



Canadian Centre for International Justice
Centre canadien pour la justice internationale



**SUBMISSION OF THE CENTER FOR CONSTITUTIONAL RIGHTS AND THE CANADIAN
CENTRE FOR INTERNATIONAL JUSTICE TO THE COMMITTEE AGAINST TORTURE ON
THE EXAMINATION OF THE SIXTH PERIODIC REPORT OF CANADA**

**THE CASE OF GEORGE W. BUSH AND CANADA'S VIOLATION OF ITS OBLIGATIONS
UNDER THE *CONVENTION AGAINST TORTURE***

**Committee against Torture
48th Session
7 May - 1 June 2012**

This report outlines Canada’s duties under the *Convention against Torture* (“the Convention”)¹ to investigate and prosecute torture, describes the crime of torture under Canadian law and examines Canada’s failure to fulfill its Convention obligations in the fall of 2011 when former U.S. President George W. Bush was present in Canada, and when proceedings to prosecute Mr. Bush for torture were initiated – and thwarted.

The submitting organizations, the Center for Constitutional Rights (“CCR”) and the Canadian Centre for International Justice (“CCIJ”), initiated the proceedings against Mr. Bush in Canada on behalf of four individuals asserting claims of torture.² Recalling that the Committee against Torture (“the Committee”) included Canada’s compliance with its universal jurisdiction obligations for torture in the list of issues to be considered at this session,³ CCR and CCIJ request that the Committee include this case study in its report, seek answers from Canada regarding the decisions taken by Canadian officials to not initiate an investigation of Mr. Bush and to stay proceedings initiated on behalf of four torture survivors, and make specific recommendations to Canada regarding its failure to comply with the Convention. Such a step by the Committee would serve as an important and necessary reminder to Canada and other State parties of the central role of the Convention in ending impunity for torture.⁴

Canada, a party to the Convention, has clearly prohibited torture. The Supreme Court of Canada has aptly summarized Canadian policy:

It can be confidently stated that Canadians do not accept torture as fair or compatible with justice. Torture finds no condonation in our *Criminal Code*; indeed the *Code* prohibits it (see, for example, s. 269.1). The Canadian people, speaking through their elected representatives, have rejected all forms of state-sanctioned torture. Our courts ensure that confessions cannot be obtained by threats or force.⁵

Likewise, the Federal Court of Appeal has held, “Surely the concept of torturing ‘the truth out’ of someone is manifestly unlawful, by any standard.”⁶

¹ *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. Res. 39/46, Annex, 39 U.N. GAOR Supp. No. 51, U.N. Doc. A/39/51 (1984).

² See Factual and Legal Basis for the Prosecution of George W. Bush, Sept. 29, 2011, available at <http://www.ccrjustice.org/files/2011.09.29%20Bush%20Canada%20Indictment.pdf>; Private Prosecution against George W. Bush, Oct. 18, 2011, available at [http://www.ccrjustice.org/files/Private%20Prosecution Oct 18 2011.pdf](http://www.ccrjustice.org/files/Private%20Prosecution%20Oct%2018%202011.pdf).

³ List of issues to be considered in connection with the consideration of the sixth periodic report of Canada (CAT/C/CAN/6), CAT/C/CAN/Q/6, Jan. 4, 2012, at para. 17.

⁴ CCR and CCIJ note, with serious concern, that despite the well-documented U.S. torture program and the travel of former members of the Bush Administration outside the United States, no investigation or prosecution of any high-level members of the former Bush Administration has been initiated by the United States or any other country under the Convention despite the presence of torture suspects in signatory States.

⁵ *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 SCR 3, at para. 50.

⁶ *Equizabal v. Canada (Minister of Employment and Immigration)*, [1994] 3 FC 514.

Additionally, in its report to this Committee, the Government of Canada affirmed that it is official government policy “that Canada not be a safe haven for war criminals”⁷ and it set forth the various mechanisms at its disposal should persons suspected of involvement in torture or other serious violations of international law arrive in Canada.⁸ The first of these remedies listed is criminal proceedings. It is recalled that this Committee previously cited as a subject of concern Canada’s low number of prosecutions for torture, and the government’s resort to immigration proceedings to remove or expel persons rather than initiate criminal proceedings against persons suspected of committing torture or terrorism related offences.⁹

Despite these clear principles and policies, the Government of Canada violated its obligations under the Convention to prosecute Mr. Bush when he was present on Canadian soil in 2011. Compounding the impunity Mr. Bush enjoyed in Canada through the failure of Canadian officials to initiate criminal proceedings *proprio motu*, private initiatives to bring criminal charges against him were stymied by the actions and inactions of government officials.

THE U.S. TORTURE PROGRAM

From January 20, 2001 to January 20, 2009, Mr. Bush served as president of the United States of America and Commander in Chief of the United States Armed Forces. In these capacities, Mr. Bush had authority over the agencies of the United States government.¹⁰

On September 14, 2001, Mr. Bush issued the “Declaration of National Emergency by reason of Certain Terrorist Attacks,” following the events of September 11.¹¹ This was the first of several directives that steadily expanded the powers vested in the Central Intelligence Agency (“CIA”), the Secretary of Defense and the U.S. military to capture suspected terrorists and create extraterritorial detention facilities. On November 13, 2001, Mr. Bush authorized the detention of alleged terrorists or “unlawful enemy combatants” and their subsequent trial by military

⁷ Committee against Torture, *Consideration of reports submitted by States parties under article 19 of the Convention: Canada*, CAT/C/CAN/6, June 22, 2011, at para. 48.

⁸ *Ibid.* at para. 46.

⁹ Committee against Torture, *Consideration of Reports submitted by States Parties under Article 19 of the Convention - Conclusions and recommendations of the Committee against Torture - Canada*, CAT/C/CR/34/CAN, July 7, 2005 at para. 4 (e). The Committee expressed concern that the use of immigration proceedings to expel or remove persons also implicated Article 3 concerns.

¹⁰ These included the Department of Defense, the Central Intelligence Agency, the Federal Bureau of Investigation, the Department of Homeland Security, the White House and the Office of the Vice President.

¹¹ “Declaration of National Emergency by Reason of Certain Terrorist Attacks,” President Proclamation 7463, September 14, 2001, available at <http://www.federalregister.gov/articles/2001/09/18/01-23358/declaration-of-national-emergency-by-reason-of-certain-terrorist-attacks>. The Authorization for the Use of Military Force (“AUMF”) (Pub. L. 107-40, 115 Stat. 224 (2001)), was enacted upon Mr. Bush’s signature of a joint resolution passed by the U.S. Congress on September 14, 2001, authorizing the use of all “necessary and appropriate force” against those whom Mr. Bush determined “planned, authorized, committed or aided” the September 11th attacks, or who harbored said persons or groups.

commissions, which he ordered would not be subject to standard principles of law or the usual rules of evidence.¹² Mr. Bush also purported to strip detainees of the power to seek a remedy not only in U.S. federal courts but also in “any court of any foreign nation, or any international tribunal.”¹³

In early 2002, Mr. 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.¹⁴ Mr. 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.” This was done as a matter of policy, not law.¹⁵

Mr. Bush buttressed these re-interpretations of international law with a legal opinion “that the President has plenary constitutional authority, as the Commander in Chief, to transfer such individuals who are captured and held outside the United States to the control of another country;”¹⁶ and that treaties normally governing detainee transfers “generally do not apply in the context of the current war.”¹⁷

Mr. Bush approved and oversaw a multi-faceted global detention program in which so-called “enhanced interrogation” techniques were employed, including practices that constitute torture.¹⁸ This system included a CIA detention program directed at so-called high-value detainees who were held in secret sites across the globe; the use of “extraordinary rendition” to send terrorist suspects or persons of interest to third countries known to employ torture; and detention by U.S. military and other government agents at locations outside the United States, including Guantánamo Bay.¹⁹

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, Nov. 16, 2001, pp. 57831-36, available at <http://www.fas.org/irp/offdocs/eo/mo-111301.htm>.

¹³ *Ibid.* at Sec. VII(b)(2).

¹⁴ John Yoo and Robert J. Delahunty, Memorandum for William J. Haynes II, General Counsel, Department of Defense, *Application of Treaties and Laws to al Qaeda and Taliban Detainees*, Jan. 9, 2002, at 1, 11, available at http://upload.wikimedia.org/wikipedia/en/9/91/20020109_Yoo_Delahunty_Geneva_Convention_memo.pdf.

¹⁵ *Ibid.*

¹⁶ Memorandum from Jay S. Bybee, Assistant Attorney General, to William J. Haynes II, General Counsel, Department of Defense, Mar. 13, 2002, at 1, available at <http://www.gwu.edu/~nsarchiv/torturingdemocracy/documents/20020313.pdf>.

¹⁷ *Ibid.* at 2.

¹⁸ International Committee of the Red Cross, Report to John Rizzo, Acting General Counsel, CIA, *ICRC Report on the Treatment of Fourteen “High Value Detainees” in CIA Custody*, Feb. 14, 2007, available at <http://www.nybooks.com/media/doc/2010/04/22/icrc-report.pdf>.

¹⁹ In addition to approving techniques prohibited by the Geneva Conventions and the *Convention against Torture*, Mr. Bush received regular intelligence and FBI briefings regarding cases of extraordinary rendition. Maher Arar is perhaps the most well-known victim of extraordinary rendition. See *Removal of a Canadian Citizen to Syria: Joint Hearing Before the Subcomm. on the Constitution, Civil Rights and Civil Liberties of the Comm. on the Judiciary and the Subcomm. on Int’l Organizations, Human Rights, and Oversight of the Comm. on Foreign Affairs of the House of Representatives*, 110th Cong. (2008), transcript at 53, available at

In his memoir and other venues, Mr. Bush admitted that he personally authorized the waterboarding of detainees in U.S. custody as well as other interrogation techniques.²⁰

Guantánamo

The prison established at the U.S. military base at Guantánamo Bay was “intended to be a facility beyond the reach of the law.”²¹ Detainees there were subjected to acts of torture, including interrogation methods employed in the CIA “high-value detainee” program. Numerous published reports detail the draconian interrogation techniques and torture at Guantánamo.²² There is widespread acceptance among intergovernmental bodies, international experts, academics and others that the interrogation techniques applied in Guantánamo and secret detention sites authorized by Mr. Bush constituted torture under international law.²³

<http://www.foreignaffairs.house.gov/110/42724.pdf>. See also, *Joint Oversight Hearing on Rendition to Torture: The Case of Maher Arar*: Joint Hearing Before the Subcomm. on the Constitution, Civil Rights and Civil Liberties of the Comm. on the Judiciary and the Subcomm. on Int’l Organizations, Human Rights, and Oversight of the Comm. on Foreign Affairs of the House of Representatives, 110th Cong. (2007). In 2007, the Government of Canada apologized to Mr. Arar for its role in his detention, although Canadian courts applied immunity and dismissed his civil lawsuit against the governments of Syria and Jordan. See *Arar v. Syrian Arab Republic*, [2005] O.J. No. 752. The government of the United States has steadfastly refused to take any responsibility for Mr. Arar’s rendition and torture and inexplicably continues to ban him from the United States. See, e.g., Amnesty International, “Apology to Maher Arar overdue,” June 25, 2011, available at <http://www.amnesty.org/en/appeals-for-action/apology-to-maher-arar-overdue>.

²⁰ George W. Bush, DECISION POINTS 169 (Crown Publishing Group 2010) at 165.

²¹ International Center for Transitional Justice, *Prosecuting Abuses of Detainees in U.S. Counter-terrorism Operations*, Nov. 2009, at 8, available at <http://ictj.org/sites/default/files/ICTJ-USA-Criminal-Justice-2009-English.pdf>.

²² See, e.g., Memorandum for Record, Department of Defense, Joint Task Force 170, Guantanamo Bay, Cuba, Oct. 9, 2003, available at <http://www.washingtonpost.com/wp-srv/nation/documents/GitmoMemo10-09-03.pdf>.

²³ See, e.g., U.N. Commission on Human Rights, *Situation of Detainees at Guantánamo Bay - Report of the Chairperson of the Working Group on Arbitrary Detention, Ms. Leila Zerrougui; the Special Rapporteur on the independence of judges and lawyers, Mr. Leandro Despouy; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Mr. Manfred Nowak; the Special Rapporteur on freedom of religion or belief, Ms. Asma Jahangir and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Mr. Paul Hunt*, E/CN.4/2006/120, Feb. 27, 2006, available at <http://www1.umn.edu/humanrts/guantanamo2006.html>; ICRC Report on the Treatment of Fourteen “High Value Detainees” in CIA Custody (Feb. 14, 2007) available at <http://www.nybooks.com/media/doc/2010/04/22/icrc-report.pdf>; U.N. Human Rights Council, *Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Working Group on Arbitrary Detention, and the Working Group on Enforced or Involuntary Disappearances*, A/HRC/13/42, Feb. 19, 2010, available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A-HRC-13-42.pdf>; U.N. Committee Against Torture, *Consideration of Reports submitted by States Parties under Article 19 of the Convention - Conclusions and recommendations of the Committee against Torture - United States of America*, CAT/C/USA/CO/2, Jul. 25, 2006, available at [http://www.unhchr.ch/tbs/doc.nsf/0/e2d4f5b2dccc0a4cc12571ee00290ce0/\\$FILE/G0643225.pdf](http://www.unhchr.ch/tbs/doc.nsf/0/e2d4f5b2dccc0a4cc12571ee00290ce0/$FILE/G0643225.pdf); Physicians for Human Rights, *Broken Laws, Broken Lives – Medical evidence of torture by US personnel and its impact*, June 2008, available at http://brokenlives.info/?dl_id=5; M. Cherif Bassiouni, THE INSTITUTIONALIZATION OF TORTURE BY THE BUSH ADMINISTRATION – IS ANYONE RESPONSIBLE? (Intersentia 2010).

Survivors of the U.S. Torture Program

The cases of four men demonstrate the horror and criminality of the U.S. Torture Program. Hassan bin Attash, Sami el-Hajj, Muhammed Khan Tumani and Murat Kurnaz each endured years of inhumane treatment while in U.S. custody at military bases in Afghanistan and Guantánamo. Each of the men participated in the private prosecution filed against Mr. Bush in October 2011 in Surrey, British Columbia, as discussed below.

Hassan bin Attash, a Yemeni man born in Saudi Arabia, was seized in Karachi, Pakistan in September 2002 at the age of 16. After being beaten and interrogated in Pakistan, Mr. bin Attash was transferred to the CIA's "Dark Prison" in Afghanistan where he was tortured for several days. He was subsequently transferred to Jordan where the Jordanian intelligence service, in the presence of American authorities, tortured him. After 16 months, Mr. bin Attash was returned to the Dark Prison where he was tortured again, including being subjected to sensory overload and deprivation. In May 2004, he was transferred to the U.S. military base in Bagram, Afghanistan where the torture continued, including threats of harm to his family, being mauled by dogs and being electrocuted. In September 2004, Mr. bin Attash was transferred to Guantánamo, where he continued to endure physical and psychological abuse, including beatings, solitary confinement, extremes of heat and cold, and sleep deprivation. Mr. bin Attash eventually gave his interrogators the answers they wanted. He still bears the scars of this torture, and remains in Guantánamo despite having never been charged with any crime.²⁴

Sami el-Hajj, a Sudanese national and Al-Jazeera correspondent, was arrested while working in Pakistan in December 2001. Mr. el-Hajj was detained and tortured in U.S. facilities in Bagram and Kandahar, Afghanistan for nearly five months. He endured hooding, stress positions, nudity, extreme temperatures and beatings. He was told he would be shot if he moved, and on one occasion, military police pulled the hairs of his beard out one by one. Mr. el-Hajj was transferred to Guantánamo in June 2002. He was interrogated approximately 200 times and was routinely beaten, abused and subjected to various forms of mistreatment amounting to torture during his time in Guantánamo. He was held without charge until his eventual release in May 2008.²⁵

Muhammed Khan Tumani, a citizen of Syria, was seized at the age of 17 with his father in Pakistan in late 2001. The United States was offering large cash rewards for the capture of Arab men so local villagers turned them over to Pakistani authorities, who in turn handed them over to the United States. Mr. Khan Tumani and his father were detained and interrogated first in Pakistan, then transferred to the U.S.-run prison in Kandahar, Afghanistan, where Mr. Khan Tumani's hand was fractured. Mr. Khan Tumani alleges he was subjected to torture in both locations. They were flown to Guantánamo in February 2002. Mr. Khan Tumani was subjected to physical and psychological abuse, including solitary confinement, sleep deprivation, constant

²⁴ See Supporting Materials to criminal information filed against Mr. Bush, *available at* [http://www.ccrijustice.org/files/Private%20Prosecution Oct 18 2011.pdf](http://www.ccrijustice.org/files/Private%20Prosecution%20Oct%2018%202011.pdf).

²⁵ *Ibid.*

noise, food deprivation, being doused with ice and cold water, and sexual abuse. During his detention, his attorneys expressed grave concerns about his mental condition and requested that the government improve his conditions and provide him with appropriate care. These requests were denied. Mr. Khan Tumani attempted suicide while detained at Guantánamo. He was released without ever having been charged with any crime in August 2009.²⁶ Mr. Khan Tumani remains separated from his family; he was resettled in Portugal and his father was resettled in Cape Verde, and they have not been permitted to see each other.

Murat Kurnaz, a German-born citizen of Turkey, was arrested at the age of 19 by Pakistani officials in December 2001 while on his way to the airport to return to Germany. He was detained for several days by the Pakistani security services. For an alleged fee of \$3,000, Mr. Kurnaz was handed over to the U.S. military and brought to Kandahar, Afghanistan. Mr. Kurnaz alleges he was physically abused and tortured in Kandahar, including beatings, electric shocks, submersion in water, and suspension from hooks for days. In February 2002, Mr. Kurnaz was transferred to Guantánamo where he alleges he was subjected to beatings, exposed to extreme heat and cold, detained in a cell where he was deprived of oxygen, shackled in painful stress positions, and kept in solitary confinement on numerous occasions. Mr. Kurnaz was released without charge in August 2006.²⁷

CANADA'S DUTIES UNDER THE CONVENTION

Canada adopted the Convention on June 24, 1987, and it entered into force two days later. The Parliament of Canada then passed legislation to criminalize torture, even when committed abroad, in accordance with the Convention.²⁸ As noted by the Committee, the definition of torture in Canada's *Criminal Code* is in accordance with the definition laid out in the Convention.²⁹ Since ratification, Canadian courts have frequently looked to the Convention to interpret domestic law on torture.³⁰

The Convention provides detailed obligations designed to “make more effective the struggle against torture.”³¹ Article 4 of the Convention is the “central norm” in relation to “fighting impunity as one of the root causes for the widespread practice of torture worldwide.”³² According to Article 4(1):

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ See, e.g., *Davidson v. British Columbia (Attorney General)*, [2006] B.C.J. No. 2630, at para. 22.

²⁹ Committee against Torture, *Consideration of Reports, supra* note 9, at para. 3(a).

³⁰ See, e.g., *Suresh supra* note 5, at para.68; *Re Mahjoub*, [2010] FC 787, at para. 28.

³¹ Convention, *supra* note 1, Preamble

³² Manfred Nowak and Elizabeth McArthur, *THE UNITED NATIONS CONVENTION AGAINST TORTURE - A COMMENTARY* (Oxford University Press 2008), at 229.

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.

Moreover, Article 5(2) provides:

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 [...]

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.”³³ The need for universal jurisdiction for torture has been 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.”³⁴

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

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.³⁵

Article 7(1) then requires that the accused be prosecuted or extradited:

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.

Where a person present in Canada is accused of torture, only a request for extradition formulated by the accused’s home country or a third country, guaranteeing an equitable trial, would permit Canada not to exert its criminal jurisdiction over the suspect.

³³ *Ibid.* at 254.

³⁴ *Ibid.* at 316.

³⁵ Emphasis added.

CANADIAN CRIMINAL CODE

Section 269.1 of the *Criminal Code*,³⁶ which provides jurisdiction over the offence of torture, “reflects the recognition of Parliament that freedom from such intentional mistreatment is a basic human right.”³⁷ The provision explicitly applies to officials and persons acting at the direction or with the acquiescence of an official. Under sections 21 and 22 of the Code, liability extends to persons who commit an offence and those who aid, abet, form a common intention to carry out, counsel, procure, solicit or incite another person to be a party to the offence.³⁸

Importantly, section 269.1(3) limits the defences available to a charge of torture:

It is no defence to a charge under this section ... that the act or omission is alleged to have been justified by exceptional circumstances, including a state of war, a threat of war, internal political instability or any other public emergency.³⁹

Section 7(3.7) of the *Criminal Code* gives Canada jurisdiction over torture committed abroad when the accused is present in territory under Canada’s jurisdiction.⁴⁰

Canada is thus empowered by the *Criminal Code* and the Convention to prosecute anyone on its soil alleged to be responsible for torture, and Canada is obligated by the Convention to either submit such a case for prosecution or extradite the accused for prosecution elsewhere. In the case of Mr. Bush, Canada failed in its duty to extradite or prosecute.

LEGAL EFFORTS UNDERTAKEN TO PROSECUTE MR. BUSH IN CANADA

On September 19, 2011, Mr. Bush travelled to Toronto, Ontario to give a talk for which he was reportedly paid between US\$100,000 and \$150,000. The Royal Canadian Mounted Police “facilitated traffic and security” for Mr. Bush’s visit to Toronto.⁴¹ At the time, it was widely

³⁶ *Criminal Code*, R.S.C., 1985, c. C-46.

³⁷ *Canada (Prime Minister) v. Khadr*, 2009 FCA 246, [2010] 1 FCR 73, at para. 51.

³⁸ *Criminal Code*, *supra* note 36. Canadian law has also recognized breach of command responsibility as a criminal offence when genocide, war crimes or crimes against humanity result from a commander’s disregard of his or her duties. *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24.

³⁹ *Criminal Code*, *supra* note 36. See also CAT, Art. 2(2).

⁴⁰ *Criminal Code*, *supra* note 36.

⁴¹ Brendan Kennedy, “George W. Bush comes and goes, Toronto Barely Notices,” *The Toronto Star*, Sept. 21, 2011, available at <http://www.thestar.com/news/article/1057078--george-w-bush-comes-and-goes-toronto-barely-notices>.

reported that Mr. Bush would again travel to Canada, this time to Surrey, British Columbia on October 20, 2011, to appear as a paid-speaker at an economic forum.⁴²

On September 29, 2011, CCR and CCIJ formally called on the Attorney General of Canada, the Honourable Robert Nicholson, to launch a criminal investigation against Mr. Bush for his role in authorizing and overseeing his administration's torture program. Their letter was supported with an extensive draft indictment setting forth the factual and legal basis for charging Mr. Bush with torture as well as approximately 4000 pages of evidence.⁴³

The draft indictment highlighted Mr. Bush's individual and command responsibility, Canada's jurisdiction under the *Criminal Code* and Canada's obligations under the Convention to take legal measures against suspected torturers within its jurisdiction.⁴⁴ The letter provided notification that if the Attorney General declined to launch a criminal investigation of Mr. Bush, CCIJ and CCR would support individual survivors of torture in pursuing a private prosecution against Mr. Bush. The office of the Attorney General of Canada provided no response prior to Mr. Bush's visit.

Faced with the Attorney General's inaction, on October 18, 2011, Matt Eisenbrandt, the Legal Director of CCIJ, attempted to lay a criminal information under section 504 of the *Criminal Code* before a Justice of the Peace in the Provincial Court in Surrey, British Columbia.⁴⁵ The information included four counts, one each for the torture of Hassan bin Attash, Sami el-Hajj, Muhammed Khan Tumani and Murat Kurnaz.⁴⁶ The Justice of the Peace was reluctant and, after

⁴² See, e.g., "Presidents Clinton and Bush at 2011 Surrey Regional Economic Summit," Feb. 1, 2011, available at <http://www.surrey.ca/city-government/8019.aspx>. Registration for the conference was CDN\$599. CBC News, "George W. Bush draws protesters at B.C. appearance," Oct. 20, 2011, available at <http://www.cbc.ca/news/canada/british-columbia/story/2011/10/20/bc-george-w-bush-protest-surrey.html>

⁴³ Available at <http://www.ccij.ca/programs/cases/guantanamo/index.php>.

⁴⁴ Several other human rights organizations, including Amnesty International, Human Rights Watch and Lawyers Against the War, similarly called for the Attorney General to prosecute Mr. Bush. See "Visit to Canada of Former US President George W. Bush and Canadian International Obligations under International Law; Amnesty International Memorandum to the Canadian Authorities," Sept. 2011, available at <http://www.amnesty.ca/files/CanadaBushSubmission.pdf>; "Canada: Don't Let Bush Get Away With Torture; Open Criminal Investigation Ahead of Ex-President's Visit to British Columbia," Oct. 12, 2011, available at <http://www.hrw.org/news/2011/10/12/canada-don-t-let-bush-get-away-torture>; Letter from Lawyers Against the War to Prime Minister Stephen Harper et al., Re: Visit of George W. Bush on October 20, 2011: Canada must prevent entry or arrest and ensure prosecution for torture, Aug. 25, 2011, available at http://www.lawyersagainstthewar.org/letters/LAW_letter_re_George_Bush_20110825.pdf.

⁴⁵ Known as a "private prosecution," section 504 of the *Criminal Code*, *supra* note 36, states, "Any one who, on reasonable grounds, believes that a person has committed an indictable offence may lay an information in writing and under oath before a justice, and the justice shall receive the information, where it is alleged ... (b) that the person, wherever he may be, has committed an indictable offence within the territorial jurisdiction of the justice. Section 504 allows individuals to lay an information where Crown counsel has failed to do so."

⁴⁶ A letter in support of the private prosecution was sent to the Attorney General of Canada. The letter was signed by 50 organizations from around the world as well as several prominent individuals, including former U.N. Special Rapporteurs on Torture, Theo van Boven and Manfred Nowak, as well as Nobel Peace Prize winner Shirin Ebadi. The letter is available at http://ccrjustice.org/files/2011-10-19_UPDATED_FINAL_Letter_of_Support_SIGNED.pdf.

taking more than two hours to speak on the phone and seek legal advice, declined to accept the information. She stated that because Mr. Bush was not currently in Canada, she lacked jurisdiction to accept an information. The Justice of the Peace recommended that Mr. Eisenbrandt return on October 20 with proof that Mr. Bush had entered Canada.

On October 20, Mr. Eisenbrandt returned to the Provincial Court. After providing documentary evidence that Mr. Bush was present in Canada, the Justice of the Peace accepted the private information and assigned a number to the file.

Mr. Eisenbrandt was then instructed to schedule a hearing. Another court official told Mr. Eisenbrandt that due to the time required for the hearing, the complexity of the offence, and the status of the court schedule, the earliest date available was in January 2012. Mr. Eisenbrandt explained the time-sensitive nature of the proceeding but was forced to accept the date in January 2012. In Mr. Eisenbrandt's presence, the scheduling clerk called Deputy Regional Crown Counsel Andrew McDonald to confirm that she had scheduled the hearing appropriately.

The Justice of the Peace then provided Mr. Eisenbrandt with a trial notice, and stated that she would personally serve the Attorney General of British Columbia ("Attorney General of BC") with the signed and affirmed information. The Justice of the Peace refused to provide Mr. Eisenbrandt with a copy of the signed information. She also refused to accept any supporting evidence for the court file.

CCR and CCIJ sent an unsigned copy of the criminal information by fax and email to the Attorney General of Canada, and arranged for a copy of the supporting materials to be delivered to his office by hand.

The same afternoon, and potentially while Mr. Bush was still in Canada, Mr. McDonald telephoned Mr. Eisenbrandt to inform him that the Attorney General of BC had intervened in the private prosecution. The Attorney General of BC had directed Mr. McDonald to stay the proceedings, which he had already done under section 579 of the *Criminal Code*. As the basis for the stay, Mr. McDonald cited section 7(7) of the *Criminal Code*, which requires anyone seeking the criminal prosecution of a non-Canadian citizen to obtain the consent of the Attorney General of Canada within eight days. Mr. McDonald stated that it had already been determined that the consent of the Attorney General of Canada would not be forthcoming under section 7(7), and consequently the Attorney General of BC had acted preemptively to stay the case. By so doing, the Attorney General of BC obstructed the actions of CCR and CCIJ – and the four torture survivors named in the information – to seek consent from the Attorney General of Canada.

Less than one week later, the Attorney General of BC stated that the decision to stay the proceedings was actually made by the Criminal Justice Branch of British Columbia ("CJB").⁴⁷ A

⁴⁷ David Ball, "B.C. intervened to halt Bush torture case," *Vancouver Observer*, Oct. 26, 2011, available at <http://www.vancouverobserver.com/world/2011/10/26/bc-intervened-halt-bush-torture-case>.

CJB spokesperson then confirmed that the CJB had never even consulted with the Attorney General of Canada about the case. Instead, the CJB made its own assessment that “there was no realistic chance of the Attorney General (of Canada)’s consent.”⁴⁸ In this regard, it is recalled that the Attorney General of Canada, Minister Nicholson, took no action upon receipt the extensive filing submitted to him on September 29, 2011 by CCR and CCIJ setting out the factual and legal case against Mr. Bush for torture.

On November 7, 2011, nearly three weeks after Mr. Bush’s visit, the Ministerial Correspondence Unit of the federal Department of Justice sent CCR and CCIJ a letter merely confirming receipt of the “correspondence concerning former President of the United States of America George W. Bush,” and advising that the “correspondence has been brought to the attention of the appropriate officials.”⁴⁹ No further action has been taken by Canadian officials in regard to the case against Mr. Bush and no further explanation has been provided to CCR, CCIJ or the four torture survivors regarding why government officials took the actions they did to forestall criminal proceedings. At minimum, an explanation of the actions taken by the various officials involved in the decision not to initiate an investigation against Mr. Bush and to stay a private prosecution lodged against him is required.

This case demonstrates a failure by Canada to abide by its obligations under the Convention to initiate proceedings when a torture suspect is present in its territory. This failure serves as a serious challenge to the effectiveness of the Convention and obstructs its goal of ending impunity for torture.

CONCLUSION

In failing to prosecute Mr. Bush, Canada undermined its stated commitment to combat torture, ignored the jurisdictional authority provided by the *Criminal Code* and violated its obligations under the Convention. Canada’s actions serve only to bolster the impunity enjoyed to date by Mr. Bush for his direct involvement in torture.

In addition, it seems certain the Bush case was not even subjected to careful examination and deliberation but rather was resolved by political calculation. The Attorney General of Canada not only failed to take action against Mr. Bush but refused to even respond to calls for investigation. When a private prosecution was launched, the well-documented case was quickly blocked. Indeed, given that the Attorney General of BC brought an end to the prosecution within, at most, hours after it was filed, and potentially while Mr. Bush remained in Canada, it is clear that the extensive evidence in the case was not even reviewed. Canada’s obligation under the Convention

⁴⁸ *Ibid.*

⁴⁹ Available at <http://www.ccij.ca/webyep-system/program/download.php?FILENAME=74-6-at-File Upload 7.pdf&ORG FILENAME=2011-11-07 Letter from DOJ Canada.pdf>.

to extradite or prosecute suspected torturers within its jurisdiction cannot be ignored based on political expediency as it appears was done in this situation.

The government's refusal to act is not only a violation of international law but also a rejection of the people who endured torture that resulted from Mr. Bush's policies. By failing to prosecute Mr. Bush, Canada denied survivors an important opportunity to seek accountability and justice for the horrific torture they suffered. This situation stands in contrast to Canada's stated goal of standing up against torture.

The Committee should investigate this case during Canada's review in May, and seek information from Canada regarding the role of the various officials in deciding against initiating proceedings against Mr. Bush and staying the private prosecution.

More broadly, Canada must be called upon to review its policies concerning the Convention and the torture provision of the *Criminal Code*, as well as its procedures for dealing with torture suspects present in Canadian territory. If Mr. Bush returns to Canada, as he has done several times since leaving office, the government must set aside political considerations and take the appropriate legal steps to initiate criminal proceedings and hold him accountable if the facts and law so require.