

# **CANADA / USA**

## **VISIT TO CANADA OF FORMER US PRESIDENT GEORGE W. BUSH AND CANADIAN OBLIGATIONS UNDER INTERNATIONAL LAW**

**AMNESTY INTERNATIONAL  
MEMORANDUM TO THE CANADIAN  
AUTHORITIES**

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INTERNATIONAL**



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# SUMMARY OF SUBMISSION

Amnesty International considers that there is enough material in the public domain – even if one were to rely only upon information released by United States authorities, and by former US President George W. Bush himself – to give rise to an obligation for Canada, should former President Bush proceed with his visit to Canada on or around 20 October 2011, to investigate his alleged involvement in and responsibility for crimes under international law, including torture, and to secure his presence in Canada during that investigation.

1. Acts of torture (and, it may be noted, other cruel, inhuman or degrading treatment and enforced disappearance) were committed against detainees held in a secret detention and interrogation program operated by the USA's Central Intelligence Agency (CIA) between 2002 and 2009.
2. The CIA established this secret program under the authorization of then-President George W. Bush.
3. Since leaving office, former President George W. Bush has said that he authorized the use of a number of "enhanced interrogation techniques" against detainees held in the secret CIA program. The former President specifically admitted to authorizing the "water-boarding" of identified individuals, whose subjection to this torture technique has been confirmed.
4. Additionally, torture and other ill-treatment, and secret detention, by US forces occurred outside the confines of the CIA-run secret detention program, including against detainees held in military custody at the US Naval Base at Guantánamo Bay in Cuba, and in the context of armed conflicts in Iraq and Afghanistan.
5. George W. Bush was Commander in Chief of all US armed forces at the relevant times.
6. The Administration of George W. Bush acted on the basis that he was essentially unrestrained by international or US law in determining the USA's response to the attacks in the USA on 11 September 2001. Among other things, President Bush decided that the protections of the Geneva Conventions of 1949, including their common article 3, would not be applied to Taliban or al-Qa'ida detainees.
7. George W. Bush, as Commander in Chief at the relevant times, if he did not directly order or authorize such crimes, at least knew, or had reason to know, that US forces were about to commit or were committing such crimes and did not take all necessary and reasonable measures in his power as Commander in Chief and President to prevent their commission or, if the crimes had already been committed, ensure that all those who were alleged to be responsible for these crimes were brought to justice.
8. The USA has failed to conduct investigations capable of reaching former President George W. Bush, and all indications are that it will not do so, at least in the near future.
9. The facts summarized above, which are matters of public record, are sufficient to give rise to mandatory obligations for Canada under international law (including but not limited to the UN Convention against Torture), should former US President George W. Bush enter Canadian territory, to:
  - launch a criminal investigation;
  - arrest former President Bush or otherwise secure his presence during that investigation; and
  - submit the case to competent authorities in Canada for the purposes of prosecution if it does not extradite him to another state able and willing to do so.

# BASIS FOR SUBMISSION

## 1. ACTS OF TORTURE WERE COMMITTED AGAINST DETAINEES HELD IN THE SECRET DETENTION PROGRAM OPERATED BY THE CIA

- On 6 September 2006, then-President George W. Bush confirmed in a public speech to members of the administration and US Congress that the CIA had been operating a program of secret detention outside the USA. He said that a number of detainees had been transferred “to an environment where they can be held secretly... a small number of suspected terrorist leaders and operatives captured during the war have been held and questioned outside the United States, in a separate program operated by the Central Intelligence Agency”. The President declined to provide “specifics of the program, including where these detainees have been held and the details of their confinement”. He referred to an “alternative set of procedures” used to interrogate detainees, identifying two individuals against whom such techniques had been used as Abu Zubaydah and Khalid Sheikh Mohammed.<sup>1</sup>
- In his speech, President Bush announced that Abu Zubaydah, Khalid Sheikh Mohammed, Ramzi bin al-Shibh “and 11 other terrorists in CIA custody” had just been transferred to the custody of the US military at Guantánamo Bay in Cuba. Among the President’s given reasons for making this information public was that the June 2006 decision by the US Supreme Court, *Hamdan v. Rumsfeld*, had “put in question the future of the CIA program” by ruling that Common Article 3 of the Geneva Conventions applied “to our war with al Qa’ida”, creating the “unacceptable” risk that US personnel involved in detentions and interrogations in this context could be prosecuted under the USA’s War Crimes Act. He called on Congress to pass the Military Commissions Act (MCA) to “clarify the rules”.<sup>2</sup> President Bush signed the MCA into law on 17 October 2006.
- At a hearing before the US Senate Select Committee on Intelligence on 5 February 2008, General Michael V. Hayden, Director of the CIA, stated that the CIA had used a technique referred to as “water-boarding” against three detainees held in secret CIA custody in 2002 and 2003. He repeated this in a statement to CIA employees the following week.<sup>3</sup>
- These three detainees were Zayn al Abidin Muhammad Husayn, more commonly known as Abu Zubaydah (Palestinian; Arrested: Faisalabad, Pakistan, 27 or 28 March 2002); Abdelrahim Hussein Abdul Nashiri (‘Abd al-Nashiri, Saudi Arabian; Arrested: Dubai, United Arab Emirates, October 2002); and Khalid Sheikh Mohammed (Pakistani; Arrested: Faisalabad, Pakistan, 1 March 2003).<sup>4</sup>
- According to a review by the CIA Inspector General completed in 2004 and released into the public domain with redactions in 2009, Khalid Sheikh Mohammed was subjected to 183 applications of water-boarding during March 2003 and Abu Zubaydah to at least 83 applications during August 2002. ‘Abd al-Nashiri was subjected to two applications of water-boarding in November 2002.<sup>5</sup>
- To date, the Geneva-based International Committee of the Red Cross (ICRC) is the only independent organization known to have interviewed any of the 14 detainees transferred in September 2006 from CIA custody to Guantánamo (where 13 of them remain).<sup>6</sup> The ICRC interviewed all 14 in late 2006. Its February 2007 report to US authorities was leaked by unknown persons in 2009. The report confirms that Khalid Sheikh Mohammed, ‘Abd al-Nashiri and Abu Zubaydah were subjected to water-boarding and included parts of their testimony:
  - Abu Zubaydah (who was still recovering from near-fatal gunshot wounds sustained at the time of his arrest): “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 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”.

- Khalid Sheikh Mohammed: “I would be strapped to a special bed, which can be rotated into a vertical position. A cloth would be placed over my face. Water was then poured onto the cloth by one of the guards so that I could not breathe. This obviously could only be done for one or two minutes at a time. The cloth was then removed and the bed was put into a vertical position. The whole process was then repeated during about one hour”.<sup>7</sup>
- Such treatment inherently, and by design in these cases, involves the intentional and coercive infliction of severe mental or physical pain or suffering for the purpose of obtaining information. As such, the infliction of such treatment by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity constitutes the crime of torture under international law (for instance as defined in article 1 of the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.)<sup>8</sup>
- Even when approving its use by the CIA, the US Department of Justice acknowledged that waterboarding “constitutes a threat of imminent death” and “creates in the subject the uncontrollable physiological sensation that the subject is drowning”.<sup>9</sup>
- US courts have in the past convicted individuals who engaged in water-boarding for the crime of torture.<sup>10</sup> Current US officials, representatives of other states, United Nations officials, and legal experts have reaffirmed that water-boarding constitutes torture.<sup>11</sup> During the time that the administration of George W. Bush was authorizing “water-boarding” for use against detainees held in secret CIA custody, the US Department of State continued to denounce as torture similar forms of conduct by other states.<sup>12</sup> In a then secret memorandum in 2005, the US Department of Justice noted that the State Department annually condemned as torture and other ill-treatment certain “coercive interrogation techniques and other practices employed by other countries”, citing examples from Indonesia, Egypt, Algeria, Iran and Syria, that “appear to bear some resemblance to some of the CIA interrogation techniques”. Although the Justice Department gave its approval to such methods for use by the CIA, it said that “the State Department’s inclusion of nudity, water dousing, sleep deprivation, and food deprivation among the conduct it condemns is significant”.<sup>13</sup>
- In addition to water-boarding, the detainees told the ICRC that other techniques used against them included “prolonged stress standing position” (detainee held naked, arms extended and chained above the head for up to three days continuously and for up to two to three months intermittently); “beatings by use of a collar”, used to “forcefully bang the head and body against the wall” (known in CIA parlance as “walling”); beating and kicking; confinement in a box; prolonged nudity; sleep deprivation and use of loud music; exposure to cold temperature/cold water; prolonged shackling; and threats, including threats of torture and other ill-treatment, threats of rape of detainee and detainee’s family; and threats of being brought close to death. The one detainee against whom all these and other identified techniques were allegedly used was Abu Zubaydah.<sup>14</sup>
- All detainees were held in solitary confinement, incommunicado, for the entirety of their secret custody, which lasted for up to four-and-a-half years (Abu Zubaydah). The ICRC concluded: “This regime 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, depersonalization

and dehumanization. The allegations of ill-treatment to which they were subjected while held in the CIA program, either singly or in combination, constituted torture". The ICRC also concluded that the detainees had been subjected to enforced disappearance.<sup>15</sup>

- By 2004, according to information released by US authorities in 2009, a "prototypical interrogation" conducted against detainees held in the secret detention program consisted of the detainee being "stripped of his clothes, shackled, and hooded, with the walling collar over his head and around his neck... As soon as the detainee does anything inconsistent with the interrogators' instructions, the interrogators use an insult slap or abdominal slap. They employ walling if it becomes clear that the detainee is not cooperating in the interrogation. This sequence may continue for several more iterations... The interrogators and security officers then put the detainee into position for standing sleep deprivation, begin dietary manipulation through a liquid diet, and keep the detainee nude (except for a diaper)." After this interrogation session, which could last for hours, the same treatment would essentially be repeated at the next session, but now with the addition of "increas[ing] the pressure on the detainee by using a hose to douse the detainee with water for several minutes. They stop and start the dousing as they continue the interrogation." After the session the detainee would again be put into a "standing position for sleep deprivation" and is "nude (except for a diaper)." At the next session, if the detainee continued to resist, "the interrogators continue to use walling and water dousing", with the possible addition of the repeated use of "the insult slap, the abdominal slap, the facial hold, the attention grasp". The interrogators also "integrate stress positions and wall standing into the session". Again after the session, sleep deprivation would be continued. At later sessions, "cramped confinement" might also be used. The "entire process" of the "prototypical interrogation" "may last 30 days" and could be extended for further 30-day periods.<sup>16</sup>
- The "enhanced interrogation" of 'Abd al-Nashiri continued for two weeks in December 2002 after he was subjected to waterboarding in late November 2002.<sup>17</sup> In a military hearing in Guantánamo in March 2007, 'Abd al-Nashiri was asked to describe his torture. All detail of his alleged torture was redacted by US officials from the published transcript. The current US administration has confirmed that the redactions include details relating to "Al Nashiri's detention and conditions of confinement" and "the interrogation methods that he claims to have experienced". It has said the same in the case of other detainees previously held in the CIA program, including Abu Zubaydah and Khalid Sheikh Mohammed.<sup>18</sup>
  - 'Abd al-Nashiri [Through interpreter] "From the time I was arrested five years ago, they have been torturing me. It happened during interviews. One time they tortured me one way, and another time they tortured me in a different way". Q: "Please described the methods that were used". A: [Redacted]. What else do I want to say? [Redacted] Many things happened. There [sic] were doing so many things. What else did they did [sic]? [Redacted]. They do so many things. So so many things. What else did they did [sic]? [Redacted]. After that another method of torture began [Redacted]. Before I was arrested I used to be able to run about ten kilometers. Now, I cannot walk for more than ten minutes. My nerves are swollen in my body. Swollen too. They used to ask me questions and the investigator after that used to laugh. And, I used to answer the answer that I knew. And, if I didn't reply what I heard, he used to [redacted]. That thing did not stop until here. So many things happened. I don't in summary [sic], that's basically what happened."<sup>19</sup>
- Several FBI agents travelled to a CIA-controlled facility at an undisclosed location in 2003. The Assistant Chief for the FBI's Counterterrorism Operational Response Section said that detainees at the facility were "manacled to the ceiling and subjected to blaring music around the clock". One of the agents reported that he was briefly given access to one of the detainees, Yemeni national Ramzi bin al Shibh, who was naked and chained to the floor.<sup>20</sup>



- Ramzi bin al-Shibh told the ICRC that in his fourth place of detention he had been subjected for seven days continuously to prolonged stress standing – wrists shackled to a bar or hook on the ceiling above his head, while held naked. He also alleged that in this same detention facility he was hosed with cold water during interrogation and that in his eighth place of detention, he was “restrained on a bed, unable to move, for one month, February 2005 and subjected to cold air-conditioning during that period”.<sup>21</sup>

## 2. THE CIA ESTABLISHED ITS SECRET DETENTION PROGRAM UNDER THE AUTHORIZATION OF GEORGE W. BUSH

- Under US law (National Security Act of 1947) only the President can authorize the CIA to conduct a covert action; the CIA can only “conduct covert action activities approved by the President”.<sup>22</sup> In January 2009, questioned about the CIA detention program, the last CIA Director under the Bush administration said: “in essence, the Agency is the action arm of the President. We operate on the farthest regions of executive authority, within the provisions of law by informing Congress and so on. But in essence, we are in the Executive Branch, and we get these directions from the President.”<sup>23</sup> Seven months later, in August 2009, the first CIA Director under the Obama administration wrote: “It is worth remembering that the CIA implements presidential decisions; we do not make them.”<sup>24</sup>
- On 17 September 2001, then-President George W. Bush signed a still classified document that “authorized the CIA to set up terrorist detention facilities outside the United States”.<sup>25</sup>
- In his 2007 memoirs, George Tenet, the former Director of the CIA who had requested this presidential authorization, recalled that formal congressional approval for this secret detention program had not been sought “as it was conducted under the president’s unilateral authorities”.<sup>26</sup>
- In his 2010 memoirs, former President George W. Bush recalled CIA Director Tenet’s request: “George proposed that I grant broader authority for covert actions, including permission for the CIA to kill or capture al Qaeda operatives without asking for my sign-off each time. I decided to grant the request”.<sup>27</sup>
- In May 2009, former US Vice President Richard Cheney said that former President Bush had known “a great deal about the [CIA detention] 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”.<sup>28</sup>
- In 2010, a US federal judge found that “Immediately following the attacks of 11 September 2001, President Bush authorized new steps to combat international terrorism”; the CIA established the “Rendition, Detention, and Interrogation Program”, “pursuant to which the CIA maintained clandestine facilities abroad at which suspected terrorists were detained, interrogated, and debriefed”.<sup>29</sup> In using “coercive methods” at secret detention sites, the CIA had been acting “upon the highest authority”, US District Court Judge Lewis Kaplan wrote.<sup>30</sup>
- According to the CIA, between March 2002 and May 2005, 94 detainees were held in the secret detention program, 28 of whom were subjected to “enhanced interrogation techniques”. Between June 2005 and July 2007, another four detainees were held in the program, two of whom were subjected to “enhanced interrogation techniques”.<sup>31</sup>
- Signing the Military Commissions Act of 2006 into law on 17 October 2006, President George W. Bush said that the legislation would “allow the Central Intelligence Agency to continue its program for questioning key terrorist leaders and operatives”.<sup>32</sup>
- On 26 April 2007, ‘Abd al-Hadi al Iraqi, was transferred from CIA custody to military detention in Guantánamo Bay after an unknown period in secret detention and interrogation at an undisclosed location.<sup>33</sup>
- In a secret memorandum dated 20 July 2007, the Office of Legal Counsel (OLC) at the US Department of Justice noted that “the CIA now proposes to operate a limited detention and interrogation program pursuant to the authority granted by the President”. The CIA was

expecting “to detain further high value detainees who meet the requirements for the program” and was seeking OLC advice as to whether six “enhanced interrogation techniques” could be used. Two of the techniques, known as “conditioning techniques”, were dietary manipulation and sleep deprivation. Under the latter, the detainee would be kept awake for up to 96 hours in one stretch by being shackled in a standing position or in a sitting position on a small stool. During this time, he would usually be made to wear a diaper as he would not be allowed to go to the toilet. The CIA told the OLC that it used sleep deprivation to bring the detainee to a “baseline state”, and this made the other four “corrective” techniques more effective. These techniques were “facial hold”; “attention grasp”; “abdominal slap”; “insult (or facial) slap”. The OLC advised that the use of all the techniques, singly or in combination, could be used, claiming that the Detainee Treatment Act (DTA), the War Crimes Act as amended by the MCA and Article 3 common to the Geneva Conventions did not prohibit them. It added that “to make that determination conclusive under United States law, the President may exercise his authority under the Constitution and the Military Commissions Act to issue an executive order adopting this interpretation of Common Article 3. We understand that the President intends to exercise this authority”, and that the proposed executive order would accomplish “precisely” the conclusion that “common article 3 permits the CIA to go forward with the proposed interrogation program”.<sup>34</sup> On 20 July 2007, President George W. Bush issued an executive order ‘determining’ that “a program of detention and interrogation approved by the Director of the Central Intelligence Agency fully complies with the obligations of the United States under Common Article 3”.<sup>35</sup> This was intended to deem conclusively for purposes of domestic US law that certain actions would not be considered to violate common article 3, and so not to constitute war crimes, regardless of the true character of such acts under international law.

- On 8 March 2008, President Bush vetoed legislation that would have explicitly prohibited water-boarding and other “enhanced interrogation techniques” by the CIA. In a statement to the House of Representatives, he said that Section 327 of the Intelligence Authorization Act for Fiscal Year 2008 “would harm our national security by requiring any element of the Intelligence Community to use only the interrogation methods authorized in the Army Field Manual on Interrogations. It is vitally important that the Central Intelligence Agency (CIA) be allowed to maintain a separate and classified interrogation program...” He said that his veto was intended to allow this CIA program to continue.<sup>36</sup>
- On 14 March 2008, the US Department of Defense announced that Muhammad Rahim al-Afghani had been transferred from CIA custody to military detention in Guantánamo after an unidentified period in CIA custody at one or more undisclosed locations.<sup>37</sup>
- In his 2010 memoirs, former President George W. Bush asserted that “of the thousands of terrorists we captured in the years after 9/11, about a hundred were placed into the CIA program. About a third of those were questioned using enhanced techniques.... Had we captured more al Qaeda operatives with significant intelligence value, I would have used the program for them as well.”<sup>38</sup>

### 3. FORMER PRESIDENT GEORGE W. BUSH HAS STATED THAT HE AUTHORIZED THE USE OF WATER-BOARDING AGAINST IDENTIFIED INDIVIDUALS

- The National Security Council (NSC) “is the President’s principal forum for considering national security and foreign policy matters with his senior national security advisors and cabinet officials...The NSC is chaired by the President.”<sup>39</sup>
- In the spring of 2002, the CIA sought specific “policy approval from the National Security Council to begin an interrogation program for high-level al Qaeda terrorists”.<sup>40</sup> John Bellinger, NSC Legal Advisor, asked the CIA to have the proposed program reviewed by the Department of Justice, and to seek advice from the OLC and the Criminal Division at the Department of Justice.<sup>41</sup> National Security Advisor Condoleezza Rice asked the Director of the CIA to brief NSC

Principals on the proposed program and Attorney General Ashcroft “personally to review” its legality.<sup>42</sup> All the meetings attended by Dr Rice on the CIA interrogation program were held at the White House, with the Justice Department’s legal advice apparently coordinated by the Counsel to the President, Alberto Gonzales.<sup>43</sup> NSC officials established a “special access program governing access to information relating to the CIA terrorist detention and interrogation program” due to the “sensitive of the activities contemplated” in the program. Even the name of the special access program is itself classified SECRET.<sup>44</sup>

- An OLC memorandum to the White House and the CIA, dated 1 August 2002, asserted that “under the circumstances of the current war against al Qaeda and its allies, application of [the US statute that criminalizes torture] to interrogations undertaken pursuant to the President’s Commander-in-Chief powers may be unconstitutional”. Even if an interrogation method were to violate the anti-torture law, “necessity or self-defense could provide justifications that would eliminate any criminal liability”.<sup>45</sup>
- The sections in the 1 August 2002 memorandum addressing the powers of the Commander-in-Chief, and possible defences for violations of the anti-torture statute, were added by OLC lawyers following a meeting at the White House with the President’s legal counsel, and possibly other officials, on 16 July 2002.<sup>46</sup>
- A second OLC memorandum, also dated 1 August 2002, and transmitted by fax to the CIA on the evening of that day, addressed the use of 10 interrogation techniques for use in an “increased pressure phase” against Abu Zubaydah who was believed to have information “that he refuses to divulge”. The 10 techniques were “attention grasp”; “walling”; “facial hold”; “facial slap (insult slap)”; “cramped confinement”; “wall standing”; “stress positions”; “sleep deprivation”; “insects placed in a confinement box”; and “the waterboard”.<sup>47</sup>
- The CIA had originally asked for approval of 12 “enhanced interrogation techniques”, the above 10 plus “use of diapers” (“the subject is forced to wear adult diapers and is denied access to toilet facilities for an extended period, in order to humiliate him”), and a 12<sup>th</sup> technique which remains classified Top Secret.<sup>48</sup>
- An email dated 31 July 2002 from one of the OLC lawyers working on the two memos states that “the White House wants both memos signed and out by COB [close of business] tomorrow”.<sup>49</sup>
- In his memoirs, published in November 2010, former President George W. Bush made a number of assertions relating to the interrogations of individuals held in the CIA’s secret detention program.
  - He said that Abu Zubaydah was resisting interrogation. “CIA experts” drew up a list of “enhanced” interrogation techniques. “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... I knew that an interrogation program this sensitive and controversial would one day become public... Had I not authorized waterboarding on senior al Qaeda leaders, I would have had to accept a greater risk that the country would be attacked... I approved the use of the interrogation techniques”.<sup>50</sup>
  - In the case of Khalid Sheikh Mohammed, former President Bush said: “George Tenet asked if he had permission to use enhanced interrogation techniques, including waterboarding, on Khalid Sheikh Mohammed.... ‘Damn right,’ I said.”<sup>51</sup>
- In his memoirs published in August 2011, former Vice President Dick Cheney stated that after Abu Zubaydah was taken into custody he “stopped answering questions” and the CIA “approached the Justice Department and the White House about what they might do to go further in interrogating him and other high-value detainees.” The CIA “developed a list of enhanced interrogation techniques,” obtained Justice Department advice that the techniques were “lawful” and then the “program was approved by the president and the National Security Council”.<sup>52</sup>

- The operational details of this now-terminated CIA detention program – including where the detainees were held and how they were treated – remain classified at the highest level of secrecy by the USA.<sup>53</sup>
- Nevertheless, it is known that waterboarding was not the only “enhanced” interrogation technique actually used rather than just authorized. Government documents confirm, for example, that enhanced techniques (plural) were used against Abu Zubaydah, while the authorities refuse to provide the specific details. Waterboarding was used as a culmination technique by the CIA *after* other techniques, for example sleep deprivation and nudity, had been used to wear down the detainee. As early as April 2002, four months before approval was given for 11 days of sleep deprivation against Abu Zubaydah, and when he was still recovering from life-threatening gunshot injuries sustained at the time of his arrest, he was subjected to sleep deprivation that exceeded the then approved limit of 48 hours. An FBI interrogator who was at the secret detention facility in the early weeks of Abu Zubaydah’s detention has said that the CIA used nudity, forced shaving and cold cell temperatures against the detainee.<sup>54</sup> Further, the allegations given by Abu Zubaydah to the ICRC of what techniques were used against him are substantially the same as the list of techniques that were authorized for use against him in the 1 August 2002 memorandum cited above.
- Until at least May 2004, the CIA did not seek OLC approval to use enhanced interrogation techniques on new detainees brought into the secret program, but relied on the 1 August 2002 memorandum relating to Abu Zubaydah.<sup>55</sup>
- A July 2004 memorandum to the National Security Council (NSC) Legal Adviser stated that the CIA’s Counterterrorist Center, which operated the secret detention program, had been informed that “authorized techniques are those previously approved for use with Abu Zubaydah (with the exception of the waterboard) and the 24 approved by the Secretary of Defense on 16 April 2003 for use by the Department of Defense.”<sup>56</sup> This clarification was relevant to the interrogation of “a certain high-value detainee”.<sup>57</sup>
- On 10 May 2005, the US Department of Justice issued two secret memorandums approving the CIA’s use of 13 “enhanced interrogation techniques”, singly or in combination, including against a specific detainee held in the secret detention program. The techniques included dietary manipulation, nudity, “walling”, facial or insult slap, stress positions, water dousing, cramped confinement, sleep deprivation, and water-boarding. On 27 April 2005, a Deputy Attorney General at the OLC wrote in an email that the Attorney General was “under great pressure from the Vice President to complete both memos, and that the President had even raised it last week, apparently at the VP’s request and the AG had promised they would be ready early this week.”<sup>58</sup>
- The secret OLC memorandum of 20 July 2007 on the use of six “enhanced interrogation techniques” in the CIA detention program stated that the techniques had been “recommended for approval by the Principals Committee of the National Security Council”.<sup>59</sup> This Committee is part of the NSC operating structure determined by presidential directive.<sup>60</sup>

#### 4. TORTURE AND OTHER ILL-TREATMENT, AS WELL AS ENFORCED DISAPPEARANCE, BY US FORCES ALSO OCCURRED OUTSIDE THE CIA’S ‘HIGH-VALUE DETAINEE’ INTERROGATION AND DETENTION PROGRAM, INCLUDING AGAINST INDIVIDUALS DETAINED IN MILITARY CUSTODY AT THE US NAVAL BASE AT GUANTÁNAMO BAY IN CUBA, AND ALSO IN THE CONTEXT OF ARMED CONFLICTS IN IRAQ AND AFGHANISTAN

- For the first two-and-a-half years of the detentions at Guantánamo, that is, until the US Supreme Court’s *Rasul v. Bush* ruling in June 2004 that US federal courts had jurisdiction to consider habeas corpus petitions filed on behalf of the detainees, the detainees had no access to legal counsel or to any court of law.

- Canadian national Omar Khadr, for example, was taken into custody in the armed conflict in Afghanistan in late July 2002 during a period when that armed conflict had become of a non-international character. He was 15 years old at the time. He did not have access to a lawyer until November 2004, after two and a half years in US military detention. During this period – in the US air base in Bagram and the US Naval Base at Guantánamo – he was allegedly subjected to detention conditions and interrogation techniques that violated the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, including hooding, having his hands tied to the ceiling, threats of rendition to rape in other countries.<sup>61</sup> At a military proceeding in May 2010, Omar Khadr’s lead interrogator at Bagram testified that, as part of the “fear up” interrogation technique he had told the teenaged Khadr a “fictitious story” about a young Afghan who had lied and been sent to a US prison where “big black guys and big Nazis” noticed “this little Muslim” and, in their patriotic rage over the 9/11 attacks, the “poor little kid” was raped in the shower and died.<sup>62</sup> A US army medic who was in charge of medical care for Bagram detainees between August 2002 and February 2003 also testified that he had seen Omar Khadr in his cell hooded and handcuffed to a bar above eye-level height, and that this was a common punishment at Bagram at the time.<sup>63</sup> In March 2004, Omar Khadr was subjected for three weeks “by US authorities to a sleep deprivation technique, known as the ‘frequent flyer program’, in an effort to make him less resistant to interrogation,” as the Supreme Court of Canada put it in 2010.<sup>64</sup> The Canadian Federal Court of Appeal had earlier written: “Mr Khadr was an imprisoned minor without the benefit of consular assistance, legal counsel, or contact with his family, who had been subjected to abusive sleep deprivation techniques in order to induce him to talk.” While the question of whether this treatment amounted to torture was not before it, the Court noted that such treatment was “in breach of international human rights law”<sup>65</sup>
- Saudi national Mohamed al-Qahtani was another of the more than 700 detainees taken to Guantánamo from January 2002 to June 2004. He was taken into custody by Pakistani forces when trying to enter Pakistan from Afghanistan on 15 December 2001. This was during a period in which the armed conflict in Afghanistan constituted an international armed conflict for purposes of international law. He was handed over to US forces on 26 December 2001 and transferred to Guantánamo on 13 February 2002. In late 2002, the US came to suspect him of having “high value” intelligence, and to consider him resistant to standard military interrogation techniques.
- On 8 August 2002 al-Qahtani (referred to as detainee number 063) was taken to an isolation facility. He was held in isolation there until at least 15 January 2003, some 160 days later. A FBI memorandum dated 14 July 2004 recalled that “in November 2002, FBI agents observed Detainee #63 after he had been subject to intense isolation for over three months. During that time period, #63 was totally isolated (with the exception of occasional interrogations) in a cell that was always flooded with light. By late November, the detainee was evidencing behavior consistent with extreme psychological trauma (talking to non-existent people, reporting hearing voices, crouching in a cell covered with a sheet for hours).”<sup>66</sup>
- On 2 December 2002, Secretary Rumsfeld approved, “as a matter of policy”, a number of “counter-resistance” techniques for use in interrogating detainees at Guantánamo, including stress positions, sensory deprivation, prolonged isolation, the use of 20-hour interrogations, hooding during transportation and interrogation, stripping, forcible shaving, and “using detainees individual phobias (such as fear of dogs) to induce stress”.<sup>67</sup>
- In 2002, “US government officials” discussed subjecting Mohamed al-Qahtani to the sort of techniques “being used with subjects including Abu Zabaida [sic]” in CIA custody and that this could “greatly enhance” Mohamed al-Qahtani’s “productivity”.<sup>68</sup>
- After three months in isolation, Mohamed al-Qahtani was for the next eight weeks – 23 November 2002 to around 15 January 2003 – subjected to interrogation under a Special Interrogation Plan. Lieutenant General Randall M. Schmidt, who led a military investigation into FBI allegations of detainee abuse at Guantánamo said of the treatment of Mohamed al-Qahtani: “...for at least 54 days, this guy was getting 20 hours a day interrogation in the

white cell. In the white room for four hours and then back out.” He elaborated that for the four hours a day that Mohamed al-Qahtani was not under interrogation, “he was taken to a white room... with all the lights and stuff going on and everything...”<sup>69</sup>

- During interrogation, Mohamed al-Qahtani – always in shackles – was variously forced to wear a woman’s bra and had a thong placed on his head; was tied by a leash and led around the room while being forced to perform a number of dog tricks; was forced to dance with a male interrogator while made to wear a towel on his head “like a burka”; was forced to wear a mask made from a box with a “smiley face” on it, dubbed the “happy Mohammed” mask by the interrogators; was subjected to forced standing, forcible shaving of his head and beard during interrogation (and photographing immediately after this), stripping and strip-searching in the presence of women, sexual humiliation, and to sexual insults about his female relatives; had water repeatedly poured over his head; had pictures of “swimsuit models” hung round his neck; was subjected to hooding, loud music for up to hours on end, white noise, sleep deprivation, and to extremes of heat and cold through manipulation of air conditioning.<sup>70</sup> Dogs were used to induce fear in him. On at least two occasions, a dog was “brought into the interrogation room and directed to growl, bark, and show his teeth” at the detainee. Lt. Gen. Schmidt said: “[H]ere’s this guy manacled, chained down, dogs brought in, put his face [sic], told to growl, show teeth, and that kind of stuff. And you can imagine the fear kind of thing.”<sup>71</sup>
- Since leaving office, Donald Rumsfeld has confirmed his involvement in approving interrogation techniques for use against Mohamed al-Qahtani after being advised that this detainee “had information that could save American lives” and that US personnel “in the chain of command believed additional techniques were warranted”.<sup>72</sup> The former Secretary of Defense further asserted that he had “understood that the techniques I authorized were intended for use with only one key individual”, that is Mohamed al-Qahtani, although in the same memoirs he notes that the Guantánamo military authorities under him were seeking the additional “counter-resistance techniques” because “some detainees” (plural) had “resisted our current interrogation methods”.<sup>73</sup> As will be described below, the Secretary of Defense acts under the direction of the President.
- In May 2008, Susan Crawford, then convening authority for the military commissions at Guantánamo, dismissed charges against Mohamed al-Qahtani, then facing trial by military commission. In January 2009, she explained: “We tortured Qahtani. His treatment met the legal definition of torture. And that’s why I did not refer the case”.<sup>74</sup> Mohamed al-Qahtani remains in detention at Guantánamo without charge or criminal trial.
- The Department of Defense Inspector General found that Standard Operating Procedures (SOP) for US forces in Afghanistan had been “influenced by the counter-resistance memorandum that the Secretary of Defense approved on December 2, 2002 and incorporated techniques designed for detainees who were identified as unlawful combatants. Subsequent battlefield SOPs included techniques such as yelling, loud music, and light control, environmental manipulation, sleep deprivation/adjustment, stress positions, 20-hour interrogations, and controlled fear (muzzled dogs)...”<sup>75</sup>
- Several FBI agents deployed to Afghanistan reported personally observing military interrogators using sleep deprivation, nudity, threats, hooding and blindfolding, prolonged isolation, stress positions, forced shaving, holding “ghost” detainees (see below), sending detainees to another country for more aggressive interrogation, and threatening such rendition.<sup>76</sup>
- From Afghanistan, “the techniques made their way to Iraq”, according to the Senate Committee on Armed Services.<sup>77</sup>
- In a number of cases, US federal and military judges have found detainees’ allegations of torture and other ill-treatment by US military and CIA personnel in Afghanistan and Guantánamo to be credible.<sup>78</sup>
- In a ruling issued in April 2010, for example, a US District Court Judge wrote that “there is ample evidence in this record that [Mohamedou Ould] Salahi [Slahi] was subjected to extensive and severe mistreatment at Guantánamo from mid-June 2003 to September 2003”.

This was the period that Mohamedou Slahi had been labelled by his US military captors as having “Special Projects Status” and subjected to a 90-day “special interrogation plan” requested by the Defense Intelligence Agency (DIA) and approved 1) by the commander of the Guantánamo detentions, General Geoffrey Miller on 1 July 2003, 2) by Deputy Secretary of Defense Paul Wolfowitz on 28 July 2003, and 3) by Secretary of Defense Donald Rumsfeld on 13 August 2003.<sup>79</sup> The plan stated that it would “not be implemented until approved by higher authority”.<sup>80</sup> Mohamedou Ould Slahi was allegedly deprived of sleep for some 70 days straight, subjected to strobe lighting and continuous loud heavy metal music, threats against him and his family, intimidation by dog, cold temperatures, dousing with cold water, physical assaults, and food deprivation. He was subjected to a fake rendition, with threats of enforced disappearance and death. The ICRC repeatedly sought access to Mohamedou Slahi during this period but were denied on the grounds of “military necessity”.<sup>81</sup>

- Donald Rumsfeld has confirmed since leaving office that he “approved interrogation techniques beyond the traditional Army Field Manual” for use against Mohamedou Ould Slahi after this detainee had “tenaciously resisted questioning”. After Slahi was “isolated from other detainees and interrogated” under the interrogation plan he had approved, Donald Rumsfeld has asserted, the detainee provided “useful intelligence”.<sup>82</sup>
- Prior to his transfer to Guantánamo, Mohamedou Ould Slahi had been arrested in Mauritania and subjected to “rendition” to Jordan, “at the request of the United States”.<sup>83</sup> He was held for eight months in Jordan, where he was “kept in isolation, and was not allowed to meet with the representatives of the International Committee of the Red Cross (ICRC), who were visiting the prison every two weeks.”<sup>84</sup> A number of other detainees who ended up in Guantánamo had earlier been subjected to “rendition” and alleged abuse elsewhere. In 2009, for example, a US District Court judge found that allegations made by Ethiopian national Binyam Mohamed were credible. Binyam Mohamed was taken into custody in Pakistan in April 2002 – apparently as a result of statements made by Abu Zubaydah under interrogation in the CIA secret program – subjected to rendition to Morocco where he was held for 18 months, transferred to the CIA-run “Dark Prison” in Kabul in Afghanistan, before being held in Bagram air base and then transferred to Guantánamo. He has claimed that he was subjected to torture and other ill-treatment in Pakistan, Morocco and the Dark Prison. District Judge Gladys Kessler noted that the US government “does not challenge or deny the accuracy of Binyam Mohamed’s story of brutal treatment”, and that his allegations bear “several indicia of reliability”. She continued: “Binyam Mohamed’s trauma lasted for two long years. During that time, he was physically and psychologically tortured. His genitals were mutilated. He was deprived of sleep and food. He was summarily transported from one foreign prison to another. Captors held him in stress positions for days at a time. He was forced to listen to piercingly loud music and the screams of other prisoners while locked in a pitch-black cell. All the while, he was forced to inculcate himself and others in various plots to imperil Americans. The Government does not dispute this evidence... [E]ven though the identity of the individual interrogators changed (from nameless Pakistanis, to Moroccans, to Americans, and to Special Agent [redacted], there is no question that throughout his ordeal Binyam Mohamed was being held at the behest of the United States. Captors changed the sites of his detention, and frequently changed his location within each detention facility. He was shuttled from country to country, and interrogated and beaten without having access to counsel until arriving at Guantánamo Bay...”<sup>85</sup>
- An unknown number of individuals were subjected to enforced disappearance in US custody during the armed conflict in Iraq. Known by US forces as “ghost detainees”, these individuals were in military custody but were kept off prison registers and hidden from the ICRC at the request of the CIA. The military investigation conducted by US Army Major General Antonio Taguba into the activities of the 800<sup>th</sup> Military Police (MP) Brigade in Iraq found that “the various detention facilities operated by the 800<sup>th</sup> MP Brigade have routinely held persons brought to them by Other Government Agencies (OGAs)<sup>86</sup> without accounting for them, knowing their identities, or even the reason for their detention. The Joint Interrogation and Debriefing Center (JIDC) at Abu Ghraib called these detainees “ghost detainees”. On at least one

occasion, the 320<sup>th</sup> MP Battalion at Abu Ghraib held a handful of “ghost detainees” (6-8) for OGAs that they moved around the facility to hide them from a visiting International Committee of the Red Cross (ICRC) survey team. This maneuver was deceptive, contrary to Army Doctrine, and in violation of international law”.<sup>87</sup>

- While details of most cases of “ghost detainees” remains unknown, US authorities have let it be known that in November 2003, Secretary of Defense Rumsfeld, acting on the request of the CIA’s then director George Tenet, ordered military officials in Iraq to keep a particular detainee, an Iraqi national, off any prison register.<sup>88</sup> In June 2004, after seven months, the unidentified detainee had still not been registered with the ICRC. The case concerned a detainee sometimes known as Triple-X, and reportedly held at the Camp Cropper detention facility. Secretary Rumsfeld, acknowledging his approval of the CIA Director’s request to keep the detainee unregistered and away from the ICRC, added that “there are instances where that occurs”, implying that this was not an isolated case.<sup>89</sup> In response to litigation brought under the Freedom of Information Act, the CIA stated in 2005 that it had located 72 documents “responsive” to the case of the Iraqi national kept off prison registers at the request of the CIA Director, but had determined that the documents “must be withheld in their entirety” from public disclosure.<sup>90</sup>
- General Paul Kern, who oversaw the Fay military investigation following the Abu Ghraib abuses, said that “there are enough unknown questions about the ‘ghost detainees’ and what agreements were made with whom” such that further investigation should be required. No further investigation is known to have been carried out. On 9 September 2004, General Paul Kern told the Senate Armed Services Committee that there might have been as many as 100 “ghost detainees” in US military custody in Iraq.<sup>91</sup>
- A leaked ICRC report dated February 2004 found that ill-treatment by US forces in Iraq was systematic in the cases of detainees suspected of security offences or deemed to have intelligence value. Such individuals “were at high risk of being subjected to a variety of harsh treatments ranging from insults, threats and humiliations to both physical and psychological coercion, which in some cases was tantamount to torture, in order to force cooperation with their interrogators”. The treatment of “high value detainees” held at a facility at Baghdad International Airport, the ICRC concluded, “constituted a serious violation of the Third and Fourth Geneva Conventions”.<sup>92</sup>

## 5. GEORGE W. BUSH WAS COMMANDER IN CHIEF OF THE US ARMED FORCES WHEN THEY COMMITTED CRIMES UNDER INTERNATIONAL LAW

- Under Article II, Section 2 of the United State Constitution, the President is Commander in Chief of the Armed Forces.
- George W. Bush decided to respond to the 11 September 2001 attacks by declaring a global “war” on terror.<sup>93</sup> He has said that his “authority to conduct the war on terror came from two sources. One was Article II of the Constitution, which entrusts the president with wartime powers as command in chief. The other was a congressional war resolution passed three days after 9/11”.<sup>94</sup> This was the Authorization for Use of Military Force (AUMF).
- A 25 September 2001 memorandum from the US Department of Justice to the White House asserted that even the broadly worded AUMF could not “place any limits on the President’s determinations as to any terrorist threat, the amount of military force to be used in response, or the method, timing, and nature of the response. These decisions, under our Constitution, are for the President alone to make”.<sup>95</sup>
- The Bush administration took the position that as “one of the core functions of the Commander in Chief is that of capturing, detaining, and interrogating members of the enemy”, “any effort by Congress to regulate the interrogation of battlefield combatants would violate the Constitution’s sole vesting of the Commander-in-Chief authority in the President”. Notwithstanding that in this case the administration asserted that the entire globe was the



battlefield, and the enemy was sweepingly defined in “a war with an international terrorist organization”, it nevertheless claimed that “Congress can no more interfere with the President’s conduct of the interrogation of enemy combatants than it can dictate strategic or tactical decisions on the battlefield”.<sup>96</sup>

- In the USA, “The Secretary of Defense is the principal defense policy adviser to the President and is responsible for the formulation of general defense policy and policy related to all matters of direct concern to the Department of Defense, and for the execution of approved policy. *Under the direction of the President*, the Secretary exercises authority, direction and control over the Department of Defense. The Secretary of Defense is a member of the President’s Cabinet and of the National Security Council” [emphasis added]<sup>97</sup> George W. Bush has recalled, of Donald Rumsfeld, that “he respected the chain of command”.<sup>98</sup>
- On 13 November 2001, as Commander In Chief, President George W. Bush signed a Military Order on the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism. The Military Order outlines the authority of the Secretary of Defense to hold individuals without trial “at an appropriate location designated by the Secretary of Defense outside or within the United States”, and/or to bring such detainees to trial by military commissions which were expressly not required to apply “the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts”.<sup>99</sup>
- The claim by the US administration to be engaged in a global conflict with non-state actors to which only the international law of armed conflict applies is without foundation in international law and should be categorically rejected. However, there is no doubt that George W. Bush was Commander in Chief of the US Armed Forces at times when: those forces under his command participated in specific international and non-international armed conflicts in Afghanistan and Iraq in which they perpetrated crimes under international law against detainees held in connection with those specific conflicts; those forces under his command additionally held other individuals, that had not been captured in relation to any such conflict, in military custody and perpetrated crimes under international law in relation to them.

## 6. THE BUSH ADMINISTRATION INITIALLY CHOSE TO ADOPT THE POSITION THAT THE PRESIDENT WAS ESSENTIALLY UNCONFINED BY INTERNATIONAL OR STATUTORY LAW IN DETERMINING THE USA’S RESPONSE TO THE ATTACKS OF 11 SEPTEMBER 2001. AMONG OTHER THINGS, GEORGE W. BUSH SPECIFICALLY DECIDED NOT TO APPLY THE PROTECTIONS OF THE GENEVA CONVENTIONS OF 1949, INCLUDING THEIR COMMON ARTICLE 3, WOULD NOT BE APPLIED TO TALEBAN OR AL-QA’IDA DETAINEES

- A 25 January 2002 memorandum to then-President George W. Bush drafted by White House Counsel Alberto Gonzales discussed certain legal issues associated with a “war against terrorism”, which the memo described as a “new kind of war” that “places a high premium” on “the ability to quickly obtain information from captured terrorists and their sponsors”. The memorandum advised that a “positive” consequence of determining that Geneva Convention protections would not apply to detainees would be the substantial reduction in the threat that US agents would be liable for criminal prosecution under the USA War Crimes Act. The War Crimes Act criminalized as war crimes under US law conduct prohibited under Article 3 common to the four Geneva Conventions of 1949, including torture, cruel treatment, and “outrages upon personal dignity, in particular, humiliating and degrading treatment”.<sup>100</sup>
- On 1 February 2002, US Attorney General John Ashcroft wrote to then-President Bush that a presidential determination against applying Geneva Convention protections to detainees “would provide the highest assurance that no court would subsequently entertain charges that American military officers, intelligence officials, or law enforcement officials violated Geneva

Convention rules relating to field conduct, detention conduct or interrogation of detainees. The War Crimes Act of 1996 makes violation of parts of the Geneva Convention a crime in the United States".<sup>101</sup>

- On 7 February 2002, then-President Bush signed a memorandum which states that al-Qa'ida and Taleban detainees do not qualify as prisoners of war, nor would Common Article 3 be applied to them. The memorandum suggested that humane treatment of detainees in the "new paradigm" of the "war against terrorism" would be a policy choice not a legal requirement, and that there were detainees "who are not legally entitled to such treatment".<sup>102</sup>
- On 13 March 2002, the OLC advised the Pentagon that "the President has full discretion to transfer al Qaeda and Taliban prisoners captured overseas and detained outside the territorial jurisdiction of the United States to third countries". Neither the Geneva Conventions nor UNCAT, the OLC asserted, posed any obstacle to such transfers.<sup>103</sup>
- In a 14 March 2003 memorandum on the military interrogation of foreign "enemy combatants" held outside the USA, the OLC advised the Pentagon that "under our Constitution, the sovereign right of the United States on the treatment of enemy combatants is reserved to the President as Commander-in-Chief", and "it is well established that the sovereign retains the discretion to treat unlawful combatants as it sees fit". General criminal laws, it continued, "must be construed as not applying to interrogations undertaken pursuant to his Commander-in-Chief authority", and "any effort by Congress to regulate the interrogation of enemy combatants" would be unconstitutional. In addition, the memorandum asserted, the USA's War Crimes Act – criminalizing as war crimes violations of the Geneva Conventions – did not apply to the interrogation of al-Qa'ida or Taleban detainees, it argued, because they did not qualify for Geneva Convention protections. Similarly it argued that the anti-torture statute – criminalizing torture by US agents abroad – did not apply if the interrogations were conducted "on permanent military bases outside the territory of the United States", including Guantánamo.<sup>104</sup>
- The above approach of the administration appears to have continued until at the earliest the judgment of the US Supreme Court in *Hamdan v. Rumsfeld* on 26 June 2006.<sup>105</sup>

## 7. AS COMMANDER IN CHIEF, GEORGE W. BUSH FAILED TO TAKE ALL REASONABLE AND NECESSARY MEASURES TO PREVENT AND SUPPRESS THE COMMISSION OF CERTAIN CRIMES AGAINST DETAINEES UNDER INTERNATIONAL LAW

- A 7 February 2002 memorandum signed by then-President George W. Bush to his administration stated that: "Of course, our values as a Nation, values which we share with many nations in the world, call for us to treat detainees humanely, including those who are not legally entitled to such treatment... As a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva".<sup>106</sup> In 2008, the US Senate Committee on Armed Services concluded that then-President Bush's 7 February 2002 decision "to replace well established military doctrine, i.e., legal compliance with the Geneva Conventions, with a policy subject to interpretation, impacted the treatment of detainees in US custody".<sup>107</sup> The Committee noted that the "President's order was not, apparently, followed by any guidance that defined the terms 'humanely' or 'military necessity'. As a result, those in the field were left to interpret the President's order."<sup>108</sup> Indeed, "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".<sup>109</sup> In practice, the idea that compliance with the rules of international humanitarian law could be set aside whenever it was deemed appropriate or "militarily necessary" to do so was a significant contributing factor to the war crimes that subsequently occurred.
- As all of the information set out above demonstrated, at the very least, then-President Bush knew that, with his authorization, some individuals would be subjected by forces under his

command to acts that intentionally inflicted severe pain or suffering, of a physical or mental nature, for the purposes of obtaining information; he also became aware that such acts were in fact being committed. Further public information, described above, confirms that acts of torture and other war crimes were also perpetrated with the authorization or acquiescence of Secretary Defence Rumsfeld or others in the chain of command. If then-President Bush did not specifically authorize such crimes, then there is no evidence that he, as Commander in Chief, took all reasonable and necessary measures to ensure: (1) that system was in place to secure proper treatment of prisoners and to prevent their ill-treatment in accordance with the standards of international law; (2) that any such system was operating in a continuous and effective manner; and (3) that violations of the standards were punished when detected by that system.

- Either George W. Bush, when President and Commander in Chief, knew about the authorization and use by Secretary Rumsfeld and others in the chain of command of such practices as “counter-resistance techniques” and holding “ghost detainees”, at or around the time such practices were being authorized or occurring, or he failed to take reasonable measures to acquire such knowledge. In any event, after such information became public after mid-2004, he failed to take all the measures necessary and reasonable to prevent further such abuse of detainees and to hold to account those responsible for previous abuses.
- Then-President Bush also knew or was wilfully blind to the fact that the use of secret and incommunicado detention facilitates torture and other abuses of detainees. In a proclamation against torture issued on 26 June 2003, President Bush asserted that “Notorious human rights abusers, including, among others, Burma, Cuba, North Korea, Iran, and Zimbabwe, have long sought to shield their abuses from the eyes of the world by staging elaborate deceptions and denying access to international human rights monitors.” The ICRC and human rights monitors were denied access to detainees held in the CIA program (and indeed the ICRC was even denied access for prolonged periods to some detainees held in military custody in the context of armed conflicts).

## 8. THE USA HAS FAILED TO CONDUCT CRIMINAL INVESTIGATIONS CAPABLE OF REACHING GEORGE W. BUSH, AND ALL INDICATIONS ARE THAT IT WILL NOT DO SO

- Amnesty International and others have for seven years been calling on the US authorities to conduct criminal investigations into the allegations and evidence of torture and other crimes under international law perpetrated against detainees by US forces.<sup>110</sup>
- The MCA was the legislative response in part to the threat perceived by the Bush administration that the US Supreme Court’s *Hamdan v. Rumsfeld* ruling could expose US personnel involved in the CIA program to prosecution under the War Crimes Act. One of the Senators who led congressional work on the MCA recalled in 2011 how “we wrote into the legislation that no one who used or approved the use of these interrogation techniques before its enactment should be prosecuted”.<sup>111</sup>
- As will be explained below, as far as is known there have been no prosecutions of anyone in relation to the CIA program of secret detention and interrogation of “high-value” detainees. (It may be noted that the US administration continues to invoke the “state secrets privilege” to block lawsuits seeking remedy and accountability for alleged human rights violations by the CIA).<sup>112</sup>
- In August 2009, the US Attorney General ordered a “preliminary review into whether federal laws were violated in connection with the interrogation of specific detainees at overseas locations”. At some point, the appointed prosecutor will recommend to the Attorney General “whether there is sufficient predication for a full investigation into whether the law was violated in connection with the interrogation of certain detainees.” At the same time, the Attorney General emphasised that “the Department of Justice will not prosecute anyone who acted in good faith and within the scope of the legal guidance given by the Office of Legal

Counsel regarding the interrogation of detainees.” The preliminary review “will not focus on those individuals”. The US Attorney General added that he “share[d] the President’s conviction that as a nation, we must, to the extent possible, look forward and not backward when it comes to issues such as these.”<sup>113</sup>

- On 30 June 2011, the US Attorney General announced that the preliminary review being conducted by Assistant US Attorney John Durham into interrogations in the CIA program was at an end. Attorney General Holder has accepted Durham’s recommendation for “a full criminal investigation regarding the death in custody of two individuals. Those investigations are ongoing.” However, “the Department [of Justice] has determined that an expanded criminal investigation of the remaining matters is not warranted.”<sup>114</sup> On the same day, CIA Director Leon Panetta: “The Attorney General has informed me that, with limited exceptions, the Department of Justice inquiries concerning the Agency’s former rendition, detention, and interrogation program have been completed and are now closed.” He emphasised that, even in the case of the investigation into the two deaths “No decision has been made to bring criminal charges. Both cases were previously reviewed by career federal prosecutors who subsequently declined prosecution.” The CIA Director added that “We are now finally about to close this chapter of our Agency’s history.”<sup>115</sup>
- On 9 November 2010, the US Department of Justice announced that no one would face prosecution for the CIA’s destruction of 92 videotapes of the interrogations of Abu Zubaydah and ‘Abd al-Nashiri.<sup>116</sup> The tapes included recordings of the use of “enhanced interrogation techniques”, including 83 applications of “water-boarding” against Abu Zubaydah. On one of the interrogation videotapes, an interrogator verbally threatened Abu Zubaydah by stating, ‘If one child dies in America, and I find out you knew something about it, I will personally cut your mother’s throat’.<sup>117</sup>
- A number of military investigations and reviews have been conducted in relation to detentions and interrogations of detainees in Iraq, Afghanistan and Guantánamo. None have been comprehensive in scope, and none have the independence or reach necessary to be able to investigate the role of high-level officials, such as the Secretary of Defense or the President.<sup>118</sup>
- At the UN Human Rights Council in Geneva on 9 November 2010, the legal advisor to the US Department of State said: “Allegations of past abuse of detainees by US forces in Afghanistan, Iraq and Guantánamo have been investigated and appropriate corrective action taken.”<sup>119</sup> As described above, however, any investigations that were undertaken failed fully to cover the range of crimes or perpetrators necessary to meet international obligations.
- US Army Major General Antonio Taguba (retired), who as noted above conducted an investigation into the activities of the 800th Military Police Brigade in Iraq, said in June 2008: “After years of disclosures by government investigations, media accounts, and reports from human rights organizations, there is no longer any doubt as to whether the [Bush] administration has committed war crimes. The only question that remains to be answered is whether those who ordered the use of torture will be held to account.”<sup>120</sup>

## 9. CANADA’S OBLIGATIONS TO ARREST, INVESTIGATE, AND PROSECUTE OR EXTRADITE

### **Canada’s international obligations**

- Canada has been party to the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) since 24 June 1987.<sup>121</sup>
- Article 1 of the UNCAT sets out the definition of torture for the purposes of the treaty:

“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.”<sup>122</sup>

- Article 2 eliminates any exceptional circumstances whatsoever, including but not limited to a state of war or a threat of war, internal political instability or any other public emergency, as ever providing a justification for torture. Article 4 requires that all acts of torture, any attempt to commit torture and any “act by any person” that constitutes “complicity or participation in torture” be an offence under national laws. Articles 5 to 7 establish an obligation on every state party to exercise and enforce criminal jurisdiction over anyone who enters its territory who is alleged to have committed any such offence. Article 7(1) specifies, in mandatory language, that: “The State Party in the 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.” The person must be taken into custody or made subject to other legal measures to ensure his presence (article 6(1)). A preliminary inquiry must be launched immediately (article 6(2)). The case must be submitted to competent authorities for the purpose of prosecution unless the person is extradited to another state able and willing to do so (article 7(1)). States Parties must afford one another “the greatest measure of assistance in connection with criminal proceedings brought in respect of any of the offences referred to in article 4, including the supply of all evidence at their disposal necessary for the proceedings” (article 9(1)).
- George W. Bush authorized the commission of acts of abuse against detainees. Among the acts he has publicly admitted to having authorised was the intentional and coercive inducement in a person who is tightly physically restrained, of the initiation of the process of suffocation by drowning. Such treatment was intended to, and inherently involved, the infliction of severe pain and suffering of a mental and/or physical nature. He has admitted that this pain and suffering was inflicted for the purpose of obtaining information. Such acts unquestionably fall within the legal definition of torture under international law. Indeed, US courts and government agencies had themselves previously characterised it as such. His intentional authorization of such acts constitutes participation and/or complicity in acts of torture, and therefore fall within the scope of the UNCAT.
- Canada has been party to the Third and Fourth Geneva Conventions of 1949 since 14 November 1965, and the 1977 First and Second Protocols since 20 May 1991. Grave breaches of the Conventions and First Protocol are subject to a similar regime of mandatory criminal jurisdiction to that under the UNCAT. Among the grave breaches defined by these treaties are “torture or inhuman treatment”, “wilfully causing great suffering or serious injury to body or health”, and “unlawful deportation or transfer or unlawful confinement” of a person protected by the Fourth Convention (article 147, Fourth Convention); and “torture or inhuman treatment” or “wilfully causing great suffering or serious injury to body or health” of a person protected by the Third Convention. The 1949 Geneva Conventions provide that each state party must “enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article” and is “under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts” if it does not “hand such persons over for trial” by another state party.<sup>123</sup> The Conventions also specify that “No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in the preceding Article.”<sup>124</sup>
- Canada has been party to the Rome Statute of the International Criminal Court, 2187 UNTS 3, since 9 July 2000. The Rome Statute entered into force in July, 2002 after being ratified by 60 nations. The Statute recognises that, in addition to “grave breaches” of the Geneva Conventions, certain violations of *customary* international humanitarian law in armed conflicts

(whether international or non-international) also constitute crimes under international law: for instance, “torture”, “cruel treatment”, and “outrages upon personal dignity, in particular humiliating and degrading treatment” (i.e. including violations of common article 3 of the 1949 Geneva Conventions). It also recognizes that commanders and other superiors are criminally responsible for war crimes committed by their subordinates, at least where they knew, or had reason to know, that their subordinates were about to commit or were committing such crimes and the superior did not take all necessary and reasonable measures in their power to prevent the commission or, if the crimes had already been committed, to punish the persons responsible.<sup>125</sup> The enumeration and definition of various crimes under international law in the Rome Statute are for the specific purposes of defining the Court’s jurisdiction; while many of its provisions indirectly confirm the status of certain conduct as war crimes under international customary law, the Statute does not purport to be an exhaustive codification of the full range and scope of war crimes under customary international law.

- As was described earlier, armed forces under the command of George W. Bush participated in international and non-international armed conflicts in Afghanistan and Iraq in which they perpetrated crimes under international law against detainees held in connection with those specific conflicts. The available evidence strongly indicates that the acts and/or omissions of George W. Bush were such as to give rise to personal criminal liability through command responsibility for the actions of his subordinates.
- In light of the factual material set out earlier, and the international legal obligations of Canada as outlined above, Amnesty International considers that – even if one were to rely only upon information released by United States authorities, and by former US President George W. Bush himself – the available evidence gives rise to an obligation for Canada, should Mr Bush proceed with his visit on or around 20 October 2011, to investigate his alleged involvement in and responsibility for crimes under international law, including torture, and to secure his presence in Canada during that investigation.
- These crimes are not ones for which a former head of state is entitled to any immunity under international law.<sup>126</sup>

#### **Relevant Canadian law**

- Canada has passed national laws that enable it to fulfil its international legal obligations as outlined above.
- As part of implementing its obligations under the UN Convention against Torture, Canada enacted section 269.1 of the *Criminal Code* (R.S.C., 1985, c. C-46) which defines the crime of torture for general purposes under Canadian law. Sections 21 to 24 of the Criminal Code define the range of parties to offences, and these and other provisions rendered as crimes under Canadian law the acts of George W. Bush as described above insofar as he ordered, authorized or otherwise assisted other persons who were under his authority to commit the crime of torture. Additionally, section 7(3.7) deems any act of torture for which a person was responsible outside of Canada, to have been committed in Canada, if the person subsequently is present in Canada. As such it provides authority to arrest and prosecute a foreign national who is criminally responsible in relation to a violation of s 269 outside of Canada, if such an individual enters Canada.
- As part of implementing its obligations under the Geneva Conventions, customary international humanitarian law, and the Rome Statute, Canada enacted the *Act respecting genocide, crimes against humanity and war crimes and to implement the Rome Statute of the International Criminal Court*, and to make consequential amendments to other Acts (*Crimes Against Humanity and War Crimes Act*), S.C. 2000, c. C-24) which was adopted on 24 June 2000 and entered into force on 23 October 2000.<sup>127</sup> The CAHWCA recognizes that genocide, crimes against humanity and war crimes constitute crimes under international law based on customary and conventional international law, including as defined in the Rome Statute of the ICC, and confirms the status of these crimes under Canadian law.

- Acts including “torture” “inhuman treatment” “wilfully causing great suffering, or serious injury to body or health” “committing outrages upon personal dignity, in particular humiliating and degrading treatment” when committed in the context of any international armed conflict are recognised as crimes under Canadian law by section 6 and the Schedule of the Act (reproducing articles 8(2)(a) and (b) of the Rome Statute of the ICC).
  - Acts including “cruel treatment and torture” “committing outrages upon personal dignity, in particular humiliating and degrading treatment”, when committed in the context of conflicts not of an international character are recognised as crimes under Canadian law by section 6 and the Schedule of the Act (reproducing article 8(2)(c) of the ICC Rome Statute).
  - The reference in the Act to the enumeration and definition of crimes as contained in the ICC Rome Statute is expressly stated not to be exhaustive of the scope of crimes under customary international law covered by the CAHWCA, as the second sentence of section 6(4) of the Act states that the reference to the Rome Statute for greater certainty, “does not limit or prejudice in any way the application of existing or developing rules of international law.” The actual definition of relevant offences under the CAHWCA is in fact potentially even broader in scope: sections 6(1) and (3) define as “war crimes” under Canadian law any “act or omission committed during an armed conflict that, at the time and in the place of its commission, constitutes a war crime according to customary international law or conventional international law applicable to armed conflicts, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.” The International Criminal Tribunal for the Former Yugoslavia has, for instance, held that all acts of torture and outrages upon personal dignity perpetrated against any person having a nexus to any form of armed conflict, whether national or non-international, constitutes a war crime as a matter of customary international law, regardless of any limitations that would apply to the formal application of, for instance, the Grave Breaches provisions of the Geneva Conventions.<sup>128</sup>
  - Provision for the responsibilities of military commanders and of superiors is provided for under section 5 of the Act.
- The provisions outlined above were intended to, and do in fact, enable Canada to comply with the mandatory provisions of the international treaties that require that in all cases where credible allegations are made, the individual’s presence in Canada is secured pending further investigation and the matter either referred to competent prosecuting authorities in Canada or slated for extradition to another state willing and able to undertake the prosecution.
  - Additionally, Canada’s *Immigration and Refugee Protection Act*, which governs the entry of all non-citizens into Canada even for short-term visits, specifically deems foreign nationals inadmissible “on grounds of violating human or international rights” where they have committed “an act outside Canada that constitutes an offence referred to in sections 4 to 7 of the Crimes Against Humanity and War Crimes Act.”<sup>129</sup>
  - Again, Amnesty International submits that the publicly-available information referenced above provides a sufficient basis to investigate and exercise criminal jurisdiction over George W. Bush for crimes under one or more of those provisions, particularly should he enter the territory of Canada.

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## ENDNOTES

<sup>1</sup> Remarks on the War on Terror, President George W. Bush, White House, 6 September 2006.

<sup>2</sup> *Ibid.*

<sup>3</sup> Statement to employees by Director of the Central Intelligence Agency, General Mike Hayden, on lawful interrogation, 13 February 2008.

<sup>4</sup> Special Review of counterterrorism detention and interrogation activities from September 2001 to October 2003, CIA Inspector General, 7 May 2004. [Hereinafter CIA Inspector General Special Review] Declassified version, 2009, page 90-91.

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

<sup>6</sup> The 14<sup>th</sup>, Ahmed Khalfan Ghailani was on 25 January 2011 sentenced to life imprisonment following his conviction in federal court in New York in 2010 following his transfer from Guantánamo to the US mainland in 2009. His sentence will be served in “conditions of highest security” which may render him inaccessible to independent human rights organizations. In pre-trial proceedings in 2010, the US District Court Judge found that in 2004 Ghailani had been “transferred to exclusive CIA custody” and “imprisoned at a secret site and subjected to extremely harsh interrogation methods as part of the CIA’s Rendition, Detention and Interrogation Program.” In doing so, the CIA had been acting under the authority of then-President George W. Bush, the judge found (see further below).

<sup>7</sup> ICRC report on the treatment of fourteen ‘high value detainees’ in CIA custody. February 2007. With cover letter to John Rizzo, Acting General Counsel, Central Intelligence Agency, 14 February 2007 [Hereinafter ICRC 2007 Report].

<sup>8</sup> UNCAT, 1465 UNTS 85.

<sup>9</sup> Memorandum for John Rizzo, Acting General Counsel of the Central Intelligence Agency, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, *Re: Interrogation of al Qaeda Operative*, 1 August 2002

<sup>10</sup> Evan Wallach, ‘Drop by drop: Forgetting the history of water torture in US courts’, *Columbia Journal of Transnational Law*, Volume 45 (2006-2007), pages 468 to 506.

<sup>11</sup> See President Barack Obama, News Conference, 29 April 2009 (“I believe that waterboarding was torture. And I think that the -- whatever legal rationales were used, it was a mistake”). Attorney General Eric Holder at the Jewish Council for Public Affairs Plenum, Washington, DC, 2 March 2009 (“As I unequivocally stated in my confirmation hearing before the US Senate, water-boarding is torture. My Justice Department will not justify it, rationalize it, or condone it. The sanction of torture is at odds with the history of American jurisprudence and American principles.”). (See also, for instance, statement to UK Parliament by then-UK Foreign Secretary David Miliband “I consider that water-boarding amounts to torture”, HC Deb, 21 April 2008, col 1726W; statement to the 63<sup>rd</sup> Session of the UN General Assembly, by the Special Rapporteur on Torture, Manfred Nowak, Thursday, 23 October 2008, paragraph 3; Committee against Torture, Concluding Observations on USA, UN Doc CAT/C/USA/CO/2 (25 July 2006), para 24; Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, UN Doc A/HRC/13/39/Add.5 (5 February 2010), para 74; Interview with Special Rapporteur on torture, Juan Mendez (12 November 2010), <http://www.abc.net.au/pm/content/2010/s3065204.htm>; Judgment of the International Military Tribunal for the Far East (1948). Part B, Chapter VIII, p. 1059.

<sup>12</sup> For example, the entry on Tunisia in the State Department’s report on human rights practices during 2003 found that “security forces tortured detainees to elicit confessions and political prisoners to



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discourage resistance. The forms of torture included: electric shock; confinement to tiny, unlit cells; submersion of the head in water; beatings with hands, sticks, and police batons; suspension from cell doors resulting in lost consciousness; cigarette burns; and food and sleep deprivation". Tunisia. Country Reports on Human Rights Practices, Bureau of Democracy, Human Rights, and Labor, US Department of State, 2003, 25 February 2004, <http://www.state.gov/drl/rls/hrrpt/2003/27939.htm>

<sup>13</sup> Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, *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*, 30 May 2005.

<sup>14</sup> ICRC 2007 report, *op. cit.*

<sup>15</sup> *Ibid.*

<sup>16</sup> Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, *Re: Application of 18 U.S.C. §§ 2340-2340A to the combined use of certain techniques in the interrogation of high value al Qaeda detainees*, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 10 May 2005.

<sup>17</sup> CIA Inspector General Special Review, *op. cit.*, para. 91.

<sup>18</sup> *ACLU v. DOD, CIA*, In the US Court of Appeals for the District of Columbia Circuit, Brief for Appellees, March 2010.

<sup>19</sup> Verbatim transcript of Combatant Status Review Tribunal Hearing for ISN 10015, held at Guantánamo Bay on 14 March 2007, as declassified on 12 June 2009.

<sup>20</sup> A review of the FBI's involvement in and observations of detainee interrogations in Guantánamo Bay, Afghanistan, and Iraq, Oversight and Review Division, Office of the Inspector General, US Department of Justice, October 2009 (revised), page 74 [hereinafter FBI OIG report].

<sup>21</sup> ICRC report, February 2007, *op. cit.*

<sup>22</sup> §1.7(a)(4), Executive Order 12333, United States Intelligence Activities, 4 December 1981 (as amended by Executive Orders 13284 (2003), 13355 (2004) and 13470 (2008)); <https://www.cia.gov/about-cia/eo12333.html>. See also Question 7, Frequently Asked Questions, Central Intelligence Agency website, <https://www.cia.gov/about-cia/faqs/index.html#covertactions>

<sup>23</sup> Transcript of Director Hayden's Interview with Fox News, 21 January 2009, <https://www.cia.gov/news-information/press-releases-statements/cia-director-interview-with-fox-news.html>

<sup>24</sup> Congress and the CIA: Time to move on. Op-ed by Leon E. Panetta, Washington Post, 2 August 2009, <https://www.cia.gov/news-information/press-releases-statements/congress-and-the-cia-time-to-move-on.html>

<sup>25</sup> Ninth Declaration of Marilyn A. Dorn, Deputy Chief, Policy and Community Action Staff, National Clandestine Service, Central Intelligence Agency, 7 June 2007.

<sup>26</sup> George Tenet, *At the Center of the Storm*, Harper Books 2007, page 366.

<sup>27</sup> George W. Bush, *Decision points*, Virgin Books, 2010, pages 186.

<sup>28</sup> CBS news transcript. *Face the Nation*, 10 May 2009. Dick Cheney interview with Bob Schieffer.

<sup>29</sup> *USA v. Ghailani*, Supplement to opinion ruling on defendant's motion to dismiss the indictment for alleged deprivation of speedy trial, US District Court for Southern District of New York, 12 July 2010.

<sup>30</sup> *USA v. Ghailani*, Opinion, US District Court for the Southern District of New York, 6 October 2010. Redacted version released on 13 October 2010.

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<sup>31</sup> Memorandum for John A. Rizzo, 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, 30 May 2005, *op. cit.*; and Memorandum for John A. Rizzo, acting General Counsel, Central Intelligence Agency, Re: Application of the War Crimes Act, the Detainee Treatment Act, and Common Article 3 of the Geneva Conventions to certain techniques that may be used by the CIA in the interrogation of high value al Qaeda detainees, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 20 July 2007.

<sup>32</sup> Remarks on signing the Military Commissions Act of 2006, President George W. Bush, 17 October 2006.

<sup>33</sup> Defense Department takes custody of a high-value detainee. US Department of Defense news release, 27 April 2007.

<sup>34</sup> Re: Application of the War Crimes Act, the Detainee Treatment Act, and Common Article 3 of the Geneva Conventions to certain techniques that may be used by the CIA in the interrogation of high value al Qaeda detainees. Memorandum for John A. Rizzo, 20 July 2007, *op.cit.*

<sup>35</sup> Executive Order 13440 – Interpretation of the Geneva Conventions Common Article 3 as applied to a program of detention and interrogation operated by the Central Intelligence Agency, 20 July 2007.

<sup>36</sup> Message to the House of Representatives returning without approval the 'Intelligence Authorization Act for Fiscal Year 2008'. President George W. Bush, 8 March 2008. Weekly Compilation of Presidential Documents, 17 March 2008, Vol. 44, No.10, p. 346.

<sup>37</sup> Defense Department takes custody of a high-value detainee. US Department of Defense news release, 14 March 2008.

<sup>38</sup> Decision points, *op. cit.*, page 171.

<sup>39</sup> National Security Council, <http://www.whitehouse.gov/administration/eop/nsc/>

<sup>40</sup> Inquiry into the treatment of detainees in US custody. Report of the Committee on Armed Services, United States Senate, 20 November 2008, page 16-17 [Hereinafter Senate Armed Services Committee report]. Regular attendees of the National Security Council are the President, 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 (aka National Security Advisor). The Director of the CIA and the Chairman of the Joint Chiefs of Staff are statutory advisors to the NSC and attend also. The Counsel to the President is to be consulted on the agenda of NSC meetings and attends meetings as appropriate. See, for example, Organization of the National Security Council System. Memorandum from President George W. Bush, 13 February 2001.

<sup>41</sup> *Ibid.* (Senate Armed Services Committee Report, page 16-17).

<sup>42</sup> *Ibid.* The NSC Principals Committee is chaired by the Assistant to the President for National Security Affairs (National Security Advisor). Regular attendees are the Secretary of State, the Secretary of the Treasury, the Secretary of Defense, and the Chief of Staff to the President. The Director of the CIA, Chairman of the Joint Chiefs of Staff, the Attorney General, and the Director of the Office of Management and Budget attend when appropriate. See, for example, Organization of the National Security Council System. Memorandum from President George W. Bush, 13 February 2001.

<sup>43</sup> *Ibid.*, page 17.

<sup>44</sup> Declaration of Wendy M. Hilton, Associate Information Review Officer, National Clandestine Service, Central Intelligence Agency, 13 May 2009. *ACLU v. Department of Defense and ACLU v Department of Justice and its component Office of Legal Counsel*, US District Court for Southern District of New York.

<sup>45</sup> Memorandum for Alberto R. Gonzales, Counsel to the President, Re: Standards of conduct for

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interrogation under 18 U.S.C §§ 2340-2340A, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 1 August 2002.

<sup>46</sup> 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 [hereinafter OPR Report]. Office of Professional Responsibility, Report, 29 July 2009, page 50.

<sup>47</sup> Memorandum for John Rizzo, Interrogation of al Qaeda operative, 1 August 2002, *op. cit.*

<sup>48</sup> OPR Report, *op. cit.*, pages 35-36. "Use of diapers" was subsequently approved by CIA Director George Tenet, without expressly mentioning humiliation as a purpose, as a "standard interrogation technique" and as a part of other techniques. A 2005 OLC memorandum noted that "because releasing a detainee from the shackles would present a security problem and would interfere with the effectiveness of the technique [of sleep deprivation], a detainee undergoing sleep deprivation frequently wears an adult diaper". The OLC memorandum noted that the CIA had claimed "that diapers are used solely for sanitary and health reasons and not in order to humiliate the detainee". 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. Memorandum for John Rizzo, 30 May 2005, *op. cit.*

<sup>49</sup> OPR Report, *op. cit.*, page 61.

<sup>50</sup> Decision Points, page 168-169.

<sup>51</sup> Decision Points, page 170-171.

<sup>52</sup> Dick Cheney. In my time: A personal and political memoir. Threshold Editions (2011), p. 357-8.

<sup>53</sup> See, for instance, Declaration of Leon E. Panetta, Director, Central Intelligence Agency, 21 September 2009. In *ACLU v. DoD*, In the US District Court for the Southern District of New York ("Specifically, information such as certain details about the conditions of confinement..., locations of detention facilities, assistance of foreign entities..., has not been disclosed... Operational details regarding the CIA's former interrogation program – that is, information regarding how the program was actually implemented – also remains classified, as do descriptions of the implementation or application of interrogation techniques, including details of specific interrogations where Enhanced Interrogation Techniques (EITs) were used (excepting such general information that has been released to date on these topics)").

<sup>54</sup> FBI OIG report, *op. cit.*, page 68.

<sup>55</sup> OPR Report, *op. cit.*, page 124, note 95.

<sup>56</sup> Memorandum for John Bellinger. Signed by Scott Muller. Dated 2 July 2004.

<sup>57</sup> See also Letter to CIA General Counsel Scott Muller from Assistant Attorney General Jack Goldsmith, 7 July 2004

<sup>58</sup> OPR report, *op. cit.*, page 142.

<sup>59</sup> Re: Application of the War Crimes Act, the Detainee Treatment Act, and Common Article 3 of the Geneva Conventions to certain techniques that may be used by the CIA in the interrogation of high value al Qaeda detainees. Memorandum for John A. Rizzo, 20 July 2007, *op. cit.*

<sup>60</sup> See, for example, Memorandum for the Vice President et al. Organization of the National Security Council system, signed by President George W. Bush, 13 February 2001, <http://www.fas.org/irp/offdocs/nspd/nspd-1.htm>

<sup>61</sup> Affidavit of Omar Ahmed Khadr, 22 February 2008.

<sup>62</sup> *USA v. Khadr*, Ruling on suppression motions D-094 and D-111. Colonel Patrick Parrish, Military Judge (military commissions), 17 August 2010.

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- <sup>63</sup> Omar Khadr 'hooded and handcuffed' at Bagram prison, court hears. Toronto Star, 4 May 2010, <http://www.thestar.com/news/world/article/803792>, and USA v. Khadr, Ruling on suppression motions, 17 August 2010, *op. cit.*
- <sup>64</sup> Canada (Prime Minister) v. Khadr, 2010 SCC 3 ; [2010] 1 S.C.R. 44 (January 29, 2010), para. 5.
- <sup>65</sup> *Canada (Prime Minister) v. Khadr* (2009 FCA 246), A-208-09, 14 August 2009.
- <sup>66</sup> Re: suspected mistreatment of detainees. To Major General Donald J. Ryder, Department of the Army, from T.J. Harrington, Deputy Assistant Director, Counterterrorism Division, US Department of Justice, Federal Bureau of Investigation. 14 July 2004.
- <sup>67</sup> Action memo, Counter-resistance techniques. Office of the Secretary of Defense, 27 November 2002, signed by Secretary Rumsfeld, 2 December 2002. See also Memorandum for Commander, Joint Task Force 170, Legal brief on proposed counter-resistance strategies, 11 October 2002.
- <sup>68</sup> FBI OIG Report, *op. cit.*, page 93.
- <sup>69</sup> Testimony of LTG Randall M. Schmidt. Taken 24 August 2005 at Davis Mountain Air Force Base, Arizona. Department of the Army Inspector General, Investigations Division.
- <sup>70</sup> FBI OIG report, *op. cit.*, pages 102-103. See also USA: Where is the accountability? Health concern as charges against Mohamed al-Qahtani dismissed, Amnesty International, 20 May 2008.
- <sup>71</sup> Testimony of LTG Randall M. Schmidt. Taken 24 August 2005, *op. cit.*
- <sup>72</sup> Donald Rumsfeld. *Known and unknown: a memoir*. Sentinel Books (2011), page 580.
- <sup>73</sup> *Ibid*, citing Memorandum for Chairman of the Joint Chiefs of Staff. Subject: Counter-resistance techniques. From US Army General James T. Hill, 25 October 2002.
- <sup>74</sup> Detainee tortured, says US official. Bob Woodward, Washington Post, 14 January 2009. See also, A case to answer: the torture of Mohamed al-Qahtani, in Memorandum to the US Government on the report of the UN Committee Against Torture and the question of closing Guantánamo, Amnesty International, June 2006.
- <sup>75</sup> Inquiry into the treatment of detainees in US custody. Report of the Committee on Armed Services, United States Senate, 20 November 2008, page xxiii (executive summary)[Hereinafter Senate Armed Services Committee report].
- <sup>76</sup> FBI OIG report, *op. cit.*, pages 213-215.
- <sup>77</sup> *Ibid*.
- <sup>78</sup> See, for a selection of examples and citations, USA: See no Evil: Government turns the other way as judges make findings about torture and other abuse, Amnesty International, February 2011.
- <sup>79</sup> Senate Armed Services Committee Report, *op. cit.*, and FBI OIG Report, *op. cit.*
- <sup>80</sup> Senate Armed Services Committee Report, *op. cit.*, page 138.
- <sup>81</sup> Memorandum for the Record, ICRC meeting with MG Miller on 9 Oct 03. US Department of Defense, Joint Task Force 170, Guantánamo Bay, Cuba. The ICRC stated that they had still not been able to visit detainee #760 (Mohamedou Ould Slahi), but were told by the commander of the Guantánamo detentions that he was "off limits" due to "military necessity". At a later meeting on 2 February 2004, the ICRC raised the case again, but were again told that they could not see him privately. Department of Defence minutes of ICRC meeting 2 Feb 2004/1620.
- <sup>82</sup> Donald Rumsfeld. *Known and unknown: a memoir*. Sentinel Books (2011), page 580 (note).
- <sup>83</sup> FBI OIG report, *op. cit.*, page 122.

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<sup>84</sup> *Slahi v. Obama*. Traverse to the government's factual return to the petition for writ of habeas corpus. In the US District Court for the District of Columbia, 2009. Unclassified version.

<sup>85</sup> *Farhi Saeed bin Mohammed et al v. Barack H. Obama et al*, Memorandum opinion, US District Court for DC, 19 November 2009.

<sup>86</sup> OGA usually refers to the CIA.

<sup>87</sup> Article 15-6 investigation of the 800<sup>th</sup> Military Police Brigade, 2004 (the Taguba report).

<sup>88</sup> Secretary Rumsfeld himself acknowledged the case. "With respect to the detainee you're talking about, I'm not an expert on this, but I was requested by the Director of Central Intelligence to take custody of an Iraqi national who was believed to be a high-ranking member of *Ansar al-Islam*. And we did so. We were asked to not immediately register the individual. And we did that. It would – it was – he was brought to the attention of the Department, the senior level of the Department I think late last month. And we're in the process of registering him with the ICRC at the present time... What I can say is that I think it's broadly understood that people do not have to be registered in 15 minutes when they come in. What the appropriate period of time is I don't know. It may very well be a lot less than seven months, but it may be a month or more." Defense Department regular briefing, US Department of Defense transcript, 17 June 2004, <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=3347>

<sup>89</sup> *Ibid.*

<sup>90</sup> *ACLU et al v. Department of Defense et al*. In the US District Court for the Southern District of New York, Fourth Declaration of Marilyn Dorn, Information Review Officer, Central Intelligence Agency, 30 March 2005.

<sup>91</sup> See, for instance, Army says CIA hid more Iraqis than it claimed. New York Times, 10 September 2004.

<sup>92</sup> Report of the International Committee of the Red Cross (ICRC) on the treatment by the Coalition Forces of prisoners of war and other protected persons by the Geneva Conventions in Iraq and during arrest, internment and interrogation, February 2004.

<sup>93</sup> Decision Points, *op. cit.*, pages 136-137.

<sup>94</sup> Decision Points, *op. cit.*, page 154.

<sup>95</sup> Memorandum opinion for Timothy Flanigan, The Deputy Counsel to the President: The President's constitutional authority to conduct military operations against terrorists and nations supporting them, From John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 25 September 2001.

<sup>96</sup> Memorandum for Alberto R. Gonzales, Counsel to the President, Re: Standards of conduct for interrogation under 18 U.S.C §§ 2340-2340A, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 1 August 2002, *op. cit.*

<sup>97</sup> US Department of Defense Website, <http://www.defense.gov/home/top-leaders/>

<sup>98</sup> Decision Points, *op. cit.*, pages 84, 92.

<sup>99</sup> Military Order: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 13 November 2001.

<sup>100</sup> Memorandum for the President: Decision re application of the Geneva Convention on prisoners of war to the conflict with Al Qaeda and the Taliban, From Alberto R. Gonzales, 25 January 2002.

<sup>101</sup> Letter from John Ashcroft, Attorney General, to President George W. Bush, 1 February 2002.

<sup>102</sup> Memorandum for the Vice President et al: Humane treatment of al Qaeda and Taliban detainees, from

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President George W. Bush, 7 February 2002.

<sup>103</sup> The President's power as Commander in Chief to transfer captured terrorists to the control and custody of foreign nations. Memorandum for William J. Haynes, II, General Counsel, Department of Defense, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 13 March 2002.

<sup>104</sup> Re: Military interrogations of alien unlawful enemy combatants held outside the United States. Memorandum for William J. Haynes II, General Counsel of the Department of Defense, from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 14 March 2003.

<sup>105</sup> *Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 26 June 2006.

<sup>106</sup> Humane treatment of al Qaeda and Taliban detainees, *op. cit.*

<sup>107</sup> Senate Armed Services Committee report, *op. cit.*, page xiii.

<sup>108</sup> *Ibid.*, page 3

<sup>109</sup> *Ibid.*, page xii.

<sup>110</sup> For example, USA: Human Dignity Denied: Torture and accountability in the 'war on terror', Amnesty International, October 2004, p 160. "Bring to trial all individuals – whether they be members of the administration, the armed forces, intelligence services and other government agencies, medical personnel, private contractors or interpreters – against whom there is evidence of having authorized, condoned or committed torture or other cruel, inhuman or degrading treatment; Any person alleged to have perpetrated an act of 'disappearance' should, when the facts disclosed by an official investigation so warrant, be brought before the competent civil authorities for prosecution and trial, in accordance with Article 14 of the UN Declaration on the Protection of All Persons from Enforced Disappearance"

<sup>111</sup> Bin Laden's death and the debate over torture. By John McCain, Washington Post, 11 May 2011.

<sup>112</sup> Generally, Amnesty International, USA: See no evil, *op. cit.*, (including information on the *Mohamed v. Jeppesen* lawsuit, and the cases of Khaled el-Masri and Canadian national Maher Arar)

<sup>113</sup> Attorney General Eric Holder regarding a preliminary review into the interrogation of certain detainees, US Department of Justice News Release, 24 August 2009.

<sup>114</sup> Statement of the Attorney General Regarding Investigation into the Interrogation of Certain Detainees, US Department of Justice 30 June 2011, <http://www.justice.gov/opa/pr/2011/June/11-ag-861.html>

<sup>115</sup> Message from the Director: DoJ Investigations Moving Toward Closure. Statement to Employees by Director of the Central Intelligence Agency Leon E. Panetta on DoJ Investigations Moving Toward Closure, 30 June 2011, <https://www.cia.gov/news-information/press-releases-statements/directors-statement-interrogation-policy-contracts.html>

<sup>116</sup> Department of Justice statement on the investigation into the destruction of videotapes by CIA personnel. US Department of Justice News Release, 9 November 2010.

<sup>117</sup> Office of Professional Responsibility report, *op. cit.*, page 83

<sup>118</sup> For example, James Schlesinger, the chairperson of the investigative panel promoted by the Bush administration as the most independent of all the reviews described Secretary Rumsfeld's conduct with regard to the issue of interrogation policy as "exemplary", despite his having signed the "counter-resistance techniques" memorandum on 2 December 2002. The other members of the Independent Panel to Review Department of Defense Detention Operations (Schlesinger Panel) agreed with such a view. One of them confirmed before the investigation began that Secretary Rumsfeld was not to be the focus of their investigation. See, US Department of Defense news transcript, Press conference with members of the Independent Panel to Review Department of Defense Detention Operations, 24 August

2004.

<sup>119</sup> Response of the United States of America to Recommendations of the United Nations Human Rights Council, Harold Hongju Koh, Legal Advisor U.S. Department of State, Geneva, Switzerland, 9 November 2010, <http://www.state.gov/s//releases/remarks/150677.htm>

<sup>120</sup> Preface to Broken Laws, Broken Lives: Medical Evidence of Torture by US personnel and its impact, Physicians for Human Rights, June 2008.

<sup>121</sup> UNCAT, 1465 UNTS 85

<sup>122</sup> Article 1 also: notes that “torture” does not include pain or suffering “arising only from, inherent in or incidental to lawful sanctions” – that is, inherent in a lawful deprivation of liberty that itself is consistent with international human rights standards (such as the UN Standard Minimum Rules on the Treatment of Prisoners); expressly provides that the UNCAT definition is “without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.”

<sup>123</sup> See Geneva Convention IV, article 146. The same text appears in each of the other three conventions.

<sup>124</sup> See Geneva Convention IV, article 148. The same text appears in each of the other three conventions.

<sup>125</sup> See ICRC Study of Customary IHL, Rule 153.

<sup>126</sup> No claim to functional or personal immunity as provided for by international law precludes a state from exercising its criminal jurisdiction over a former official of another state, including a former head of state, in respect of (among others) the crime of torture (*a fortiori* where the states in question are parties to the UN Convention against Torture) or war crimes (whether as grave breaches under the Geneva Conventions or as a matter of customary international law). At its 2001 session held in Vancouver, Canada, the Institute of International Law adopted a resolution on “Immunities from Jurisdiction and Execution of Heads of State and of Government in International Law” [http://www.idi-ijl.org/idiE/resolutionsE/2001\\_van\\_02\\_en.PDF](http://www.idi-ijl.org/idiE/resolutionsE/2001_van_02_en.PDF), article 13(1) of which states “A former Head of State enjoys no inviolability in the territory of a foreign State” and article 13(2) of which states: “Nor does he or she enjoy immunity from jurisdiction, in criminal, civil or administrative proceedings, except in respect of acts which are performed in the exercise of official functions and relate to the exercise thereof. Nevertheless, he or she may be prosecuted and tried when the acts alleged constitute a crime under international law, or when they are performed exclusively to satisfy a personal interest, or when they constitute a misappropriation of the State’s assets and resources.” The very character of such crimes as torture, the express text as well as the purpose and object of the treaties requiring and agreeing to the exercise of national jurisdiction over such acts when committed by agents of other states, and the statutes of international criminal tribunals establishing jurisdiction over the acts, are fundamentally incompatible with any claim that the general provision for functional immunity under international law at the same time protects public officials from all of these specific provisions on torture, war crimes, and other crimes under international law. See among others, UK House of Lords, *R v Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No 3)*, [1999] 2 All ER 97 <http://www.publications.parliament.uk/pa/ld199899/ldjudgmt/jd990324/pino1.htm>; International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Furundžija*, Case No. IT-95-17/1, Trial Judgement (10 December 1998) <http://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf> para 140: “Both customary rules and treaty provisions applicable in times of armed conflict prohibit any act of torture. Those who engage in torture are personally accountable at the criminal level for such acts. ... Individuals are personally responsible, whatever their official position, even if they are heads of State or government ministers: Article 7(2) of the Statute and Article 6(2) of the Statute of the International Criminal Tribunal for Rwanda . . . are indisputably declaratory of customary international law”; and *Prosecutor v Blaškić*, Case No. IT-95-14, Appeals Chamber Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997 (29 October 1997) <http://www.icty.org/x/cases/blaskic/acdec/en/71029JT3.html>, stating at para 41 that under “the norms of

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international criminal law prohibiting war crimes, crimes against humanity and genocide... those responsible for such crimes cannot invoke immunity from national or international jurisdiction even if they perpetrated such crimes while acting in their official capacity"; *Eichmann v. Attorney General, Supreme Court of Israel*, Appeals Judgment, 29 May 1962 [http://www.haguejusticeportal.net/Docs/NLP/Israel/Eichmann\\_Appeals\\_Judgement\\_29-5-1962.pdf](http://www.haguejusticeportal.net/Docs/NLP/Israel/Eichmann_Appeals_Judgement_29-5-1962.pdf). Nor does personal immunity, whatever ones' views on whether it protects heads of state and diplomatic officials *while they are in office* from the jurisdiction of other states in relation to crimes under international law (Amnesty International takes the position it does not), continue to apply *once they have left office*. See, among others, UK House of Lords, *R v Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No 3)*, [1999] 2 All ER 97 <http://www.publications.parliament.uk/pa/ld199899/ldjudgmt/jd990324/pino1.htm>; Institut de Droit International, Resolution adopted September 2009, on Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in case of International Crimes, article III.2: "When the position or mission of any person enjoying personal immunity has come to an end, such personal immunity ceases." [http://www.idi-iil.org/idiE/resolutionsE/2009\\_naples\\_01\\_en.pdf](http://www.idi-iil.org/idiE/resolutionsE/2009_naples_01_en.pdf). For further discussion of both forms of immunity, see Antonio Cassese, "When May Senior State Officials Be Tried for International Crimes? Some Comments on the *Congo v Belgium* case" (2002) 13 *European Journal of International Law* 853 <http://www.ejil.org/pdfs/13/4/1564.pdf> at 862-874. (In this regard, it should be noted that the 14 February 2002 judgment of the International Court of Justice in *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* involved only the personal immunity of an *incumbent* foreign minister and is not directly relevant to the case at hand).

<sup>127</sup> Canada's Crimes Against Humanity and War Crimes Act, Department of Foreign Affairs and International Trade, Canada, 3 June 2011. <http://www.international.gc.ca/court-cour/war-crimes-guerres.aspx>.

<sup>128</sup> ICTY, *Prosecutor v Furundžija* (IT-95-17/1) "Lašva Valley": Decision on the Defendant's Motion to Dismiss Counts 13 and 14 of the Indictment (Lack of Subject Matter Jurisdiction), 29 May 1998, paras 7-18; Trial Judgment, 10 December 1998, paras 131-164, 258-275; Appeal Judgment, 21 July 2000.

<sup>129</sup> *Immigration and Refugee Protection Act* (S.C. 2001, c. 27), Canada, Available: <http://laws-lois.justice.gc.ca/eng/acts/I-2.5/FullText.html> at s.35(1)(a).



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