

No: ICC-02/17

Date: 31 January 2018

**PRE-TRIAL CHAMBER III**

**Before:** Judge Antoine Kesia-Mbe Mindua, Presiding Judge  
Judge Chang-ho Chung  
Judge Raul C. Pangalangan

**SITUATION IN THE ISLAMIC REPUBLIC OF AFGHANISTAN**

**VICTIMS' REPRESENTATION**

(Victims' Representation Forms at Appendix I and II)

*-Confidential-*

**Submitted on Behalf of:**

**SHARQAWI AL HAJJ  
GULED HASSAN DURAN**

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***“Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.”***

- *Preamble, Statute of the International Criminal Court*

## **I. INTRODUCTION**

1. On 20 November 2017, the Prosecutor requested that this Pre-Trial Chamber authorize the opening of an investigation into alleged crimes committed on the territory of Afghanistan in the period since 1 May 2003, as well as other alleged crimes that have a nexus to the armed conflict on the territory of other States Parties in the period since 1 July 2002.<sup>1</sup> The Request seeks authorization to investigate *inter alia* torture, cruel treatment, rape and other sexual violence by members of the U.S. armed forces and/or the Central Intelligence Agency (“CIA”) against conflict-related detainees in Afghanistan and at other locations, principally in 2003-2004. Request, ¶4.

2. This representation is submitted on behalf of **Sharqawi Al Hajj** and **Guled Hassan Duran**, victims of crimes falling within the scope of Request (“Victims”), pursuant to Article 15(3) of the Statute of the International Criminal Court, to share their views and concerns on the Request and the proposed investigation.

3. The Victims are currently detained at Guantánamo Bay, where they have been held for approximately a dozen years without charge after transfer from detention centers operated by the U.S. Central Intelligence Agency including on the territory of Afghanistan after 1 May 2003.<sup>2</sup> Because of their ongoing detention at Guantánamo and the restrictions on communication in place by the detaining authority, the Victims have not been able to assist in the preparation of their representations; accordingly, the information set out in their VPRS forms and incorporated and expanded upon herein is based exclusively on publicly available sources including Victims’ declassified filings in their respective cases in U.S. courts.<sup>3</sup>

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<sup>1</sup> *Situation in the Islamic Republic of Afghanistan*, Pre-Trial Chamber III, ‘Request for authorisation of an investigation pursuant to article 15, 20 November 2017, ICC-02/17-7 (“Request”).

<sup>2</sup> Both Victim Al Hajj and Victim Duran are referenced in the Senate Select Committee on Intelligence, *Committee Study of the Central Intelligence Agency’s Detention and Interrogation Program Executive Summary*, Declassification Revisions 3 December 2014 (“SSCI Executive Summary”).

<sup>3</sup> See *Al Hajj v. Trump*, Case No. 09-cv-745 (D.D.C.); *Duran v. Trump*, Case No. 16-cv-02358 (D.D.C.). In both habeas corpus cases, the Victims are represented by other attorneys at the Center for Constitutional Rights who have security clearances and operate pursuant to *inter alia* applicable statutes, regulations and protective orders. Habeas counsel for Sharqawi Abdu Ali Al Hajj and Guled Hassan Duran have no involvement in this matter and do not confirm or deny any statement or other aspect of this matter.

4. **Victim Sharqawi Al Hajj**<sup>4</sup> was born in May 1974 in Ta'izz, Yemen and is a Yemeni citizen. Relevant to the pending Request, in 2000 Mr. Al Hajj traveled to Afghanistan, fled to Pakistan after the U.S. bombing campaign began in 2001, and, in February 2002, was captured in Karachi during a joint American and Pakistani operation. From Pakistan, Mr. Al Hajj was transported on a CIA-operated flight to Amman, Jordan, where he was detained for twenty-three months by Jordanian authorities acting under the authority of, and for the purposes of collecting information for, the CIA. Mr. Al Hajj was subjected to repeated acts of physical and mental torture while in detention in Jordan, and was hidden during visits from the Red Cross. He was transported by the CIA from Jordan to Afghanistan on 8 January 2004, where he was held first in the CIA-run "Dark Prison" for approximately five months, and then was detained in the U.S. Department of Defense ("DOD") facility at Bagram Air Base. Mr. Al Hajj was subjected to repeated acts of physical and mental torture in both locations in Afghanistan; indeed, in 2011, a U.S. federal judge adjudicating his habeas corpus claim found that Sharqawi had been subjected to "patent ... physical and psychological coercion" in Jordan and Kabul and a second U.S. federal district court refused to rely on statements attributed to Mr. Al Hajj "in light of the abusive circumstances of [his] detention" and because he had "recently been tortured" while detained in Jordan and Afghanistan.<sup>5</sup> In August 2004, Mr. Al Hajj was transferred to the U.S.-operated detention facility in Guantánamo Bay, where he remains detained. Mr. Al Hajj has never been accused of any act of violence, and has never been charged with any crime. Mr. Al Hajj suffers from the physical and psychological effects of his torture and is currently experiencing acute health issues: his counsel in U.S. habeas proceedings filed an emergency motion for a medical evaluation in September 2017, following a precipitous decline in his health after several weeks on a hunger strike (Mr. Al Hajj's weight was 47kgs) because of growing despair over his ill health and indefinite detention – itself a form of torture. *See* Section III (A).

5. **Victim Guled Hassan Duran**<sup>6</sup> was born in April 1974 and is a Somali citizen. Relevant to the pending Request, Mr. Duran was captured on 4 March 2004 by Djiboutian security forces as he was transiting through the airport en route from Mogadishu, Somalia to Sudan, where he was to receive medical treatment. The Djiboutians turned Mr. Duran over to CIA personnel. After a few hours of interrogation, Mr. Duran was loaded on to a plane,

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<sup>4</sup> Also known as Riyadh Mr. Al Hajj *or* Shergawi *or* al-Haag *or* Riyadh the Facilitator.

<sup>5</sup> *See Abdah v. Obama*, 708 F. Supp. 2d 9, 14 (D.D.C. 2010).

<sup>6</sup> Also known as Guled Hasan Duran *or* Guleed Hassan Dourad *or* Gouled Hassan Dourad *or* Guleed Hassan Ahmed.

shackled and strapped down to the floor of the plane, and was flown to an unknown location, making one stop en route.<sup>7</sup> Until 2006, when he was transferred to Guantánamo, Mr. Duran was imprisoned in the CIA's secret prison network, where myriad forms of physical and psychological torture have been documented, but little information about his location and treatment during that time has been made publicly available. Based on a report by the International Committee of the Red Cross ("ICRC"), it is known that Mr. Duran spent at least some of the time between his capture in March 2004 and his transfer to Guantánamo Bay in September 2006 detained in Afghanistan.<sup>8</sup> Moreover, the ICRC report establishes that Mr. Duran was subjected to "a combination of physical and psychological ill-treatment with the aim of obtaining compliance and extracting information," transfer "to multiple locations" in a manner "that was intrusive and humiliating and that challenged the dignity of the persons concerned," "continuous solitary confinement and incommunicado detention throughout the entire period of [his] undisclosed detention, and the infliction of further ill-treatment through the use of various methods either individually or in combination, in addition to the deprivation of other basic material requirements" – conditions "that amounted to torture and/or cruel, inhuman or degrading treatment."<sup>9</sup> Mr. Duran was named as a so-called "high-value detainee"; however, he denies having any link to al-Qaeda,<sup>10</sup> and he has never been charged with a crime or tried for any terror-related offense. He remains detained at Guantánamo without charge. *See* Section III (B).

6. The Victims support the opening of an investigation into the extremely grave criminal acts by U.S. actors arising out of the running of an international network of prisons by the CIA and the DOD, including on the territory of Afghanistan and other States Parties, where torture and other forms of cruel treatment were part and parcel of the U.S. "rendition, detention and interrogation" program forthwith. Such an investigation would serve the interests of justice in that it would make clear that no one is above the law regardless of power or position; that those who bear the greatest responsibility for serious international crimes will be held accountable and will not enjoy global impunity; and that all victims of serious crimes can and will have their claims heard and adjudicated by an independent and impartial tribunal. *See* ICC Statute, Art. 53(1)(c). An investigation into the criminal conduct

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<sup>7</sup> Mr. Duran was told where he was brought but this information remains classified by the United States.

<sup>8</sup> International Committee of the Red Cross, *ICRC Report on the Treatment of Fourteen "High Value Detainees" in CIA Custody*, February 2007, available at <http://www.nybooks.com/media/doc/2010/04/22/icrc-report.pdf> ("ICRC CIA Detainee Report").

<sup>9</sup> *Id* at 4-5, 7.

<sup>10</sup> Robert Burns, "Somali Held at Guantanamo Denies Al-Qaeda Link," *Associated Press* (5 May 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/05/04/AR2007050402185.html>.

outlined in the Request furthers the core mission of the ICC: to end impunity and contribute to preventing the reoccurrence of such crimes.

7. This representation is jointly submitted, incorporating and expanding upon the information set forth in the VPRS Victims' Representation Forms appended hereto at Appendix I and II, to present Victims' representations on the appropriate scope of the investigation.<sup>11</sup> While the Victims fully support the Prosecutor's Request, they consider the articulated scope of the proposed investigation into **U.S. and other international forces** unduly narrow in three fundamental respects: (1) the proposed investigation specifically **encompasses only part of the crime-base**; in addition to detention/interrogation-related torture in Afghanistan and in CIA-run locations, the investigation must also include CIA-run extraordinary renditions and proxy detentions that involved conduct on the territory of a State Party as well as continuing crimes that began on the territory of a State Party and were or are ongoing at Guantánamo; (2) the Request **identifies only a subsection of crimes** that fall within the Situation; additional war crimes (i.e., Art. 8(2)(e)(xi)) and crimes against humanity (i.e., Arts. 7(1)(e), 7(1)(f), 7(1)(g), 7(1)(h) and 7(1)(i)), which reflect both the attack against a civilian population and the policy aspect of the multi-faceted detention and interrogation program, should also be investigated for the purpose of any future case(s); and (3) the proposed investigation **encompasses only some categories of persons who bear the greatest responsibility** for the crimes; the investigation should explicitly include U.S. civilian and military leadership, and private contractors.

8. The scope of investigation advanced herein is necessary for determining the factual and legal context in which the alleged crimes occurred, and for a proper examination of the crime-base and the criminal liability of those who bear the greatest responsibility for the grave crimes within the ICC's jurisdiction set forth in the Request. Victims are not seeking a significantly larger investigation, but rather, a more fulsome analysis of the criminal conduct currently encompassed in the Request, which necessarily requires examining the related conduct – and harms – before and after a detainee's arrival in a detention center on the territory of Afghanistan or in a CIA-run detention center in Poland, Lithuania or Romania. Failure to include this conduct within the scope of the investigation could lead the Court to leave unaddressed serious crimes against detainees that fall squarely within its jurisdiction.

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<sup>11</sup> Victims joint submission of this Framing Document does not imply acceptance of common legal representation at any stage of proceedings nor does it interfere with the individualized victim- representative relationship identified in each VPRS form.

9. Moreover, the suggested framing of the alleged criminal acts as crimes against humanity avoids the risk that the investigation and any subsequent prosecutions might reinforce the so-called “war on terror” paradigm advanced by the United States in the aftermath of the September 11<sup>th</sup> attacks; the U.S. response which spawned the detention and interrogation program at issue has entailed a counter-terrorism effort that has extended far beyond any armed conflict, as understood under international law, or “battlefield.” It is a global campaign of anti-terrorism operations without any defined end, better understood as a law-enforcement effort than a military mission. Indeed, through investigation of this Situation, the Pre-Trial Chamber, and subsequently the Prosecution, has both an opportunity, and, respectfully, a duty to disentangle those crimes that occur in the context of or with a nexus to an armed conflict from those committed as part of a widespread or systematic attack on a civilian population arising out of terrorism/counter-terrorism operations.<sup>12</sup>

10. Victims’ views are provided on issues of admissibility, and in particular, on gravity of the crimes and complementarity. Finally, Victims’ views are provided on why this investigation serves the interests of justice, and, indeed, why authorization to investigate in accordance with the scope set out herein is required to satisfy the interests of justice.

11. Victims’ representations herein are necessarily summary in form. Further information can be provide by and through their Representative, in writing or in person, should that be of assistance to the Pre-Trial Chamber in deciding the Request.

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<sup>12</sup> Georges Abi-Saab warned against treating the September 11<sup>th</sup> attacks as an “act of war” bringing into play the law of war rather than as a criminal enterprise or act of terrorist groups warranting a “‘law enforcement’ approach in the sense of criminal prosecution and repression of the individual perpetrators.” See “The Proper Role of International Law in Combating Terrorism,” xv-xx, in Bianchi, Andrea (ed.), *Enforcing International Law Norms Against Terrorism* (Hart Publishing, 2004). Professor Abi-Saab’s words required heeding:

The alternative course of resort to unilateral force (whether by one State or a coalition of States), pressuring and threatening other States and even acting on their territory without their consent, in the name of combating terrorism – apart from its blatant violation of some of the most fundamental principles of international law – can only lead to disastrous results. It would nurture a widening and increasingly destructive cycle of violence on a global level, of which nobody can foresee the end or the full consequences, apart from the total erosion of the international legal order, and a gradual descent into anarchy at the hands of those who are supposedly trying to defend world order. *Id.* at xxii.

*“Americans should not expect one battle, but a lengthy campaign, unlike any other we have ever seen.”*

– George W. Bush

*“As repeatedly asserted, the ICRC considers that, from a legal perspective, there is no such thing as a ‘war against terrorism’”*

- International Committee of the Red Cross<sup>13</sup>

## **II. FACTUAL AND CONTEXTUAL BACKGROUND: THE UNITED STATES DETENTION AND INTERROGATION PROGRAM IN AFGHANISTAN AND OTHER STATES PARTIES**

12. Victims provide this factual and contextual background, which builds on and deepens the information set forth in the Request, *see* ¶¶ 68-71, 188-189, 192-203, 206, 209-216, 218-252, to assist the Pre-Trial Chamber in its assessment of the Court’s jurisdiction over, and the appropriate scope of, any investigation and potential cases arising from the Situation.

13. The United States was not engaged in an armed conflict at the time of the September 11<sup>th</sup> attacks. The immediate response of the President of the United States George W. Bush was to declare a “national emergency” in response to “the terrorist attacks.”<sup>14</sup>

14. President Bush and U.S. senior officials mobilized assets across the US government to respond to the attacks.<sup>15</sup> Bolstered by the Congressional Authorization for Use of Military Force (AUMF),<sup>16</sup> Bush, Vice President Dick Cheney and other senior U.S. civilian and military officials, including government attorneys, working primarily through the National Security Council (NSC),<sup>17</sup> constructed a two-part response: a military response managed by

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<sup>13</sup> ICRC, *International humanitarian law and the challenges of contemporary armed conflicts*,” 32<sup>nd</sup> International Conference of the Red Cross and Red Crescent (Geneva, Switzerland, 8-10 Dec. 2015) at 18, available at <https://www.icrc.org/en/document/applicability-ihl-terrorism-and-counterterrorism>.

<sup>14</sup> Executive Office of the President, *Declaration of National Emergency by Reason of Certain Terrorist Attacks*, 14 September 2001, available at <http://www.federalregister.gov/articles/2001/09/18/01-23358/declaration-of-national-emergency-by-reason-of-certain-terrorist-attacks>.

<sup>15</sup> In his capacity as president of the United States and Commander-in-Chief, Bush had authority over the agencies of the United States government, including but not limited to, the Central Intelligence Agency (CIA), the Department of Defense (DOD), the Department of Justice (DOJ), including the Federal Bureau of Investigation (FBI), the Department of Homeland Security (DHS), the Department of State (DOS), as well as over the White House staff and the Office of the Vice President.

<sup>16</sup> On 18 September 2001, President Bush was empowered by Congress to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided” those attacks or who harbored said persons or organizations “to prevent any future acts of international terrorism against the United States by such nations, organizations[,] or persons.” Authorization for Use of Military Force, [Pub.L. No. 107–40, § 2\(a\), 115 Stat. 224](#), 224 (2001).

<sup>17</sup> Bush chaired the National Security Council (NSC), which advises and assists the president on national security and foreign policies, and serves as the president’s principal arm for coordinating these policies among various government agencies. *See* “National Security Council,” *The White House*, available at <https://www.whitehouse.gov/nsc/>: “Its regular attendees (both statutory and non-statutory) are the Vice

the Department of Defense under Secretary of Defense Donald Rumsfeld and a covert, counter-terrorism response led by the Central Intelligence Agency (CIA) under the leadership of Director of Central Intelligence (DCI) George Tenet.<sup>18</sup> While the military and counter-terrorism responses overlapped in time, space and objective,<sup>19</sup> it was the CIA-led covert operation that constituted the primary response to the “terrorist attacks” of September 11<sup>th</sup>, and it was through the covert CIA detention and interrogation program that the Victims were captured, detained – both directly by the CIA and through proxy-State CIA detention – interrogated and subjected to brutal, long-term acts of physical and psychological torture.

15. The military response, with the U.S. launch of military operations in Afghanistan 7 October 2001, has been outlined in the Request. *See* ¶¶ 15-17, 68-70. Victims elaborate below upon detention under the Department of Defense and crimes arising out thereof.

16. The covert, counter-terrorism response requires further elaboration.<sup>20</sup> DCI Tenet advised Bush and other senior officials that the CIA could “launch in short order an aggressive covert-action program” which involved CIA paramilitaries from the Special Activities Division and small teams of special operations forces building up anti-Taliban forces on the ground and directing allied air attacks on the enemy front line. But, Tenet advised, “Afghanistan was only the opening act of a comprehensive strategy for combating international terrorism,” and “raised the importance of being able to detain unilaterally al-Qa’ida operatives around the world.”<sup>21</sup> On 17 September 2001, Bush issued a 12-page directive known as a “Memorandum of Notification” that authorized the CIA to capture

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President, the Secretary of State, the Secretary of the Treasury, the Secretary of Defense, and the Assistant to the President for National Security Affairs. The Chairman of the Joint Chiefs of Staff is the statutory military advisor to the Council, and the Director of National Intelligence is the intelligence advisor. The Chief of Staff to the President, Counsel to the President, and the Assistant to the President for Economic Policy are invited to attend any NSC meeting. [...].”

<sup>18</sup> The United States simultaneously sought the participation of international allies and institutions, including the United Nations and NATO, to support its efforts, particularly in relation to the military response in Afghanistan and developing legal and political regimes to track terrorist organizations and financing.

<sup>19</sup> The overlap between the two responses is evident through *e.g.*, CIA operatives and special forces on the ground directing the Northern Alliance with CIA’s Tenet having been authorized to spend up to \$1 billion to secure allegiances among Afghan factions (*see* George Tenet, *At the Center of the Storm: The CIA During America’s Time of Crisis* (Harper, 2007), at p. 175); the movement of detainees between CIA-run facilities and DoD detention sites.

<sup>20</sup> OTP Request recognizes the counter-terrorism response to September 11<sup>th</sup>, as well as a military response, Request, ¶230.

<sup>21</sup> Tenet, *At the Center of the Storm* at 176-177. Indeed, the Request recognizes CIA detention global in nature, Request ¶ 248.

suspected terrorists and members of Al-Qaeda, and to create detention facilities outside the United States where suspects can be held and interrogated.<sup>22</sup> See also Request, ¶ 71.

17. Bush's directive marked the official launching of the CIA program by vesting the agency with extraordinary power. Described as a "covert action Memorandum of Notification (MON) to authorize the director of central intelligence (DCI) to 'undertake operations designed to capture and detain persons who pose a continuing, serious threat of violence or death to U.S. persons and interests or who are planning terrorist activities,' ...the MON provided unprecedented authorities, granting the CIA significant discretion in determining whom to detain, the factual basis for the detention, and the length of the detention." SSCI Executive Summary at p. 11.<sup>23</sup> In March 2002, CIA headquarters expanded authority for CIA personnel to detain "individuals who might not be high-value targets in their own right, but could provide information on high-value targets." *Id.* at 13.

#### a. U.S. Detention Operations

18. On 13 November 2001, Bush authorized the detention of suspected terrorists or aiders and abettors thereof, and subsequent trial by military commissions, which he ordered would not be subject to the principles of law and rules of evidence applicable to trials held in U.S. federal courts.<sup>24</sup> Bush further vested Secretary of Defense Rumsfeld with powers related to the detention of such persons and the establishment of military commissions. Notably, through this order, Bush 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."<sup>25</sup> By late 2001, Bush was planning for the detention of individuals at the U.S.

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<sup>22</sup> The directive has yet to be publically released. See also Tenet, *At the Center of the Storm* at 208: "The president approved our recommendations on Monday, September 17, and provided us broad authorities to engage al-Qa'ida. As Cofer Black, chief of the CIA Counterterrorist Center, later told Congress, 'the gloves came off' that day." The CIA detention program is discussed in the CIA Inspector General's *Special Review: Counterterrorism, Detention and Interrogation Activities, September 2001 – October 2003*, dated 7 May 2004 and publically released on 24 August 2009 ("CIA IG Report") available at <https://www.cia.gov/library/readingroom/docs/0005856717.pdf>.

<sup>23</sup> 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, at [http://assembly.coe.int/CommitteeDocs/2007/EMarty\\_20070608\\_NoEmbargo.pdf](http://assembly.coe.int/CommitteeDocs/2007/EMarty_20070608_NoEmbargo.pdf) ("Marty Report"), at ¶ 58 (describing the Memorandum as "a means of granting the CIA important new competences relating to its covert actions: new choices it could make and new ways it could respond if confronted with Al-Qaeda targets in the field"). Tenet "delegated the management and oversight of the capture and detention authorities provided by the MON" to the CIA's deputy director for operations, James Pavitt, and the CIA's Chief of the Counterterrorism Center Cofer Black. SSCI Report at p. 13.

<sup>24</sup> *Military Order of November 13, 2001: Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism*, Federal Register Vol. 66, No. 222, 16 November 2001, pp. 57831-36, available at <http://www.fas.org/irp/offdocs/eo/mo-111301.htm>.

<sup>25</sup> *Id.* at Sec. VII(b)(2).

Naval Station at Guantánamo Bay, Cuba (Guantánamo), seeking to place detainees beyond the reach of U.S. courts.<sup>26</sup> On 11 January 2002, the first detainees arrived in Guantánamo Bay, having been detained in or transferred through Afghanistan.

19. On 18 January 2002, upon consideration of advice from John Yoo and Robert Delahunty, both of the Department of Justice Office of Legal Counsel (“OLC”),<sup>27</sup> and the additional oral advice of Chief White House Counsel, Alberto Gonzales,<sup>28</sup> 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. On 19 January 2002, Secretary of Defense Rumsfeld transmitted Bush’s determination regarding the status of the Taliban and al Qaeda to combatant commanders, along with the order that the commanders should treat such individuals in a manner “consistent” with the “principles” of the Geneva Conventions only “to the extent appropriate and consistent with military necessity.”<sup>29</sup> On 7 February 2002, pursuant to his “authority as Commander-in-Chief and Chief Executive of the United States,” Bush issued a formal memorandum stating that the Geneva Conventions do not apply to the conflict with al Qaeda, and that Common Article 3 of the Geneva Conventions did not apply to either al Qaeda or Taliban detainees.<sup>30</sup> BUSH called only for detainees to be treated humanely and “to the extent appropriate and consistent with military necessity, in a manner consistent with principles of Geneva,” as a matter of

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<sup>26</sup> See Patrick Philbin and John Yoo, Memorandum for William J. Haynes II, General Counsel, Department of Defense, *Possible Habeas Jurisdiction over Aliens Held in Guantanamo Bay, Cuba*, 28 December 2001, available at <https://nsarchive2.gwu.edu/torturingdemocracy/documents/20011228.pdf>.

<sup>27</sup> 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 January 2002, available at <https://nsarchive2.gwu.edu/torturingdemocracy/documents/20020109.pdf> at 1, 11. A follow-up memorandum was completed, upon request, for BUSH’s Counsel, Alberto Gonzales, and William Haynes on January 22, 2002 by Jay Bybee of the DOJ’s OLC, which came to the same conclusion: international treaties including the Geneva Conventions do not apply to the Taliban or Al Qaeda.

<sup>28</sup> See Senate Armed Services Committee, *Inquiry into the Treatment of Detainees in U.S. Custody*, 20 November 2008, available at <https://www.nytimes.com/interactive/projects/documents/report-by-the-senate-armed-services-committee-on-detainee-treatment> (“SASC Report”) at 1. See also Alberto R. Gonzales, Memorandum for the President, *Decision re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban*, 25 January 2002, available at <https://nsarchive2.gwu.edu/torturingdemocracy/documents/20020125.pdf> (“January 25 Gonzales Memo to Bush”). In this memo, Gonzales asserted that the “new paradigm” of the “war on terror” makes certain provisions of the Geneva Conventions “quaint” and “renders *obsolete* Geneva’s strict limitations on questioning of enemy prisoners.” Gonzales noted that the positive “consequences” of such a determination included: eliminating the need to determine the prisoner of war status of detainees on a case-by-case basis; leaving open “options for the future”; and reducing the threat of prosecution under the US War Crimes Act.

<sup>29</sup> Donald Rumsfeld., Secretary of Defense, Memorandum for Chairman of the Joint Chief of Staff, *Status of Taliban and Al Qaida*, 19 Jan. 2002, <https://nsarchive2.gwu.edu/torturingdemocracy/documents/20020119.pdf>.

<sup>30</sup> The recipients of the memorandum were: the Vice President Cheney, Secretary of State Colin Powell, Secretary of Defense Rumsfeld, Attorney General Ashcroft, his Chief of Staff, CIA Director Tenet, Assistant to the President for National Security Affairs, and the Chairman of the Joint Chiefs of Staff. See George Bush, The White House, Memorandum for the Vice President, et al., *Humane Treatment of Taliban and al-Qaeda Detainees* (7 Feb. 2002), available at [http://www.pegc.us/archive/White\\_House/bush\\_memo\\_20020207\\_ed.pdf](http://www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf).

policy – not law. Through discussions among members of the NSC, which BUSH chaired, BUSH was fully briefed on, and approved as a matter of policy, the indefinite detention of individuals held by the U.S. government, and specifically, the CIA.<sup>31</sup>

20. In a memorandum dated 13 March 2002, Assistant Attorney General Jay Bybee advised the General Counsel at the Department of Defense, William J. Haynes II, on the legality of rendering detainees captured in the war against al Qaeda and other terrorist organizations. Bybee concluded “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.”<sup>32</sup> Bybee located considerable discretion in the person of the President, explaining that treaties normally governing detainee transfers “generally do not apply in the context of the current war,” and do not constrain presidential power. He opined,

Even if those treaties were applicable to the present conflict, however, they do not impose significant restrictions on the operation of the President's Commander-in-Chief authority. The [Geneva Convention] imposes some limitations on the transfer of United States-held POWs to other nations. These limitations, however, apply only to individuals who are legally entitled to POW status, and leave the President considerable discretion as to when such transfers are permissible...[T]here are no GPW constraints on the President's ability to transfer al Qaeda prisoners to third countries. The Torture Convention also imposes limitations on transfer, but those restrictions have no extraterritorial effect and thus are not applicable to prisoners who are captured and detained abroad.<sup>33</sup>

Bybee further stated that “historical practice firmly supports the power of the President to transfer and otherwise dispose of the liberty of *all* individuals captured incident to military operations, and not merely those individuals who may technically be classified as prisoners of war under relevant treaties.”<sup>34</sup> Bush embraced Bybee’s interpretation of expanded powers as president in regard to the transfer or rendition of individuals in the custody of the United States.

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<sup>31</sup> CIA IG Report at 7-8.

<sup>32</sup> Bybee, Jay S., Assistant Attorney General, Memorandum for William J. Haynes II, General Counsel, Department of Defense, *Re: The President's power as Commander in Chief to transfer captured terrorists to the control and custody of foreign nations*, 13 March 2002, available at <http://www.justice.gov/olc/docs/memorandum03132002.pdf> (“March 2002 Bybee Memo”) at 1.

<sup>33</sup> *Id.* at 2. Bybee also stated, “Although the President is free from ex ante constitutional and domestic law constraints on his ability to transfer military detainees held outside the United States to the custody of foreign nations, criminal penalties could apply to such transfers if they were deemed to be part of a conspiracy to commit an act of torture abroad.” *Id.* at 25. The March 2002 Bybee memo further advised, “[R]eading the Torture Convention to apply extraterritorially would interfere with the President's powers as Commander in Chief and Chief Executive to direct the operations of the military.” *Id.*

<sup>34</sup> *Id.* at 20 (emphasis in original).

21. Bush, acting with the advice and support of senior military and civilian officials, oversaw and approved the creation of a multi-faceted global detention program in which new so-called “enhanced interrogation” techniques were employed – techniques which constitute torture. *See, e.g.*, Request, ¶ 165. This program included the CIA detention program authorized through the 17 September 2001 Memorandum of Notification described above, directed at so-called high-value detainees who were held in secret sites across the globe; the use of “extraordinary rendition” which entailed sending a person of interest or terrorist-suspect to a third-country known to employ torture to be detained and interrogated under such conditions; and detention by U.S. military and other government agents such as the CIA at locations outside the United States, including at detention centers in Afghanistan and at Guantánamo Bay. These three facets of the program will be discussed in turn below.

#### **b. CIA Detention and Interrogation**

22. The Request outlines the broad contours of the CIA torture program, particularly as it relates to detention and interrogation operations on the territory of Afghanistan, Poland, Lithuania and Romania – the latter three locations having been the subject of intensive study by the United Nations,<sup>35</sup> the Council of Europe<sup>36</sup> and litigation before the European Court of Human Rights.<sup>37</sup> *See* Request, ¶¶ 201-203.<sup>38</sup> The Victims outline some additional aspects of the CIA Rendition and Interrogation program that are relevant to their individual cases and to a comprehensive understanding of the crime-base.

#### **i. CIA “High-Value Detainee” and Direct Detention Program**

23. As described by the ICRC, the CIA detention program “included transfers of detainees to multiple locations, maintenance of the detainees in continuous solitary confinement and incommunicado detention throughout the entire period of their undisclosed detention, and the infliction of further ill-treatment through the use of various methods either individually or in combination, in addition to the deprivation of other basic material

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<sup>35</sup> Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism et al., *Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism*, Human Rights Committee, U.N. Doc. A/HRC/13/42 (19 February 2010), available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A-HRC-13-42.pdf> (“UN Joint Study”).

<sup>36</sup> Marty Report.

<sup>37</sup> *See, e.g.*, ECtHR, *El-Masri v. Macedonia*, Appl.No. 39630/09, “Judgment,” 13 December 2012; ECtHR, *Abu Zubaydah v. Poland*, Appl. No. 7511/13, “Judgment,” 24 July 2014; ECtHR, *Al-Nashiri v. Poland*, Appl. No. 28761/11, “Judgment,” 24 July 2014.

<sup>38</sup> Notably, however, no U.S. or non-U.S. official has been held individually criminally responsible for the grave violations of international law that occurred at the locations. *See* Admissibility: Complementarity, *supra* Sec. VIII.

requirements.”<sup>39</sup> The UN Joint Study on secret detentions noted that detainees had been held in Afghanistan, Thailand, Poland and Romania, among other locations.<sup>40</sup> As is now known, CIA “black sites” were hosted in multiple countries, including also Lithuania; these locations are documented in the SSCI Executive Summary as: GREEN (Thailand); BLUE (Poland); BLACK (Romania); VIOLET (Lithuania); COBALT (Afghanistan); GRAY (Afghanistan); ORANGE (Afghanistan); and BROWN (Afghanistan).<sup>41</sup> Fourteen individuals, including **Victim Guled Duran**, known as so-called “high value detainees” previously held as part of the CIA detention program, were transferred by Bush to detention at Guantánamo from CIA “black sites,” including from site(s) on the territory of Afghanistan. Bush announced the transfers in September 2006. The ICRC later described the fourteen individuals as “missing persons.”<sup>42</sup>

24. The UN Joint Study found that the CIA had taken 94 detainees into custody and had employed “enhanced interrogation techniques to varying degrees in the interrogation of 28 of those detainees.”<sup>43</sup> The Senate Report expands these numbers: 119 detainees into custody and had employed enhanced interrogation techniques in the interrogation of 39 of those

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<sup>39</sup> ICRC CIA Detainee Report at 4. The ICRC further found: “The ability of the detaining authority to transfer persons over apparently significant distances to secret locations in foreign countries acutely increased the detainees’ feeling of futility and helplessness, making them more vulnerable to the methods of ill-treatment...these transfers increased the vulnerability of the fourteen to their interrogation, and was performed in a manner (goggles, earmuffs, use of diapers, strapped to stretchers, sometimes rough handling) that was intrusive and humiliating and that challenged the dignity of the persons concerned.” *Id.* at 7. It is notable that the ICRC CIA Detainee Report, based solely on interviews with the detainees and apparently prepared without the benefit of the CIA IG Report or any of the legal memoranda prepared by various U.S. government officials, details the same interrogation techniques as those outlined in the CIA IG Report. The ICRC CIA Detainee Report, at 8-9, details the use of waterboarding, prolonged stress positions, beatings, confinement in a box, prolonged nudity, sleep deprivation, exposure to cold temperature, prolonged shackling, forced shaving, and manipulation of diet.

<sup>40</sup> UN Joint Study at 45-50. On 11 June 2007, the Parliamentary Assembly of the Council of Europe published the investigative report authored by Dick Marty on secret detentions and illegal transfers of “high value detainees” by the CIA involving Council of Europe member states. The report confirmed the existence of secret CIA sites in Poland and Romania and found that the interrogation techniques used on detainees were “tantamount to torture.” Marty Report at ¶9. On 27 June 2007, the Parliamentary Assembly adopted a resolution in which it unequivocally stated:

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

*See* Resolution 1562 (2007), Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report, adopted on 27 June 2007, available at <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17559>.

<sup>41</sup> *See, e.g.*, Adam Goldman and Julie Tate, “Decoding the secret black sites and the Senate’s report on the CIA interrogation program,” *Washington Post*, 9 December 2015, available at [https://www.washingtonpost.com/news/worldviews/wp/2014/12/09/decoding-the-secret-black-sites-on-the-senates-report-on-the-cia-interrogation-program/?nid&utm\\_term=.3e6ee7282487](https://www.washingtonpost.com/news/worldviews/wp/2014/12/09/decoding-the-secret-black-sites-on-the-senates-report-on-the-cia-interrogation-program/?nid&utm_term=.3e6ee7282487).

<sup>42</sup> ICRC CIA Detainee Report at 8.

<sup>43</sup> UN Joint Study at ¶103.

detainees.<sup>44</sup> Critically, these numbers cannot be said to represent the total number of people who were detained either directly or through proxy detention or extraordinary rendition by the CIA, and most certainly not the full number of persons who were subjected to violations falling within the jurisdiction of the ICC, including torture.

25. In March 2002, the first so-called “high value detainee,” Abu Zubaydah, was detained and interrogated by the CIA.<sup>45</sup> His detention “accelerated” the development of the CIA interrogation program.<sup>46</sup> In his memoir *DECISION POINTS*, Bush explained that the decision was taken to transfer Abu Zubaydah to CIA custody and to “move him to a secure location in another country where the Agency would have total control over his environment.”<sup>47</sup>

26. The CIA interrogation program overseen by DCI Tenet and the CIA’s Counter-Terrorism Center (CTC) and Operations, including Cofer Black, Stephen Kappes and Jose Rodriguez, sanctioned by Bush after reviewing the legal advice of Rizzo and Bybee, included interrogation techniques that were directly inspired by the “Survival Evasion Resistance Escape (SERE)” training program, in which U.S. military members were exposed to, and taught how to resist, interrogation techniques used by enemy forces that did not adhere to the Geneva Conventions.<sup>48</sup> Notably, and as revealed in detail through the Senate Torture report, albeit without names, two CIA-contractors played a key role in developing the techniques: James Mitchell and John Bruce Jessen.<sup>49</sup> The U.S. employed these techniques on CIA

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<sup>44</sup> SSCI Executive Summary at pp. 8, 14, 96, 101, 217, 458-461.

<sup>45</sup> CIA IG Report, at 2-3; SSCI Executive Summary at pp. 17-49. A memo authored by then-OLC Assistant Attorney General Jay Bybee attempted to give the CIA its first written legal approval for ten interrogation tactics, including waterboarding. Bybee, Jay, Memorandum for John Rizzo, Acting General Counsel of the Central Intelligence Agency, *Interrogation of al Qaeda Operative*, 1 August 2002, at 2, 13-14, and 15, available at <http://www.justice.gov/olc/docs/memo-bybee2002.pdf> (“August 2002 Bybee Memo to Rizzo”). The 1 August 2002 memorandum described in great detail how the techniques should be used, including placing Abu Zubaydah “in a cramped confinement box with an insect” as “he appears to have a fear of insects” as well as the use of water-boarding, which Bybee concluded did not constitute torture. *Id.* at 2, 13-14, and 15.

Notably, the current Deputy Director of the CIA, Gina Haspel, was present during the interrogation of Abu Zubaydah. Matthew Rosenberg, “New C.I.A. Deputy Director, Gina Haspel, Had Leading Role in Torture,” *New York Times*, 2 February 2017, available at <https://www.nytimes.com/2017/02/02/us/politics/cia-deputy-director-gina-haspel-torture-thailand.html>. It is recalled that the current Director of the CIA, who praised Ms. Haspel as a “proven leader with an uncanny ability to get things done,” recently said the CIA would be expanding covert operations and would be “more vicious, more aggressive, more inclined to take risks[...].” “CIA Director Mike Pompeo on “crushing” foes amid shutdown, N. Korean nuclear threat,” *CBS News*, 22 January 2018, available at <https://www.cbsnews.com/news/mike-pompeo-cia-director-interview-cbs-this-morning-norah-odonnell-today/>.

<sup>46</sup> CIA IG Report at 12; SSCI Executive Summary at pp. 25-49.

<sup>47</sup> George W. Bush, *Decision Points* (Crown Publishing Group, 2010) at 169.

<sup>48</sup> As noted in the CIA IG’s Report, at 21-22, fn. 26, the use of the techniques in SERE training, and specifically waterboarding, was “so different from the subsequent Agency [CIA] usage as to make it irrelevant...there was no *a priori* reason to believe that applying the waterboard with the frequency and intensity with which it was used by the psychologist/interrogators was either efficacious or medically safe.” See also *id.* at 37.

<sup>49</sup> Mitchell and Jessen are referred to as “SWIGERT” and “DUNBAR” in the SSCI Executive Summary. See SSCI Executive Summary at pp. 31-37. See generally *Salim v. Mitchell*, Case No. 2:15-cv-286-JLQ (E.D. Wa.).

detainees, which included waterboarding; confining detainees in a dark box for up to 18 hours at a time and possibly with an insect placed in the confinement box; up to 11 days of sleep deprivation; a facial hold or facial slap; “walling,” which consists of pulling a detainee forward and then pushing him back quickly against “a flexible false wall so that his shoulder blades hit the wall;” and use of stress positions.<sup>50</sup>

27. The ICRC CIA Detainee Report further explained that the program “was clearly designed to undermine human dignity and to create a sense of futility by inducing, in many cases, severe physical and mental pain and suffering, with the aim of obtaining compliance and extracting information, resulting in exhaustion, depersonalisation and dehumanisation.”<sup>51</sup>

28. The interrogation methods used on detainees were euphemistically qualified by the U.S. government as “enhanced,” but the United Nations and the ICRC found that they rose to the level of torture and cruel, inhuman or degrading treatment.<sup>52</sup> The ICRC unequivocally concluded that, upon the information gathered from interviews with the former CIA detainees, conducted after their transfer to Guantánamo:

The allegations of ill-treatment of the detainees indicate that, in many cases, the ill-treatment to which they were subjected while held in the CIA program, either singly or in combination, constituted torture. In addition, many other elements of the ill treatment, either singly or in combination, constituted cruel inhuman or degrading treatment.<sup>53</sup>

29. The ICRC concluded that the CIA program’s interrogation techniques consisted of: suffocation by water – or waterboarding; prolonged stress in the standing position while arms are shackled above the head; beatings by use of a collar held around the detainee’s neck and used to forcefully bang the head and body against the wall; beating and kicking; confinement in a box; forced nudity for periods ranging from several weeks to several months; sleep deprivation through use of forced stress positions (standing or sitting); cold water and use of repetitive loud noise or music; exposure to cold temperature; prolonged shackling; threats of ill-treatment to the detainee and/or his family; forced shaving; and deprivation or restricted provision of solid food.<sup>54</sup>

30. The CIA interrogations of Abu Zubaydah were videotaped and those videotapes were sent to CIA headquarters.<sup>55</sup> In total there were 92 videotapes, 12 of which included

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<sup>50</sup> A list of techniques is found in the CIA IG Report, *id.* at 15.

<sup>51</sup> ICRC CIA Detainee Report at 26.

<sup>52</sup> *See, e.g., id.* at 5.

<sup>53</sup> *Id.* at 26.

<sup>54</sup> *See id.* at 8-9.

<sup>55</sup> CIA IG Report at 36.

application of so-called “enhanced interrogation techniques.”<sup>56</sup> The videotapes included evidence of torture, including the waterboarding of Abu Zubaydah 83 times.<sup>57</sup> Those videotapes were destroyed by the CIA in November 2005.<sup>58</sup> Abu Zubaydah described to the ICRC his waterboarding:

I was put on what looked like a hospital bed, and strapped down very tightly with belts. A black cloth was then placed over my face and the interrogators used a mineral water bottle to pour water on the cloth so that I could not breathe. After a few minutes the cloth was removed and the bed was rotated into an upright position. The pressure of the straps on my wounds caused severe pain. I vomited. The bed was then again lowered to a horizontal position and the same torture carried out with the black cloth over my face and water poured on from a bottle. On this occasion my head was in a more backward, downwards position and the water was poured on for a longer time. I struggled without success to breathe. I thought I was going to die. I lost control of my urine. Since then I still lose control of my urine when under stress.<sup>59</sup>

31. In November 2002, another CIA detainee held in a secret site, Abd al-Rahim Al-Nashiri, was arrested. He was waterboarded twice in November 2002.<sup>60</sup> Although the CIA IG Report is heavily redacted when discussing the interrogation of Al-Nashiri, it confirms that CIA headquarters authorized the use of “enhanced interrogation techniques” against him.<sup>61</sup> Al

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<sup>56</sup> *Id.* at 36, ¶ 77.

<sup>57</sup> *Id.* at ¶ 78.

<sup>58</sup> See “Statement by Attorney General Michael B. Mukasey Regarding the Opening of an Investigation Into the Destruction of Videotapes by CIA Personnel,” *U.S. Department of Justice*, 2 January 2008, available at [http://www.justice.gov/opa/pr/2008/January/08\\_opa\\_001.html](http://www.justice.gov/opa/pr/2008/January/08_opa_001.html). No one has been prosecuted for the destruction of those tapes, and the evidence of torture contained therein. “Department of Justice Statement on the Investigation into the Destruction of Videotapes by CIA Personnel,” *U.S. Department of Justice*, 9 November 2010, available at <http://www.justice.gov/opa/pr/2010/November/10-ag-1267.html>. Indeed, one of the individuals implicated in the tape destruction, Gina Haspel, has been promoted to Deputy Director of the CIA under President Donald Trump. See Rosenberg, Matthew, “New C.I.A. Deputy Director, Gina Haspel, Had Leading Role in Torture,” *New York Times*, 2 February 2017.

<sup>59</sup> ICRC CIA Detainee Report at 10. The interrogation of Abu Zubaydah was discussed in a memorandum written in May 2005, signed by then-Acting Assistant Attorney General Steven Bradbury. This was one of three memos written by Bradbury that sought to assure the CIA that its interrogation methods it had been using since 2002 were legal, even when used in combination, and despite the prohibition against torture and cruel, inhuman, or degrading treatment. One 40-page memo cites the CIA’s Inspector General Report, indicating that waterboarding had been used “at least 83 times during August 2002” (CIA IG Report at 90) in the interrogation of Abu Zubaydah, “and 183 times during March 2003 in the interrogation of [Khalid Sheikh Mohammed],” but still comes to the conclusion that these acts did not violate the prohibition against torture. Bradbury, Steven, Memorandum for John A. Rizzo, Senior Deputy General Counsel, Central Intelligence Agency, *Re: Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques that May Be Used in the Interrogation of High Value al Qaeda Detainees*, 30 May 2005, available at <https://www.justice.gov/sites/default/files/olc/legacy/2013/10/21/memo-bradbury2005.pdf> at 37. See CIA IG Report at 91.

<sup>60</sup> CIA IG Report at 4 and 90. See also ICRC CIA Detainee Report at 10-11.

<sup>61</sup> CIA IG Report at 35-36, ¶ 76. In addition to being subjected to waterboarding and other “enhanced interrogation techniques,” Al-Nashiri was also threatened with a semi-automatic handgun, which, although unloaded, was held close to his head while he was shackled. A power drill was also used to threaten Al-Nashiri: it was revved while Al-Nashiri stood naked and hooded. *Id.* at 42. The Department of Justice declined to

Nashiri's waterboarding was authorized and condoned up through the chain of command to Bush.<sup>62</sup> As is now known through the Senate Report, Al Nashiri was subjected to a range of "enhanced interrogation techniques," i.e., torture, including mock execution, while held at the secret site in Poland.<sup>63</sup>

32. A third CIA "high value detainee," Khalid Sheik Mohammed, was subjected to waterboarding 183 times.<sup>64</sup> Khalid Sheik Mohammed was held in CIA "black sites" on the territory of States Parties Afghanistan, Poland and Romania, and was subjected to torture, including multiple forms of sexual violence, on each.<sup>65</sup> In his memoir, Bush specifically acknowledged that, upon request by CIA Director George Tenet, he authorized the use of "enhanced interrogation techniques" on Khalid Sheik Mohammed, including waterboarding.<sup>66</sup> Other so-called "enhanced interrogation techniques" used upon Khalid Sheik Mohammed were threats to kill his children<sup>67</sup> and the deprivation of sleep for 180 hours.<sup>68</sup>

33. The CIA IG Report confirms that President Bush was fully briefed on the specific "enhanced interrogation techniques" employed by the CIA, through consultations carried out in the summer of 2002 by the CIA with the NSC and with "senior Administration officials."<sup>69</sup> The CIA IG Report further confirms that in early 2003 the CIA continued to inform senior Administration officials, including the White House Counsel and others of the NSC, of the status of its Counterterrorism Program, because "[t]he Agency specifically wanted to ensure that these officials and the [Congressional] Committees continued to be aware of and approve CIA's actions."<sup>70</sup> Select members of the NSC were given a detailed briefing on the program

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prosecute the perpetrators of these acts, although the incident was reported to it. *Id.* Interrogators also threatened family members of Al-Nashiri, including his mother, *id.* at 42-43, and subjected him to stress positions and standing on his shackles. *Id.* at 44. *See generally* ECtHR, *Al Nashiri v. Poland*, Appl. No. 28761/11.

<sup>62</sup> Bush, *Decision Points*, at 169-171.

<sup>63</sup> SSCI Executive Summary at pp. 66-73. It is noted that forced nudity, which can itself constitute an underlying act of torture depending on the circumstances, was used at multiple points throughout these "interrogation" sessions.

<sup>64</sup> CIA IG Report at 44-45.

<sup>65</sup> SSCI Executive Summary at pp. 81-96.

<sup>66</sup> *See* Bush, *Decision Points*, at 170. According to the ICRC CIA Detainee Report, Khalid Sheik Mohammed was kept naked during waterboarding sessions, with female interrogators present. Khalid Sheik Mohammed also told the ICRC that he sustained injuries to his ankles and wrists as he struggled in the panic of not being able to breathe during the waterboarding sessions. *See* ICRC CIA Detainee Report at 11.

<sup>67</sup> CIA IG Report at 43.

<sup>68</sup> *Id.* at 104.

<sup>69</sup> *Id.* at 23, ¶ 45. *See also id.* at 100, ¶ 252; Letter from CIA General Counsel Scott W. Muller to Representative Jane Harman, 28 February 2003, *available at* <https://www.thetorturereport.org/report/chapter-3-black-sites-lies-and-videotapes> (stating that it "would be fair to assume" that the Executive Branch "addressed" the policy and legal aspects of the "interrogation techniques" being employed by the CIA).

<sup>70</sup> CIA IG Report at 23, ¶ 46.

by the CIA on 29 July 2003, and again on 16 September 2003. “[N]one of those involved in these briefings expressed any reservations about the program.”<sup>71</sup> In an April 2008 interview with ABC News, Bush acknowledged that he knew of the detailed discussions members of his national security team (the “Principals Committee” of the NSC) were having to define the interrogation techniques to be used by the CIA. When asked about the treatment of Khalid Sheik Mohammad, Bush said: “I didn’t have any problem at all trying to find out what Khalid Sheikh Mohammed knew.”<sup>72</sup>

34. The ICRC was refused access to detainees held in the CIA program.<sup>73</sup> As revealed through a 2007 ICRC report, after CIA detainees had been transferred to Guantanamo, the ICRC made repeated requests to the United States to grant it access to the detainees generally, including specific detainees whom the ICRC believed to be, and were in fact, held by the CIA in secret detention sites outside of the United States.<sup>74</sup>

35. On 6 September 2006, BUSH announced that fourteen individuals had been in CIA custody as a “high value detainee” and were being transferred to Guantánamo under the custody of the Department of Defense.<sup>75</sup> Among those individuals was **Victim Guled Hassan**. In the September 6th speech, Bush officially acknowledged the existence of a CIA terrorist detention and interrogation program. Bush stated that “our government has changed its policies,” and admitted to authorizing an “alternative set of procedures” on persons detained “secretly” and “outside the United States” in a program operated by the CIA, while refusing to specify what techniques were authorized.<sup>76</sup> Bush also discussed Abu Zubaydah, who had been waterboarded at least 83 times. Notably, while BUSH stated that there were no detainees held in the CIA detention program as of 6 September 2006, he explicitly reserved the right to place, again, persons in CIA detention in secret sites beyond the reach of the law.

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<sup>71</sup> *Id.* at 24.

<sup>72</sup> Greenburg, Jan et al., “Bush Aware of Advisers’ Interrogation Talks: President Said He Knew His Senior Advisers Discussed Tough Interrogation Techniques,” *ABC News*, 11 April 2008, available at <http://abcnews.go.com/TheLaw/LawPolitics/story?id=4635175&page=3> (EXHIBIT 50) (“Bush Aware of Advisers’ Interrogation Talks”).

<sup>73</sup> Indeed, the ICRC was not informed by the U.S. government of the CIA detention program.

<sup>74</sup> See ICRC CIA Detainee Report at 3.

<sup>75</sup> “So I’m announcing today that Khalid Sheikh Mohammed, Abu Zubaydah, Ramzi bin al-Shibh, and 11 other terrorists in CIA custody have been transferred to the United States Naval Base at Guantanamo Bay. They are being held in the custody of the Department of Defense.” “President Discusses Creation of Military Commissions to Try Suspected Terrorists”, *The White House*, 6 September 2006, <http://georgewbush-whitehouse.archives.gov/news/releases/2006/09/20060906-3.html> (“President Discusses Creation of Military Commissions”).

<sup>76</sup> *Id.* The announcement coincided with the transfer of 14 people from CIA custody to Guantánamo. See also CIA IG Report at 7, finding that the CIA detention program “diverges sharply from previous Agency policy and rules that govern interrogations by U.S. military and law enforcement officers.” See also *id.* at 91: “The EITs [enhanced interrogation techniques] used by the Agency under the CTC Program are inconsistent with the public policy positions that the United States has taken regarding human rights.” *Id.* at 101-102.

Indeed, in March 2008, BUSH vetoed legislation that would have banned the CIA from using “enhanced interrogation techniques,” including waterboarding, saying it “would take away one of the most valuable tools in the war on terror.”<sup>77</sup>

36. In this speech, Bush also expressed fear that members of the U.S. military involved in torture might be prosecuted for war crimes, “[S]ome believe our military and intelligence personnel involved in capturing and questioning terrorists could now be at risk of prosecution under the War Crimes Act – simply for doing their jobs in a thorough and professional way.” He emphasized that he would not allow this to happen and asked Congress to prevent detainees from pursuing civil claims against U.S. military personnel for violations of the Geneva Conventions.<sup>78</sup> Through these measures, Bush sought to provide complete immunity from justice for any member of the U.S. military who tortured a detainee.

37. Having met with the fourteen “high value detainees” held in the CIA program following their transfer from secret sites to Guantánamo in September 2006, the ICRC concluded that it “clearly considers that the allegations of the fourteen include descriptions of treatment and interrogation techniques – singly or in combination – that amounted to torture and/or cruel, inhuman or degrading treatment.”<sup>79</sup>

## ii. Extraordinary Rendition and Proxy Detention

38. “Extraordinary Rendition” is considered to be “the transfer of an individual, with the involvement of the United States or its agents, to a foreign state in circumstances that make it more likely than not that the individual will be subjected to torture or cruel, inhuman, or degrading treatment.”<sup>80</sup> The practice is “to transfer terrorist suspects to locations where it is

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<sup>77</sup> Eggen, Dan, “Bush Announces Veto of Waterboarding Ban,” *Washington Post*, 8 March 2008, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/03/08/AR2008030800304.html>.

President Barack Obama foreclosed this possibility. Isikoff, Michael, “Obama’s Order Ends Bush-Era Interrogation Tactics,” *Newsweek*, 21 January 2009, <http://www.newsweek.com/obamas-order-ends-bush-era-interrogation-tactics-77965>. There are reports, however, that President Donald Trump and the CIA, under the leadership of Director Mike Pompeo and Deputy Director Haspel, could reinstate such a program. See, e.g., Rosenberg, Matthew, “New C.I.A. Deputy Director, Gina Haspel, Had Leading Role in Torture,” *New York Times*, 2 February 2017; Browne, Ryan, “Trump’s Pick for CIA Says He’s Open to Waterboarding,” *CNN*, 21 January 2017, <https://www.cnn.com/2017/01/21/politics/pompeo-cia-waterboarding/index.html>.

<sup>78</sup> Congress responded by passing the Military Commissions Act 2006, Public L. 109-366, 120 Stat. 2600, available at [http://www.loc.gov/rr/frd/Military\\_Law/pdf/PL-109-366.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/PL-109-366.pdf), which remains in effect.

<sup>79</sup> ICRC CIA Detainee Report at 5. See also *id.* at 26: “The allegations of ill-treatment of the detainees indicate that, in many cases, the ill-treatment to which they were subjected while held in the CIA program, either singly or in combination, constituted torture.”

<sup>80</sup> See, e.g., The Committee on International Human Rights of the Association of the Bar of the City of New York and The Center for Human Rights and Global Justice at NYU School of Law, *Torture by Proxy: International and Domestic Law Applicable to “Extraordinary Renditions,”* 2004, available at [http://www.nycbar.org/pdf/report/Torture%20by%20Proxy%20-%20Final%20\(PDF\).pdf](http://www.nycbar.org/pdf/report/Torture%20by%20Proxy%20-%20Final%20(PDF).pdf) (“Torture by Proxy”) at 5.

known that they may be tortured, hoping to gain useful information with the use of abusive interrogation tactics.”<sup>81</sup> Under this practice, people like Canadian citizen Maher Arar, were sent to countries like Syria, for interrogation under torture.<sup>82</sup>

39. As has been well documented, the US/CIA’s “extraordinary rendition” and its rendition to proxy-detention program implicates numerous States, including many States Parties to the ICC.<sup>83</sup> Some States allowed their territory to be used for stopovers, refueling or “rest and relaxation” stops for its rendition flight crews,<sup>84</sup> for fly-overs,<sup>85</sup> or for U.S. bases that held detainees;<sup>86</sup> or were involved in the capture or interrogation of detainees;<sup>87</sup> while others directly detained and questioned terrorism suspects for the United States.<sup>88</sup>

40. Most relevant to the Victims is the role played by the countries of *Jordan* and *Djibouti* in their arrest, detention and interrogation – and the serious harms both men endured.

41. At least 14 non-Jordanians were sent by the United States to Jordan’s General Intelligence Department (GID) custody between 2001-2004, the vast majority of whom were then “returned to CIA custody immediately after intensive periods of abusive interrogation” suggesting that Jordan’s goal “was assisting the CIA rather than directly furthering Jordanian security objectives. Such people were not actually handed over; rather they were effectively lent to Jordan for interrogation purposes.”<sup>89</sup> As Human Rights Watch documented, the U.S.

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<sup>81</sup> *Id.* at 4-5.

<sup>82</sup> In September 2002, Arar was changing planes at JFK airport in New York on his way home to Canada. He was detained and interrogated by U.S. officials for nearly two weeks. On 8 October 2002, Arar was then taken from his cell at 04:00 and advised that based on classified evidence he was found to be a member of Al Qaeda, and that he was being sent to Syria rather than Canada. He was put on a private jet (Presidential Aviation N829MK), which flew over Canadian airspace, stopped in Rome, Italy with Arar onboard, and landed in Jordan, where he was beaten and interrogated, and ultimately delivered to Syria. He was detained in a grave-like cell and tortured for nearly one year in Syria. *See, e.g.,* Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar: Analysis & Recommendations*, September 2006, available at [https://ccrjustice.org/sites/default/files/attach/2015/05/ARAR\\_AR\\_English.pdf](https://ccrjustice.org/sites/default/files/attach/2015/05/ARAR_AR_English.pdf); Plaintiff’s Complaint and Demand for Jury Trial, Dkt. No. 1, 22 January 2004, *Arar v. Ashcroft*, Case No. 04-cv-0249 (E.D.N.Y 2004), available at <http://www.ccrjustice.org/files/Arar%20Complaint%20with%20Exhibits.pdf>.

<sup>83</sup> *See, e.g.,* Open Society Justice Initiative, *Globalizing Torture: CIA Secret Detention and Extraordinary Rendition*, February 2013, available at <https://www.opensocietyfoundations.org/reports/globalizing-torture-cia-secret-detention-and-extraordinary-rendition> (“OSJI *Globalizing Torture*”) at pp. 61-118; UN Joint Study at pp. 59-85; The Rendition Project, available at <https://www.therenditionproject.org.uk/>.

<sup>84</sup> OSJI *Globalizing Torture: see, e.g.,* Belgium, Croatia, Czech Republic, Finland, Gambia, Greece, Iceland, Ireland, Italy, Portugal, Spain and United Kingdom.

<sup>85</sup> OSJI *Globalizing Torture: see, e.g.,* Austria, Denmark, United Kingdom.

<sup>86</sup> OSJI *Globalizing Torture: see, e.g.,* Albania, Bosnia-Herzegovina.

<sup>87</sup> OSJI *Globalizing Torture: see, e.g.,* Australia, Canada, Djibouti, Gambia, Germany, Italy, Kenya, Jordan, Lithuania, Malawi, Poland, Romania, Sweden and United Kingdom.

<sup>88</sup> OSJI *Globalizing Torture: see, e.g.,* Djibouti, Gambia, Jordan, Kenya, Macedonia, Malawi and United Kingdom.

<sup>89</sup> Human Rights Watch, *Double Jeopardy: CIA Renditions to Jordan*, 7 April 2008, available at <https://www.hrw.org/report/2008/04/07/double-jeopardy/cia-renditions-jordan> at 1, 6, 13. Human Rights Watch

was fully aware of Jordan's record of employing torture on its detainees: "The evidence indicates that torture in such cases was not a regrettable consequence of rendition; it may have been the purpose."<sup>90</sup> And indeed, the men transferred by the CIA to detention in Jordan under the suspicion of links to terrorism, including **Victim Al Hajj**, were tortured.<sup>91</sup> See Section III (A).

42. In addition to detaining and interrogating persons for the CIA on its territory, Jordan also permitted use of its airports and airspace for rendition flights.<sup>92</sup> Finally, Jordan also served as the delivery point for "extraordinary rendition" victim Maher Arar; Jordanian officials conducted an initial interrogation of Arar before transporting him to Syria.<sup>93</sup>

43. Djibouti participated in the capture, detention and interrogation of individuals from Yemen, Somalia, Tanzania and Kenya on behalf of the CIA, including **Victim Duran**;<sup>94</sup> some, if not all, of these individuals were subsequently detained in Afghanistan. Rendition flights, including those operated by a private contractor that is known to have operated CIA rendition flights, landed in Djibouti in 2003-04.<sup>95</sup> (ICC jurisdiction over Djibouti commences on 1 February 2003). Djibouti was lauded by the U.S. Army commander for Central

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determined that Jordan was one of the earliest locations for proxy-detention because of the long-standing relationship between the CIA and Jordan's General Intelligence Department (GID). *Id.* at 10. Once the CIA had constructed its own facilities in Romania, Poland and Lithuania, its dependence on Jordan for proxy-detention waned. See also UN Joint Study at pp. 70-72.

<sup>90</sup> Human Rights Watch, *Double Jeopardy* at 6. For a list of persons extraordinarily rendered to Jordan, see OSJI *Globalizing Torture* at 87.

<sup>91</sup> Another former detainee who was detained in Jordan, tortured, and subsequently transferred to Afghanistan under the same transfer protocol as Mr. Al Hajj was Mohamed Farag Ahmad Bashmilah. See Declaration of Mohamed Farag Ahmad Bashmilah in Support of Plaintiff's Opposition to the United States' Motion to Dismiss, or, In the Alternative, for Summary Judgment, 5 December 2007, *Mohamed et al. v. Jeppesen Dataplan, Inc.*, Case No. 5:07-cv-02798 (JW) (N.D. Ca.), available at [https://www.therenditionproject.org.uk/pdf/PDF%20240%20\[Mohamed%20et%20al%20v.%20Jeppesen%20Dataplan,%20Inc.%20-%20Bashmilah%20Decl.%20\(Dec%202007\)\].pdf](https://www.therenditionproject.org.uk/pdf/PDF%20240%20[Mohamed%20et%20al%20v.%20Jeppesen%20Dataplan,%20Inc.%20-%20Bashmilah%20Decl.%20(Dec%202007)].pdf) ("Declaration of Mohamed Farag Ahmad Bashmilah").

<sup>92</sup> OSJI *Globalizing Torture* at 87.

<sup>93</sup> See Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Report on Mission to Jordan, Human Rights Council, U.N. Doc. A/HRC/4/33/Add.3 (5 January 2007), available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G07/101/07/PDF/G0710107.pdf?OpenElement> at ("UN Mission to Jordan Report") at ¶¶ 43-45, note 11.

<sup>94</sup> See OSJI *Globalizing Torture* at 73-74. Other persons held in Djibouti include Mohammed al-Asad, a Yemeni national, who has a case pending before the African Court of Human Rights. See "Mohammed al-Asad v. Djibouti: Seeking Justice for a Victim of Extraordinary Rendition," *Center for Human Rights and Global Justice at NYU School of Law*, available at <http://chrgj.org/mohammed-al-asad-v-djibouti-seeking-justice-for-a-victim-of-extraordinary-rendition/>.

<sup>95</sup> OSJI *Globalizing Torture* at 74. See also The Rendition Project, <https://www.therenditionproject.org.uk/>. For more detailed information on the relationship between Djibouti and the United States, and Djibouti's passive and active support for the U.S. rendition and interrogation program, see Declaration of Clara Gutteridge, 21 August 2012, *Al-Asad v. Djibouti*, African Commission on Human and Peoples' Rights, Communication No. 383/2010, available at <http://chrgj.org/wp-content/uploads/2014/05/GutteridgeITEM-20-Exhibits-Attached-to-Response-by-Al-Asad-to-Djiboutis-Arguments-on-Admissibility-120830-2.pdf>.

Command as having “given extraordinary support for US military basing, training and counter-terrorism operations.”<sup>96</sup>

44. Involvement of the Executive Branch, up to and including the president, in rendition was confirmed during a Congressional hearing. On 17 April 2007, the former head of the Bin Laden Unit at the CIA, Michael Scheuer, testified at a Joint Congressional Hearing before the Subcommittee on International Organizations, Human Rights, and Oversight and the Subcommittee on Europe of the Committee on Foreign Affairs, that decisions about where to hold rendered detainees were not made by the CIA, but were “made by the President of the United States. No rendition target has ever been taken somewhere on the sole decision of the Central Intelligence Agency.”<sup>97</sup> He testified that no prisoner would be taken “anywhere in this world without the authority of the executive branch.”<sup>98</sup>

45. Indeed, in his memoir *Decision Points*, BUSH confirms his own role in making decisions on alleged terrorists or persons believed to have security information and determining the methods of interrogation to be used:

In this new kind of war, there is no more valuable source of intelligence on potential attacks than the terrorists themselves. Amid the steady stream of threats made after 9/11, I grappled with three of the most critical decisions I would make in the war on terror: where to hold captured enemy fighters, how to determine their legal status and ensure they eventually faced justice, and how to learn what they knew about future attacks so we could protect the American people.<sup>99</sup>

46. At the same time, the critical role of the CIA and its Director, George Tenet, in implementing the program is well documented, including most notably through the Senate Torture Report. Indeed, as will be set forth below, the cases of both **Victim Sharqawi Al Hajj** and **Victim Guled Hassan Duran** make clear the direct participation of the CIA upon arrest, transfer, detention and untimely, interrogation using techniques that constitute torture.

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<sup>96</sup> Amnesty International, *United States of America: Below the radar: Secret flights to torture and ‘disappearance’*, 5 April 2006, available at <https://www.amnesty.org/en/documents/AMR51/051/2006/en/>, at p. 11.

<sup>97</sup> Extraordinary Rendition in U.S. Counterterrorism Policy: The Impact on Transatlantic Relations, Hearing Before the Subcommittee on International Organizations, Human Rights, and Oversight and the Subcommittee on Europe of the House Committee on Foreign Affairs, 110th Congress, 17 April 2007, available at [https://fas.org/irp/congress/2007\\_hr/rendition.pdf](https://fas.org/irp/congress/2007_hr/rendition.pdf), at 37.

<sup>98</sup> *Id.* at 18.

<sup>99</sup> Bush, *Decision Points* at 165.

### c. Department of Defense Detention in Afghanistan and Transfer to Guantánamo

47. Since it began operating on 11 January 2002, 779 men have been detained at the prison at Guantánamo Bay; 41 Muslim men currently remain, including **Victim Al Hajj** and **Victim Duran**. The majority of men detained at Guantánamo were transferred there from Afghanistan.<sup>100</sup> The prison was “intended to be a facility beyond the reach of the law.”<sup>101</sup> As such, detainees have been subjected to acts of torture, including methods of torture employed in the CIA “high value detainee” program. There have been a plethora of reports published that detail the draconian conditions, interrogation techniques and torture that took place – and continues, albeit in most cases, in a different form – at Guantánamo. Since as early as 2003, ICRC staff has expressed their deep concerns about the detention conditions in Guantánamo – indeed, published memoranda by U.S. officials from that period contain descriptions of meetings held between ICRC staff and Guantánamo commander Geoffrey Miller where concerns were raised.<sup>102</sup> In 2006, a group of five United Nations Special Rapporteurs published a joint Report on the situation of detainees at Guantánamo Bay that came to the express conclusion that the interrogation techniques authorized and deployed by the Department of Defense, which operated under the command of Bush, amounted to torture.<sup>103</sup> Additionally, the UN experts also concluded *inter alia* that the force-feeding of detainees on hunger strike amounted to acts of torture.<sup>104</sup> A 2006 report by the United Nations Committee against Torture explicitly recommended that the U.S. “rescind any interrogation technique, including methods involving sexual humiliation, ‘water boarding’, ‘short shackling’ and using dogs to induce fear, that constitute torture or cruel, inhuman or degrading treatment or

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<sup>100</sup> It is recognized that transfers from Afghanistan prior to 1 May 2003, when the detainee had never been captured, detained or interrogated by a national or on the territory of a State Party fall squarely outside the jurisdiction of the Court. Such information can be considered to provide context for the crimes that fall within the Court’s jurisdiction.

<sup>101</sup> International Center for Transitional Justice, *Prosecuting Abuses of Detainees in U.S. Counter-terrorism Operations*, November 2009, available at <http://ictj.org/sites/default/files/ICTJ-USA-Criminal-Justice-2009-English.pdf>, at 8.

<sup>102</sup> *Memorandum for Record: ICRC Meeting with MG Miller on 09 Oct 03*, Department of Defense, Joint Task Force 170, Guantanamo Bay, Cuba, 9 October 2003, available at <http://www.washingtonpost.com/wp-srv/nation/documents/GitmoMemo10-09-03.pdf>; see also Higham, Scott, “A Look Behind the ‘Wire’ At Guantanamo,” *Washington Post*, 13 June 2004, available at <http://www.washingtonpost.com/wp-dyn/articles/A37364-2004Jun12.html> and also Lewis, Neil A., “Red Cross Finds Detainee Abuse in Guantánamo,” *New York Times*, 30 November 2004, available at <http://www.nytimes.com/2004/11/30/politics/30gitmo.html?pagewanted=1&r=1>.

<sup>103</sup> Chairperson-Rapporteur of the Working Group on Arbitrary Detention et al., *Situation of Detainees at Guantánamo Bay*, UN Commission on Human Rights, UN Doc. E/CN.4/2006/120, 27 February 2006, available at [http://repository.un.org/bitstream/handle/11176/259174/E\\_CN.4\\_2006\\_120-EN.pdf?sequence=3&isAllowed=y](http://repository.un.org/bitstream/handle/11176/259174/E_CN.4_2006_120-EN.pdf?sequence=3&isAllowed=y) (“UN Guantánamo Situation Report”) at ¶87.

<sup>104</sup> *Id* at ¶ 88.

punishment.”<sup>105</sup> Other studies have detailed how the Bush administration, for example, forcibly deployed the drug mefloquine against detainees at Guantánamo in order to break their resistance to interrogation, despite the fact that it is well-known to have severe side effects and cause health problems.<sup>106</sup> In sum, there has been widespread international acceptance – amongst intergovernmental bodies, international experts, academics and others – that the interrogation techniques applied in Guantánamo constitute torture under international law.

**48. Accordingly, other States – including States Parties Afghanistan, Poland, Lithuania, Romania and Jordan, as well as the many countries which facilitated extraordinary rendition flights, identified above – all should have known that participating in detention, rendition and interrogation operations that included the detention facility at Guantánamo Bay risked facilitating, aiding, abetting or otherwise assisting torture, if not contributing to its commission by acting with the United States for the common purpose of torturing individuals suspected – often without any basis – of association or involvement in terrorism.**

49. While Guantánamo falls beyond the territorial scope of the Court, for a number of reasons examination of the particulars of the interrogation and detention regime in place there is necessary for a full understanding of the crimes which occurred on the territory of States Parties as well as those committed with the participation or assistance of nationals from States Parties, and to assess the full scope of the crimes – past and present – inflicted upon the Victims.

50. *First*, detainees were shuttled back and forth between detention sites on the territory of States Parties, i.e., particularly between Afghanistan and Guantánamo, such that the different locations formed one continuing criminal operation. DOD facilities in Afghanistan, including from the military bases in Kandahar and Bagram, served as both interrogation facilities and holding centers until detainees were moved to Guantánamo. The same is true for individuals held in CIA “black sites” – their ultimate destination was Guantánamo. In some cases, such as the case of four CIA “high value detainees” including Abu Zubaydah and

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<sup>105</sup> 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*, UN Doc. CAT/C/USA/CO/2, 25 July 2006, available at [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2FC%2FUSA%2FCO%2F2\\_4](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2FC%2FUSA%2FCO%2F2_4) (“US CAT Report”), at ¶24.

<sup>106</sup> See, for a detailed medical analysis, Seton Hall University School of Law, Center for Policy and Research, *Drug Abuse – an exploration of the government’s use of mefloquine at Guantánamo*, available at <http://law.shu.edu/ProgramsCenters/PublicIntGovServ/policyresearch/upload/drug-abuse-exploration-government-use-mefloquine-gunatanamo.pdf>.

Al-Nashiri, suspected terrorists were first brought *to* Guantánamo from CIA blacksites located on States Parties' territory and then *from* Guantánamo to a number of CIA blacksites, ultimately again being detained on States Parties territory, before being *returned back to* Guantánamo.<sup>107</sup> It is therefore an artificial break in rendition-detention-interrogation program to exclude all detentions at Guantánamo.

51. *Second*, the same detention regimes and interrogation techniques were used in locations on the territory of States Parties and at Guantánamo. Notably, the legal memos that governed interrogations for the DOD and CIA applied equally at locations on States Parties' territory and at Guantánamo. Moreover, U.S. government reports establish how detention and interrogation regimes migrated from one location to another.<sup>108</sup> Mohammed al Qahtani, a detainee transferred from Afghanistan to Guantánamo who was subjected to a prolonged, aggressive "interrogation," is a case in point. The same SERE-inspired "interrogation techniques" used on detainees in the CIA detention program were used against him in what was known as the "First Special Interrogation Plan." This interrogation plan, which began on 23 November 2002 and ended 16 January 2003, included 48 days of severe sleep deprivation and 20-hour interrogations,<sup>109</sup> forced nudity, sexual humiliation,<sup>110</sup> religious humiliation,<sup>111</sup> dehumanizing treatment,<sup>112</sup> the use of physical force against him, prolonged stress positions,

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<sup>107</sup> See Scott Horton, "Three-Card Monte at Gitmo," *Harpers*, 6 August 2010, available at <https://harpers.org/blog/2010/08/three-card-monte-at-gitmo/>; "AP Exclusive: To keep program secret, CIA whisked 9/11 figures from Gitmo before court ruling," *Associated Press*, 6 August 2010, available at <http://www.foxnews.com/us/2010/08/06/ap-exclusive-program-secret-cia-whisked-figures-gitmo-court-ruling.html>.

<sup>108</sup> See, e.g., SASC Report; Office of the Inspector General, U.S. Department of Justice, *A Review of the FBI's Involvement in and Observations of Detainee Interrogations in Guantanamo Bay, Afghanistan, and Iraq*, May 2008, available at [https://www.aclu.org/sites/default/files/pdfs/safefree/OIG\\_052008\\_i\\_7.pdf](https://www.aclu.org/sites/default/files/pdfs/safefree/OIG_052008_i_7.pdf).

<sup>109</sup> See, e.g., SASC Report at 76 ("The interrogation would be conducted for '20-hour sessions' and at the completion of each session, Kahtani would be permitted four hours of rest, and then 'another 20 hour interrogation session [would] begin.'"); Declaration of Gitanjali S. Gutierrez, Esq., Lawyer for Mohammed al Qahtani, Criminal Complaint Against Donald Rumsfeld, The Prosecutor General at the Federal Supreme Court, Federal Republic of Germany, 14 November 2006, available at [http://www.ccrjustice.org/files/Gutierrez%20Declaration%20re%20Al%20Qahtani%20Oct%202006\\_0.pdf](http://www.ccrjustice.org/files/Gutierrez%20Declaration%20re%20Al%20Qahtani%20Oct%202006_0.pdf) ("Gutierrez Declaration") at 10-15.

<sup>110</sup> Among the forms of sexual humiliation to which Mr. al Qahtani was subjected were use of female interrogators who straddled, touched or otherwise molested him (known as "Invasion of Space by a female"); being forced to wear a woman's bra and having a thong placed on his head during the course of an interrogation; told that his mother and sisters were whores; and forced to wear, look at or study pornographic images. See Gutierrez Declaration at 15-20; SASC Report at 90.

<sup>111</sup> Some instances of the acts of religious humiliation are detailed in a released interrogation log, available at <http://www.time.com/time/2006/log/log.pdf>. These acts include: constructing a shrine to Osama bin Laden and informing Mr. al Qahtani that he could only pray to bin Laden; "forced grooming," including forcibly shaving Mr. al Qahtani's beard; and interrupting, controlling or denying Mr. al Qahtani's right to pray.

<sup>112</sup> A military investigation reports the following treatment on 20 December 2002, "[A]n interrogator tied a leash to the subject of the first Special Interrogation's chains, led him around the room, and forced him to perform a series of dog tricks." *Army Regulation 15-6: Final Report: Investigation into FBI Allegations of Detainee Abuse*

prolonged sensory overstimulation, and threats with military dogs.<sup>113</sup> These techniques were later widely acknowledged as torture. Indeed, the former convening officer of the military commissions at Guantánamo, Susan Crawford, declared that she could not bring charges against al Qahtani due to the torture inflicted on him, “We tortured [al-]Qahtani. ... His treatment met the legal definition of torture. And that's why I did not refer the case [for prosecution].”<sup>114</sup>

52. *Third*, U.S. personnel moved between detention centers in Afghanistan and Guantánamo – sometimes going *with* detainees from one location to another, thus forming a very real link between the conditions and treatment in one place and the next. This was the case for **Victim Al Hajj** and the three detainees with whom he was transferred, who traveled from Bagram to Guantánamo with a female interrogator from the Naval Criminal Investigative Service.

53. *Finally, and most fundamentally*, the harms the Victims were subjected to on the territory of States Parties continue at Guantánamo; indeed, for neither Victim and for none of the men detained at Guantánamo did the crime commence in Cuba or on the U.S. naval base there. For the men still detained at Guantánamo, including **Victim Al Hajj** and **Victim Duran**, the profound physical and mental harm arising out of detention in CIA blacksites or proxy-detention, and at Bagram, has not only *not* been treated or allowed to heal, it has continued. The men remain cut-off from the outside world, detained without charge and without any real hope for release. The detainees continue to be denied fundamental rights under international law, including the right to due process. As explained below, **Victim Al Hajj** is experiencing acute physical and mental medical issues arising out of sixteen years of arbitrary, endless detention. And notably, reflecting the profile of the so-called “terrorists,” all the men who remain at Guantanamo are Muslim. It is for this reason that eleven of the remaining detainees at Guantánamo, including **Victim Al Hajj**, recently renewed their motion for habeas corpus stating this:

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at *Guantanamo Bay, Cuba Detention Facility*, amended 9 June 2005, available at [https://www.thetorturedatabase.org/files/foia\\_subsite/pdfs/schmidt\\_furlow\\_report.pdf](https://www.thetorturedatabase.org/files/foia_subsite/pdfs/schmidt_furlow_report.pdf) (“Schmidt Report”).

<sup>113</sup> For detail of the interrogation of Mr. al Qahtani, which included a simulated rendition, see SASC Report at 77-78, 88-91; Gutierrez Declaration; Adam Zagorin, and Michael Duffy, “Inside the Interrogation of Detainee 063,” *Time Magazine*, 19 June 2005, available at <http://www.time.com/time/magazine/article/0,9171,1071284,00.html>, and 83 pages of interrogation log at <http://www.time.com/time/2006/log/log.pdf>; Schmidt Report at 13-21.

<sup>114</sup> Bob Woodward, “Detainee Tortured, Says U.S. Official; Trial Overseer Cites “Abusive” Methods Against 9/11 Suspect,” *Washington Post*, 14 January 2009, at A1, available at [www.washingtonpost.com/wp-dyn/content/article/2009/01/13/AR2009011303372.html](http://www.washingtonpost.com/wp-dyn/content/article/2009/01/13/AR2009011303372.html). Crawford continued, “This was not any one particular act; this was just a combination of things that had a medical impact on him, that hurt his health. It was abusive and uncalled for. And coercive. Clearly coercive. It was that medical impact that pushed me over the edge [to call it torture].” *Id.*

Many [of the detainees] are suffering the devastating psychological and physiological consequences of indefinite detention in a remote prison camp where they have endured conditions devised to break human beings, and there the aura of forever hangs heavier than ever. Given President Donald Trump’s proclamation against releasing any petitioners – driven by executive hubris and raw animus rather than by reason or deliberative national security concerns – these petitioners may never leave Guantánamo alive, absent judicial intervention. [...] The President’s apparent policy to detain for detention’s sake, driven by religious animus, is unlawful.<sup>115</sup>

### III. ARREST, DETENTION AND TORTURE OF VICTIMS AL-HAJJ AND DURAN

*“Mr. Al Hajj is among those prisoners the government might as well say are ‘too tortured’ to charge but won’t release”*<sup>116</sup>

#### a. Sharqawi Abdu Al-Hajj

54. In 2000, Mr. Al Hajj traveled to Afghanistan and then fled to Pakistan after the U.S. bombing campaign began in October 2001. On 7 February 2002, he was captured in Karachi by American and Pakistani personnel.<sup>117</sup>

55. Mr. Al-Hajj was held in solitary confinement until midnight of 10 February 2002 when unidentified individuals placed a hood over his head, cuffed his hands together, and placed him into a car.<sup>118</sup> Mr. Al-Hajj was not told where they were taking him. Upon arriving at an undisclosed airport, the car drove directly beside a CIA-owned Gulfstream V jet aircraft under tail number N379P, registered to Aero Contractors based in North Carolina in the United States.<sup>119</sup> The individuals removed Mr. Al-Hajj from the car and boarded him onto the

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<sup>115</sup> Motion for Order Granting Writ of Habeas Corpus, 11 January 2018, *Al Bihani, et al. v. Trump*, Case No. 04-cv-1194 (D.D.C.), Dkt. No. 1885, available at [https://ccrjustice.org/sites/default/files/attach/2018/01/AlBihani\\_et\\_al\\_v\\_Trupm\\_MotionforOrderGrantingWrit.pdf](https://ccrjustice.org/sites/default/files/attach/2018/01/AlBihani_et_al_v_Trupm_MotionforOrderGrantingWrit.pdf) at pp. 1, 4.

<sup>116</sup> CCR Senior Staff Attorney Pardiss Kebriaei, who represents Mr. Al Hajj in his U.S. federal habeas corpus proceedings. CCR Press Release, *New Release Hearing Held for CIA-Tortured Gitmo “Forever” Prisoner*, 28 February 2017, available at <https://ccrjustice.org/home/press-center/press-releases/new-release-hearing-held-cia-tortured-gitmo-forever-prisoner>.

<sup>117</sup> Declaration of Petitioner Sharqawi Abdu Ali Al-Haag (ISN 1457), 18 February 2010, *Mattan v. Obama*, Case No. 09-cv-745 (D.D.C.), Dkt. No. 1368 (“Sharqawi Declaration”); SSCI Executive Summary, p. 386, note 2185.

<sup>118</sup> Human Rights Watch, *Double Jeopardy*, at 23.

<sup>119</sup> *Id.*; *Ali Al-Hajj al-Sharqawi*, The Rendition Project, available at <https://www.therenditionproject.org.uk/prisoners/sharqawi.html>; see also *Sharqawi Abdu Ali Al Hajj*, North Carolina Commission of Inquiry on Torture, October 2017, available at <https://www.dropbox.com/s/4cgz2gau0gnl6oh/Ali-%20al-Hajj%20al-Sharqawi%20narrative-final-dmw.docx?dl=0>; Weissman, Deborah et al., *The North Carolina Connection to Extraordinary Rendition and Torture*, January 2012, available at <http://www.law.unc.edu/documents/clinicalprograms/finalrenditionreportweb.pdf>.

The Rendition Project tracks the flight path of N379P between 6-16 February 2002 as Johnston County (North Carolina) Airport (KJNX) -> Washington Dulles International Airport (KIAD) -> Glasgow Prestwick Airport (EGPK) -> Dubai (OMDB) -> FLIGHTS UNRECORDED/PLANE DISAPPEARED (believed to be Kabul -> Amman) -> Amman, Jordan (OJAI) -> Glasgow Prestwick Airport (EGPK) -> Bahrain (OBBI) -> FLIGHTS UNRECORDED/PLANE DISAPPEARED (believed to be Kabul -> Amman) -> OJAI -> Rome,

aircraft through what appeared to him as a back entrance.<sup>120</sup> He was then placed into a dark compartment within the aircraft where he was held down tightly around his neck and placed onto a chair with guards surrounding him.<sup>121</sup> Mr. Al-Hajj was told he would be returning to Yemen.<sup>122</sup>

#### ***CIA Proxy-Detention in Jordan: February 2002-January 2004***

56. Sometime between 11-15 February 2002, Mr. Al Hajj was instead transported to Amman, Jordan.<sup>123</sup>

57. Mr. Al-Hajj was taken to and held as a detainee in the General Intelligence Department (GID) Headquarters in Wadir Sir, Amman, Jordan from February 2002 to January 2004.<sup>124</sup> (Notably, Jordan signed the Rome Statute on 7 October 1998, and deposited its instrument of ratification on 11 April 2002, vesting the Court with jurisdiction over its territory and citizens effective 1 July 2002).

58. Mr. Al Hajj's detention has been corroborated by the CIA, identifying him as "Riyadh the Facilitator" in the Senate Select Intelligence Committee report on CIA Torture.<sup>125</sup> **Critically, the CIA identified Mr. Al Hajj as a detainee in "CIA custody" who was "detained February 2002"** when he is purported to have provided useful information used by the CIA.<sup>126</sup>

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Italy (LIRF) -> KIAD -> KJNX. It is recalled that the United Kingdom, Jordan and Italy were all States Parties to the ICC at the time of the flights. Flight plan available at <https://www.therenditionproject.org.uk/flights/renditions/N379P-020206.html>.

<sup>120</sup> Human Rights Watch, *Double Jeopardy*, at 23.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Ali Al-Hajj al-Sharqawi* The Rendition Project.

<sup>124</sup> Human Rights Watch, *Double Jeopardy*, at 1-3, 13-15, 23-25. Mr. Al-Hajj was held alongside then 17-year-old detainee Hassan bin Attash, a Saudi-born Yemeni, for the majority of his detention at the GID Headquarters. *Id.* at 25-27. For more information on CIA detention in Jordan, see Amnesty International, *United States of America / Yemen: Secret Detention in CIA "Black Sites"*, 8 November 2005, available at <https://www.amnesty.org/en/documents/AMR51/177/2005/en/>; Open Society Justice Initiative, *Globalizing Torture: CIA Secret Detention and Extraordinary Rendition*, February 2013, available at <https://www.opensocietyfoundations.org/reports/globalizing-torture-cia-secret-detention-and-extraordinary-rendition>, at 87-88; UN Joint Study at 70-72; Dick Marty, Committee on Legal Affairs and Human Rights, Alleged Secret Detentions in Council of Europe Member States, Council of Europe Parliamentary Assembly, 22 January 2006, available at [http://assembly.coe.int/CommitteeDocs/2006/20060124\\_Jdoc032006\\_E.pdf](http://assembly.coe.int/CommitteeDocs/2006/20060124_Jdoc032006_E.pdf), at 13; Amnesty International, *Jordan: "Your confessions are ready for you to sign": Detention and torture of political suspects*, July 2006, available at <https://www.amnesty.org/en/documents/MDE16/005/2006/en/>; Amnesty International, *USA/Jordan/Yemen: Torture and secret detention: Testimony of the 'disappeared' in the 'war on terror,'* 4 August 2005, available at <https://www.amnesty.org/download/Documents/84000/amr511082005en.pdf>; Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Report on Mission to Jordan, Human Rights Council, U.N. Doc. A/HRC/4/33/Add.3 (5 January 2007), available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G07/101/07/PDF/G0710107.pdf?OpenElement>, at 13-16.

<sup>125</sup> SSCI Executive Summary at p. 386, note 2185.

<sup>126</sup> *Id.* at pp.384-386 & notes 2177, 2181. The Senate Committee did not consider Mr. Al Hajj in CIA detention because he was physically in foreign government custody; the CIA's assertion that he was in fact in "CIA

59. For the twenty-three months, Mr. Al-Hajj was subjected to continuous interrogation and torture. He began documenting his ordeal around October 2002 in a handwritten note, marked with his thumbprint and titled, “a short summary of my sufferings.”<sup>127</sup> In his note, he describes his experience with GID interrogators:

They beat me up in a way that does not know mercy and they’re still beating me. They threatened me with electricity with snakes and dogs . . . [They said] we’ll make you see death .... They threatened to rape me.<sup>128</sup>

60. Mr. Al Hajj explained that the Jordanians were seeking information for the Americans and feeding his responses back to the CIA: “Every time that the interrogator asks me about a certain piece of information, and I talk, he asks me if I told this to the Americans. And if I say no he jumps for joy, and he leaves me and goes to report it to his superiors, and they rejoice.”<sup>129</sup>

61. When representatives of the ICRC visited the GID facility, Mr. Al-Hajj was hidden from them. Guards would move Mr. Al-Hajj to the soldier’s lecture room, where he would remain until the ICRC representative had finally left the facility.<sup>130</sup>

62. Mr. Al Hajj informed his attorneys that the GID interrogators in Jordan had also performed *falaqa* on him, a Jordanian torture method in which prisoners are given extended beatings on the bottoms of their feet, causing excruciating pain.<sup>131</sup> During his time at the GID Headquarters in Jordan, Mr. Al Hajj was kept in an isolation cell, beaten regularly, and was placed on the ground during interrogations, with the interrogator in a chair above him with his foot on his face.<sup>132</sup> In April 2006, Mr. Al-Hajj further elaborated on his treatment in GID detention:

I was being interrogated all the time, in the evening and in the day. I was shown thousands of photos, and I really mean thousands, I am not exaggerating .... And in between all this you have the torture, the abuse, the cursing, humiliation. They had threatened me with being sexually abused and electrocuted. I was told that if I wanted to leave with permanent disability both mental and physical, that that could be arranged. They said they had all the

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custody” clearly demonstrates that the CIA had control over Mr. Hajj throughout his detention, with Jordan serving as a proxy-detention power.

<sup>127</sup> Joanne Mariner, “We’ll Make You See Death,” *Salon* 10 April 2008, available at [https://www.salon.com/2008/04/10/jordan\\_rendition/](https://www.salon.com/2008/04/10/jordan_rendition/).

<sup>128</sup> *Id.*; Human Rights Watch, *Double Jeopardy*, at 2.

<sup>129</sup> Mariner, “We’ll Make You See Death”. See also Human Rights Watch, *Double Jeopardy*, at 14; Sharqawi Declaration at ¶6.

<sup>130</sup> Human Rights Watch, *Double Jeopardy*, at 3, 17; Sharqawi Declaration at ¶5.

<sup>131</sup> Human Rights Watch, *Double Jeopardy*, at 2-3, 16.

<sup>132</sup> Sharqawi Declaration at ¶4.

facilities of Jordan to achieve that. I was told that I had to talk, I had to tell them everything.<sup>133</sup>

63. After prolonged torture, Mr. Al-Hajj began to confess to allegations made by his interrogators, and manufactured facts in order to make the torture stop.<sup>134</sup> Mr. Al-Hajj refused to sign a report with statements that he had never uttered. His captors told him that he would be subject to further interrogation and that someone would “pluck” his beard. After the culmination of his ordeal and additional threats, Mr. Al-Hajj signed the statement.<sup>135</sup>

64. Mr. Al-Hajj’s accounts of his treatment at the GID detention facility have been corroborated through the testimony of other detainees held at such facility around the same time period, most of whom were subjected to similar abusive treatment. One detainee in particular alleged that Mr. Al-Hajj had received harsher abuses when compared to other detainees.<sup>136</sup>

***CIA Transfer from Jordan to Afghanistan: 7 January 2004***

65. On 7 January 2004, Mr. Al-Hajj was taken out of his cell and transported by the CIA on a plane operated by Aero Contractors with registration number N313P to Kabul, Afghanistan.<sup>137</sup> According to his account to his prior attorney:

He was taken to the airport in a black hood that came down to his shirt. When [he and the Americans] arrived at the airport, they cut his clothes off, searched his anus and gave him diapers, shorts, a sleeveless shirt and plastic handcuffs. He stood in the room for an hour in handcuffs tied to the walls. They took pictures of him. Then they came for him, tied his feet together and tied his hands together. One other man was thrown into a luggage cart, and Shergawi was picked up like a sack and thrown on top of him. Then they carried him like a sack and threw him into the plane. Two men were already in the plane, and they were American.<sup>138</sup>

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<sup>133</sup> Human Rights Watch, *Double Jeopardy*, at 24.

<sup>134</sup> Memorandum Opinion of Judge Henry H. Kennedy, 16 March 2010, *Abdah v. Obama*, Case No. 04-cv-01254, Dkt. No. 782 at p. 7.

<sup>135</sup> Sharqawi Declaration at ¶7.

<sup>136</sup> See generally Human Rights Watch, *Double Jeopardy*.

<sup>137</sup> See *Rendition Circuit: 5-10 January 2004*, The Rendition Project, <https://www.therenditionproject.org.uk/flights/renditions/N313P-040105.html>.

<sup>138</sup> Human Rights Watch, *Double Jeopardy*, at 25. This protocol during the transport process has been determined to be aimed at forcing a state of learned helplessness upon detainees and has been ruled by the European Court of Human Rights to constitute a form of torture. Pfander, James, *Constitutional Torts and the War on Terror*, 35 (Oxford University Press, 2017); ECtHR, *El-Masri v. Macedonia*, Appl.No. 39630/09, “Judgment,” 13 December 2012.

*Detention in Afghanistan – “Dark Prison” & Bagram: 8 January 2004 – August 2004*

66. Upon arrival on a CIA-charted flight to Kabul on 8 January 2004, Mr. Al-Hajj was transferred to the CIA-run “**Dark Prison.**”<sup>139</sup> Throughout his detention at the Dark Prison, guards kept his cell in complete darkness and subjected him to continuous loud music.<sup>140</sup> The cell was filthy with vermin, the food was extremely bad, and on occasions, prison guards force-fed Mr. Al Hajj when he refused to eat.<sup>141</sup> This account accords with the assessments of conditions in the Dark Prison: prisoners were held in total darkness, chained to their cell walls, deprived of food, water, and sleep, and continuously subjected to loud heavy-metal music, rap music, or other disorienting sounds.<sup>142</sup>

67. According to the Senate Torture Report, a location given the name “DETENTION SITE COBALT” was in operation between September 2002 and an undisclosed time in 2004. At this site, detainees were subject to “complete darkness and isolation” as well as extreme sensory deprivation. The windows “were blacked out and detainees were kept in total darkness.” Detainees in their cells “were shackled to the wall and given buckets for human waste,” and often subjected to forced standing, stress positions, sleep deprivation, cold temperatures and showers, “loud music, sensory deprivation, extended isolation, reduced quantity and quality of food, nudity, and ‘rough treatment,’” with many of the uses of these techniques going unreported in official records.<sup>143</sup> CIA officials at the site, including the supervising officer, were deemed to be inexperienced, untrained, immature, and lacking appropriate judgment to properly conduct interrogations; some personnel had admitted to committing sexual assault previous to their assignment.<sup>144</sup> DETENTION SITE COBALT is considered to be the notorious “Salt Pit,”<sup>145</sup> though it has also been associated with the “Dark Prison,”<sup>146</sup> by researchers and detainees,<sup>147</sup> and, because the timeline of detentions and

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<sup>139</sup> Sharqawi Declaration, ¶¶ 8-9.

<sup>140</sup> *Id.*; *Al-Hajj v. Obama*, 800 F. Supp. 2d 19, 21 (D.D.C. 2011); Amnesty International, *U.S.A.: Crimes and Impunity*, April 2015, available at [https://www.amnestyusa.org/wp-content/uploads/2017/04/cia\\_torture\\_report\\_amr\\_5114322015.pdf](https://www.amnestyusa.org/wp-content/uploads/2017/04/cia_torture_report_amr_5114322015.pdf), at 10.

<sup>141</sup> *Al-Hajj*, 800 F. Supp. 2d at 21-22.

<sup>142</sup> See OSJI, *Globalizing Torture*, at 62-64; see also Human Rights Watch, “U.S. Operated Secret ‘Dark Prison’ in Kabul,” 19 December 2005, <http://pantheon.hrw.org/legacy/english/docs/2005/12/19/afghan12319.htm>.

<sup>143</sup> SSCI Executive Summary at 49, 51, 56, 60-61.

<sup>144</sup> *Id.* at 49-50, 57-59.

<sup>145</sup> Amnesty International, *U.S.A.: Crimes and Impunity*, at 8, 23.

<sup>146</sup> Norton, Ben, “Hell in “Dark Prison”: New forms of torture at CIA black site revealed,” *Salon*, 4 October 2016, <https://www.salon.com/2016/10/04/hell-in-dark-prison-new-forms-of-torture-at-cia-black-site-revealed/>.

<sup>147</sup> Norton, Ben, “Hell in “Dark Prison”: New forms of torture at CIA black site revealed,” *Salon*, 4 October 2016, <https://www.salon.com/2016/10/04/hell-in-dark-prison-new-forms-of-torture-at-cia-black-site-revealed/>; Human Rights Watch, *US: Ex-Detainees Describe Unreported CIA Torture*, 3 October 2016, available at <https://www.hrw.org/news/2016/10/03/us-ex-detainees-describe-unreported-cia-torture>; *Mohammed al-*

description of conditions of confinement by former detainees in the Dark Prison match details known about DETENTION SITE COBALT, some journalists and advocates have surmised that the Salt Pit and the Dark Prison may be the same location.<sup>148</sup>

68. Another detainee, Khaled al-Maqtari created a detailed list of each detainee, and the cell they were held in at the Dark Prison, for the first few months of 2004, along with a floor plan of the facility.<sup>149</sup> This information has been corroborated through similar descriptions of such facilities during that time period within the testimonies of detainees Mohammed al-Shoroeiya, Khalid al-Sharif, and Mohamed Bashmilah.<sup>150</sup>

69. Around 10-16 May 2004, guards transported Mr. Al Hajj to the Bagram Air Base.<sup>151</sup> Upon arrival, Mr. Al Hajj was told Bagram was “a base belonging to the American Army.”<sup>152</sup> For two and a half months at Bagram, Mr. Al Hajj was placed in solitary confinement in a two foot by three-foot wooden cage with no toilet.<sup>153</sup> At one point, he was apparently interrogated by a female interrogator from the Naval Criminal Investigative Service.<sup>154</sup> In another instance, he was beaten by two guards.<sup>155</sup> Reports of torture – including sleep deprivation, extreme cold, forced nudity, inadequate food, denial of religious practices, and

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*Shoroeiya and Khalid al-Sharif, The Rendition Project*, [https://www.therenditionproject.org.uk/prisoners/shoroeiya\\_sharif.html](https://www.therenditionproject.org.uk/prisoners/shoroeiya_sharif.html); Fault Lines, “The dark prisoners: Inside the CIA's torture programme,” *Al Jazeera*, 14 September 2016, available at <https://www.aljazeera.com/indepth/features/2016/03/dark-prisoners-cia-torture-programme-160326051331796.html>. For example, detainee Rafiq al-Hami describes being in the “Dark Prison” (Worthington, Andy, *Video: Tunisian Freed from Guantánamo Calls for the Return of His Compatriots*, 25 January 2012, <http://www.andyworthington.co.uk/2012/01/25/video-tunisian-freed-from-guantanamo-calls-for-the-return-of-his-compatriots/>) and was located at COBALT according to the SSCI Executive Summary at p. 102, note 591.

<sup>148</sup> Amnesty International, *U.S.A.: Crimes and Impunity*, at 55; Rosenberg, Carol, and Landay, Jonathan, “Justice Department probing CIA in two detainee deaths,” *Miami Herald*, 30 June 2011, available at <http://www.bradenton.com/latest-news/article34711572.html>.

<sup>149</sup> Amnesty International, *USA: A Case to Answer*, March 2008, available at <https://www.amnesty.org/en/documents/AMR51/013/2008/en/>, at 23.

<sup>150</sup> See Declaration of Mohamed Farag Ahmad Bashmilah in Support of Plaintiff’s Opposition to the United States’ Motion to Dismiss, or, In the Alternative, for Summary Judgment, 5 December 2007, *Mohamed et al. v. Jeppesen Dataplan, Inc.*, Case No. 5:07-cv-02798 (JW) (N.D. Ca.), available at [https://www.therenditionproject.org.uk/pdf/PDF%20240%20\[Mohamed%20et%20al%20v.%20Jeppesen%20Dataplan,%20Inc.%20-%20Bashmilah%20Decl.%20\(Dec%202007\)\].pdf](https://www.therenditionproject.org.uk/pdf/PDF%20240%20[Mohamed%20et%20al%20v.%20Jeppesen%20Dataplan,%20Inc.%20-%20Bashmilah%20Decl.%20(Dec%202007)].pdf).

<sup>151</sup> OSJI, *Globalizing Torture*, at 56; *Al-Hajj*, 800 F. Supp. 2d at 22.

<sup>152</sup> *Al-Hajj*, 800 F. Supp. 2d at 22; Sharqawi Declaration at ¶9.

<sup>153</sup> *Id.*

<sup>154</sup> Center for Constitutional Rights, *Supplemental Appendix Part 3: 11 Years and Counting: Profiles of Men Detained at Guantánamo*, March 2013, Precautionary Measures 259/02, Inter-American Commission on Human Rights, available at [https://ccrjustice.org/sites/default/files/assets/files/Part%203\\_Supplemental%20Appendix%20%28App%2050\\_2%29.pdf](https://ccrjustice.org/sites/default/files/assets/files/Part%203_Supplemental%20Appendix%20%28App%2050_2%29.pdf).

<sup>155</sup> *Al-Hajj*, 800 F. Supp. 2d at 22; Sharqawi Decalation at at ¶9.

other mistreatment – are common at Bagram, and at least two detainees have been killed at the site following abuse.<sup>156</sup>

70. Mr. Al Hajj remained at the Bagram facility in U.S. military custody for approximately four months.<sup>157</sup>

***CIA Transfer from Afghanistan to Guantánamo: 19 September 2004***

71. According to flight records, on 19 September 2004, Mr. Al-Hajj was transported from Afghanistan to Guantánamo on a United States military aircraft with call-sign RCH948y.<sup>158</sup> He was accompanied by the same female interrogator from the Naval Criminal Investigative Service and fellow detainees Hassan bin Attash, Binyam Mohamed and al-Kazimi.<sup>159</sup>

***Mr. Al-Hajj's Current Circumstances and Status: Indefinite Detention at Guantánamo***

72. Mr. Al-Hajj is being held in the “communal” camp at Guantanamo with most of the remaining detainees who are being held without charge. He has never been accused of taking up arms against the United States or involvement in any act of violence.

73. On 19 April 2013, the Periodic Review Board within the Department of Defense identified Mr. Al Hajj as eligible for review.<sup>160</sup> He had PRB hearings in 2016 and 2017, as a result of which he was again designated for continuing detention. His next PRB hearing is scheduled for 2020, 18 years after his capture, and his detention appears to be indefinite.<sup>161</sup>

74. In recent months, Mr. Al Hajj has suffered increasing despair with regard to his failing health and chronic and deteriorating conditions. He recently “escalated” his hunger strike because of his health issues and his indefinite detention, and in July 2017 he reported that he “stopped being fed through a tube or drinking Ensure.”<sup>162</sup> As a result of his hunger strike, his health has further deteriorated. On one occasion, he lost consciousness and was

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<sup>156</sup> Golden, Tim, “In U.S. Report, Brutal Details of Two Afghan Inmates’ Deaths,” *New York Times*, 20 May 2005, <http://www.nytimes.com/2005/05/20/world/asia/in-us-report-brutal-details-of-2-afghan-inmates-deaths.html>. For more information on torture at Bagram, see, e.g., Open Society Foundations, *Confinement Conditions at a U.S. Screening Facility on Bagram Air Base*, 14 October 2010, available at <https://www.opensocietyfoundations.org/sites/default/files/confinement-conditions-20101014.pdf>; Graham-Harrison, Emma, “US finally closes detention facility at Bagram airbase in Afghanistan,” *The Guardian*, 11 December 2014, <https://www.theguardian.com/world/2014/dec/11/afghanistan-us-bagram-torture-prison>.

<sup>157</sup> *Ali Al-Hajj Al-Sharqawi*, The Rendition Project.

<sup>158</sup> SSCI Executive Summary at 4; *Ali Al-Hajj Al-Sharqawi*, The Rendition Project.

<sup>159</sup> *Ali Al-Hajj Al-Sharqawi*, The Rendition Project; Amnesty International, *U.S.A.: Crimes and Impunity*, at 55.

<sup>160</sup> Leopold, Jason, “Identities of 71 Gitmo Prisoners Eligible for Hearings Released by US,” *Al Jazeera America*, 20 February 2014, <http://america.aljazeera.com/articles/2014/2/19/71-guantanamo-prisonerseligibleforparolehearings.html>.

<sup>161</sup> *Unclassified Summary of Final Determination*, Periodic Rev. Secretariat, Dep’t. of Def., 1 (30 March 2017), [http://www.prs.mil/Portals/60/Documents/ISN1457/FullReview1/20170330\\_U\\_ISN1457\\_FINAL\\_DETERMINATION\\_PUBLIC.pdf](http://www.prs.mil/Portals/60/Documents/ISN1457/FullReview1/20170330_U_ISN1457_FINAL_DETERMINATION_PUBLIC.pdf).

<sup>162</sup> Declaration of Pardiss Kebriaei in Support of Petitioner Sharqawi Al Hajj’s Emergency Motion, 6 September 2017, *Al Hajj v. Trump*, Case No. 09-cv-745 (D.D.C.) (“Kebriaei Declaration”), at ¶3.

taken to the hospital under emergency circumstances. The medical team informed him that his blood sugar had dropped so low and had “reached a point of danger.”<sup>163</sup>

75. Mr. Al Hajj’s condition, both physical and mental, has been of great concern to his current attorneys, one of whom stated in support of an emergency motion seeking his release that he was noticeably failing, appearing “frail, gaunt” and without energy and concentration.<sup>164</sup> Mr. Al Hajj further described suffering from frequent and severe abdominal pains. He has also suffered from severe bouts of jaundice. He reported that his weight, as of August 2017, was 104 pounds/47 kgs.<sup>165</sup>

76. Mr. Al Hajj’s physical and mental condition have deteriorated to the point where it has interfered with his ability to consult with counsel or to attend habeas or Periodic Review Board meetings as he finds it too physically demanding to be moved from his cell.

77. Dr. Jess Ghannam, an expert Professor of Psychiatry who is also a licensed psychologist for over twenty years, and who has served as an expert consultant in cases of Military Commission proceedings at Guantánamo, assessed Mr. Al Hajj’s current physical and mental condition based on information from his counsel, and her experience based on working with current and former detainees at Guantánamo.<sup>166</sup> Dr. Ghannam set forth his “significant concerns about his health and potential for decline and a medically emergent collapse.” He expressed great concern about the “functioning of his liver, the appearance of jaundice, and lack of treatment,” which may fail to comply with the accepted standard of care for his condition.<sup>167</sup>

78. Dr. Ghannam also opines that Mr. Al Hajj suffers from a condition known as “Guantánamo Syndrome” suffered by individuals “subjected to severe torture in Pakistan, Afghanistan, and Jordan.” He describes these conditions as “debilitating and disabling.” The symptoms include “sleep difficulties, cognitive difficulties, gastro-intestinal difficulties, chronic pain, chronic headaches, fatigue, and general physical impairment.” He further explains that these symptoms are present in individuals who are *not* on a hunger strike. He offers his opinion, “with reasonable medical probability, that Mr. Hajj may very well be on the precipice of total bodily collapse.”<sup>168</sup>

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<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at ¶4.

<sup>165</sup> *Id.* at ¶¶8-9.

<sup>166</sup> Declaration of Dr. Jess Ghannam in Support of Petitioner Sharqawi Al Hajj’s Emergency Motion, 29 August 2017, *Al Hajj v. Trump*, Case No. 09-cv-745 (D.D.C.). Mr. Al Hajj was diagnosed with Hepatitis B prior to his detention. *Id.* at ¶10

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at ¶12.

79. Mr. Al Hajj has been detained for over 16 years with no independent medical or psychological support, which exacerbates the physical and mental harms arising out of his torture and cruel treatment in Jordan and Afghanistan, and with no prospects for transfer or release, contributing, if not causing, his current grave health crisis. Moreover, his frail and debilitating condition interferes with his ability to access judicial relief.<sup>169</sup>

**b. Guled Duran**

80. On 4 March 2004, Mr. Duran was transiting through the airport in Djibouti on route from Mogadishu, Somalia to Sudan, where he was to receive medical treatment following an injury he sustained in Somalia that left him with a colostomy bag and a wound that had not healed properly. Instead, Mr. Duran was captured by Djiboutian security forces upon arrival at the airport. The Djiboutians delivered Mr. Duran over to CIA personnel,<sup>170</sup> who brought him into a house. Six or seven Americans with covered faces, grey or black jumpsuits, and a video camera searched him. Mr. Duran was stripped naked and handcuffed. A CIA doctor gave him a medical check-up, at which point he said “oh shit, he’s got a colostomy bag,” and changed it for him. After the doctor left four men came and interrogated him. The men, who appeared to be more like soldiers than interrogators, appeared to know information about Mr. Duran.<sup>171</sup>

81. After a few hours of interrogation and being screamed at, Mr. Duran was loaded on to a plane, shackled and strapped down to the floor of the plane. He was flown to an unknown location,<sup>172</sup> making one stop en route. Upon arrival, his eyes were taped closed and he was transported to a hospital, where he was stripped, photographed and then given a medical check up. The next day, Mr. Duran was told he was an enemy combatant and was not entitled to a lawyer. He was stripped naked and interrogated.<sup>173</sup> During the multi-day interrogation, interrogators threatened to send Mr. Duran “somewhere he would not believe, where he would not see the sun,” and threatened his family, including those family members living in the United States.<sup>174</sup>

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<sup>169</sup> See Petitioner’s Emergency Motion for an Independent Medical Evaluation and Medical Records, 6 September 2017, *Al Hajj v. Trump*, Case No. 09-cv-745 (D.D.C.).

<sup>170</sup> SSCI Executive Summary at p. 339.

<sup>171</sup> Factual Supplement to Petition for Writ of Habeas Corpus, Dkt. No. 11-1, 13 February 2017, *Duran v. Trump*, Case No. 16-cv-02358 (D.D.C.) (“Factual Supplement”).

<sup>172</sup> Mr. Duran was told where he was brought but this information remains classified by the United States.

<sup>173</sup> Factual Supplement at ¶¶8-10.

<sup>174</sup> *Id.* at ¶11.

82. Until 2006, when he was transferred to Guantánamo, Mr. Duran was imprisoned in the CIA’s secret prison network, but little information about his location and treatment during that time has been made publicly available; however, it is known that Mr. Duran was held at some point between March 2004 and September 2006 at one or more CIA-run detention facilities in Afghanistan.<sup>175</sup> Flight data suggests that Mr. Duran was transferred to either a CIA-run detention facility in Morocco, at Guantánamo or Afghanistan for his initial detention in March 2004.<sup>176</sup> It is known that he was flown to another location in March or April 2004 because the ICRC was coming and the CIA did not want them to discover him.<sup>177</sup> At this location, Mr. Duran was interrogated every day. He was then flown to another, newly constructed detention facility in February 2005, where he could not see the sky. He was flown again to detention another facility in April 2006.

83. In April 2006, Mr. Duran was flown to another location for surgery—more than two years after his initial detention; he remained in the hospital for one month and then was returned to detention.<sup>178</sup> Mr. Duran asserts that medical care was withheld to pressure him to cooperate and was “used as a lever for his interrogations,” and he continues to suffer the aftereffects from the long period of neglect.<sup>179</sup>

84. Mr. Duran was named as a so-called “high-value detainee” and was transferred to Guantánamo Bay in September 2006 along with thirteen detainees who President Bush disclosed had been held in CIA “black sites” prior to their transfer to Guantánamo. Following transfer to Guantánamo, the ICRC was granted its first access to these 14 men, including Mr. Duran. The ICRC Report concludes that the men were all subjected to “a combination of physical and psychological ill-treatment with the aim of obtaining compliance and extracting information,” transfer “to multiple locations” in a manner “that was intrusive and humiliating and that challenged the dignity of the persons concerned,” “continuous solitary confinement and incommunicado detention throughout the entire period of their undisclosed detention, and the infliction of further ill-treatment through the use of various methods either individually or in combination, in addition to the deprivation of other basic material

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<sup>175</sup> ICRC CIA Detainee Report.

<sup>176</sup> *Gouled Dourad*, The Rendition Project, <https://www.therenditionproject.org.uk/prisoners/dourad.html>.

<sup>177</sup> Factual Supplement at ¶12.

<sup>178</sup> *Id.* at ¶¶17-18.

<sup>179</sup> *Id.* at ¶22.

requirements” – conditions “that amounted to torture and/or cruel, inhuman or degrading treatment.”<sup>180</sup>

85. Additionally, the SSCI confirms that Mr. Duran was subjected to the CIA’s “enhanced interrogation techniques.”<sup>181</sup> These techniques can include: “(1) attention grasp, (2) walling, (3) facial hold, (4) facial slap (insult slap), (5) cramped confinement, (6) wall standing, (7) stress positions, (8) sleep deprivation, (9) insects placed in a confinement box, and (10) the waterboard.”<sup>182</sup>

86. Mr. Duran denied having any link to al-Qaeda. He has never been charged with a crime and remains detained at Guantánamo without charge.

#### **IV. REPRESENTATIONS REGARDING THE FACTUAL AND TERRITORIAL SCOPE OF THE CRIME-BASE**

87. In the Request, the Prosecutor specifies two areas for investigation involving U.S. actors: (1) war crimes committed by members of the armed forces and/or the CIA in the context of a non-international armed conflict in Afghanistan; and (2) war crimes committed by members of the on the territory of other States Parties, including Romania, Lithuania and Poland, when committed “in the context of and associated with the armed conflict in Afghanistan.” Request ¶¶ 187-189. The Prosecutor specifically *excludes* from the scope of the investigation crimes against persons initially detained by the U.S. in Afghanistan and transferred to the U.S. naval base at Guantanamo Bay. *See* Request ¶ 188.

88. **The Victims** fall squarely within the proposed scope of the investigation, due to their detention in *inter alia* CIA-run detention facilities on the territory of States Parties, including Afghanistan, at a minimum, and, in relation **Victim Al Hajj**, at Bagram. *See* Request, ¶¶ 43, 203.

89. The Request excludes persons detained in Afghanistan “but subjected to alleged crimes on the territory of States that are not a party to the Statute, such as the US naval base at Guantanamo Bay, in the Republic of Cuba,” as well as persons detained and mistreated on a State Party’s territory without a “clear nexus to the armed conflict in Afghanistan, such as the detention of persons allegedly linked to other “franchise” Al Qaeda groups or other terrorist organizations.” Request, ¶188, 250. The Victims express their concern at this

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<sup>180</sup> ICRC CIA Detainee Report, at 4-5, 7.

<sup>181</sup> SSCI Executive Summary at pp. 336-337. *C.f., id.* at 338-340 (confirming Mr. Duran’s detention by the CIA, but stating that he was not subjected to CIA “enhanced interrogation techniques”).

<sup>182</sup> August 2002 Bybee Memo to Rizzo at p. 2.

limitation, and ask the Pre-Trial Chamber to authorize a more holistic approach to the investigation, which will necessarily entail examination of three aspects of the detention and interrogation regime that *could* be considered to fall beyond the scope of the Prosecutor's request, namely:

- a. Detentions and resulting violations between 1 July 2002 and 2006 that involved States Parties *beyond* those on territory of Afghanistan, Poland, Lithuania and/or Romania that fall within the full CIA detention and interrogation program, i.e., "extraordinary renditions" and proxy detentions. Investigation of these aspects of the U.S. detention program, would allow a complete understanding of the scale and impact of the US detention and interrogation operations, and provide evidence and insight into the policy. It would be arbitrary and incomplete to begin investigation only at the point where a detainee is transferred into a CIA-operated detention facility (i.e., COBALT) as opposed to when individual comes under custody and control of CIA detention and interrogation program through proxy detention at a detention facility operated by and on the territory of a third-State Party, or with the involvement of a State Party in East Africa.

**There is no jurisdiction bar, and no basis in logic or fact, to exclude Victim Al Hajj's detention and interrogation in Jordan, or Victim Duran's detention, interrogation and transfer from Djibouti (or any subsequent harms arising from his two-plus years in CIA detention at unknown locations, which included at some stage, location(s) in Afghanistan) from the scope of the investigation, or possible criminal cases.**

As detailed above, in the initial phase of the rendition-and-interrogation program and before it established its own detention facilities in Romania, Poland and Lithuania, the CIA relied upon other States to detain and interrogate suspected terrorists. This was the case for **Victim Al Hajj**, who was sent to Jordan for what is widely considered as proxy-detention and interrogation. Victim Al Hajj was under the effective control of the CIA while detained on the territory of Jordan from February 2002-January 2004: after capture through a joint U.S.-Pakistani operation, he was delivered to Jordan in a CIA-chartered plane; he was apparently interrogated using questions provided by the CIA and for the purposes of providing information to the United States; information purportedly provided by Mr. Al Hajj was in fact delivered to the United States and relied upon in its investigation and intelligence operations regarding the September 11<sup>th</sup> attack (*see* SSCI Executive Summary, pp. 383-387 (referring to Al Hajj as "Riyadh the Facilitator")); Mr. Al Hajj was returned into CIA custody and transported by CIA-chartered plane from Jordan to a CIA-run detention facility in

Afghanistan, where he remained under US custody and control, in detention facilities run by the CIA and the DOD.<sup>183</sup> Moreover, the severe physical and mental harm that Mr. Al Hajj was subjected to in Jordan continued to impact him throughout his detention and interrogation in U.S.-run facilities, up to and including his continued detention in Guantánamo. Likewise, the severe deprivation of Mr. Al Hajj's right to be free of arbitrary detention and denial of due process commenced upon his capture in Pakistan and his rendition by the CIA to Jordan, and has continued throughout his detention in Afghanistan and to today. It would result in an injustice to exclude from the investigation, and consideration of potential cases, the serious harms Mr. Al Hajj experienced – and the criminal acts by the U.S. actors in sending him for proxy-detention and interrogation - on the territory of State Party Jordan.

As detailed above, **Victim Duran** was captured on the territory of State Party Djibouti at the apparent behest of, and relying on information from, the U.S. He was transferred into the custody of the CIA in Djibouti soon after his capture, and was then designated as a “high value detainee” and entered into the CIA HVD detention and interrogation program, such that he was held in “blacksite” detention from March 2004-September 2006, including being held at some point (if not throughout this period) on the territory of Afghanistan. He was subjected to the CIA interrogation regime, as documented in the 2007 ICRC Report. Indeed, as the Senate Report makes clear, the operation that involved the capture, detention and interrogation of Mr. Duran was considered by the United States to be part-and-parcel of its intelligence operation and response to the September 11<sup>th</sup> attacks. *See* SSCI Executive Summary, pp. 336-342. The U.S. considered Mr. Duran to be an “al Qa’ida facilitator,” *id.* at 337, and as such a designee (which is contested), he falls within the scope of the investigation, as there exists a nexus between his detention and interrogation and the armed conflict in Afghanistan.

- b. Crimes that originated in Afghanistan after 1 May 2003 or on the territory of a States Party after 1 July 2002, and continued/are continuing at Guantánamo Bay. The Prosecution’s exclusion of crimes at Guantánamo fails to acknowledge that the *criminal conduct*, in many cases, *originated* in Afghanistan or in a CIA-run detention facility. The detention, interrogation, and torture that has occurred at Guantánamo is, in fact, only a continuation of the original crime. **Victims Al Hajj** and **Duran** are have been subjected to (and indeed, are continuing to be subjected to) *inter alia* torture and arbitrary detention at Guantánamo – conduct that commenced on the territory of a State

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<sup>183</sup> Former CIA Director Panetta and other CIA officials refer to men being detained (without charge) in proxy detention in Jordan and Djibouti as “*detainees in our custody.*” Panetta clearly identified men held in in Jordan and Djibouti as “*these individuals were in our program and were subjected to some form of enhanced interrogation.*” (SSCI Executive Summary, p. 386).

Party, albeit under somewhat different form, and is continuing as part of the same criminal enterprise involving the same class of perpetrators, as occurred on the territory of State Parties, including Afghanistan. Under theory of continuing crimes,<sup>184</sup> and for all the factual linkages identified in Section II (c), conduct at Guantánamo by the same class of perpetrators and against Victims who fall within the scope of the investigation should form part of the investigation.

## V. REPRESENTATIONS REGARDING THE CRIMES THAT FALL WITHIN THE SCOPE OF INVESTIGATION ARISING OUT OF US DETENTION AND INTERROGATION OPERATIONS

90. In the Request, the Prosecution identifies a subsection of crimes that fall within the Situation involving U.S. actors, i.e., war crimes of torture and cruel treatment, outrages upon personal dignity, and rape and other forms of sexual violence. The Victims have each been subjected to the three crimes the Prosecutor identified and urge the Pre-Trial Chamber to authorize investigation of these crimes.

91. The Victims observe that the Prosecutor has sought authorization to expand or modify the investigation, including to adopt different legal qualifications for cases sufficiently linked to the authorized investigation, Request, ¶ 38, and that she focused only on a subsection of victims to support the Request (¶ 189). The Victims further note the views expressed by the Pre-Trial Chamber in authorizing an investigation into the Situation in Georgia that the Prosecutor should not be limited to those crimes mentioned in the decision authorizing an investigation as to “impose such limitation would be [...] illogical, as an examination under article 15(3) and (4) of the Statute is inherently based on limited information” and the purpose of an investigation is to determine which crimes, if any may be prosecuted.<sup>185</sup>

92. In light of the severity of the harms they suffered and their understanding of the context in which the criminal conduct was conducted, the Victims respectfully request that the Pre-Trial Chamber consider the overall and complete scope of the crimes committed by U.S. actors and *specifically* authorize an investigation into the following additional violations:

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<sup>184</sup> See, e.g., Corina Heri, *Enforced Disappearance and the European Court of Human Rights’ ratione temporis Jurisdiction*, 12 J. INT’L CRIM. JUST. 751, 758 (2014); Alan Nissel, *Continuing Crimes in the Rome Statute*, 25 Mich. J. Int’l L. 653, 667 (2004); *The Prosecutor vs. Nahima et. al.*. Case N°. ICTR-99-52-A, Judgment, 28 Nov. 2007, para 722.

<sup>185</sup> Pre-Trial Chamber I, *Situation in Georgia*, “Decision on the Prosecutor’s request for authorization of an investigation,” ICC-01/15, 27 Jan. 2016, para. 63.

- a. war crimes: subjecting person to medical or scientific experiments that are not justified by medical treatment and that cause death or seriously endanger health (**Art. 8(2)(e)(xi)**); and
- b. crimes against humanity: imprisonment or severe deprivation of physical liberty in violation of fundamental rules of international law (**Art. 7(1)(e)**); torture (**Art. 7(1)(f)**); rape and other forms of sexual violence (**Art. 7(1)(g)**); persecution on religious, political, ethnic, cultural grounds (**Art. 7(1)(h)**); and enforced disappearance (**Art. 7(1)(i)**).

93. Investigation and prosecution of both classes of crimes will capture the full scope and seriousness of the crimes committed by U.S. actors arising out of the military and CIA detention and interrogation programs – and the ongoing harms Victims suffer.

94. As a preliminary matter, the Prosecutor describes the detainees subjected to alleged crimes by members of the U.S. armed forces and CIA as “suspected of being members of the Taliban and/or Al Qaeda or of cooperating with those groups,” and who were subjected to the alleged criminal conduct “while *hors de combat*.” Request, ¶ 199. The Prosecutor asserts that detainees were interrogated for actual or perceived knowledge of Taliban and Al Qaeda, citing U.S. government reports and statements. *Id.*

95. The Prosecutor’s designation of detainees as *hors de combat* presupposes that the detainees had, in fact, been combatants or otherwise directly participating in hostilities. The Victims broadly challenge this classification; rather, the Victims assert that their proper status at the time of detention is **civilians**, and that they were to be accorded all protections afforded under international human rights and humanitarian law due civilians.

96. The Prosecutor’s description of the motivation for detention and purported reason for, and scope of, interrogation also requires comment. It is unclear whether the Prosecutor might be accepting that there was a factual basis for the detention and interrogation of specific detainees, including reasonable suspicion, as commonly understood in criminal law. On the contrary, persons were often targeted by the U.S. or their partners for arrest, detention (and in some cases, sale for a bounty) not because a credible basis existed for designating them as a “terrorist” or otherwise closely associating them with “terrorism” but because of their perceived particular profile: i.e., their ethnic, national, religious or perceived political opinions. (To the extent that the Prosecutor is identifying the characteristics of the persons who were profiled for detention and interrogation, such an assessment accords with the

Victims analysis with regards to identifying the “civilian population” that was subject to “attack” for purposes of crimes against humanity. *See* Section V(b).)

**a. War Crimes**

97. Before addressing the basis for including crimes under Article 8 (e)(xi) as part of the investigation, the Victims make the following observations in response to the Request:

- (a) As noted above, the Victims are *civilians*, not combatants, and deny that they were actively participating in hostilities at the time of their detention. Accordingly, although the Prosecutor is correct that Victims were protected persons under the Geneva Conventions, her reference to them as “*hors de combat*” is inaccurate. *See* Request, ¶ 199. Moreover, to the extent the Prosecutor’s reference to Victims as persons *hors de combat* is based on her review of U.S. government documents, Victims *strongly* caution the Pre-Trial Chamber (and the Prosecutor) to accept factual assertions about detainees’ status, conduct or alleged associations presented by the United States.<sup>186</sup>
- (b) The definition and standard for torture. The Victims caution against using the number of persons identified by the United States (including in the SSCI Executive Summary) as having been subjected to “enhanced interrogation techniques” as any basis for determining the number of persons subjected to torture. The Victims largely endorse the overview of torture jurisprudence set forth in the Request, pp. 91-96; clearly, the standard set down in the Elements of the Crimes, relevant jurisprudence and customary international law provide an appropriate guide for discerning whether torture has been committed – not whether it falls beyond the scope of what was “authorized” by U.S. authorities. The U.S. authorized torture.
- (c) For underlying acts of torture, the Prosecutor lists “incommunicado detention and prolonged and continuous solitary confinement” (Request, ¶ 193 (1)). Both **Victim Al Sharqawi** and **Victim Duran** were held in extended periods of incommunicado detention and prolonged solitary confinement. Victims observe

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<sup>186</sup> It is recalled, for example, that Secretary of Defense Rumsfeld declared that the individuals detained at Guantánamo were “the worst of the worst.” As of 25 January 2018, of the 780 people who were detained at Guantánamo, of whom only approximately fifteen men *in total* will have charges brought against them. (There are currently 41 men at Guantánamo, of whom five have been cleared for release and 23 have not been charged with a crime or cleared for release.)

that these techniques are stand-alone *per se* acts of torture (*c.f.*, Request, ¶194). *See, e.g., Prosecutor v. Čelebići*, Case, IT-96-21-A, Judgment, 20 Feb. 2001, ¶ 320, 327, ICRC Rule 99; Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, U.N. Doc. A/66/268 (5 Aug. 2011) ¶¶ 57-61; UN Special Rapporteur on Torture Doc. A/63/175, Jul. 28, 2008, § 70-85; Istanbul Statement on the Use and the Effects of Solitary Confinement. *See* Principle 7 of the Basic Principles for the Treatment of Prisoners, Adopted and proclaimed by General Assembly resolution 45/111 of 14 December 1990.

- (d) The Request makes brief reference to mental harm – both as an intentional part of the detention program (see, Request, ¶194 – added as last “moreover” sentence) and as a basis for “serious harm” Request, ¶195. Both **Victims** urge the Pre-Trial Chamber, and subsequently the Prosecution – to more fully develop the evidence on *profound* mental harm. As has been observed:

Mock executions, sleep deprivation, the abuse of specific personal phobias, prolonged solitary confinement, etc. for the purpose of extracting information, are equally destructive as physical torture methods. [...] Moreover, their suffering is very often aggravated by the lack of acknowledgement, due to the lack of scars, which leads to their accounts very often being brushed away as mere allegations.<sup>187</sup>

Numerous bodies have observed that some of the most long-lasting and profound forms of cruelty are those inflicted on the psychological level.<sup>188</sup> Some of the psychological tactics that cause prolonged mental harm include exploiting phobias such as fear of dogs, breaking sexual taboos or sexual abuse for cultural reasons (i.e., forced nudity including in front of opposite gender, threats of a sexual nature or lewd remarks, groping genitals), which is of particular concern to Muslims such as the Victims and use of solitary confinement and sleep deprivation.<sup>189</sup>

- (e) The Prosecution’s discussion of force-feeding arrives at the correct conclusion that, as practiced in CIA facilities and specifically the inhumane practice of “rectal

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<sup>187</sup> U.N. Special Rapporteur on Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, Manfred Nowak, Study on the Phenomenon of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in the World, Including an Assessment of Conditions of Detention, U.N.Doc. A/HRC/13/39/Add.5, ¶ 55 (5 February 2010).

<sup>188</sup> *See* Nigel Rodley, *The Treatment of Prisoners Under International Law* (3d ed. 2009) at 97-98 (collecting cases).

<sup>189</sup> *See* Hernán Reyes, “The Worst Scars Are in the Mind: Psychological Torture,” 867 *Int’l Rev. of the Red Cross* 591, 604-611 (Sept. 2007); *see also* David Luban and Henry Shue, “Mental Torture: A Critique of Erasures in U.S. Law,” 100 *Geo. L.J.* 823, 824 (2012).

rehydration” constitutes a form of rape and other sexual violence. Request, ¶¶ 207-212. However, the Request suggests that such force-feeding in these circumstances *could* be employed and deemed a “medical necessity.” Request, ¶ 212. This runs contrary to an international consensus based on international human rights principles and ethical guidelines, as developed by the World Medical Association that the ‘forced feeding’ of a mentally competent person capable of making an informed decision is never acceptable.<sup>190</sup> As detainees have recently to hunger-strikes (as **Victim Al Hajj** recently did), it is urged the Court’s assessment of the force-feeding reflect that international consensus.

- (f) The Prosecutor’s request states that “sexual violence” claims are supported by 12 detainees in the custody of U.S. armed forces and eight CIA detainees. (Request, ¶ 213). These low numbers suggest that the Prosecutor’s office is not capturing full extent of sexual violence. Detainees were often forcibly stripped, touched, subjected to cavity searches, and kept naked, in the presence of interrogators and prison staff, including staff of the opposite gender. *See, e.g., Prosecutor v. Furundžija*, No. IT-95-17/1-T, Trial Chamber, 10 Dec. 1998. Indeed, sexualized violence has been recognized as “hallmark” of sorts of the U.S. post-9/11 detention and interrogation program. *See* Margaret Satterthwaite and Jayne Huckerby, Eds. *Gender, National Security, and Counter-Terrorism: Human Rights Perspectives* (2013, Routledge).

98. The Victims consider that the war crime of subjecting person to medical or scientific experiments that are not justified by medical treatment and that cause death or seriously endanger health (8(2)(e)(xi)) should be included within the scope of the investigation. There

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<sup>190</sup> Article 6, World Medical Association, Declaration of Tokyo - Guidelines for Physicians Concerning Torture and other Cruel, Inhuman or Degrading Treatment or Punishment in Relation to Detention and Imprisonment (1975, revised, 2006). Available at <http://www.wma.net/en/30publications/10policies/c18/> (“Where a prisoner refuses nourishment and is considered by the physician as capable of forming an unimpaired and rational judgment concerning the consequences of such a voluntary refusal of nourishment, he or she shall not be fed artificially.”); Article 13, World Medical Association, Declaration of Malta on Hunger Strikers (1991, revised 2006). Available at <http://www.wma.net/en/30publications/10policies/h31/> (“Forcible feeding is never ethically acceptable. Even if intended to benefit, feeding accompanied by threats, coercion, force or use of physical restraints is a form of inhuman and degrading treatment. Equally unacceptable is the forced feeding of some detainees in order to intimidate or coerce other hunger strikers to stop fasting.”). *See* International Committee of the Red Cross, Hunger strikes in prisons: the ICRC’s position (31 Jan. 2013). Available at <http://www.icrc.org/eng/resources/documents/faq/hunger-strike-icrc-position.htm>; Jeremy A. Lazarus, MD, President of the American Medical Association, Letter to Chuck Hagel, U.S. Secretary of Defense (25 April 2013). Available at <http://media.miamiherald.com/smedia/2013/04/30/07/58/FRs25.So.56.pdf>. *See also* Jason Leopold, “The Military Admitted Force-Feeding Gitmo Detainees Violates International Law and Medical Ethics”, *Vice* (Jan. 29, 2015), <https://news.vice.com/article/how-a-military-memo-could-save-the-nurse-who-refused-to-force-feed-guantanamo-detainees>.

is a reasonable basis for concluding that the entire detention and interrogation regime developed for the CIA, with the input of private contractors Mitchell and Jessen, constitutes an unlawful medical experiment; Physicians for Human Rights (PHR) has made just such a finding.<sup>191</sup> It involved testing the limits of humans to endure techniques such as waterboarding, prolonged solitary confinement and sleep deprivation, and the effects of different interrogations techniques, either in combination or separately, and collecting medical data related to these techniques to inform subsequent interrogation practices. As PHR opined:

The essence of the extensive ethical and legal protections for human subjects is that the subjects, especially vulnerable populations such as prisoners, must be treated with the dignity befitting human beings and not simply as experimental guinea pigs.<sup>192</sup>

#### **b. Crimes Against Humanity**

99. The Victims submit that there exists a reasonable basis to believe that the conduct in question constitutes crimes of humanity within the jurisdiction of the Court – *inter alia*, imprisonment or other severe deprivation of liberty in violation of fundamental rules of international law; torture; rape and other forms of sexual violence; persecution against any identifiable group on political, religious, racial, national, and/or ethnic grounds; and enforced disappearance – and that these crimes should be included within the scope of the investigation.

100. In making this recommendation, it is recalled that crimes against humanity do not require the existence of an armed conflict. As such, acts that satisfy the *chapeau* elements can constitute a crime against humanity when committed far from a battlefield, or indeed, in the absence of hostilities. Counterterrorism operations can occur in the context of an armed conflict – or in the absence of an armed conflict.<sup>193</sup> As has been set forth in Section II, the U.S. response to a terrorist attack on September 11<sup>th</sup> entailed both a military and a counterterrorism response, and these two responses often overlapped in time, place and objective – but not always. The Prosecutor’s finding that a nexus exists between the armed conflict and those acts of torture *et al* that occurred beyond the “battlefield” or the territory where hostilities were being conducted i.e., CIA detention centers in Romania, Lithuania and

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<sup>191</sup> See Physicians for Human Rights, *Experiments in Torture: Evidence of Human Subject Research and Experimentation in the “Enhanced” Interrogation Program*, June 2010 available at: <http://physiciansforhumanrights.org/library/reports/experiments-in-torture-2010.html>.

<sup>192</sup> PHR, *Experiments in Torture*, p. 6.

<sup>193</sup> Counterterrorism responses such as financial sanctions or trade embargoes are examples of responses that are often unrelated to the existence of an armed conflict.

Poland, is appropriate, particularly when considered in light of the origins, object and purpose of the nexus requirement, which was to extend the protections and humanitarian principles of the Geneva Conventions.<sup>194</sup> At the same time, being that the counterterrorism operations are directed against “terrorists” i.e, persons belonging to a terrorist organization (as opposed to an armed force), they are directed against *civilians*.<sup>195</sup> When such counterterrorism responses violate principles of law – whether derived from international human rights, international criminal or international humanitarian law (when a terrorist organization has either taken on all the indicia of an armed force, such that it is a party to a conflict) – they can constitute either war crimes *or* crimes against humanity, depending on the scale, the existence of a policy and the context. The September 11<sup>th</sup> counterterrorism response, as manifest in the rendition, detention and interrogation, unquestionably violated international law. It also confused the boundaries of the various branches of international law. As the ICRC has repeatedly advised, the “war on terror” is a legal fiction.<sup>196</sup> It has been used and exploited to justify operations directed at civilians that would only be permitted in the context of an armed conflict when employed against combatants or civilians actively participating in hostilities. In adjudicating the Prosecutor’s Request, the Court has the opportunity to disentangle the various threads of the U.S. September 11<sup>th</sup> response, and distinguish acts that are lawful from those that are not, as well as which bodies of law supply the animating principles and are applicable – international humanitarian law and/or international human rights law. By allowing the examination of the criminal conduct through the lens of crimes against humanity – alongside war crimes (not in place of, as such crimes were committed), the Court would be providing the opportunity for the target of the “attack” to be clearly identified (civilians with

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<sup>194</sup> *Prosecutor v. Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct. 1995, para. 69:

The geographical and temporal frame of reference for internal armed conflicts is similarly broad. This conception is reflected in the fact that beneficiaries of common Article 3 of the Geneva Conventions are those taking no active part (or no longer taking active part) in the hostilities. This indicates that the rules contained in Article 3 also apply outside the narrow geographical context of the actual theatre of combat operations. The relatively loose nature of the language “for reasons related to such conflict”, suggests a broad geographical scope as well. The nexus required is only a relationship between the conflict and the deprivation of liberty, not that the deprivation occurred in the midst of battle.

<sup>195</sup> See President George W. Bush, 6 September 2006: “The terrorists who declared war on America represent no nation, they defend no territory, and they wear no uniform. They do not mass armies on borders, or flotillas of warships on the high seas. They operate in the shadows of society; they send small teams of operatives to infiltrate free nations; they live quietly among their victims; they conspire in secret, and then they strike without warning.” <https://georgewbush-whitehouse.archives.gov/news/releases/2006/09/20060906-3.html>

<sup>196</sup> ICRC, *International humanitarian law and the challenges of contemporary armed conflicts*, 32<sup>nd</sup> International Conference of the Red Cross and Red Crescent (Geneva, Switzerland, 8-10 Dec. 2015) at 18, available at <https://www.icrc.org/en/document/applicability-ihl-terrorism-and-counterterrorism>.

the characteristics to be profiled as a “terrorist”), while with the also recognizing the scale and systemic nature of the crimes.

101. “[C]rimes against humanity involve the following contextual elements: (i) an attack directed against any civilian populations; (ii) a State or organizational policy; (iii) an attack of a widespread or systematic nature; (iv) a nexus exists between the individual act and the attack; and (v) knowledge of the attack.”<sup>197</sup> All of these elements are satisfied with regard to criminal conduct resulting from the U.S. rendition, detention and interrogation program.

102. The Victims, who are civilians perceived to be or detained under the pretense of having been profiled as a “terrorist”, were subjected to crimes including deprivation of fundamental rights, torture, sexual violence and enforced disappearance by U.S. officials and their agents in the course of a widespread or systematic attack pursuant to or in furtherance of an official policy, i.e., the detention and interrogation of suspected terrorists using so-called “enhanced interrogation techniques” to *inter alia* punish and humiliate the detainees purportedly for the purpose of extracting intelligence, to commit such an attack.

103. It is recalled that “attack” does not necessarily equate with “military attack,”<sup>198</sup> and “refers more generally to a campaign or operation conducted against the civilian population.”<sup>199</sup> As Article 7(2)(a) explains, an “attack” requires “the multiple commission of acts.” This requirement is intended to convey that crimes against humanity are crimes of a collective nature and thus exclude single or isolated acts.<sup>200</sup> The crimes arising out of the U.S. detention and interrogation were collective in nature, and not single or isolated acts, and thus satisfy this requirement.

104. Regarding “any civilian population,” the term “civilian” means those who are not members of armed forces or other legitimate combatants.<sup>201</sup> International law requires that

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<sup>197</sup> See *Côte d’Ivoire Authorization to Investigate Decision*, para. 29:

<sup>198</sup> See *Elements of Crimes: Article 7 Crimes Against Humanity*, Introduction, para. 3.

<sup>199</sup> R. Dixon, C.K. Hall, “Article 7,” in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, 2d. ed., 2008, p. 124. See *The Prosecutor v. Laurent Gbagbo*, Decision on the confirmation of charges, ICC-02/11-01/11-656, 12 June 2014, para. 209: “The expression ‘course of conduct’ already embodies a systematic aspect as it describes a series or overall flow of events as opposed to a mere aggregate of random acts. As already recognised by the jurisprudence of the Court, it implies the existence of a certain pattern as the ‘attack’ refers to a ‘campaign or operation carried out against the civilian population.’” See also *id.* at 210 (finding that “evidence relevant to providing the degree of planning, direction or organization” is relevant)

<sup>200</sup> See *Prosecutor v Tadić*, Case No. IT -94-1-T, Judgment and Opinion, 7 May 1997, at para. 644.

<sup>201</sup> Additional Protocol I provides: “A civilian is any person who does not belong to one of the categories of persons referred to in Article 4A(1)(2)(3) and (6) of the Third Convention and in Article 43 of this Protocol.” Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Article 50 (1).

See also *Côte d’Ivoire Authorization to Investigate Decision*, para. 33; *Katanga Trial Judgment*, para. 801.

“[i]n case of doubt whether a person is a civilian, that person shall be considered to be a civilian.”<sup>202</sup> The term “civilian population” encompasses group of people linked by shared characteristics that make them the object of the attack, and aims to protect the fundamental rights of all persons against systematic violations – particularly when carried out by a State or organization pursuant to a policy.<sup>203</sup> “The potential civilian victims can be of any nationality, ethnicity or may possess other distinguishing features, including suspected perceived political affiliations.”<sup>204</sup> The element of “attacks directed at any civilian population” was found satisfied at the Article 15 investigation-authorization stage for both Côte d’Ivoire and Kenya when civilians were singled out ethnic or political targets because of their memberships.<sup>205</sup> In this Situation, the “civilian population” which was subject to attack were those individuals who shared the characteristics that led to them being identified as a terrorist/suspected terrorist/associate of a terrorist, such that they warranted being detained and interrogated pursuant to the U.S. counterterrorism policy. Those characteristics were based on a profile that was defined by the U.S.: perceived political views or affiliations, religion (including level of religious engagement), ethnicity or nationality (including Arabs present in Afghanistan and Pakistan). The Victims fall within the targeted class of civilians.

105. In relation to the specific crimes against humanity that fall within the scope of the Court’s jurisdiction for which there exists a reasonable basis to conclude their existence, imprisonment or other severe deprivation of liberty in violation of fundamental rules of international law; persecution against any identifiable group on political, religious, racial, national, and/or ethnic grounds; and enforced disappearance require brief comment.<sup>206</sup>

106. The CIA detention program, in particular, constituted a fundamental violation of international law on its face. It had as its *modus operandi* capturing people and detaining

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<sup>202</sup> Additional Protocol I, Art. 50(1).

The ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law (May 2009, at p. 20) provides that the concept of “civilian” in international armed conflict is understood as “all persons who are neither members of the armed forces of a party to the conflict nor participants in a *levée en masse* are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities.” *See id.* at p. 26.

<sup>203</sup> *See* Gerhard Werle and Florian Jessberger, *Principles of International Law*, p. 882-885.

<sup>204</sup> *See, e.g., Côte d’Ivoire Authorization to Investigate Decision*, para. 62. *See also id.* at paras. 24-25 (discussing Prosecutor’s submissions) and para. 41 (conclusions of the pre-trial chamber)..

<sup>205</sup> *See, e.g., Côte d’Ivoire Authorization to Investigate Decision*, para. 41 (civilians perceived to support the opposition and members of specific ethnic and religious communities in Abidjan and the western part of the country were targeted from 28 November 2010 onwards) and 95 (civilians perceived to support Gbagbo and from specific ethnic communities were the object of attacks in the western part of Côte d’Ivoire in March 2011).

<sup>206</sup> In relation to torture (7(1)(f)); rape and other forms of sexual violence (7(1)(g)), it is noted that the Prosecutor has effectively recognized the the existence of a plan or policy or on the large scale occurrence of crimes in her analysis of war crimes. Request, ¶ 159.

them in secret locations, incommunicado, with no pretense of *any* legal basis or adjudicative process, the quintessential arbitrary detention system<sup>207</sup>. There was not only no due process – no charges, no review, no access to counsel – detainees simply had no rights. And for **Victim Al Hajj** and **Victim Duran**, there continues to be fundamental violation of their right to due process and an independent judiciary while detained at Guantánamo.

107. Persecution is defined as “the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.”<sup>208</sup> Indeed, “discrimination is the essence of the crime of persecution.”<sup>209</sup> The crime of persecution can encompass many acts, including those of a physical or judicial character, which “violate an individual’s right to equal enjoyment of his basic rights.”<sup>210</sup> Among the fundamental rights protected by the UDHR, the ICCPR and the ICESCR that can be considered-- the right to be free from torture<sup>211</sup> and freedom from discrimination and equal protection of the law.<sup>212</sup> In this Situation, detainees were targeted for detention because of their identity (or perceived identity), whether based on political, religious, national or ethnic grounds.

108. Detainees held in CIA “blacksites” such as **Victim Duran** were subjected to enforced disappearance.<sup>213</sup> Following his abduction at the behest of the CIA, no one knew where he was, whether he was alive or his fate, including the ICRC. Indeed, to this day, the public – and his Representative submitting this Representation – is not allowed to know where he was

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<sup>207</sup> See *Prosecutor v. Delalić*, Case No. IT-96-21-A, Judgment, 20 Feb. 2001, para. ¶¶ 320, 327; ICRC Rule 99, Fourth Geneva Convention, Art. 43.

<sup>208</sup> Article 7(2)(g). The ICTY has defined “persecution” as “an act or omission which does the following: 1. [D]iscriminates in fact and which denies or infringes upon a fundamental right laid down in international or customary or treaty law (the *actus reus*); and 2. was carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion or politics (the *mens rea*).” Trial Chamber II, *Prosecutor v. Milorad Krnojelac*, IT-97-25-T, Judgment, 15 Mar. 2002, para. 431 (hereinafter “*Krnojelac* Trial Judgment”). This definition has been consistently adopted at the ICTY. See e.g., Appeals Chamber, *Prosecutor v. Milorad Krnojelac*, IT-97-25-A, Judgment, 17 Sept. 2003, para. 185 (hereinafter “*Krnojelac* Appeal Judgment”); Appeals Chamber, *Prosecutor v. Miroslav Kvočka*, IT-98-30/1-A, Judgment, 28 Feb. 2005, para. 320 (hereinafter “*Kvočka*, Trial Judgment”); Appeals Chamber, *Prosecutor v. Vasiljević*, IT-98-32-A, Judgment, 25 Feb. 2004, para. 113. The ICTR has also applied the ICTY’s definition of persecution as set out in the *Krnojelac* Appeal Judgment. See Appeals Chamber, *The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze*, ICTR-99-52-A, Judgment, para. 985.

<sup>209</sup> Darryl Robinson, “Defining ‘Crimes Against Humanity’ at the Rome Conference,” in *Developments in International Law*, 93 *American Journal of International Law* 43, 46 (1999).

<sup>210</sup> *Tadić* Trial Judgment, para. 710. See also Trial Chamber, *Prosecutor v. Kupreškić*, IT-95-16-T, Judgment, 14 Jan. 2000, para. 568 (hereinafter “*Kupreškić* Trial Judgment”)(“It is clear that persecution may take diverse forms, and does not necessarily require a physical element.”).

<sup>211</sup> See UDHR, Art. 5; ICCPR, Art. 7; Convention Against Torture.

<sup>212</sup> See UDHR, Art. 7; ICCPR, Art. 26;

<sup>213</sup> See, e.g., ICRC Report at 25; US CAT Report, at 17; “The fact of being detained outside any judicial or ICRC control in an unknown location is already a form of torture, as Louise Arbour, UN High Commissioner for Human Rights has said” in the Martyr Report 2007, at 241. See also *El-Megreisi v. Libyan Arab Jamahiriya*, Communication No. 440/1990, U.N. Doc. CCPR/C/50/D/440/1990 (1994), para. 5.4.

being held incommunicado for four years. His detention in secret “blacksites” was for the very purpose underlying the crime of enforced disappearance: to remove him from the protections of the law. In so doing, his captors and interrogators were able to torture and otherwise seriously mistreat him, and do so without having to answer to a lawyer or a court.

## **VI. REPRESENTATIONS REGARDING THE CATEGORIES OF PERSONS WHO BEAR THE GREATEST RESPONSIBILITY FOR THE CRIMES**

109. In the Request, the Prosecutor identifies as potential targets of the investigation “members of the United States of America (“US”) armed forces and members of the Central Intelligence Agency (“CIA”). *See* Request, ¶ 4. While the Victims are in accord with the agencies identified by the Prosecution as being involved in the underlying criminal conduct, they are considered that proposed investigation encompasses only some categories of persons who bear the greatest responsibility for the crimes. Specifically, the Victims are concerned that, as framed, with the qualifier “members,” the investigation could fail to properly explore the potential criminal liability of those who bear the greatest responsibility. The Prosecutor should be empowered to focus on those who bear the greatest responsibility, meaning those persons who ordered, authorized, facilitated and furthered a system of detention unbound from international humanitarian or human rights principles, and an interrogation regime that explicitly and implicitly incorporated and encouraged acts of torture, which includes:

- a. U.S. civilian and military leadership, with oversight for and providing direction to armed forces and CIA. This would include persons within the Executive Branch, up to and including the President and Commander-in-Chief; members of the National Security Council, including Secretary of Defense, Director of the CIA and the lawyers who provided “legal advice” that served to provide legal cover for torture; and senior leadership within the CIA counter-terrorism operations divisions.<sup>214</sup> *See* Section II (a).
- b. Contractors who participated in, designed, furthered or enabled CIA rendition, detention and interrogation operations. It is critical that those persons who engage(d) in illegal acts in the context of armed conflict for profit, as government contractors, appreciate that such involvement with a government agency does not come with an immunity pass. Specifically, the Prosecutor should investigate the acts and omissions of Mitchell and Jessen in relation to the design and implementation of the CIA “enhanced interrogation” regime. Additionally, the Prosecution should investigate the corporate officers from

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<sup>214</sup> More detailed information can be provided at the appropriate time, to the Office of the Prosecutor, or if of assistance to the Pre-Trial Chamber, during this stage of review.

the companies that operated the fleet of private planes that shuttled shackled and bound rendition victims from one detention center to another, euphemistically known as the “torture taxis,” including those that transported **Victim Al Hajj** and **Victim Duran**.<sup>215</sup>

- c. In order to have full understanding of the scope and the operations of the detention and interrogation program/policy, the *investigation* must also include those non-U.S. persons who facilitated, otherwise aided and abetted or were otherwise complicit in the commission of crimes, even if *case* against such persons is deemed either non-admissible or otherwise into in the interests of justice, particularly in light of the Prosecutor’s policy to focus on those who bear the greatest responsibility. At a minimum, States Parties to the ICC with knowledge of, and evidence about, crimes within the jurisdiction of the Court, must cooperate with the Prosecution and provide information requested. *See* ICC Statute. Arts. 54(3)(c); Art. 86; Art. 87; Art. 93.

## VII. ADMISSIBILITY: GRAVITY

110. In the Request, the Prosecution concludes that the alleged crimes by members of the US armed forces and members of the CIA are of sufficient gravity to justify further action by the Court. *Request*, ¶ 352. The Victims concur.

111. It is the view of the Victims, the Pre-Trial Chamber should take the following factors into account when assessing gravity:

- a. The severity of physical and mental harm to the **Victims** and other detainees from prolonged, sadistic and multi-layered mistreatment and the ongoing arbitrary detention. The mental harm, in particular, is long-term, and in some cases, debilitating; the recent urgent request for medical evaluation filed by **Victim Al Hajj** makes this plain, as does the recent devastating series in *The New York Times* on the mental state of former detainees, “How U.S. Torture Left a Legacy of Damaged Minds.”<sup>216</sup> It is also important that neither the Pre-Trial Chamber nor the Prosecution use the U.S. standard of “enhanced interrogation techniques” as a bench-mark or measure for whether a detainee was subjected to torture, cruel treatment or any other crime falling within the jurisdiction of the Court; the U.S. sought to redefine torture, and its definition should not, and must not, be the guide for the Court.
- b. The scale of the multi-faceted rendition, detention and interrogation program. The U.S. CIA detention and interrogation program involved at least 54 countries, with detainees from more than forty countries having been

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<sup>215</sup> *See* The Rendition Project, The Corporate Network, *available at* <https://www.therenditionproject.org.uk/flights/companies/index.html>.

<sup>216</sup> Matt Apuzzo, Sheri Fink and James Risen, “How U.S. Torture Left a Legacy of Damaged Minds,” *The New York Times*, 9 October 2016 *available at* <https://www.nytimes.com/2016/10/09/world/cia-torture-guantanamo-bay.html>.

subjected to cruel treatment, if not torture, falling within the jurisdiction of the Court. The victims resulting from both CIA and DOD detention far exceed those named in the Senate CIA Report, particularly when looking at U.S. military detention sites including Bagram.<sup>217</sup> The global impact of the crimes set out in this Situation make it particularly suited to review by the International Criminal Court.

- c. The impact of the U.S. detention and interrogation program on “national security” and “terrorism” policies globally, and the rule of law. As the United States under George Bush moved to embrace torture as an official policy, other countries followed suit. As the Special Rapporteurs on Torture, on Counterterrorism and Human Rights Defenders (among others) can readily attest, numerous States exploited the interrogation and detention practices of the U.S. in Afghanistan and “blacksites” to justify their own changes to laws in the name of the fight against “terrorists,” adopted administrative detention and preventative detention regimes, and targeting of political opponents and human rights defenders. The international legal regime as a whole has suffered to, as the U.S. under Bush largely ignored reports and findings by international bodies created to enforce international law, including international human rights and humanitarian law, and undermined the ICRC’s mandate by hiding detainees.

## VIII. ADMISSIBILITY: COMPLEMENTARITY

112. In the Request, In the Request, the Prosecution concludes that no national investigations or prosecutions have been or are ongoing against those who appear most responsible for the crimes allegedly committed by members of the U.S. armed forces or CIA. *Request*, ¶¶ 299, 312. The Victims concur.

113. As the Center for Constitutional Rights has been involved in efforts to achieve accountability for crimes that fall within the scope of the requested investigation since 2002, in national and foreign domestic courts, as well as raising the violations with various

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<sup>217</sup> See The Report of The Constitution Project's Task Force on Detainee Treatment, p. 57 et seq, (2013) available at [https://www.opensocietyfoundations.org/sites/default/files/constitution-project-report-on-detainee-treatment\\_0.pdf](https://www.opensocietyfoundations.org/sites/default/files/constitution-project-report-on-detainee-treatment_0.pdf). “Estimates on the number of detainees in that program at any one time over the last decade have varied, **up to several thousand** (...) ..there were two important military sites to which a detainee was eventually sent if the detainee was to be kept in military custody in Afghanistan for any significant period of time: the Kandahar airport facility and a larger site at Bagram Air Base, first called Bagram Collection Point (BCP) and later called the Bagram Theater Internment Facility. The two sites became the first stop on the path Guantánamo Bay, Cuba.” (...) "Conditions and treatment both in Kandahar and at Bagram were, by accounts from detainees and soldiers alike, brutal. Conditions were reported slightly better, though only comparatively so, at Kandahar compared with Bagram. In-processing of detainees at both facilities was designed to shock new detainee arrivals in an effort to recreate “point of capture” shock in the hope new captives would be more compliant. The behavior included yelling, nakedness, body cavity searches, alleged beatings, sleep deprivation and barking military dogs.”

international human rights bodies, it offers the following representations on behalf of the Victims<sup>218</sup>:

- a. No criminal investigations have been undertaken by the United States Department of Justice into those bear the greatest responsibility for the crimes alleged herein, including senior U.S. civilian and military officials or contractors working with them, and no such investigations – or prosecutions – will occur. While there is no doubt that the U.S. has the legal framework to provide for jurisdiction over allegations of torture and other serious international law violations for which the named individual defendants bear individual criminal responsibility, it is apparent from the 15-year failure to investigate or prosecute any mid or high-level officials that the U.S. will not exercise its jurisdiction to enforce accountability for torture. Former President Obama embraced a policy of “look forward, not back” even after acknowledging “we tortured some folks” following review of the Senate Report, the SSCI report.<sup>219</sup> After the SSCI Report, the Justice Department said that its investigators “did not find any new information [in the Senate torture report] that they had not previously considered in reaching their determination,” adding that AUSA Durham’s “inquiry was extraordinarily thorough and we stand by our previously announced decision not to initiate criminal charges.”<sup>220</sup> Years later, much of the information on CIA torture remains buried in the 6,700 still-classified documents of the Senate Committee report<sup>221</sup> and in the classified findings of the Durham inquiry.<sup>222</sup>

For a detailed analysis of the U.S. response to credible evidence of torture during the Obama administration, please see: CCR and ECCHR, “Response to the Submission from the United States in Relation to the Criminal Complaint pending against David Addington, Jay Bybee, Douglas Feith, Alberto Gonzales, William Haynes and John Yoo,” *Audiencia Nacional*, Spain Case No. 134/2009 (April 2001), available at <https://ccrjustice.org/sites/default/files/assets/Spain%20rebuttal%20submission%20FINAL.pdf>.

- b. The United States has actively thwarted efforts to achieve accountability or redress through civil actions. The U.S. has effectively denied any victim the right to a remedy in U.S. court. Indeed, to date, no victim has even received an apology from the executive branch. In cases against U.S. officials seeking a civil remedy brought by alleged victims of torture in Afghanistan or through CIA operations, the United States has consistently claimed immunity or

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<sup>218</sup> Based on her work over the last eleven years at the Center for Constitutional Rights in this area, Victim-representative Katherine Gallagher can provide the Pre-Trial Chamber with a more detailed account of the U.S. response to allegations of torture and accountability efforts, should that be of assistance.

<sup>219</sup> Press Conference by the President, The White House, 1 August 2014, available at <https://obamawhitehouse.archives.gov/the-press-office/2014/08/01/press-conference-president>.

<sup>220</sup> “U.S. Tells Court That Documents From Torture Investigation Should Remain Secret,” *New York Times*, 10 December 2014, available at: [http://www.nytimes.com/2014/12/11/us/politics/us-tells-court-that-documents-from-torture-investigation-should-remain-secret.html?\\_r=2](http://www.nytimes.com/2014/12/11/us/politics/us-tells-court-that-documents-from-torture-investigation-should-remain-secret.html?_r=2)

<sup>221</sup> “USA: Crimes and Impunity,” Amnesty International, April 2015, available at: [http://www.amnestyusa.org/sites/default/files/usa\\_crimes\\_and\\_impunity\\_report.pdf](http://www.amnestyusa.org/sites/default/files/usa_crimes_and_impunity_report.pdf)

<sup>222</sup> “U.S. Tells Court That Documents From Torture Investigation Should Remain Secret,” *New York Times*, 10 December 2014, available at: [http://www.nytimes.com/2014/12/11/us/politics/us-tells-court-that-documents-from-torture-investigation-should-remain-secret.html?\\_r=2](http://www.nytimes.com/2014/12/11/us/politics/us-tells-court-that-documents-from-torture-investigation-should-remain-secret.html?_r=2)

sought to have cases dismissed using such defenses as “states secrets.” The Obama Administration’s Department of Justice broadly embraced the arguments put forth under the Bush Administration that torture can be within the scope of employment of U.S. government officials and members of the military – despite the universal recognition that torture can never be an official act.<sup>223</sup> The immunity that the Obama Administration sought for U.S. officials – as the Bush Administration did before it – contributes to a culture of impunity that leaves open the possibility that such egregious conduct can occur again – a possibility very much alive in the United States under Donald Trump.

- c. The United States has obstructed efforts to achieve any measure of accountability in foreign courts. While refusing to pursue criminal investigations and prosecutions domestically, it is now known how the United States attempted to subvert the cause of justice in Spain and interfered with or otherwise effectively blocked accountability efforts in France.<sup>224</sup>

In Spain, the U.S. engaged in a political campaign to have U.S. torture cases dismissed by Spanish courts, wholly disregarding the independence of prosecutors and the judiciary. United States State Department cables released in the press and on the internet paint a detailed picture of the efforts undertaken by U.S. diplomats and members of Congress to obstruct and otherwise interfere with proceedings before Spain’s *Audiencia Nacional*. Indeed, through repeated comments made in the cables about the independence of the judiciary – and the firm adherence to that principle by judges in Spain – U.S. diplomats and other officials both implicitly and explicitly acknowledged that their attempts to interfere with criminal proceedings was utterly improper.<sup>225</sup>

For example, on 1 April 2009, the U.S. Embassy in Madrid issued cable 09MADRID347, entitled “Spain: Prosecutor Weighs GTMO Criminal Case vs. Former USG Officials.” This cable detailed the filing of a case against six former Bush administration officials (“the Bush six”), providing an overview of the legal theory and some of the supporting evidence cited in the complaint. The cable described a meeting between U.S. officials and Chief Prosecutor Javier Zaragoza who was reported to be “displeased to have this [case] dropped in his lap,” but informed the U.S. officials that “in all likelihood he would have no option but to open a case,” as “the complaint appears well-documented.” The cable indicated that Zaragoza purportedly informed the U.S. officials of the position he would take regarding assignment of the case (“He will also argue against the case being assigned to Garzon”) and that he would not act quickly in the case (“Zaragoza said he was in no rush to proceed with the case”). The cable also indicated that U.S. officials discussed the case

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<sup>223</sup> See, e.g., *Al Zahrani v. Rumsfeld* case page at: <http://www.ccrjustice.org/ourcases/current-cases/al-zahrani-v.-rumsfeld>; *Rasul v. Rumsfeld* case page at: <http://www.ccrjustice.org/ourcases/current-cases/rasul-v.-rumsfeld>; *Mohamed v. Jeppesen Dataplan, Inc.* case page at: <http://www.aclu.org/nationalsecurity/mohamed-et-al-v-jeppesen-dataplan-inc>; *El-Masri v. Tenet* case page at: <http://acluva.org/224/el-masri-v-tenet/>.

<sup>224</sup> See, e.g., Cable 05PARIS3989, 8 June 2005 (Subject: French Judiciary to Investigate Guantanamo Imprisonment of 2 ex-Detainees).

<sup>225</sup> See, e.g., Cable 09MADRID34, 1 April 2009: “we do not know if the [Spanish] government would be willing to take the risky step of trying behind the scenes to influence the prosecutor’s recommendation on this case or what their reaction to such a request would be.”

with Spanish officials from the Ministry of Foreign Affairs and the Ministry of Justice on 31 March and 1 April 2009. (“MFA contacts have told us that they are concerned about the case, but have stressed the independence of the judiciary. They too have suggested the case will move slowly.”) The cable also revealed that advice was given by Spanish prosecutor Zaragoza to US officials to open an investigation into the acts alleged in the complaint as “the only way out” for the US. (“Zaragoza also noted that Spain would not be able to claim jurisdiction in the case if the USG opened its own investigation.”). Ultimately, the “Bush Six” case was closed by Judge Velasco.<sup>226</sup> A complaint was filed with the UN Special Rapporteur on the Independence of Judges and Lawyers, which has not been adjudicated.<sup>227</sup>

Additional cables reveal other attempts by the United States to influence proceedings in the *Audiencia Nacional* and other European venues, demonstrating that what the U.S. attempted to do in the case against the Bush six was not an isolated incident.<sup>228</sup>

- d. It is inconceivable that the current administration in the United States will undertake any investigations or prosecutions of the alleged crimes. On the contrary, with the current President of the United States having campaigned on the promise to “bring back a hell of a lot worse than waterboarding,” there is a far greater risk of a repetition of the crimes than there is the chance for accountability in *any* form. Appointments such the Deputy Director of the CIA, Gina Haspel, who was present during the torture of CIA-detainee Abu Zubaydah, demonstrate that a return to torture by the United States is a very real concern.

## IX. INTERESTS OF JUSTICE

114. The investigation sought by the Prosecutor is interests of justice. It constitutes a much-needed first step to ending the cycle of impunity that has existed for crimes committed on the territory of Afghanistan for too long, and for the global impunity that U.S. officials have enjoyed for the last 15 years despite adopting torture as an official policy during the

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<sup>226</sup> For more information, see Center for Constitutional Rights, *Accountability: Spain*, available at

<sup>227</sup> See Complaint against the United States of American and the Kingdom of Spain: Interference with the Independence and Impartiality of the Judiciary, 19 January 2012, available at <https://ccrjustice.org/sites/default/files/assets/files/SR%20complaint%201.19.12%20FINAL.pdf>.

<sup>228</sup> For efforts by U.S. officials to influence or otherwise interfere with criminal proceedings pending in Spain, see, e.g., 07MADRID1805/122552, 18 Sept. 2007 (discussing meeting between U.S. Embassy staff in Madrid and Javier Zaragoza to discuss proceedings in Spain against former Guantánamo detainees); 07MADRID82/92692, 16 Jan. 2007, 07MADRID101/93036 18 Jan. 2007, 07MADRID141/94177 26 Jan. 2007, and 07MADRID911, 14 May 2007/12958 (discussing meeting between U.S. officials and Spanish officials, including Attorney General and Chief Prosecutor, regarding *Couso* case); 06MADRID3104/91121, 28 Dec. 2006 (discussing the rendition case pending before Judge Moreno); 06MADRID1490, 9 June 2006 (discussing assurances by Spanish government officials that they could “manage [the rendition case] with little difficulty” and that “Spain had no objection to USG intelligence flights through Spanish territory”).

For cables that reveal reports by US diplomatic missions in Macedonia and Germany to the US Secretary of State regarding ongoing rendition investigations and alleged CIA flights in those countries, see 06SKOPJE105, 2 February 2006; 06SKOPJE118, 6 February 2006; and 07BERLIN242, 6 February 2006.

Bush administration in response to the September 11<sup>th</sup> attacks. Such an investigation, and even more an investigation of the scope and with the targets suggested through these representations, will demonstrate that no one is above the law regardless of their power or position; that those who bear the greatest responsibility for serious international crimes will be held accountable and not enjoy global impunity; and that *all* victims of serious crimes can and will have their claims heard and adjudicated by an independent and impartial tribunal.

115. It cannot be emphasized enough how important deterrence and an end of impunity for U.S. crimes is at this particular moment vis-à-vis the current U.S. administration. Indeed, as this Representation is being finalized, President Trump announced his intention to keep the prison at Guantánamo Bay open and to “transport additional detainees to U.S. Naval Station Guantánamo Bay when lawful and necessary to protect the Nation.”<sup>229</sup> There is what can only be described as a manifestation of Islamophobia at the highest levels of the U.S. government,<sup>230</sup> which presents the very real risk that “terrorism” and “national security” will be invoked to undercut fundamental rights and basic protections that ensure all people are treated with dignity and respect to target a particular group, i.e., Muslims and especially Muslim men, and revisit some of the darkest days of U.S. history – that contained in the Senate Torture Report.

116. As the International Criminal Court marks its 20<sup>th</sup> anniversary, through this representation, the Victims urge the Court to fulfill the promise of Rome to end impunity and thus to contribute to the prevention of such odious acts as torture, by granting the Prosecutor’s Request.

Submitted by and through:



Katherine Gallagher  
Center for Constitutional Rights

On 31 January 2018  
New York, NY USA

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<sup>229</sup> Presidential Executive Order on Protecting America Through Lawful Detention of Terrorists, The White House, 30 Jan. 2018, *available at* <https://www.whitehouse.gov/presidential-actions/presidential-executive-order-protecting-america-lawful-detention-terrorists/>.

<sup>230</sup> Donald Trump’s ban on travel to the US from some Muslim-majority countries has been denounced by the UN’s rights chief as “mean-spirited” and illegal under international human rights law. Adam Withnall, “UN denounces Trump’s travel ban as ‘mean-spirited’ and illegal under human rights law,” *Independent*, 30 Jan. 2017, *available at* <http://www.independent.co.uk/news/world/americas/donald-trump-muslim-travel-ban-illegal-un-rights-chief-a7552991.html>.