, to a foreign state in circumstances that make it more likely than not that the individual will be subjected to torture or cruel, inhuman, or degrading treatment.”<sup>65</sup> The practice is “to transfer terrorist suspects to locations where it is known that they may be tortured, hoping to gain useful information with the use of abusive interrogation tactics.”<sup>66</sup>

38. One of the most well-known cases of “extraordinary rendition” is that of Maher Arar. On September 26, 2002, Canadian citizen Maher Arar was changing planes at John F. Kennedy airport in New York on his way home to Canada. He was detained and interrogated by U.S. officials for nearly two weeks, and refused a phone call for the first five days. Although he was able to meet briefly with an immigration attorney ten days into his detention, the next night, around 9:00 pm on a Sunday, U.S. officials lied to Arar saying his lawyer was waiting for him in order to get him out of his cell, and then lied and said the lawyer did not want to be present. They

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<sup>63</sup> See Resolution 1562 (2007), Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report, adopted on Jun. 27, 2007, available at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta07/ERES1562.htm#1> (EXHIBIT 27).

<sup>64</sup> Dan Eggen, *Bush Announces Veto of Waterboarding Ban*, Washington Post, Mar. 8, 2008, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/03/08/AR2008030800304.html>.

<sup>65</sup> See, e.g., The Committee on International Human Rights of the Association of the Bar of the City of New York and The Center for Human Rights and Global Justice, *Torture by Proxy: International and Domestic Law Applicable to “Extraordinary Renditions”* (2004), at 5 [hereinafter “Torture by Proxy”], available at <http://www.chrgj.org/docs/TortureByProxy.pdf> (EXHIBIT 28).

<sup>66</sup> *Ibid.* at 5-6.

then questioned Arar until approximately 3:00 in the morning regarding his fears of being sent to Syria. Arar repeatedly asked for his attorney, and repeatedly told the officials he would be tortured if sent to Syria.<sup>67</sup>

39. The next day, Arar was taken from his cell at 4:00 in the morning and advised that based on classified evidence he was found to be a member of Al Qaeda, and that he was being sent to Syria rather than Canada. He was put on a private jet to Jordan, beaten and interrogated, and delivered to Syria. For the first two weeks in Syria Arar was physically tortured, including being beaten in the stomach, face, and back of the neck, and whipped with a two-inch thick electric cable on the palms, hips, and lower back, and interrogated up to 18 hours a day. He was confined in a dark, dank underground grave-like cell that was three feet wide, six feet long, and seven feet tall for more than ten months. The Syrian government released him after nearly a year saying it had found no connection to any criminal or terrorist organization or activity.

40. The Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar conducted an extensive public inquiry regarding these events and released its findings and recommendations in a three-volume report in September 2006.<sup>68</sup> The Commission found no evidence that Arar committed any offense or that his activities constituted a threat to the security of Canada, nor was there evidence that could implicate him in terrorist activities.<sup>69</sup> Furthermore, it found no evidence that Canadian officials participated or acquiesced in the U.S. decision to detain and remove Arar to Syria, but found that it was very likely that the U.S. relied on inaccurate and unfair information about Arar that was provided by Canadian officials.<sup>70</sup>

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<sup>67</sup> For information on the rendition of Maher Arar, see, e.g., Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, Report of the Events Relating to Maher Arar (2006) (hereinafter “Arar Commission Report”) (EXHIBIT 29); Plaintiff’s Complaint and Demand for Jury Trial, *Arar v. Ashcroft*, No. 04-cv-0249 (E.D.N.Y. Jan. 22, 2004), available at <http://www.ccrjustice.org/files/Arar%20Complaint%20with%20Exhibits.pdf> (EXHIBIT 30).

<sup>68</sup> See Arar Commission Report, *supra* n. 67.

<sup>69</sup> *Ibid.*, ANALYSIS AND RECOMMENDATIONS at 59.

<sup>70</sup> *Ibid.* at 14.

41. In its investigation of the incident, the United States Department of Homeland Security’s Office of the Inspector General found that the Immigration and Naturalization Service (INS) “concluded that Arar was entitled to protection from torture and that returning him to Syria would more likely than not result in his torture.”<sup>71</sup> The Report further found that officials in Washington D.C. overrode that determination.<sup>72</sup> Apparently there were some type of assurances obtained regarding Arar, but they “were ambiguous regarding the source or authority purporting to bind the Syrian government to protect Arar,”<sup>73</sup> and the “validity of the assurances to protect Arar appears not to have been examined.”<sup>74</sup>

42. At one of two Congressional Joint Committee hearings that focused on Arar’s rendition, the Inspector General testified that he could not get a satisfactory response from government officials as to why Arar was sent to Syria and he could not rule out the possibility that Arar was sent to Syria to be interrogated under unlawful conditions.<sup>75</sup>

43. Mr. Arar’s “extraordinary rendition” to torture was decided at the highest levels of the BUSH Administration, including Deputy Attorney General Larry Thompson who signed the October 7, 2002 order disregarding Arar’s designation of Canada as the country of removal, thereby clearing the way for him to be sent to Syria the next morning.<sup>76</sup> Thompson also personally called Deputy Secretary of State Richard Armitage to ask if he had any foreign policy

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<sup>71</sup> The Department of Homeland Security, Office of the Inspector General: *Report on the Removal of a Canadian Citizen to Syria* (March 2008) [hereinafter “DHS OIG Report”] (EXHIBIT 31).

<sup>72</sup> *Ibid.* at 29–30.

<sup>73</sup> *Ibid.* at 5.

<sup>74</sup> *Ibid.* at 22.

<sup>75</sup> ‘*Removal of a Canadian Citizen to Syria*’: *Joint Hearing Before the Subcomm. on the Constitution, Civil Rights and Civil Liberties of the Comm. on the Judiciary and the Subcomm. on Int’l Organizations, Human Rights, and Oversight of the Comm. on Foreign Affairs of the House of Representatives*, 110th Cong. (2008), transcript at 53, available at <http://www.foreignaffairs.house.gov/110/42724.pdf> (EXHIBIT 32). See also, ‘*Joint Oversight Hearing on Rendition to Torture: The Case of Maher Arar*’: *Joint Hearing Before the Subcomm. On the Constitution, Civil Rights and Civil Liberties of the Comm. on the Judiciary and the Subcomm. on Int’l Organizations, Human Rights, and Oversight of the Comm. on Foreign Affairs of the House of Representatives*, 110th Cong. (2007) (Exhibit 33).

<sup>76</sup> See DHS OIG Report, *supra* n.71, at 20.

objections to sending Arar to Syria.<sup>77</sup> There is also evidence of Attorney General John Ashcroft's personal involvement, including a document released by the Department of Homeland Security's Office of the Inspector General that contains a list of documents relating to its inspection and report, *The Removal of a Canadian Citizen to Syria*. One of these is a Department of Justice document entitled, "Memo from James Ziglar [the INS Commissioner] to the Attorney General, October 7, 2002," the day before Arar was rendered to Canada.<sup>78</sup> A document released by the U.S. Department of Justice provides evidence that Attorney General Ashcroft was invited to an October 4, 2002, meeting regarding Arar (while Arar was in custody in New York) along with Thompson, both of their chiefs of staff, and other very high-level DOJ officials, including FBI officials.<sup>79</sup>

44. BUSH received regular intelligence and FBI briefings, including when Arar was in custody in New York and when he was rendered to Syria.<sup>80</sup> BUSH also received a daily "threat matrix" documenting all threats directed at the United States from the previous twenty-four hours.<sup>81</sup>

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<sup>77</sup> See the Department of Homeland Security Office of Inspector General's Addendum to OIG-08-18, *The Removal of a Canadian Citizen to Syria*, available at <http://www.ccrjustice.org/files/1%2028%2010%20Addendum%20to%20DHS%20OIG-08-18.pdf> (EXHIBIT 34)

<sup>78</sup> See pp. 36-37 of "DHS OIG documents released in part - 18.06.09," available at [http://www.extraordinaryrendition.org/component/docman/doc\\_download/200-dhs-oig-documents-released-in-part-180609.html](http://www.extraordinaryrendition.org/component/docman/doc_download/200-dhs-oig-documents-released-in-part-180609.html).

<sup>79</sup> See Plaintiff/Appellant's Notice of Lodging and Declaration in Support Thereof filed in *Arar v. Ashcroft* (06-4216-cv) in the United States Court of Appeals for the Second Circuit (Nov. 14, 2008), available at <http://www.ccrjustice.org/files/11.14.08%20Plaintiff's%20Notice%20of%20Lodging.pdf>.

<sup>80</sup> See White House Daily Press Briefings, available at <http://georgewbush-whitehouse.archives.gov/news/releases/>, e.g., September 27, 2002 (BUSH had his intelligence briefings at his ranch); October 3, 2002 (BUSH had an intelligence briefing and an FBI briefing); October 4, 2002 (same); October 8, 2002 (BUSH had intelligence briefing and FBI briefing with Attorney General, noted in October 9, 2002 briefing);

<sup>81</sup> Mark Danner, *After September 11: Our State of Exception*, New York Review of Books, Oct. 13, 2011, available at <http://www.nybooks.com/articles/archives/2011/oct/13/after-september-11-our-state-exception/?pagination=false>; see also, JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* (Norton 2007), at 71 (EXHIBIT 35).

45. The Commission of Inquiry Report, and especially the August 9, 2007 Addendum to the Report, revealed evidence that the CIA was communicating with the RCMP regarding Arar while he was being detained in New York. BUSH's September 17, 2001 directive authorized the CIA to transfer suspects to the custody of foreign nations.

46. BUSH not only put into effect the extraordinary rendition program under which Arar was delivered to torture in Syria, but the evidence indicates that he would have been personally aware of and contributed to discussions and decision-making regarding Arar's fate.

### 3. Guantánamo

47. The prison at Guantánamo Bay was "intended to be a facility beyond the reach of the law."<sup>82</sup> As such, detainees were subjected to acts of torture, including methods of torture employed in the CIA "high value detainee" program.

48. In addition to detainees in the CIA detention program, the SERE-inspired "interrogation techniques" were also used against Mohammed al Qahtani, a detainee at Guantánamo who was subjected to a prolonged, aggressive interrogation that violated international law, known as the "First Special Interrogation Plan." This interrogation plan, which began on November 23, 2002 and ended January 16, 2003, included 48 days of severe sleep deprivation and 20-hour interrogations,<sup>83</sup> forced nudity, sexual humiliation,<sup>84</sup> religious humiliation,<sup>85</sup> dehumanizing

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<sup>82</sup> International Center for Transitional Justice, *Prosecuting Abuses of Detainees in U.S. Counter-terrorism Operations* (Nov. 2009), at 8, available at <http://ictj.org/sites/default/files/ICTJ-USA-Criminal-Justice-2009-English.pdf> (EXHIBIT 36).

<sup>83</sup> See, e.g., SASC Report, *supra* n. 19, at 76 ("The interrogation would be conducted for '20-hour sessions' and at the completion of each session, Kahtani would be permitted four hours of rest, and then 'another 20 hour interrogation session [would] begin."); Decl. of Gitanjali S. Gutierrez, Esq., Lawyer for Mohammed al Qahtani, Criminal Complaint Against Donald Rumsfeld, The Prosecutor General at the Federal Supreme Court, Federal Republic of Germany (filed Nov. 14, 2006) ("Gutierrez Declaration"), at 10-15, available at [http://www.ccrjustice.org/files/Gutierrez%20Declaration%20re%20Al%20Qahtani%20Oct%202006\\_0.pdf](http://www.ccrjustice.org/files/Gutierrez%20Declaration%20re%20Al%20Qahtani%20Oct%202006_0.pdf) (EXHIBIT 37).

<sup>84</sup> Among the forms of sexual humiliation to which Mr. al Qahtani was subjected were use of female interrogators who straddled, touched or otherwise molested him (known as "Invasion of Space by a female"); being forced to wear a woman's bra and having a thong placed on his head during the course of an interrogation; told that his mother and sisters were whores; and forced to wear, look at or study pornographic images. See Gutierrez Declaration, *supra* n. 83, at 15-20; SASC Report, *supra* n. 19, at 90.

treatment,<sup>86</sup> the use of physical force against him, prolonged stress positions, prolonged sensory overstimulation, and threats with military dogs.<sup>87</sup> These techniques were later widely acknowledged as torture. Indeed, the former convening officer of the military commissions at Guantánamo, Susan Crawford, declared that she could not bring charges against al Qahtani due to the torture inflicted on him, “We tortured al-Qahtani. ... His treatment met the legal definition of torture. And that's why I did not refer the case for prosecution.”<sup>88</sup>

49. There have been a plethora of reports published that detail the draconian conditions, interrogation techniques and torture that took place at Guantánamo. Since as early as 2003, ICRC staff has expressed their deep concerns about the detention conditions in Guantánamo - indeed, published memoranda by U.S. officials from that period contain descriptions of meetings held between ICRC staff and Guantánamo commander Geoffrey Miller where concerns were raised.<sup>89</sup>

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<sup>85</sup> Some instances of the acts of religious humiliation are detailed in a released interrogation log, *available at* <http://www.time.com/time/2006/log/log.pdf>. These acts include: constructing a shrine to Osama bin Laden and informing Mr. al Qahtani that he could only pray to bin Laden; “forced grooming,” including forcibly shaving Mr. al Qahtani’s beard; and interrupting, controlling or denying Mr. al Qahtani’s right to pray.

<sup>86</sup> The interrogation log records the following treatment on December 20, 2002, “[A]n interrogator tied a leash to the subject of the first Special Interrogation’s chains, led him around the room, and forced him to perform a series of dog tricks.”

<sup>87</sup> For detail of the interrogation of Mr. al Qahtani, which included a simulated rendition, *see* SASC Report, *supra* n. 19, at 77-78, 88-91; Gutierrez Declaration; *Inside the Interrogation of Detainee 063*, Time Magazine, Jun. 12, 2005, *available at* <http://www.time.com/time/magazine/article/0,9171,1071284,00.html> (EXHIBIT 38), and 83 pages of interrogation log at <http://www.time.com/time/2006/log/log.pdf> (EXHIBIT 39); *Army Regulation 15-6: Final Report Investigation into FBI Allegations of Detainee Abuse at Guantanamo Bay, Cuba Detention Facility*, Apr. 1, 2005 (“Schmidt Report”), at 13-21, *available at* <http://www.defense.gov/news/Jul2005/d20050714report.pdf> (EXHIBIT 40).

<sup>88</sup> Bob Woodward, *Detainee Tortured, Says U.S. Official; Trial Overseer Cites “Abusive” Methods Against 9/11 Suspect*, Washington Post, Jan. 14, 2009, at A1, *available at* [www.washingtonpost.com/wp-dyn/content/article/2009/01/13/AR2009011303372.html](http://www.washingtonpost.com/wp-dyn/content/article/2009/01/13/AR2009011303372.html) (EXHIBIT 41). Crawford continued, “This was not any one particular act; this was just a combination of things that had a medical impact on him, that hurt his health. It was abusive and uncalled for. And coercive. Clearly coercive. It was that medical impact that pushed me over the edge to call it torture.” *Ibid.*

<sup>89</sup> Memorandum for Record, Department of Defense, Joint Task Force 170, Guantanamo Bay, Cuba, Oct. 9, 2003, *available at* <http://www.washingtonpost.com/wp-srv/nation/documents/GitmoMemo10-09-03.pdf> (EXHIBIT 42); *see also* Scott Higham, *A Look Behind the ‘Wire’ At Guantanamo*, Washington Post, Jun. 13, 2004, *available at* <http://www.washingtonpost.com/wp-dyn/articles/A37364-2004Jun12.html> and also Neil A. Lewis, *Red Cross Finds Detainee Abuse in Guantánamo*, New York Times, Nov. 30, 2004, *available at* <http://www.nytimes.com/2004/11/30/politics/30gitmo.html?pagewanted=1&r=1>.

In 2006, a group of five United Nations Special Rapporteurs published a joint Report on the situation of detainees at Guantánamo Bay. Crucially, this report came to the express conclusion that the interrogation techniques authorized and deployed by the Department of Defense, which operated under the command of BUSH, amounted to torture.<sup>90</sup> Additionally, the UN experts also concluded *inter alia* that the force-feeding of detainees on hunger strike amounted to acts of torture.<sup>91</sup> A 2006 report by the United Nations Committee against Torture explicitly recommended that the U.S. “rescind any interrogation technique, including methods involving sexual humiliation, ‘water boarding’, ‘short shackling’ and using dogs to induce fear, that constitute torture or cruel, inhuman or degrading treatment or punishment.”<sup>92</sup> A 2008 study by *Physicians for Human Rights* came to the conclusion that many techniques used in Guantánamo, especially those exercised over a longer period or in combination with other techniques, amounted to torture.<sup>93</sup> Other studies have detailed how the BUSH administration, for example, forcibly deployed the drug mefloquine against detainees at Guantánamo in order to break their resistance to interrogation, despite the fact that it is well-known to have severe side effects and cause health problems.<sup>94</sup> In sum, there is widespread international acceptance - amongst

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<sup>90</sup> United Nations Commission on Human Rights, *Situation of Detainees at Guantánamo Bay - Report of the Chairperson of the Working Group on Arbitrary Detention, Ms. Leila Zerrougui; the Special Rapporteur on the independence of judges and lawyers, Mr. Leandro Despouy; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Mr. Manfred Nowak; the Special Rapporteur on freedom of religion or belief, Ms. Asma Jahangir and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Mr. Paul Hunt*, E/CN.4/2006/120, Feb. 27, 2006, at para. 87, available at <http://www.un.org/Docs/journal/asp/ws.asp?m=E/CN.4/2006/120> (“UN Guantánamo Situation Report”) (EXHIBIT 43).

<sup>91</sup> *Id* at para. 88.

<sup>92</sup> United Nations Committee Against Torture, *Consideration of Reports submitted by States Parties under Article 19 of the Convention - Conclusions and recommendations of the Committee against Torture - United States of America*, CAT/C/USA/CO/2, Jul. 25, 2006 (“US CAT Report”), at para. 24, available at [http://www.unhcr.ch/tbs/doc.nsf/0/e2d4f5b2dccc0a4cc12571ee00290ce0/\\$FILE/G0643225.pdf](http://www.unhcr.ch/tbs/doc.nsf/0/e2d4f5b2dccc0a4cc12571ee00290ce0/$FILE/G0643225.pdf) (EXHIBIT 44).

<sup>93</sup> Physicians for Human Rights, *Broken Laws, Broken Lives – Medical evidence of torture by US personnel and its impact*, June 2008, at 120, available at [http://brokenlives.info/?dl\\_id=5](http://brokenlives.info/?dl_id=5) (EXHIBIT 45).

<sup>94</sup> See for a detailed medical analysis, Seton Hall University School of Law, Center for Policy and Research, *Drug Abuse – an exploration of the government’s use of mefloquine at Guantanamo*, available at <http://law.shu.edu/ProgramsCenters/PublicIntGovServ/policyresearch/upload/drug-abuse-exploration-government-use-mefloquine-gunatanamo.pdf> (EXHIBIT 46).

intergovernmental bodies, international experts, academics and others - that the interrogation techniques applied in Guantánamo constitute torture under international law.<sup>95</sup>

50. One of nearly 800 men detained at Guantánamo is Sami el-Hajj, a Sudanese national and journalist, who was arrested in Pakistan close to the Afghan border in December 2001. He had been visiting the area as part of his employment as a correspondent for Al-Jazeera. After his arrest, el-Hajj was detained and tortured in U.S facilities in Bagram and Kandahar, Afghanistan before being transferred to Guantánamo Bay on June 13, 2002. He was held there without charge as an ‘enemy combatant’ until his eventual release in May 2008.

51. After his arrest, on January 7, 2002, el-Hajj was sent to a military jail in Quetta, Pakistan and handed over to the U.S authorities. He was shackled, gagged, hooded, put in ankle chains, and pushed onto the floor of a plane along with other detainees. There was no toilet on board and so people were forced to urinate on themselves and (due to proximity) each other before arriving at U.S administered Bagram Military Detention Center the following day.

52. El-Hajj was detained in Bagram from January 8-23, 2002. El-Hajj has described his 16 day detention in Bagram, Afghanistan as “the longest days of his life”. He was constantly subject to abuse while detained in Bagram. Upon arrival, he was asked by the military police where he came from and why he had come to fight them. After explaining that he was African and not here to fight, his face was pushed into the runway and he was beaten and kicked. Thereafter, he was subjected to hooding, cuffed in stress positions, stripped of his clothes, subjected to extremely cold conditions, forced to endure repeated beatings by the military police and assaulted by dogs, among other techniques. He was detained, along with other detainees, in a freezing hangar with his hands tied and only two blankets. He was told that he would be shot if he moved. There was an oil drum that was to be used as a toilet and it could only be used twice a day. El-Hajj recalled his ordeal at Bagram, while detained in Guantánamo, in the following terms:

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<sup>95</sup> For a good overview *see, e.g.*, M. CHERIF BASSIOUNI, ‘THE INSTITUTIONALIZATION OF TORTURE BY THE BUSH ADMINISTRATION – IS ANYONE RESPONSIBLE?’ (2010).

... we were only allowed to go and relieve ourselves twice a day, once before sunrise and once before sunset, and you would only be allowed to go when it was your turn. I remember once that I had to go urgently, so I whispered to the person before me to allow me to go before him. Then a soldier shouted angrily in my face, “No talking! Come here.” He pointed to the door and he hung me there from my hands on the wire and I stayed there standing throughout the day shivering from the extreme cold which caused me to urinate on my clothes. The soldiers just laughed at me!<sup>96</sup>

53. El-Hajj was not allowed to talk during his time at Bagram and was severely deprived of sleep from the third day onward due to the exposure to cold. Additionally, he was stomped on by guards and mishandled when being removed from the plane, which led to the tearing of his ligaments and loss of lateral support in his left knee. He requested, but was denied, medical assistance for these injuries.

54. El-Hajj was interrogated a number of times whilst detained in Bagram. On Day 10 of his detention he was interrogated by a U.S official working with an Algerian translator. He was repeatedly told during his interrogations that he had conducted interviews with Osama bin Laden for Al-Jazeera – an allegation that he consistently refuted.

55. On January 23, 2002 el-Hajj was transferred to the U.S detention facility in Kandahar, Afghanistan, where he remained until June 13, 2002. While at Kandahar, el-Hajj was subjected to repeated physical, sexual and religious abuse including: assault by dogs; beatings; hooding; being shackled and cuffed in stress positions for prolonged periods of time; and being subjected to extreme temperatures.

56. In one particular incident, U.S military police pulled the hairs of el-Hajj’s beard out one by one. He was also subjected to cruel and arbitrary punishments. Prisoners were punished if they spoke in groups of more than three, even if praying. El-Hajj was punished for translating for people and punished if he did not translate for people. In particular, he was forced to kneel on cold concrete with his hands on his head for extended periods of time (he still has marks on his knees from this treatment). In the summer, he was similarly forced to kneel in the hot sun for

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<sup>96</sup> Sami Muhyideen Al Haj, *Why am I being punished?* (Dec. 19, 2005), available at <http://old.cageprisoners.com/articles.php?id=11337>.

extensive periods as punishment for things like talking with other prisoners. Other humiliating treatment included having the Qu’ran thrown down the toilet in front of him, being forced to endure searches of his anal cavity and being subjected to threats of sexual abuse by military police. During one incident, a military police officer told him, “I want to fuck you”. El-Hajj said, “But I’m a man” and the U.S official replied, “That’s okay. I like to do it with men.”

57. El-Hajj was transferred by the U.S authorities from Kandahar, Afghanistan to Guantánamo Bay on June 13, 2002, where he was detained as an ‘enemy combatant’ without trial or charge, and remained until May 1, 2008.

58. In the journey to Guantánamo, El-Hajj was placed on a plane with 30-40 other detainees. He was hooded, gagged, forcibly medicated, and then goggled. His legs were shackled to the floor of the plane and his hands were chained to his legs. He, along with the other detainees, was forced to endure this prolonged stress position for the duration of the entire flight. If they had to go the toilet, the military police would unshackle one hand and watch them defecate. They were given no toilet paper and not allowed to wash. Upon arrival in Guantánamo, he was beaten and subjected to an intrusive anal search once again.

59. El-Hajj was interrogated approximately 200 times while detained (for almost 6 years) in Guantánamo Bay. Before his first interrogation he was forcibly deprived of sleep for two days. Almost all of the interrogation sessions were aimed at co-opting el-Hajj to work as an informant for the CIA within Al-Jazeera – indeed, he and his family were offered US citizenship and money for his son’s education if he would agree to become an informant. The interrogators also sought to have el-Hajj confirm the existence of purported links between Al-Jazeera and Al-Qaeda – including that the media network was a ‘front’ for, and funded by, Al-Qaeda, who paid them to conduct interviews with Osama bin Laden. El-Hajj has consistently and repeatedly refuted these allegations.

60. El-Hajj was routinely beaten, abused and subjected to various forms of mistreatment amounting to torture by agents during his detention in Guantánamo. He was routinely beaten about the head, feet and arms by U.S officials at the camp, including the notorious ‘Emergency

Reaction Force' (ERF) – a riot squad who, at one point, beat him 6 times in 10 days. On the second day of a hunger strike in August 2003 - following an incident involving the desecration of the Qu'ran (see below) - an ERF squad came into his cell and beat him and subjected him to pepper spray. On the third day of the hunger strike he was placed in isolation, pushed down stairs, kicked and beaten, and he suffered a cut on the cheek that required stitches from which he still bears the scar. This incident is recalled in a letter that el-Hajj wrote while in detention in Guantánamo in 2005:

The harassment by the soldiers did not end and took on new forms from time to time. I remember that one day they told us that a soldier had put his foot on the Qur'an until his footprint was imprinted on the words of God. The detainees were enraged by this insult to their religion. They decided that the American management must return the copies of the Qur'an so that they could be tested in our presence, particularly as the general had previously promised that this harassment would not be repeated. They broke their promise as usual and the detainees decided not to leave their cells for recreation a walk or to bathe, even those who were in greatest need of it, until they gathered the Qur'ans. As usual, the officials came and threatened the detainees. A few minutes later, the riot forces stormed into the detainees' cells and started hitting them and tied them up with chains and shackles. They then shaved their beards, moustaches and their heads and put them into solitary isolation. As a detainee, my turn came and started with them spraying a chemical substance in my eyes. Then five soldiers entered my cell and started beating me. They then took me to the walking area and there they threw me on the ground. One of them grabbed me by my head and hit it against the concrete floor. They hit me again and as a result of this, my eyelid was cut and my face was covered in blood while I was tied in chains and shackles. It was in this condition that they shaved my head, my beard and my moustache and then they put me in solitary where they left me to swim in my own blood. After an hour, a soldier came and asked me from the window if I wanted the medical team. I refused and continued praying to God, invoking Him and complaining to Him about the oppression I was suffering. When I felt that I had almost lost consciousness from the loss of blood, I asked for the medical team, so they came and from the opening for food which is no more than three inches by ten inches, they sewed three stitches in my eyelid, bandaged my head and gave me some drugs claiming that they were antibiotics. I felt asleep from the strength of them.<sup>97</sup>

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*Ibid.*

61. El-Hajj was also routinely subjected to sleep deprivation techniques. In the same letter he recalled:

One night I was stressed after spending many long hours in the investigation room. I went to sleep early because I was extremely tired. I put my hands and my head under the cover. When I was asleep, I suddenly heard a scream and a soldier yelled at me, take your hands and your head out from under the cover; I got up startled and quickly obeyed the soldier's orders, because we are not allowed to sleep with our heads and our hands under the cover. Then I slept again. Soon the soldier was kicking the door of my cell as hard as he could and spoke in a stern voice. He shouted, why do you put the toothpaste where your toothbrush should be and he accused me of breaking the military laws and regulations. He took all my things and I was punished like this for a whole week.

[...]

[The soldiers] would always wake us up under the pretext of needing to inspect our cells. I remember that one night they asked me to wake up for an inspection, then when they entered and found nothing, they punished me for seven days because they found three grains of rice on the floor that ants had gathered around. I said to myself, why am I being punished? This cannot be considered a good enough reason to punish a person!<sup>98</sup>

62. In the same letter, el-Hajj recalls another specific incident of mistreatment:

One night, two soldiers stood outside my cell with chains and shackles. They shouted and kicked the door violently. I woke up startled. They shackled me and then led me from my camp to Camp Romeo where they put me in a cage after they had stripped me of my clothes except for my shirt and my shorts, without shoes, soap, toothbrush, etc. When I asked why I was being punished, I received no reply until the next day when the official came to me after I begged for an answer and told me that this punishment would last two weeks because a soldier had found an iron nail in the window outside my cell. I said to the official, "I've got an iron nail?! Where could I have brought it from and how could I have put it on my window from the outside? And why?". However, he went away quickly without saying so much as two words to me. I spent two weeks sitting because I couldn't kneel in my shorts without revealing my private parts. I slept on the metal on fourteen nights in the cold winter.<sup>99</sup>

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<sup>98</sup> *Ibid.*

<sup>99</sup> *Ibid.*

63. El-Hajj was also subjected to extreme temperatures. On a number of occasions, camp guards exposed el-Hajj to extreme heat (by shutting the windows of his cell) or extreme cold (by turning on the air-conditioning) for extensive periods of time, causing sleep deprivation and prolonged discomfort. El-Hajj was also subjected to racial abuse and other forms of humiliation during his time in Guantánamo. He was particularly singled out for attention (called “nigger whore” and “stupid black”) and disproportionately harassed and mistreated because of the colour of his skin: “... having black skin was reason enough for the white soldiers to harass us, provoke us and punish us sometimes with reason and sometimes for no reason at all.”<sup>100</sup> He was also routinely denied essential medical treatment and assistance. El-Hajj had, for example, been diagnosed with throat cancer in 1998 and prescribed medicines to be taken daily. However, he was denied access to this medicine during the entirety of his detention in Guantánamo. As discussed above, El-Hajj’s knee had been stamped on by guards at Bagram and the ligament of his right knee was broken. Consequently, he had no lateral support in his knee and, as a result, could simply fall over at any time. Despite requesting assistance and being told by doctors at Guantánamo that he needed an operation, no proper assistance or operations were provided.

64. In January 2007, el-Hajj started a hunger strike in protest against his ongoing detention without charge and mistreatment. As a result, he was force-fed liquid through a tube inserted into one of his nostrils by camp officials. After 480 days of hunger strike in this manner – during which time he suffered severe weight loss, a kidney infection and a condition that resulted in profuse anal bleeding – el-Hajj was finally released from Guantánamo Bay on May 1, 2008. Upon his “release” – a senior defence official had stated that el-Hajj had not actually been released but rather “transferred to the Sudanese government” – he was reunited with his family. In November 2008, el-Hajj recommenced his employment with Al-Jazeera, this time as Head of the Public Liberties and Human Rights news desk in Doha, Qatar.

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<sup>100</sup> *Ibid.*

#### 4. Other Instances of Torture

65. Finally, as is well-known, detainees in Iraq, including at the notorious Abu Ghraib prison, were also subjected to torture, cruel, inhuman and degrading treatment, and other serious violations of international law.<sup>101</sup> General Taguba documented “numerous incidents of sadistic, blatant, and wanton criminal abuses were inflicted on several detainees.”

#### C. Admissions and Findings that BUSH Authorized and Approved Torture

66. BUSH has acknowledged on numerous occasions, and without any apparent remorse or consequence, that he authorized and condoned the waterboarding of detainees held in U.S. custody, and that he was aware of and condoned the use of so-called “enhanced interrogation techniques.” BUSH’s own admissions are consistent with, and confirm the findings of, key reports, such as the CIA Inspector General’s Report and the Marty Report.

67. The CIA IG Report confirms that BUSH was fully briefed on the specific “enhanced interrogation techniques” employed by the CIA, through consultations carried out in the summer of 2002 by the CIA with the NSC, which BUSH chairs, and with “senior Administration officials.”<sup>102</sup> The CIA IG Report further confirms that in early 2003 the CIA continued to inform

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<sup>101</sup> Detailed accounts of the torture and other crimes committed against Iraqi detainees can be found in numerous reports by the U.S. military as well as in an International Commission of the Red Cross (ICRC) report. See MG Antonio Taguba, *Art. 15-6: Investigation of the 800th Military Police Brigade* (2004) (“Taguba Report”), available at [http://www.npr.org/iraq/2004/prison\\_abuse\\_report.pdf](http://www.npr.org/iraq/2004/prison_abuse_report.pdf) (EXHIBIT 47); G. Fay & A. Jones, US Army, *AR 15-6 Investigation of Intelligence Activities At Abu Ghraib Prison and 205<sup>th</sup> Military Intelligence Brigade* (2004) (“Fay Report”), available at [http://www.washingtonpost.com/wp-srv/nationi/documents/fay\\_report\\_8-25-04.pdf](http://www.washingtonpost.com/wp-srv/nationi/documents/fay_report_8-25-04.pdf) (EXHIBIT 48); *Report of the ICRC on the Treatment by the Coalition Forces of Prisoners of War and other Protected Persons by the Geneva Conventions in Iraq during Arrest Internment and Interrogation*, February 2004, available at [http://www.globalsecurity.org/military/library/report/2004/icrc\\_report\\_iraq\\_feb2004.pdf](http://www.globalsecurity.org/military/library/report/2004/icrc_report_iraq_feb2004.pdf) (EXHIBIT 49); J. Schlesinger, *Final Report of the Independent Panel to Review Department of Defense Detention Operations*, August 2004, available at <http://www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf> (abuses were ‘widespread’ and serious in numbers and effect). See also *Broken Laws, Broken Lives – Medical evidence of torture by US personnel and its impact*, *supra* n. 93; Plaintiff’s Fourth Amended Complaint and Demand for Jury Trial, *Saleh v. Titan*, No. 04-cv-0249 (D.D.C. Dec. 17, 2007), available at <http://www.ccrjustice.org/files/CACI%20Fourth%20Amended%20Complaint%2012.17.07.pdf>.

<sup>102</sup> CIA IG Report, *supra* n. 6, at 23, para. 45. See also *ibid.* at 100, para. 152; Letter from CIA General Counsel, Scott W. Muller, to Representative Jane Harman (Feb. 28, 2003) (stating that it “would be fair to assume” that the Executive Branch “addressed” the policy and legal aspects of the “interrogation techniques” being employed by the CIA), available at [http://www.house.gov/apps/list/press/ca36\\_harman/mullerletter.pdf](http://www.house.gov/apps/list/press/ca36_harman/mullerletter.pdf).

senior Administration officials, including the White House Counsel and others of the NSC, of the status of its Counterterrorism Program, because “[t]he Agency specifically wanted to ensure that these officials and the [Congressional] Committees continued to be aware of and approve CIA’s actions.”<sup>103</sup> Select members of the NSC were given a detailed briefing on the program by the CIA on July 29, 2003, and again on September 16, 2003. “[N]one of those involved in these briefings expressed any reservations about the program.”<sup>104</sup> BUSH met daily with, and was briefed by, his intelligence team.<sup>105</sup>

68. In addition, BUSH played an active role in supporting the CIA secret detention program. Marty’s Council of Europe investigation, for example, reported that BUSH welcomed to the Oval Office a high-level group of delegates from Bucharest to personally thank them to their contribution to the CIA program, as Romania hosted CIA black sites.<sup>106</sup>

69. In an April 2008 interview with ABC News, BUSH acknowledged that he knew of the detailed discussions members of his national security team (the “Principals Committee” of the NSC) were having to define the interrogation techniques to be used by the CIA. When asked

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<sup>103</sup> CIA IG Report, *supra* n. 6, at 23, para. 46.

<sup>104</sup> *Ibid.* at 24.

<sup>105</sup> See White House Daily Press Briefings, available at <http://georgewbush-whitehouse.archives.gov/news/releases/>, e.g., September 15, 2001 (BUSH met with NSC); September 17, 2001 (BUSH met with his National Security Council and visited the Pentagon; the NSC meeting includes Vice President Cheney); September 18, 2001 (BUSH met with his National Security Council); October 25, 2001 (BUSH met with NSC, met with Homeland Security Advisor Tom Ridge and members of congress; White House Press Secretary Ari Fleischer stated: “...the President had a briefing with the CIA; he had a briefing with the Attorney General and the Director of the FBI, as he does each morning”); October 26, 2001 (BUSH convened NSC, and had a meeting with Attorney General, the head of the FBI, and Homeland Security Advisor Tom Ridge; White House Press Secretary, Ari Fleischer stated: “The President, after that, received his morning briefing from the CIA); October 31, 2001 (BUSH “had his usual round of intelligence briefings” and met with NSC); White House Press Briefings, June 20, 2002 (BUSH receives CIA and FBI briefings); June 28, 2002 (BUSH received intelligence and FBI briefings, convened NSC); July 3, 2002, (BUSH received intelligence and FBI briefings, convened NSC); July 10, 2002 (same); July 12, 2002 (same); July 16, 2002, (BUSH received CIA and FBI briefings); July 23, 2002 (same); July 24, 2002 (same); July 26, 2002 (same); July 30, 2002 (same); July 31, 2002 (same); August 1, 2002 (BUSH received CIA and FBI briefings and convened Homeland Security Council).

<sup>106</sup> See Marty Report, *supra* n. 7, at 44, para 218.

about the treatment of Khalid Sheik Mohammad, which included waterboarding, BUSH said: “I didn't have any problem at all trying to find out what Khalid Sheikh Mohammed knew.”<sup>107</sup>

70. BUSH released his memoir, *DECISION POINTS*, on November 9, 2010. In the book, BUSH states unequivocally that he authorized the torture, including waterboarding, of individuals held in U.S. custody.<sup>108</sup> He further admits and acknowledges his role in selecting and approving the interrogation techniques used by the CIA, “I took a look at the list of techniques. There were two that I felt went too far, even if they were legal. I directed the CIA not to use them. Another technique was waterboarding, a process of simulated drowning. No doubt the procedure was tough [...] I would have preferred that we get the information another way. But the choice between security and values was real. Had I not authorized waterboarding on senior al Qaeda leaders, I would have had to accept a greater risk I was unwilling to take. [...] I approved the use of the interrogation techniques.”<sup>109</sup>

71. BUSH details how at his direction, Department of Justice and CIA lawyers conducted a legal review of the list of interrogation techniques proposed by the CIA. (Notably, the current U.S. Attorney General, Eric Holder, has unequivocally defined waterboarding as an act of torture.<sup>110</sup>) Having received advice from government lawyers that it was permissible to waterboard detainees, BUSH admits that he responded “damn right” to the query of whether Khaled Sheik Mohammed could and should be waterboarded.<sup>111</sup>

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<sup>107</sup> *Bush Aware of Advisers' Interrogation Talks: President Said He Knew His Senior Advisers Discussed Tough Interrogation Techniques*, ABC News, available at <http://abcnews.go.com/TheLaw/LawPolitics/story?id=4635175&page=3> [hereinafter *Bush Aware of Advisers' Interrogation Talks*] (EXHIBIT 50).

<sup>108</sup> *DECISION POINTS*, *supra* n. 32, at 169-171. *See supra* (discussing authorizing CIA interrogation techniques, including waterboarding).

<sup>109</sup> *Ibid.* at 169.

<sup>110</sup> *See* Transcript of Confirmation Hearing for Eric Holder as Attorney General of the United States, Jan. 16, 2009, available at [http://www.nytimes.com/2009/01/16/us/politics/16text-holder.html?\\_r%41&pagewanted%3Dall](http://www.nytimes.com/2009/01/16/us/politics/16text-holder.html?_r%41&pagewanted%3Dall).

<sup>111</sup> *DECISION POINTS*, *supra* n. 32, at 170.

72. In an interview with Matt Lauer of NBC News on November 8, 2010, BUSH again admitted that he authorized acts of torture, including waterboarding:

BUSH: [...] one of the high value al Qaeda operatives was Khalid Sheik Mohammed, the chief operating officer of al Qaeda, ordered the attack on 9/11, and they say he's got information. I said, "Find out what he knows." And so I said to our team, "are the techniques legal?" And he says, "yes, they are," and I said, "use 'em."

LAUER: Why is waterboarding legal, in your opinion?

BUSH: Because the lawyers said it was legal. He said it did not fall within the Anti-Torture Act. I'm not a lawyer, but you gotta trust the judgment of people around you and I do.

LAUER: You say it's legal and "the lawyers told me."

BUSH: Yeah.

LAUER: Critics say that you got the Justice Department to give you the legal guidance and the legal memos that you wanted.

BUSH: Well—

LAUER: Tom Kean, who was a former Republican co-chair of the 9/11 commission said they got legal opinions they wanted from their own people.

BUSH: He obviously doesn't know. I hope Mr. Kean reads the book. That's why I've written the book. He can, they can draw whatever conclusion they want.<sup>112</sup>

73. BUSH's admission of authorizing torture techniques was previously acknowledged by the second-highest ranking member of his administration, Vice President Dick Cheney. On May 10, 2009, former Vice President Cheney appeared on the CBS News television program *Face the Nation*. Asked what BUSH had known about torture methods, Cheney replied, "I certainly, yes, have every reason to believe he knew -- he knew a great deal about the program. He basically authorized it. I mean, this was a presidential-level decision. And the decision went to the president. He signed off on it."

74. In relation to rendition, BUSH allowed for and approved the expansion of the program to renditions to torture. Involvement of the executive branch, up to and including the president, was confirmed during a Congressional hearing. On April 17, 2007, the former head of the Bin Laden Unit at the CIA, Michael Scheuer, testified at a Joint Congressional Hearing before the

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<sup>112</sup> Transcript: "'Decision Points,' Former president George W. Bush reflects on the most important decisions of his presidential and personal life," Part 3, NBC, Nov. 8, 2010, available at [http://www.msnbc.msn.com/id/40076644/ns/politics-decision\\_points/](http://www.msnbc.msn.com/id/40076644/ns/politics-decision_points/) (EXHIBIT 51).

Subcommittee on International Organizations, Human Rights, and Oversight and the Subcommittee on Europe of the Committee on Foreign Affairs, that decisions about where to hold rendered detainees were not made by the CIA, but were “made by the President of the United States. No rendition target has ever been taken somewhere on the sole decision of the Central Intelligence Agency.”<sup>113</sup> He testified that no prisoner would be taken “anywhere in this world without the authority of the executive branch.”<sup>114</sup>

75. Indeed, in his memoir *Decision Points*, BUSH confirms his own role in making decisions on alleged terrorists or persons believed to have security information and determining the methods of interrogation to be used:

In this new kind of war, there is no more valuable source of intelligence on potential attacks than the terrorists themselves. Amid the steady stream of threats made after 9/11, I grappled with three of the most critical decisions I would make in the war on terror: where to hold captured enemy fighters, how to determine their legal status and ensure they eventually faced justice, and how to learn what they knew about future attacks so we could protect the American people.”<sup>115</sup>

Such decisions included sending people like Maher Arar to countries including Egypt and Syria, for interrogation under torture.

## II. LEGAL ARGUMENTS

### A. Canadian Jurisdiction over the Offense of Torture

#### 1. The Criminal Code gives Canada jurisdiction over torture committed abroad

76. The Supreme Court of Canada, in addressing the issue of torture, has succinctly described the context in which it arises as an element of the “war on terror”:

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<sup>113</sup> *Extraordinary Rendition in U.S. Counterterrorism Policy: The Impact on Transatlantic Relations: Hearing Before the Subcomm. on International Organizations, Human Rights, and Oversight and the Subcomm. on Europe of the H. Comm. on Foreign Affairs*, 110th Cong. 14 (2007) at 37 (EXHIBIT 52).

<sup>114</sup> *Ibid.* at 18.

<sup>115</sup> DECISION POINTS, *supra* n. 32, at 165.

The issues engage concerns and values fundamental to Canada and indeed the world. On the one hand stands the manifest evil of terrorism and the random and arbitrary taking of innocent lives, rippling out in an ever-widening spiral of loss and fear. Governments, expressing the will of the governed, need the legal tools to effectively meet this challenge.

On the other hand stands the need to ensure that those legal tools do not undermine values that are fundamental to our democratic society — liberty, the rule of law, and the principles of fundamental justice — values that lie at the heart of the Canadian constitutional order and the international instruments that Canada has signed. In the end, it would be a Pyrrhic victory if terrorism were defeated at the cost of sacrificing our commitment to those values.<sup>116</sup>

77. The Supreme Court is clear about Canada’s rejection of torture:

It can be confidently stated that Canadians do not accept torture as fair or compatible with justice. Torture finds no condonation in our *Criminal Code*; indeed the *Code* prohibits it (see, for example, s. 269.1). The Canadian people, speaking through their elected representatives, have rejected all forms of state-sanctioned torture. Our courts ensure that confessions cannot be obtained by threats or force.<sup>117</sup>

78. The Federal Court of Appeal has held, “Surely the concept of torturing ‘the truth out’ of someone is manifestly unlawful, by any standard.”<sup>118</sup>

79. This rejection of torture is reflected in criminal penalties imposed under Article 269.1, of the Canadian Criminal Code (R.S.C., 1985, c. C-46). This provision “reflects the recognition of Parliament that freedom from such intentional mistreatment is a basic human right.”<sup>119</sup> Section 269.1 defines torture as follows:

Every official, or every person acting at the instigation of or with the consent or acquiescence of an official, who inflicts torture on any other person is guilty of an

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<sup>116</sup> *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 SCR 3. at paras. 3-4.

<sup>117</sup> *Ibid.* at para. 50.

<sup>118</sup> *Equizabal v. Canada (Minister of Employment and Immigration)*, [1994] 3 FC 514.

<sup>119</sup> *Canada (Prime Minister) v. Khadr*, 2009 FCA 246, [2010] 1 FCR 73 at para. 51.

indictable offence and liable to imprisonment for a term not exceeding fourteen years.

80. In paragraph 2, “official” is defined as:

(b) a public officer,...

or

(d) any person who may exercise powers, pursuant to a law in force in a foreign state, that would, in Canada, be exercised by a person referred to in paragraph (a), (b), or (c), whether the person exercises powers in Canada or outside Canada.

81. “Torture” means any act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person

(a) for a purpose including

(i) obtaining from the person or from a third person information or a statement,

(ii) punishing the person for an act that the person or a third person has committed or is suspected of having committed, and

(iii) intimidating or coercing the person or a third person, or

(b) for any reason based on discrimination of any kind,

but does not include any act or omission arising only from, inherent in or incidental to lawful sanctions.

82. Importantly, paragraph 3 limits the defences available to a charge of torture:

It is no defence to a charge under this section ... that the act or omission is alleged to have been justified by exceptional circumstances, including a state of war, a threat of war, internal political instability or any other public emergency.

83. Section 7(3.7) of the Criminal Code gives extraterritorial effect to section 269.1:

Notwithstanding anything in this Act or any other Act, every one who, outside Canada, commits an act or omission that, if committed in Canada, would constitute an offence against, a conspiracy or an attempt to commit an offence against, being an accessory after the fact in relation to an offence against, or any counselling in relation to an offence against, section 269.1 shall be deemed to commit that act or omission in Canada if

...

(d) the complainant is a Canadian citizen; or

(e) the person who commits the act or omission is, after the commission thereof, present in Canada.

84. Under the Criminal Code, liability is found in several ways:

21. (1) Every one is a party to an offence who

(a) actually commits it;

(b) does or omits to do anything for the purpose of aiding any person to commit it; or

(c) abets any person in committing it.

(2) Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence.

22. (1) Where a person counsels another person to be a party to an offence and that other person is afterwards a party to that offence, the person who counselled is a party to that offence, notwithstanding that the offence was committed in a way different from that which was counselled.

(2) Everyone who counsels another person to be a party to an offence is a party to every offence that the other commits in consequence of the counselling that the person who counselled knew or ought to have known was likely to be committed in consequence of the counselling.

(3) For the purposes of this Act, “*counsel*” includes procure, solicit or incite.

85. Canadian law has also recognized breach of command responsibility as a criminal offense. Though it only applies to genocide, war crimes and crimes against humanity, the standard is instructive on the duties and liability of commanders:

7. (1) A military commander commits an indictable offence if

(a) the military commander, outside Canada,

(i) fails to exercise control properly over a person under their effective command and control or effective authority and control, and as a result the person commits an offence under section 4, or

(ii) fails, before or after the coming into force of this section, to exercise control properly over a person under their effective command and control or effective authority and control, and as a result the person commits an offence under section 6;

(b) the military commander knows, or is criminally negligent in failing to know, that the person is about to commit or is committing such an offence; and

(c) the military commander subsequently

(i) fails to take, as soon as practicable, all necessary and reasonable measures within their power to prevent or repress the commission of the offence, or the further commission of offences under section 4 or 6, or

(ii) fails to take, as soon as practicable, all necessary and reasonable measures within their power to submit the matter to the competent authorities for investigation and prosecution.<sup>120</sup>

86. International jurisprudence likewise has held commanders criminally liable for failing to take measure to prevent or punish abuses committed by subordinates.<sup>121</sup> The International Criminal Court, though adopting a slightly different standard than other international tribunals, also holds commanders and superiors liable for the acts of their subordinates.<sup>122</sup>

87. As an indictable offence, a charge of torture is not subject to any limitations period.

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<sup>120</sup> *Crimes against Humanity and War Crimes Act*, (S.C. 2000, c. 24)

<sup>121</sup> See, e.g., *See Prosecutor v. Delalić, Mucić, Delić, and Landžo*, Case No. IT-96-21-T, Judgment, Nov. 16, 1998 (“*Čelebići* Trial Judgment”); *Prosecutor v. Mucić, Delić, and Landžo*, Case No. IT-96-21-A, Judgment, Feb. 20, 2001 (“*Čelebići* Appeal Judgment”); *Prosecutor v. Sesay, Kallon, and Gbao*, Case No. SCSL-04-15-T, Judgment, Mar. 2, 2009.

<sup>122</sup> Rome Statute of the International Criminal Court, Jul. 17, 1998, *entered into force* Jul. 1, 2002, U.N. Doc. A/CONF.183/9, 37 ILM 1002 (1998), 2187 UNTS 90.

2. Canada has committed itself to prosecute torture under the terms of an international agreement, the Convention Against Torture

88. Parliament added section 269.1 to the Criminal Code in order to implement the requirements of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (“CAT” or “Convention”).<sup>123</sup> Canada adopted CAT on June 24, 1987 and the Convention entered into force two days later, on June 26, 1987. There are currently 147 signatories to CAT.

89. Article 1, para. 1, of CAT, provides that:

For the purposes of this Convention, torture means 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.

90. As noted by the Committee against Torture, the definition of torture in the Canadian Criminal Code is in accordance with the definition laid out in CAT.<sup>124</sup> In addition, Canadian courts look to CAT and international authorities to interpret domestic law on torture.<sup>125</sup>

91. Relevant for consideration of the transfer of detainees to countries where they faced a risk, or indeed, were intended to be tortured, as is alleged to be the case of those subjected to “extraordinary rendition,” Article 3 of CAT provides, “No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”<sup>126</sup>

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<sup>123</sup> *Davidson v. British Columbia (Attorney General)*, [2006] B.C.J. No. 2630 at para. 22.

<sup>124</sup> Report of the Committee against Torture, A/60/44 (2005).

<sup>125</sup> See *Suresh* at para.68; *Mahjoub (Re)*, 2010 FC 787 at para. 28.

<sup>126</sup> See, e.g., *Torture by Proxy*, *supra* n.65; see also Brief for The Redress Trust as Amicus Curiae in Support of Plaintiff-Appellant Urging Reversal, filed in *Arar v. Ashcroft* (06-4216-cv) in the United States Court of Appeals

92. The Committee against Torture has found that *nonrefoulement* “must be recognized as a peremptory norm under international law, and not merely as a principle enshrined in Article 3 CAT.”<sup>127</sup> Furthermore, the Human Rights Committee has interpreted the absolute prohibition on torture in Article 7 of the International Covenant of Civil and Political Rights (ICCPR) to prohibit *refoulement*,<sup>128</sup> and Article 22 of the American Convention on Human Rights expressly prohibits *refoulement*.<sup>129</sup> Because the principle of *nonrefoulement* is absolute, it cannot be compromised due to national security interests.<sup>130</sup>

93. Canadian law implements the rule of non-refoulement. The *Immigration and Refugee Protection Act*, in section 115(1), reads:

A protected person or a person who is recognized as a Convention refugee by another country to which the person may be returned shall not be removed from Canada to a country where they would be at risk of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion or at risk of torture or cruel and unusual treatment or punishment.

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for the Second Circuit (Oct. 28, 2008), available at <http://www.ccrjustice.org/files/10.28.08%20Amicus%20Brief%20Redress%20Trust.pdf>.

<sup>127</sup> UN Committee against Torture, Summary Record of the 624th Meeting, U.N. Doc. CAT/C/SR.624 (Nov. 24, 2004), § 51-52.

<sup>128</sup> Human Rights Committee, General Comment 20, Article 7, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 (1994) at § 9.

<sup>129</sup> O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force Jul. 18, 1978.

<sup>130</sup> See e.g., *Agiza v Sweden*, U.N. Doc. CAT/C/34/D/233/2003, Communication No. 230/2003 (Committee Against Torture 2005). See also, *Saadi v. Italy*, App. No. 37201/06 (Eur. Ct. H.R. 2008) at ¶¶ 138-41 (a higher standard of proof should not be applied to individuals considered “undesirable or dangerous”; *Chahal v. United Kingdom*, App. No. 22414/93 (Eur. Ct. H.R. 1996), at para. 79.

94. Canadian courts and tribunals have repeatedly invoked section 115(1) and the rule of nonrefoulement in their decisions.<sup>131</sup> Particularly relevant is the Federal Court’s analysis concerning diplomatic assurances:

[T]here appears to be a growing consensus that diplomatic assurances should not be sought when the practice of torture is sufficiently systematic or widespread. In his report to the U.N. General Assembly of September 1, 2004 [*Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc. A/59/324, the U.N. Special Rapporteur on Torture looked at the *non-refoulement* obligations inherent in the absolute and non-derogable prohibition against torture and other forms of ill-treatment. Noting that all relevant considerations must be taken into account when determining whether there are substantial grounds for believing a person would be at risk of being subjected to torture, the Special Rapporteur expressed the view that in circumstances where there is a “consistent pattern of gross, flagrant or mass violations of human rights”, or of “systematic practice of torture,” “the principle of non-refoulement must be strictly observed and diplomatic assurances should not be resorted to.”<sup>132</sup>

95. The Canadian Criminal Code’s rejection of the defence of “exceptional circumstances” also parallels CAT’s provision on the subject. This is particularly relevant in these circumstances, given BUSH’s focus on the terrorist attacks on September 11 and the “war on terror” in presenting his authorization of waterboarding. Article 2(2) of CAT reads:

*No exceptional circumstances whatsoever*, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture. (emphasis added).

96. Then-Special Rapporteur on Torture, Manfred Nowak, stated in the Commentary on CAT he co-authored with Elizabeth McArthur:

Article 2(2) confirms that the prohibition of torture is one of the few absolute and non-derogable human rights. No State may invoke any exceptional circumstances, such as war or terrorism, as a justification of torture. This provision, therefore, provides a clear answer to all attempts aimed at undermining

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<sup>131</sup> See, e.g., *Németh v. Canada (Justice)*, 2010 SCC 56, [2010] 3 SCR 281 at para. 23.

<sup>132</sup> *Lai v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 361, [2008] 2 FCR 3, at para. 136.

the absolute prohibition on torture for the sake of national security in combating global terrorism, such as the ‘ticking time bomb scenario’ or special interrogation methods authorized by Israel and the US government in their respective counter-terrorism strategies.<sup>133</sup> (emphasis added)

97. Nowak and McArthur also highlight that the object and purpose of CAT is “to make the struggle against torture and cruel, inhuman or degrading treatment more effective by establishing additional State obligations to prevent torture and cruel, inhuman or degrading treatment, to assist victims of torture and to punish the perpetrators of torture.”<sup>134</sup>

98. Article 4 of CAT is “*the central norm in relation to the third objective of fighting impunity as one of the root causes for the widespread practice of torture worldwide.*”<sup>135</sup>

According to Article 4 (1):

Each 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.

99. Moreover, Article 5 of the Convention provides:

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases:

- a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;
- b) When the alleged offender is a national of that State;
- c) When the victim was a national of that State if that State considers it appropriate.

2. Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in Paragraph 1 of this article.

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<sup>133</sup> Manfred Nowak and Elizabeth McArthur, *The United Nations Convention Against Torture - A Commentary* (Oxford University Press 2008) (“Nowak and McArthur Commentary”), at 89.

<sup>134</sup> *Ibid.* at 251.

<sup>135</sup> *Ibid.* at 229.

100. Article 5(2) provides for universal jurisdiction in all cases where an alleged torturer is present “in order to avoid safe havens for perpetrators of torture.”<sup>136</sup> This provision makes CAT “*the first human rights treaty incorporating the principal of universal jurisdiction as an international obligation of all State parties without any precondition other than the presence of the alleged torturer.*”<sup>137</sup> (emphasis in original) The need for universal jurisdiction for torture was explained as such: “Torture ... is according to its definition in Article 1 primarily committed by State officials, and the respective governments usually have no interest in bringing their own officials to justice.”<sup>138</sup>

101. It is appropriate in this case to recall the drafting history of this provision. As discussed in the Nowak and McArthur Commentary on CAT, this provision met with “fierce objection” from many States, with the strongest supporter of the draft provision for universal jurisdiction (presented by Sweden) being the United States: “the US Government expressed the opinion that torture is an offence of special international concern which means that it should have a broad jurisdictional basis in the same way as the international community had agreed upon in earlier conventions against hijacking, sabotage and the protection of diplomats.”<sup>139</sup> The Commentary continues: “It was, above all, the delegation from the United States which had convincingly argued that universal jurisdiction was intended primarily to deal with situations where torture is a State policy and where the respective government, therefore, was not interested in extradition and prosecution of its own officials accused of torture.”<sup>140</sup>

102. In Article 6(1), CAT states unambiguously that contracting States are obligated to take legal measures against suspected torturers within their jurisdiction:

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<sup>136</sup> *Ibid.* at 254 (emphasis added).

<sup>137</sup> *Ibid.* at 316.

<sup>138</sup> *Ibid.*

<sup>139</sup> *Ibid.* at 314.

<sup>140</sup> *Ibid.* at 315.

Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State Party in whose territory a person alleged to have committed any offence referred to in article 4 is present *shall* take him into custody or take other legal measure to ensure his presence. (emphasis added)

103. According to the Nowak and McArthur Commentary:

Most of the procedural safeguards provided for in Article 6 are fairly self-evident. If the suspected torturer is present in the territory of the State which initiates criminal proceedings (the presence is a legal requirement only for exercising universal jurisdiction), *its authorities shall take him or her into custody or take other legal measure to ensure his or her presence.*<sup>141</sup> (emphasis added)

104. Once the presence of the suspect is guaranteed, the State must immediately proceed to a preliminary inquiry.<sup>142</sup> This inquiry will make it possible to determine the follow-up necessary, in particular if the State Party itself will conduct the proceedings to their conclusion or if extradition is possible.

105. Simultaneously with the preliminary inquiry to be initiated with immediate effect, “When a State has put a person in detention, in accordance with the provisions of this article, it immediately notifies of this detention and of the circumstances that justify it the States contemplated in paragraph 1 of art. 5”<sup>143</sup>, that is to say, as a priority, the United States, the State of which BUSH is a national (within the meaning of Art. 5, para. 1, let. b).

106. Article 7, paragraph 1 of CAT then requires that the accused be prosecuted:

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<sup>141</sup> Nowak and McArthur Commentary, *supra* n. 133, at 329. The French text does not perfectly make clear that the adoption of measures guaranteeing the presence of the presumed torturer in its territory constitutes an obligation for the State. (“S’il estime que les circonstances le justifient, après avoir examiné les renseignements dont il dispose, tout Etat partie sur le territoire duquel se trouve une personne soupçonnée d’avoir commis une infraction visée à l’article 4 assure la détention de cette personne ou prend toutes autres mesures juridiques nécessaires pour assurer sa présence.”) The terms “if it considers that the circumstances so warrant” cannot be used to grant prosecution authorities any room to allow them to introduce an assessment following, for example, regard for the diplomatic interests of the State concerned.

<sup>142</sup> CAT, Article 6, para. 2

<sup>143</sup> CAT, Article 6, para. 4

The State Party in territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found, shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.

107. Therefore, only a request for extradition formulated by the United States or a third country, guaranteeing BUSH an equitable trial, would permit Canada not to exert its criminal jurisdiction over the crimes in question.<sup>144</sup>

108. Canada is thus empowered by the Criminal Code and CAT to prosecute anyone within its territory alleged to be responsible for torture, and Canada is obligated by CAT to either submit the case for the purpose of prosecution or extradite.

3. Canada will have an obligation to extradite or prosecute

109. BUSH will be present on Canadian soil during the day of Thursday, October 20, 2011.

110. The legal requirement of presence in Canada will be satisfied on the above-mentioned date. With regard to the case of Canadian citizen Maher Arar, the Government of Canada already has jurisdiction under section 269.1(d) even prior to BUSH's visit.

111. We are not aware of any current or forthcoming requests to the Government of Canada for the extradition of BUSH to the United States or a third country.<sup>145</sup> Should no extradition

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<sup>144</sup> See *ibid.* at 344.

<sup>145</sup> The United States ratified the Convention Against Torture on October 21, 1994. The same obligations as those presented above are applicable to, and imposed on, the United States. The United States has codified acts of torture as a criminal offense under domestic law. The relevant criminal provisions (cf. US Code, Title 18, Part I) define torture as: § 2340. Definitions: As used in this chapter—(1) “torture” means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control;(2) “severe mental pain or suffering” means the prolonged mental harm caused by or resulting from—(A) the intentional infliction or threatened infliction of severe physical pain or suffering; (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (C) the threat of imminent death; or (D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality; and (3) “United States” means the several States of the United States, the District of Columbia, and the commonwealths, territories, and possessions of the United States. See also § 2340A. Torture, (a) Offense.— Whoever outside the

requests be made, the Government of Canada is required to submit the matter to its authorities for the purpose of prosecution.<sup>146</sup>

112. Consequently, through the Criminal Code and CAT, the Government of Canada has jurisdiction to prosecute the acts of torture and, under international law, the obligation to do so when BUSH is present and not extradited.<sup>147</sup>

### **B. The Acts Alleged Constitute Torture**

113. Based on the foregoing, it can be concluded that the interrogation methods employed by the U.S. officials under BUSH's command and control satisfy the constitutive elements of torture, as reflected in Criminal Code section 269.1 and Article 1 of CAT: these acts were perpetrated by government officials; they had a clear purpose, which was to obtain from the victim or from third parties information or a confession; they were committed intentionally; they were carried out upon persons in a position of powerlessness; they have caused severe physical or mental pain or suffering.

114. The acts constitute torture under Canadian law. In one of the few prosecutions under section 269.1, a military officer was convicted of torture in similar circumstances to some of the facts described above. The officer ordered a training exercise in which a soldier was kidnapped

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United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life. (b) Jurisdiction.— There is jurisdiction over the activity prohibited in subsection (a) if—(1) the alleged offender is a national of the United States; or (2) the alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender.

<sup>146</sup> See, e.g., *Suleymane Guengueng et autresv.* Sénégal, para.9(7). Communication No. 181/2001,CAT/C/36/D/181/2001 of May 19, 2006.

<sup>147</sup> If the Government of Canada intends to violate its legal obligations by failing to investigate and prosecute BUSH while he is in Canada, the Government should instead deny BUSH entry. A foreign national is inadmissible on grounds of criminality for “committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an indictable offence under an Act of Parliament.” As discussed above, *supra* n. 145, torture is an indictable offence in both Canada and the United States. Alternatively, a foreign national is inadmissible to Canada on grounds of *serious* criminality for “committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.” Torture under section 269.1 of the Criminal Code meets this threshold, as the crime is punishable for up to a maximum of fourteen years.

and threatened by masked and armed “intruders.” The defendant had ordered that the victim be bound and gagged, locked in a room, his head covered by a pillowcase and threatened with guns. The court held that the infliction of mental pain on the soldier constituted torture and was intended to extract from him information about the location of a key.<sup>148</sup>

115. In *Harkat*, the Federal Court – though only analyzing the admissibility of testimony that, according to public reports, had been obtained through torture – excluded statements made by Abu Zubaida [Abu Zubaydah], who was being held *incommunicado* by the United States while BUSH was president. The court said the public information “raise[d] significant concern about the methods used to interrogate Abu Zubaida [Abu Zubaydah].”<sup>149</sup>

116. The Committee Against Torture has noted that the interrogation techniques carried out by the CIA since 2002 “have resulted in the death of some detainees during interrogation” or have “led to serious abuses of detainees”, and as such the United States “should rescind any interrogation technique, including methods involving sexual humiliation, ‘waterboarding’, ‘short shackling’ and using dogs to induce fear, that constitutes torture or cruel, inhuman or degrading treatment or punishment, in all places of detention under its de facto effective control, in order to comply with its obligations under the Convention.”<sup>150</sup>

117. In their joint report of February 27, 2006, the five Special Rapporteurs arrived at the conclusion that the interrogation methods meet the definition of torture:

These techniques meet four of the five elements in the Convention definition of torture (the acts in question were perpetrated by government officials; they had a clear purpose, i.e. gathering intelligence, extracting information; the acts were committed intentionally; and the victims were in a position of powerlessness).

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<sup>148</sup> *R. c. Rainville*, 2001 CanLII 1572 (QC CQ).

<sup>149</sup> *Harkat, Re*, 2005 FC 393 at para. 120. Though not ruling directly on section 269.1, the Supreme Court of Canada decided that a regime that included lack of access to *habeas corpus* and sleep deprivation used to “soften up” Canadian prisoner Omar Khadr at Guantanamo Bay did not accord with fundamental justice and thus violated his rights under Section 7 of the *Canadian Charter of Rights and Freedoms*. *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 SCR 44 at paras. 24-26.

<sup>150</sup> US CAT Report, *supra* n. 92, para 24.

However, to meet the Convention definition of torture, severe pain or suffering, physical or mental, must be inflicted.

Treatment aimed at humiliating victims may amount to degrading treatment or punishment, even without intensive pain or suffering. It is difficult to assess in abstracto whether this is the case with regard to acts such as the removal of clothes. However, stripping detainees naked, particularly in the presence of women and taking into account cultural sensitivities, can in individual cases cause extreme psychological pressure and can amount to degrading treatment, or even torture. The same holds true for the use of dogs, especially if it is clear that an individual phobia exists. Exposure to extreme temperatures, if prolonged, can conceivably cause severe suffering.

On the interviews conducted with former detainees, the Special Rapporteur concludes that some of the techniques, in particular the use of dogs, exposure to extreme temperatures, sleep deprivation for several consecutive days and prolonged isolation were perceived as causing severe suffering. He also stresses that the simultaneous use of these techniques is even more likely to amount to torture. The Parliamentary Assembly of the Council of Europe also concluded that many detainees had been subjected to ill-treatment amounting to torture, which occurred systematically and with the knowledge and complicity of the United States Government. The same has been found by Lord Hope of Craighead, member of the United Kingdom's House of Lords, who stated that "some of [the practices authorized for use in Guantánamo Bay by the United States authorities] would shock the conscience if they were ever to be authorized for use in our own country".<sup>151</sup>

118. In addition, jurisprudence from various international bodies - international or regional courts or human rights treaty bodies - qualifies the different interrogation methods authorized and overseen by Bush as torture and/or cruel, inhumane or degrading treatment:

- Exposure to extreme temperatures<sup>152</sup>
- Sleep deprivation<sup>153</sup>
- Punching or kicking<sup>154</sup>

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<sup>151</sup> UN Guantánamo Situation Report, *supra* n. 90, paras. 51-52.

<sup>152</sup> See the European Court of Human Rights, case of *Tekin vs. Turkey* (1998); *Akdeniz vs. Turkey* (2001); Human Rights Committee, case of *Polay Campos vs. Peru* (1997), § 9.

<sup>153</sup> European Court of Human Rights, *Ireland vs. United Kingdom* (1978), § 167.

<sup>154</sup> Committee Against Torture, case *Dragan Dimitrijevic vs. Serbia and Montenegro* (2004), paragraph 5.3; case *Ben Salem vs. Tunisia* (2007), § 16.4; case *Saadia Ali vs. Tunisia* (2008), § 15.4

- Isolation in a “coffin” for prolonged periods<sup>155</sup>
- Threats of bad treatment<sup>156</sup>
- Solitary confinement<sup>157</sup>
- Forced nudity<sup>158</sup>

119. Waterboarding, which BUSH admitted he authorized, has been found to be an act of torture.<sup>159</sup>

120. This jurisprudence, coupled with the conclusions described above by the United Nations, the ICRC, and the Council of Europe on the illegality of the techniques authorized by BUSH, shows that the so-called “enhanced interrogation techniques” are unlawful and amount to torture, in violation of Canadian law and CAT.

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<sup>155</sup> Committee Against Torture, Summary account of the proceedings concerning the inquiry on Turkey, doc. A/48/44/Add.1, 1993, paragraph. 52, for a case where the Committee required the immediate demolition of the isolation cells known as coffins, which constituted on their own a form of torture; Human Rights Committee, case *Cabal and Pasini vs. Australia* (2003), § 8.4, where the cell was of the dimensions similar to those of a telephone cabin.

<sup>156</sup> Special Rapporteur for the Commission on Human Rights, Report to the General Assembly on the question of torture and other cruel, inhuman or degrading treatment or punishment (UN Doc. A/56/156) July 3, 2001; Human Rights Committee, case *Estrella v. Uruguay* (Communication No. 74/1980) Mar. 29, 1983; European Court of Human Rights, *Campbell and Cosans v. the United Kingdom* (1982), § 26; European Court of Human Rights *Gafgen v. Germany* (2010): § 91 and 108. Committee against Torture: Summary account of the results of the proceedings concerning the inquiry on Peru, doc. A/56/44, 2001, §186; Concluding Observations on Denmark, doc. A/57/44, 2002, §74(c)–(d); Concluding Observations on Denmark, doc. CAT/C/DNK/CO/5, 2007, § 14; Concluding Observations on Japan, doc. CAT/C/JPN/CO/1, 2007, §18. Human Rights Committee: General Comment No. 20, 1992, §6; HRC, Concluding Observations on Denmark, doc. CCPR/CO/70/DNK, 2000, § 12; Case *Polay Campos v Peru*, views of Nov. 6, 1997, § 8.6 ; Case *Vuolanne v Finland* (1989), § 9.5.

<sup>157</sup> ECOSOC, Situation of persons detained at Guantánamo Bay, Feb. 27, 2006, E/CN.4/2006/120, § 53 and 87; UN Special Rapporteur on Torture Doc. A/63/175, Jul. 28, 2008, § 70-85. See also the Annexe, containing the Istanbul Statement on the Use and the Effects of Solitary Confinement. See Principle 7 of the Basic Principles for the Treatment of Prisoners, Adopted and proclaimed by General Assembly resolution 45/111 of Dec. 14, 1990.

<sup>158</sup> Committee against Torture, Case *Saadia Alia v. Tunisia* (2008) § 15.4; European Court of Human Rights, *Valasinas v. Lithuania* (2001).

<sup>159</sup> See, e.g., G. SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW AT WAR 461-466 (Cambridge University Press 2010) (surveying jurisprudence and collecting statements by international bodies and experts that waterboarding constitutes torture); Transcript of Confirmation Hearing for Eric Holder as Attorney General of the United States, Jan. 16, 2009, available at [http://www.nytimes.com/2009/01/16/us/politics/16text-holder.html?\\_r=41&pagewanted=all](http://www.nytimes.com/2009/01/16/us/politics/16text-holder.html?_r=41&pagewanted=all); See also E. Wallach, *Drop by Drop: Forgetting the History of Water Torture in U.S. Courts*, 45 Colum. J. Transnat'l L. 468 (2007).

121. Extraordinary Rendition is also unlawful and amounts to torture, in violation of Canadian law and CAT. Numerous esteemed bodies have investigated the United States' Extraordinary Rendition program and found that it violates international law, and have cited Arar's rendition to torture as one instance of such conduct.<sup>160</sup>

122. In addition, enforced disappearance and secret detention constitute torture. In July 2006, before BUSH publicly acknowledged and officially endorsed the existence of the CIA secret detention program, the Committee against Torture reviewed the United States' compliance with CAT, and in particular the practice of secret detention. The Committee concluded:

The State party should ensure that no one is detained in any secret detention facility under its de facto effective control. Detaining persons in such conditions constitutes, per se, a violation of the Convention.<sup>161</sup>

123. In *El-Megreisi v Libya*, the UN Human Rights Committee, the treaty body in charge of reviewing the State parties' compliance with the *International Covenant on Civil and Political Rights* (ICCPR), found that the victim, who had been secretly detained for more than three years, "by being subjected to prolonged incommunicado detention in an unknown location, is the victim of torture and cruel and inhumane treatment, in violation of articles 7 and 10, paragraph 1,

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<sup>160</sup> See, e.g., Council of Europe, Committee on Legal Affairs and Human Rights: Alleged secret detentions and unlawful inter-state transfers involving Council of Europe Member States (June 2006), available at [http://assembly.coe.int/CommitteeDocs/2006/20060606\\_Ejdoc162006PartII-FINAL.pdf](http://assembly.coe.int/CommitteeDocs/2006/20060606_Ejdoc162006PartII-FINAL.pdf); Council of Europe, Committee on Legal Affairs and Human Rights: Secret detentions and Illegal Transfers of Detainees involving Council of Europe Member States: Second Report (June 2007), available at [http://www.libertysecurity.org/IMG/pdf\\_EMarty\\_20070608\\_NoEmbargo.pdf](http://www.libertysecurity.org/IMG/pdf_EMarty_20070608_NoEmbargo.pdf); European Parliament, *Report on the Alleged use of European countries by the CIA for transportation and illegal detention of prisoners* (January 2007), available at [http://www.europarl.europa.eu/comparl/tempcom/tdip/final\\_report\\_en.pdf](http://www.europarl.europa.eu/comparl/tempcom/tdip/final_report_en.pdf); UN Joint Study, *supra* n. 37; Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Aug. 30, 2005, A/60/316, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/476/51/PDF/N0547651.pdf?OpenElement>.

<sup>161</sup> US CAT Report, *supra* n. 92, at 17. See also, "The fact of being detained outside any judicial or ICRC control in an unknown location is already a form of torture, as Louise Arbour, UN High Commissioner for Human Rights has said" in the Marty Report 2007, *supra* n. 7, at 241.

of the Covenant.”<sup>162</sup>

124. In addition, the conditions under which the “high value detainees” were disappeared meets the definition of enforced disappearance under international law, which in itself is a violation of CAT. The International Convention for the Protection of All Persons from Enforced Disappearance provides for an accepted definition under international law of enforced disappearance. Article 2 of the Convention states:

“enforced disappearance” is considered to be the 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.<sup>163</sup>

125. The ICRC found in its February 2007 report that the detention of the fourteen CIA “high value detainees” amounted to “enforced disappearance”:

The totality of the circumstances in which they were held effectively amounted to an arbitrary deprivation of liberty and enforced disappearance, in contravention of international law.<sup>164</sup>

126. The Human Rights Committee, as well as the Committee against Torture, has recognized that enforced disappearance “is inseparably linked to treatment that amounts to a violation of Article 7 [of the ICCPR, prohibiting torture].”<sup>165</sup> When an enforced disappearance has been

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<sup>162</sup> *El-Megreisi v. Libyan Arab Jamahiriya*, Communication No. 440/1990, U.N. Doc. CCPR/C/50/D/440/1990 (1994), para. 5.4.

<sup>163</sup> See The International Convention for the Protection of All Persons from Enforced Disappearance, adopted on Dec. 20, 2006, available at <http://www2.ohchr.org/english/law/disappearance-convention.htm>.

<sup>164</sup> ICRC CIA Detainee Report, *supra* n. 11, at 25.

<sup>165</sup> *Bozize c. Central African Republic* No. 449/1990, Doc. NU, CCPR/C/50/D/428/1990, 1994 at 5.7, and Communication No. 449/1991: Dominican Republic, Doc., NU, CCPR/C/51/D/449/1991 at 5.7.

perpetrated, it is not necessary that ill-treatment be also inflicted in order for the disappearance to meet the definition of torture.<sup>166</sup>

127. In its conclusions and recommendations to the United States in 2006, the Committee against Torture unequivocally recalled that enforced disappearance constitutes in itself a violation of the Convention against Torture:

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.<sup>167</sup>

### **C. Individual Criminal Liability under Canadian and International Law**

128. BUSH is responsible for torture, both for ordering it and, as a commander, for failing to stop or punish it.

129. Two leading commentators on CAT, Burgers and Danelius, have noted:

It is important, in particular, that different forms of complicity or participation are punishable, since the torturer who inflicts pain or suffering often does not act alone, but his act is made possible by the support or encouragement which he receives from other persons. In many cases, the torturer is merely a tool in the hands of someone else, and although this does not relieve him of criminal responsibility, the person or persons who instructed him should also be punished. In the definition of torture in article 1, reference is made to cases where pain or suffering is inflicted “at the instigation or with the consent or acquiescence of a public official or other person in an official capacity.” *Such instigation, consent or acquiescence should be considered to be included in the term “complicity or participation” in article 4.*<sup>168</sup> (emphasis added)

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<sup>166</sup> See *Celis Laureano c. Peru* Communication No. 540/1993, Doc. NU, CCPR/C/51/D/540/1993. See also the conclusions and recommendations of the Committee against Torture, A/52/44, at 79, A/52/44, at 247, and A/53/44, at 249 and 251.

<sup>167</sup> US CAT Report, *supra* n. 92, para 18.

<sup>168</sup> J. HERMAN BURGERS/HANS DANIELIUS, *THE UNITED NATIONS CONVENTION AGAINST TORTURE* 127s (Martinus Nijhoff, Dordrecht 1988).

130. According to the Committee Against Torture, “the hierarchical leaders – also including the civil servants –are not able to evade answerability nor their criminal responsibility for acts of torture or of poor treatment committed by subordinates when they knew or should have known that these people were committing, or were susceptible to commit, these inadmissible acts and that they did not take the reasonable means of prevention that were imposed upon them.”<sup>169</sup>

131. Both in the case of Augusto Pinochet, as well as in the case of Hissène Habré, the Committee Against Torture was in fact confronted with two former Heads of State where it was not alleged that they themselves had directly carried out torture. It nonetheless remains that both Great Britain as well as Senegal were called upon to prosecute these two former Heads of State in conformity with their conventional obligations.

132. The same analysis and results apply to BUSH. As outlined above, BUSH could be prosecuted for ordering, aiding, abetting, counseling, exercising command responsibility over and carrying out the common purpose to commit acts of torture.

133. As president of the United States, and Commander-in-Chief of the U.S. Armed Forces, BUSH bears individual and command responsibility for the acts of his subordinates which he ordered, authorized, condoned or otherwise aided and abetted, and the violations committed by his subordinates which he failed to prevent or punish.

134. BUSH bears individual criminal responsibility for the torture he personally authorized and supervised through the CIA torture program. On September 17, 2001, BUSH signed the directive launching the CIA program by vesting the agency with unprecedented power. Investigative sources by inter-governmental bodies have found that BUSH directly, and repeatedly, approved the CIA program, including the treatment of “high value detainees” by the agency.

135. Through regular meetings of the NSC, briefings by members of his Cabinet, including but not limited to the Director of the CIA, Secretary of Defense, Secretary of State, Vice President,

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<sup>169</sup> Committee against Torture, General Observation n° 2, § 26 (CAT/C/GC/2).

the Attorney General and White House Counsel, BUSH was fully informed of the treatment of detainees in U.S. custody, including detainees held in secret sites by the CIA, and the acts of torture and cruel, inhuman and degrading treatment to which detainees were subjected while under the control of the United States.

136. The United States Senate Armed Services Committee (SASC) conducted an 18-month inquiry into the treatment of detainees in U.S. custody entitled, “Inquiry into the Treatment of Detainees in U.S. Custody.” It contains detailed information on the involvement of officials at the highest levels of the US government in formulating and implementing the US detention and interrogation program. In essence, the SASC Report provides a comprehensive overview of United States policies and program of torture and other forms of serious abuse of detainees during the Bush Administration in Afghanistan, Guantánamo and Iraq. Drawing on legal memorandum, international investigations within the military, the FBI and the CIA, as well as testimony of more than 70 witnesses, the Report conclusively establishes that the interrogation policies that originated in the White House, the Department of Defense, the Department of Justice and the CIA in 2001-2002 led to the torture and abuse of detainees in Afghanistan, Guantánamo, Iraq and elsewhere.

137. The Committee found:

*The abuse of detainees in US custody cannot simply be attributed to the actions of “a few bad apples” acting on their own. The fact is that senior officials in the United States government solicited information on how to use aggressive techniques, redefined the law to create the appearance of their legality, and authorized their use against detainees.*

138. The Committee further found that following BUSH’s February 7, 2002 determination that the Geneva Conventions did not apply to members of al Qaeda or the Taliban, “techniques such as waterboarding, nudity, and stress positions, used in SERE training to simulate tactics used by enemies that refuse to follow the Geneva Conventions, were authorized for use in interrogations of detainees in U.S. custody. (...) Members of the President’s Cabinet and other senior officials participated in meetings inside the White House in 2002 and 2003 where specific interrogation

techniques were discussed. National Security Council Principals reviewed the CIA’s interrogation program during that period. (...) The Central Intelligence Agency’s (CIA) interrogation program included at least one SERE training technique, waterboarding. Senior Administration lawyers, including Alberto Gonzales, Counsel to the President, and David Addington, Counsel to the Vice President, were consulted on the development of legal analysis of CIA interrogation techniques. Legal opinions subsequently issued by the Department of Justice’s Office of Legal Counsel (OLC) interpreted legal obligations under U.S. anti-torture laws and determined the legality of CIA interrogation techniques. Those OLC opinions distorted the meaning and intent of anti-torture laws, rationalized the abuse of detainees in U.S. custody and influenced Department of Defense determinations as to what interrogation techniques were legal for use during interrogations conducted by U.S. military personnel.”

139. The legal opinions that were written most notably from 2002-2005 by the White House Counsel and the Department of Justice Office of Legal Counsel, are referred to by BUSH as the prevailing legal justifications for the ongoing torture of detainees: “We had legal opinions that enabled us to do it.”<sup>170</sup> What the memos in question sought to achieve was to redefine torture in order to provide a pre-emptive legal cover or defense for potential criminal prosecutions that could arise from the “enhanced interrogation techniques” to be used. The legal opinions, and most notoriously a August 2, 2002 memo written to the attention of BUSH’s counsel, advised that the Convention Against Torture’s prohibition on torture was to be read narrowly so as to prohibit only acts that inflict pain equivalent to major organ failure or death.<sup>171</sup> It is today not disputed – and in fact confirmed by an investigation from the Department of Justice<sup>172</sup> - that

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<sup>170</sup> *Bush Aware of Advisers’ Interrogation Talks*, *supra* n. 107.

<sup>171</sup> Memorandum from Jay S. Bybee, the Department of Justice Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, *Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A* (Aug. 1, 2002), available at <http://f11.findlaw.com/news.findlaw.com/wp/docs/doj/bybee80102mem.pdf> (EXHIBIT 53).

<sup>172</sup> See *US Department of Justice, Office of Professional Responsibility, 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 15* (2009), available at <http://judiciary.house.gov/hearings/pdf/OPRFinalReport090729.pdf>.

these opinions were written with the full consciousness that the conclusions were contrary to clearly established law and would be used to allow torture.<sup>173</sup>

140. These memos can in no way provide a legal cover to officials who have authorized, implemented, or supervised the illegal interrogation techniques to be used on detainees – including BUSH. In fact, attempting to immunize torturers is a violation of domestic and international law. The United States, as a party to the Convention Against Torture cannot claim that they were no longer under the obligation to abide by it. In addition, the prohibition against torture is a *jus cogens* norm, meaning that no circumstances may ever justify the recourse to torture. Internal governmental memos cannot legally allow it, or provide any type of legal cover for those implementing it.

141. Moreover, in addition to authorizing and being personally aware of the details of the interrogation techniques amounting to torture, BUSH actively sought to prevent legislation from the U.S. Congress aimed at ending the illegal treatment and torture of detainees in U.S. custody. In October 2005, the Detainee Treatment Act introduced by Senator John McCain passed in Congress and prohibited the inhuman treatment of detainees. On December 30, 2005, Defendant BUSH signed the, “President's Statement on Signing of H.R. 2863,” in which he claimed that his “constitutional authority” as Commander-in-Chief took precedence in “protecting the American people from further terrorist attacks” and therefore gave himself the power to ignore the new prohibition on inhumane treatment contained in the bill he had just signed into law.

142. These forms of liability under Canadian law parallel those in CAT, namely “all acts of torture including the acts of attempt, complicity and participation are criminal offences punishable in a manner proportionate to the gravity of the crimes committed. Officials who order

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<sup>173</sup> The Nuremberg International Military Tribunal’s jurisprudence provides a direct precedent for the prosecution of government lawyers who individually and consciously participated in violations of international law, see *United States v. Altstoetter*, in 3 Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10 (1951)(“The Justice Case”), available at <http://www.mazal.org/NMT-Home.htm> and *United States v. Weizsaecker*, in 12-14 Trials of War Criminals before the Nuremberg Military Tribunals Under Control Council Law No. 10 (1951) (“The Ministries Case”).

or instruct others to carry out torture must therefore be made criminally responsible by national law.”<sup>174</sup>

143. Based on the foregoing, there are grounds for individual criminal responsibility for BUSH.

#### **D. Absence of immunity**

144. Since Canadian law itself provides no substantive or formal immunity, only immunity recognized by international law could apply. However, in this case, immunity cannot apply as it would conflict with Canada’s obligation to exercise its jurisdiction in prosecuting the case against BUSH described herein.

145. Both conventional international law and customary international law will be examined as a possible basis for claiming immunity.

##### **1. Absence of immunity by treaty**

146. In the present matter, conventional international law does not provide for immunity.

147. The diplomatic and consular immunities provided for by the Vienna Convention on Diplomatic Relations (entered into force April 24, 1964) and Vienna Convention on Consular Relations (entered into force on March 19, 1967) clearly do not apply as BUSH is neither a diplomat nor a consular official, but is coming to Surrey as a private citizen of the United States.

148. The Convention on Special Missions of 1969 (New York, entered into force June 21, 1985) likewise does not apply since the purpose of the visit of BUSH to Surrey clearly comes under his private sphere. He will be in Canada to take part in an economic forum at which he is a paid speaker.

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<sup>174</sup> Nowak and McArthur Commentary *supra* n. 133, at 236.

## 2. Absence of customary immunity

149. There are only two types of immunity provided for by *customary* international law. The first regards *functional immunity*, that is, the theory according to which facts committed in the scope of an official office could not give rise to any criminal liability of their author. The second regards the *personal immunity* of a former head of state.

150. Functional immunity has to do with substantive law and implies that the acts performed in carrying out an official function cannot result in their author's individual criminal liability, but only the possible liability of the State that he or she represents. Personal immunity is of a procedural nature and guarantees the inviolability of the holder of the office in question during its duration.<sup>175</sup>

### i. Absence of functional immunity

151. The starting point for considering the application of functional immunity must be that international law does not provide immunity for the perpetrator of acts recognized as crimes by the international community; such acts cannot be attributable to the State due to the consensus among states that such acts – including torture – are impermissible and illegal under all circumstances.<sup>176</sup> Because such actions are not, and indeed, cannot be considered “sovereign acts” or “governmental acts”, they cannot fall within the scope of an official’s authority under international law.<sup>177</sup>

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<sup>175</sup> See, e.g., Antonio Cassese, *When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case*, 13 Eur. J. Int’l L. 853 (2002) (“Cassese on *Yerodia*”).

<sup>176</sup> See, e.g., Cassese on *Yerodia*, 13 Eur. J. Int’l L. at, 862; *Regina v. Bow Street Metro. Stipendiary Magistrate, Ex parte Pinochet (No. 3)*, [1999] 2 All E.R. 97, 179 [2000] 1 A.C. 147 (H.L.) (“Pinochet (3)”), Opinion of Lord Browne-Wilkinson (“Can it be said that the commission of a crime which is an international crime against humanity and jus cogens is an act done in an official capacity on behalf of the state? I believe there to be strong grounds for saying that the implementation of torture...cannot be a state function.”). See also *Filártiga v. Peña-Irala*, 630 F.2d 876, 8849 (2d Cir. 1980).

<sup>177</sup> See, e.g., *Prosecutor v. Milošević*, Case No. IT-02-54-PT, Decision on Preliminary Matters, ¶32 (Nov. 8, 2001) (quoting Nuremberg Judgement, Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10 (“He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law.”)); *Prosecutor v. Blaškić*, IT-95-14-AR, (Issue of subpoena duces tecum), ¶41 (Oct. 29, 1997) (“those responsible for

152. In a controversial judgment, however, the International Court of Justice decided that where no particular rule of conventional law is found to apply, there exists a rule of *customary* international law relative to the functional immunities applicable to former ministers of foreign affairs (and by extension to former heads of state). The Court further found:

after a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all of the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity.<sup>178</sup>

153. Because torture cannot be considered a “sovereign act” that receives immunity.<sup>179</sup> It is also important to note that the *Yerodia* case did not include charges of torture under the Convention Against Torture.

154. In applying general principles of law, the general *customary* international rule must, however, give way to a specific conventional international rule.<sup>180</sup>

155. It would be contrary to the very object and purpose of CAT to allow possible immunities to prevent the realization of one of the primary goals of CAT, namely, the prosecution of torturers.

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[war crimes, crimes against humanity and genocide] cannot invoke immunity from national or international jurisdiction even if they perpetrated such crimes while acting in their official capacity”); *Attorney Gen. of the Gov’t of Israel v. Eichmann*, 36 I.L.R. 277, 310 (Supreme Court of Israel 1962) (“international law postulates that it is impossible for a State to sanction an act that violates its severe prohibitions, and from this follows the idea which forms the core of the concept of ‘international crime’ that a person who was a party to such crime must bear individual responsibility for it. If it were otherwise, the penal provisions would be a mockery.”).

<sup>178</sup> *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* (“*Yerodia*”), Judgment of Feb.14, 2002, para. 61, available at <http://www.icj-cij.org/docket/files/121/8126.pdf>.

<sup>179</sup> See, e.g., *Yerodia*, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, para. 75 (serious international crimes cannot be regarded as official acts).

<sup>180</sup> See, for example, International Court of Justice, case of the military and paramilitary activities in Nicaragua and against this state, decree of June 27, 1986, § 247 (available at <http://www.icj-cij.org/docket/files/70/6502.pdf>: “In a general manner, since conventional rules have the nature of *lex specialis*, it would not be suitable for a State to present a demand founded on a rule of customary international law if, by treaty, it has already provided for means to settle such a demand.”

156. Thus, in the field of the fight against torture, there simply is no legal room to apply, as regards functional immunity, any rule of *customary* international law that derogates a rule of *conventional* international law.

157. Several international authorities have already ruled that the prohibition of the torture constitutes a *jus cogens* rule of international law that allows no place for the application of a contrary customary law rule based on the author's particular capacity.<sup>181</sup>

158. In fact, “[c]learly, the value of *jus cogens* in prohibiting torture justifies the idea that this is henceforth one of the most fundamental norms of the international community.”<sup>182</sup>

159. The fact that the presumed author of the universally punishable act holds or has held an official office in his country does not, therefore, constitute an obstacle to prosecution. Such was the finding by the House of Lords in the U.K. in the case of General Augusto Pinochet, a former head of state. As Lord Millett opined in *Pinochet (3)*, “[i]nternational law cannot be supposed to

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<sup>181</sup> European Court of Human Rights, *Case Al-Adsani v. United Kingdom*, judgment of Nov. 21, 2001, para. 60: “The primordial importance that the prohibition of the torture covers is more and more recognized, as are testified by other domains of international law. Thus, torture is prohibited by article 5 of the Universal Declaration of human rights and article 7 of the international Pact relative to civil rights and policies. In its article 2, the United Nations Convention against torture and other cruel, inhuman or degrading punishments or treatments in any State starts from taking legislative, administrative, judicial measures and other effective measures to prevent that acts of torture are committed in any territory under its jurisdiction and, in its article 4, to monitor that all acts of torture constitute infractions with regards to its criminal law (paragraphs 25-29 above). Besides, according to several decisions of justice, the prohibition of torture henceforth has value of imperative norm, that means *jus cogens*. Thus in its judgment of December 10, 1998 in the *Furundžija* case, the International Criminal Tribunal for the former Yugoslavia, while referring specifically to the set of the conventional rules cited above, has said that “by reason of the importance of the values that it protects, this principle [forbidding torture] became an imperative norm or *jus cogens*, that is to say a norm that is located in the international hierarchy at a higher rank than the conventional law and even the rules of the “ordinary” common law.” Similar declarations are found in other cases of this same court or of national jurisdictions-among which the House of Lords in the case *ex parte Pinochet (No. 3)*-had to hear.” (citations omitted). See also case of *Mauritanian Captain Ely Ould Dah*, as discussed in *European Court of Human Rights decision, Ould Dah v. France* (Application No. 13113/03), Mar. 17, 2009, available online in French at <http://cmiskp.echr.coe.int/tkp197/view.asp?item%41&portal%4hbk&action%4html&highlight%4ould%20%7C%20dah&sessionid%423103930&skin%4hudoc-en>.

<sup>182</sup> *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgement (Dec. 10, 1998), para. 154. See also *Prosecutor v. Delalić*, Case No. IT-96-21-T, Judgement (Nov. 16, 1998), para. 454 and *Prosecutor v. Kunarac*, Case No. IT-96-21-T, Judgement (Feb. 22, 2001), para. 466.

have established a crime having the character of a *jus cogens* and at the same time to have provided an *immunity* which is co-extensive with the obligation it seeks to impose.”<sup>183</sup>

160. International practice supports this conclusion. In the case of Pinochet, himself a former head of state (President of Chile at the time of the acts), the Committee against Torture, the very authority responsible for supervising the proper application of CAT by the States, expressly emphasized that if the United Kingdom did not extradite Pinochet to Spain or a third-party country, it would then have to undertake the investigation and prosecution of the case:

The Committee recommends finally that the case of the Chilean senator Pinochet is submitted to the public prosecutor's office in order to determine if a lawsuit is feasible, and, if the case arises, that the criminal prosecution is engaged in England if the decision not to extradite him was taken. This would be in conformity with the obligations incumbent upon the state starting according to articles 4 to 7 the Convention and article 27 of the Vienna Convention of 1969 on treaty law.<sup>184</sup>

161. The Supreme Court of Canada has looked approvingly to the Pinochet decision. In rejecting an argument for broad immunity put forth by the United States as an intervenor in *Schreiber*, the court reasoned:

In addition, the interpretation advanced by the United States would deprive the victims of the worst breaches of basic rights of any possibility of redress in national courts. Given the recent trends in the development of international humanitarian law enlarging this possibility in cases of international crime, as evidenced in the case before the House of Lords, *R. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 3)*, [1999] 2 W.L.R. 827, such a result would jeopardize at least in Canada a potentially important progress in the protection of the rights of the person.<sup>185</sup>

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<sup>183</sup> 179 [2000] 1 A.C. 147 (H.L.) (“Pinochet (3)”), Opinion of Lord Millett; *See also Regina v. Bow Street Metro. Stipendiary Magistrate, Ex parte Pinochet (No. 3)*, [1999] 2 All E.R. 97.

<sup>184</sup> Committee against Torture, Final Remarks, United Kingdom of Great Britain and Northern Ireland, Nov. 17, 1998, document UN A/54/44, §§ 72-77, ch. 5f.

<sup>185</sup> *Schreiber v. Canada (Attorney General)*, 2002 SCC 62, [2002] 3 SCR 269 at para. 37.

The Ontario Court of Appeal, while applying immunity in a civil lawsuit for torture, also cited *Pinochet* for the proposition that immunity can be revoked in a criminal case.<sup>186</sup>

162. Another case involving a former head of state has until recently occupied the Committee against Torture. Hissène Habré, the former president of Chad, currently lives in exile in Senegal, where proceedings have been brought against him in particular, for acts of torture committed while he was in office.<sup>187</sup>

163. The Committee against Torture has acknowledged that Senegal had not abided by its international obligations by not prosecuting the former Chadian head of state.

The Committee deems that the party state cannot invoke the complexity of its judicial procedure or other reasons derived from its internal law to justify the failure to observe its obligations according to the Convention. It considers that *this obligation to pursue Hissène Habré for the alleged facts of torture existed in the head of the party state, on the failure to prove that it did not have sufficient elements permitting prosecution of Hissène Habré.*<sup>188</sup> (emphasis added).

164. The customary rule that could allow immunity for the acts committed by a public agent in the exercise of his office must cede to a contrary conventional rule that defines torture, criminalizes it, and obliges States to prosecute the alleged offender of such acts when he or she is present in their territory. The capacity of former head of state has not, therefore, put BUSH beyond the reach of the law.

ii. Absence of personal immunity (or jurisdictional immunity)

165. The purpose of personal immunity is to protect the holders of certain official offices (consuls, diplomats, prime ministers, heads of state – and, since *Yerodia*, ministers of foreign

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<sup>186</sup> *Bouzari v. Iran*, 2004 CanLII 871 (ON CA) at para. 91.

<sup>187</sup> For the latest developments in the case of Hissène Habré, including a request from Chad for Habré to be sent to Belgium for prosecution, see “Senegal: Chad asks for the extradition of Hissène Habré to Belgium,” Jul. 22, 2011, available at <http://www.hrw.org/news/2011/07/22/senegal-chad-asks-extradition-hiss-ne-habr-belgium>.

<sup>188</sup> Committee against Torture, communication 181/2001, observations of May 17, 2006, para. 9.8 (CAT/C/36/D/181/2001).

affairs) from prosecution during the exercise of their office, by guaranteeing them an immunity from jurisdiction.

166. As the International Court of Justice has noted:

the *immunity* from jurisdiction enjoyed by incumbent Ministers of Foreign Affairs does not mean that they enjoy *impunity* in respect to any crimes he might have committed, irrespective of their gravity. Immunity from criminal jurisdiction and individual criminal liability are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility.<sup>189</sup> (emphasis in original).

167. The International Court of Justice has thus recalled in this respect that such a protection against prosecution abroad was only valid as long as the person concerned is still in office, given that the aim of the rule is to protect officials from impediments to performing their duties.

168. The International Court of Justice found,

the functions of a Minister for Foreign Affairs are such that, *throughout the duration of his or her office*, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability. This immunity and this inviolability protect the individual concerned against any act of authority on the part of another State that would hinder the exercise of his or her office.<sup>190</sup> (emphasis added).

169. While there might exist legitimate reasons for recognizing such an immunity for a head of state while in office, such an immunity does not make any sense and does not pursue any particular purpose if it were extended to former heads of state. International law does not accord special protections for former heads of states simply because they once were a head of state; such immunity is allowed for during the time in office to allow agents in office to fulfill their tasks.

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<sup>189</sup> *Yerodia*, *supra* n.178, para. 60.

<sup>190</sup> *Ibid.* at para. 54.

170. Canadian law is no different. Parliament explicitly exempted criminal proceedings from coverage under the *State Immunity Act*.<sup>191</sup> Moreover, prohibitive rules of customary international law are incorporated into domestic law in the absence of explicitly conflicting legislation.<sup>192</sup> Further, “as a matter of law, courts will strive to avoid constructions of domestic law pursuant to which the state would be in violation of its international obligations.”<sup>193</sup> Therefore, any application of immunity in the context of a criminal proceeding for torture would contravene the domestic incorporation of the above-cited international law on immunity.

### III. CONCLUSION

171. To conclude, Canada has jurisdiction under domestic and international law when BUSH is “present in Canada.”

172. The foregoing demonstrates that a case for torture exists, as a matter of law and fact, against George W. BUSH.

173. Accordingly, once BUSH is present, if no extradition is sought, the Canadian authorities are under a positive legal obligation to investigate BUSH and submit the case for prosecution.

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<sup>191</sup> R.S.C. 1985 c. S-18.

<sup>192</sup> *R. v. Hape*, [2007] 2 S.C.R. 292 at para. 39.

<sup>193</sup> *Ibid.* at para. 53. See also ROBERT J. CURRIE, INTERNATIONAL & TRANSNATIONAL CRIMINAL LAW (2010), at 580-96.

## BUSH TORTURE CASE APPENDIX

Exhibit	Description of Document
1	<a href="#"><u>“Surrey Regional Economic Summit”</u></a>
2	<a href="#"><u>Authorization for the Use of Military Force (Pub. L. 107-40, 115 Stat. 224 (2001))</u></a>
3	<a href="#"><u>GEORGE TENET, AT THE CENTER OF THE STORM: THE CIA DURING AMERICA’S TIME OF CRISIS (Harper 2007)</u></a>
4	<a href="#"><u>Eighth Declaration of Marilyn A. Dorn, Information Review Officer Central Intelligence Agency, <i>ACLU, et al. v. Department of Defense, et al.</i>, No. 04 Civ. 4151 (S.D.N.Y. Jan. 5, 2007)</u></a>
5	<a href="#"><u>CIA Inspector General, <i>Special Review: Counterterrorism, Detention and Interrogation Activities, September 2001 – October 2003</i> (May 7, 2004)</u></a>
6	<a href="#"><u>Senator Dick Marty (Switzerland), Council of Europe Parliamentary Assembly, <i>Secret detentions and illegal transfers of detainees involving Council of Europe member States: second report</i>, CoE Doc. 11302 rev (June 11, 2007)</u></a>
7	<a href="#"><u>European Parliament resolution on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners (2006/2200(INI))</u></a>
8	<a href="#"><u>International Committee of the Red Cross (ICRC), Report to John Rizzo, Acting General Counsel, CIA, <i>ICRC Report on the Treatment of Fourteen “High Value Detainees” in CIA Custody</i>, (Feb. 14, 2007)</u></a>
9	<a href="#"><u>Military Order of November 13, 2001: <i>Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism</i>, Federal Register Vol. 66, No. 2 (Nov. 16, 2001)</u></a>
10	<a href="#"><u>Patrick Philbin and John Yoo, Memorandum for William J. Haynes II, General Counsel, Department of Defense, <i>Possible Habeas Jurisdiction over Aliens Held in Guantanamo Bay, Cuba</i> (Dec. 28, 2001)</u></a>

11	<a href="#"><u>John Yoo and Robert J. Delahunty, Memorandum for William J. Haynes II, General Counsel, Department of Defense, <i>Application of Treaties and Laws to al Qaeda and Taliban Detainees</i> (Jan. 9, 2002)</u></a>
12	<a href="#"><u>Senate Armed Services Committee, <i>Inquiry into the Treatment of Detainees in U.S. Custody</i> (Nov. 20, 2008)</u></a>
13	<a href="#"><u>Alberto R. Gonzales, Memorandum for the President, <i>Decision re Application of the Geneva Convention of Prisoners of War to the Conflict with Al Qaeda and the Taliban</i> (Jan. 25, 2002)</u></a>
14	<a href="#"><u>Secretary of Defense, Memorandum for Chairman of the Joint Chief of Staff, <i>Status of Taliban and Al Qaeda</i> (Jan. 19, 2002)</u></a>
15	<a href="#"><u>US detention related to the events of 11 September 2001 and its aftermath – the role of the ICRC, Jul. 30, 2008 (ICRC Operational Update)</u></a>
16	<a href="#"><u>George Bush, The White House, Memorandum for the Vice President, et al., <i>Humane Treatment of Taliban and al-Qaeda Detainees</i> (Feb. 7, 2002)</u></a>
17	<a href="#"><u>William H. Taft, IV, Legal Adviser, Department of State, Memorandum to Counsel to the President, Alberto Gonzales, <i>Comments on Your Paper on the Geneva Convention</i> (Feb. 2, 2002)</u></a>
18	<a href="#"><u>Memorandum from Jay S. Bybee, Assistant Attorney General, to William J. Haynes II, General Counsel, Department of Defense (Mar. 13, 2002)</u></a>
19	<a href="#"><u>Memorandum for John Rizzo, Acting General Counsel of the Central Intelligence Agency, <i>Interrogation of al Qaeda Operative</i> (Aug. 1, 2002)</u></a>
20	<a href="#"><u>GEORGE W. BUSH, DECISION POINTS (Crown Publishing Group 2010)</u></a>
21	<a href="#"><u>United Nations Human Rights Council, <i>Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Working Group on Arbitrary Detention, and the Working Group on Enforced or Involuntary Disappearances</i>, A/HRC/13/42, Feb. 19, 2010</u></a>
22	<a href="#"><u>Statement by Attorney General Michael B. Mukasey Regarding the Opening of an Investigation Into the Destruction of Videotapes by CIA Personnel, Jan. 2, 2008</u></a>

23	<a href="#"><u>Department of Justice Statement on the Investigation into the Destruction of Videotapes by CIA Personnel, Nov. 9, 2010</u></a>
24	<a href="#"><u>Memorandum for John A. Rizzo Senior Deputy General Counsel, Central Intelligence Agency, Re: Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques that May Be Used in the interrogation of High Value al Qaeda Detainees (May 30, 2005)</u></a>
25	<a href="#"><u>President Discusses Creation of Military Commissions to Try Suspected Terrorists”, Sept. 6, 2006</u></a>
26	<a href="#"><u>Military Commissions Act 2006, Public L. 109-366, 120 Stat. 2600</u></a>
27	<a href="#"><u>Council of Europe Parliamentary Assembly, Resolution 1562 (2007), Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report, adopted on June 27, 2007</u></a>
28	<a href="#"><u>The Committee on International Human Rights of the Association of the Bar of the City of New York and The Center for Human Rights and Global Justice, N.Y.U School of Law, Torture by Proxy: International and Domestic Law Applicable to “Extraordinary Renditions (2004)</u></a>
29	Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, Report of the Events Relating to Maher Arar (2006) - <a href="#"><u>Analysis and Recommendations</u></a> - <a href="#"><u>Factual Background – Volume I</u></a> - <a href="#"><u>Factual Background – Volume II</u></a>
30	<a href="#"><u>Plaintiff’s Complaint and Demand for Jury Trial, Arar v. Ashcroft, No. 04-cv-0249 (E.D.N.Y Jan. 22, 2004)</u></a>
31	<a href="#"><u>The Department of Homeland Security, Office of the Inspector General: Report on the Removal of a Canadian Citizen to Syria (March 2008)</u></a>
32	<a href="#"><u>‘Removal of a Canadian Citizen to Syria’: Joint Hearing Before the Subcomm. on the Constitution, Civil Rights and Civil Liberties of the Comm. on the Judiciary and the Subcomm. on Int’l Organizations, Human Rights, and Oversight of the Comm. on Foreign Affairs of the House of Representatives, 110th Cong. (2008)</u></a>

33	<a href="#"><u><i>Joint Oversight Hearing on Rendition to Torture: The Case of Maher Arar': Joint Hearing Before the Subcomm. On the Constitution, Civil Rights and Civil Liberties of the Comm. on the Judiciary and the Subcomm. on Int'l Organizations, Human Rights, and Oversight of the Comm. on Foreign Affairs of the House of Representatives, 110th Cong. (2007)</i></u></a>
34	<a href="#"><u>Department of Homeland Security Office of Inspector General's Addendum to OIG-08-18, The Removal of a Canadian Citizen to Syria</u></a>
35	JACK GOLDSMITH, <u>THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION</u> (Norton 2007) <i>available at</i> <a href="http://ccrjustice.org/files/Jack%20Goldsmith%20-%20The%20Terror%20Presidency.pdf"><u>http://ccrjustice.org/files/Jack%20Goldsmith%20-%20The%20Terror%20Presidency.pdf</u></a>
36	<a href="#"><u>International Center for Transitional Justice, <i>Prosecuting Abuses of Detainees in U.S. Counter-terrorism Operations</i>, Nov. 2009</u></a>
37	<a href="#"><u>Decl. of Gitanjali S. Gutierrez, Esq., Lawyer for Mohammed al Qahtani, Criminal Complaint Against Donald Rumsfeld, The Prosecutor General at the Federal Supreme Court, Federal Republic of Germany (filed Nov. 14, 2006)</u></a>
38	<a href="#"><u><i>Inside the Interrogation of Detainee 063</i>, Time Magazine, Jun. 12, 2005</u></a>
39	<a href="#"><u>Interrogation Log, Detainee 063, Time Magazine</u></a>
40	<a href="#"><u><i>Army Regulation 15-6: Final Report Investigation into FBI Allegations of Detainee Abuse at Guantanamo Bay, Cuba Detention Facility</i>, Apr. 1, 2005</u></a>
41	<a href="#"><u>Bob Woodward, <i>Detainee Tortured, Says U.S. Official; Trial Overseer Cites "Abusive" Methods Against 9/11 Suspect</i>, Washington Post, Jan. 14, 2009</u></a>
42	<a href="#"><u>Memorandum for Record, Department of Defense, Joint Task Force 170, Guantanamo Bay, Cuba, Oct. 9, 2003</u></a>
43	<a href="#"><u>United Nations Commission on Human Rights, <i>Situation of Detainees at Guantánamo Bay - Report of the Chairperson of the Working Group on Arbitrary Detention, Ms. Leila Zerrougui; the Special Rapporteur on the independence of judges and lawyers, Mr. Leandro Despouy; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Mr. Manfred Nowak; the Special Rapporteur on freedom of religion or belief, Ms. Asma Jahangir and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and</i></u></a>

	<a href="#"><u>mental health, Mr. Paul Hunt, E/CN.4/2006/120, Feb. 27, 2006</u></a>
44	<a href="#"><u>United Nations Committee Against Torture, <i>Consideration of Reports submitted by States Parties under Article 19 of the Convention - Conclusions and recommendations of the Committee against Torture - United States of America</i>, CAT/C/USA/CO/2, Jul. 25, 2006</u></a>
45	<a href="#"><u>Physicians for Human Rights, <i>Broken Laws, Broken Lives – Medical evidence of torture by US personnel and its impact</i>, June 2008</u></a>
46	<a href="#"><u>Seton Hall University School of Law, Center for Policy and Research, <i>Drug Abuse – an exploration of the government’s use of mefloquine at Guantanamo</i></u></a>
47	<a href="#"><u>MG Antonio Taguba, Art. 15-6: Investigation of the 800th Military Police Brigade (2004)</u></a>
48	<a href="#"><u>G. Fay &amp; A. Jones, US Army, <i>AR 15-6 Investigation of Intelligence Activities At Abu Ghraib Prison and 205th Military Intelligence Brigade</i> (2004)</u></a>
49	<a href="#"><u>Report of the ICRC on the Treatment by the Coalition Forces of Prisoners of War and other Protected Persons by the Geneva Conventions in Iraq during Arrest Internment and Interrogation, February 2004</u></a>
50	<a href="#"><u>Bush Aware of Advisers’ Interrogation Talks: President Said He Knew His Senior Advisers Discussed Tough Interrogation Techniques, ABC News, Apr. 11, 2008</u></a>
51	<a href="#"><u>Transcript: “‘Decision Points,’ Former president George W. Bush reflects on the most important decisions of his presidential and personal life,” Part 3, NBC, Nov. 8, 2010</u></a>
52	<a href="#"><u>Extraordinary Rendition in U.S. Counterterrorism Policy: The Impact on Transatlantic Relations: Hearing Before the Subcomm. on International Organizations, Human Rights, and Oversight and the Subcomm. on Europe of the H. Comm. on Foreign Affairs, 110th Cong. 14 (2007)</u></a>
53	<a href="#"><u>Memorandum from Jay S. Bybee, the Department of Justice Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, <i>Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A</i> (Aug. 1, 2002)</u></a>