CANADA

BRIEFING TO THE UN COMMITEE AGAINST TORTURE

48th Session, May 2012

AMNESTY INTERNATIONAL

Amnesty International Publications

First published in 2012 by
Amnesty International Publications
International Secretariat
Peter Benenson House
1 Easton Street
London WC1X 0DW
United Kingdom
www.amnesty.org

Index: AMR 20/004/2012
Original Language: English
Printed by Amnesty International, International Secretariat, United Kingdom

Amnesty International is a global movement of more than 3 million supporters, members and activists in more than 150 countries and territories who campaign to end grave abuses of human rights.

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INTRODUCTION

> *"Clearly, the prohibition against torture in the Convention against Torture is absolute. Canada should not inflict torture, nor should it be complicit in the infliction of torture by others."*

Justice Dennis O'Connor provided this description of Canada's legal obligation with respect to torture in the final report[1] he issued as Commissioner of the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar. His succinct description captures the nature of the concerns and recommendations included in this brief.

The brief does outline some concerns about the infliction of torture or other ill-treatment within Canada, including ongoing concerns about the use of conducted energy devices and allegations of excessive force by police that have arisen in connection with various protests, such as the Indigenous land protest at Tyendinaga or the demonstrations at the time of the June 2010 G20 Summit in Toronto. Primarily, however, the brief lays out concerns about a variety of ways in which Canadian action or inaction risks complicity in torture or other ill-treatment, through such means as inadequate efforts to protect Indigenous women from violence, prisoner transfers, deportations, national security relationships with foreign governments and failure to ensure justice and accountability for torture.

This brief builds on Amnesty International's previous submissions to the UN Committee against Torture (the Committee) with respect to Canada's record of compliance with the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Convention) in 2000[2] and 2004;[3] as well as the submission made to the Committee for the List of Issues for this review.[4] Amnesty International's concerns and recommendations arise with respect to eight main themes:

- Failure to implement international human rights obligations
- Indigenous peoples
- Justice and Accountability
- National Security
- *Refoulement*
- Refugees and Migrants
- Policing
- International Issues

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[1] Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, Report of the Events relating to Maher Arar: Analysis and Recommendations, September 2006, pg. 346.
[2] *It's Time: Amnesty International's Briefing to the United Nations Committee against Torture with respect to the Third Report of Canada*, November 2000.
[3] *Redoubling the Fight against Torture*, Amnesty International's Brief to the UN Committee against Torture with respect to the Committee's Consideration of the Fourth Periodic Report from Canada, 8 October 2004.
[4] *Canada – List of Issues*, Amnesty International, August 2011.

I. CANADA'S INTERNATIONAL HUMAN RIGHTS IMPLEMENTATION GAP

Many of the issues that are highlighted in this brief reflect concerns and recommendations that this Committee has directed at Canada during previous reviews but which have not been implemented. That is the case, for instance, with respect to Canada's failure to respect the absolute nature of Article 3 of the Convention, barriers to torture survivors being able to use Canadian courts to obtain redress from foreign governments, and the overwhelming tendency of Canada to deport accused torturers rather than ensure they are brought to justice through extradition or prosecution. Not only have these recommendations not been implemented, there has been no public consultation or reporting of the government's decision not to implement these recommendations. Canadians would, in fact, not be readily able to determine the status of these recommendations and whether any decisions about implementation have been made.

Amnesty International has frequently highlighted the concern that the system in place in Canada for coordinating and ensuring the implementation of international human rights obligations, including the Concluding Observations and Views of treaty bodies and recommendations made by the Special Procedures, is inadequate.[5] It is highly secretive and lacks meaningful and accountable coordination among the various levels of government in Canada. Similarly, numerous UN treaty bodies have noted Canada's failings with respect to implementation and have repeatedly called for the system to be improved.

- The Committee on Economic, Social and Cultural Rights, noting that most of its previous recommendations have not been implemented, has called on Canada "to establish transparent and effective mechanisms, involving all levels of government as well as civil society, including indigenous peoples, with the specific mandate to follow up on the Committee's concluding observations."[6]

- The Human Rights Committee has urged Canada to "establish procedures, by which oversight of implementation of the Covenant is ensured, with a view, in particular, to reporting publicly on any deficiencies. Such procedures should operate in a transparent and accountable manner and guarantee full participation of all levels of government and of civil society, including indigenous peoples."[7]

- The Committee on the Elimination of Discrimination against Women has urged that Canada "search for innovative ways to strengthen the currently existing consultative federal-provincial-territorial Continuing Committee of Officials for human rights as

[5] See for instance: *Canada: Amnesty International Submission to the UN Universal Periodic Review: Fourth session of the UPR Working Group of the Human Rights Council*, February 2009 (AMR 20/004/2008).
[6] *Concluding Observations of the Committee on Economic, Social and Cultural Rights*, E/C.12/CAN/CO/4, E/C.12/CAN/CO/5, 22 May 2006, para. 35.
[7] *Concluding Observations of the Human Rights Committee*, CCPR/C/CAN/CO/5, 20 April 2006, para. 6.

well as other mechanisms of partnership in order to ensure that coherent and consistent measures in line with the Convention are achieved."[8]

- The Committee on the Rights of the Child has encouraged Canada to "strengthen effective coordination and monitoring, in particular between the federal, provincial and territorial authorities, in the implementation of policies for the promotion and protection of the child, as it previously recommended, with a view to decreasing and eliminating any possibility of disparity or discrimination in the implementation of the Convention."[9]

Unfortunately, these recommendations to improve the approach to international human rights implementation in Canada remain, themselves, largely unimplemented.

RECOMMENDATION:

Canada should work with provincial and territorial governments, as well as Indigenous Peoples' organizations and civil society to ensure an approach to the implementation of Canada's international human rights obligations, including those arising under the Convention, that is publicly accessible, broadly consultative, politically accountable and well-coordinated among various levels of government.

II. INDIGENOUS PEOPLES

A) VIOLENCE AGAINST INDIGENOUS WOMEN - ARTICLES 12 AND 13

Indigenous women and girls in Canada suffer greatly disproportionate rates of violence including more frequent attacks and more severe forms of violence than other women and girls in the country. Police in Canada do not consistently record or report whether the victims of violent crime are Indigenous. As a consequence there are no reliable, disaggregated statistics on the rate of violence faced by Indigenous women.[10] However, in a 2004 Canadian government survey Indigenous women reported rates of violence, including domestic violence and sexual assault, three and half times (3.5 times) higher than non-Indigenous women.[11] As of March 2010, the Native Women's Association of Canada had documented 582 cases of missing and murdered Indigenous women and girls, mostly from the past three decades.[12]

Indigenous women experience high levels of violence within their own families and communities, as well as within the wider society.

In some instances men specifically seek out Indigenous and other marginalized women as

[8] *Report of the Committee on the Elimination of Discrimination against Women*, A/58/38, Twenty-eighth session (13-31 January 2003), para. 350.
[9] *Concluding observations: Canada*, CRC/C/15/Add.215, 27 October 2003, para. 11.
[10] Statistics Canada, "Violent victimization of Aboriginal women in the Canadian provinces, 2009," Shannon Brennan, (17 May, 2011).
[11] Jodi-Anne Brzozowski, Andrea Taylor-Butts and Sara Johnson, "Victimization and offending among the Aboriginal population in Canada", Juristat. Vol. 26, no. 3 (Canadian Centre for Justice Statistics, 2006).
[12] Native Women's Association of Canada, *What their voices tell us: Research findings from the Sisters in Spirit Initiative* (31 March 2010), p. i., available at: http://www.nwac.ca/sites/default/files/reports/2010_NWAC_SIS_Report_EN.pdf.

targets of extreme acts of violence. These acts may be motivated by racism and misogyny or be carried out in the expectation that society's indifference to the welfare and safety of these women will protect the perpetrators' from being held accountable. A 1991 Manitoba provincial inquiry into the abduction and murder of an Indigenous woman, Helen Betty Osborne, 20 years earlier, concluded that this crime "was a racist and sexist act."[13] Similarly, Justice David Wright, speaking of the 1992 murders of Eva Taysup, Shelley Napope, and Calinda Waterhen in Saskatchewan, said the man responsible for the killings saw the victims as vulnerable for four reasons:

> one, they were young; second, they were women; third, they were native; and fourth, they were prostitutes. They were persons separated from the community and their families. The accused treated them with contempt, brutality; he terrorized them and ultimately he killed them. He seemed determined to destroy every vestige of their humanity.[14]

As these examples illustrate, the pattern of violence against Indigenous women in Canada is well-established. However, as Amnesty International's research has found[15], the disappearance and killings of marginalized women and girls often attracts little public attention or demand for action. There are widespread accounts of police services dismissing the concerns of family members, friends and even other officers over the safety of Indigenous and marginalized women. The Manitoba Justice Inquiry concluded that when Helen Betty Osborne was abducted and murdered in 1971, police in The Pas, Manitoba had already been long aware of a pattern of white men sexually preying on Indigenous women and girls but "did not feel that the practice necessitated any particular vigilance."[16] An inquiry has been called into police response to the disappearance and murder of at least 26 women -- including a large number of Indigenous women -- from the Downtown Eastside in Vancouver. The Inquiry has heard testimony from one officer – at one point the only officer assigned to investigate these disappearances – noting that it took years to convince superiors that there was a need to act.[17]

Today, there is still no concerted government response in keeping with the frequency and severity of the threats to the lives of Indigenous women and girls in Canada. Police in some jurisdictions have implemented welcome reforms including training and improved procedures for investigation of missing persons. Responses, however, vary considerably across jurisdictions.[18]

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[13] Report of the Aboriginal Justice Inquiry of Manitoba: The Deaths of Helen Betty Statistics Canada, "Violent victimization of Aboriginal women in the Canadian provinces, 2009," Shannon Brennan, (17 May 2011). *Amnesty International,* Canada: Stolen Sisters: A Human Rights Response to Discrimination and Violence against Indigenous Women in Canada*, 3 October 2004 (AMR 20/003/2004).*
[14] Regina v. Crawford, 31 May 1996.
[15] *Amnesty International,* Canada: Stolen Sisters: A Human Rights Response to Discrimination and Violence against Indigenous Women in Canada*, 3 October 2004 (AMR 20/003/2004).*
[16] Manitoba Justice Inquiry, Op. Cit.
[17] The Canadian Press. "Officer weeps while testifying at Pickton Inquiry." 31 January 2012.
[18] For example, despite the requirement from many police forces in Canada to take cultural sensitivity courses, many police officers continue to be assigned to First Nations and Métis communities with minimal knowledge of the culture and history of the people they serve. The national police force, the RCMP, does require that a specialized liaison officer be involved in the case when the missing person is Indigenous; however, few police forces have specific protocols on actions to be taken when Indigenous women and girls are reported missing. In 2004, the Saskatchewan Justice Reform Commission pointed to a number of positive practices within the Saskatoon police force that should be emulated elsewhere. These included the creation of an Indigenous liaison post and regular cooperation with community elders,

The federal government's response to the levels of violence faced by Indigenous women, announced in October 2010, is a piecemeal set of programs and initiatives, some of which, such as Criminal Code amendments to streamline the process of obtaining police wire taps, are of questionable relevance to addressing the threats to Indigenous women's lives. [19] The federal government has taken no measures to ensure that police accurately and consistently record the Indigenous identity of victims of crime, something that is necessary to ensure an accurate picture of the levels and nature of violence faced by Indigenous women, and have made no commitment to develop national guidelines or protocols for police training or response to missing persons cases.[20]

Despite Canada's noteworthy efforts at the UN Human Rights Council to encourage all states to develop national action plans to end violence against women,[21] the government of Canada has refused to develop such a plan to address the systemic threats to the welfare and safety of Indigenous women.[22]

RECOMMENDATION:

Canada should work with Indigenous women's organizations to develop a coordinated, comprehensive, national plan of action to end violence against Indigenous women and girls. Such a plan of action must include measures to address social and economic factors placing Indigenous women at risk, ensure unbiased investigation of missing persons cases, and enable accurate police recording and public disclosure of rates of violence against Indigenous women.

B) POLICING INDIGENOUS PROTESTS - ARTICLE 16

In September 1995, the Ontario Provincial Police (OPP) deployed a force of approximately 200 officers, including snipers, to respond to the occupation of Ipperwash Provincial Park by a small group of Indigenous protesters. The protest was meant to focus attention on the longstanding failure of the federal and provincial governments to restore Indigenous lands taken in the 1890s and 1930s. On the night of 6 September 1995, the situation escalated when police suddenly moved against the protesters. One Indigenous man was allegedly badly beaten by police and another, Dudley George, was fatally shot by a police sniper who was subsequently criminally charged and convicted.

The OPP subsequently implemented a number of reforms intended to prevent the recurrence of a similar tragedy. A new framework for responding to Indigenous land rights protests, the Framework for Police Preparedness for Aboriginal Critical Incidents, adopted by the OPP in 2000 and updated in 2005, recognizes that Indigenous land protests involve a variety of rights protected in law - including rights of free speech and assembly as well as Indigenous land rights - and affirms that "it is the role of the OPP and all of its employees to make every effort prior to a critical incident to understand the issues and to protect the rights of all involved

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including having elders accompany officers on some patrols in predominantly Indigenous neighborhoods.
[19] *Canada: Nineteenth and Twentieth Periodic Reports*, Submitted to the UN Committee on the Elimination of All Forms of Racial Discrimination, CERD/C/CAN/19-20 (8 June 2011), para. 46.
[20] Amnesty International. *No More Stolen Sisters: The Need for a Comprehensive Response to Violence and Discrimination Against Indigenous Women*, September 2009 (AMR 20/012/2009).
[21] Human Rights Council, Resolution 7/24 Elimination of Violence against Women, 41st Meeting (28 March 2008), online at: http://ap.ohchr.org/Documents/E/HRC/resolutions/A_HRC_RES_7_24.pdf.
[22] CBC News, *No Action plan on missing aboriginal women* (July 5, 2011), online at: http://www.cbc.ca/news/politics/story/2011/07/05/pol-ambrose-women.html.

parties throughout the cycle of conflict."[23] The stated purpose of the Framework includes promoting and developing "strategies that minimize the use of force to the fullest extent possible."[24]

In 2003, the Ontario provincial government instituted a public inquiry into the events at Ipperwash, following calls for such an inquiry by many organizations and individuals, and by the UN Human Rights Committee.[25] The Inquiry report, released in 2007, made numerous recommendations addressing the police response to Indigenous protests and the underlying factors leading to such protests. The Inquiry report called for an independent evaluation of the OPP Framework to assess how well it has been institutionalized within the police service. The report also called for the provincial government to adopt, "as soon as it is practical to do so," a province-wide "peacekeeping" policy based largely on the OPP Framework, in order to "codify the lessons learned at Ipperwash and reassure both Aboriginal and non-Aboriginal Ontarians that peacekeeping is the goal of both police and government in this province, that treaty and Aboriginal rights will be respected, that negotiations will be attempted at every reasonable opportunity, and that the use of force must be the last resort."[26]

Despite a public commitment by the provincial government to fully implement the recommendations of the Ipperwash Inquiry, the province has yet to implement a provincial peacekeeping policy and the OPP framework has not been subjected to an independent review as called for by the Inquiry. The federal government, which chose not to participate in the Inquiry, has also not taken up its recommendations.

A case study carried out by Amnesty International suggests that significant gaps remain in the OPP's implementation of its own framework for responding to Indigenous protests and that the provincial government is not holding the OPP accountable to this framework.[27] In separate incidents in June 2007 and April 2008, hundreds of heavily armed OPP officers were deployed to surround and contain protesters from the Tyendinaga Mohawk Territory in Ontario. These forces included members of the Tactics and Rescue Unit, commonly known as the sniper squad. No credible evidence has ever been brought forward to show that the protesters were armed or represented a significant threat to public safety.[28] However, in an incident in April 2008 the situation escalated to the point that OPP officers, in response to a false report that a rifle had been sighted, drew handguns and levelled high powered assault rifles at unarmed activists and bystanders.[29] The provincial government has failed to conduct an independent probe of these incidents and the OPP has refused to confirm to Amnesty International whether it has even conducted an internal review.

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[23] Ontario Provincial Police. Framework for Police Preparedness for Aboriginal Critical Incidents. p. 2.
[24] Ontario Provincial Police. Framework for Police Preparedness for Aboriginal Critical Incidents. p. 2.
[25] UN Human Rights Committee. Concluding observations of the Human Rights Committee: Canada. 7 April 1999, CCPR/C/79/Add.105.
[26] Province of Ontario, Report of the Ipperwash Inquiry, Vol. 2, p. 216.
[27] Amnesty International Canada. "I was never so frightened in my entire life": Excessive and dangerous police response during Mohawk land rights protests on the Culbertson Tract (May 2011). Available at: http://www.amnesty.ca/files/canada-mohawk-land-rights.pdf.
[28] Amnesty International Canada. *"I was never so frightened in my entire life": Excessive and dangerous police response during Mohawk land rights protests on the Culbertson Tract* (May 2011), available at: http://www.amnesty.ca/files/canada-mohawk-land-rights.pdf.
[29] Amnesty International Canada. *"I was never so frightened in my entire life": Excessive and dangerous police response during Mohawk land rights protests on the Culbertson Tract* (May 2011), available at: http://www.amnesty.ca/files/canada-mohawk-land-rights.pdf.

RECOMMENDATIONS:

1. Canada should ensure that all jurisdictions in the country adopt and implement binding policies publicly affirming that in responding to Indigenous occupations and protests, particularly within the context of land related resources disputes, the use of force will be contemplated only as a last resort and only as strictly necessary to protect life or ensuring the safety of others.

2. Canada should press the government of the Province of Ontario to implement fully the recommendations of the Ipperwash Inquiry, including an independent review of the Framework for Police Preparedness for Aboriginal Critical Incidents, and to conduct a specific probe into the OPP handling of incidents at Tyendinaga.

III. JUSTICE AND ACCOUNTABILITY

A) REDRESS - ARTICLE 14

The absence of effective measures to allow survivors of torture in other countries, who are now physically present in Canada, to seek compensation through Canadian courts, continues to be a subject of concern. Canadian law effectively bars victims of torture, whether citizens, landed immigrants or foreign nationals, from obtaining redress against foreign governments responsible for their torture, through provisions of the State Immunity Act (SIA) which grants immunity to foreign governments from the civil jurisdiction of any court in Canada except in lawsuits based on commercial activities, or due to criminal activities, injuries or losses occurring in Canada.

To date, at least three court challenges have been brought against this restriction on the ability of victims to seek compensation for torture, on the ground that it violates the Canadian Charter of Rights and Freedoms and Canada's international obligations.[30] However, the Canadian government has each time successfully argued that the prohibition against torture as a rule of *jus cogens* under international law does not extend to a requirement to provide the right to a civil remedy for torture committed abroad by a foreign state.

In 2004, the Ontario Court of Appeal decided the Bouzari case which considered, among other issues, the entitlement of sovereign states responsible for *jus cogens* violations to immunity in civil actions.[31] The case involved a Canadian citizen, Houshang Bouzari, claiming civil damages against the government of Iran for torturing him in 1993, prior to his arrival in Canada. Mr. Bouzari's counsel argued that the prohibition against torture constitutes a peremptory norm that overrides the civil immunity accorded to foreign states. Rejecting this argument, the Ontario Court of Appeal held,

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[30] *Bouzari v. Iran*, [2002] O.J. No. 1624, online at: http://www.canlii.org/en/on/onca/doc/2004/2004canlii871/2004canlii871.html; *Arar v. Syrian Arab Republic*, [2005] O. J. No. 752, online at: http://www.canlii.org/eliisa/highlight.do?text=arar&language=en&searchTitle=Ontario&path=/en/on/onsc/doc/2005/2005canlii4945/2005canlii4945.html; *Kazemi (Estate of) v. Islamic Republic of Iran*, 2011 QCCS 196, online at: http://www.canlii.org/en/qc/qccs/doc/2011/2011qccs196/2011qccs196.html.

[31] *Bouzari v. Iran*, [2002] O.J. No. 1624, online at: http://www.canlii.org/en/on/onca/doc/2004/2004canlii871/2004canlii871.html.

> Under both customary international law and international treaty there is today a balance struck between the condemnation of torture as an international crime against humanity and the principle that states must treat each other as equals not to be subjected to each other's jurisdiction. It would be inconsistent with that balance to provide a civil remedy against a foreign state for torture committed abroad.[32]

The reasoning of this decision was followed in the cases of Ziba Zahra Kazemi and Maher Arar. Maher Arar was subject to extraordinary rendition and removed from the United States to Syria in October 2002, where he was imprisoned for one year and subjected to torture. His ordeal was the subject of a Commission of Inquiry in Canada which exonerated him from any wrongdoing and found that the actions and omissions of Canadian officials contributed to the circumstances leading to his torture.[33] In 2005, Maher Arar brought a civil action for damages against Syria, arguing for the recognition of torture as an exception to the principle of immunity conferred by the SIA. Citing Bouzari, however, the Superior Court of Ontario dismissed the action, noting that,

> [t]he exceptions to such immunity listed in the SIA are few in number and succinct. The facts presented to this Court have not brought Mr. Arar within the exceptions outlined in the SIA. [...] The proposal that the SIA be amended to exclude immunity for torture has been the subject of considerable commentary. Nevertheless, the Parliament of Canada has not yet amended the Act to exclude immunity for torture. Such an amendment remains the sole responsibility of Parliament.[34]

In 2011, an almost identical judgement was given by the Superior Court of Quebec in a case brought in Canada against the Iranian government by the estate of a deceased Canadian citizen, Zahra Kazemi, who died as a result of torture while imprisoned in Iran in 2003, and by her son in his own right.[35] The son's claim for damages he suffered by way of emotional distress in Canada during his mother's ordeal was allowed to proceed, but Zahra Kazemi's Estate's claim for the torture and death she experienced in Iran was not. Relying again on Bouzari and Arar, the Superior Court of Quebec held that:

> [t]here are no exceptions to the general principle of state immunity other than those specifically mentioned in the SIA. Our legal system does not permit any importation of non-codified principles of common law or international law. The purpose of the SIA was precisely to enunciate legal rules applicable to the subject of state immunity. This legislation is restrictive in nature and should be narrowly interpreted.[36]

Together, these decisions have come to pose what has proven to date to be an insurmountable obstacle for victims of torture at the hands of foreign governments, who

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[32] *Ibid.*, at para. 95.
[33] Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar , "Factual Background". Volume 1 available online at: http://www.sirc-csars.gc.ca/pdfs/cm_arar_bgv1-eng.pdf and Volume 2 available online at: http://www.sirc-csars.gc.ca/pdfs/cm_arar_bgv2-eng.pdf.
[34] *Arar v. Syrian Arab Republic*, [2005] O. J. No. 752 at paras. 26, 28, online at: http://www.canlii.org/eliisa/highlight.do?text=arar&language=en&searchTitle=Ontario&path=/en/on/onsc/doc/2005/2005canlii4945/2005canlii4945.html.
[35] *Kazemi (Estate of) v. Islamic Republic of Iran*, 2011 QCCS 196, online at: http://www.canlii.org/en/qc/qccs/doc/2011/2011qccs196/2011qccs196.html. The Quebec Superior Court held that the estate of Zahra Kazemi was barred from suing Iran because of Canada's *State Immunity Act.* However, the civil action instituted by her son Stephan Hachemi has been allowed to proceed.
[36] *Ibid.*, at para. 213.

turn to the Canadian courts to seek redress. The immunity enjoyed by foreign governments furthers impunity for the torture they have ordered or tolerated. In 2005, the Committee against Torture called on Canada to address this by amending "the State Immunity Act to allow effective compensation to victims of international crimes such as torture, including civil compensation, wherever or by whomever committed."[37]

Recommendation:

Canada should amend the State Immunity Act to allow lawsuits against foreign governments based on crimes under international law, such as torture.

B) UNIVERSAL JURISDICTION: PROSECUTION, EXTRADITION AND DEPORTATION- ARTICLES 5, 7, 8

Impunity for torture is also perpetuated through Canadian policy and practice of failing to exercise universal jurisdiction with respect to individuals who are suspected of being criminally responsible for torture and are or have been present in Canada. In many cases, deportation is pursued rather than prosecution. In other cases, no action is taken or there has been deliberate action taken to stop a criminal case from going forward. This Committee has previously expressed concern about Canada's "apparent willingness, in the light of the low number of prosecutions for terrorism and torture offences, to resort in the first instance to immigration processes to remove or expel individuals from its territory."[38]

I) PROSECUTION VS. DEPORTATION

Canadian law, through provisions in the Criminal Code[39] and the Crimes against Humanity and War Crimes Act,[40] provides for universal jurisdiction and thus allows domestic prosecution of persons for crimes committed outside its territory which are not linked to Canada by the nationality of the suspect or the victims or by harm to Canada's own national interests. However, in the 25 years since Canadian criminal law was amended to allow that possibility, there has never been a universal jurisdiction prosecution for torture launched, and there have been only two criminal prosecutions initiated during the 11 years since the Crimes Against Humanity and War Crimes Act came into force.[41]

The government continues to prefer deportation, as evidenced by a recent initiative to publicize the names and faces of 30 individuals who had been found inadmissible to Canada on grounds they may have been responsible for war crimes or crimes against humanity. The 30 men were all slated for deportation rather than extradition, surrender or prosecution.[42]

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[37] Conclusions and recommendations of the Committee against Torture, Canada, CAT/C/CR/34/CAN, July 2005 at para. 4(g).
[38] Conclusions and recommendations of the Committee against Torture, Canada, CAT/C/CR/34/CAN, July 2005 at para. 4(e).
[39] *Criminal Code*, R.S.C., 1985, c. C-46, Article 269.1, online at: http://www.canlii.org/en/ca/laws/stat/rsc-1985-c-c-46/latest/rsc-1985-c-c-46.html.
[40] Crimes Against Humanity and War Crimes Act, SC 2000, c 24, online at: http://www.canlii.org/en/ca/laws/stat/sc-2000-c-24/latest/sc-2000-c-24.html.
[41] Her Majesty the Queen v. Desire Munyaneza, May 22, 2009, online at: http://www.ccij.ca/programs/cases/index.php?DOC_INST=12; Jacques Mungwarere is the second person prosecuted under the *Crimes Against Humanity and War Crimes Act*. For more information regarding his case, see http://www.ccij.ca/programs/cases/index.php?DOC_INST=11.
[42] CBC News, "Ottawa names war crimes suspects in Canada" (21 July 2011), online at:

In a letter to Amnesty International dated 9 August 2011, the Minister of Citizenship and Immigration stated that the Canadian government "was not obligated to conduct full-blown trials, at the cost of millions of taxpayer dollars, to prosecute every inadmissible individual for crimes committed in distant countries, often decades ago.... Our preeminent goal.... is defending Canada and upholding the integrity of our immigration system by enforcing these deportation orders."[43] Similarly, Public Safety Minister Vic Toews stated in a national media interview that:

> Canada is not the UN. It's not our responsibility to make sure each one of these faces justice in their own countries ...What we are doing with [the Canada Border Services Agency] is ensuring that Canadian law is obeyed. These individuals have no right to be here and are being removed.[44]

This is contrary to the position advanced by Canada in its Report to the International Law Commission in 2009, clearly recognizing the nature and importance of the universal jurisdiction provisions in the Canadian Criminal Code:

> Section 6(2) of the Criminal Code states the general rule that the territorial application of Canadian criminal law is limited to those offences committed in Canada, unless Canadian jurisdiction is specifically extended by federal law. Exceptions to the general rule that provides for trial in Canada of offences committed outside Canada are primarily outlined in section 7 of the Criminal Code. Section 7 of the Criminal Code extends Canadian criminal law jurisdiction to cover a number of offences which often have international law implications such as air piracy, offences against diplomats, terrorist offences, protection of nuclear material and torture. A number of the offences referred to in section 7 of the Criminal Code, such as torture (section 269.1), crimes against internationally protected persons (section 431) and terrorism offences (part II.1) were created to fulfil Canada's obligations under the international conventions listed above aimed at preventing and suppressing certain types of offences.[45]

Recommendation:

Canada should adopt a policy, backed up by sufficient resources, which ensures that extradition or criminal investigations, when appropriate, will be pursued over deportation when there are reasonable grounds to believe that an act of torture has been committed outside Canada by an individual present in Canada. The policy should ensure that such individuals will be arrested and taken into custody or that other legal measures will be taken to ensure their presence pending a determination whether to institute criminal or extradition proceedings and to make a preliminary inquiry into the facts. If sufficient admissible evidence is available Canada must submit the case to its competent authorities for the purposes of investigation or prosecution, unless an extradition request has been made by another state.

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http://www.cbc.ca/news/world/story/2011/07/21/pol-war-criminals-suspects-toews.html.

[43] Jason Kenney, Canadian Minister of Citizenship, Immigration and Multiculturalism. "Response to Open Letter from Amnesty International" (9 August 2011), online at: http://www.jasonkenney.ca/news/an-open-letter-to-amnesty-international/.

[44] CBC News, "War crimes prosecution not up to Canada, Towes says"(3 August 2011), online at: http://www.cbc.ca/news/canada/story/2011/08/03/war-crimes-suspect-toronto-arrest.html.

[45] The obligation to extradite or prosecute (*aut dedere aut judicare*), Comments and information received from Governments', 26 March 2009, A/CN.4/612, para.50.

II) INVESTIGATION AND PROSECUTION OF VISITORS TO CANADA

The recent refusal of Canadian authorities to investigate the torture allegations against former US President George W. Bush when he entered Canada in October 2011 is a pointed example of Canada's disregard of its obligations, under the Convention, to exercise and enforce criminal jurisdiction over anyone who enters its territory who is alleged to have committed torture.

In September 2011, Amnesty International provided Canadian authorities with a detailed factual and legal analysis of George W. Bush's criminal responsibility for acts of torture he ordered and authorized during his eight year presidency.[46] At the same time, the Canadian Centre for International Justice and the US-based Centre for Constitutional Rights provided the Attorney General of Canada with an extensive and detailed draft indictment against Bush, setting forth the factual and legal basis for charging him with torture.[47] The organizations highlighted that there was sufficient evidence to give rise to an obligation for Canada under the Convention, should former president Bush arrive in Canada, to launch a criminal investigation into his alleged involvement in and responsibility for crimes under international law, including torture, and to arrest or otherwise secure his presence in Canada during that investigation.

The Canadian government declined to arrest, investigate and prosecute George Bush while he was in the country. Among other explanations, it has been suggested that this was consistent with a Canadian policy to concentrate resources on pursuing investigations against individuals resident in Canada over those only in the country temporarily, as visitors.

A private prosecution against the former president was initiated in Provincial Court in British Columbia on behalf of four individuals who had endured torture while in US custody. Within only hours, however, the Attorney General of British Columbia intervened in the case and stayed the proceedings, effectively shutting down the prosecution.[48]

Declassified US government reports and memoranda, reports from the United Nations and the International Committee of the Red Cross, and statements by George Bush himself establish that he authorized the establishment of a secret detention and interrogation program by the US Central Intelligence Agency (CIA) between the years of 2002 and 2009, pursuant to which clandestine facilities were maintained abroad, at which suspected terrorists were detained, interrogated, and subjected to a number of "enhanced interrogation techniques." These techniques included "forced nudity", "walling", "facial or insult slap", "abdominal slap", "prolonged stress positions", "cramped confinement", "wall standing", "sleep deprivation", "dietary manipulation", "insects placed in a confinement box" and "water boarding". They were intended to, and inherently involved, the infliction of severe pain and suffering of a mental and/or physical nature. George Bush has publicly admitted that they were employed for the purpose of obtaining information. His administration authorized and oversaw this well-

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[46] Amnesty International, *Visit to Canada of former US president George W. Bush and Canadian obligations under international law: Amnesty International Memorandum to the Canadian authorities* (AMR 51/080/2011) , online at: http://www.amnesty.ca/files/CanadaBushSubmission.pdf;
[47] Canadian Centre for International Justice and Centre for Constitutional Rights, *Letter to the Attorney General of Canada calling for prosecution of George W. Bush* and *Draft indictment for George W. Bush sent to the Attorney General of Canada*, (29 September 2011), online at: http://www.ccij.ca/programs/cases/guantanamo/index.php.
[48] News Release, Canadian Centre for International Justice, "Human Rights Groups condemn Canadian Attorney General's Move to Immediately block torture case against George W. Bush" (24 October 2011), online at: http://www.ccij.ca/media/news-releases/2011/index.php?DOC_INST=10.

documented torture program on the asserted basis that the protections of the Geneva Conventions of 1949, including Common Article 3, did not apply to Taleban or al-Qa'ida detainees.[49]

Torture and other ill-treatment by US forces also occurred outside the confines of the CIA-run secret detention program, including against detainees held in military custody at the US Naval Base at Guantánamo Bay in Cuba, and in the context of armed conflicts in Iraq and Afghanistan. As Commander in Chief of all US armed forces, former president Bush bears individual and command responsibility for these acts of torture that he ordered and authorized or otherwise failed to prevent and punish.[50]

RECOMMENDATION:

Canada should dedicate resources to ensuring that universal jurisdiction can and will be exercised in cases of individuals who are only temporarily present in Canada against whom there are credible allegations of responsibility for crimes under international law, including torture.

IV. TORTURE AND NATIONAL SECURITY MEASURES

A) THE ROLE OF CANADIAN AUTHORITIES IN THE TORTURE AND ILL-TREATMENT OF CANADIAN NATIONALS ABROAD - ARTICLES 1, 2, 3, 4, 5, 11, 14

The Committee against Torture has monitored closely the concern that Canada's national security and intelligence practices may directly or indirectly expose Canadian citizens and other individuals to a risk of torture or other ill-treatment in other countries, notwithstanding Canada's *non-refoulement* obligations, enshrined in, *inter alia*, article 3 of the Convention, as well as other provisions in the Convention, such as articles 1, 2, 4, 5, 11, and 13.

The Committee's 2005 Concluding Observations, for example, expressed concerns about "the alleged roles of the State party's authorities in the expulsion of Canadian national Mr. Maher Arar, expelled from the United States to the Syrian Arab Republic where torture was reported to be practiced."[51] The Committee's List of Issues prepared for the consideration of the sixth periodic report of Canada requested Canada to provide detailed information about the status of implementing a comprehensive review and oversight mechanism for security and intelligence

[49] Amnesty International, *Visit to Canada of former US president George W. Bush and Canadian obligations under international law.*
[50] Amnesty International, *Visit to Canada of former US president George W. Bush and Canadian obligations under international law.*
[51] Conclusions and recommendations of the Committee against Torture, Canada, CAT/C/CR/34/CAN, July 2005 at para. 4(b).

operations in Canada.[52] Canada has not yet taken any steps to establish such a mechanism. The failure to do so and the ongoing need for a comprehensive review and oversight mechanism is well illustrated by the cases of Maher Arar; Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin; and Omar Khadr.

I) MAHER ARAR

The case of Maher Arar brought into sharp focus the ways that Canada's national security practices may contribute to the overseas torture of individuals. Maher Arar, a Canadian citizen, was arrested by US officials in September 2002 while returning to Canada from a family holiday in Tunisia. He was held for two weeks in the United States and then subject to extraordinary rendition to Syria, via Jordan, where he was imprisoned unlawfully for one year and subject to torture and inhuman prison conditions.

Upon Maher Arar's release and return to Canada, a public inquiry was established to examine the role of Canadian officials in what happened to him. The Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar (Arar Inquiry) issued its Factual Report in September 2006[53] and its Policy Report in December 2006.[54] The Arar Inquiry found that Maher Arar had been tortured while held in detention in Syria between October 2002 and October 2003[55] and that the actions and omission of Canadian officials contributed to the circumstances leading to him being tortured. The Arar Inquiry also found that there was no evidence Maher Arar was involved in or responsible for any terrorist activities. Both the Factual and Policy Reports contain comprehensive recommendations as to reforms that should be adopted to avoid similar cases in the future. Maher Arar received an official apology and $10.5 million in compensation from the Canadian government.[56]

There has not yet been any public reporting as to the status of implementing the numerous recommendations made in the Factual Report, all of which are designed to minimize the likelihood of a case like Maher Arar's arising again in the future. The detailed and comprehensive recommendation from the Policy Report, laying out a new model for ensuring the review of Canadian law enforcement and security agencies involved in national security investigations, has not yet been accepted or adopted. More than five years since the completion of the Commission of Inquiry there have been no changes to the review and oversight of law enforcement and security agencies active in the area of national security.

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[52] List of issues prepared by the Committee to be considered in connection with the consideration of the sixth periodic report of Canada, CAT/C/CAN/6, 31 October – 25 November 2011.
[53] Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, "Factual Background". Volume 1 available online at: http://www.sirc-csars.gc.ca/pdfs/cm_arar_bgv1-eng.pdf and Volume 2 available online at: http://www.sirc-csars.gc.ca/pdfs/cm_arar_bgv2-eng.pdf.
[54] Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar , "Report of the Events Relating to Maher Arar: Analysis and Recommendations", Online at: http://www.pch.gc.ca/cs-kc/arar/Arar_e.pdf.
[55] Commissioner O'Connor concluded that: "Based on all of the evidence and information available to me, I conclude that the [Syrian Military Intelligence] tortured Mr. Arar while interrogating him during the period he was held incommunicado." Report of the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, Analysis and Recommendations, pg. 187.
[56] Office of the Prime Minister of Canada, "Prime Minister releases letter of apology to Maher Arar and his family and announces completion of mediation process", 26 January 2007, Online at: http://pm.gc.ca/eng/media.asp?id=1509. See also: CBC News, "RCMP Chief apologizes to Arar for 'terrible injustices'", 28 September 2006, Online at: http://www.cbc.ca/news/canada/story/2006/09/28/zaccardelli-appearance.html. See also: CBC News, "Ottawa reaches $10 Million Settlement with Arar", 25 January 2007, Online at: http://www.cbc.ca/news/canada/story/2007/01/25/arar-harper.html.

RECOMMENDATIONS:

1. Canada should provide a publicly accessible implementation plan with a timeline, for all of the recommendations from the Arar Inquiry.

2. Canada should move immediately to implement the model of comprehensive review and oversight of law enforcement and security agencies involved in national security activities, proposed in the Policy Report from the Arar Inquiry.

II) ABDULLAH ALMALKI, AHMAD ABOU-ELMAATI AND MUAYYED NUREDDIN

In the wake of the Maher Arar case, concerns arose about the imprisonment and torture abroad of three other Canadian citizens, in circumstances pointing to the likelihood that the actions of Canadian officials had contributed to the human rights violations they experienced. Ahmad Abou-Elmaati was held in Syria from November 2001 to January 2002 and in Egypt from January 2002 to March 2004. Abdullah Almalki was held in Syria from May 2002 to July 2004. Muayyed Nureddin was held in Syria from December 2003 to January 2004.

At the close of the Arar Inquiry, Commissioner O'Connor concluded that there was need for an independent review of the circumstances surrounding the imprisonment of these three men.[57] In December 2006, the government appointed former Supreme Court of Canada justice Frank Iacobucci to head the Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin (Iacobucci Inquiry). The Inquiry was completed and issued its public report in October 2008.[58]

Commissioner Iacobucci found that all three men suffered mistreatment amounting to torture while held in detention and concluded that the mistreatment suffered "resulted indirectly from the actions of Canadian officials."[59] These actions included sharing information with the foreign agencies about the victims' suspected involvement in terrorist activities and sending them questions to be posed to the men while they were held in foreign detention. Commissioner Iacobucci found that the men had been labelled as suspected extremists or *jihadists* or of posing an imminent threat in ways that were "inflammatory, inaccurate and lacking investigative foundation."[60] He concluded that these actions were deficient in the circumstances and contributed to the mistreatment. In the case of Ahmad Abou-Elmaati and Abdullah Almalki, the report also identified "a number of deficiencies in the actions of Canadian officials to provide consular services," which contributed to the circumstances resulting in their detention and torture. These deficiencies included the failure of Canadian consular officials to consider sufficiently the possibility of mistreatment and torture and the improper disclosure of information collected in the course of providing consular assistance to Mr. Abou-Elmaati and Mr. Abdullah Almalki to the Canadian Security Intelligence Service (CSIS) and other Canadian officials.

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[57] Report of the Events Relating to Maher Arar: Analysis and Recommendations, pg. 278: "Ì have heard enough evidence about the cases of Messrs. Almalki, El Maati and Nureddin to observe that the cases should be reviewed and that the review should be done through an independent and credible process that is able to address the integrated nature of the underlying investigations."

[58] Frank Iacobucci, *Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin* (Iacobucci Report). Published by Government of Canada, October 2008, followed by *"Supplement to Public Report*" in March 2010. *Iacobucci Report* available in hardcopy: http://publications.gc.ca/site/eng/331864/publication.html . Supplement to Public Report available online at: http://dsp-psd.pwgsc.gc.ca/collection_2010/bcp-pco/CP32-90-1-2010-eng.pdf.

[59] Iacobucci Report, pgs. 35-39.

[60] Iacobucci Report, pg. 400.

The government has provided neither an apology nor compensation to any of the three men in response to the findings of the inquiry.[61] The men have instead been forced into protracted litigation in an effort to obtain redress.

RECOMMENDATION:

Canada should ensure that Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin, all found through a judicial inquiry to be torture survivors, are immediately provided with adequate and appropriate redress.

III) OMAR KHADR

Canadian citizen Omar Khadr was apprehended by US forces in Afghanistan in July 2002 when he was 15 years old. He has been held in detention at Guantánamo Bay since October 2002. In October 2010 he was sentenced to an eight year prison term pursuant to a plea agreement. Under the terms of the plea deal he is required to serve at least one year of that sentence at Guantánamo Bay after which he is eligible for transfer to Canada. An application for transfer to Canada was submitted on his behalf in approximately May 2011. He has been eligible for return to Canada since 1 November 2011 but as of 9 March 2012 no decision on his transfer application has been reached. He remains in detention at Guantánamo Bay. It is not clear whether the delays are attributable to the US government, Canadian government or both.

Omar Khadr has made credible allegations that he was tortured and/or ill-treated by US officials in both Afghanistan and Guantánamo Bay.[62] Those allegations have never been independently investigated. Additionally, US officials have consistently refused to acknowledge that Omar Khadr, who was only fifteen years old when he was apprehended by US soldiers in the course of a military operation in Afghanistan, was a child soldier and should be accorded the rights and appropriate treatment under international instruments dealing with child soldiers.[63]

The Canadian government has maintained a position of not intervening in Omar Khadr's case throughout his years in detention. Canadian courts, including the Supreme Court of Canada, have ruled that Canadian officials were complicit in the violation of Omar Khadr's rights by

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[61] All three opposition parties' representatives on the House of Commons' *Standing Committee on Public Safety and National Security* voted in favour of a report calling on the government to issue an apology, and compensation to Messrs. Al-Malki, Abou-Elmaati, and Nureddin. Testimony from the *Hansard* record of the House of Commons on 3 December 2009 shows opposition Members of Parliament Niki Ashton, Don Davies, Mark Holland and Mario Laframboise questioning the government about offering compensation or an apology, with no resulting government commitment to do so. See Official Report (Hansard) of the House of Commons, Volume 144, Number 123, 2nd Session of the 40th Parliament (3 December 2009), Available online at: http://www.parl.gc.ca/housechamberbusiness/ChamberPublicationIndexSearch.aspx?arpist=s&arpit=almalki&arpidf=2009%2f12%2f3&arpidt=2009%2f12%2f3&arpid=True&arpij=False&arpice=False&arpicl=&ps=Parl40Ses0&arpisb=Publication&arpirpp=100&arpibs=False&Language=E&Mode=1&Parl=41&Ses=1&arpicpd=4292108#Para1747408.

[62] The allegations are detailed in the Affidavit of Omar Ahmed Khadr, dated October 23, 2008, found at: http://www.mc.mil/CASES/MilitaryCommissions.aspx. The allegations were rejected by the Military Judge presiding over Omar Khadr's military commission trial because Omar Khadr did not submit to cross-examination on the allegations; see: http://www.defense.gov/news/D94-D111.pdf.

[63] Office of the Special Representative of the Secretary General for Children and Armed Conflict, "Statement of SRSG Ms. Radhika Coomaraswamy on the occasion of the trial of Omar Khadr before the Guantanamo Military Commission" (10 August 2010), online at: http://www.un.org/children/conflict/english/09-august-2010-trial-of-omar-khadr.html.

virtue of a number of interrogation sessions he was subjected to by Canadian officials at Guantánamo Bay in circumstances where the ongoing violation of his rights there were allegedly apparent. In particular the Supreme Court was concerned about the fact that Canadian officials interrogated Omar Khadr at Guantánamo Bay, without counsel, knowing that he was young and had been subjected to extensive sleep deprivation in advance so as to make him more pliable. The court found as follows:

> The record suggests that the interviews conducted by CSIS and DFAIT provided significant evidence in relation to these charges. During the February and September 2003 interrogations, CSIS officials repeatedly questioned Mr. Khadr about the central events at issue in his prosecution, extracting statements from him that could potentially prove inculpatory in the U.S. proceedings against him... Mr. Khadr's statements to Canadian officials are potentially admissible against him in the U.S. proceedings, notwithstanding the oppressive circumstances under which they were obtained... The above interrogations also provided the context for the March 2004 interrogation, when a DFAIT official, knowing that Mr. Khadr had been subjected to the "frequent flyer program" to make him less resistant to interrogations, nevertheless proceeded with the interrogation of Mr. Khadr. [64]

RECOMMENDATIONS:

1. Canada should promptly approve the application made by Omar Khadr to be returned to Canada. If necessary Canada should press US authorities to expedite necessary approvals as well.

2. Canada should ensure that Omar Khadr is provided with an adequate remedy for the human rights violations that the Supreme Court of Canada has ruled he experienced.

B) TORTURE AND OTHER ILL-TREATMENT IN THE CONTEXT OF CANADIAN INTELLIGENCE ACTIVITIES ARTICLES 1, 2, 4, 5, 15

I) INBOUND INTELLIGENCE

The Convention makes it clear, in Article 15, that information obtained under torture is not to be "invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made." There are provisions in Canadian law which clearly incorporate that obligation, such as section 83 of the Immigration and Refugee Protection Act which provides that information "that is believed on reasonable grounds to have been obtained as the result of the use of torture" will not be relied upon in immigration security certificate proceedings.[65] However, there are worrying indications that Canadian law enforcement and security agencies may rely upon information that may have been obtained under torture in other circumstances, in particular in the course of intelligence activities.

In January 2012, a letter from Minister of Public Safety Vic Toews to Richard Fadden, the Director of the Canadian Security Intelligence Service (CSIS), dated 7 December 2010, was

[64] Canada (Prime Minister) *v.* Khadr, 2010 SCC 3, [2010] 1 S.C.R. 44, para. 20; online at: http://scc.lexum.org/en/2010/2010scc3/2010scc3.html.
[65] *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, s. 83(1.1), online at: http://laws.justice.gc.ca/eng/acts/I-2.5/page-23.html.

made public pursuant to an Access to Information Request. The letter instructs CSIS, "in exceptional circumstances where there exists a threat to human life or public safety ... to share the most complete information available at the time with relevant authorities, including information based on intelligence provided by foreign agencies that may have been derived from the use of torture or mistreatment." The letter goes on to state that "ignoring such information solely because of its source would represent an unacceptable risk to public safety." This position is confirmed in a subsequent Ministerial Direction sent from Minister Toews to Mr. Fadden on 28 July 2011, also made public pursuant to an Access to Information Request.[66]

It is incumbent upon Canada to ensure that all aspects of law enforcement and security activities uphold and respect the absolute ban on torture and other ill-treatment. Canada cannot credibly claim to be vigorously promoting respect for the absolute prohibition on torture or other ill-treatment while at the same time allowing and even requiring security and intelligence services in exceptional circumstances to make use of information that may have been obtained through such prohibited treatment beyond the limited exception provided by relevant international law. As the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has stated:

> Reliance on information from torture in another country, even if the information is obtained only for operational purposes, inevitably implies the "recognition of lawfulness" of such practices and therefore triggers the application of principles of State responsibility. Hence, States that receive information obtained through torture or inhuman and degrading treatment are complicit in the commission of internationally wrongful acts. Such involvement is also irreconcilable with the obligation *erga omnes* of States to cooperate in the eradication of torture.[67]

Similarly the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has called on states to recognize that the "exclusionary rule" is applicable beyond legal proceedings including, *inter alia*, intelligence decisions.

> Attempts to restrict the applicability of the exclusionary rule represent a serious threat to international efforts to eradicate torture. It is of deep concern that States regularly receive and rely on information – either as intelligence or evidence for proceedings – whose sources present a real risk of having been acquired as a result of torture and ill-treatment from third party States. Receiving or relying on information from third parties which may be compromised by the use of torture does not only implicitly validate the use of torture and ill-treatment as an acceptable tool to gain information, but creates a market for information acquired through torture, which in the long term undermines the goal of preventing and eradicating

[66] Ministerial Direction to the Canadian Security Intelligence Service: Information Sharing with Foreign Entities, accessible online at: http://www.scribd.com/doc/83543050/Directive-to-CSIS-re-info-sharing.
[67] Martin Scheinin , Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, A/HRC/10/3, 4 February 2009, para 55. Available online at: http://www2.ohchr.org/english/issues/terrorism/rapporteur/docs/A.HRC.10.3.pdf.

> torture.[68]
>
> In the considered opinion of the Special Rapporteur, in order for the "exclusionary rule" to work as a preventative measure and create a disincentive for would-be abusers to deploy ill-treatment as a tool for extracting confessions or corroborating information, its applicability must be extended to cover intelligence and executive decisions. In other words, it can only remain effective if it is applicable to all and any information which may form the basis of a judicial or administrative process or decisions by the executive and its agencies.[69]

The Canadian government should adopt a policy prohibiting the use of information in the course of intelligence activities when it has been established that there is a real risk that the information was procured through resort to torture or other ill-treatment. This is consistent with the *jus cogens* and *erga omnes* prohibition of torture and other prohibited ill-treatment. The soliciting, receipt, or use of information where there is a real risk that it was obtained through torture or other prohibited ill-treatment is inconsistent with and undermines the fundamental and absolute nature of the prohibition – and moreover undermines the *erga omnes* obligation to prevent, prohibit, criminalise, prosecute and punish the same acts. The recipient of the information should also be attempting to prosecute and punish the provider of the information. As such, the soliciting, receipt and use of that very information is wholly incompatible with the prohibition.

RECOMMENDATION:

Canada should establish a clear policy barring the Canadian Security Intelligence Service and other Canadian law enforcement and security agencies from making use of information received from other domestic or international law enforcement or security agencies, when there is a real risk that it was obtained as the result of torture or other prohibited treatment.

II) OUTBOUND INTELLIGENCE

The Ministerial Direction on Information Sharing with Foreign Entities, provided to CSIS on 28 July 2011 also deals with situations where CSIS is faced with the question of whether to provide information to foreign agencies when doing so would give rise to a substantial risk of mistreatment, which is defined as "torture or other cruel, inhuman or degrading treatment or punishment."[70] The Direction lays out a number of criteria to be taken into account in making such a decision, including the nature and imminence of any relevant threat to national security, the importance of sharing the information and possible measures to mitigate the risk of mistreatment. It clearly leaves open the possibility that information will be provided to foreign entities even though there is a substantial risk that it will lead to torture or other prohibited ill-treatment.

The Direction not only violates the absolute prohibition on torture in the Convention, it runs counter to a key recommendation from the judicial inquiry into the case of Maher Arar:

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[68] Juan Mendez, Report submitted by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/16/52, 3 February 2011, para 53. Available online at: http://www2.ohchr.org/english/bodies/hrcouncil/docs/16session/A.HRC.16.52.pdf

[69] *Ibid.*, para. 56.

[70] *Supra*, footnote 66.

> Information should never be provided to a foreign country where there is a credible risk that it will cause or contribute to the use of torture. Policies should include specific directions aimed at eliminating any possible Canadian complicity in torture, avoiding the risk of other human rights abuses and ensuring accountability.[71]

RECOMMENDATION:

Canada should withdraw the Ministerial Direction to the Canadian Security Intelligence Service: Information Sharing with Foreign Entities and replace it with a policy that conforms with Canada's obligations under the Convention and other international human rights instruments, including not to provide information to foreign governments when doing so gives rise to a substantial risk of torture or other prohibited ill-treatment.

V. REFOULEMENT

A) IMMIGRATION AND REFUGEE PROTECTION ACT - ARTICLE 3

Since 1999, the Committee against Torture, the Human Rights Committee and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment have called on the Canadian government to recognize and respect the absolute nature of the *non-refoulement* obligation enshrined in, for example, Article 3 of the Convention to refrain from deporting, extraditing, surrendering or otherwise removing any person from Canada to a country where he or she faces a real risk of torture.[72] Canadian law continues to provide for an exception to the principle of *non-refoulement* in the case of persons who are found to be inadmissible to Canada on grounds of security, violating human or international human rights, serious criminality or organized criminality, regardless of whether they are asylum seekers, protected persons or even permanent residents.[73]

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[71] Footnote 1, Recommendation 14.

[72] Conclusions and Recommendations of the Committee against Torture, Canada, CAT/C/CR/34/CAN, July 2005 at para. 5(a); Concluding Observations of the Committee against Torture: Canada, A/56/44, November 2000 at para. 59; Concluding Observations of the Human Rights Committee, Canada, CCPR/C/CAN/CO/5, April 2006 at para. 15; Concluding Observations of the Human Rights Committee: Canada, CCPR/C/79/Add.105, 7 April 1999 at para. 13; *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, A/60/316, 30 August 2005, at paras. 33, 52.

[73] IRPA 115 (2). Under Canada's *Immigration and Refugee Protection Act* IRPA, people who are not Canadian citizens may be subject to removal from Canada for reasons of "serious criminality" which is defined in s.36 of the IRPA. Specifically, s.36(1) states that a permanent resident or a foreign national is inadmissible on grounds of serious criminality if they have been convicted in Canada of a federal crime punishable by at least 10 years in prison, or if they have actually been sentenced in Canada to a federal crime and received a sentence of at least six months. Additionally, a permanent resident or a foreign national may be found inadmissible if they have been convicted of an offence outside Canada that if committed inside Canada would carry a term of imprisonment of 10 years or more. Without the status of citizen or permanent resident, the threshold for the possible deportation of foreign nationals is lower than that for permanent residents. Thus, in addition to the grounds of serious criminality described above, s.36(2) also stipulates that a foreign national is inadmissible on grounds of criminality for conviction in Canada of any indictable federal offence, or conviction in Canada of any two offences under any Act of

In January 2002, the Supreme Court of Canada decided in the case of Suresh v. Canada (Minister of Citizenship and Immigration) that while "deportation to torture will generally violate the principles of fundamental justice protected by s. 7" of the Canadian Charter of Rights and Freedoms, it "might be justified in exceptional circumstances."[74] The Court did not define what those "exceptional circumstances" may be.

Since Suresh, no Canadian court has yet found "exceptional circumstances" to exist that would justify a person's removal from Canada to face a risk of torture. Nor has there been clear jurisprudence as to the exceptional discretion to deport to torture. A 2004 decision of the Federal Court Trial Division held that "before deciding to return a refugee to torture, there must be evidence of a serious threat to national security." The Federal Court further maintained that a deportation decision is reasonable only when it "considers the alternatives to deportation and [...] specifically defines and explains the threat and how it might be realized."[75]

In a 2006 decision, the Federal Court articulated a more stringent requirement, holding that deportation to a substantial risk of torture "would infringe an individual's rights [...] under s. 7 of the Charter, and [...] infringement generally would require that the exceptional case would have to be justified under s. 1." The Court noted that "this limitation is consistent, not merely with the decision in Suresh but also with Canada's international obligations."[76]

This decision points to a serious, though still insufficient, effort by the Federal Court to bring Canada into compliance with its obligation under Article 3 of the Convention even though its laws provide for exceptions to the principle of *non-refoulement*. The Canadian government does not accept even this narrow interpretation of the Suresh exception.[77] The government continues to refuse to bring Canadian law and practice into conformity with unconditional respect for the principle of *non-refoulement* in all circumstances.

RECOMMENDATION:

Canada must amend all relevant laws to explicitly implement the unconditional nature of the *non-refoulement* provisions in article 3 of the Convention.

B) PRISONER TRANSFERS IN AFGHANISTAN: REFOULEMENT AND EXTRATERRITORIAL JURISDICTION - ARTICLES 2, 3

In December 2005, Canada concluded an agreement[78] with the government of Afghanistan under the terms of which prisoners apprehended by Canadian Forces during the course of military operations in Afghanistan would be transferred into the custody of Afghan officials.

Parliament not arising out of a single occurrence. Additionally, foreign nationals convicted outside Canada of equivalent offences are also deemed inadmissible.

[74] Suresh *v.* Canada (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 3, 2002 SCC 1.

[75] *Sogi v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 1080 (QL), at para. 21.

[76] *Jaballah, Re* 2006 FC 1230, 16 October 2006 at para. 86.

[77] Canada's Sixth Periodic report to the Committee against Torture, CAT/C/CAN/6, 22 June 2011, at para. 36.

[78] *Arrangement for the Transfer of Detainees Between the Canadian Forces and the Ministry of Defence of the Islamic Republic of Afghanista*n (18 December 2005), online at: http://www.afghanistan.gc.ca/canada-afghanistan/assets/pdfs/Dec2005.pdf. The agreement was replaced by another agreement in May 2007: http://www.afghanistan.gc.ca/canada-afghanistan/assets/pdfs/agreement_detainees_030507.pdf.

This replaced the previous practice of handing prisoners over to US forces in Afghanistan.[79]

Amnesty International immediately raised concern about the new agreement with the Canadian authorities.[80] The organization pointed out that given the prevalence and systematic nature of torture in Afghan prisons, such transfer would subject prisoners, particularly those handed over to the Afghan National Directorate of Security (NDS), to a strong risk of torture or other ill-treatment, and was, therefore, contrary to Article 3 of the Convention[81] as well as other relevant treaty and customary law provisions by which Canada was bound. In light of these concerns, Amnesty International called on the Canadian government to cease transferring prisoners to Afghan officials until such time as the real risk of torture or other ill-treatment no longer existed.[82] The government refused to do so, arguing that the terms of the agreement with Afghan authorities, including promises that Canadian officials would be able to monitor facilities where transferred prisoners were held, provided sufficient protection against torture.[83]

In February 2007 Amnesty International and the British Columbia Civil Liberties Association jointly commenced proceedings in the Federal Court of Canada, seeking a court order halting prisoner transfers due to the concerns about torture.[84] In April of the same year, the Globe and Mail newspaper published interviews with 30 men who claimed they were whipped with electrical tables, electrocuted, starved, frozen and choked after they were handed over to the NDS by Canadian Forces members.[85] In October 2009, Canadian diplomat Richard Colvin, who was posted in Afghanistan between April 2006 and October 2007, provided to the Military Police Complaints Commission[86] an affidavit detailing the serious concerns he had

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[79] Amnesty International had repeatedly raised concerns about this earlier practice because of allegations of prisoner abuse at US detention facilities in Afghanistan, as well as concerns about prisoners being further transferred to Guantánamo Bay.

[80] Letter from Amnesty International to the Honorable Gordon O'Connor, Minister of National Defence (3 April 2006), available at: http://www3.thestar.com/static/PDF/afghandocs/SCA%200835.pdf.

[81] Article 3(1) of the Convention reads as follows: "No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."

[82] Specifically, Amnesty International called on the Canadian government to suspend transfers "until such time as it is clear that efforts to improve the Afghan system have been successful ... and [any transfer] arrangement is fully consistent with Canada and Afghanistan's international obligations in the area of human rights and humanitarian law."

[83] On 5 April 2006, Gordon O'Connor, the Minister of National Defence, stated in Parliament that "we have no intention of redrafting the agreement. The Red Cross and the Red Crescent are charged with ensuring that prisoners are not abused. There is nothing in the agreement that prevents Canada from determining the fate of prisoners so there is no need to make any change in the agreement ... We are quite satisfied with the agreement. It protects prisoners under the Geneva agreement and all other war agreements," online at: http://openparliament.ca/politicians/gordon-oconnor/?page=101. The Red Cross later stated however that it had no role in monitoring Canada-Afghanistan transfer arrangement in direct contradiction to the assurances given by Minister O'Connor, see Paul Koring, "Red Cross contradicts Ottawa on detainees" (8 March 2007), online at: http://www.theglobeandmail.com/news/national/article746018.ece.

[84] *Amnesty International Canada v. Canada (Chief of the Defence Staff)*, 2008 FC 336, [2008] 4 FCR 546, online at: http://www.canlii.org/en/ca/fct/doc/2008/2008fc336/2008fc336.html; *Amnesty International Canada v. Canadian Forces*, 2008 FC 162, online at http://www.canlii.org/en/ca/fct/doc/2008/2008fc162/2008fc162.html.

[85] Graeme Smith, "From Canadian custody into cruel hands. Savage beatings, electrocution, whipping and extreme cold: Detainees detail a litany of abuses by Afghan authorities" The Globe and Mail, 23 April 2007, online at: http://v1.theglobeandmail.com/servlet/story/RTGAM.20070423.wdetainee23/BNStory/Afghanistan.

[86] On 12 March 2008 the Military Police Complaints Commission announced that a public hearing would be conducted, looking at the role that military police may have played in prisoner transfers. The hearing

about torture and ill-treatment of transferred prisoners and the steps he took to bring those concerns to the attention of various Canadian officials.[87]

Canada has not incorporated the provisions of the Convention into domestic law, despite being obliged to do so under international law.[88] Although Canada may not invoke the provisions of its internal law as justification for its failure to comply with a treaty, under Canadian law it is not possible to independently argue or enforce international treaties in Canadian courts unless they have been domestically incorporated. The failure to incorporate and the inability to independently enforce the Convention pose a troubling conundrum for ensuring compliance. The legal basis for the court challenge, therefore, was the Canadian Charter of Rights and Freedoms (the Charter). The Court was urged to take account of a range of international human rights standards, including Article 3 of the Convention, as persuasive in informing a proper interpretation of the Charter in this context.

In March 2008, the Federal Court dismissed the challenge to the practice of transferring battlefield detainees in Afghanistan, and accepted the Canadian government's argument that the Charter cannot apply to the conduct of Canadian soldiers operating outside of Canada, in Afghanistan, even when they exercise "effective military control" over persons in their custody.[89] In arriving at this conclusion, the Court reasoned,

> The practical result of applying such a "control of the person"-based test would be problematic in the context of a multinational military effort such as the one in which Canada is currently involved in Afghanistan. Indeed, it would result in a patchwork of different national legal norms applying in relation to detained Afghan citizens in different parts of Afghanistan, on a purely random-chance basis. [...] This would be a most unsatisfactory result, in the context of a United Nations-sanctioned multinational military effort, further suggesting that the appropriate legal regime to govern the military activities currently underway in Afghanistan is the law governing armed conflict—namely international humanitarian law.[90]

The judgment was affirmed on appeal by the Federal Court of Appeal,[91] and the Supreme Court of Canada subsequently denied leave to appeal from the Federal Court of Appeal judgment.[92]

It appears that the government, while arguing that the agreement it had concluded with Afghan authorities, and its accompanying monitoring provisions, adequately addressed concerns about torture, did nonetheless on a number of occasions suspend prisoner transfers

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concluded in February 2011 and the MPCC provided its *interim* report to the government on 22 December 2011. That report is not a public document. As of 9 March 2009 no final report had been released publicly.

[87] Affidavit of Richard James Colvin, 5 October 2009, available online at: http://www3.thestar.com/static/PDF/Colvin_Affidavit.pdf

[88] Vienna Convention on the Law of Treaties, article 27.

[89] *Amnesty International Canada v. Canada (Chief of the Defence Staff)*, 2008 FC 336, [2008] 4 FCR 546, online at: http://www.canlii.org/en/ca/fct/doc/2008/2008fc336/2008fc336.html.

[90] *Ibid.* at paras. 274, 276.

[91] *Amnesty International Canada v. Canada (Chief of the Defence Staff)*, 2008 FCA 401, [2009] 4 F.C.R. 149, online at: http://www.unhcr.org/refworld/docid/4b98f1832.html.

[92] *Amnesty International Canada v. Canada (Chief of the Defence Staff)*, 2008 FCA 401, Desjardins, J.A., judgment dated 17 December 2008, leave to appeal to S.C.C. refused 21 May 2009.

because of credible reports of torture.[93] The number and length of all such suspensions has never been publicly confirmed by the government. Canada ended its combat operations in Afghanistan in July 2011, but some Canadian troops do remain as part of a training mission. In December 2011 the government announced that any future prisoners apprehended by Canadian soldiers in Afghanistan will be handed over to US forces in the country.[94]

The conclusions arrived at in this case are deeply troubling when considered in light of the fact that international treaties ratified by Canada cannot be independently argued in Canadian legal proceedings other than through domestic legal instruments. To rule that detainees held outside Canada by Canadian forces have rights under international law but not under the Charter is to overlook that no meaningful enforcement mechanism other than the Charter is actually available in Canada with respect to the overseas military activities of Canadians soldiers. Recognizing the extraterritorial reach of the Charter is consequently the only feasible option for protecting the internationally protected human rights, especially the right to be free from torture, of detainees transferred by Canada into the custody of Afghan prison officials.

RECOMMENDATIONS:

1. Canada should confirm that it will not authorize Canadian military forces or other personnel to transfer prisoners to any foreign authorities when doing so gives rise to a substantial risk that the prisoners will be subject to torture; and that assurances from foreign governments and monitoring arrangements will not be relied upon to justify transfers when such substantial risk exists.

2. Canada should incorporate all provisions of the Convention in national law and, in particular, take all steps to ensure that provisions of the Convention that give rise to extraterritorial jurisdiction can be domestically enforced by Canadian courts.

VI. REFUGEES AND MIGRANTS

Amnesty International is deeply concerned about recently proposed legislation, Bill C-31: *Protecting Canada's Immigration System Act*.[95] Tabled by the government in the wake of the arrival of two boat loads of Tamil refugee claimants from Sri Lanka on Canada's west coast in 2009 and 2010, the Bill purports to crack down on the practice of "human smuggling." The Bill is also designed to reduce the numbers of refugee claimants coming from countries that the government perceives to be "safe", including Roma refugee claimants from Central

[93] Afghan officer boasted to military about torturing prisoners, Toronto Start, 8 September 2010, available online at: http://www.thestar.com/news/world/afghanistan/article/858275--afghan-officer-boasted-to-military-about-torturing-prisoners; Afghan intelligence interrupts Canadian questioning of prisoner abuse claims, 13 September 2010, available online at: http://www.winnipegfreepress.com/breakingnews/afghan-prisoner-abuse-claims-surfaced-as-recently-as-last-year-documents-102808399.html.
[94] *Feds say Afghan detainees will be transferred to US*, CTV News, 9 December 2011: http://www.ctv.ca/CTVNews/QPeriod/20111209/canada-afghanistan-prisoners-111209/. *Arrangement between the Government of Canada and the Government of the United States of America concerning the transfer of persons between the Canadian Forces and the U.S. Forces in Afghanistan*, accessible online at: http://www.afghanistan.gc.ca/canada-afghanistan/documents/arrangementparwan.aspx?lang=eng&view=d
[95] Bill C-31, the *Protecting Canada's Immigration System Act*, introduced by the Minister of Citizenship and Immigration, 16 February 2012, available at: http://www.parl.gc.ca/HousePublications/Publication.aspx?Docid=5391960&file=4

European countries and refugee claimants from Mexico. Amnesty International considers that the Bill, as currently drafted, is inconsistent with the Convention and several other international treaties and it would likely result, if it were to be implemented in its current form, in serious violations of international refugee law and international human rights law.

A) MANDATORY DETENTION - ARTICLES 2, 11, 16

Bill C-31 authorizes the Minister of Public Safety to "designate as an irregular arrival the arrival in Canada of a group of persons if he or she ... has reasonable grounds to suspect that, in relation to the arrival in Canada of the group, there has been, or will be, a contravention of subsection 117(1) [IRPA's human smuggling provisions]."[96] The Bill then subjects those who are so designated, including possible survivors of torture, to a range of discriminatory sanctions including mandatory, warrantless and unreviewable detention for a minimum period of one year.[97] With respect to reviewing the detention, the proposed legislative change is as follows:

> ... in the case of a designated foreign national who was 16 years of age or older on the day of the arrival that is the subject of the designation in question, the Immigration Division must review the reasons for their continued detention on the expiry of 12 months after the day on which that person is taken into detention and may not do so before the expiry of that period.[98] [emphasis added]

During this period, release is only possible where the person's application for protection is allowed or where the Minister decides that there are "exceptional circumstances" warranting an earlier release. There is no definition in the Bill for what constitutes "exceptional circumstances". If the refugee claimant is not released after twelve months, there is a review of the detention by the Immigration Division of the Immigration and Refugee Board, but not more than once every six months.

Amnesty International is concerned about this proposed policy of mandatory detention for asylum seekers solely based on their manner of arrival in Canada and considers the detention to be arbitrary. The arbitrariness inherent in such a policy is laid bare by the fact that it is applied in the absence of a case-by-case examination of the necessity, proportionality and appropriateness of detention in each individual case. International legal standards, in fact, establish that refugee claimants should not be detained other than in exceptional cases. Amnesty International considers that there can be no lawful justification for automatic detention. The European Court of Human Rights has found that automatic detention of asylum-seekers in Malta violated the European Convention on Human Rights in failing to ensure that detainees had access to an "effective and speedy remedy for challenging the lawfulness of the detention," thus constituting arbitrary detention.[99]

Among other concerns related to this proposal, is the fact that the provisions of the Bill fail to provide for any possibility of exempting from mandatory detention individuals who are survivors of torture. Such individuals and other vulnerable populations will instead frequently be held in correctional and maximum security facilities whenever facilities for purposes of immigration

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[96] Clause 10.
[97] Clauses 24 and 25.
[98] Clause 25, proposed additional s. 57.1 to the Immigration and Refugee Protection Act.
[99] *Louled Massoud v* Malta, judgement of 27 July 2010, made final on 27 October 2010, at para. 46, online at: http://www.unhcr.org/refworld/docid/4c6ba1232.html.

detention do not exist.[100]

This Committee has previously emphasized that detention of those entering irregularly the State party's territory should be used as a measure of last resort only and a reasonable time limit for detention should be set and has called for "mandatory detention of those entering irregularly the State's territory" to be abolished, highlighting as well that non-custodial measures and alternatives to detention should be made available to persons in immigration detention.[101]

B) DENIAL OF APPEAL RIGHTS - ARTICLE 3

Bill C-31 also removes the right of appeal from a decision denying a claim for protection in Canada, for groups of persons who are designated as "an irregular arrival" and also for individuals coming for a country of origin that the Minister of Citizenship and Immigration designates to be "safe." [102]

The United Nations High Commissioner for Refugees (UNHCR) has consistently maintained that an appeal procedure "[is] a fundamental, necessary part of any refugee status determination process."[103] The Human Rights Committee has held that states are obliged to afford aliens facing deportation an opportunity to appeal deportation orders prior to their removal.[104] A refugee claimant's nationality or the manner of their arrival in Canada do not constitute legitimate reasons for departing from these international standards that require states to afford refused refugee claimants the right to an effective appeal on the merits. Instead, this proposal would introduce discrimination with respect to access to justice and remove a necessary safeguard against wrongful rejection of refugee claims, increasing the risk of an error being made and a consequential violation of Canada's *non-refoulement* obligation under the Convention.

Amnesty International is particularly concerned that some of the countries that are assumed to be likely candidates for designation as "safe" countries of origin, notably Mexico,[105] are countries where torture continues to widespread and commonplace.[106]

In the absence of an appeal, judicial review by "leave" from the Federal Court becomes the only available remedy for refused refugee claimants. This remedy does not include the full reconsideration of the merits of the claim. Canada's obligation to refrain from the removal of persons to face a risk of torture applies with respect to all persons seeking protection

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[100] Canada Border Services Agency, "CBSA Detentions and Removals Program - Evaluation Study" November 2010, Available at: http://cbsa-asfc.gc.ca/agency-agence/reports-rapports/ae-ve/2010/dr-rd-eng.html.
[101] Committee Against Torture (CAT), *Concluding observations of the Committee against Torture : Australia*, 22 May 2008, CAT/C/AUS/CO/3 at para. 11, available at: http://www.unhcr.org/refworld/docid/4885cf7f0.html.
[102] Clause 36.
[103] UNHCR letter to then Minister of Citizenship and Immigration Denis Coderr on non-implementation of the RAD (May 9, 2002), online at: http://ccrweb.ca/unhcrRAD.html.
[104] Human Rights Committee, *Hammel v. Madagascar* (3 April 1987), Communication No. 155/1983 at paras. 18.2-19.2.
[105] Kristen Shane, *Refugee bill widens safe country net*, Embassy Magazine, 9 March 2012, online at: http://www.embassymag.ca/page/view/refugee-02-29-2012.
[106] Amnesty International Annual Report, 2011, Mexico, online at: http://www.amnesty.org/en/region/mexico/report-2011.

regardless of how they arrive in Canada and no matter their nationality.

RECOMMENDATION:

Canada should withdraw Bill C-31 and only proceed with further law reform with respect to human smuggling and refugee protection in a manner that fully respects international law, including the Convention against Torture.

VII. POLICING

A) CONDUCTED ENERGY DEVICES AND OTHER "LESS THAN LETHAL" POLICE WEAPONRY - ARTICLES 1, 2, 11, 16

Amnesty International continues to be concerned by the use of less-than-lethal weapons, particularly Conducted Energy Devices (CEDs) such as TASERS. While some police forces have adopted stricter standards that limit the use of such devices to situations where there is a clear and serious imminent threat to life, most do not. Amnesty International has frequently expressed concern that the use of these weapons may, in some circumstances, be tantamount to torture or ill-treatment.[107] This Committee has also expressed concern that the use of such weapons may constitute a form of torture.[108]

There are no consistent and coherent standards applicable to all policing forces across the country, as some are subject to federal government jurisdiction and others to provincial and territorial governments. Guidelines developed by the federal government in October 2010 are not binding and do not adopt a threshold of harm standard which would justify the use of a TASER.[109] Amnesty International has suggested that the Federal Guidelines should be amended to require that CED's will only be used in situations involving an "imminent threat of death or serious (potentially life threatening) injury which cannot be contained by less extreme options."[110]

The legal framework for the testing and approval for use of new forms of less than lethal weapons by police agencies in Canada, such as sonic devices, is unclear. Some of these weapons pose a potential risk of resulting in torture or ill-treatment when used.

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[107] Amnesty International, *Less than lethal? The use of stun weapons in US Law Enforcement* (Index: AMR 51/010/2008), available online at: http://amnesty.org/en/library/asset/AMR51/010/2008/en/530be6d6-437e-4c77-851b-9e581197ccf6/amr510102008en.pdf. See also: *Redoubling the Fight against Torture*, Amnesty International's Brief to the UN Committee against Torture with respect to the Committee's Consideration of the Fourth Periodic Report from Canada, 8 October 2004, at 14; Amnesty International Annual Report, *Canada*, 2006; Amnesty International Annual Report, *Canada*, 2004.

[108] UN Committee against Torture, Concluding Observations: Portugal, 2008, CAT/C/PRT/CO/4, at para. 14.

[109] Guidelines for the Use of Conducted Energy Weapons, 15 October 2010. Available online at: http://www.publicsafety.gc.ca/prg/le/gucew-ldrai-eng.aspx.

[110] This standard has been enunciated by Amnesty International in various reports and submissions to government, including, "'Less than Lethal?' The use of Stun Weapons in US Law Enforcement", Amnesty International Publications 2008, AMR 51/010/2008, online at: http://www.amnesty.ca/amnestynews/upload/AMR510102008.pdf.

RECOMMENDATIONS:

1. Canada should amend the Guidelines for the Use of Conducted Energy Weapons to require that CED's will only be used in situations involving an imminent threat of death or serious (potentially life threatening) injury which cannot be contained by less extreme options.

2. Canada should adopt a clear legislative framework to govern the testing and approval for use of all weapons used by police and other law enforcement agencies, which clearly incorporates international human rights standards including provisions of the UN Convention against Torture.

B) POLICING OF THE JUNE 2010 G8 AND G20 PROTESTS - ARTICLES 11, 16

There continues to be controversy about the policing response to large scale public protests in Toronto when Canada hosted the G8 and G20 Summits in June 2010. More than one thousand people were arrested, the overwhelming number of whom appear to have been involved in legitimate acts of protest.[111]

Detailed and credible allegations have been made by many individuals of abuse and ill-treatment at the hands of police and of inhuman prison conditions in the temporary detention centre that was used to hold those arrested, such as this testimony at a public citizen's inquiry, provided by John Pruyn, who wears a prosthetic leg.

> The police ordered me to walk ... I said I can't. Then one of the police grabbed my artificial leg and yanked it right off my leg for no apparent reason ... He pulled it off, and then told me to put it back on. I just looked at him ... I could not believe what he was saying. Of course, I can't put my leg back on with my hands tied behind my back ... so then he says 'hop'. And again I said 'I can't'. The he says 'you asked for it'. So then one police grabbed me under each arm and they started to drag me backwards. As they were dragging me backwards we went over pavement and I had on a short sleeve shirt and my elbows were digging right into the pavement and they were gouged out, both elbows, both sides ... we go to the paddy wagon and he slammed me onto the ground. They kicked me some more and then they went through my pockets for a quick search.[112]

Police forces and government officials at both the level of the federal government and Ontario provincial government were involved in overseeing the security of the Summit. Both the federal and provincial governments have, to date, rejected calls for a comprehensive public inquiry to examine all aspects of the security operation.

Notably, the House of Commons Standing Committee on Public Safety and National Security, in a wide-ranging study looking at security issues related to the G8 and G20 Summits has called for a public inquiry to be established:

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[111] Canadian Civil Liberties Association and National Union of Public and General Employees, *Breach of the Peace: G20 Summit, Accountability in Policing and* Governance (February 2011), online at: http://ccla.org/wordpress/wp-content/uploads/2011/02/Breach-of-the-Peace-Final-Report.pdf.
[112] *Ibid.*, pgs. 33-34.

> The Committee recommends that the Government of Canada convene a full judicial, independent public inquiry to investigate the security at the G8/G20 summits, with sufficiently broad terms of reference to allow it to investigate all levels of government, all decision making processes and all the events that occurred that led to property damage, civil rights violations and bodily harm, and with the power to make recommendations stemming from its findings to ensure similar events are never repeated in Canada.[113]

Numerous internal and external reviews conducted by various individuals and bodies have looked at a range of concerns associated with the policing operation on an issue by issue basis.[114] Some of those reviews have been conducted by bodies that are not independent of the police.[115] Many aspects of the policing operation have not been reviewed at all, there has been little review of the political decisions associated with those operations and there has been no independent and comprehensive review that takes in the totality of the policing and security arrangements and the role played by all policing, intelligence and political actors.

RECOMMENDATION:

Canada should work with the province of Ontario to convene a joint, comprehensive public inquiry into all aspects of the policing and security operations at the G8 and G20 Summits.

VIII. INTERNATIONAL LEVEL RECOMMENDATIONS AND CONCERNS

A) RATIFICATION OF THE OPTIONAL PROTOCOL TO THE CONVENTION AGAINST TORTURE

The Canadian government has made public commitments to consider signing and ratifying the Optional Protocol to the Convention since 2005. Amnesty International is calling on the government to act on that commitment and sign and ratify the Optional Protocol without any

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[113] House of Commons Standing Committee on Public Safety and National Security, *Issues Surrounding Security at the G8 and G20 Summits*, March 2011, Recommendation 7, pg. 19.
[114] Andre Marin, Ombudsman Ontario, *G20 Report: Caught in the Act* National Union of Public and General (December 2010), online at: http://www.ombudsman.on.ca/Resources/Reports/Caught-in-the-Act.aspx; Employees and Canadian Civil Liberties Association, *Breach of the Peace G20 Summit: Accountability in Policing and Governance* (February 2011), online at: http://ccla.org/wordpress/wp-content/uploads/2011/02/Breach-of-the-Peace-Final-Report.pdf; Toronto Police Service After-Action Review (June 2011), online at: http://torontopolice.on.ca/publications/files/reports/g20_after_action_review.pdf; Ontario Provincial Police, *Consolidated After Action Report – Summits 2010* (November 2011), online at: http://www.opp.ca/ecms/files/265483322.4.pdf; Office of the Independent Police Review Director, I*nvestigative Report* into the complaint of Adam Nobody (13 January 2012), online at: http://www.cbc.ca/news/pdf/OIPRDInvestigative-Nobody01132012.pdf. The Toronto Police Services Board is expected to complete and release its G20 report in March 2012.
[115] See for example Toronto Police Service After-Action Review (June 2011), online at: http://torontopolice.on.ca/publications/files/reports/g20_after_action_review.pdf; Ontario Provincial Police, *Consolidated After Action Report – Summits 2010* (November 2011), online at: http://www.opp.ca/ecms/files/265483322.4.pdf.

further delays.

Canada pledged to consider signing and ratifying the Optional Protocol as part of the pledges it made when standing for election to the UN Human Rights Council in 2006.[116] Canada accepted the recommendation to consider the possible signature and ratification of the optional protocol in 2009 during the state's Universal Periodic Review consideration,[117] and said domestic legislation was undergoing the required analysis. Alongside this ratification, the Canadian government should ensure the creation or designation of one or more National Preventive Mechanisms which are strong, effective, and independent and which can freely monitor all places of detention and have access to all information pertaining to all persons deprived of their liberty in order to prevent torture and other ill-treatment.

RECOMMENDATION:

Canada should move immediately to ratify the Optional Protocol to the Convention Against Torture and take all necessary steps to implement the Optional Protocol domestically.

B) INTERIM MEASURES - ARTICLE 22

This Committee has previously raised concerns about Canada's "reluctance to comply with all requests for interim measures of protection, in the context of individual complaints presented under Article 22 of the Convention."[118] The concerns about the dismissive approach of the Canadian government to this Committee's interim measure requests persist. A recent example is the case of Leon Mugesera who was deported to Rwanda to face genocide and war crimes charges despite the issuance of a request for interim measures by this Committee, asking Canada to stay the deportation proceedings while it considered a pending claim that Mugesera would face torture in Rwanda.[119] Dismissing Mugesera's application for a temporary stay of his deportation while his case was pending before the Committee, the Superior Court of Quebec held that the requests and findings of the Committee are not binding on states parties.[120]

As it has in similar cases in the past, Amnesty international had urged the government to comply with the interim measures request, to allow this Committee sufficient time to examine the merits of Mr. Mugesera's request. Amnesty International has growing concern about the frequency with which Canada now often refuses to comply with interim measure requests, from this Committee and other international human rights bodies, particularly in cases involving deportation or extradition.[121]

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[116] Human Rights Council: Canada's Commitments and Pledges,10 April 2006, available online at: http://www.un.org/ga/60/elect/hrc/canada.pdf
[117] Report of the Working Group on the Universal Periodic Review, Canada, Addendum, Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review, A/HRC/11/17/Add, June 2009.
[118] Conclusions and recommendations of the Committee against Torture, Canada, CAT/C/CR/34/CAN, July 2005 at para. 4(f).
[119] Toronto Star, "Montreal judge rejects Leon Mugesera's bid to avoid deportation to Rwanda" (23 January 2012), online at: http://www.thestar.com/news/canada/article/1119658--montreal-judge-rejects-leon-mugesera-s-bid-to-stay-in-canada; Canadian Centre for International Justice Public Cases and Interventions: Mugesera, online: http://www.ccij.ca/programs/cases/index.php?DOC_INST=3.
[120] Mugesera c. Kenney, 2012 QCCS 116 at paras. 36-37, online at: http://www.jugements.qc.ca/php/decision.php?liste=58657237&doc=E90413FB495183C9BEEFE7F3E30025278588174B1CF368F667F6EB52003CF5FF&page=1.
[121] See for example, *Ahani v. Canada (A.G.)* (2002), 58 O.R. (3d) 107 (Ont. C.A.), leave to appeal to

When accepting the Convention and the complaint mechanisms associated with it, Canada also accepted the procedure of interim measures of protection as "necessary to avoid irreparable damage to the victim or victims of alleged violations."[122]

Amnesty International has highlighted how crucial it is to the integrity of the international human rights system, which is centrally reliant on the cooperation of states, that Canada comply with all requests and recommendations, including interim measures, made by UN bodies. Canada continues to assert, including in front of domestic courts, that interim measures requests are not binding.[123]

Recommendation:

Canada must cooperate fully with the Committee against Torture including by abiding by their declaration under Article 22 to accept the competence of the Committee to receive and consider communications from or on behalf of individuals and by complying with associated requests for interim measures.

S.C.C. refused, [2002] S.C.C.A. No. 62 (Q.L.): The Ontario Court of Appeal ruled that "neither the Committee's views [in this case the Human Rights Committee] nor its interim measures requests are binding on Canada as a matter of international law, much less as a matter of domestic law"; *T.P.S. v. Canada*, CAT/C/24/D/99/1997, UN Committee Against Torture (CAT), 4 September 2000, online at: http://www.unhcr.org/refworld/docid/3f588ed03.html.

[122] Rules of Procedure of the Committee Against Torture, CAT/C/3/Rev.5, Rule 114.

[123] Mugesera c. Kenney, 2012 QCCS 116 at paras. 36-37.

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