

**PRELIMINARY “INDICTMENT FOR TORTURE”: GEORGE W. BUSH
BROUGHT PURSUANT TO THE CONVENTION AGAINST TORTURE***

** The present document is a modified version of an individual criminal complaint prepared for submission against George W. BUSH in anticipation of his visit to Geneva, Switzerland on 12 February 2011. The individual criminal complaint brought on behalf of an individual plaintiff was not filed, as planned, on 7 February 2011 because of the announcement, on the eve of the filing, that BUSH cancelled his trip. Factual details regarding that visit, as a basis for establishing BUSH’s presence in Switzerland and the inclusion of analysis of Swiss law is reflective of the origins of this document. This document is not intended to serve as a comprehensive presentation of all evidence against BUSH for torture; rather, it presents the fundamental aspects of the case against him, and a preliminary legal analysis of liability for torture, and a response to certain anticipated defenses. This document will be updated and modified as developments warrant.*

I. FACTUAL BACKGROUND

A. George W. BUSH

1. George W. BUSH was born on 6 July 1946, in New Haven, Connecticut, United States. From 20 January 2001- 20 January 2009, BUSH served as president of the United States of America and Commander in Chief of the United States Armed Forces. Pursuant to Article II of the United States Constitution, executive power was vested in BUSH, as president of the United States. Upon assuming office, BUSH took an oath to “preserve, protect and defend” the Constitution of the United States.

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

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

4. It has been publicly and widely reported that BUSH will be present in Geneva to take part as the guest of honor in a charity evening organized by the Keren Hayessod foundation, set to take place at the Hôtel President Wilson. His presence is announced for Saturday, 12 February 2011.²

B. Overview of Detention Policies and Torture Program

5. On 14 September 2001, BUSH issued the “Declaration of National Emergency by reason of Certain Terrorist Attacks,”³ following the September 11th terrorist attacks.

6. On 17 September 2001,⁴ BUSH issued a 12-page directive (known as a “memorandum of notification”) that went to the Director of the CIA and members of the National Security Council, in which BUSH authorized the CIA to capture suspected terrorists and members of Al-Qaeda, and to create detention facilities outside the United States where suspects can be held and interrogated.⁵ BUSH’s directive marked the official launching of the CIA program by vesting the

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

² Tribune de Genève (Alain Jourdan), George W. Bush à Genève pour un gala de charité, 8 January 2011 (Exhibit 1); see also World Organisation Against Torture (OMCT), Switzerland, *Letter to the Swiss Confederation regarding the visit of Mr. Bush*, 1 February 2011 (Exhibit 2).

³ Available at <http://www.federalregister.gov/articles/2001/09/18/01-23358/declaration-of-national-emergency-by-reason-of-certain-terrorist-attacks>

⁴ The following day, the Authorization for the Use of Military Force (“AUMF”) (Pub. L. 107-40, 115 Stat. 224 (2001)), was enacted upon BUSH’s signature to a joint resolution passed by the U.S. Congress on 14 September 2001, authorizing the use of force by the U.S. Armed Forces against those responsible for the September 11th attacks. The AUMF granted BUSH the authority to use all “necessary and appropriate force” against those whom he determined “planned, authorized, committed or aided” the September 11th attacks, or who harbored said persons or groups.

⁵ The directive has yet to be publically released. It has been discussed in numerous news stories (see, e.g., *Timeline: History of Harsh Interrogation Techniques*, available at <http://www.npr.org/templates/story/story.php?storyId=103376537>; G. Kessler, *U.S. Decision on Iraq Has Puzzling Past*, Washington Post, 12 Jan. 2003, available at <http://www.washingtonpost.com/ac2/wp-dyn/A43909-2003Jan11>). See also George Tenet, *AT THE CENTER OF THE STORM: THE CIA DURING AMERICA’S TIME OF CRISIS* 208 (Harper 2007) (written by former CIA director): “The president approved our recommendations on Monday, September 17, and provided us broad authorities to engage al-Qa’ida. As Cofer Black [chief of the CIA Counterterrorist Center] later told Congress, ‘the gloves came off’ that day.” (EXHIBIT 3) It has also been the subject of on-going litigation under the Freedom of Information Act. See Eighth Declaration of Marilyn A. Dorn

agency with unprecedented power. The document was “a means of granting the CIA important new competences relating to its covert actions: new choices it could make and new ways it could respond if confronted with Al-Qaeda targets in the field.”⁶

7. According to Swiss Senator Dick Marty’s 2007 Report to the Council of Europe, BUSH had been personally involved in the conception, discussion, and formulation of this new strategy. The 17 September 2001 directive, referred to by Marty as a “Presidential Finding,” is said to have “create[d] paramilitary teams to hunt, capture, detain, or kill designated terrorists almost anywhere in the world.”⁷ Marty’s Report shed further light on what the directive was intended to achieve:

Our team has spoken with several American officials who have seen the text of the Presidential Finding and participated in the operations that put it into action. Two particularly striking observations have emerged from these discussions. First, by putting “a lot of stock in *Special Activities*” the Finding “redefined the role of the Agency”, even in the eyes of some of its own, more conservative senior officials. Second, the “really broad, not specific” scope of the covert actions authorised in the Finding meant that the CIA was instantly granted enough room for manoeuvre to design a secret detentions programme overseas.⁸

Information Review Officer Central Intelligence Agency, *ACLU, et al. v. Department of Defense, et al.*, No. 04 Civ. 4151 (S.D.N.Y. Jan. 5, 2007), at 33-38, available at http://www.aclu.org/files/pdfs/natsec/20070105_Dorn_Declaration_8.pdf (“Dom Declaration”) (EXHIBIT 4).

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

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

⁷ Jane Mayer, *The Black Sites*, *The New Yorker*, 13 Aug. 2007, at 5, available at http://www.newyorker.com/reporting/2007/08/13/070813fa_fact_mayer?currentPage=all

⁸ Marty Report, *supra* n. 6, at 14, para 59. Marty added “My conclusion that President Bush put the CIA at the forefront of his “war machinery” is corroborated by numerous CIA insiders,” at 16, fn. 29.

The work of the “Temporary Committee on the alleged use of European countries by the CIA for the transport and illegal detention of prisoners” (TDIP) led to the adoption by the European Parliament in 2006 of a resolution on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners (2006/2200(INI)). See European Parliament resolution on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners (2006/2200(INI)), available at http://www.europarl.europa.eu/comparl/tempcom/tdip/final_ep_resolution_en.pdf (“EP Resolution”) (EXHIBIT 7).

8. The International Committee of the Red Cross (“ICRC”) was refused access to detainees held in the CIA program.⁹ As revealed through a 2007 ICRC report, the ICRC made repeated requests to the United States to grant it access to the detainees generally, including specific detainees whom the ICRC believed to be, and were in fact, held by the CIA in secret detention sites outside of the United States.¹⁰

9. On 7 October 2001, BUSH announced that, on his orders, “the United States military has begun strikes against al Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan.”¹¹

10. On 13 November 2001, BUSH authorized the detention of alleged terrorists and subsequent trial by military commissions, which he ordered would not be subject to the principles of law and rules of evidence applicable to trials held in U.S. federal courts.¹² In this order, BUSH vested himself with the power to detain and try by military commission a broad category of persons believed to be, or have been, linked to the acts of international terrorism.¹³ In this order, BUSH further vested his Secretary of Defense, Donald Rumsfeld, with certain powers related to the detention of such persons and the establishment of military commissions. BUSH emphasized that tasking his subordinate, Rumsfeld, with these responsibilities related to detention policies “shall not be construed to limit the authority of the President as Commander in Chief of the Armed Forces [...]”¹⁴ Finally, through this order, BUSH purported to strip

The EP Resolution states *inter alia* “imposing or executing or allowing directly or indirectly secret and illegal detentions, which are instruments resulting in people’s ‘disappearance’, constitute serious violations of human rights per se.”

⁹ Indeed, the ICRC was not informed of the CIA detention program.

¹⁰ ICRC, Report to John Rizzo, Acting General Counsel, CIA, *ICRC Report on the Treatment of Fourteen “High Value Detainees” in CIA Custody*, 14 February 2007 (detailing ICRC findings following interviews with 14 “high value detainees” transferred to Guantánamo in September 2006), available at <http://www.nybooks.com/media/doc/2010/04/22/icrc-report.pdf> (“ICRC CIA Detainee Report”) (EXHIBIT 8).

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

¹² *Military Order of November 13, 2001: Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism*, Federal Register Vol. 66, No. 2, 16 November 2001, pp. 57831-36, available at <http://www.fas.org/irp/offdocs/eo/mo-111301.htm> (EXHIBIT 9).

¹³ Section II(a)(1) includes persons who are, or have been members of al Qaeda; engaged in, aided or abetted, or conspired to commit, acts of terrorism, or preparatory acts that have caused, threaten to cause, or have as their aim to cause, injury or adverse effects on the U.S. and its citizens or policies; and has knowingly harbored someone in the first two categories.

¹⁴ *Id.* at Sec. VII(a)(2).

detainees of the power to seek a remedy not only in U.S. federal courts but also in “any court of any foreign nation, or any international tribunal.”¹⁵

11. By late 2001, BUSH was planning for the detention of individuals at the U.S. Naval Station at Guantánamo Bay, Cuba (Guantánamo) as evidenced by memoranda addressing the question of whether the U.S. federal courts would have jurisdiction of individuals detained in Guantánamo¹⁶ – a prospect which BUSH sought to foreclose through his 13 November 2001 Order.

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

13. On 18 January 2002, BUSH decided that the Third Geneva Convention did not apply to the conflict with al Qaeda or members of the Taliban, and that they would not receive the protections afforded to prisoners of war. This decision was taken upon consideration of advice from John Yoo and Robert Delahunty, both of the Department of Justice (“DOJ”) Office of Legal Counsel (“OLC”),¹⁷ and the additional oral advice of his Chief White House Counsel, Alberto Gonzales.¹⁸

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

¹⁵ *Id.* at Sec. VII(b)(2).

¹⁶ See Patrick Philbin and John Yoo, Memorandum for William J. Haynes II, General Counsel, Department of Defense, *Possible Habeas Jurisdiction over Aliens Held in Guantanamo Bay, Cuba* (28 Dec. 2001), available at <http://www.torturingdemocracy.org/documents/20011228.pdf> (EXHIBIT 10).

¹⁷ John Yoo and Robert J. Delahunty, Memorandum for William J. Haynes II, General Counsel, Department of Defense, *Application of Treaties and Laws to al Qaeda and Taliban Detainees* (9 Jan. 2002), at 1,11, available at http://upload.wikimedia.org/wikipedia/en/9/91/20020109_Yoo_Delahunty_Geneva_Convention_memo.pdf (EXHIBIT 11). A follow-up memorandum was completed, upon request, for BUSH’s Counsel, Alberto Gonzales, and William Haynes was completed on 22 January 2002 by Jay Bybee of the DOJ’s OLC, which came to the same conclusion: international treaties including the Geneva Conventions do not apply to the Taliban or Al Qaeda.

¹⁸ See Senate Armed Services Committee, *Inquiry into the Treatment of Detainees in U.S. Custody*, 20 November 2008, at 1 (“Senate Armed Services Report” or “SASC Report”) (EXHIBIT 12). The full text report, with redacted information, was released in April 2009 and is available at: http://armed-services.senate.gov/Publications/Detainee%20Report%20Final_April%202009.pdf. See also Alberto R. Gonzales, Memorandum for the President, *Decision re Application of the Geneva Convention of Prisoners of War to the Conflict with Al Qaeda and the Taliban* (25 January 2002) (“25 January Gonzales Memo to Bush”), available at http://www.washingtonpost.com/wp-srv/politics/documents/chenev/gonzales_addington_memo_jan252001.pdf (EXHIBIT 13). In this memo, Gonzales asserted that the “new paradigm” of the “war on terror” makes certain provisions of the Geneva Conventions “quaint” and indeed “renders *obsolete* Geneva’s strict limitations on questioning of enemy prisoners. Gonzales noted that the positive “consequences” of such a determination included: eliminating the need to determine the prisoner of war status of detainees on a case-by-case basis; leaving open “options for the future”; and reducing the threat of prosecution under the US War Crimes Act.

necessity.”¹⁹ The combatant commanders were ordered to transmit the content of this memo to the subordinate commanders, including commander of Joint Task Force (JTF) 160 responsible for Guantánamo.²⁰

15. On 25 January 2002, the ICRC made its first visit to the detention facility in Guantánamo Bay, Cuba.²¹

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

17. On 7 February 2002, pursuant to his “authority as Commander-in-Chief and Chief Executive of the United States,” BUSH issued a memorandum stating that the Geneva Conventions do not apply to the conflict with al Qaeda, and that Common Article 3 of the Geneva Conventions did not apply to either al Qaeda or Taliban detainees.²² BUSH called only for detainees to be treated humanely and “to the extent appropriate and consistent with military necessity, in a manner consistent with principles of Geneva,” as a matter of policy – not law.²³ In so doing, BUSH rejected Secretary of State Colin Powell’s calls to reconsider and reverse his 18 January 2002 determination regarding the application of the Geneva Conventions,²⁴ and disregarded the advice of the Legal Advisor to the State Department that the non-application of the Geneva Conventions to the conflict in Afghanistan was inconsistent with plain language of the Geneva Conventions and unvaried practice of the United States in the fifty years since becoming a party to the Conventions.²⁵

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

²⁰ Philippe Sands, *TORTURE TEAM: RUMSFELD’S MEMO AND THE BETRAYAL OF AMERICAN VALUES* 31-32 (Palgrave Macmillan 2008).

²¹ See *US detention related to the events of 11 September 2001 and its aftermath – the role of the ICRC*, 30 July 2008 (ICRC Operational Updated), available at <http://www.icrc.org/eng/resources/documents/update/usa-detention-update-121205.htm> (EXHIBIT 15).

²² The recipients of the memorandum were: the Vice President, Secretary of State, Secretary of Defense, Attorney General, his Chief of Staff, Director of Central Intelligence, Assistant to the President for National Security Affairs, and the Chairman of the Joint Chiefs of Staff. See George Bush, The White House, Memorandum for the Vice President, et al., *Humane Treatment of Taliban and al-Qaeda Detainees* (7 February 2002), available at http://www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf (EXHIBIT 16).

²³ *Id.*

²⁴ See 25 January Gonzales Memo to Bush, *supra* n. 18.

²⁵ William H. Taft, IV, Legal Adviser, Department of State, Memorandum to Counsel to the President, Alberto Gonzales, *Comments on Your Paper on the Geneva Convention* (2 February 2002), available at <http://www.texscience.org/reform/torture/taft-2feb02.pdf> (EXHIBIT 17).

18. In March 2002, the first “high value detainee” Abu Zubaydah, was detained and interrogated by the CIA.²⁶ His detention “accelerated” the development of the CIA interrogation program.²⁷ In his memoir *DECISION POINTS*, BUSH explained that the decision was taken to transfer Abu Zubaydah to CIA custody and to “move him to a secure location in another country where the Agency would have total control over his environment.”²⁸

19. Through, among other means, discussions among members of the NSC, which BUSH chaired, BUSH was fully briefed on, and approved as a matter of policy, the indefinite detention of individuals held by the U.S. government, and specifically, the CIA.²⁹

20. The CIA interrogation program sanctioned by BUSH included interrogation techniques that were directly inspired by the “Survival Evasion Resistance Escape (SERE)” training program, in which U.S. military members were exposed to, and taught how to resist, interrogation techniques used by enemy forces that did not adhere to the Geneva Conventions.³⁰ As detailed in the CIA IG Report, the U.S. employed these techniques, which included waterboarding; confining detainees in a dark box for up to 18 hours at a time and possibly with an insect placed in the confinement box; up to 11 days of sleep deprivation; facial hold or facial slap; “walling,” which consists of pulls a detainee forward and then pushing him back quickly against “a flexible false wall so that his shoulder blades hit the wall;” and use of stress positions, on CIA detainees.³¹

21. As described by the ICRC, the CIA detention program “included transfers of detainees to multiple locations, maintenance of the detainees in continuous solitary confinement and incommunicado detention throughout the entire period of their undisclosed detention, and the

²⁶ CIA IG Report, *supra* n. 5, at 2-3. A memo authored by then-OLC Assistant Attorney General Jay Bybee attempted to give the CIA its first written legal approval for ten interrogation tactics, including waterboarding. Memorandum for John Rizzo, Acting General Counsel of the Central Intelligence Agency, *Interrogation of al Qaeda Operative* (1 August 2002), at 2, 13-14, and 15, available at <http://www.justice.gov/olc/docs/memo-bybee2002.pdf> (EXHIBIT 18). The 1 August 2002 memorandum described in great detail how the techniques should be used, including placing Abu Zubaydah “in a cramped confinement box with an insect” as “he appears to have a fear of insects” as well as the use of water-boarding, which Bybee concluded did not constitute torture. *Id.* at 2, 13-14, and 15.

²⁷ CIA IG Report, *supra* n. 5, at 12.

²⁸ George W. Bush, *DECISION POINTS* 169 (Crown Publishing Group: 2010) (EXHIBIT 19).

²⁹ CIA IG Report, *supra* n. 5, at 7-8. Notably, the CIA Inspector General found the continued detention without charge to present “serious long-term political and legal challenges.” (emphasis added).

³⁰ As noted in the CIA IG’s Report, *supra* n. 5, at 21-22, fn. 26, the use of the techniques in SERE training, and specifically waterboarding, was “so different from the subsequent Agency [CIA] usage as to make it irrelevant...there was no *a priori* reason to believe that applying the waterboard with the frequency and intensity with which it was used by the psychologist/interrogators was either efficacious or medically safe.” See also *id.* at 37.

³¹ A list of techniques is found in the CIA IG Report, *id.* at 15.

infliction of further ill-treatment through the use of various methods either individually or in combination, in addition to the deprivation of other basic material requirements.”³² The UN Joint Study on secret detentions noted that detainees had been held in Afghanistan, Thailand, Poland and Romania, among other locations.³³ The ICRC described the fourteen individuals previously held as part of the CIA detention program, whom BUSH transfer to detention at Guantánamo BUSH announced in September 2006, as “missing persons.”³⁴

22. The ICRC Detainee CIA Report further explained that the program “was clearly designed to undermine human dignity and to create a sense of futility by inducing, in many cases, severe physical and mental pain and suffering, with the aim of obtaining compliance and extracting information, resulting in exhaustion, depersonalisation and dehumanisation.”³⁵

23. The interrogation methods used on detainees were euphemistically qualified by the U.S. government as “enhanced,” but the United Nations and the ICRC found that they rose to the level of torture and cruel, inhuman or degrading treatment.³⁶ The ICRC unequivocally concluded that, upon the information gathered from interviews with the former CIA detainees, conducted after their transfer to Guantánamo:

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

³² ICRC CIA Detainee Report, *supra* n. 10, at 4. The ICRC further found: “The ability of the detaining authority to transfer persons over apparently significant distances to secret locations in foreign countries acutely increased the detainees’ feeling of futility and helplessness, making them more vulnerable to the methods of ill-treatment...these transfers increased the vulnerability of the fourteen to their interrogation, and was performed in a manner (goggles, earmuffs, use of diapers, strapped to stretchers, sometimes rough handling) that was intrusive and humiliating and that challenged the dignity of the persons concerned.” *Id.* at 7. It is notable that the ICRC CIA Detainee Report, based solely on interviews with the detainees and prepared without the benefit of the CIA IG Report or any of the legal memoranda prepared by various U.S. government officials, details the same interrogation techniques as those outlined in the CIA IG Report. The ICRC CIA Detainee Report, at 8-9, details the use of waterboarding, prolonged stress positions, beatings, confinement in a box, prolonged nudity, sleep deprivation, exposure to cold temperature, prolonged shackling, forced shaving, and manipulation of diet.

³³ United Nations Human Rights Council, *Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Working Group on Arbitrary Detention, and the Working Group on Enforced or Involuntary Disappearances*, A/HRC/13/42, 19 February 2010, at 45-50, available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A-HRC-13-42.pdf> (“UN Joint Study”) (EXHIBIT 20).

³⁴ ICRC CIA Detainee Report, *supra* n. 10, at 8.

³⁵ *Id.* 26.

³⁶ *See, e.g., id.* at 5; UN Joint Study, *supra* n. 33.

the ill treatment, either singly or in combination, constituted cruel inhuman or degrading treatment.³⁷

24. The ICRC concluded that the CIA program's interrogation techniques consisted of: suffocation by water – or waterboarding; prolonged stress standing position while arms are shackled above the head; beatings by use of a collar held around the detainees neck and used to forcefully bang the head and body against the wall; beating and kicking; confinement in a box; forced nudity for periods ranging from several weeks to several months; sleep deprivation through use of forced stress positions (standing or sitting), cold water and use of repetitive loud noise or music; exposure to cold temperature; prolonged shackling; threats of ill-treatment to the detainee and/or his family, forced shaving; and deprivation or restricted provision of solid food.³⁸

25. The UN Joint Study found that the CIA had taken 94 detainees into custody and had employed “enhanced interrogation techniques to varying degrees in the interrogation of 28 of those detainees.”³⁹

26. The CIA interrogations of Abu Zubaydah were videotaped and those videotapes were sent to CIA headquarters.⁴⁰ It total there were 92 videotapes, 12 of which included application of so-called “enhanced interrogation techniques.”⁴¹ The videotapes included evidence of torture, including the waterboarding of Abu Zubaydah 83 times.⁴² Those videotapes were destroyed by the CIA in November 2005.⁴³ Abu Zubaydah described to the ICRC his waterboarding;

I was put on what looked like a hospital bed, and strapped down very tightly with belts. A black cloth was then placed over my face and the interrogators used a mineral water bottle to pour water on the cloth so that I could not breathe. After a few minutes the cloth was removed and the bed was rotated into an upright position. The pressure of the straps on my wounds caused severe pain. I vomited. The bed was then again lowered to a horizontal position and the same torture

³⁷ ICRC CIA Detainee Report, *supra* n. 10, at 26.

³⁸ *See id.* at 8-9.

³⁹ UN Joint Study, *supra* n. 10, at para. 103.

⁴⁰ CIA IG Report, *supra* n. 5, at 36.

⁴¹ *Id.* at 36, para. 77.

⁴² *Id.* at para. 78.

⁴³ *See* Statement by Attorney General Michael B. Mukasey Regarding the Opening of an Investigation Into the Destruction of Videotapes by CIA Personnel, 2 January 2008, *available at* http://www.justice.gov/opa/pr/2008/January/08_001.html (EXHIBIT 21). No one has been prosecuted for the destruction of those tapes, and the evidence of torture contained therein. Department of Justice Statement on the Investigation into the Destruction of Videotapes by CIA Personnel, 9 November 2010, *available at* <http://www.justice.gov/opa/pr/2010/November/10-ag-1267.html> (EXHIBIT 22).

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.⁴⁴

27. In November 2002, another CIA detainee held in a secret site, Al-Nashiri, was arrested. He was waterboarded twice in November 2002.⁴⁵ Although the CIA IG Report is heavily redacted when discussing the interrogation of Al-Nashiri, it confirms that CIA HQ authorized the use of “enhanced interrogation techniques” against him.⁴⁶ As discussed below, BUSH authorized and condoned the waterboarding of Al-Nashiri.⁴⁷

28. A third CIA “high value detainee,” Khalid Sheik Mohammed, was subjected to waterboarding 183 times.⁴⁸ In his recent memoir, BUSH specifically acknowledged that, upon request by CIA Director George Tenet, he authorized the use of “enhanced interrogation techniques” on Khalid Sheik Mohammed, including waterboarding.⁴⁹ In discussing “haul[ing]

⁴⁴ ICRC CIA Detainee Report, *supra* n. 10, at 10. The interrogation of Abu Zubaydah was discussed in a memorandum written in May 2005, signed by then-Acting Assistant Attorney General Steven Bradbury. This was one of three memos written by Bradbury that sought to assure the CIA that its interrogation methods it had been using since 2002 were legal, even when used in combination, and despite the prohibition against torture and cruel, inhuman, or degrading treatment. One 40-page memo cites the CIA’s Inspector General Report, indicating that waterboarding had been used “at least 83 times during August 2002” (CIA IG Report, *supra* n. 5, at 90) in the interrogation of Abu Zubaydah, “and 183 times during March 2003 in the interrogation of [Khalid Sheikh Mohammed],” but still comes to the conclusion that these acts did not violate the prohibition against torture. Memorandum for John A. Rizzo Senior Deputy General Counsel, Central Intelligence Agency, *Re: Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques that May Be Used in the interrogation of High Value al Qaeda Detainees*, 30 May 2005, at 37, available at http://luxmedia.com.edgesuite.net/aclu/olc_05302005_bradbury.pdf (EXHIBIT 23) . See CIA IG Report, *supra* n. 5, at 91.

⁴⁵ CIA IG Report, *supra* n. 5, at 4 and 90. See also ICRC CIA Detainee Report, *supra* n. 10 at 10-11.

⁴⁶ CIA IG Report, *supra* n. 5, at 35, para. 76. In addition to being subjected to waterboarding and other “enhanced interrogation techniques,” Al-Nashiri was also threatened with a semi-automatic handgun, which, although unloaded, was held close to his head while he was shackled. A power drill was also used to threaten Al-Nashiri: it was revved while Al-Nashiri stood naked and hooded. *Id.* at 42. The Department of Justice declined to prosecute the perpetrators of these acts, although the incident was reported to it. *Id.* Interrogators also threatened family members of Al-Nashiri, including his mother, *id.*, subjected him to stress positions and standing on his shackles. *Id.* at 44.

⁴⁷ DECISION POINTS, *supra* n. 28, at 169-171.

⁴⁸ CIA IG Report, *supra* n. 5, at 44-45.

⁴⁹ See DECISION POINTS, *supra* n. 28, at 170.

According to the ICRC CIA Detainee Report, Khalid Sheik Mohammed was kept naked during waterboarding sessions, with female interrogators present. Khalid Sheik Mohammed also told the ICRC that he sustained injuries to his ankles and wrists as he struggled in the panic of not being able to breathe during the waterboarding sessions. See ICRC CIA Detainee Report, *supra* n. 10, at 11.

out their target,” following a raid on the apartment complex where Khalid Sheik Mohammed was, and the CIA interrogation that followed, BUSH writes in DECISION POINTS:

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

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

“Damn right,” I said.

Other so-called “enhanced interrogation techniques” used upon Khalid Sheik Mohammed were threats to kill his children⁵⁰ and the deprivation of sleep for 180 hours.⁵¹

29. In a speech given on 6 September 2006, BUSH “officially acknowledged the existence of a CIA terrorist detention and interrogation program.”⁵² Defendant BUSH stated that “our government has changed its policies,” and admitted to authorizing an “alternative set of procedures” on persons detained “secretly” and “outside the United States” in a program operated by the CIA, while refusing to specify what techniques were authorized.⁵³ BUSH also discussed another individual held in this program, Abu Zubaydah. As discussed above, Abu Zubaydah was subjected to acts of torture, including having been waterboarded at least 83 times. Notably, while BUSH stated that there were no detainees held in the CIA detention program as of 6 September 2006, he explicitly reserved the right to place, again, persons in CIA detention in secret sites beyond the reach of the law.

⁵⁰ CIA IG Report, *supra* n. 5, at 43.

⁵¹ *Id.* at 104.

⁵² Dom Declaration, *supra* n. 5, at 33.

⁵³ President Bush’s Speech in Terrorism: Transcript, New York Times, 6 Sep. 2006, *available at* http://www.nytimes.com/2006/09/06/washington/06bush_transcript.html?pagewanted=all (EXHIBIT 24). The announcement coincided with the transfer of 14 people from CIA custody to Guantánamo. *See also* CIA IG Report, *supra* n. 5, at 7, finding that the CIA detention program “diverges sharply from previous Agency policy and rules that govern interrogations by U.S. military and law enforcement officers.” *See also, id.* at 91: “The EITs [enhanced interrogation techniques] used by the Agency under the CTC Program are inconsistent with the public policy positions that the United States has taken regarding human rights.” *Id.* at 101-102.

30. In his 6 September 2006 speech, BUSH also expressed fear that members of the U.S. military involved in torture might be prosecuted for war crimes: “some believe our military and intelligence personnel involved in capturing and questioning terrorists could now be at risk of prosecution under the War Crimes Act -- simply for doing their jobs in a thorough and professional way.” He emphasized that he would not allow this to happen and asked Congress to prevent detainees from pursuing civil claims against U.S. military personnel for violations of the Geneva Conventions.⁵⁴ Through these measures, BUSH sought to provide complete immunity from justice for any member of the U.S. military who tortured a detainee.

31. Having met with the fourteen “high value detainees” held in the CIA program following their transfer from secret sites to Guantánamo in September 2006, the ICRC concluded that it “clearly considers that the allegations of the fourteen include descriptions of treatment and interrogation techniques – singly or in combination – that amounted to torture and/or cruel, inhuman or degrading treatment.”⁵⁵

32. On 11 June 2007, the Parliamentary Assembly of the Council of Europe, of which Switzerland is a member state, published an investigative report authored by Dick Marty on secret detentions and illegal transfers of “high value detainees” by the CIA involving Council of Europe member states.⁵⁶ The report confirmed the existence of secret CIA sites in Poland and Romania and found that the interrogation techniques used on detainees were “tantamount to torture.”⁵⁷ On 27 June 2007, the Parliamentary Assembly, adopted a resolution in which it unequivocally stated:

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

⁵⁴ Congress responded by passing the Military Commissions Act 2006, Public L. 109-366, 120 Stat. 2600 (EXHIBIT 25), available at http://www.loc.gov/rr/frd/Military_Law/pdf/PL-109-366.pdf.

⁵⁵ ICRC CIA Detainee Report, *supra* n. 10, at 5. *See also id.* at 26: “The allegations of ill-treatment of the detainees indicate that, in many cases, the ill-treatment to which they were subjected while held in the CIA program, either singly or in combination, constituted torture.”

⁵⁶ *See* Marty Report, *supra* n. 6.

⁵⁷ *See id.* at 8, para 9.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.⁵⁸

33. In March 2008, BUSH vetoed legislation that would have banned the CIA from using “enhanced interrogation techniques,” including waterboarding, saying it “would take away one of the most valuable tools on the war on terror.”⁵⁹

34. In addition to detainees in the CIA detention program, these SERE-inspired “interrogation techniques” were also used against Mohammed al Qahtani, a detainee at Guantánamo who was subjected to a prolonged, aggressive interrogation that violated international law, known as the “First Special Interrogation Plan.” This interrogation plan, which began on 23 November 2002 and ended 16 January 2003, included 48 days of severe sleep deprivation and 20-hour interrogations,⁶⁰ forced nudity, sexual humiliation,⁶¹ religious humiliation,⁶² dehumanizing treatment,⁶³ the use of physical force against him, prolonged stress positions, prolonged sensory overstimulation, and threats with military dogs.⁶⁴ These techniques

⁵⁸ See Resolution 1562 (2007), Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report, adopted on June 27, 2007, available at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta07/ERES1562.htm#1> (EXHIBIT 26).

⁵⁹ Dan Eggen, *Bush Announces Veto of Waterboarding Ban*, Washington Post, 8 March 2008, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/03/08/AR2008030800304.html>.

⁶⁰ See, e.g., SASC Report, *supra* n. 18, at 76 (“The interrogation would be conducted for ‘20-hour sessions’ and at the completion of each session, Kahtani would be permitted four hours of rest, and then ‘another 20 hour interrogation session [would] begin.”); Decl. of Gitanjali S. Gutierrez, Esq., Lawyer for Mohammed al Qahtani, Criminal Complaint Against Donald Rumsfeld, The Prosecutor General at the Federal Supreme Court, Federal Republic of Germany (filed Nov. 14, 2006) (“Gutierrez Declaration”), at 10-15, available at http://www.ccrjustice.org/files/Gutierrez%20Declaration%20re%20Al%20Qahtani%20Oct%202006_0.pdf (EXHIBIT 27).

⁶¹ Among the forms of sexual humiliation to which Mr. al Qahtani was subjected were use of female interrogators to who straddled, touched or otherwise molested him (known as “Invasion of Space by a female”); forced to wear a woman’s bra and had a thong placed on his head during the course of an interrogation; told that his mother and sisters were whores; and forced to wear, look at or study pornographic images. See Gutierrez Declaration, *supra* n. 60, at 15-20; SASC Report, *supra* n. 18, at 90.

⁶² Some instances of the acts of religious humiliation are detailed in a released interrogation log, available at <http://www.time.com/time/2006/log/log.pdf>. These acts include: constructing a shrine to Osama bin Laden and informing Mr. al Qahtani that he could only pray to bin Laden; “forced grooming,” including forcibly shaving Mr. al Qahtani’s beard; and interrupting, controlling or denying Mr. al Qahtani’s right to pray.

⁶³ The interrogation log record the following treatment on 20 December 2002: “an interrogator tied a leash to the subject of the first Special Interrogation’s chains, led him around the room, and forced him to perform a series of dog tricks.”

⁶⁴ For detail of the interrogation of Mr. al Qahtani, which included a simulated rendition, see SASC Report, *supra* n. 18, at 77-78, 88-91; Gutierrez Declaration; *Inside the Interrogation of Detainee 063*, Time Magazine, 12 June 2005, available at <http://www.time.com/time/magazine/article/0,9171,1071284,00.html> (EXHIBIT 28), and 83 pages of interrogation log at <http://www.time.com/time/2006/log/log.pdf> (EXHIBIT 29); *Army Regulation 15-6*:

were later widely acknowledged as torture. Indeed, the former convening officer of the military commissions at Guantánamo, Susan Crawford, declared that she could not bring charges against Mr. al Qahtani due to the torture inflicted on him: “we tortured al-Qahtani. ... His treatment met the legal definition of torture. And that's why I did not refer the case for prosecution.”⁶⁵

35. There have been a plethora of reports published that detail the draconian conditions, interrogation techniques and torture that took place at Guantánamo. Since as early as 2003, ICRC staff has expressed their deep concerns about the detention conditions in Guantánamo - indeed, published memoranda by U.S. officials from that period contain descriptions of meetings held between ICRC staff and Guantánamo commander Geoffrey Miller where concerns were raised.⁶⁶ In 2006, a group of five United Nations Special Rapporteurs published a joint Report on the situation of detainees at Guantánamo Bay. Crucially, this report came to the express conclusion that the interrogation techniques authorized and deployed by the Department of Defence, which operates under the command of BUSH, amounted to torture.⁶⁷ Additionally, the UN experts also concluded *inter alia* that the force-feeding of detainees on hunger strike amounted to acts of torture.⁶⁸ A 2006 report by the United Nations Committee against Torture explicitly recommended that the U.S. “rescind any interrogation technique, including methods involving sexual humiliation, ‘water boarding’, ‘short shackling’ and using dogs to induce fear, that

Final Report Investigation into FBI Allegations of Detainee Abuse at Guantanamo Bay, Cuba Detention Facility, 1 April 2005 (“Schmidt Report”), at 13-21, available at <http://www.defense.gov/news/Jul2005/d20050714report.pdf>. (EXHIBIT 30).

⁶⁵ Bob Woodward, *Detainee Tortured, Says U.S. Official; Trial Overseer Cites “Abusive” Methods Against 9/11 Suspect*, *Washington Post*, 14 Jan. 2009, at A1, available at www.washingtonpost.com/wp-dyn/content/article/2009/01/13/AR2009011303372.html (EXHIBIT 31). Crawford continued: “This was not any one particular act; this was just a combination of things that had a medical impact on him, that hurt his health. It was abusive and uncalled for. And coercive. Clearly coercive. It was that medical impact that pushed me over the edge to call it torture.” *Id.*

⁶⁶ Memorandum for Record, Department of Defense, Joint Task Force 170, Guantanamo Bay, Cuba, 9 October 2003, available at: <http://www.washingtonpost.com/wp-srv/nation/documents/GitmoMemo10-09-03.pdf> (EXHIBIT 32); see also Scott Higham, *Washington Post*, A Look Behind the ‘Wire’ At Guantanamo, 13 June 2004, available at: <http://www.washingtonpost.com/wp-dyn/articles/A37364-2004Jun12.html> and also Neil A. Lewis, *New York Times*, Red Cross Finds Detainee Abuse in Guantánamo, 30 November 2004, available at: <http://www.nytimes.com/2004/11/30/politics/30gitmo.html?pagewanted=1&r=1>.

⁶⁷ United Nations Commission on Human Rights, *Situation of Detainees at Guantánamo Bay - Report of the Chairperson of the Working Group on Arbitrary Detention, Ms. Leila Zerrougui; the Special Rapporteur on the independence of judges and lawyers, Mr. Leandro Despouy; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Mr. Manfred Nowak; the Special Rapporteur on freedom of religion or belief, Ms. Asma Jahangir and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Mr. Paul Hunt*, E/CN.4/2006/120, 27 February 2006, at para. 87, available at: <http://www.un.org/Docs/journal/asp/ws.asp?m=E/CN.4/2006/120> (“UN Guantánamo Situation Report”) (EXHIBIT 33).

⁶⁸ *Id.* at para. 88.

constitute torture or cruel, inhuman or degrading treatment or punishment”.⁶⁹ A 2008 study by *Physicians for Human Rights* came to the conclusion that many techniques used in Guantánamo, especially those exercised over a longer period or in combination with other techniques, amounted to torture.⁷⁰ Other studies have detailed how the BUSH administration, for example, forcibly deployed the drug mefloquine against detainees at Guantánamo in order to break their resistance to interrogation, despite the fact that it is well-known to have severe side effects and cause health problems.⁷¹ In sum, there is widespread international acceptance - amongst intergovernmental bodies, international experts, academics and others - that the interrogation techniques applied in Guantánamo constitute torture under international law.⁷²

36. Finally, as is well-known, detainees in Iraq, including at the notorious Abu Ghraib prison, were also subjected to torture, cruel, inhuman and degrading treatment, and other serious violations of international law.⁷³

⁶⁹ United Nations Committee Against Torture, *Consideration of Reports submitted by States Parties under Article 19 of the Convention - Conclusions and recommendations of the Committee against Torture - United States of America*, CAT/C/USA/CO/2, 25 July 2006 (“US CAT Report”), at para. 24, available at: <http://www.un.org/Docs/journal/asp/ws.asp?m=CAT/C/USA/CO/2> (EXHIBIT 34).

⁷⁰ Physicians for Human Rights, *Broken Laws, Broken Lives – Medical evidence of torture by US personnel and its impact*, June 2008, at p. 120, available at: http://brokenlives.info/?dl_id=5 (EXHIBIT 35).

⁷¹ See for a detailed medical analysis, Seton Hall University School of Law, Center for Policy and Research, *Drug Abuse – an exploration of the government’s use of mefloquine at Guantanamo*, available at <http://law.shu.edu/ProgramsCenters/PublicIntGovServ/policyresearch/upload/drug-abuse-exploration-government-use-mefloquine-gunatanamo.pdf> (EXHIBIT 36).

⁷² For a good overview see, *inter alia*, M. Cherif Bassiouni, ‘The Institutionalization of Torture by the Bush Administration – Is Anyone Responsible?’ (2010) (esp. Chapter 2)

⁷³ Detailed accounts of the torture and other crimes committed against Iraqi detainees can be found in numerous reports by the U.S. military as well as in an International Commission of the Red Cross (ICRC) report. See MG Antonio Taguba, *Art. 15-6: Investigation of the 800th Military Police Brigade* (2004) (“Taguba Report”), available at <http://www.dod.mil/pubs/foi/detainees/taguba/> (EXHIBIT 37); G. Fay & A. Jones, US Army, *AR 15-6 Investigation of Intelligence Activities At Abu Ghraib Prison and 205th Military Intelligence Brigade* (2004) (“Fay Report”), available at http://www.washingtonpost.com/wp-srv/nation/documents/fay_report_8-25-04.pdf (EXHIBIT 38); *Report of the ICRC on the Treatment by the Coalition Forces of Prisoners of War and other Protected Persons by the Geneva Conventions in Iraq during Arrest Internment and Interrogation*, February 2004, available at http://www.globalsecurity.org/military/library/report/2004/icrc_report_iraq_feb2004.pdf (EXHIBIT 39); J. Schlesinger, *Final Report of the Independent Panel to Review Department of Defense Detention Operations*, August 2004, available at <http://www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf> (abuses were ‘widespread’ and serious in numbers and effect).

C. Admissions and Findings that BUSH Authorized and Approved Torture

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

38. The CIA IG Report confirms that BUSH was fully briefed on the specific “enhanced interrogation techniques” employed by the CIA, through consultations carried out in the summer of 2002 by the CIA with the NSC, which BUSH chairs, and with “senior Administration officials.”⁷⁴ The CIA IG Report further confirms that in early 2003 the CIA continued to inform senior Administration officials, including the White House Counsel and others of the NSC, of the status of its Counterterrorism Program, because “[t]he Agency specifically wanted to ensure that these officials and the [Congressional] Committees continued to be aware of and approve CIA’s actions.”⁷⁵ Select members of the NSC were given a detailed briefing on the program by the CIA on 29 July 2003, and again on 16 September 2003: “none of those involved in these briefings expressed any reservations about the program.”⁷⁶ BUSH met daily with, and was briefed by, his intelligence team.⁷⁷

⁷⁴ CIA IG Report, *supra* n. 5, at 23, para. 45. *See also id.* at 100, para. 152; Letter from CIA General Counsel, Scott W. Muller, to Representative Jane Harman (28 February 2003) (stating that it “would be fair to assume” that the Executive Branch “addressed” the policy and legal aspects of the “interrogation techniques” being employed by the CIA), available at http://www.house.gov/apps/list/press/ca36_harman/mullerletter.pdf.

⁷⁵ CIA IG Report, *supra* n. 5, at 23, para. 46.

⁷⁶ *Id.* at 24.

⁷⁷ *See* White House Daily Press Briefings, available at <http://georgewbush-whitehouse.archives.gov/news/releases/>, e.g., 15 Sept 2001 (BUSH meets with NSC); 17 September 2001 (BUSH met with his National Security Council and visited the Pentagon; the NSC meeting includes Vice President Cheney); 18 September 2001 (BUSH met with his National Security Council); 25 October 2001 (BUSH met with NSC, met with Homeland Security Advisor Tom Ridge and members of congress; White House Press Secretary Ari Fleischer states: “...the President had a briefing with the CIA; he had a briefing with the Attorney General and the Director of the FBI, as he does each morning”); 26 October 2001 (BUSH convened NSC, and had a meeting with Attorney General, the head of the FBI, and Homeland Security Advisor Tom Ridge; White House Press Secretary, Ari Fleischer stated: “The President, after that, received his morning briefing from the CIA”); 31 October 2001 (BUSH “had his usual round of intelligence briefings” and met with NSC); White House Press Briefings, 20 June 2002 (BUSH receives CIA and FBI briefings); 28 June 2002 (BUSH receives intelligence and FBI briefings, convenes NSC); 3 July 2002, (BUSH receives intelligence and FBI briefings, convenes NSC); 10 July 2002 (same); 12 July 2002 (same); 16 July 2002, (BUSH receives CIA and FBI briefings); 23 July 2002 (same); 24 July 2002 (same); 26 July 2002 (same); 30 July 2002 (same); 31 July 2002 (same); 1 August 2002 (BUSH receives CIA and FBI briefings and convenes Homeland Security Council).

39. In addition, BUSH played an active role in supporting the CIA secret detention program. Marty's Council of Europe investigation, for example, reported that BUSH welcomed to the oval office a high-level group of delegates from Bucharest to personally thank them to their contribution to the CIA program, as Romania hosted CIA black sites.⁷⁸

40. In an April 2008 interview with ABC News, BUSH acknowledged that he knew of the detailed discussions members of his national security team (the "Principals Committee" of the NSC) were having to define the interrogation techniques to be used by the CIA. When asked about the treatment of Khalid Sheik Mohammad, which included waterboarding, BUSH said: "I didn't have any problem at all trying to find out what Khalid Sheikh Mohammed knew."⁷⁹

41. BUSH released his memoir, *DECISION POINTS*, on 9 November 2010. In the book, BUSH states unequivocally that he authorized the torture, including waterboarding, of individuals held in U.S. custody.⁸⁰ He further admits and acknowledges his role in selecting and approving the interrogation techniques used by the CIA: "I took a look at the list of techniques. There were two that I felt went too far, even if they were legal. I directed the CIA not to use them. Another technique was waterboarding, a process of simulated drowning. No doubt the procedure was tough [...] I would have preferred that we get the information another way. But the choice between security and values was real. Had I not authorized waterboarding on senior al Qaeda leaders, I would have had to accept a greater risk I was unwilling to take. [...] I approved the use of the interrogation techniques."⁸¹

42. BUSH details how at his direction, Department of Justice and Central Intelligence Agency lawyers conducted a legal review of the list of interrogation techniques proposed by the CIA. (Notably, the current U.S. Attorney General, Eric Holder, has unequivocally defined waterboarding as an act of torture.⁸²) Having received legal advice from government lawyers that it is permissible to waterboard detainees, BUSH admits that he responded "damn right" to the query of whether Khaled Sheik Mohammed could and should be waterboarded.⁸³

⁷⁸ See Marty Report, *supra* n. 6, at 44, para 218.

⁷⁹ *Bush Aware of Advisers' Interrogation Talks: President Said He Knew His Senior Advisers Discussed Tough Interrogation Techniques*, ABC News, (EXHIBIT 40) available at <http://abcnews.go.com/TheLaw/LawPolitics/story?id=4635175&page=3>.

⁸⁰ *DECISION POINTS*, *supra* n. 28, at 169-171. See *supra* para. xx (discussing authorizing CIA interrogation techniques, including waterboarding).

⁸¹ *Id.* at 169.

⁸² See Transcript of Confirmation Hearing for Eric Holder as Attorney General of the United States, 16 January 2009, available at http://www.nytimes.com/2009/01/16/us/politics/16text-holder.html?_r%41&pagewanted%4all.

⁸³ *DECISION POINTS*, *supra* n. 28, at 170.

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

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

LAUER: Why is waterboarding legal, in your opinion?

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

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

BUSH: Yeah.

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

BUSH: Well—

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

BUSH: He obviously doesn't know. I hope Mr. Kean reads the book. That's why I've written the book. He can, they can draw whatever conclusion they want.⁸⁴

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

⁸⁴ Transcript: "'Decision Points,' Former president George W. Bush reflects on the most important decisions of his presidential and personal life," Part 3, NBC, 8 November 2010, available at (EXHIBIT 41).

II. LEGAL ARGUMENTS

A. The Jurisdiction of the Geneva Swiss Authorities: Application of the Convention Against Torture

45. According to Article 6, para. 1, of the Swiss Criminal Code of December 21, 1937 (RS 311.0; “CPS”),

Any person who commits a felony or misdemeanor abroad that Switzerland is obligated to prosecute under the terms of an international convention is subject to this Code provided:

- a. the act is also liable to prosecution at the place of commission or no criminal law jurisdiction applies at the place of commission, and
- b. if the author is in Switzerland and is not extradited.

1. A crime or an offense that Switzerland has committed itself to prosecute under the terms of an international agreement

46. Switzerland adopted the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 (“CAT” or “Convention”) on 6 October 1986. This Convention entered into force on 26 June 1987. There are currently 147 signatories to CAT.

47. The United States ratified the Convention on 21 October 1994.

48. Article 1, para. 1, of CAT, provides:

For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

49. As it will be developed below, there is not any doubt that the acts discussed above correspond to this definition. It is noted, in particular, that BUSH, in his capacity as President of the United States, clearly meets the condition of “*the public official or other person acting in an official capacity*”.

50. Particularly relevant in these circumstances, given BUSH’s focus on the terrorist attacks on 9/11 and the “war on terror” in presenting his authorization of waterboarding, is Article 2(2) of CAT:

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

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

Article 2(2) confirms that the prohibition of torture is one of the few absolute and non-derogable human rights. No State may invoke any exceptional circumstances, such as war or terrorism, as a justification of torture. This provision, therefore, provides a clear answer to all attempts aimed at undermining the absolute prohibition on torture for the sake of national security in combating global terrorism, such as the ‘ticking time bomb scenario’ or special interrogation methods authorized by Israel and the US government in their respective counter-terrorism strategies.⁸⁵ (emphasis added)

52. According to Article 4 (1) of CAT:

Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.

53. This provision reflect the object and purpose of CAT: “to make the struggle against torture and cruel, inhuman or degrading treatment more effective by establishing additional State obligations to prevent torture and cruel, inhuman or degrading treatment, to assist victims of torture and to punish the perpetrators of torture. *Article 4 is the central norm in relation to the*

⁸⁵ Manfred Nowak and Elizabeth McArthur, *The United Nations Convention Against Torture - A Commentary*, (Oxford University Press 2008), (“Nowak and McArthur Commentary”), at 89.

third objective of fighting impunity as one of the root causes for the widespread practice of torture worldwide.”⁸⁶

54. As will be demonstrated below, Switzerland, even if it has not yet adopted a provision on torture, has, nevertheless, the criminal standards necessary for its repression.

55. Moreover, Article 5 of the Convention provides:

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

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

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

56. Article 5(2) provides for universal jurisdiction in all cases where an alleged torturer is present “in order to avoid safe havens for perpetrators of torture.”⁸⁷ This provision makes CAT “*the first human rights treaty incorporating the principal of universal jurisdiction as an international obligation of all State parties without any precondition other than the presence of the alleged torturer.*”⁸⁸ (emphasis in original) The need for universal jurisdiction for torture was explained as such: “Torture ... is according to its definition in Article 1 primarily committed by State officials, and the respective governments usually have no interest in bringing their own officials to justice.”⁸⁹

57. It is appropriate in this case to recall the drafting history of this provision. As discussed in the Nowak and McArthur Commentary on CAT, this provision met with “fierce objection” from many States, with the strongest supporter of the draft provision for universal jurisdiction (presented by Sweden) being the United States: “the US Government expressed the opinion that

⁸⁶ *Id.*, at 229.

⁸⁷ *Id.* at 254.

⁸⁸ *Id.* at 316.

⁸⁹ *Id.*

torture is an offence of special international concern which means that it should have a broad jurisdictional basis in the same way as the international community had agreed upon in earlier conventions against hijacking, sabotage and the protection of diplomats.”⁹⁰ The Commentary continues: “It was, above all, the delegation from the United States which had convincingly argued that universal jurisdiction was intended primarily to deal with situations where torture is a State policy and where the respective government, therefore, was not interested in extradition and prosecution of its own officials accused of torture.”⁹¹

58. Switzerland has correctly established its jurisdiction within the meaning of Article 5 of CAT, by the adoption of Article 6 of the CPS.⁹²

59. The text of Article 6 of CAT, states in particular that:

“1. Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State Party in whose territory a person alleged to have committed any offence referred to in article 4 is present, shall take him into custody or take other legal measures to ensure his presence. The custody and other legal measures shall be as provided in the law of that State but may be continued only for such time as is necessary to enable any criminal or extradition proceedings to be instituted.

2. Such State shall immediately make a preliminary inquiry into the facts.”

60. The English language version of the Convention states unambiguously the obligation imposed on the contracting States, in Article 6(1):

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

61. According to the Nowak and McArthur Commentary on the Convention:

⁹⁰ *Id.* at 314.

⁹¹ *Id.* at 315.

⁹² See Initial Report to the UN Committee against Torture, 25 March 2002, at 4, cited in *Extraterritorial Jurisdiction in the European Union: A Study of the Laws and Practice in the 27 Member States of the European Union*, December 2010 (FIDH/REDRESS), at 251, available at www.fidh.org/IMG/pdf/Extraterritorial_Jurisdiction_In_the_27_Member_States_of_the_European_Union_FINAL.pdf.

Most of the procedural safeguards provided for in Article 6 are fairly self-evident. If the suspected torturer is present in the territory of the State which initiates criminal proceedings (the presence is a legal requirement only for exercising universal jurisdiction), *its authorities shall take him or her into custody or take other legal measure to ensure his or her presence.*⁹³ (emphasis added)

62. Once the presence of the suspect is guaranteed, the State must immediately proceed to a preliminary inquiry. (Article 6, para. 2, CAT). This inquiry will make it possible to determine the follow-up necessary, in particular if the State Party itself will conduct the proceedings to their conclusion or if extradition to the interested party is necessary.

63. Simultaneously with the preliminary inquiry to be initiated with immediate effect, “When a State has put a person in detention, in accordance with the provisions of this article, it immediately notifies of this detention and of the circumstances that justify it the States contemplated in para. 1 of art. 5” (Article 6, para. 4, CAT), that is to say, as a priority, the United States, the State of which BUSH is a national (within the meaning of Art. 5, para. 1, let. b, CAT).

64. According to Article 7, para. 1 of CAT:

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

65. Only a request for extradition formulated by the United States, guaranteeing BUSH an equitable trial, would permit Switzerland not to exert its criminal jurisdiction over the crimes in question.⁹⁴

66. Based on the foregoing facts and discussion, it can be concluded that this matter indeed relates to a crime or an offense that Switzerland has committed itself to prosecute under the terms of an international agreement, and that the responsibility to prosecute an author of torture present in its territory constitutes an **obligation** internationally contracted by Switzerland, and not simply an option which it can disregard.

⁹³ Nowak and McArthur Commentary, *supra* n. 85, at 329. The French text does not perfectly make clear that the adoption of measures guaranteeing the presence of the presumed torturer in its territory constitutes an obligation for the State. The terms “if it considers that the circumstances so warrant” cannot be used to grant prosecution authorities any room to allow them to introduce an assessment following, for example, regard for the diplomatic interests of the State concerned.

⁹⁴ See *id.* at 344.

2. The act is also punished in the State where it has been committed or the place of commission of the act does not establish any criminal jurisdiction

67. The United States ratified the Convention Against Torture on 21 October 1994.
68. The same obligations as those presented above are applicable to, and imposed on, the United States.
69. The United States has, moreover, complied with one of its obligations under CAT in codifying acts of torture as a criminal offense under domestic law.⁹⁵
70. The relevant criminal provisions (cf. US Code, Title 18, Part I) define torture as:

§ 2340. Definitions

As used in this chapter—

(1) “torture” means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control;

(2) “severe mental pain or suffering” means the prolonged mental harm caused by or resulting from—

(A) the intentional infliction or threatened infliction of severe physical pain or suffering;

(B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(C) the threat of imminent death; or

(D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality; and

(3) “United States” means the several States of the United States, the District of Columbia, and the commonwealths, territories, and possessions of the United States.

⁹⁵ It is recalled, however, that the Committee against Torture has found that the definition of torture employed by the United States in its criminal code is not in full compliance with Article 1 of CAT.

71. The relevant provision provides:

§ 2340A. Torture

(a) Offense.— Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.

(b) Jurisdiction.— There is jurisdiction over the activity prohibited in subsection (a) if—

(1) the alleged offender is a national of the United States; or

(2) the alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender.

(c) Conspiracy.— A person who conspires to commit an offense under this section shall be subject to the same penalties (other than the penalty of death) as the penalties prescribed for the offense, the commission of which was the object of the conspiracy.

72. Accordingly, the acts in question in this case are also punishable in the United States.

3. The offender is in Switzerland and is not extradited

73. BUSH will be present on Swiss soil at the very least during the day of Saturday, 12 February 2011. It has been reported by the press that he should spend at least one night in Geneva, on Swiss soil.

74. The condition of the presence in Switzerland will be satisfied, according to every likelihood, on the above-mentioned date.

75. Consequently, through the combined application of Article 6 of the CPS, and the Convention Against Torture, the Swiss authorities not only are competent to prosecute the acts of torture, but they also have the obligation to do so under international law.

76. The prosecution of acts of torture does not come under the jurisdiction of the federal authorities; it is upon the cantons that the prosecution of such acts falls (articles 22ss of the Swiss Code of Criminal Procedure, of October 5, 2007, RS 312.0 - hereafter CPPS).

77. Since BUSH does not have either habitual domicile or residence in Switzerland, it is the canton of Geneva that must exercise criminal jurisdiction, since it is in this territory that BUSH could be apprehended (art. 32, para. 2, CPPS).

B. Absence of immunity

78. Since Swiss law itself provides no substantive or formal immunity, the question could only be posed as to whether an immunity recognized by international law could conflict with Switzerland's obligation to exercise its jurisdiction in prosecuting the case against BUSH described herein.

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

1. Absence of immunity by convention

80. In present matter, conventional international law does not provide for any particular immunity.

81. As a preliminary matter, it is recalled that the Convention Against Torture is intended to apply to acts involving "a public official or other person acting in an official capacity."

82. The diplomatic and consular immunities provided for by the Vienna Conventions of 1961 on Diplomatic Relations and of 1963 (entered into force 24 April 1964) on Consular Relations (entered into force on 19 March 1967) clearly do not apply as BUSH is neither a diplomat nor a consular official, but is coming to Geneva as a private citizen of the United States.

83. BUSH enjoys no diplomatic status in Switzerland, not having been recognized, in particular, by the federal Department of Foreign Affairs as occupying a representational office in Switzerland (cf., for example, art. 4, 1961 Convention).

84. On a conventional level, there remains only the Convention on Special Missions of 1969 (New York, entered into force 21 June 1985). This does not apply, however, since the purpose of the visit of BUSH to Geneva obviously comes under his private sphere. It will be recalled, in fact, that he will stay in Geneva to take part in an official charity gala.

2. Absence of customary immunity

85. It is only possible to consider here, in order to rule them out, two possible exceptions to the obligation of prosecution ensuing from CAT and Swiss law, provided for by *customary* international law. The first regards *functional immunity*, that is, the theory according to which

facts committed in the scope of an official office could not give rise to any criminal liability of their author. The second regards the *personal immunity* of a former head of state.

86. It will be recalled that functional immunity has to do with substantial law and implies that the acts performed in carrying out an official function, cannot entail their author's individual criminal liability, but only the possible liability of the State that he or she represents. Personal immunity is of a procedural nature and guarantees the inviolability of the holder of the office in question during its duration.⁹⁶

i. The absence of functional immunity

87. The starting point for considering the application of functional immunity must be that international law does not provide immunity for the perpetrator of acts recognized as crimes by – and against – the international community; such acts cannot be attributable to the State due to the consensus among states that such acts – including torture – are impermissible and illegal under all circumstances.⁹⁷ Because such actions are not, and indeed, cannot be considered “sovereign acts” or “governmental acts”, they cannot fall within the scope of an official’s authority under international law.⁹⁸

88. In a controversial judgment, however, the International Court of Justice decided that where no particular rule of conventional law is found to apply, there exists a rule of *customary*

⁹⁶ See, e.g., Antonio Cassese, *When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case*, 13 Eur. J. Int’l L. 853 (2002) (“Cassese on *Yerodia*”); Philip Grant & Bernard Bertossa, “Immunities,” in *The Fight Against Impunity in Swiss Law*, TRIAL 2003, at 91.

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

⁹⁸ See, e.g., *Prosecutor v. Milošević*, Case No. IT-02-54-PT, Decision on Preliminary Matters, ¶32 (Nov. 8, 2001) (quoting Nuremberg Judgement, Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10 (“He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law.”)); *Prosecutor v. Blaškić*, IT-95-14-AR, (Issue of subpoena duces tecum), ¶41 (Oct. 29, 1997) (“those responsible for [war crimes, crimes against humanity and genocide] cannot invoke immunity from national or international jurisdiction even if they perpetrated such crimes while acting in their official capacity”); *Attorney Gen. of the Gov’t of Israel v. Eichmann*, 36 I.L.R. 277, 310 (Supreme Court of Israel 1962) (“international law postulates that it is impossible for a State to sanction an act that violates its severe prohibitions, and from this follows the idea which forms the core of the concept of ‘international crime’ that a person who was a party to such crime must bear individual responsibility for it. If it were otherwise, the penal provisions would be a mockery.”).

international law relative to the functional immunities applicable to former ministers of foreign affairs (and by extension to former heads of state). The Court further found:

after a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all of the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity.⁹⁹

89. Because torture cannot be considered a “sovereign act,” it must be considered as act committed in a “private capacity.”¹⁰⁰ It is recalled that the *Yerodia* case did not include charges of torture under the Convention Against Torture.

90. In applying general principles of law, the general *customary* international rule must, however, give way to a specific conventional international rule.¹⁰¹

91. Under the plain-language of CAT, Article 1, that the author of the torture acted in an official position is a fundamental element of establishing torture under the Convention; it would be contrary to the very object and purpose of the Convention to allow possible immunities to prevent the realization of one of the primary goals of CAT, namely, the prosecution of torturers.

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

93. It will be emphasized, in addition, that several international authorities have already ruled that the prohibition of the torture constitutes a rule of international law coming under *jus cogens*

⁹⁹ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* (“*Yerodia*”), Judgment of 14 February 2002, para. 61, available online at <http://www.icj-cij.org/docket/files/121/8126.pdf>.

¹⁰⁰ *See, e.g., Yerodia*, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, para. 75 (serious international crimes cannot be regarded as official acts).

¹⁰¹ *See, for example, International Court of Justice, case of the military and paramilitary activities in Nicaragua and against this state, decree of June 27, 1986, § 247* (available at: <http://www.icj-cij.org/docket/files/70/6502.pdf>: “In a general manner, since conventional rules have the nature of *lex specialis*, it would not be suitable for a State to present a demand founded on a rule of customary international law if, by treaty, it has already provided for means to settle such a demand.”)

that allows no place for the application of a contrary customary law rule rendering the act lawful because of its author's particular capacity.¹⁰²

94. In fact, “[c]learly, the value of *jus cogens* in prohibiting torture justifies the idea that this is henceforth one of the most fundamental norms of the international community.”¹⁰³

95. The fact that the presumed author of the universally punishable act holds or has held an official office in his country does not, therefore, constitute an obstacle to prosecution, in the sense that it would render the act lawful (functional immunity). As Lord Millett opined in *Pinochet (3)*, “[i]nternational law cannot be supposed to have established a crime having the character of a *jus cogens* and at the same time to have provided an *immunity* which is co-extensive with the obligation it seeks to impose.”

96. International practice supports this conclusion. In the case of General Augusto Pinochet, himself a former head of state (President of Chile at the time of the acts), the Committee against Torture, the very authority responsible for supervising the proper application of the Convention by the States, has expressly emphasized, even though the suspect was still a senator of his country, that if the United Kingdom should not extradite him to Spain or a third-party country, it would then have to undertake the investigation and prosecution of the case through its conclusion:

¹⁰² European Court of Human Rights, *Case Al-Adsani v. United Kingdom*, judgment of 21 November 2001, para. 60: “The primordial importance that the prohibition of the torture covers is more and more recognized, as are testified by other domains of international law. Thus, torture is prohibited by article 5 of the Universal Declaration of human rights and article 7 of the international Pact relative to civil rights and policies. In its article 2, the United Nations Convention against torture and other cruel, inhuman or degrading punishments or treatments in any State starts from taking legislative, administrative, judicial measures and other effective measures to prevent that acts of torture are committed in any territory under its jurisdiction and, in its article 4, to monitor that all acts of torture constitute infractions with regards to its criminal law (paragraphs 25-29 above). Besides, according to several decisions of justice, the prohibition of torture henceforth has value of imperative norm, that means *jus cogens*. Thus in its judgment of 10 December 1998 in the *Furundžija* case, the International Criminal Tribunal for the former Yugoslavia, while referring specifically to the set of the conventional rules cited above, has said that “by reason of the importance of the values that it protects, this principle [forbidding torture] became an imperative norm or *jus cogens*, that is to say a norm that is located in the international hierarchy at a higher rank than the conventional law and even the rules of the “ordinary” common law.” Similar declarations are found in other cases of this same court or of national jurisdictions-among which the House of Lords in the case *ex parte Pinochet* (No. 3)-had to hear.” (citations omitted). See also case of *Mauritanian Captain Ely Ould Dah*, as discussed in *European Court of Human Rights decision, Ould Dah v. France* (Application No. 13113/03), 17 March 2009, available online in French at <http://cmiskp.echr.coe.int/tkp197/view.asp?item%41&portal%4hbkm&action%4html&highlight%4ould%20%7C%20dah&sessionid%423103930&skin%4hudoc-en>

¹⁰³ *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgement (10 Dec. 1998), para. 154. See also *Prosecutor v. Delalić*, Case No. IT-96-21-T, Judgement (16 November 1998), para. 454 and *Prosecutor v. Kunarac*, Case No. IT-96-21-T, Judgement (22 February 2001) para. 466

The Committee recommends finally that the case of the Chilean senator Pinochet is submitted to the public prosecutor's office in order to determine if a lawsuit is feasible, and, if the case arises, that the criminal prosecution is engaged in England if the decision not to extradite him was taken. This would be in conformity with the obligations incumbent upon the state starting according to articles 4 to 7 the Convention and article 27 of the Vienna Convention of 1969 on treaty law.¹⁰⁴

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

98. The Committee against torture, referred to by a victim, has acknowledged that Senegal had not abided by its international obligations, by not prosecuting the former Chadian head of state.

The Committee deems that the party state cannot invoke the complexity of its judicial procedure or other reasons derived from its internal law to justify the failure to observe its obligations according to the Convention. It considers that *this obligation to pursue Hissène Habré for the alleged facts of torture existed* in the head of the party state, on the failure to prove that it did not have sufficient elements permitting prosecution of Hissène Habré.¹⁰⁵ (emphasis added).

99. The customary rule that could allow immunity for the acts committed by a public agent in the exercise of his office must cede to a contrary conventional rule defining torture, criminalizing it, and obliging States to prosecute the alleged offender of such acts when he or she is present in their territory. The capacity of former head of state has not, therefore, rendered lawful the acts with which BUSH is accused.

ii. Absence of personal immunity (or jurisdictional immunity)

100. The purpose of personal immunity is to protect the holders of certain official offices (consuls, diplomats, prime ministers, heads of state – and, since *Yerodia*, ministers of foreign affairs) from prosecution during the exercise of their office, by guaranteeing them an immunity from jurisdiction.

¹⁰⁴ Committee against Torture, Final Remarks, United Kingdom of Great Britain and Northern Ireland, November 17, 1998, document UN A/54/44, §§ 72-77, ch. 5f.

¹⁰⁵ Committee against Torture, communication 181/2001, observations of 17 May 2006, para. 9.8 (CAT/C/36/D/181/2001).

101. As the International Court of Justice has noted:

the *immunity* from jurisdiction enjoyed by incumbent Ministers of Foreign Affairs does not mean that they enjoy *impunity* in respect to any crimes he might have committed, irrespective of their gravity. Immunity from criminal jurisdiction and individual criminal liability are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility.¹⁰⁶ (emphasis in original).

102. The International Court of Justice has thus recalled in this respect that such a protection against prosecution abroad was only valid as long as the person concerned is still in office, given that the aim of the rule consists in conferring on him a protection against acts that would not allow him precisely to exercise his duties correctly.

103. The International Court of Justice found,

the functions of a Minister for Foreign Affairs are such that, *throughout the duration of his or her office*, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability. This immunity and this inviolability protect the individual concerned against any act of authority on the part of another State that would hinder the exercise of his or her office.¹⁰⁷ (emphasis added).

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

105. To conclude, concerning functional immunity, the general customary international rule must give way to the specific conventional international rule rendering acts of torture unlawful whatever the office of the public agent in question – a rule, moreover, ratified, and thus accepted, both by Switzerland and by the United States. As for personal immunity, it quite simply does not exist for a former official agent.

¹⁰⁶ *Yerodia*, para. 60.

¹⁰⁷ *Id.* at para. 54.

C. The Alleged Acts of Torture

1. The acts alleged constitute acts of torture under International Law

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

107. The Committee Against Torture has already been able to note that as concerns the interrogation techniques carried out by the CIA since 2002 “that have resulted in the death of some detainees during interrogation” or have “led to serious abuses of detainees”, the United States “should rescind any interrogation technique, including methods involving sexual humiliation, “waterboarding”, “short shackling” and using dogs to induce fear, that constitutes torture or cruel, inhuman or degrading treatment or punishment, in all places of detention under its de facto effective control, in order to comply with its obligations under the Convention.¹⁰⁸

108. In their joint report of 27 February 2006, regarding the Situation of persons detained in Guantánamo Bay, Report of the Chairperson-Rapporteur of the Working Group on Arbitrary Detention, the Special Rapporteur on the independence of judges and lawyers, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Special Rapporteur on freedom of religion or belief, and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, have arrived at the conclusions that, regarding these interrogation methods:

These techniques meet four of the five elements in the Convention definition of torture (the acts in question were perpetrated by government officials; they had a clear purpose, i.e. gathering intelligence, extracting information; the acts were committed intentionally; and the victims were in a position of powerlessness). However, to meet the Convention definition of torture, severe pain or suffering, physical or mental, must be inflicted. Treatment aimed at humiliating victims may amount to degrading treatment or punishment, even without intensive pain or suffering. It is difficult to assess in abstracto whether this is the case with regard to acts such as the removal of clothes. However, stripping detainees naked, particularly in the presence of women and taking into account cultural sensitivities, can in individual cases cause extreme psychological pressure and can amount to degrading

¹⁰⁸ US CAT Report, *supra* n.69, paragraph 24.

treatment, or even torture. The same holds true for the use of dogs, especially if it is clear that an individual phobia exists. Exposure to extreme temperatures, if prolonged, can conceivably cause severe suffering.

On the interviews conducted with former detainees, the Special Rapporteur concludes that some of the techniques, in particular the use of dogs, exposure to extreme temperatures, sleep deprivation for several consecutive days and prolonged isolation were perceived as causing severe suffering. He also stresses that the simultaneous use of these techniques is even more likely to amount to torture. The Parliamentary Assembly of the Council of Europe also concluded that many detainees had been subjected to ill-treatment amounting to torture, which occurred systematically and with the knowledge and complicity of the United States Government. The same has been found by Lord Hope of Craighead, member of the United Kingdom's House of Lords, who stated that "some of [the practices authorized for use in Guantánamo Bay by the United States authorities] would shock the conscience if they were ever to be authorized for use in our own country".¹⁰⁹

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

- Exposure to extreme temperatures¹¹⁰
- Sleep deprivation¹¹¹
- Punching or kicking¹¹²
- Isolation in a "coffin" for prolonged periods¹¹³
- Threats of bad treatment¹¹⁴

¹⁰⁹ UN Guantánamo Situation Report, *supra* . n. 67, paras. 51-52.

¹¹⁰ See the European Court of Human Rights, case of *Tekin vs. Turkey* (1998); *Akdeniz vs. Turkey* (2001); Human Rights Committee, case of *Polay Campos vs. Peru* (1997), § 9.

¹¹¹ European Court of Human Rights, *Ireland vs. United Kingdom* (1978), § 167.

¹¹² Committee Against Torture, case *Dragan Dimitrijevic vs. Serbia and Montenegro* (2004), paragraph 5.3.; case *Ben Salem vs. Tunisia* (2007), § 16.4; case *Saadia Ali vs. Tunisia* (2008), § 15.4

¹¹³ Committee Against Torture, Summary account of the proceedings concerning the inquiry on Turkey, doc. A/48/44/Add.1, 1993, paragraph. 52, for a case where the Committee required the immediate demolition of the isolation cells known as coffins, which constituted on their own a form of torture; Human Rights Committee, case *Cabal and Pasini vs. Australia* (2003), § 8.4, where the cell was of the dimensions similar to those of a telephone cabin.

¹¹⁴ Special Rapporteur for the Commission on Human Rights, Report to the General Assembly on the question of torture and other cruel, inhuman or degrading treatment or punishment (UN Doc. A/56/156) 3 July 2001; Human Rights Committee, case *Estrella v. Uruguay* (Communication No. 74/1980) 29 March 1983; European Court of Human Rights, *Campbell and Cosans v. the United Kingdom* (1982), § 26; European Court of Human Rights *Gafgen v. Germany* (2010): § 91 and 108. Committee against Torture: Summary account of the results of the

- Solitary confinement¹¹⁵
- Forced nudity¹¹⁶

110. This jurisprudence, coupled with the witnesses' testimonies, the findings and conclusions mentioned above by the United Nations Special Procedures, the ICRC, or the Council of Europe on the legality of the techniques authorized by Bush, there is no question that the so-called "enhanced interrogation techniques" are unlawful and amount to torture, in violation of the Convention Against Torture.

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

The State party should ensure that no one is detained in any secret detention facility under its de facto effective control. Detaining persons in such conditions constitutes, per se, a violation of the Convention.¹¹⁷

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

proceedings concerning the inquiry on Peru, doc. A/56/44, 2001, §186; Concluding Observations on Denmark, doc. A/57/44, 2002, §74(c)-(d); Concluding Observations on Denmark, doc. CAT/C/DNK/CO/5, 2007, § 14; Concluding Observations on Japan, doc. CAT/C/JPN/CO/1, 2007, §18. Human Rights Committee: General Comment No. 20, 1992, §6; HRC, Concluding Observations on Denmark, doc. CCPR/CO/70/DNK, 2000, § 12; Case *Polay Campos v Peru*, views of 6 November 1997, § 8.6 ; Case *Vuolanne v Finland* (1989), § 9.5

¹¹⁵ ECOSOC, Situation of persons detained at Guantánamo Bay, February 27, 2006, E/CN.4/2006/120, § 53 and 87; UN Special Rapporteur on Torture Doc. A/63/175 of 28 July 2008, § 70-85. See also the Annexe, containing the Istanbul Statement on the Use and the Effects of Solitary Confinement. See Principle 7 of the Basic Principles for the Treatment of Prisoners, Adopted and proclaimed by General Assembly resolution 45/111 of 14 December 1990.

¹¹⁶ Committee against Torture, Case *Saadia Alia v. Tunisia* (2008) § 15.4; European Court of Human Rights, *Valasinas v. Lithuania* (2001).

¹¹⁷ US CAT Report, *supra* n. 69, at 17. See also, "The fact of being detained outside any judicial or ICRC control in an unknown location is already a form of torture, as Louise Arbour, UN High Commissioner for Human Rights has said" in the Marty Report 2007, at 241.

of the Covenant.”¹¹⁸

113. In addition, the conditions under which the “high value detainees” were disappeared meets the definition of enforced disappearance under international law, which in itself is a violation of CAT. The International Convention for the Protection of All Persons from Enforced Disappearance, which Switzerland has signed on 19 January 2011, provides for an accepted definition under international law of enforced disappearance. Article 2 of the Convention states:

enforced disappearance" is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.¹¹⁹

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

The totality of the circumstances in which they were held effectively amounted to an arbitrary deprivation of liberty and enforced disappearance, in contravention of international law.¹²⁰

115. The Human Rights Committee, as well as the Committee against Torture, has recognized that enforced disappearance “is inseparably linked to treatment that amounts to a violation of Article 7 [of the ICCPR, prohibiting torture].”¹²¹ When an enforced disappearance has been perpetrated, it is not necessary that ill-treatment be also inflicted in order for the disappearance to meet the definition of torture.¹²²

¹¹⁸ *El-Megreisi v. Libyan Arab Jamahiriya*, Communication No. 440/1990, U.N. Doc. CCPR/C/50/D/440/1990 (1994), para. 5.4.

¹¹⁹ See The International Convention for the Protection of All Persons from Enforced Disappearance, adopted on 20 December 2006, available at <http://www2.ohchr.org/english/law/disappearance-convention.htm>.

¹²⁰ ICRC CIA Detainee Report 2007, at 25.

¹²¹ *Bozize c. Central African Republic* No. 449/1990, Doc. NU, CCPR/C/50/D/428/1990, 1994 at 5.7, and Communication No. 449/1991: *Dominican Republic*, Doc., NU, CCPR/C/51/D/449/1991 at 5.7.

¹²² See *Celis Laureano c. Peru* Communication No. 540/1993, Doc. NU, CCPR/C/51/D/540/1993. See also the conclusions and recommendations of the Committee against Torture, A/52/44, at 79, A/52/44, at 247, and A/53/44, at 249 and 251.

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

The State party should adopt all necessary measures to prohibit and prevent enforced disappearance in any territory under its jurisdiction, and prosecute and punish perpetrators, as this practice constitutes, per se, a violation of the Convention.¹²³

2. Individual criminal liability under International Law

117. According to Article 1 of CAT, the torture must be inflicted “by an agent of the civil service or any other person acting in an official capacity or upon his instigation or with his express and tacit agreement”. The Article 4 of CAT for its part recalls that the States are required to criminalize not only direct torture, but also the other methods of participation in such a crime; therefore, “it is the same for the attempt to carry out torture or any act carried by any person which would constitute complicity or participation in the act of torture.”

118. Two leading commentators on CAT, Burgers and Danelius, recall that:

It is important, in particular, that different forms of complicity or participation are punishable, since the torturer who inflicts pain or suffering often does not act alone, but his act is made possible by the support or encouragement which he receives from other persons. In many cases, the torturer is merely a tool in the hands of someone else, and although this does not relieve him of criminal responsibility, the person or persons who instructed him should also be punished. In the definition of torture in article 1, reference is made to cases where pain or suffering is inflicted “at the instigation or with the consent or acquiescence of a public official or other person in an official capacity.” *Such instigation, consent or acquiescence should be considered to be included in the term “complicity or participation” in article 4.*¹²⁴ (emphasis added)

119. According to the Committee Against Torture, “the hierarchical leaders – also including the civil servants – are not able to evade answerability nor their criminal responsibility for acts of torture or of poor treatment committed by subordinates when they knew or should have known

¹²³ US CAT Report, *supra* n. 69, para 18.

¹²⁴ J. HERMAN BURGERS/HANS DANELIUS, *The United Nations Convention against Torture*, Martinus Nijhoff, Dordrecht 1988, pp. 127s.

that these people were committing, or were susceptible to commit, these inadmissible acts and that they did not take the reasonable means of prevention that were imposed upon them.¹²⁵

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

121. The same analysis and results apply to BUSH.

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

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

124. Through regular meetings of the NSC, briefings by members of his Cabinet, including but not limited to the Director of the CIA, Secretary of Defense, Secretary of State, Vice President, the Attorney General and White House Counsel, BUSH was fully informed of the treatment of detainees in U.S. custody, including detainees held in secret sites by the CIA, and the acts of torture and cruel, inhuman and degrading treatment to which detainees were subjected while under the control of the United States.

125. The United States Senate Armed Services Committee (SASC) conducted an 18-month inquiry into the treatment of detainees in U.S. custody entitled, “Inquiry into the Treatment of Detainees in U.S. Custody.” It contains detailed information on the involvement of officials at the highest levels of the US government in formulating and implementing the US detention and interrogation program. In essence, the SASC Report provides a comprehensive overview of United States policies and program of torture and other forms of serious abuse of detainees during the Bush Administration in Afghanistan, Guantánamo and Iraq. Drawing on legal memorandum, international investigations within the military, the FBI and the CIA, as well as

¹²⁵ Committee against Torture, General Observation n° 2, § 26 (CAT/C/GC/2)..

testimony of more than 70 witnesses, the Report conclusively establishes that the interrogation policies that originated in the White House, the Department of Defense, the Department of Justice and the CIA in 2001-2002 led to the torture and abuse of detainees in Afghanistan, Guantánamo, Iraq and elsewhere.

126. The Committee found:

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

127. The Committee further found that following BUSH’s 7 February 2002 determination that the Geneva Conventions did not apply to members of al Qaeda or the Taliban, “techniques such as waterboarding, nudity, and stress positions, used in SERE training to simulate tactics used by enemies that refuse to follow the Geneva Conventions, were authorized for use in interrogations of detainees in U.S. custody. (...) Members of the President’s Cabinet and other senior officials participated in meetings inside the White House in 2002 and 2003 where specific interrogation techniques were discussed. National Security Council Principals reviewed the CIA’s interrogation program during that period. (...) The Central Intelligence Agency’s (CIA) interrogation program included at least one SERE training technique, waterboarding. Senior Administration lawyers, including Alberto Gonzales, Counsel to the President, and David Addington, Counsel to the Vice President, were consulted on the development of legal analysis of CIA interrogation techniques. Legal opinions subsequently issued by the Department of Justice’s Office of Legal Counsel (OLC) interpreted legal obligations under U.S. anti-torture laws and determined the legality of CIA interrogation techniques. Those OLC opinions distorted the meaning and intent of anti-torture laws, rationalized the abuse of detainees in U.S. custody and influenced Department of Defense determinations as to what interrogation techniques were legal for use during interrogations conducted by U.S. military personnel.”

128. The legal opinions that were written most notably from 2002-2005 by the White House Counsel and the Department of Justice Office of Legal Counsel, are referred to by BUSH as the prevailing legal justifications for the ongoing torture of detainees: “We had legal opinions that enabled us to do it.”¹²⁶ What the memos in question sought to achieve was to redefine torture in order to provide a pre-emptive legal cover or defense for potential criminal prosecutions that

¹²⁶ *Bush Aware of Advisers’ Interrogation Talks: President Said He Knew His Senior Advisers Discussed Tough Interrogation Techniques*, ABC News, (EXHIBIT 42) available at <http://abcnews.go.com/TheLaw/LawPolitics/story?id=4635175&page=3>.

could arise from the “enhanced interrogation techniques” to be used. The legal opinions, and most notoriously a 2 August 2002 memo written to the attention of BUSH’s counsel, advised that the Convention Against Torture’s prohibition on torture was to be read narrowly so as to prohibit only acts that inflict pain equivalent to major organ failure or death.¹²⁷ It is today not disputed – and in fact confirmed by an investigation from the Department of Justice¹²⁸ – that these opinions were written with the full consciousness that the conclusions were contrary to clearly established law and would be used to allow torture.¹²⁹

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

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

¹²⁷ Memorandum from Jay S. Bybee, the Department of Justice Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, *Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A*, available at <http://f11.findlaw.com/news.findlaw.com/wp/docs/doj/bybee80102mem.pdf>. (EXHIBIT 43)

¹²⁸ See *US Department of Justice, Office of Professional Responsibility, Investigation Into The Office of Legal Counsel’s Memoranda Concerning Issues Relating to the Central Intelligence Agency’s Use of “Enhanced Interrogation Techniques” On Suspected Terrorists 15 (2009)*, available at <http://judiciary.house.gov/hearings/pdf/OPRFinalReport090729.pdf>.

¹²⁹ The Nuremberg International Military Tribunal’s jurisprudence provides a direct precedent for the prosecution of government lawyers who individually and consciously participated in violations of international law, see *United States v. Altstoetter*, in 3 Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10 (1951) (“The Justice Case”), available at <http://www.mazal.org/NMT-Home.htm> and *United States v. Weizsaecker*, in 12-14 Trials of War Criminals before the Nuremberg Military Tribunals Under Control Council Law No. 10 (1951) (“The Ministries Case”).

131. CAT applies to “all acts of torture including the acts of attempt, complicity and participation are criminal offences punishable in a manner proportionate to the gravity of the crimes committed. Officials who order or instruct others to carry out torture must therefore be made criminally responsible by national law.”¹³⁰

132. Based on the foregoing, the individual criminal responsibility of BUSH is clearly established incurred under the CAT.

3. The acts committed are covered by incriminations of the Swiss Criminal Code

133. The acts addressed here unquestionably meet the definition of the torture.

134. The Swiss Criminal Code does not concretely contain any provisions on torture as such but acts amounting to torture are incriminated by way of reference to other offenses contained in Swiss law.¹³¹

135. This is also the position of the Federal Council in the reports it has submitted to the Committee against torture.

136. During the ratification process of the CAT, the Swiss Federal Council did not, in fact, deem it necessary to adapt the criminal legislation, as is however required by Article 4 of the CAT. Consequently, the Federal Government wrote in 1985 that “if the Swiss criminal law does not recognize specific infraction(s) that repress torture, it does foresee a whole arsenal of satisfactory provisions as regards Article 4 of the Convention.”¹³²

137. In its 1989 initial report pursuant to Article 19 of CAT, (CAT/C/5/Add.17), the Federal Council affirmed that Switzerland fulfilled its obligations under Article 4 of CAT even if torture was not, as much, incriminated, insofar as any act of torture could be repressed by various provisions of the Swiss Criminal Code (see paragraphs 46 through 50 of the report, which are referred to in the subsequent reports of 1993 and of 1997).

138. It is therefore on the basis of the Swiss Criminal Code that the prosecution can proceed in accordance with Article 6 of the Code.

139. It is necessary to link the acts presented earlier to one or more infractions under Swiss law.

¹³⁰ Nowak and McArthur Commentary, *supra* n. 85, at 236.

¹³¹ François Membrez, «La torture», in *La lutte contre l'impunité en droit suisse*, TRIAL, 2003, p. 79.

¹³² FF 1985 III 279

140. In the present case, the torture that was inflicted upon a multitude of detainees constitutes, at minimum:

- assault (Art. 126 of the Swiss Criminal Code) ;
- serious bodily harm (Art. 122 of the Swiss Criminal Code)
- bodily harm (Art. 123 of the Swiss Criminal Code) ;
- endangerment of the life or health of others (Art. 127 or 129 of the Swiss Criminal Code) ;
- verbal abuse (Art. 177 of the Swiss Criminal Code) ;
- threats (Art. 180 of the Swiss Criminal Code) ;
- duress (Art. 181 of the Swiss Criminal Code) ;
- false imprisonment (Art. 183 of the Swiss Criminal Code) and
- abuse of authority (Art. 312 of the Swiss Criminal Code).

4. Statute of limitations

141. The facts under discussion took place starting at the end of the year 2001, and continued until the end of the mandate of BUSH, on 20 January 2009.

142. BUSH is liable for many of the alleged acts to prison sentences of 10 years (Art. 122 of the Swiss Criminal Code), of five years (Art. 183 of the Swiss Criminal Code) or of three years (Art. 123 of the Swiss Criminal Code), this when only limiting ourselves to these infractions.

143. According to Article 97 line 1 of the Swiss Criminal Code, the criminal act is prescribed:

- a. after 30 years if the infraction is liable to a custodial life sentence;
- b. after fifteen years if it is liable to a custodial sentence of more than three years;
- c. after seven years if it is liable for another penalty.

144. According to Article 98 (b) of the Swiss Criminal Code, “the calculation of the date of prescription runs from the date of the last act, if the activity was undertaken on multiple occasions.”

145. In the case in point, the criminal activity did effectively take place on multiple occasions and only ceased upon the conclusion of the mandate of BUSH, on 20 January 2009.

146. Under these conditions, the limitation from criminal prosecution has not been reached.

147. In addition, one will note that Article 101 of the Swiss Criminal Code provides that “crimes committed so as to apply duress (...) that place or threaten to place under danger the lives or limbs of a large number of persons” are not subject to prescription.

5. Additional Considerations

148. To conclude, we shall recall that the jurisdiction of the Swiss authorities is given insofar as the offender, BUSH, “is not extradited” (Art. 6 of the Swiss Criminal Code).

149. Therefore, were a third-party country – in this case, the United States – to seek the extradition of BUSH, with all the requisite guaranties regarding the prosecution of the acts of torture that are laid against him, as well as regards the holding of a fair trial, then the jurisdiction of Switzerland could be stricken.

150. Until such an extradition request is received, there is no doubt that the international jurisdiction of Switzerland is established and, that by virtue of CAT, the Swiss authorities are under a positive legal obligation to prosecute Bush.

* * *

Given the foregoing, the undersigned, hereby requests that you act upon this complaint.

Attachment: Exhibit List of Documentary Evidence