

**HASSAN BIN ATTASH, SAMI EL-HAJJ, MUHAMMED KHAN TUMANI
and MURAT KURNAZ v. CANADA**

**Communication presented to the Committee against Torture,
Pursuant to Article 22 of the Convention against Torture**

For Violation of Articles 5, 6 and 7 of the Convention

Hassan bin Attash, a Yemeni national born in Jeddah, Saudi Arabia in 1985, and currently detained at the U.S. prison camp at Guantánamo Bay, Cuba;

Sami el-Hajj, a Sudanese citizen born in Khartoum on 15 February 1969;

Muhammed Khan Tumani, a Syrian citizen born in Aleppo on 7 July 1983;

and

Murat Kurnaz, a Turkish citizen born in Bremen, Germany on 19 March 1982,

Represented, for the purposes of this action, by Katherine Gallagher of the Center for Constitutional Rights (“CCR”), working in conjunction with Matt Eisenbrandt of the Canadian Centre for International Justice (“CCIJ”),

HEREBY present this communication to the Committee against Torture (“Committee”), pursuant to Article 22 of the Convention against Torture (“Convention” or “Torture Convention”).

Hassan bin Attash, Sami el-Hajj, Muhammed Khan Tumani and Murat Kurnaz (collectively, “Complainants”), allege that they are direct victims of a **violation by Canada of its obligations under Articles 5 (2), 6 (1) and 7 (1) of the Convention**. Canada recognized the competence of the Committee to receive and consider communications from or on behalf of individuals pursuant to Article 22 of the Convention on 13 November 1989.

The Complainants’ case has not been submitted for examination under any other procedure of international investigation or settlement.

As set out in ANNEX I and acting through their legal representatives, the Complainants have empowered Katherine Gallagher, acting in coordination with their legal representatives, to represent them before the Committee in all matters related to this communication.¹ All communications with the Complainants should be sent to Katherine Gallagher, CCR, 666 Broadway, 7th Floor, New York, NY 10012, USA, email: kgallagher@ccrjustice.org.

¹ A formal authorization from Sami el-Hajj authorizing Katherine Gallagher to act as his legal representative for the purpose of these proceedings will be filed forthwith.

I. The Facts

The Complainants have been victims of, *inter alia*, acts of torture while detained in facilities run by or associated with U.S. military or intelligence forces. These acts of torture were committed by agents of the former U.S. president George W. Bush acting under Mr. Bush's direction, command or authorization. The facts underlying this Communication can be summarized as follows.

A. *The Torture Program*²

From 20 January 2001 to 20 January 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.³

On 14 September 2001, Mr. Bush issued the "Declaration of National Emergency by reason of Certain Terrorist Attacks," following the events of September 11.⁴ 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 13 November 2001, Mr. Bush authorized the detention of alleged terrorists or "unlawful enemy combatants" and their subsequent trial by military commissions, which he ordered would not be subject to standard principles of law or the usual rules of evidence.⁵ 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."⁶

² For a detailed account of the case against George W. Bush, *see* "Factual and Legal Basis for Prosecution of George W. Bush pursuant to the Canadian Criminal Code and the Convention against Torture," CCR and CCIJ, 29 Sept. 2011," available at <http://www.ccrjustice.org/files/2011.09.29%20Bush%20Canada%20Indictment.pdf> and attached hereto at ANNEX II.

³ 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.

⁴ "Declaration of National Emergency by Reason of Certain Terrorist Attacks, Presidential Proclamation 7463, 14 Sept. 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 14 September 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.

⁵ *Military Order of November 13, 2001: Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism*, Federal Register Vol. 66, No. 2, 16 Nov. 2001, pp. 57831-36, available at <http://www.fas.org/irp/offdocs/eo/mo-111301.htm>.

⁶ *Ibid.* at Sec. VII(b)(2).

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; this decision was memorialized in a memo authored by John Yoo and Robert J. Delahunty.⁷ 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.⁸

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,”⁹ and that treaties normally governing detainee transfers “generally do not apply in the context of the current war.”¹⁰

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.¹¹ 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.¹²

⁷ John Yoo and Robert J. Delahunty, Memorandum for William J. Haynes II, General Counsel, Department of Defense, *Application of Treaties and Laws to al Qaeda and Taliban Detainees*, 9 Jan. 2002, at 1, 11, available at http://upload.wikimedia.org/wikipedia/en/9/91/20020109_Yoo_Delahunty_Geneva_Convention_memo.pdf.

⁸ *Ibid.*

⁹ Memorandum from Jay S. Bybee, Assistant Attorney General, to William J. Haynes II, General Counsel, Department of Defense, 13 Mar. 2002, at 1, available at <http://www.gwu.edu/~nsarchiv/torturingdemocracy/documents/20020313.pdf>.

¹⁰ *Ibid.* at 2.

¹¹ 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*, 14 Feb. 2007, available at <http://www.nybooks.com/media/doc/2010/04/22/icrc-report.pdf> (“ICRC CIA Detainee Report”).

¹² 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 <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 United States has steadfastly refused to take any responsibility for Mr. Arar’s rendition and torture. See, e.g.,

The prison established at the U.S. military base at Guantánamo Bay was “intended to be a facility beyond the reach of the law.”¹³ 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.¹⁴

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.¹⁵

This Committee has noted that the interrogation techniques carried out by the CIA since 2002 “resulted in the death of some detainees during interrogation” or “led to serious abuses of detainees,” and, as such, concluded that the United States “should rescind any interrogation technique, including methods involving sexual humiliation, ‘waterboarding,’ ‘short shackling’ and using dogs to induce fear, that constitutes torture or cruel, inhuman or degrading treatment or punishment, in all places of detention under its de facto effective control, in order to comply with its obligations under the Convention.”¹⁶

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

These techniques meet four of the five elements in the Convention definition of torture (the acts in question were perpetrated by government officials; they had a clear purpose, i.e. gathering intelligence, extracting information; the acts were committed intentionally; and the victims were in a position of powerlessness). However, to meet the Convention definition of torture, severe pain or suffering, physical or mental, must be inflicted.

Treatment aimed at humiliating victims may amount to degrading treatment or punishment, even without intensive pain or suffering. It is difficult to assess in abstracto whether this is the case with regard to acts such as the removal of

Amnesty International, “Apology to Maher Arar overdue,” 25 June 2011, *available at* <http://www.amnesty.org/en/appeals-for-action/apology-to-maher-arar-overdue>.

¹³ 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>.

¹⁴ *See, e.g.*, Memorandum for Record, Department of Defense, Joint Task Force 170, Guantanamo Bay, Cuba, 9 Oct. 2003, *available at* <http://www.washingtonpost.com/wp-srv/nation/documents/GitmoMemo10-09-03.pdf>.

¹⁵ George W. Bush, *DECISION POINTS* (Crown Publishing Group 2010) at 169-71.

¹⁶ United Nations Committee against Torture, *Consideration of Reports submitted by States Parties under Article 19 of the Convention - Conclusions and recommendations of the Committee against Torture - United States of America*, CAT/C/USA/CO/2, Jul. 25, 2006, at para. 24, *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) (“US CAT Report”).

clothes. However, stripping detainees naked, particularly in the presence of women and taking into account cultural sensitivities, can in individual cases cause extreme psychological pressure and can amount to degrading treatment, or even torture. The same holds true for the use of dogs, especially if it is clear that an individual phobia exists. Exposure to extreme temperatures, if prolonged, can conceivably cause severe suffering.

On the interviews conducted with former detainees, the Special Rapporteur concludes that some of the techniques, in particular the use of dogs, exposure to extreme temperatures, sleep deprivation for several consecutive days and prolonged isolation were perceived as causing severe suffering. He also stresses that the simultaneous use of these techniques is even more likely to amount to torture. The Parliamentary Assembly of the Council of Europe also concluded that many detainees had been subjected to ill-treatment amounting to torture, which occurred systematically and with the knowledge and complicity of the United States Government. The same has been found by Lord Hope of Craighead, member of the United Kingdom's House of Lords, who stated that "some of [the practices authorized for use in Guantánamo Bay by the United States authorities] would shock the conscience if they were ever to be authorized for use in our own country".¹⁷

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

- Exposure to extreme temperatures¹⁸
- Sleep deprivation¹⁹
- Punching or kicking²⁰
- Isolation in a "coffin" for prolonged periods²¹

¹⁷ United Nations Commission on Human Rights, *Situation of Detainees at Guantánamo Bay - Report of the Chairperson of the Working Group on Arbitrary Detention, Ms. Leila Zerrougui; the Special Rapporteur on the independence of judges and lawyers, Mr. Leandro Despouy; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Mr. Manfred Nowak; the Special Rapporteur on freedom of religion or belief, Ms. Asma Jahangir and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Mr. Paul Hunt*, E/CN.4/2006/120, 27 Feb. 2006, available at <http://www.un.org/Docs/journal/asp/ws.asp?m=E/CN.4/2006/120>, at paras. 51-52 ("UN Guantánamo Situation Report").

¹⁸ See European Court of Human Rights, case of *Tekin vs. Turkey* (1998); *Akdeniz vs. Turkey* (2001); Human Rights Committee, case of *Polay Campos vs. Peru* (1997), § 9.

¹⁹ European Court of Human Rights, *Ireland vs. United Kingdom* (1978), § 167.

²⁰ Committee Against Torture, case *Dragan Dimitrijevic vs. Serbia and Montenegro* (2004), paragraph 5.3; case *Ben Salem vs. Tunisia* (2007), § 16.4; case *Saadia Ali vs. Tunisia* (2008), § 15.4

- Threats of bad treatment²²
- Solitary confinement²³
- Forced nudity²⁴

Waterboarding, which Mr. Bush admitted he authorized, has been found to be an act of torture.²⁵

This jurisprudence, coupled with the conclusions described above by the United Nations, the ICRC, and the Council of Europe on the illegality of the techniques authorized by Mr. Bush, demonstrates that the so-called “enhanced interrogation techniques” were unlawful and amounted to torture, in violation of the Convention as well as Canadian law, as described below.

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

²¹ Committee against Torture, *Summary account of the proceedings concerning the inquiry on Turkey*, doc. A/48/44/Add.1, 1993, paragraph. 52, for a case where the Committee required the immediate demolition of the isolation cells known as coffins, which constituted on their own a form of torture; Human Rights Committee, case *Cabal and Pasini vs. Australia* (2003), § 8.4, where the cell was of the dimensions similar to those of a telephone cabin.

²² Special Rapporteur for the Commission on Human Rights, Report to the General Assembly on the question of torture and other cruel, inhuman or degrading treatment or punishment (UN Doc. A/56/156), 3 July 2001; Human Rights Committee, *Estrella v. Uruguay* (Communication No. 74/1980), 29 Mar. 1983; European Court of Human Rights, *Campbell and Cosans v. the United Kingdom* (1982), § 26; European Court of Human Rights *Gafgen v. Germany* (2010): § 91 and 108. Committee against Torture: Summary account of the results of the proceedings concerning the inquiry on Peru, doc. A/56/44, 2001, §186; Concluding Observations on Denmark, doc. A/57/44, 2002, §74(c)–(d); Concluding Observations on Denmark, doc. CAT/C/DNK/CO/5, 2007, § 14; Concluding Observations on Japan, doc. CAT/C/JPN/CO/1, 2007, §18. Human Rights Committee: General Comment No. 20, 1992, §6; HRC, Concluding Observations on Denmark, doc. CCPR/CO/70/DNK, 2000, § 12; Case *Polay Campos v Peru*, views of 6 Nov. 1997, § 8.6 ; Case *Vuolanne v Finland* (1989), § 9.5.

²³ United Nations Economic and Social Council (ECOSOC), *Situation of persons detained at Guantánamo Bay*, 27 Feb. 2006, E/CN.4/2006/120, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/112/76/PDF/G0611276.pdf?OpenElement>, § 53 and 87; UN Special Rapporteur on Torture Doc. A/63/175, 28 Jul. 2008, § 70-85. See also the Annexes, containing the Istanbul Statement on the Use and the Effects of Solitary Confinement. See Principle 7 of the Basic Principles for the Treatment of Prisoners, Adopted and proclaimed by General Assembly resolution 45/111 of Dec. 14, 1990.

²⁴ Committee against Torture, Case *Saadia Alia v. Tunisia* (2008) § 15.4; European Court of Human Rights, *Valasinas v. Lithuania* (2001).

²⁵ See, e.g., G. SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW AT WAR* 461-466 (Cambridge University Press 2010) (surveying jurisprudence and collecting statements by international bodies and experts that waterboarding constitutes torture); Transcript of Confirmation Hearing for Eric Holder as Attorney General of the United States, 16 Jan. 2009, available at http://www.nytimes.com/2009/01/16/us/politics/16text-holder.html?_r=41&pagewanted=all; See also E. Wallach, *Drop by Drop: Forgetting the History of Water Torture in U.S. Courts*, 45 Colum. J. Transnat’l L. 468 (2007).

The State party should ensure that no one is detained in any secret detention facility under its de facto effective control. Detaining persons in such conditions constitutes, per se, a violation of the Convention.²⁶

In *El-Megreisi v Libya*, the UN Human Rights Committee, the treaty body in charge of reviewing States parties' compliance with the International Covenant on Civil and Political Rights ("ICCPR"), found that the victim, who had been secretly detained for more than three years, "by being subjected to prolonged incommunicado detention in an unknown location, is the victim of torture and cruel and inhumane treatment, in violation of articles 7 and 10, paragraph 1, of the Covenant."²⁷

In addition, the conditions under which the "high-value detainees" were detained meet the definition of enforced disappearance under international law, which in itself is a violation of the Torture Convention. Article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance defines enforced disappearance:

"enforced disappearance" is considered to be the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.²⁸

The ICRC found in its February 2007 report that the detention of the fourteen CIA "high-value detainees" amounted to "enforced disappearance":

The totality of the circumstances in which they were held effectively amounted to an arbitrary deprivation of liberty and enforced disappearance, in contravention of international law.²⁹

The Human Rights Committee, as well as the Committee against Torture, has recognized that enforced disappearance "is inseparably linked to treatment that amounts to a violation of Article

²⁶ US CAT Report, *supra* n. 16 at 17. See also Senator Dick Marty (Switzerland), Council of Europe Parliamentary Assembly, *Secret detentions and illegal transfers of detainees involving Council of Europe member States: second report*, CoE Doc. 11302 rev, 11 June 2007, available at <http://assembly.coe.int/Documents/WorkingDocs/Doc07/edoc11302.pdf> ("Marty Report"), at 241 ("The fact of being detained outside any judicial or ICRC control in an unknown location is already a form of torture, as Louise Arbour, UN High Commissioner for Human Rights has said.") .

²⁷ *El-Megreisi v. Libyan Arab Jamahiriya*, Communication No. 440/1990, U.N. Doc. CCPR/C/50/D/440/1990 (1994), para. 5.4.

²⁸ See The International Convention for the Protection of All Persons from Enforced Disappearance, adopted on 20 Dec. 2006, available at <http://www2.ohchr.org/english/law/disappearance-convention.htm>.

²⁹ ICRC CIA Detainee Report, *supra* n. 11 at 25.

7 [of the ICCPR, prohibiting torture].”³⁰ When an enforced disappearance has been perpetrated, it is not necessary that ill-treatment also be inflicted in order for the disappearance to meet the definition of torture.³¹

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

The State party should adopt all necessary measures to prohibit and prevent enforced disappearance in any territory under its jurisdiction, and prosecute and punish perpetrators, as this practice constitutes, per se, a violation of the Convention.³²

The United States Senate Armed Services Committee (“SASC”) conducted an 18-month inquiry into the treatment of detainees in U.S. custody.³³ Its report contains detailed information on the involvement of officials at the highest levels of the US government in formulating and implementing the US detention and interrogation program. In essence, the SASC Report provides a comprehensive overview of US policies, including the program of torture and other forms of serious abuse of detainees in Afghanistan, Guantánamo and Iraq during the Bush Administration. Drawing on legal memoranda, internal investigations within the military, FBI and CIA, and the testimony of more than 70 witnesses, the Report conclusively establishes that the interrogation policies that originated in the Bush White House, the Department of Defense, the Department of Justice and the CIA in 2001-2002 led to the torture and abuse of detainees in Afghanistan, Guantánamo, Iraq and elsewhere.

The SASC found:

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

³⁰ *Mojica v. Dominican Republic*, Communication No. 449/1991, Doc. NU, CCPR/C/51/D/449/1991 Views of 15 July 1994 at para. 5.7.

³¹ *See Celis Laureano c. Peru* Communication No. 540/1993, Doc. NU, CCPR/C/51/D/540/1993. See also the conclusions and recommendations of the Committee against Torture, A/52/44, at 79, A/52/44, at 247, and A/53/44, at 249 and 251.

³² US CAT Report, *supra* n. 16 at para. 18.

³³ Senate Armed Services Committee, *Inquiry into the Treatment of Detainees in U.S. Custody*, 20 Nov. 2008, (“Senate Armed Services Report” or “SASC Report”). The full text report, with redacted information, was released in April 2009 and is available at: http://armed-services.senate.gov/Publications/Detainee%20Report%20Final_April%2022%202009.pdf.

The SASC further found that following Mr. Bush's 7 February 2002 determination that the Geneva Conventions did not apply to members of al Qaeda or the Taliban, "techniques such as waterboarding, nudity, and stress positions, used in SERE training to simulate tactics used by enemies that refuse to follow the Geneva Conventions, were authorized for use in interrogations of detainees in U.S. custody. [...] Legal opinions subsequently issued by the Department of Justice's Office of Legal Counsel (OLC) interpreted legal obligations under U.S. anti-torture laws and determined the legality of CIA interrogation techniques. Those OLC opinions distorted the meaning and intent of anti-torture laws, rationalized the abuse of detainees in U.S. custody and influenced Department of Defense determinations as to what interrogation techniques were legal for use during interrogations conducted by U.S. military personnel."³⁴

B. The Complainants' Cases

Hassan bin Attash, Sami el-Hajj, Muhammed Khan Tumani and Murat Kurnaz each endured years of torture and cruel, inhuman and degrading treatment while in U.S. custody at military bases in Afghanistan and Guantánamo. These four 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. As a result of the torture, 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.³⁵

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

³⁴ *Ibid.* "SERE training" refers to the Survival Evasion Resistance Escape (SERE) training program, in which U.S. military members were exposed to, and taught how to resist, interrogation techniques.

³⁵ See Supporting Materials to criminal information filed against Mr. Bush, available at http://www.ccrjustice.org/files/Private%20Prosecution_Oct_18_2011.pdf.

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 2008.³⁶

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 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 2009.³⁷ 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 2006.³⁸

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ *Ibid.*

C. Legal Liability of George W. Bush

Mr. Bush is responsible for torture, both for ordering it and, as a commander, for failing to stop it or punish his subordinates who committed it. Mr. Bush has openly admitted that he authorized waterboarding and other techniques that amount to torture.

Two leading commentators on the Torture Convention, Burgers and Danelius, have noted:

It is important, in particular, that different forms of complicity or participation are punishable, since the torturer who inflicts pain or suffering often does not act alone, but his act is made possible by the support or encouragement which he receives from other persons. In many cases, the torturer is merely a tool in the hands of someone else, and although this does not relieve him of criminal responsibility, the person or persons who instructed him should also be punished. In the definition of torture in article 1, reference is made to cases where pain or suffering is inflicted “at the instigation or with the consent or acquiescence of a public official or other person in an official capacity.” *Such instigation, consent or acquiescence should be considered to be included in the term “complicity or participation” in article 4.*³⁹ (emphasis added)

Even if Mr. Bush had not specifically authorized torture, he would still be legally responsible for failing to prevent torture or punish his subordinates who carried it out. This Committee has found that “the hierarchical leaders – also including the civil servants – are not able to evade answerability nor their criminal responsibility for acts of torture or of poor treatment committed by subordinates when they knew or should have known that these people were committing, or were susceptible to commit, these inadmissible acts and that they did not take the reasonable means of prevention that were imposed upon them.”⁴⁰

Both in the case of Augusto Pinochet, as well as in the case of Hissène Habré, this Committee was confronted with two former Heads of State where it was not alleged that they themselves had directly carried out torture. The Committee nonetheless called on Great Britain and Senegal, respectively, to prosecute these two former Heads of State in conformity with their Convention obligations.

The same analysis and results apply to Mr. Bush, who could be prosecuted for ordering, aiding, abetting, counseling, exercising command responsibility over and carrying out the common purpose to commit acts of torture. As president of the United States, and Commander-in-Chief of the U.S. Armed Forces, Mr. Bush bears individual responsibility for the torture he personally authorized and supervised and for the acts of his subordinates which he failed to prevent or punish.

³⁹ J. HERMAN BURGERS/HANS DANIELIUS, *THE UNITED NATIONS CONVENTION AGAINST TORTURE* 127s (Martinus Nijhoff, Dordrecht 1988).

⁴⁰ Committee against Torture, General Observation No. 2, § 26 (CAT/C/GC/2).

D. Canadian Legal Framework

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”⁴¹ 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.⁴²

Section 269.1 of the *Criminal Code*,⁴³ which provides jurisdiction over the offence of torture, “reflects the recognition of Parliament that freedom from such intentional mistreatment is a basic human right.”⁴⁴ 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.⁴⁵ As noted by this Committee, the definition of torture in the *Code* is in accordance with the definition laid out in the Torture Convention.⁴⁶

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.

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

Canada is thus empowered by the *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.

⁴¹ United Nations Committee against Torture, *Consideration of Reports submitted by States Parties under Article 19 of the Convention – Sixth periodic reports of States parties - Canada*, CAT/C/CAN/6, 22 June 2011, available at <http://www2.ohchr.org/english/bodies/cat/docs/AdvanceVersions/CAT-C-CAN-6.pdf>, at para. 48 (“Canada CAT 2012 Report”).

⁴² *Ibid.* at para. 46.

⁴³ *Criminal Code*, R.S.C., 1985, c. C-46.

⁴⁴ *Canada (Prime Minister) v. Khadr*, 2009 FCA 246, [2010] 1 FCR 73, at para. 51.

⁴⁵ 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.

⁴⁶ Report of the Committee against Torture, A/60/44 (2005).

E. This Committee's review of Canada

As a State party, Canada came up for review by the Committee during the 48th session held earlier this year. With regards to Articles 5, 7 and 8 the Committee asked Canada to provide:

detailed information on how the State party has exercised its universal jurisdiction over persons responsible for acts of torture, wherever they occurred and regardless of the nationality of the perpetrator or victim, and (b) specific examples and texts of any decisions on the subject, including the outcomes of reviews by the Program Coordinating Operations Committee (PCOC)...⁴⁷

In its report, Canada addressed the Committee's list of inquiries:

If persons suspected of involvement in atrocities do arrive in Canada or are found to be living in Canada, the [Program Coordinating Operations Committee (PCOC)] partners assess the situation to determine the most appropriate remedy. Remedies include the following:

- (a) Criminal proceedings that are based on investigations conducted by the RCMP under the Crimes Against Humanity and War Crimes Act (<http://laws.justice.gc.ca/en/C-45.9/>);
- (b) Enforcement of the [Immigration and Refugee Protection Act], including denial of access to and exclusion from refugee protection and removal proceedings;
- (c) Citizenship revocation;
- (d) Extradition to foreign states and surrender to international tribunals under the Extradition Act (<http://laws.justice.gc.ca/en/E-23.01/>).⁴⁸

With regards to admissibility of allegations, Canada set out the following requirements:

In order to be added to the inventory for criminal investigation, the allegation must disclose personal involvement or command responsibility, the evidence pertaining to the allegation must be corroborated, and the necessary evidence must be able to be obtained in a reasonable and rapid fashion. As there are

⁴⁷ 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, 4 Jan. 2012, at para. 17, available at <http://www2.ohchr.org/english/bodies/cat/docs/CAT.C.CAN.Q.6.pdf>. CCR and CCIJ submitted a shadow-report to the Committee responding to this issue, detailing Canada's actions in response to the filing of the private prosecution by the Complainants against George W. Bush and asserting that Canada failed to comply with its obligations under the Convention. See 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, available at <http://www.ccrjustice.org/files/CCR-CCIJ%20CAT%20CANADA%20Report%20re%20Bush.pdf>.

⁴⁸ Canada CAT 2012 Report, *supra* n. 41 at para. 46.

resources available for criminal investigation, the partners have redefined the test for inclusion in the modern war crimes inventory in order to recognize the narrowed strategic focus for criminal investigation and prosecution – one of the most difficult and expensive remedies available under the program...⁴⁹

In response to the Committee’s concerns on Canada’s limited use of prosecutions, Canada noted:

While the Committee has expressed some concern about the low number of prosecutions for terrorism and torture offences, the Government of Canada notes that prosecution is but one way in which Canada can impose sanctions on war criminals and those who have participated in crimes against humanity. The decision to utilize a particular remedy is carefully considered and is assessed in accordance with the Government’s policy that Canada not be a safe haven for war criminals. The decision to use one or more of these mechanisms is based on a number of factors which include: the different requirements of the courts in criminal and immigration/refugee cases to substantiate and verify evidence; the resources available to conduct the proceeding; and Canada’s obligations under international law.⁵⁰

Among its concluding observations for Canada, the Committee highlighted:

that any person present in the State party’s territory who is suspected of having committed acts of torture may be prosecuted and tried in the State party under the Criminal Code and the Crimes against Humanity and War Crimes Act. However, the very low number of prosecutions for war crimes and crimes against humanity, including torture offences, under the aforementioned laws raises issues with respect to the State party’s policy in exercising universal jurisdiction.⁵¹

The Committee recommended:

*that the State party take all necessary measures with a view to ensuring the exercise of the universal jurisdiction over persons responsible for acts of torture, including foreign perpetrators who are temporarily present in Canada, in accordance with article 5 of the Convention. The State party should enhance its efforts, including through increased resources, to ensure that the “no safe haven” policy prioritizes criminal or extradition proceedings over deportation and removal under immigration processes.*⁵² (emphasis added).

⁴⁹ *Ibid.* at para. 47.

⁵⁰ *Ibid.* at para. 48.

⁵¹ Concluding observations of the Committee against Torture, Canada, CAT/C/CAN/CO/6, 25 June 2012, available at <http://www2.ohchr.org/english/bodies/cat/cats48.htm>.

⁵² *Ibid.*

F. George W. Bush Present in Canada: Failure to Investigate or Prosecute

On 19 September 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.⁵³ At the time, it was widely reported that Mr. Bush would again travel to Canada, this time to Surrey, British Columbia on 20 October 2011, to appear as a paid speaker at an economic forum.⁵⁴

i. Communications with Canada’s Attorney General Regarding Torture Convention Obligations

In anticipation of Mr. Bush’s October 2011 visit, 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.⁵⁵

This letter, dated 29 September 2011, was supported with an extensive draft indictment setting forth the factual and legal basis for charging Mr. Bush with torture as well as approximately 4,000 pages of evidence.⁵⁶ The draft indictment highlighted Mr. Bush’s legal responsibility for the torture he ordered, authorized, condoned, or otherwise aided and abetted, as well as for violations committed by his subordinates, which he failed to prevent or punish. In particular, Mr. Bush authorized or oversaw enforced disappearance and secret detention, extraordinary rendition, waterboarding, exposure to extreme temperatures, sleep deprivation, punching, kicking, isolation in “coffin” cells for prolonged periods, threats of serious maltreatment, solitary confinement, and forced nudity.

The indictment also noted Canada’s jurisdiction under the *Criminal Code* and Canada’s obligations under the Torture Convention to take legal measures against suspected torturers within its territory.⁵⁷ The letter provided notification that if the Attorney General refused to

⁵³ Brendan Kennedy, “George W. Bush comes and goes, Toronto Barely Notices,” *The Toronto Star*, 21 Sept. 2011, available at <http://www.thestar.com/news/article/1057078--george-w-bush-comes-and-goes-toronto-barely-notices>.

⁵⁴ See, e.g., “Presidents Clinton and Bush at 2011 Surrey Regional Economic Summit,” 1 Feb. 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,” 20 Oct. 2011, available at <http://www.cbc.ca/news/canada/british-columbia/story/2011/10/20/bc-george-w-bush-protest-surrey.html>.

⁵⁵ See “First Letter to Canadian Minister of Justice,” 29 Sept. 2011, available at <http://ccrjustice.org/ourcases/current.cases/BUSH-torture-indictment>. Attached hereto as ANNEX III.

⁵⁶ See Bush Canada Indictment and Supporting Materials, *supra* n. 2 and at Annex II.

⁵⁷ 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,” 12 Oct. 2011, available at

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 Attorney General of Canada provided no response prior to Mr. Bush's visit.

CCR and CCIJ wrote a follow-up letter to Minister Nicholson on 14 October 2011, reminding the Attorney General about Canada's obligation under the Convention to prosecute or extradite for prosecution anyone present in its territory for whom there is a reasonable belief he or she has committed torture.⁵⁸

2. The Filing and Subsequent Stay of a Criminal Information against Mr. Bush in Canada

Faced with the Attorney General's inaction, on 18 October 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.⁵⁹ The Information included four counts, one each for the torture of Hassan bin Attash, Sami el-Hajj, Muhammed Khan Tumani and Murat Kurnaz.⁶⁰ The Justice of the Peace was reluctant to take the Information and, after taking more than two hours to speak on the phone and seek legal advice, she declined to accept the Information. She stated that because Mr. Bush was not currently in Canada, she lacked jurisdiction to accept the Information. The Justice of the Peace recommended that Mr. Eisenbrandt return on 20 October with proof that Mr. Bush had entered Canada.

On 19 October 2011, a letter in support of the private prosecution, signed by over 50 prominent human rights individuals and non-governmental organizations, was sent to the Attorney General of Canada.⁶¹

On 20 October 2011, Mr. Eisenbrandt returned to the Provincial Court. After Mr. Eisenbrandt provided documentary evidence that Mr. Bush was present in Canada, the Justice of the Peace

<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, 20 Oct. 2011: Canada must prevent entry or arrest and ensure prosecution for torture, 25 Aug. 2011, available at http://www.lawyersagainsthewar.org/letters/LAW_letter_re_George_BUSH_20110825.pdf.

⁵⁸ See "Second Letter to Canadian Minister of Justice," 14 Oct. 2011, CCR and CCIJ, available at <http://ccrjustice.org/ourcases/current.cases/BUSH-torture-indictment>. Attached hereto at ANNEX IV.

⁵⁹ Known as a "private prosecution," section 504 of the *Criminal Code*, *supra* n. 433, states, "Anyone 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.

⁶⁰ Criminal Information/Dénonciation and Supporting Materials filed against Mr. Bush on 18 October 2011, available at http://ccrjustice.org/files/Private%20Prosecution_Oct_18_2011.pdf. Attached hereto at ANNEX V.

⁶¹ 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. Attached hereto at ANNEX VI.

accepted the criminal 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.⁶²

The same afternoon, and potentially while Mr. Bush was still in Canada, Andrew 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 criminal Information – to seek consent from the Attorney General of Canada within the permitted eight days.

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").⁶³ A 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."⁶⁴ In this regard, it is recalled

⁶² See "Third Letter of Filing to Canadian Minister of Justice re: Sworn Information," CCR and CCIJ, 20 Oct. 2011, available at http://ccrjustice.org/files/2011-10-20_Letter_to_AG_re_sworn_Information.pdf. Attached hereto at ANNEX VII.

⁶³ David Ball, "B.C. intervened to halt BUSH torture case," Vancouver Observer, 26 Oct. 2011, available at <http://www.vancouverobserver.com/world/2011/10/26/bc-intervened-halt-BUSH-torture-case>.

⁶⁴ *Ibid.*

that the Attorney General of Canada, Minister Nicholson, took no action upon receipt of the extensive filing submitted to him on 29 September 2011 by CCR and CCIJ setting out the factual and legal case against Mr. Bush for torture.

On 7 November 2011, nearly three weeks after Mr. Bush's visit, the Ministerial Correspondence Unit of the federal Department of Justice, finally responding to CCR's and CCIJ's original letter to the Attorney General of Canada on 29 September 2011, 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."⁶⁵

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.

II. Violation by Canada of Its Obligations under the Torture Convention

The Complainants assert that Canada violated its obligations under the Torture Convention, and specifically:

- **Article 5 (2)** of the Torture Convention by failing to take all measures necessary to ensure that jurisdiction was properly established and/or exercised when an alleged torturer – Mr. Bush – was present in its territory and it did not extradite him pursuant to Article 8;
- **Article 6 (1)** of the Torture Convention by failing to take Mr. Bush into custody or to take other legal measures to ensure his presence following an examination of the evidence provided to Canadian officials, including the draft indictment, the criminal Information filed by the CCR, CCIJ and the Complainants, and the supporting materials thereto; and
- **Article 7 (1)** of the Torture Convention by failing to prosecute or extradite Mr. Bush.

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.

⁶⁵ Letter from Department of Justice Canada, Ministerial Correspondence Unit, Acknowledging Receipt of Correspondence Concerning Former President of the United States of America George W. Bush, 7 Nov. 2011, 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. Attached hereto at ANNEX VIII.

Indeed, 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. The Complainants respectfully submit that 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 blocked almost immediately. 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, in violation of Article 6 of the Convention. Furthermore, Canada's obligation under the Convention to extradite or prosecute suspected torturers within its jurisdiction cannot be ignored based on political expediency as it appears was done in this situation, in violation of Article 7 of the Convention.

Canada's refusal to act is not only a violation of international law but also a rejection of the people – these Complainants – 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.

A. Obligations under the Convention

Article 5(2) of the Convention provides for universal jurisdiction in all cases where an alleged torturer is present “in order to avoid safe havens for perpetrators of torture.”⁶⁶ This provision makes the Torture Convention “*the first human rights treaty incorporating the principal of universal jurisdiction as an international obligation of all State parties without any precondition other than the presence of the alleged torturer.*”⁶⁷ (emphasis in original) The need for universal jurisdiction for torture was explained as such: “Torture ... is according to its definition in Article 1 primarily committed by State officials, and the respective governments usually have no interest in bringing their own officials to justice.”⁶⁸

⁶⁶ Manfred Nowak and Elizabeth McArthur, *THE UNITED NATIONS CONVENTION AGAINST TORTURE - A COMMENTARY* (Oxford University Press 2008) (“Nowak and McArthur Commentary”), at 254 (emphasis added).

⁶⁷ *Ibid.* at 316.

⁶⁸ *Ibid.* As discussed in the Nowak and McArthur Commentary on CAT, this provision met with “fierce objection” from many States, with the strongest supporter of the draft provision for universal jurisdiction (presented by Sweden) being the United States: “the US Government expressed the opinion that torture is an offence of special international concern which means that it should have a broad jurisdictional basis in the same way as the international community had agreed upon in earlier conventions against hijacking, sabotage and the protection of

In Article 6(1), the Convention 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.

According to the Nowak and McArthur Commentary:

Most of the procedural safeguards provided for in Article 6 are fairly self-evident. If the suspected torturer is present in the territory of the State which initiates criminal proceedings (the presence is a legal requirement only for exercising universal jurisdiction), *its authorities shall take him or her into custody or take other legal measure to ensure his or her presence.*⁶⁹ (emphasis added)

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

Simultaneously with the preliminary inquiry to be initiated with immediate effect, under Article 6 (4) of the Convention, when a State has put a person in detention, it must notify the State(s) referred to in Article 5(1)(b) [in this case, the State of which Mr. Bush is a national, i.e., the United States] of the detention and the circumstances which justify such detention.

Article 7, paragraph 1 of the Convention then requires that the accused be prosecuted:

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.

Therefore, only a request for extradition formulated by the United States or a third country, guaranteeing Mr. Bush an equitable trial, would have permitted Canada not to exert its criminal jurisdiction over the crimes in question.⁷⁰

diplomats.” *Ibid.* at 314. The Commentary continues: “It was, above all, the delegation from the United States which had convincingly argued that universal jurisdiction was intended primarily to deal with situations where torture is a State policy and where the respective government, therefore, was not interested in extradition and prosecution of its own officials accused of torture.” *Ibid.* at 315.

⁶⁹ *Ibid.* at 329.

⁷⁰ *Ibid.* at 344.

B. The Committee's previous treatment of the Convention's obligation to prosecute or extradite

There is precedent in the jurisprudence of this Committee for finding that Canada violated its obligations under Articles 5, 6 and 7 of the Convention. The case of Hissène Habré, the former president of Chad living in Senegal, came to the Committee pursuant to a communication under Article 22 that alleged violations of Articles 5 and 7. The Committee found that Senegal had not abided by its international obligations under the Convention:

The Committee considers that the State party cannot invoke the complexity of its judicial proceedings or other reasons stemming from domestic law to justify its failure to comply with these obligations under the Convention. It is of the opinion that the State party was obliged to prosecute Hissène Habré for alleged acts of torture unless it could show that there was not sufficient evidence to prosecute...⁷¹

On 20 July 2012 the International Court of Justice (ICJ) weighed in on this matter in its judgment of *Belgium v. Senegal* on questions relating to Senegal's obligation to prosecute or extradite Habré. The ICJ affirmed the obligations on States parties under the Convention to investigate or prosecute torture allegations. The ICJ rejected Senegal's claims that its failure to initiate proceedings against Habré was based on financial difficulties, delays caused by a referral to the African Union, and internal Senegalese law.⁷² The ICJ found that these issues did not discharge Senegal from its obligation to prosecute or extradite.

The ICJ discussed the object and purpose of the Convention, as reflected in Articles 5-7:

The purpose of all these obligations is to enable proceedings to be brought against the suspect, in the absence of his extradition, and to achieve the object and purpose of the Convention, *which is to make more effective the struggle against torture by avoiding impunity for the perpetrators of such acts.* [...] This obligation ... has in particular a preventive and deterrent character, since by equipping themselves with the necessary legal tools to prosecute this type of offence, the States parties ensure that their legal systems will operate to that effect and commit themselves to co-ordinating their efforts to eliminate any risk of impunity. This preventive character is all the more pronounced as the number of States parties increases.⁷³ (emphasis added)

⁷¹ Committee against Torture, communication 181/2001, observations of May 17, 2006, para. 9.8 (CAT/C/36/D/181/2001).

⁷² *Questions Relating to the Obligation to Prosecute or Extradite* (Belg. v. Sen.) Judgment of 20 July 2012, available at <http://www.icj-cij.org/docket/files/144/17064.pdf>.

⁷³ *Ibid.* at paras. 74-75.

The ICJ emphasized that, under Article 7, a State is required to submit a case to its competent authorities for the purpose of prosecution and is relieved of that obligation only when the State receives a request for extradition and positively exercises that option.⁷⁴

Of particular relevance to Mr. Bush's case, the ICJ analyzed Senegal's compliance with the obligation under Article 6 to conduct a preliminary inquiry "to corroborate or not the suspicions regarding a person alleged to have committed acts of torture."⁷⁵ Finding that Senegal had not conducted such an inquiry – in spite of complaints filed by victims in 2000 and 2008 – the ICJ concluded that Senegal breached its obligation under the Convention. The ICJ held that Senegal "must, without further delay, submit the case of Mr. Hissène Habré to its competent authorities for the purpose of prosecution, if it does not extradite him."⁷⁶

III. Admissibility of the Complaint

This submission meets all the conditions of admissibility laid down in Article 22 of the Convention. It is presented by individuals who consider themselves victims of a violation by Canada, a State Party to the Convention. Canada has made a declaration recognizing the Committee's competence under article 22 (1) of the Convention.

In compliance with Article 22 (2), this communication is not anonymous and is signed properly by Katherine Gallagher on behalf of the Complainants, with proof of, and conditions for, representation of the Complainants set forth in Annex I. The communication alleges facts that, *prima facie*, constitute serious violations of the Convention. It is therefore not a communication reflecting an abuse of the right of submission of such communications.

The conditions of admissibility laid down in Article 22 (5) are also satisfied. The subject matter of this complaint "has not been and is not being examined under another procedure of international investigation or settlement." *See, e.g., Arthur Kasombola Kalonzo v. Canada*, decision of July 4, 2012, CAT/C/48/D/343/2008, para. 8.1. The Complainants took all steps available to them, under the circumstances of this case, to effect Canada's compliance with its obligations under the Convention. The lack of any response by the Attorney General of Canada, the entirely insufficient letter – three weeks of Mr. Bush's visit – from the Ministerial Correspondence Unit, and the direct intervention by the Attorney General of BC to block the private prosecution all show that Canadian officials had no intention of pursuing this matter. No other domestic options are available in Canada, as judicial review of matters of prosecutorial

⁷⁴ *Ibid.* at paras. 91-95.

⁷⁵ *Ibid.* at para. 83.

⁷⁶ *Ibid.* at para. 122.

discretion is generally not permitted⁷⁷ and previous attempts to obtain judicial review concerning stays of private prosecutions have failed.⁷⁸

IV. Relief Sought

Canada's refusal to initiate an investigation and prosecution of Mr. Bush upon his arrival in Canada and the decision of the Attorney General of BC to immediately stay the private proceedings brought against him by the Complainants has caused harm to the Complainants.

The Complainants request that the Committee find Canada in breach of its obligations under the Convention, and specifically that Canada breached its obligations under Articles 5 (2), 6 (1) and 7 (1) of the Torture Convention.

The Complainants further request that the Committee seek an explanation of the actions taken by the various federal and provincial officials involved in the decisions not to initiate an investigation against Mr. Bush and to stay the private prosecution lodged against him.

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, and make any changes to its procedures to ensure that its officials place priority on fulfilling Canada's obligations under the Torture Convention. In this regard, the Complainants recall the recent statement by the Committee in its Concluding Observations in relation to Canada's compliance with its obligations under Article 5. Such changes should include a review of the level of funding allocated to universal jurisdiction prosecutions.

Should Mr. Bush return to Canada, the government must be urged by the Committee to 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.

⁷⁷ *Krieger v. Law Society (Alberta)*, [2002] S.C.J. No. 45, [2002] 3 S.C.R. 372 (S.C.C.); *R. v. Power*, [1994] S.C.J. No. 29, 89 C.C.C. (3d) 1 (S.C.C.).

⁷⁸ *See Davidson v. British Columbia (Attorney General)*, [2006] B.C.J. No. 2630.

We remain available to the Committee to provide any follow-up information or clarification that might be of assistance to its consideration of this communication.

Respectfully submitted,

14 November 2012



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ANNEXES

- Annex I:** Letters from the Legal Representatives of Hassan bin Attash, Murat Kurnaz, and Muhammed Khan Tumani, and from Sami el-Hajj authorizing Katherine Gallagher to represent the Complainants in this Communication
- Annex II:** “Factual and Legal Basis for Prosecution of George W. Bush pursuant to the Canadian Criminal Code and the Convention against Torture,” CCR and CCIJ, 29 Sept. 2011
- Annex III:** First Letter to Canadian Attorney General from CCR and CCIJ, 29 Sept. 2011
- ANNEX IV:** Second Letter to Canadian Attorney General from CCR and CCIJ, 14 Oct. 2011
- ANNEX V:** Criminal Information/Dénonciation and Supporting Materials filed against Mr. Bush, 19 Oct. 2011
- ANNEX VI:** Letter of Support of Private Criminal Prosecutions, 19 Oct. 2011
- ANNEX VII:** Third Letter of Filing to Canadian Attorney General re: Sworn Information from CCR and CCIJ, 20 Oct. 2011
- ANNEX VIII:** Letter from Department of Justice Canada, Ministerial Correspondence Unit, Acknowledging Receipt of Correspondence Concerning Former President of the United States of America George W. Bush, 7 Nov. 2011