



ORGANISATION MONDIALE CONTRE LA TORTURE
WORLD ORGANISATION AGAINST TORTURE
ORGANIZACION MUNDIAL CONTRA LA TORTURA

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General Prosecutor of the Canton and
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Monsieur Beyeler Erwin
General Prosecutor of the Swiss
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Geneva, February 1, 2011

Re: Switzerland's obligations under the United Nations Convention Against Torture (UNCAT) in the event of an upcoming visit of Mr George W Bush or other US officials against whom there is credible information about their responsibility for acts of torture

Your Excellency,

We are writing to you regarding the visit of former US President George W Bush on February 12, 2011, to Geneva which was widely reported in the media in Switzerland. The World Organisation Against Torture (OMCT) - comprised of the largest network of anti-torture organizations - would like to share with you its pre-occupation about upholding Switzerland's obligations under international law, notably the UN Convention against Torture (UNCAT), in this regard. We would like to draw your particular attention at Switzerland's obligation under both international and domestic law to initiate criminal investigations against any person present in its jurisdiction where there is reason to believe that he/she committed, authorized, participated in or was otherwise complicit in acts of torture.

Torture and other forms of cruel, inhuman or degrading treatment or punishment are prohibited under all circumstances and can never be justified whether in times of peace or war. As a state party to various human rights treaties, such as the UN Covenant on Civil and Political Rights (ICCPR) and the UN Convention Against Torture (UNCAT), Switzerland has a positive legal obligation to investigate any allegation of torture with the aim of bringing those responsible to justice. Article 5 paragraph 2 UNCAT requires it to establish jurisdiction over the crime of torture also when committed outside of its jurisdiction when the offender is present in its jurisdiction. Where there is reliable information available that the person present on its jurisdiction may be responsible for an act of torture Article 7 UNCAT obliges the state party to

submit the case to its competent authorities for prosecution' unless it decides to extradite the alleged offender. These obligations apply to acts of torture wherever they have been committed and irrespective of whether they were committed in times of peace or in the context of an armed conflict.

Acts of torture, cruel and inhuman or degrading treatment, however, may in addition incur criminal responsibility under the Geneva Conventions as grave breaches when committed in the context of an international armed conflict, or as serious breaches of common article 3 in the case of non-international armed conflict. If torture and ill-treatment are part of a planned policy and widespread or systematic they may also trigger criminal responsibility as a crime against humanity as reflected in the Rome Statute for an International Criminal Court. The jurisdiction over acts torture and cruel, inhuman or degrading treatment should an offender find himself under Swiss jurisdiction may thus derive from international human rights, international criminal and international humanitarian law.

While we note that the specific crime of torture as defined in the UN Convention Against Torture has not been as such incorporated into the domestic law of Switzerland its constituent conduct is criminalized also under the Swiss criminal code which also provides the necessary jurisdictional basis for investigations and prosecutions should the offender be present on its soil even if for a transitory period of time.¹

With this in mind we would like to draw your attention to two areas of particular concern:

It is well documented that the United States engaged in interrogation policies and practices euphemistically described as 'enhanced interrogations'. These were further regularized in a number of so-called legal memos that sought to redefine the scope of the absolute prohibition of torture.² President Obama had to issue executive orders on his first day in office to end these authorizations and to ensure compliance with the full scope of legal obligations not to engage in acts of torture as well as equally prohibited acts of cruel, inhuman or degrading treatment or punishment.³ The scope of authorized abusive interrogation techniques included a wide array of physical and psychological abuse against persons deprived of liberty that amount to torture and other forms of prohibited cruel, inhuman or degrading treatment. The existence of this policy has been publicly acknowledged and defended by former senior government officials and has been approved at the highest level of government.⁴ Indeed, in September 2006, then-President Bush acknowledged the existence of a secret detention program run by the Central Intelligence Agency, in which detainees were held in complete isolation in various locations outside the United States and subjected to "enhanced interrogation techniques," including water-boarding. These detainees were also withheld from the International Committee of the Red Cross which finally had an opportunity to interview the

¹ Article 6 of the Swiss Criminal Code. Also written response of the government of Switzerland to the list of issues on the occasion of the examination of its sixth report, CAT/C/CHE/Q/6/Add.1, 3 March 2010.

² See http://www.aclu.org/human-rights_national-security/documents-delivered-responsive-torture-foia; See also Karen Greenberg (ed.), *The Torture Papers*, Cambridge 2005.

³ The White House, Executive Order: Ensuring Lawful Interrogations, 22 January 2009, http://www.whitehouse.gov/the_press_office/EnsuringLawfulInterrogations/

⁴ See amongst others the report of the Inspector General of the Central Intelligence Services in 2004 released on August 24, 2009 which provides a detailed account of the CIA's detention, interrogations, and renditions programmes and describe abusive techniques, including water-boarding, mock executions, and threats to kill and rape detainees family members and a range of other abuses, CIA Inspector General, Special Review, Counter-Terrorism Detention and Interrogation Activities, (September 2001-October 2003) (2003 – 7123-IG), 7 May 2008, available at http://media.washingtonpost.com/wp-srv/nation/documents/cia_oig_report.pdf?hpid=topnews

men after years in detention, and concluded that they had been tortured.⁵ In this regard, the OMCT notes also the recent admissions by former President Bush contained in his own biography released in November 2009.⁶ In various parts of the book reference is made to the enhanced interrogation techniques including specific accounts of having authorized such interrogation techniques in relation to so-called high-value detainees. This includes explicit references on at least two occasions on the authorization of practices of 'water-boarding' in which the prisoner is bound to an inclined board, feet raised and head slightly below the feet, material wrapped over the prisoner's face and water poured over them creating a terrifying fear of drowning. The OMCT has been confronted with water-boarding as an obvious form of torture in many parts of the world. It is important, however, to underline that many of the other techniques employed do equally qualify as torture as defined under international law, especially as they were used in combination and against persons held outside the protection of the law. Moreover, it is important to bear in mind that other forms of cruel, inhuman or degrading treatment are equally prohibited and can engage criminal responsibility under international law. The OMCT would be willing to provide further information on any of these points should it be required.

Second, the OMCT remains pre-occupied about the impunity in relation to the practice of secret detention and extraordinary renditions. Extra-ordinary renditions and secret detentions resulted in multiple human rights violations, including torture, cruel and inhuman or degrading treatment, prolonged arbitrary detention and enforced disappearances and also constitute crimes under international law. These violations have been documented by the Council of Europe Inquiry led by Swiss Senator Dick Marty into Alleged Secret Detentions and Unlawful inter-state Transfers⁷, the European Parliament Temporary Committee⁸ and the joint global study of four independent mandate holders of the UN Human Rights Council on secret detention.⁹ These reports provide compelling information on the practice of extra-ordinary renditions, secret detention and torture. A number of court cases and investigations do provide further evidence of these violations. The policy of secret detention itself was acknowledged by President Bush when fourteen so-called 'high-value detainees' from unacknowledged CIA detention sites outside the United States were transferred to the US.

A significant amount of evidence is located within other jurisdictions, including in Europe, which can be accessed through mutual legal assistance schemes or is contained in official reports in the United States itself. The OMCT draws attention to criminal convictions of CIA officials in the courts of Milan for the extra-ordinary rendition of Mr Hassan Mustafa Osama Nasr, alias Abu Omar, to Egypt, investigations that resulted in demands for arrest warrants of CIA officials by the prosecuting authorities in Germany concerning the abduction, torture and arbitrary detention of German citizen Khaled Al Masri, a case that is also now pending against the Former Yugoslav Republic of Macedonia at the European Court of Human Rights for an

⁵ ICRC report available at <http://www.nybooks.com/media/doc/2010/04/22/icrc-report.pdf>; Statement of George W Bush, September 6, 2006. http://www.nytimes.com/2006/09/06/washington/06bush_transcript.html?pagewanted=all

⁶ See George W. Bush, Decision Points, November 2009. Admissions of having authorized water-boarding were affirmed in subsequent interviews, see as <http://today.msnbc.msn.com/id/39976132/ns/40085897>.

⁷ Council of Europe Parliamentary Assembly, Committee on Legal Affairs and Human Rights, Alleged Secret Detentions and Unlawful Inter-state Transfers, Council of Europe Doc 10957, 12 June 2006 and Doc 11302 rev, 11 June 2007.

⁸ Report of the Temporary Committee on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners (2006/2200 (INI)).

⁹ Joint study on global practices in relation to secret detention in the context of countering terrorism of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Working Group on Arbitrary Detention and the Working Group on Enforced or Involuntary Disappearances, UN Doc A/HRC/13/42, 26 January 2010.

alleged failure to conduct independent investigations into these crimes¹⁰. Preliminary investigations are conducted in Spain against officials of the administration of President Bush and the lawyers who authored legal memos on enhanced interrogations, an investigation started in Poland regarding the detention, torture and ill-treatment and enforced disappearances of a victim by members of the CIA.¹¹ Decisions of the UN Committee Against Torture, the UN Human Rights Committee on cases of extraordinary rendition of two individuals from Sweden to Egypt provide further account of these practices.¹² In Canada, too, judicial inquiries such as the Maher Arar Inquiry have revealed a body of credible information about extra-ordinary renditions and torture.¹³

Until today the United States have failed to take any credible steps to assume its responsibility under international law, including the UN Convention Against Torture, to investigate those responsible for committing, authorizing, participating or otherwise being complicit in such violations. To the contrary it has been stated that an investigation launched in the US will only look into interrogations in which individual interrogators exceeded the ill-treatment authorized in the various legal memos government lawyers had crafted.¹⁴ Moreover, where civil proceedings have been initiated by those subjected to torture and enforced disappearances and other serious human rights violations they have been frustrated and undermined through the invocation of notions of state secrecy, special circumstances related to national security or foreign policy considerations.¹⁵ As leaked cables now appear to confirm, pressure has also been exercised to prevent investigations and legal cases in other European jurisdictions.¹⁶ We would like to recall in this regard that state authorities, including the executive branch of government, would have an obligation to support and not to impede criminal investigations into acts of torture, cruel and inhuman or degrading treatment or enforced disappearances should they be initiated in Switzerland or elsewhere.

In light of the overwhelming body of available information there can hardly be doubt that there are grounds that were to trigger Switzerland's obligation to submit cases for investigations into the crime of torture against anybody present on its soil who has authorized, participated or was complicit in the above practices. This would have to include also former President G Bush who had the overall control as commander in chief and as all information suggests authorized, knew and acquiesced into the practices that constitute the crime of torture. Switzerland would also have to take measures against any offender present on its territory to secure his presence for such criminal investigations and proceedings. In this regard, the OMCT considers that neither officials nor former Heads of States can enjoy immunity for the crime of torture under the UN Convention Against Torture, nor can superior orders or the memos drafted by government lawyers and that sought to immunize officials from prospective prosecution under US domestic law, shield them from responsibility under international law.

¹⁰ See <http://www.soros.org/initiatives/justice/focus/national-security/news/el-masri-european-court-20101014>

¹¹ The Polish Prosecution Services recognized victim status to a person subjected to 'enhanced interrogations' within the investigation to one of the 'high-value' detainees allegedly held in Poland, see www.interights.org/documentbank/index.htm?id=609.

¹² UN Committee Against Torture, Views of 20 May 2005, *Agiza versus Sweden* Communication No.233/2003, UN Doc CAT/C/34/D/223/2003 (2005) and UN Human Rights Committee, View of 10 November 2006, *Alzery v Sweden*, UN Doc. CCPR/V/88/D/1416/2005.

¹³ Reports of the Canadian Commission of Inquiry into actions of Canadian officials relating to Maher Arar, 12 December 2006, www.ararcommission.ca

¹⁴ Statement of the Attorney General regarding a Preliminary Review into the Interrogation of Certain Detainees, 24 August 2009, <http://www.justice.gov/ag>

¹⁵ See, e.g. *Arar v. Ashcroft*, 585 F 3d 559, 574-82 (2nd Cir. 2009); *Rasul v Myers*, 563 F 3d 527, 532 n5 (DC Cir.2009); *Mohammed v Jeppesen, Inc.*, 614 F 3d 1070 (9th Cir. 2010).

¹⁶ See <http://ccrjustice.org/wikileaks-us-government-interference-justice-and-accountability-spain-0>

Your Excellency,

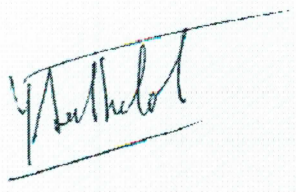
Switzerland has played a vital role in building up a framework of international human rights, international humanitarian and international criminal law over the last sixty years. The OMCT with its network of anti-torture organizations around the world has seen first hand the dramatic effect of torture in context of counter-terrorism over the last years and their knock-on effect on human rights protection around the world. It is now the impunity in the face of well documented violations of international human rights law and crimes under international law that threatens the rule of law.

We therefore respectfully ask your government to uphold the rule of law and its obligations under international law in ensuring effective investigations into torture whenever there is reliable information that a person present on its jurisdiction has committed the crime of torture. It is indeed a fundamental tenet of the rule of law and also of criminal law that it applies to all equally irrespective of origin or status. The prohibition of torture is a higher norm of international law (*ius cogens*) owed to all states (*erga omnes*) who should take actions bringing them to an end. We therefore kindly ask you to address the continuous impunity for acts of torture and enforced disappearances and absence of any remedies and reparations.

We remain at your disposal should you require further information on any of the issues addressed.

We thank you in advance for your attention and consideration.

Yours sincerely,



Yves Berthelot
President



Eric Sottas
Secretary-General