International Civil Liberties Monitoring Group (ICLMG)
Canadian NGO Coalition – Shadow Brief

Submission of Information by the ICLMG to the Committee Against Torture (CAT) for the Examination of Canada's 6th Report in May 2012

(Endorsed by the Canadian Association of University Teachers)

The ICLMG submits that certain Canadian policies, practices and cases contravene multiple provisions of the "Convention Against Torture". In this respect, we request the Committee to take note of the following information which we urge the committee to use in formulating questions, comments, observations and recommendations when Canada's 6th Report comes up for its S.19 examination during May 2012.

1. The ICLMG

The ICLMG is a pan-Canadian coalition of civil society organizations that was established in the aftermath of the September 11th, 2001 terrorist attacks in the United States. The coalition brings together 40 international development and human rights NGO's, unions, professional associations, faith groups, environmental and refugee organizations. Its purpose is to monitor the impact of anti-terrorism legislation on human rights standards, to advocate against abuses and violations, and in certain cases, to take up the cause of those who have become innocent victims of such abuses.

2. Canada's Ratification and Implementation

Canada ratified the Convention Against Torture on June 24th, 1987 and the Treaty entered into force for Canada on July 24th. 1987. On November 13th, 1989 pursuant to arts. 21 and 22 of the Convention, Canada recognized the competence of the CAT to receive and consider inter-state and individual complaints against it. Canada has implemented the Convention through the adoption of the Canadian Charter of Rights and Freedoms in 1982 and in particular, through the adoption of articles 12 and 24(2) of the Charter. Canada's implementation also includes art. 269.1 of the Criminal Code and the enactment of the Crimes Against Humanity and War Crimes Act, also certain provisions of the Immigration and Refugee Protection Act. Canada has also ratified the International Covenant on Civil and Political Rights which includes art. 7 (against torture) and the Convention on the Rights of the Child which includes art. 37a (against the torture of children).

3. Canada's 6th Report

The ICLMG has examined Canada's 6th Report and wishes to take issue with the information or lack of information in several of the report's paragraphs (the paragraphs of Canada's 6th Report which are at issue are referred to in turn under the appropriate articles of the Convention).

CAT, art. 2 : Legislative, administrative, judicial and other measures to prevent torture.

4. Anti-Terrorism Act (Canada's 6th Report, par. 13 & 14)

Contrary to the position taken by Canada in these paragraphs, the ICLMG asserts that the Anti-Terrorism Act of 2001 is not a measure to prevent torture. Quite the opposite; by introducing preventive detention, arbitrary arrest and investigative hearings, and by suspending the principle of innocence until proven guilty, and the right to remain silent, this law opens the door to treatment and punishment prohibited by the Convention. In para.14, Canada refers to the two provisions – preventive detention and investigative hearings – which became inoperative in 2006 due to a five-year sunset clause. The government tried to reintroduce these measures in 2007 but they were defeated in Parliament. Now with a majority, the government has introduced them once again in Bill S-7 and their passage is virtually assured.

These provisions in Bill S-7 not only contravene the Canadian Charter of Rights and Freedoms and the International Covenant on Civil and Political Rights (ICCPR) but open the door to cruel and inhuman treatment and other treaty violations.

5. Security Certificates (Canada's 6th Report, para.15, 16 & 17)

In these paragraphs, Canada refers to the Security Certificate process under the *Immigration and Refugee Protection Act which until 2008 contained no measure to prevent torture. On the contrary, with individuals imprisoned for long periods on the basis of secret evidence and without the recognized protections for a fair trial, torture and other Convention violations were predictable. In 2007, the Supreme Court of Canada ruled unanimously that this process violated the Charter of Rights and was unconstitutional (Charkaoui vs. Canada).

In an attempt to respond to the Supreme Court judgment, the government introduced and passed amendments providing for "special advocates" who would protect the interests of those detained and who could challenge the evidence – but could not discuss the evidence with the detainees. As a result, a detainee can still be held in prison without a fair trial, does not have the right to know the case against him, nor the right to answer that case and may be deported to countries where there is a risk of torture. The ICLMG argues that the amended security certificate process is still in violation of human rights standards for a fair trial and does not satisfy the 2007 Supreme Court judgment. As a result, there are now new challenges to the legislation which could again test these issues before the Supreme Court.

But more serious is information contained in a letter sent in 2008 by the Director of the Canadian Security and Intelligence Service (CSIS) to the Minister of Public Safety. The letter warned that if certain opposition amendments were made to the Immigration and Refugee Protection Act, it could become impossible to use security certificates to arrest suspected terrorists since it would prohibit the use of information from regimes known to use torture, thus indicating that such cases might not stand up without information obtained under duress. This information vindicated the suspicions of the five men who had been detained in Canada for long periods under security certificates, i.e., Messers. Charkaoui, Harkat, Almrei, Jaballah and Mahjoub.

This information was compounded by a further revelation that in 2010, the Minister of Public Safety sent a letter to the Director of CSIS stating that in some cases, where a threat to human life or public safety exists, information from foreign agencies that may have used torture to obtain it can be used. This was supplemented by a directive sent by the same Minister to CSIS in July 2011 setting out a process whereby intelligence information might be shared with foreign agencies known (or suspected) to practice torture.

The ICLMG submits that not only are such policies in violation of the CAT art.2(2) but they also promote a market for information obtained from torture. The emphasis should be on obtaining information through legitimate means and not on providing exceptions where torture may be used. In 2006, Justice Dennis O'Conner, reporting for the federal Arar Commission, recommended policies "aimed at eliminating any possible Canadian complicity in torture, avoiding the risk of other human rights abuses and ensuring accountability.

Canada's 6th Report makes further statements on security certificates under art.11 (Canadian Report, para.75-83) and in Appendix I, Review of Jurisprudence. The ICLMG will make further comments on those statements later in this document.

6. Criminal Code (Canada's 6th Report, para.18)

While it is correct that art. 269.1 of Canada's Criminal Code is a strong provision against torture (CAT, art.4) and the use of evidence obtained from torture (CAT, art.15), and that the RCMP manuals contain provisions against the support or condoning of torture, these provisions are undermined by the communications and directives relating to CSIS as described in Part '5' above. Consequently, there is inconsistency between the Criminal Code and the RCMP policies on torture on the one hand, and those relating to CSIS on the other.

7. Consular Services (Canada's 6th Report, para.19-23)

The ICLMG takes issue with Canada's statements in para.23 that "in cases where it is suspected that Canadians, detained abroad, have suffered torture … Canada makes the strongest efforts … to ensure the detainee's rights are respected." This was not the situation with respect to the recent case of Abousfian Abdelrazik, nor with the cases of Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin which were the subject of an enquiry by Justice Frank Iacobucci in 2006-08.

Mr. Abdelrazik was arrested while visiting the Sudan in 2003, apparently at the request of Canadian intelligence agents. Allegedly tortured while in detention, he was never charged and was released from prison in 2005. He was finally cleared of all links to terrorism by the RCMP and CSIS in 2007 and returned to Canada in 2009, but he remained on the U.N. 1267 blacklist until 2011. In his legal actions against the Canadian government (Abdelrazik vs. Canada, 2009, FC 580), the court found that CSIS was complicit in his initial detention in Sudan and that torture was a viable cause of action. The Canadian government moved to strike the claim on the grounds that there is no enforceable right to protection from torture but the court disagreed (this case and issue are not mentioned in Canada's 6th Report).

Messers Almalki, Elmaati and Nureddin, all Canadians, were arrested while visiting Syria where they were detained and tortured as a result of indirect actions by Canadian officials, i.e., the sharing of incorrect information and assisting with interrogations.

Mr. Almalki was arrested in 2002 and spent 22 months in detention in degrading and inhumane conditions, interrogated and mistreated. He did not receive any consular visits during his detention.

Mr. Elmaati was arrested in 2001, spent 2 months in Syrian detention and was then transferred to Egypt where he spent another 24 months in detention. He was held in degrading and inhumane conditions, interrogated and mistreated. He did not receive any consular visits in Syria although he did receive some in Egypt.

Mr Nureddin was arrested in Syria in 2003 and spent 33 days in detention where he was held in degrading and inhumane conditions, interrogated and mistreated. He did not receive any consular visits.

All eventually returned to Canada without any charges against them. In the Iacobucci Report on these cases in 2008, the Commissioner was critical of the consular services in 2 of these cases (see Appendix 2, Canada's 6th Report).

8. Extradition – The Hassan Diab Case (Canada's 6th Report, no mention)

Hassan Diab is a Canadian university professor alleged by the French government to be a party to a 1980 bombing in France that killed 4 people. France has recently sought the extradition of Diab from Canada to stand trial in France where he could face life in prison. Under Canada's extradition law, there is first a hearing before a judge and then a reference to the Minister of Justice who makes the final decision. Contrary to international human rights standards, the hearing before the judge does not provide the recognized protections for a fair trial – there is a lack of due process, no procedure to test unreliable evidence, including secret evidence and evidence obtained through torture; nor is there protection against unjust extradition requests that are politically motivated.

In the judicial hearing, the judge found (June 6, 2011) that the case against Diab was weak, suspect and confusing and did not describe the source of certain evidence or the circumstances upon which it was received . Nevertheless, under the Canadian extradition law, he felt obliged to rule for the extradition. The case then went to the Minister of Justice who also decided in favour of extradition. This is an example of a Canadian law which does not protect individuals against evidence resulting from torture and doesn't conform to Canada's obligations under the Convention, especially art.2 and 15 (CAT) (this case and issue are not mentioned in Canada's 6th Report).

9. Omar Khadr, Canadian tortured at Guantanamo Bay. Cuba (Canada's 6th Report, no mention)

Omar Khadr is a Canadian citizen who was captured by U.S. forces following a firefight in Afghanistan in 2002 when he was 15 years old. He was labelled an "enemy combatant" and was accused of murdering an American soldier. He has been in prison at Guantanamo Bay for 10 years and has been subject to torture and ill-treatment. Although this detention and process have been

condemned as illegal by several courts and a parliamentary committee, Canada has failed to comply with its obligations under the CAT to prevent, prosecute and remedy the torture to one of its citizens.

As a child combatant at the time of his arrest, Omar Khadr was entitled to special protection under the Convention on the Rights of the Child and the Optional Protocol on the involvement of children in armed conflict. This issue is more fully presented in a shadow brief prepared for the CAT and Canada's 6th Report submitted jointly by Lawyers Rights Watch Canada and ICLMG (this case and issue are not mentioned in Canada's 6th Report).

10. Canadians Abroad (Canada's 6th Report, para.24 & 25)

The ICLMG agrees with CAT's Draft General Comment No. 2 (the Comments) that all general transfers of individuals on a foreign territory (by Canadian officials or military officers) in which there is a potential risk of torture, would be a violation of obligations under the CAT, and therefore, the ICLMG does not agree with Canada's statement in para.25 which says that such a policy is not supported by the text of the convention. We believe that CAT's position is supported by CAT art.2,4 and 5. For a more substantial statement of support, we refer to an article in the National Journal of Constitutional Law by Maureen Webb (27 NJCL 2011).

CAT art.11, Treatment of persons arrested, detained or imprisoned

11. Immigration Detention (Canada's 6th Report, para.75-83)

The ICLMG has already dealt with detention resulting from security certificates in Part '5' of this shadow brief. Nevertheless, we wish to repeat our disagreement with Canada's statement in para. 83 that the Bill C-3 amendments to the Security Certificate process under the Immigration and Refugee Protection Act respect Canadian and international human rights standards. Under the Security Certificate process, an individual can still be detained for long periods without due process, without knowing the case against him, nor have the right to answer that case and may be deported to a country where there is a risk of torture. Tainted evidence cannot be properly challenged. The ICLMG submits that this amended law does not satisfy the 2007 Supreme Court judgment and it is likely to reappear before the Court shortly.

CAT, art.12, Impartial and Prompt Investigation

12. The Commission for Public Complaints Against the RCMP (Canada's 6th Report, para.97-100)

In 2004, the Canadian government established the Arar Commission to investigate and report on the actions of Canadian officials (including the RCMP) relating to the arrest, detention, treatment and torture of Maher Arar, a Canadian citizen. in Syria in 2002 and 2003. The Commission, under Justice Dennis O'Connor, carried out its work from February 2004 until December 2006. In his first report in September 2006, Justice O'Connor concluded that the RCMP, without justification, had labelled Mr. Arar an "Islamist extremist linked to Al Quaida" and then shared this inaccurate information with U.S.

law enforcement agencies. He also concluded that it was likely that in arresting Mr. Arar in New York and sending him to Syria, the U.S. authorities relied on the false information given to them by the RCMP..
In his first report, Justice O'Connor made 23 recommendations to correct the abuses and failures which led to Mr. Arar's ordeal. In his second report in December 2006, Justice O'Connor made strong recommendations to establish a comprehensive review and oversight mechanism for security and intelligence operations in Canada.

While there are some review bodies in Canada (such as the Commission for Public Complaints against the RCMP – the CPC), they were, according to Justice O'Connor, narrowly-focused, diverse in their mandates and powers, ineffective against joint operations and unable to protect Mr. Arar (and others) from the abuse he endured.

O'Connor's recommendations would provide greater assurance that security and intelligence activities respected the rule of law, due process and human rights standards. To date, six years later, there is still no action by the Canadian government to implement O'Connor's recommendations despite increasing security measures and with several intelligence and law enforcement agencies having no oversight or review procedures at all. This is confirmed by Canada in para. 97 where it says that there have been no changes to the CPC for the RCMP, and in para. 98 where it says "with respect to independent oversight of the RCMP, there have been no mechanisms established."

All of this is soon to be made worse by an initiative of the U.S. and Canadian governments to establish a North American Security Perimeter which for many purposes would establish one harmonized border protection and national security regime for all of Canada and the U.S. There is no doubt that in such circumstances, it would be extremely difficult to get the U.S. to agree to the comprehensive oversight and review agency for all intelligence and security operations as proposed by Judge O'Connor. As a result, it will become almost impossible to curb the abuses which happened to Maher Arar and others.

13. The Optional Protocol (Canada's 6th Report, para.9&10)

The Optional Protocol to create a sub-committee on the Prevention of Torture was initiated in 2002 and came into force in 2006. To date, 71 states have signed the Protocol and 62 have ratified. Canada has neither signed nor ratified this important Protocol. We consider the reasons set out in para. 10 for not acceding to this protocol as unconvincing. It has now been 10 years since the Protocol was initiated and many other states have completed their ratifications and accessions. We recommend that CAT urge Canada to ratify as soon as possible.

Conclusion

In this submission, the ICLMG requests the CAT to raise the above-cited issues with the Canadian government during the review of Canada's 6th Report during May 2012 and to recommend changes to its laws and policies which would require Canada to act in full accord with the Convention Against Torture.

Montreal, April 16th, 2012.

Roch Tassé, National Coordinator, ICLMG rocht@iclmg.ca
Warren Allmand, Steering Committee, ICLMG allmandw@gmail.com