

# **TORTURE, WAR CRIMES, ACCOUNTABILITY**

**VISIT TO SWITZERLAND OF FORMER  
US PRESIDENT GEORGE W. BUSH  
AND SWISS OBLIGATIONS UNDER  
INTERNATIONAL LAW**

**AMNESTY INTERNATIONAL'S  
MEMORANDUM TO THE SWISS  
AUTHORITIES**

**AMNESTY  
INTERNATIONAL**



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Introduction .....	1
Summary of Submission .....	2
Basis for submission .....	3



## INTRODUCTION

Amnesty International considers that there is enough material in the public domain – even if one were to rely only upon information released by United States authorities, and by former US President George W. Bush himself – to give rise to an obligation on Switzerland, should Mr Bush proceed with his visit on or around 12 February 2011, to investigate his alleged involvement in and responsibility for crimes under international law, including torture, and to secure his presence in Switzerland during that investigation.

## SUMMARY OF SUBMISSION

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

# BASIS FOR SUBMISSION

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

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

Mohammed, 'Abd al-Nashiri and Abu Zubaydah were subjected to water-boarding and included parts of their testimony:

- Abu Zubaydah (who was still recovering from near-fatal gunshot wounds sustained at the time of his arrest): "I was put on what looked like a hospital bed, and strapped down very tightly with belts. A black cloth was then placed over my face and interrogators used a mineral water bottle to pour water on the cloth so that I could not breathe. After a few minutes the cloth was removed and the bed was rotated into an upright position. The pressure of the straps on my wounds caused severe pain. I vomited. The bed was then again lowered to a horizontal position and the same torture carried out with the black cloth over my face and water poured on from a bottle. On this occasion my head was in a more backward, downwards position and the water was poured on for a longer time. I struggled without success to breathe. I thought I was going to die. I lost control of my urine. Since then I still lose control of my urine when under stress".
  - Khalid Sheikh Mohammed: "I would be strapped to a special bed, which can be rotated into a vertical position. A cloth would be placed over my face. Water was then poured onto the cloth by one of the guards so that I could not breathe. This obviously could only be done for one or two minutes at a time. The cloth was then removed and the bed was put into a vertical position. The whole process was then repeated during about one hour".<sup>7</sup>
- Such treatment inherently, and by design in these cases, involves the intentional and coercive infliction of severe mental or physical pain or suffering for the purpose of obtaining information. As such, the infliction of such treatment by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity constitutes the crime of torture under international law (for instance as defined in article 1 of the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.)<sup>8</sup>
  - US courts have in the past convicted individuals who engaged in water-boarding for the crime of torture.<sup>9</sup> Current US officials, representatives of other states, United Nations officials, and legal experts have reaffirmed that water-boarding constitutes torture.<sup>10</sup> During the time that the administration of George W. Bush was authorizing "water-boarding" for use against detainees held in secret CIA custody, the US Department of State continued to denounce as torture similar forms of conduct by other states.<sup>11</sup>
  - In addition to water-boarding, the detainees told the ICRC that other techniques used against them included "prolonged stress standing position" (detainee held naked, arms extended and chained above the head for up to three days continuously and for up to two to three months intermittently); "beatings by use of a collar", used to "forcefully bang the head and body against the wall" (known in CIA parlance as "walling"); beating and kicking; confinement in a box; prolonged nudity; sleep deprivation and use of loud music; exposure to cold temperature/cold water; prolonged shackling; and threats, including threats of torture and other ill-treatment, threats of rape of detainee and detainee's family; and threats of being brought close to death. The one detainee against whom all these and other identified techniques were allegedly used was Abu Zubaydah.<sup>12</sup>



- All detainees were held in solitary confinement, incommunicado, for the entirety of their secret custody, which lasted for up to four-and-a-half years (Abu Zubaydah). The ICRC concluded: “This regime was clearly designed to undermine human dignity and to create a sense of futility by inducing, in many cases, severe physical and mental pain and suffering, with the aim of obtaining compliance and extracting information, resulting in exhaustion, depersonalization and dehumanization. The allegations of ill-treatment to which they were subjected while held in the CIA program, either singly or in combination, constituted torture”. The ICRC also concluded that the detainees had been subjected to enforced disappearance.<sup>13</sup>
- The operational details of this now-terminated CIA detention program – including where the detainees were held and how they were treated – remain classified at the highest level of secrecy by the USA.<sup>14</sup>
- By 2004, according to information released by US authorities in 2009, a “prototypical interrogation” conducted against detainees held in the secret detention program consisted of the detainee being “stripped of his clothes, shackled, and hooded, with the walling collar over his head and around his neck... As soon as the detainee does anything inconsistent with the interrogators’ instructions, the interrogators use an insult slap or abdominal slap. They employ walling if it becomes clear that the detainee is not cooperating in the interrogation. This sequence may continue for several more iterations... The interrogators and security officers then put the detainee into position for standing sleep deprivation, begin dietary manipulation through a liquid diet, and keep the detainee nude (except for a diaper).” After this interrogation session, which could last for hours, the same treatment would essentially be repeated at the next session, but now with the addition of “increas[ing] the pressure on the detainee by using a hose to douse the detainee with water for several minutes. They stop and start the dousing as they continue the interrogation.” After the session the detainee would again be put into a “standing position for sleep deprivation” and is “nude (except for a diaper).” At the next session, if the detainee continued to resist, “the interrogators continue to use walling and water dousing”, with the possible addition of the repeated use of “the insult slap, the abdominal slap, the facial hold, the attention grasp”. The interrogators also “integrate stress positions and wall standing into the session”. Again after the session, sleep deprivation would be continued. At later sessions, “cramped confinement” might also be used. The “entire process” of the “prototypical interrogation” “may last 30 days”.<sup>15</sup>
- The “enhanced interrogation” of ‘Abd al-Nashiri continued for two weeks in December 2002 after he was subjected to waterboarding in late November 2002.<sup>16</sup> In a military hearing in Guantánamo in March 2007, ‘Abd al-Nashiri was asked to describe his torture. All detail of his alleged torture was redacted by US officials from the published transcript. The current US administration has confirmed that the redactions include details relating to “Al Nashiri’s detention and conditions of confinement” and “the interrogation methods that he claims to have experienced”. It has said the same in the case of other detainees previously held in the CIA program, including Abu Zubaydah and Khalid Sheikh Mohammed.<sup>17</sup>
  - ‘Abd al-Nashiri [Through interpreter] “From the time I was arrested five years ago, they have been torturing me. It happened during interviews. One time they tortured me one way, and another time

they tortured me in a different way". Q: "Please described the methods that were used". A: [Redacted]. What else do I want to say? [Redacted] Many things happened. There [sic] were doing so many things. What else did they did [sic]? [Redacted]. They do so many things. So so many things. What else did they did [sic]? [Redacted]. After that another method of torture began [Redacted]. Before I was arrested I used to be able to run about ten kilometers. Now, I cannot walk for more than ten minutes. My nerves are swollen in my body. Swollen too. They used to ask me questions and the investigator after that used to laugh. And, I used to answer the answer that I knew. And, if I didn't reply what I heard, he used to [redacted]. That thing did not stop until here. So many things happened. I don't in summary [sic], that's basically what happened."<sup>18</sup>

- Several FBI agents travelled to a CIA-controlled facility at an undisclosed location in 2003. The Assistant Chief for the FBI's Counterterrorism Operational Response Section said that detainees at the facility were "manacled to the ceiling and subjected to blaring music around the clock". One of the agents reported that he was briefly given access to one of the detainees, Yemeni national Ramzi bin al Shibh, who was naked and chained to the floor.<sup>19</sup>
- Ramzi bin al-Shibh told the ICRC that in his fourth place of detention he had been subjected for seven days continuously to prolonged stress standing – wrists shackled to a bar or hook on the ceiling above his head, while held naked. He also alleged that in this same detention facility he was hosed with cold water during interrogation and that in his eighth place of detention, he was "restrained on a bed, unable to move, for one month, February 2005 and subjected to cold air-conditioning during that period".<sup>20</sup>

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

- Under US law (National Security Act of 1947) only the President can authorize the CIA to conduct a covert action.<sup>21</sup>
- On 17 September 2001, then-President George W. Bush signed a still classified document that "authorized the CIA to set up terrorist detention facilities outside the United States".<sup>22</sup>
- In his 2007 memoirs, George Tenet, the former Director of the CIA who had requested this presidential authorization, recalled that formal congressional approval for this secret detention program had not been sought "as it was conducted under the president's unilateral authorities".<sup>23</sup>
- In his 2010 memoirs, former President George W. Bush recalled CIA Director Tenet's request: "George proposed that I grant broader authority for covert actions, including permission for the CIA to kill or capture al Qaeda operatives without asking for my sign-off each time. I decided to grant the request".<sup>24</sup>
- In May 2009, former US Vice President Richard Cheney said that former President Bush had known "a great deal about the [CIA detention] program. He basically authorized it. I mean, this was a presidential-level decision. And the decision went to the President. He signed off on it".<sup>25</sup>

- In 2010, a US federal judge found that “Immediately following the attacks of 11 September 2001, President Bush authorized new steps to combat international terrorism”; the CIA established the “Rendition, Detention, and Interrogation Program”, “pursuant to which the CIA maintained clandestine facilities abroad at which suspected terrorists were detained, interrogated, and debriefed”.<sup>26</sup> In using “coercive methods” at secret detention sites, the CIA had been acting “upon the highest authority”, US District Court Judge Lewis Kaplan wrote.<sup>27</sup>
- According to the CIA, between March 2002 and May 2005, 94 detainees were held in the secret detention program, 28 of whom were subjected to “enhanced interrogation techniques”. Between June 2005 and July 2007, another four detainees were held in the program, two of whom were subjected to “enhanced interrogation techniques”.<sup>28</sup>
- Signing the Military Commissions Act of 2006 into law on 17 October 2006, President George W. Bush said that the legislation would “allow the Central Intelligence Agency to continue its program for questioning key terrorist leaders and operatives”.<sup>29</sup>
- On 26 April 2007, ‘Abd al-Hadi al Iraqi, was transferred from CIA custody to military detention in Guantánamo Bay after an unknown period in secret detention and interrogation at an undisclosed location.<sup>30</sup>
- On 20 July 2007, President George W. Bush issued an executive order effectively re-authorizing the CIA’s secret detention program.<sup>31</sup>
- On 14 March 2008, the US Department of Defense announced that Muhammad Rahim al-Afghani had been transferred from CIA custody to military detention in Guantánamo after an unidentified period in CIA custody at an undisclosed location.<sup>32</sup>
- In his 2010 memoirs, former President George W. Bush asserted that “of the thousands of terrorists we captured in the years after 9/11, about a hundred were placed into the CIA program. About a third of those were questioned using enhanced techniques.... Had we captured more al Qaeda operatives with significant intelligence value, I would have used the program for them as well.”<sup>33</sup>

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

- A US Department of Justice Office of Legal Counsel (OLC) memorandum to the White House and the CIA, dated 1 August 2002, asserted that “under the circumstances of the current war against al Qaeda and its allies, application of [the US statute that criminalizes torture] to interrogations undertaken pursuant to the President’s Commander-in-Chief powers may be unconstitutional”. Even if an interrogation method were to violate the anti-torture law, “necessity or self-defense could provide justifications that would eliminate any criminal liability”.<sup>34</sup>
- The sections in the 1 August 2002 memorandum addressing the powers of the Commander-in-Chief, and possible defences for violations of the anti-torture statute, were added by OLC lawyers following a meeting at the White House with the President’s legal counsel, and possibly other officials, on 16 July 2002.<sup>35</sup>
- A second OLC memorandum, also dated 1 August 2002, and transmitted by fax to the CIA on the evening of that day, addressed the use of 10 interrogation techniques for use in an “increased pressure phase” against

Abu Zubaydah who was believed to have information “that he refuses to divulge”. The 10 techniques were “attention grasp”; “walling”; “facial hold”; “facial slap (insult slap)”; “cramped confinement”; “wall standing”; “stress positions”; “sleep deprivation”; “insects placed in a confinement box”; and “the waterboard”.<sup>36</sup>

- The CIA had originally asked for approval of 12 “enhanced interrogation techniques”, the above 10 plus “use of diapers” (“the subject is forced to wear adult diapers and is denied access to toilet facilities for an extended period, in order to humiliate him”), and a 12<sup>th</sup> technique which remains classified Top Secret.<sup>37</sup>
- An email dated 31 July 2002 from one of the OLC lawyers working on the two memos states that “the White House wants both memos signed and out by COB [close of business] tomorrow”.<sup>38</sup>
- In his memoirs, published in November 2010, former President George W. Bush made a number of assertions relating to the interrogations of individuals held in the CIA’s secret detention program.
  - He said that Abu Zubaydah was resisting interrogation. “CIA experts” drew up a list of “enhanced” interrogation techniques. “I took a look at the list of techniques. There were two that I felt went too far, even if they were legal. I directed the CIA not to use them. Another technique was waterboarding, a process of simulated drowning... I knew that an interrogation program this sensitive and controversial would one day become public... Had I not authorized waterboarding on senior al Qaeda leaders, I would have had to accept a greater risk that the country would be attacked... I approved the use of the interrogation techniques”.<sup>39</sup>
  - In the case of Khalid Sheikh Mohammed, former President Bush said: “George Tenet asked if he had permission to use enhanced interrogation techniques, including waterboarding, on Khalid Sheikh Mohammed.... ‘Damn right,’ I said.”<sup>40</sup>
- Until at least May 2004, the CIA did not seek OLC approval to use enhanced interrogation techniques on new detainees brought into the secret program, but relied on the 1 August 2002 memorandum relating to Abu Zubaydah.<sup>41</sup>

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

- For the first two-and-a-half years of the detentions at Guantánamo, that is, until the US Supreme Court’s *Rasul v. Bush* ruling in June 2004 that US federal courts had jurisdiction to consider habeas corpus petitions filed on behalf of the detainees, the detainees had no access to legal counsel or to any court of law.
- Saudi national Mohamed al-Qahtani, for example, was one of more than 700 detainees taken to Guantánamo from January 2002 to June 2004. He was taken into custody by Pakistani forces when trying to enter Pakistan from Afghanistan on 15 December 2001. This was during a period in which the armed conflict in Afghanistan constituted an international armed

conflict for purposes of international law. He was handed over to US forces on 26 December 2001 and transferred to Guantánamo on 13 February 2002. In late 2002, the US came to suspect him of having “high value” intelligence, and to consider him resistant to standard military interrogation techniques.

- On 8 August 2002 al-Qahtani (referred to as detainee number 063) was taken to an isolation facility. He was held in isolation there until at least 15 January 2003, some 160 days later. A FBI memorandum dated 14 July 2004 recalled that “in November 2002, FBI agents observed Detainee #63 after he had been subject to intense isolation for over three months. During that time period, #63 was totally isolated (with the exception of occasional interrogations) in a cell that was always flooded with light. By late November, the detainee was evidencing behavior consistent with extreme psychological trauma (talking to non-existent people, reporting hearing voices, crouching in a cell covered with a sheet for hours).”<sup>42</sup>
- On 2 December 2002, Secretary Rumsfeld approved, “as a matter of policy”, a number of “counter-resistance” techniques for use in interrogating detainees at Guantánamo, including stress positions, sensory deprivation, prolonged isolation, the use of 20-hour interrogations, hooding during transportation and interrogation, stripping, forcible shaving, and “using detainees individual phobias (such as fear of dogs) to induce stress”.<sup>43</sup>
- In 2002, “US government officials” discussed subjecting Mohamed al-Qahtani to the sort of techniques “being used with subjects including Abu Zabaida [sic]” in CIA custody and that this could “greatly enhance” Mohamed al-Qahtani’s “productivity”.<sup>44</sup>
- After three months in isolation, Mohamed al-Qahtani was for the next eight weeks – 23 November 2002 to around 15 January 2003 – subjected to interrogation under a Special Interrogation Plan. Lieutenant General Randall M. Schmidt, who led a military investigation into FBI allegations of detainee abuse at Guantánamo said of the treatment of Mohamed al-Qahtani: “...for at least 54 days, this guy was getting 20 hours a day interrogation in the white cell. In the white room for four hours and then back out.” He elaborated that for the four hours a day that Mohamed al-Qahtani was not under interrogation, “he was taken to a white room... with all the lights and stuff going on and everything...”<sup>45</sup>
- During interrogation, Mohamed al-Qahtani – always in shackles – was variously forced to wear a woman’s bra and had a thong placed on his head; was tied by a leash and led around the room while being forced to perform a number of dog tricks; was forced to dance with a male interrogator while made to wear a towel on his head “like a burka”; was forced to wear a mask made from a box with a “smiley face” on it, dubbed the “happy Mohammed” mask by the interrogators; was subjected to forced standing, forcible shaving of his head and beard during interrogation (and photographing immediately after this), stripping and strip-searching in the presence of women, sexual humiliation, and to sexual insults about his female relatives; had water repeatedly poured over his head; had pictures of “swimsuit models” hung round his neck; was subjected to hooding, loud music for up to hours on end, white noise, sleep deprivation, and to extremes of heat and cold through manipulation of air conditioning.<sup>46</sup> Dogs were used to induce fear in him. On at least two occasions, a dog was “brought into the interrogation room and directed to growl, bark, and show his teeth” at the detainee. Lt. Gen. Schmidt said: “[H]ere’s this guy

manacled, chained down, dogs brought in, put his face [sic], told to growl, show teeth, and that kind of stuff. And you can imagine the fear kind of thing."<sup>47</sup>

- In May 2008, Susan Crawford, then convening authority for the military commissions at Guantánamo, dismissed charges against Mohamed al-Qahtani, then facing trial by military commission. In January 2009, she explained: "We tortured Qahtani. His treatment met the legal definition of torture. And that's why I did not refer the case".<sup>48</sup>
- The Department of Defense Inspector General found that Standard Operating Procedures (SOP) for US forces in Afghanistan had been "influenced by the counter-resistance memorandum that the Secretary of Defense approved on December 2, 2002 and incorporated techniques designed for detainees who were identified as unlawful combatants. Subsequent battlefield SOPs included techniques such as yelling, loud music, and light control, environmental manipulation, sleep deprivation/adjustment, stress positions, 20-hour interrogations, and controlled fear (muzzled dogs)..."<sup>49</sup>
- From Afghanistan, "the techniques made their way to Iraq", according to the Senate Committee on Armed Services.<sup>50</sup>
- In a number of cases, US federal and military judges have found detainees' allegations of torture and other ill-treatment by US military and CIA personnel in Afghanistan and Guantánamo to be credible.<sup>51</sup>
- In a ruling issued in April 2010, for example, a US District Court Judge wrote that "there is ample evidence in this record that [Mohamedou Ould] Salahi [Slahi] was subjected to extensive and severe mistreatment at Guantánamo from mid-June 2003 to September 2003". This was the period that Mohamedou Slahi had been labelled by his US military captors as having "Special Projects Status" and subjected to a 90-day "special interrogation plan" requested by the Defense Intelligence Agency (DIA) and approved 1) by the commander of the Guantánamo detentions, General Geoffrey Miller on 1 July 2003, 2) by Deputy Secretary of Defense Paul Wolfowitz on 28 July 2003, and 3) by Secretary of Defense Donald Rumsfeld on 13 August 2003.<sup>52</sup> The plan stated that it would "not be implemented until approved by higher authority".<sup>53</sup> Mohamedou Ould Slahi was allegedly deprived of sleep for some 70 days straight, subjected to strobe lighting and continuous loud heavy metal music, threats against him and his family, intimidation by dog, cold temperatures, dousing with cold water, physical assaults, and food deprivation. He was subjected to a fake rendition, with threats of enforced disappearance and death. The ICRC repeatedly sought access to Mohamedou Slahi during this period but were denied on the grounds of "military necessity".<sup>54</sup>
- An unknown number of individuals were subjected to enforced disappearance in US custody during the armed conflict in Iraq. Known by US forces as "ghost detainees", these individuals were in military custody but were kept off prison registers and hidden from the ICRC at the request of the CIA. The military investigation conducted by US Army Major General Antonio Taguba into the activities of the 800<sup>th</sup> Military Police (MP) Brigade in Iraq found that "the various detention facilities operated by the 800<sup>th</sup> MP Brigade have routinely held persons brought to them by Other Government Agencies (OGAs)<sup>55</sup> without accounting for them, knowing their identities, or even the reason for their detention. The Joint Interrogation and Debriefing Center (JIDC) at Abu Ghraib called these detainees "ghost detainees". On at least one occasion, the 320<sup>th</sup> MP Battalion at Abu Ghraib held a handful

of “ghost detainees” (6-8) for OGAs that they moved around the facility to hide them from a visiting International Committee of the Red Cross (ICRC) survey team. This maneuver was deceptive, contrary to Army Doctrine, and in violation of international law”.<sup>56</sup>

- While details of most cases of “ghost detainees” remains unknown, US authorities have let it be known that in November 2003, Secretary of Defense Rumsfeld, acting on the request of the CIA's then director George Tenet, ordered military officials in Iraq to keep a detainee off any prison register. In June 2004, after seven months, the unidentified detainee had still not been registered with the ICRC. The case concerned a detainee sometimes known as Triple-X, and reportedly held at the Camp Cropper detention facility.
- General Paul Kern, who oversaw the Fay military investigation following the Abu Ghraib abuses, said that “there are enough unknown questions about the ‘ghost detainees’ and what agreements were made with whom”, such that further investigation should be required. No further investigation is known to have been carried out.<sup>57</sup> On 9 September 2004, General Paul Kern told the Senate Armed Services Committee that there might have been as many as 100 “ghost detainees” in US military custody in Iraq.<sup>58</sup>
- A leaked ICRC report dated February 2004 found that ill-treatment by US forces in Iraq was systematic in the cases of detainees suspected of security offences or deemed to have intelligence value. Such individuals “were at high risk of being subjected to a variety of harsh treatments ranging from insults, threats and humiliations to both physical and psychological coercion, which in some cases was tantamount to torture, in order to force cooperation with their interrogators”. The treatment of “high value detainees” held at a facility at Baghdad International Airport, the ICRC concluded, “constituted a serious violation of the Third and Fourth Geneva Conventions”.<sup>59</sup>

## **5. GEORGE W. BUSH WAS COMMANDER IN CHIEF OF THE US ARMED FORCES**

- Under Article II, Section 2 of the United State Constitution, the President is Commander in Chief of the Armed Forces.
- George W. Bush decided to respond to the 11 September 2001 attacks by declaring a global “war” on terror.<sup>60</sup> He has said that his “authority to conduct the war on terror came from two sources. One was Article II of the Constitution, which entrusts the president with wartime powers as command in chief. The other was a congressional war resolution passed three days after 9/11”.<sup>61</sup> This was the Authorization for Use of Military Force (AUMF).
- A 25 September 2001 memorandum from the US Department of Justice to the White House asserted that even the broadly worded AUMF could not “place any limits on the President's determinations as to any terrorist threat, the amount of military force to be used in response, or the method, timing, and nature of the response. These decisions, under our Constitution, are for the President alone to make”.<sup>62</sup>
- The Bush administration took the position that as “one of the core functions of the Commander-in-Chief is that of capturing, detaining, and interrogating members of the enemy”, “any effort by Congress to regulate the interrogation of battlefield combatants would violate the Constitution's sole vesting of the Commander-in-Chief authority in the President”. Notwithstanding that in this case the administration asserted that the entire

globe was the battlefield, and the enemy was sweepingly defined in “a war with an international terrorist organization”, it nevertheless claimed that “Congress can no more interfere with the President’s conduct of the interrogation of enemy combatants than it can dictate strategic or tactical decisions on the battlefield”.<sup>63</sup>

- In the USA, “The Secretary of Defense is the principal defense policy adviser to the President and is responsible for the formulation of general defense policy and policy related to all matters of direct concern to the Department of Defense, and for the execution of approved policy. *Under the direction of the President*, the Secretary exercises authority, direction and control over the Department of Defense. The Secretary of Defense is a member of the President's Cabinet and of the National Security Council” [emphasis added]<sup>64</sup> George W. Bush has recalled, of Donald Rumsfeld, that “he respected the chain of command”.<sup>65</sup>
- On 13 November 2001, as Commander In Chief, President George W. Bush signed a Military Order on the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism. The Military Order outlines the authority of the Secretary of Defense to hold individuals without trial “at an appropriate location designated by the Secretary of Defense outside or within the United States”, and/or to bring such detainees to trial by military commissions which were expressly not required to apply “the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts”.<sup>66</sup>

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

- A 25 January 2002 memorandum to then-President George W. Bush drafted by White House Counsel Alberto Gonzales advised that a “positive” consequence of determining that Geneva Convention protections would not apply to detainees held in what he called the “war against terrorism”, which he described as a “new kind of war” that “places a high premium” on “the ability to quickly obtain information from captured terrorists and their sponsors”, would be the substantial reduction in the threat that US agents would be liable for criminal prosecution under the USA War Crimes Act. The War Crimes Act criminalized as war crimes under US law conduct prohibited under Article 3 common to the four Geneva Conventions of 1949, including torture, cruel treatment, and “outrages upon personal dignity, in particular, humiliating and degrading treatment”.<sup>67</sup>
- On 1 February 2002, US Attorney General John Ashcroft wrote to then-President Bush that a presidential determination against applying Geneva Convention protections to detainees “would provide the highest assurance that no court would subsequently entertain charges that American military officers, intelligence officials, or law enforcement officials violated Geneva Convention rules relating to field conduct, detention conduct or



interrogation of detainees. The War Crimes Act of 1996 makes violation of parts of the Geneva Convention a crime in the United States".<sup>68</sup>

- On 7 February 2002, then-President Bush signed a memorandum which states that al-Qa'ida and Taleban detainees do not qualify as prisoners of war, nor would Common Article 3 be applied to them. The memorandum suggested that humane treatment of detainees in the "new paradigm" of the "war against terrorism" would be a policy choice not a legal requirement, and that there were detainees "who are not legally entitled to such treatment".<sup>69</sup>
- In a 14 March 2003 memorandum on the military interrogation of foreign "enemy combatants" held outside the USA, the OLC advised the Pentagon that "under our Constitution, the sovereign right of the United States on the treatment of enemy combatants is reserved to the President as Commander-in-Chief", and "it is well established that the sovereign retains the discretion to treat unlawful combatants as it sees fit". General criminal laws, it continues, "must be construed as not applying to interrogations undertaken pursuant to his Commander-in-Chief authority", and "any effort by Congress to regulate the interrogation of enemy combatants" would be unconstitutional. In addition, the memorandum asserts, the USA's War Crimes Act – criminalizing as war crimes violations of the Geneva Conventions – does not apply to the interrogation of *al-Qa'ida* or Taleban detainees, it argued, because they do not qualify for Geneva Convention protections. Similarly it argues that the anti-torture statute – criminalizing torture by US agents abroad – does not apply if the interrogations are conducted "on permanent military bases outside the territory of the United States", including Guantánamo.<sup>70</sup>

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

- A 7 February 2002 memorandum signed by then-President George W. Bush to his administration stated that: "Of course, our values as a Nation, values which we share with many nations in the world, call for us to treat detainees humanely, including those who are not legally entitled to such treatment... As a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva".<sup>71</sup> In 2008, the US Senate Committee on Armed Services concluded that then-President Bush's 7 February 2002 decision "to replace well established military doctrine, i.e., legal compliance with the Geneva Conventions, with a policy subject to interpretation, impacted the treatment of detainees in US custody".<sup>72</sup> The Committee noted that the "President's order was not, apparently, followed by any guidance that defined the terms 'humanely' or 'military necessity'. As a result, those in the field were left to interpret the President's order."<sup>73</sup> Indeed, "senior officials in the United States government solicited information on how to use aggressive techniques, redefined the law to create the appearance of their legality, and authorized their use against detainees".<sup>74</sup> In practice, the idea that compliance with the rules of international humanitarian law could

- be set aside whenever it was deemed “militarily necessary” was a significant contributing factor to the war crimes that subsequently occurred.
- As the information set out above demonstrated, at the very least, then-President Bush knew that, with his authorization, some individuals would be subjected by forces under his command to acts that intentionally inflicted severe pain or suffering, of a physical or mental nature, for the purposes of obtaining information; he became aware that such acts were being committed. Further public information, described above, confirms that acts of torture and other war crimes were also perpetrated with the authorization or acquiescence of Secretary Defence Rumsfeld or others in the chain of command. If then-President Bush did not specifically authorize such crimes, then there is no evidence that he, as Commander in Chief, took all reasonable and necessary measures to ensure: (1) that system was in place to secure proper treatment of prisoners and to prevent their ill-treatment in accordance with the standards of international law; (2) that any such system was operating in a continuous and effective manner; and (3) that violations of the standards were punished when detected by that system.
  - Either George W. Bush, when President, knew about the authorization and use by Secretary Rumsfeld and others of such practices as “counter-resistance techniques” and holding “ghost detainees” at or around the time they were being authorized or occurring, or he failed to take reasonable measures to acquire such knowledge. In any event, after such information became public after mid-2004, he failed to take all the measures necessary and reasonable to prevent further such abuse of detainees and to hold to account those responsible for previous abuses.
  - Then-President Bush also knew that the use of secret and incommunicado detention facilitates torture. In a proclamation against torture issued on 26 June 2003, President Bush asserted that “Notorious human rights abusers, including, among others, Burma, Cuba, North Korea, Iran, and Zimbabwe, have long sought to shield their abuses from the eyes of the world by staging elaborate deceptions and denying access to international human rights monitors.” The ICRC and human rights monitors were denied access to detainees held in the CIA program (and indeed the ICRC was even denied access to some detainees held in military custody in the context of armed conflicts).

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

- Amnesty International and others have for more than six years been calling on the US authorities to conduct criminal investigations into the allegations and evidence of torture and other crimes under international law perpetrated against detainees by US forces.<sup>75</sup>
- As far as is known, there have been no prosecutions of anyone in relation to the CIA program of secret detention and interrogation of “high-value” detainees. (Further, the US administration continues to invoke the “state secrets privilege” to block lawsuits seeking remedy and accountability for alleged human rights violations by the CIA).
- In August 2009, the US Attorney General ordered a “preliminary review into whether federal laws were violated in connection with the interrogation of

specific detainees at overseas locations". At some point, the appointed prosecutor will recommend to the Attorney General "whether there is sufficient predication for a full investigation into whether the law was violated in connection with the interrogation of certain detainees." At the same time, the Attorney General has emphasised that "the Department of Justice will not prosecute anyone who acted in good faith and within the scope of the legal guidance given by the Office of Legal Counsel regarding the interrogation of detainees." The preliminary review "will not focus on those individuals". The US Attorney General added that he "share[d] the President's conviction that as a nation, we must, to the extent possible, look forward and not backward when it comes to issues such as these."<sup>76</sup>

- On 9 November 2010, the US Department of Justice announced that no one would face prosecution for the CIA's destruction of 92 videotapes of the interrogations of Abu Zubaydah and 'Abd al-Nashiri.<sup>77</sup> The tapes included recordings of the use of "enhanced interrogation techniques", including "water-boarding".
- A number of military investigations and reviews have been conducted in relation to detentions and interrogations of detainees in Iraq, Afghanistan and Guantánamo. None have been comprehensive in scope, and none have the independence or reach necessary to be able to investigate the role of high-level officials, such as the Secretary of Defense or the President.<sup>78</sup>
- At the UN Human Rights Council in Geneva on 9 November 2010, the legal advisor to the US Department of State said: "Allegations of past abuse of detainees by US forces in Afghanistan, Iraq and Guantánamo have been investigated and appropriate corrective action taken."<sup>79</sup> As described above, however, any investigations that were undertaken failed fully to cover the range of crimes or perpetrators necessary to meet international obligations.
- US Army Major General Antonio Taguba (retired): "After years of disclosures by government investigations, media accounts, and reports from human rights organizations, there is no longer any doubt as to whether the [Bush] administration has committed war crimes. The only question that remains to be answered is whether those who ordered the use of torture will be held to account."<sup>80</sup>

## **9. SWITZERLAND'S OBLIGATIONS TO ARREST, INVESTIGATE, AND PROSECUTE OR EXTRADITE**

- Switzerland has been party to the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), 1465 UNTS 85, since 2 December 1986.
- Article 1 of the UNCAT sets out the definition of torture for the purposes of the treaty:

"any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."<sup>81</sup>

- Article 2 eliminates any exceptional circumstances whatsoever, including but not limited to a state of war or a threat of war, internal political instability or any other public emergency, as ever providing a justification for torture. Article 4 requires that all acts of torture, any attempt to commit torture and any “act by any person” that constitutes “complicity or participation in torture” be an offence under national laws. Articles 5 to 7 establish an obligation on every state party to exercise and enforce criminal jurisdiction over anyone who enters its territory who is alleged to have committed any such offence. Article 7(1) specifies, in mandatory language, that: “The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.” The person must be taken into custody or made subject to other legal measures to ensure his presence (article 6(1)). A preliminary inquiry must be launched immediately (article 6(2)). The case must be submitted to competent authorities for the purpose of prosecution unless the person is extradited to another state able and willing to do so (article 7(1)). States Parties must afford one another “the greatest measure of assistance in connection with criminal proceedings brought in respect of any of the offences referred to in article 4, including the supply of all evidence at their disposal necessary for the proceedings” (article 9(1)).
- Switzerland has represented to the UN Committee against Torture, pursuant to the state’s reporting obligation under the UNCAT, that “the criminal provisions in force in our country cover and severely punish all behaviour that could be described as acts of torture (such as offences against life and physical integrity, offences against liberty, offences against sexual integrity, offences against honour, abuse of authority, etc.)”<sup>82</sup> Switzerland has affirmed that pursuant to its domestic laws it has established “jurisdiction in all the hypothetical situations envisaged in article 5 of the Convention.”<sup>83</sup> It has identified articles 217 et seq of the Code of Criminal Procedure, as well as provisions under Cantonal laws, as providing the authority to arrest or otherwise ensure the presence of a person as required by article 6 of the UNCAT.<sup>84</sup> It has affirmed that the requirement to prosecute anyone who is not extradited is also provided for by articles 5 to 7 of the Code Pénal and Cantonal laws.<sup>85</sup>
- George W. Bush authorized the commission of acts of abuse against detainees. Among the acts he has publicly admitted to having authorised was the intentional and coercive inducement in a person who is tightly physically restrained, of the initiation of the process of suffocation by drowning. Such treatment was intended to, and inherently involved, the infliction of severe pain and suffering of a mental and/or physical nature. He has admitted that this pain and suffering was inflicted for the purpose of obtaining information. Such acts unquestionably fall within the legal definition of torture under international law. Indeed, US courts and government agencies had themselves previously characterised it as such. His intentional authorization of such acts constitutes participation and/or complicity in acts of torture, and therefore fall within the scope of the UNCAT as implemented in Swiss law.
- Switzerland has been party to the Third and Fourth Geneva Conventions of 1949 since 31 March 1950, and the 1977 First and Second Protocols since 17 February 1982. Grave breaches of the Conventions and First Protocol are subject to a similar regime of mandatory criminal jurisdiction

to that under the UNCAT. Among the grave breaches defined by these treaties are “torture or inhuman treatment”, “wilfully causing great suffering or serious injury to body or health”, and “unlawful deportation or transfer or unlawful confinement” of a person protected by the Fourth Convention (article 147, Fourth Convention); and “torture or inhuman treatment” or “wilfully causing great suffering or serious injury to body or health” of a person protected by the Third Convention. The 1949 Geneva Conventions provide that each state party must “enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article” and is “under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts” if it does not “hand such persons over for trial” by another state party.<sup>86</sup> The Conventions also specify that “No High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in the preceding Article.”<sup>87</sup>

- Switzerland has been party to the Rome Statute of the International Criminal Court, 2187 UNTS 3, since 12 October 2001. The Rome Statute recognises that, in addition to “grave breaches” of the Geneva Conventions, certain violations of *customary* international humanitarian law in armed conflicts (whether international or non-international) also constitute crimes under international law: for instance, “torture”, “cruel treatment”, and “outrages upon personal dignity, in particular humiliating and degrading treatment” (i.e. including violations of common article 3 of the 1949 Geneva Conventions). Commanders and other superiors are criminally responsible for war crimes committed by their subordinates, at least where they knew, or had reason to know, that their subordinates were about to commit or were committing such crimes and the superior did not take all necessary and reasonable measures in their power to prevent the commission or, if the crimes had already been committed, to punish the persons responsible.<sup>88</sup>
- As part of implementing its obligations under the Geneva Conventions, customary international humanitarian law, and the Rome Statute, Switzerland enacted the “Loi fédérale portant modification de lois fédérales en vue de la mise en oeuvre du Statut de Rome de la Cour pénale internationale” which came into force in January 2011, and brings a wide range of war crimes, formerly largely treated under the jurisdiction of the military justice system, within the scope of the civilian justice system. The law also expressly recognises a rule of commander/superior responsibility.
- Again, Amnesty International submits that the publicly-available information referenced above provides a sufficient basis to investigate and exercise criminal jurisdiction over George W. Bush for crimes under one or more of those provisions, particularly should he enter the territory of Switzerland.
- These crimes are not ones for which a former head of state is entitled to any immunity under international law.<sup>89</sup>

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USA: Impunity for crimes in CIA secret detention program continues, 29 January 2010, <http://www.amnesty.org/en/library/info/AMR51/008/2010/en>

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Memorandum to the US Government on the rights of people in US custody in Afghanistan and Guantánamo Bay, April 2002, <http://www.amnesty.org/en/library/info/AMR51/053/2002/en>

## ENDNOTES

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

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

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

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

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

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

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

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

<sup>9</sup> Evan Wallach, ‘Drop by drop: Forgetting the history of water torture in US courts’, Columbia Journal of Transnational Law, Volume 45 (2006-2007), pages 468 to 506.

<sup>10</sup> See President Barack Obama, News Conference, 29 April 2009 (“I believe that waterboarding was torture. And I think that the -- whatever legal rationales were used, it was a mistake”). Attorney General Eric Holder at the Jewish Council for Public Affairs Plenum, Washington, DC, 2 March 2009 (“As I unequivocally stated in my confirmation hearing before the US Senate, water-boarding is torture. My Justice Department will not justify it, rationalize it, or condone it. The sanction of torture is at odds with the history of American jurisprudence and American principles.”). (See also, for instance, statement to UK Parliament by then-UK Foreign Secretary David Miliband “I consider that water-boarding amounts to torture”, HC Deb, 21 April 2008, col 1726W; statement to the 63<sup>rd</sup> Session of the UN General Assembly, by the Special Rapporteur on Torture, Manfred Nowak, Thursday, 23 October 2008, paragraph 3; Committee against Torture, Concluding Observations on USA, UN Doc CAT/C/USA/CO/2 (25 July 2006), para 24; Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, UN Doc A/HRC/13/39/Add.5 (5 February 2010), para 74; Interview with Special Rapporteur on torture, Juan Mendez (12 November 2010), <http://www.abc.net.au/pm/content/2010/s3065204.htm>; Judgement of the International Military Tribunal for the Far East (1948). Part B, Chapter VIII, p. 1059.

<sup>11</sup> For example, the entry on Tunisia in the State Department’s report on human rights practices during 2003 found that “security forces tortured detainees to elicit confessions and political prisoners to discourage resistance. The forms of torture included: electric shock; confinement to tiny, unlit cells; submersion of the head in water; beatings with hands, sticks, and police batons; suspension from cell doors resulting in lost consciousness; cigarette burns; and food and sleep deprivation”. Tunisia. Country Reports on Human Rights Practices, Bureau of Democracy, Human Rights, and Labor, US Department of State, 2003, 25 February 2004, <http://www.state.gov/g/drl/rls/hrrpt/2003/27939.htm>



<sup>12</sup> ICRC 2007 report, *op. cit.*

<sup>13</sup> *Ibid.*

<sup>14</sup> See, for instance, Declaration of Leon E. Panetta, Director, Central Intelligence Agency, 21 September 2009. In *ACLU v. DoD*, In the US District Court for the Southern District of New York (“Specifically, information such as certain details about the conditions of confinement..., locations of detention facilities, assistance of foreign entities..., has not been disclosed... Operational details regarding the CIA’s former interrogation program – that is, information regarding how the program was actually implemented – also remains classified, as do descriptions of the implementation or application of interrogation techniques, including details of specific interrogations where Enhanced Interrogation Techniques (EITs) were used (excepting such general information that has been released to date on these topics)”.

<sup>15</sup> Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, Re: Application of 18 U.S.C. §§ 2340-2340A to the combined use of certain techniques in the interrogation of high value al Qaeda detainees, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 10 May 2005.

<sup>16</sup> CIA Inspector General Special Review, *op. cit.*, para. 91.

<sup>17</sup> *ACLU v. DOD, CIA*, In the US Court of Appeals for the Southern District of New York, Brief for Appellees, March 2010.

<sup>18</sup> Verbatim transcript of Combatant Status Review Tribunal Hearing for ISN 10015, held at Guantánamo on 14 March 2007, as declassified on 12 June 2009.

<sup>19</sup> A review of the FBI’s involvement in and observations of detainee interrogations in Guantánamo Bay, Afghanistan, and Iraq, Oversight and Review Division, Office of the Inspector General, US Department of Justice, October 2009 (revised), page 74 [hereinafter FBI OIG report].

<sup>20</sup> ICRC report, February 2007, *op. cit.*

<sup>21</sup> See Question 7, Frequently Asked Questions, Central Intelligence Agency website, <https://www.cia.gov/about-cia/faqs/index.html#covertactions>

<sup>22</sup> Ninth Declaration of Marilyn A. Dorn, Deputy Chief, Policy and Community Action Staff, National Clandestine Service, Central Intelligence Agency, 7 June 2007.

<sup>23</sup> George Tenet, *At the Center of the Storm*, Harper Books 2007, page 366.

<sup>24</sup> George W. Bush, *Decision points*, Virgin Books, 2010, pages 186.

<sup>25</sup> CBS news transcript. *Face the Nation*, 10 May 2009. Dick Cheney interview with Bob Schieffer.

<sup>26</sup> *USA v. Ghailani*, Supplement to opinion ruling on defendant’s motion to dismiss the indictment for alleged deprivation of speedy trial, US District Court for Southern District of New York, 12 July 2010.

<sup>27</sup> *USA v. Ghailani*, Opinion, US District Court for the Southern District of New York, 6 October 2010. Redacted version released on 13 October 2010.

<sup>28</sup> 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, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 30 May 2005; and Memorandum for John A. Rizzo, acting General Counsel, Central Intelligence Agency, Re: Application of the War Crimes Act, the Detainee Treatment Act, and Common Article 3 of the Geneva Conventions to certain techniques that may be used by the CIA in the interrogation of high value al Qaeda detainees, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office

of Legal Counsel, US Department of Justice, 20 July 2007.

<sup>29</sup> Remarks on signing the Military Commissions Act of 2006, President George W. Bush, 17 October 2006.

<sup>30</sup> Defense Department takes custody of a high-value detainee. US Department of Defense news release, 27 April 2007.

<sup>31</sup> Executive Order 13440 – Interpretation of the Geneva Conventions Common Article 3 as applied to a program of detention and interrogation operated by the Central Intelligence Agency, 20 July 2007.

<sup>32</sup> Defense Department takes custody of a high-value detainee. US Department of Defense news release, 14 March 2008.

<sup>33</sup> Decision points, *op. cit.*, page 171.

<sup>34</sup> Memorandum for Alberto R. Gonzales, Counsel to the President, Re: Standards of conduct for interrogation under 18 U.S.C §§ 2340-2340A, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 1 August 2002.

<sup>35</sup> Investigation into the Office of Legal Counsel's memoranda concerning issues relating to the Central Intelligence Agency/s use of 'enhanced interrogation techniques' on suspected terrorists [hereinafter OPR Report]. Office of Professional Responsibility, Report, 29 July 2009, page 50.

<sup>36</sup> Memorandum for John Rizzo, Acting General Counsel of the Central Intelligence Agency: Interrogation of al Qaeda operative, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 1 August 2002.

<sup>37</sup> OPR Report, pages 35-36. "Use of diapers" was subsequently approved by CIA Director George Tenet, without expressly mentioning humiliation as a purpose, as a "standard interrogation technique" and as a part of other techniques. A 2005 OLC memorandum noted that "because releasing a detainee from the shackles would present a security problem and would interfere with the effectiveness of the technique [of sleep deprivation], a detainee undergoing sleep deprivation frequently wears an adult diaper". The OLC memorandum noted that the CIA had claimed "that diapers are used solely for sanitary and health reasons and not in order to humiliate the detainee". Re: Application of United States obligations under Article 16 of the Convention against Torture to certain techniques that may be used in the interrogation of high value al Qaeda detainees. Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 30 May 2005.

<sup>38</sup> OPR Report, page 61.

<sup>39</sup> Decision Points, page 168-169.

<sup>40</sup> Decision Points, page 170-171.

<sup>41</sup> OPR Report, *op. cit.*, page 124, note 95.

<sup>42</sup> Re: suspected mistreatment of detainees. To Major General Donald J. Ryder, Department of the Army, from T.J. Harrington, Deputy Assistant Director, Counterterrorism Division, US Department of Justice, Federal Bureau of Investigation. 14 July 2004.

<sup>43</sup> Action memo, Counter-resistance techniques. Office of the Secretary of Defense, 27 November 2002, signed by Secretary Rumsfeld, 2 December 2002. See also Memorandum for Commander, Joint Task Force 170, Legal brief on proposed counter-resistance strategies, 11 October 2002.

<sup>44</sup> FBI OIG Report, *op. cit.*, page 93.

<sup>45</sup> Testimony of LTG Randall M. Schmidt. Taken 24 August 2005 at Davis Mountain Air Force Base,

Arizona. Department of the Army Inspector General, Investigations Division.

<sup>46</sup> FBI OIG report, pages 102-103. See also USA: Where is the accountability? Health concern as charges against Mohamed al-Qahtani dismissed, Amnesty International, 20 May 2008.

<sup>47</sup> Testimony of LTG Randall M. Schmidt. Taken 24 August 2005, *op. cit.*

<sup>48</sup> Detainee tortured, says US official. Bob Woodward, Washington Post, 14 January 2009. See also, A case to answer: the torture of Mohamed al-Qahtani, in Memorandum to the US Government on the report of the UN Committee Against Torture and the question of closing Guantánamo, Amnesty International, June 2006.

<sup>49</sup> Inquiry into the treatment of detainees in US custody. Report of the Committee on Armed Services, United States Senate, 20 November 2008, page xxiii (executive summary)[Hereinafter Senate Armed Services Committee report].

<sup>50</sup> *Ibid.*

<sup>51</sup> See, for a selection of examples and citations, USA: See no Evil: Government turns the other way as judges make findings about torture and other abuse, Amnesty International, February 2011.

<sup>52</sup> Senate Armed Services Committee Report, *op. cit.*, and FBI OIG Report, *op. cit.*

<sup>53</sup> Senate Armed Services Committee Report, *op. cit.*, page 138.

<sup>54</sup> Memorandum for the Record, ICRC meeting with MG Miller on 9 Oct 03. US Department of Defense, Joint Task Force 170, Guantánamo Bay, Cuba. The ICRC stated that they had still not been able to visit detainee #760 (Mohamedou Ould Slahi), but were told by the commander of the Guantánamo detentions that he was "off limits" due to "military necessity". At a later meeting on 2 February 2004, the ICRC raised the case again, but were again told that they could not see him privately. Department of Defence minutes of ICRC meeting 2 Feb 2004/1620.

<sup>55</sup> OGA usually refers to the CIA.

<sup>56</sup> Article 15-6 investigation of the 800<sup>th</sup> Military Police Brigade, 2004 (the Taguba report).

<sup>57</sup> See, for instance, Defense Department regular briefing, 17 June 2004, US Department of Defense transcript.

<sup>58</sup> See, for instance, Army says CIA hid more Iraqis than it claimed. New York Times, 10 September 2004.

<sup>59</sup> Report of the International Committee of the Red Cross (ICRC) on the treatment by the Coalition Forces of prisoners of war and other protected persons by the Geneva Conventions in Iraq and during arrest, internment and interrogation, February 2004.

<sup>60</sup> Decision Points, *op. cit.*, pages 136-137.

<sup>61</sup> Decision Points, page 154.

<sup>62</sup> Memorandum opinion for Timothy Flanigan, The Deputy Counsel to the President: The President's constitutional authority to conduct military operations against terrorists and nations supporting them, From John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 25 September 2001.

<sup>63</sup> Memorandum for Alberto R. Gonzales, Counsel to the President, Re: Standards of conduct for interrogation under 18 U.S.C §§ 2340-2340A, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 1 August 2002, *op. cit.*

<sup>64</sup> US Department of Defense Website, <http://www.defense.gov/home/top-leaders/>

<sup>65</sup> Decision Points, *op. cit.*, pages 84, 92.

<sup>66</sup> Military Order: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 13 November 2001.

<sup>67</sup> Memorandum for the President: Decision re application of the Geneva Convention on prisoners of war to the conflict with Al Qaeda and the Taliban, From Alberto R. Gonzales, 25 January 2002.

<sup>68</sup> Letter from John Ashcroft, Attorney General, to President George W. Bush, 1 February 2002.

<sup>69</sup> Memorandum for the Vice President et al: Humane treatment of al Qaeda and Taliban detainees, from President George W. Bush, 7 February 2002.

<sup>70</sup> Re: Military interrogations of alien unlawful enemy combatants held outside the United States. Memorandum for William J. Haynes II, General Counsel of the Department of Defense, from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 14 March 2003.

<sup>71</sup> Humane treatment of al Qaeda and Taliban detainees, *op. cit.*

<sup>72</sup> Senate Armed Services Committee report, *op. cit.*, page xiii.

<sup>73</sup> *Ibid.*, page 3

<sup>74</sup> *Ibid.*, page xii.

<sup>75</sup> For example, USA: Human Dignity Denied: Torture and accountability in the 'war on terror', Amnesty International, October 2004, p 160. "Bring to trial all individuals – whether they be members of the administration, the armed forces, intelligence services and other government agencies, medical personnel, private contractors or interpreters – against whom there is evidence of having authorized, condoned or committed torture or other cruel, inhuman or degrading treatment; Any person alleged to have perpetrated an act of 'disappearance' should, when the facts disclosed by an official investigation so warrant, be brought before the competent civil authorities for prosecution and trial, in accordance with Article 14 of the UN Declaration on the Protection of All Persons from Enforced Disappearance"

<sup>76</sup> Attorney General Eric Holder regarding a preliminary review into the interrogation of certain detainees, US Department of Justice News Release, 24 August 2009.

<sup>77</sup> Department of Justice statement on the investigation into the destruction of videotapes by CIA personnel. US Department of Justice News Release, 9 November 2010.

<sup>78</sup> For example, James Schlesinger, the chairperson of the investigative panel promoted by the Bush administration as the most independent of all the reviews described Secretary Rumsfeld's conduct with regard to the issue of interrogation policy as "exemplary", despite his having signed the "counter-resistance techniques" memorandum on 2 December 2002. The other members of the Independent Panel to Review Department of Defense Detention Operations (Schlesinger Panel) agreed with such a view. One of them confirmed before the investigation began that Secretary Rumsfeld was not to be the focus of their investigation. See, US Department of Defense news transcript, Press conference with members of the Independent Panel to Review Department of Defense Detention Operations, 24 August 2004.

<sup>79</sup> Response of the United States of America to Recommendations of the United Nations Human Rights Council, Harold Hongju Koh, Legal Advisor U.S. Department of State, Geneva, Switzerland, 9 November 2010, <http://www.state.gov/s/l/releases/remarks/150677.htm>

<sup>80</sup> Preface to Broken Laws, Broken Lives: Medical Evidence of Torture by US personnel and its impact, Physicians for Human Rights, June 2008.

<sup>81</sup> Article 1 also: notes that "torture" does not include pain or suffering "arising only from, inherent in or incidental to lawful sanctions" – that is, inherent in a lawful deprivation of liberty that itself is consistent

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with international human rights standards (such as the UN Standard Minimum Rules on the Treatment of Prisoners); expressly provides that the UNCAT definition is "without prejudice to any international instrument or national legislation which does or may contain provisions of wider application."

<sup>82</sup> Sixth Periodic Report (UN Doc. CAT/C/CHE/6, 18 March 2009), para 194. See also the detailed identification of relevant provisions of the Code Pénal in the Third Periodic Report (UN Doc. CAT/C/34/Add.6, 19 June 1997), paragraphs 6-12. See also paragraphs 1-32 and 46-50 of the Initial Report (UN Doc. CAT/C/5/Add.17, 1989).

<sup>83</sup> Sixth Periodic Report, paragraph 109, referring to articles 3 to 7 of the Code Pénal. See also paragraph 52 of the Initial Report.

<sup>84</sup> Sixth Periodic Report, paragraphs 112-115. See also paragraphs 53-54 of the Initial Report.

<sup>85</sup> Sixth Periodic Report, paragraphs 117. See also paragraphs 52-59 of the Initial Report.

<sup>86</sup> See Geneva Convention IV, article 146. The same text appears in each of the other three conventions.

<sup>87</sup> See Geneva Convention IV, article 148. The same text appears in each of the other three conventions.

<sup>88</sup> See ICRC Study of Customary International Humanitarian Law (ICRC/Cambridge University Press, 2005) Rule 153, <http://www.icrc.org/customary-ihl/eng/docs/home>

<sup>89</sup> See Institut de Droit International, Resolution adopted September 2009, on Immunity from Jurisdiction of the State and of Persons Who Act on Behalf of the State in case of International Crimes, article III.2: "When the position or mission of any person enjoying personal immunity has come to an end, such personal immunity ceases." "L'immunité personnelle prend fin au terme de la fonction ou de la mission de son bénéficiaire." [http://www.idi-iil.org/idiE/resolutionsE/2009\\_naples\\_01\\_en.pdf](http://www.idi-iil.org/idiE/resolutionsE/2009_naples_01_en.pdf); [French version: [http://www.idi-iil.org/idiF/resolutionsF/2009\\_naples\\_01\\_fr.pdf](http://www.idi-iil.org/idiF/resolutionsF/2009_naples_01_fr.pdf)]; UK House of Lords, *R v Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No 3)* [1999] 2 WLR 827. Amnesty International is aware of the opinion set out in the 'Ordonnance de refus de donner suite', given at Berne, 8 May 2003, in reference to Affaire no. MPC/EAI/1/03/0085, which refers to immunity of George W. Bush, but note that it referred specifically to immunity as "*acting* head of state" [emphasis added] [this phrase in English in original] and did not address the situation of former heads of state. To whatever extent para 61 of the 14 February 2002 judgment of the International Court of Justice in *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, may imply a position contradictory to that previously adopted by the UK House of Lords, or subsequently adopted by the Institute de Droit International, we respectfully submit it to be an incomplete statement of the law, and note that issue was not squarely before the Court on the facts of its case.

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