International Civil Liberties Monitoring Group (ICLMG)

Canada
Submission of Information to the Committee Against Torture
65th session (12 November - 7 December 2018)

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 45 international development and human rights NGOs, unions, professional associations, faith groups, environmental and refugee organizations. Its purpose is to monitor the impact of anti-terrorism and national security 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 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 art. 21 and 22 of the Convention, Canada recognized the competence of the Committee Against Torture (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. ICLMG on Canada's obligations

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 Report comes up for its S.19 examination during the 65th session (12 November - 7 December 2018).

<u>CAT, art. 2 : Legislative, administrative, judicial and other measures to prevent torture</u>

4. Anti-Terrorism Legislation

Contrary to the position taken by Canada in its previous report, 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, these provisions 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.

There is a bill going through Parliament right now, Bill C-59, the National Security Act of 2017, that would remove the provision on investigative hearings from the Criminal Code. Although we welcome this proposed change, there are several major concerns with the bill that need to be addressed and that are not mitigated by the removal of the investigative hearings provision.

Bill C-59 was introduced by this current government with the aim of reforming Canada's national security framework and fix the problems with the very problematic Anti-terrorism Act of 2015 (formerly known as Bill C-51). Not only does it not fix the problems with C-51, it introduces new ones. Some of the most troubling aspects of Bill C-59 are 1) the bill's empowerment of our national security agencies to conduct mass surveillance; 2) the practical impossibility of an individual effectively challenging their inclusion on the "no-fly list"; and 3) the authorization of Canada's signals intelligence agency, the Communications Security Establishment (CSE), to conduct cyberattacks.

Another major concern, that is more closely related to the work of the CAT, is the fact that C-59 does not eliminate the warrant-based regime created by C-51 for authorizing the Canadian Security Intelligence Service (CSIS) to engage in activities that would otherwise violate the Charter. The powers retained by CSIS, although trimmed by C-59, still allow the agency to violate non-derogable rights in a future major public order emergency. In particular, the new restrictions on this warrant regime leave open the possibility of the authorization of incommunicado detention. This would constitute enforced or involuntary disappearance, a practice of arbitrary detention that places a suspect outside of the protections of the law that are safeguarded by access to counsel and at risk of even more serious human rights violations, such as mistreatment.

Finally, one of the few amendments that were brought to Bill C-59 — out of the hundreds of changes suggested by the ICLMG, other human rights organizations and the opposition parties — introduces a provision mandating that directives be put in place to prevent all Canadian agencies from becoming complicit in torture abroad. However, this provision does not specify what those directives should stipulate to avoid such complicity, which leaves too much discretion to ministers, as you will see below under section 6 regarding ministerial directives on the use of information obtained through torture. Bill C-59 is currently being debated in the Senate.

5. Security Certificates

In the Security Certificate process under the Immigration and Refugee Protection Act, 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.

In a subsequent judgment released on May 14, 2014, the Supreme Court of Canada rightly acknowledged that the amended security certificate regime "does not provide a perfect process" and has "inherent limitations." However, the court concluded that the special advocates and judges involved can mitigate the unfairness inherent in this process. We strongly disagree. Regardless of special advocates' skill, experience or diligence, the statutory structure prevents them from fulfilling their statutory duties; the limitations they are subject to are simply too serious and numerous. And although it is helpful that the Supreme Court of Canada asserted that the process must be fair, and provided judges with more robust guidance on how to exercise their discretion in order to achieve fairness — including being "vigilant" and "skeptical" of governments' "overclaiming" national security in a bid to keep information secret — relying on judges' discretion to ensure a fair process is insufficient. When it comes to the protection of internationally enshrined human rights, discretion is simply never enough. Although the case fundamentally engages Canada's binding international obligations, the decision contained no reference to any relevant international legal sources.

Furthermore, a very worrisome letter sent in 2008 by the Director of CSIS to the Minister of Public Safety 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 have been detained in Canada for long periods under security certificates, i.e., Messers. Charkaoui, Harkat, Almrei, Jaballah and Mahjoub.

For all these reasons, the ICLMG asserts that the amended security certificate process is still in violation of human rights standards for a fair trial, and continues to call for its elimination.

5.1 Mohamed Harkat

On the specificity of Mr. Mohamed Harkat's case, the security certificate to which he is subjected to was upheld by the Supreme Court of Canada in the same May 14, 2014 judgment; a decision we disagree with as well. Mr. Harkat is a United Nations Convention refugee who has lived in Canada for 22 years. In 2002, under the security certificate regime, Mr. Harkat was imprisoned in maximum security for 43 months. He spent years under house arrest, and was placed under some of the most severe bail conditions in Canadian history. All of this without ever having been charged with a crime. The original "evidence" against Mr. Harkat was destroyed by CSIS, and the allegations against him are based on the testimony of an informant who failed a lie detector test and was never cross-examined in court. Deportation proceedings have been initiated by the government in 2015 as Mr. Harkat's domestic recourses have been exhausted. Despite representing no risk to Canada, Mohamed Harkat is facing a very high risk of torture were he to be deported to his native Algeria with the label of terrorism suspect hanging over his head. In the past, the Supreme Court has ruled government

should not remove individuals where there is a substantial risk of torture. However, it also said there may be undefined “exceptional circumstances” where removal is warranted, which is in violation of the Convention Against Torture.

Mr. Harkat, his wife and his family and friends have been living in constant fear since deportation proceedings began three years ago. The toll of the security certificate and its draconian rules approach what many would deem "cruel and unusual punishment." Sophie Harkat, Mr. Harkat’s wife, herself has described the "psychological torture" that they have gone through, including: being constantly followed by agents from the Canadian Border Security Agency (CBSA), restricting Harkat from taking on any employment that requires a cell phone or a computer, or driving across provincial lines, unannounced visits and arbitrary house searches, and contradictory instructions from CBSA that cause further confusion and stress around following bail conditions. Furthermore, the clinical director of the Integrated Forensic Program at the Royal Ottawa Health Group — one of Canada's leading mental health specialists — recently wrote a report based on 112 evaluation sessions with Mr. Harkat going back to 2009, as well as additional interviews dating back to 2005. The report states that:

> Mr. Harkat has a history of chronic depression, anxiety and post-traumatic stress related to having been incarcerated on a Security Certificate in maximum security for 43 months, including one year in solitary confinement followed by many years of living under very strict bail conditions and facing deportation to Algeria, where he believes he will be arrested, tortured and at risk of death.[…] There are times when Mr. Harkat has experienced recurrent visions on a virtually daily basis over several months of being arrested, incarcerated, deported and tortured. Sometimes he has visions of being shot by CBSA due to a misunderstanding, minor misstep or accidental violation of his bail conditions. Often, he has been troubled by insomnia and recurrent nightmares with the same themes as his daytime visions. Energy has been chronically low and concentration impaired such that reading is limited to no more than five minutes at a time. Appetite is chronically poor to a point where he has to force himself to eat even one meal a day.

The report goes on to find that Harkat has "a complete absence of psychopathic traits" and scored at the low end of risk on a wide battery of tests designed to test for rigidity of thought or propensity to violence. The report also finds that "Harkat has continued to express a belief in Canadian democracy and the judicial system in spite of his complaints about the flaws of the government's case against him and the unfairness of the process. My experience is that ironically Mr. Harkat's level of confidence in Canadian democracy and judicial system surpasses that of most Canadian-born citizens." The report concluded that: "It cannot be overemphasized how stressful Mr. Harkat's present situation is, and how the present situation is anything but benign."

The Harkats were back in court in November 2017 to try and relax their bail conditions, which continue to cause major health issues. As the mental health evaluation noted, "The risk of continuing with the present situation is further permanent neurobiological changes that will be more refractory to treatment and recovery the longer they continue. This risk is not only to his mental health, but his

physical health as well. Chronic stress is associated with increased risk for cardiovascular events (heart attacks and strokes), and suppressed immunity, including susceptibility to infections and cancer. There are also costs to his wife and family, financial costs, including to the Canadian taxpayer, and loss of Mr. Harkat's potential contributions through work."

Despite these serious concerns, despite the fact that his bail conditions have been regularly relaxed in the past, including the removal of his electronic monitoring bracelet several years ago, and despite the fact that CSIS has not even filed a risk assessment for this bail hearing, his current bail conditions were not relaxed further. The Harkats and their supporters are now urging the Public Safety Minister, under section 42.1 of the Immigration and Refugee Protection Act, to allow Mr. Harkat to stay in Canada as that would not be contrary to the national interest. Based on the report cited above and other court assessments, this a fact which is already clear.

Finally, the Harkats are still waiting to hear the United Nations' response to their application. It is more urgent than ever that the U.N. addresses Harkat's case. It's a matter of life or death.

In brief, since the Security Certificate regime is in violation of fundamental human rights, since deporting someone to a country where there is a risk of torture is contrary to the Convention Against Torture, and since Mr. Harkat, and his family, have suffered major health issues tantamount to psychological torture for the last 16 years, we ask the Committee to urge Canada to stop Mr. Harkat's deportation proceedings, to quash the security certificate against him and to eliminate the security certificate regime altogether.

6. Ministerial Directives on Information Obtained through Torture

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 minister subsequently issued essentially identical directions to the Royal Canadian Mounted Police (RCMP) and CBSA.

The current government has issued new directives on the collection, request and use of information tied to torture that, while they go further than previous rules, still do not meet Canada's international obligations to never and in no way support torture. Here are some of our specific concerns regarding those new ministerial directives:

- The limit on the sharing and requesting of information is still set to whether there was a "substantial risk" of torture. This is the same threshold as previous directives, and remains too high a limit for rejecting certain kinds of information.
- Even where a substantial risk of mistreatment is present, mitigating factors such as assurances and caveats can still allow for the sharing or requesting of information. There is no information on how those caveats and assurances are enforced once information is shared or requested.

- That, regarding the use of information that was likely obtained through the mistreatment of an individual, the government only lays out three situations where this information cannot be used – leaving open other potential uses, such as initiating further investigations, developing profiles, or perhaps even placing them on the no-fly list.
- That, as in other reporting on national security issues, what will be shared publicly will not be enough to ensure true accountability and transparency in how information is shared, requested or used.

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, the public inquiry into the case of Maher Arar clearly documented that irresponsible sharing of intelligence information from and to Canada can and does result in torture. Notably, Commissioner Dennis O'Connor made an explicit recommendation that intelligence information should never be shared by Canadian agencies if it could lead to torture, and recommended policies "aimed at eliminating any possible Canadian complicity in torture, avoiding the risk of other human rights abuses and ensuring accountability."

While it is correct that art. 269.1 of Canada's Criminal Code is a strong provision against torture (CAT, art.4) and against 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 ministerial directives described above.

Finally, the international context makes Canada's actions all the more urgent. U.S. President Donald Trump told ABC News that he is open to the return of torture during interrogations, saying he believes "torture works." This assertion raises troubling questions about the very real risk that intelligence sharing between our two countries may again become tainted by concerns about torture.

7. Consular Services

The provision of consular assistance when troubles arise is not mandated by legislation, but is instead a purely discretionary act, one that may well depend on political will and the identity of victims, and reflect the racist biases of many a consular affairs case officer. Thus when CSIS shares inflammatory and often incorrect information, say, about a Muslim individual travelling in the Middle East, Global Affairs is under no obligation to check on whether said individual is being tortured while detained as a result of that false information.

For example, when those Canadians wealthy enough to enjoy traveling in the Caribbean were stranded by Hurricane Maria, an emergency response centre with 200 staff was put together and responded within two minutes to emails and telephone enquiries from 5,000 people. Admirable as that is, it is a sign of political priorities that while vacationers facing power outages and flight delays can access Global Affairs, those with loved ones detained illegally and tortured abroad do not receive such expedited responses. Sometimes it can take years.

Critically, one finding of the report of the Auditor General on Consular Services to Canadians Abroad regarding those detained is:

> Global Affairs Canada officers did not always contact Canadians who had been arrested or detained abroad within its service standards, and case files often provided no explanation as to why no contact was made. We also found that the level of consular assistance varied from one case to another. While assistance may vary due to local conditions or judgment of the consular officer, the files did not contain sufficient documentation to explain this variation. […] In cases involving allegations of mistreatment or torture of Canadians detained abroad, we found that consular officers took immediate action to contact detainees and make in-person visits when possible. However, we found that it took between one and six months for departmental officials to formally assess the allegations. Also, the Department did not provide sufficient training to consular staff on how to conduct prison visits.

While the auditor general says this is important because "Canadians detained abroad often require immediate contact and information from family members as well as lists of local lawyers," it is also significant because most torture occurs immediately after detention begins. If it is taking Ottawa up to six months to figure that out, the torture survivor is essentially stranded. Such abandonment of Canadians detained abroad is nothing new, and was in fact detailed in two separate judicial inquiries by Judges O'Connor and Iacobucci into the role of Canadian officials in the torture of four Canadian Muslim men in Syria and Egypt, Maher Arar, Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin. The inquiries also found that the term abandonment might be too charitable a description; complicity in their torture would be far more accurate. Although these inquiries happened more than a decade ago, little seems to have changed. Among several other concerns, the report asserts that:

> Once officials had determined that torture or mistreatment had likely occurred, it then took a further 47 days on average to inform the Minister in writing for cases of torture, and 29 days on average to inform the Deputy Minister in writing for cases of mistreatment. In our view, taking three months or more to advise the Minister about whether a Canadian detained abroad is being or has been tortured does not meet the intent of Justice O'Connor's recommendations. We note that of the 15 cases we reviewed, 6 Canadians remained detained abroad as of March 2018.

7.1 Messers Almalki, Elmaati and Nureddin

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. Although, the Iacobucci Commission cleared them of all suspicions of criminal activities and found that Canadian officials were indirectly responsible for their detention and mistreatment, it took another 9 years as well as a lawsuit for the men to receive compensation and an apology from the Canadian governement.

7.2 Abousfian Abdelrazik

Mr. Abdelrazik was arrested while visiting Sudan in 2003, 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.

Internal documents released under freedom of access requests indicate how hostile the foreign affairs bureaucracy was to helping return a Canadian who had been tortured abroad due to the actions of CSIS. "We will take no extraordinary measures, such as sending in a government airplane or a private charter, to effect his [Mr. Abdelrazik's] departure from Sudan," wrote Canadian ambassador David Hutchings from Khartoum in 2004. "Should [Abdelrazik's ex-wife] get a private plane, there is very little we could do to stop him from entering Canada. He would need an [emergency passport] and I guess this could be refused but on what ground?" wrote Odette Gaudet-Fee, a case officer who later added she wished she had a magic wand to make the case go away. While the Federal Court found that the Canadian government violated Abdelrazik's rights in refusing to return him home (and ordered the government to comply with a repatriation order), Odette Gaudet-Fee remains a consular case officer with no punishment or consequences.

In his legal action 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.

Although the federal governement wanted to reach a settlement in Mr. Abdelrazik’s suit, it backed out of mediation on the day before it was scheduled to begin, in April 2018. Again, on the eve of the opening of the long-anticipated 8-week trial for Abousfian Abdelrazik’s civil case in September 2018, the federal government asked the case be adjourned so that, under Section 38 of the Canada Evidence Act, documents which the government itself had already released be reviewed for national security concerns. Notably Federal Court Justice St. Louis agreed to grant the adjournment “reluctantly” and ordered the government to immediately pay the costs of Mr. Abdelrazik’s legal team in preparing for trial, costs that she concluded have been “thrown away as a result of the adjournment”.

We believe these last-minute indefinite delays are cynical and shameful, and were likely pursued for partisan concerns, as the recent settlements and compensations for Canada's complicity in detention and torture abroad were met with outrage from a portion of the Canadian population and media, and we will be having a federal election in 2019.

This action skirts Canada's fundamental obligation under international law to provide an effective remedy when its officials are complicit in serious human rights violations. We repeat our demand that the Canadian government halt these contemptuous delay tactics and move instead to promptly ensure Mr. Abdelrazik receives appropriate and fair redress.

8. Extradition – The Hassan Diab Case

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 had sought the extradition of Diab from Canada to stand trial in France. 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, and no procedure to test unreliable evidence, including secret evidence and evidence obtained through torture. Experts testified at the hearing about France's troubling history of using intelligence obtained through torture in terrorism trials. Furthermore, there is no protection against unjust extradition requests that are politically motivated.

In the judicial hearing, the judge found 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. Even though Dr Diab should have been freed as the "evidence" was manifestly unreliable, the judge said he felt forced by the law to uphold the extradition order. But he also said that he couldn't consider the evidence of the experts on the unreliability of the hand writing analysis because that was reserved for trial — which made no sense since he had to determine if the evidence was "manifestly unreliable" for Dr Diab not to be extradited. The court of appeal said that the judge was wrong in not ruling on the evidence but that they wouldn't intervene with his decision. The Supreme Court refused to hear Dr Diab's appeal, without reason. Every single level of Canadian courts failed Dr Diab. The case then went to the Minister of Justice who also decided in favour of extradition. Two days later, in November 2014, he was on a plane to France where he spent the next three years in jail, in solitary confinement 20 to 22 hours a day. The French investigative judges found that the fingerprint comparison was a key reason to release Dr Diab. They described the unsourced intelligence as "full of contradictions and inaccuracies", and they verified that Dr Diab was not even in France when the bombing occurred. The investigative judges finally closed their investigation (with no charges) so Dr Diab was released and returned to Canada in January 2018. Dr Diab was finally reunited with his family, including his son, who was born while he was detained in France. He missed the first 3 years of his life. The French prosecutors have appealed this decision.

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 Against Torture, especially art. 2 and 15.

Recently, troubling revelations based on access to information request showed that lawyers with Canada's department of Justice were helping France build its case against Dr Diab, a Canadian citizen. They even obtained exculpatory evidence before he was extradited but never disclosed it to the court — something they are allowed to do under the extradition law. Even more recent documents have shown that France has made a fingerprint comparison that cleared Dr Diab one year before it made its extradition request.

The department of Justice recently opened an internal review into the case of Hassan Diab; which was promptly replaced by an external review because of the obvious conflict of interest. However, Dr Diab, his lawyer and his supporters, including the ICLMG, are calling for a public inquiry into his case, as an external review is insufficient. A public inquiry is necessary to be able to compel documents and testimonies to get to the whole truth, and to hopefully reform the law.

9. Omar Khadr, Canadian tortured at Guantanamo Bay, Cuba

Omar Khadr, a Canadian citizen was subjected to years of torture and ill-treatment and arbitrary detention after being captured by Special Forces troops of the US Armed Forces in Afghanistan in July 2002 and imprisoned by the US first in Bagram prison in Afghanistan and then in Guantanamo Bay prison until repatriation to Canada in September 2012. Omar Khadr was imprisoned in Canada until granted judicial interim release in May 2015. In July 2017, Canada paid compensation to Omar Khadr.

After repatriation, Canada continued to subject Omar Khadr to harsh treatment which included, while in prison, periods of isolation and solitary confinement, denial of timely and necessary medical care to preserve his eyesight and treat other injuries suffered during his capture in 2002, unreasonable restrictions of rehabilitation opportunities through education and counselling, and the absence of legal aid. Throughout, Canada vigorously opposed court applications seeking improved conditions and persisted in characterizing and treating Omar Khadr as blameworthy and likely dangerous. Canada has not yet provided the full redress recommended by the Committee and required by the Convention.

ICLMG and Lawyers' Rights Watch Canada (LRWC) are calling on the government, among other things, to:

- Establish a Public Commission of Inquiry to investigate, identify those responsible and make recommendations to remedy the acts and omissions of Canadian officials that contributed to violations of Omar Khadr's rights, and to hold those involved accountable;
- Educate and train law enforcement personnel, lawyers, judges, prison officials, medical personnel and others who may be involved in the treatment of detained persons about their duties under the Convention;
- Ratify the Optional Protocol to the Convention;
- Enact legislation to put in place procedures for: complaints of torture and/or ill treatment by State and non-state actors; investigation of complaints and identification of suspects; and prosecution of suspects;

- Allow those who face torture outside of Canada to bring suit within Canadian courts.

We have sent you our full joint submission about Omar Khadr in another email, but you can also read it here: http://iclmg.cfswpnetwork.ca/wp-content/uploads/sites/37/2018/10/Report-to-CAT_re_Khadr_Oct2018_LRWC_ICLMG.pdf

CAT, art.12, Impartial and Prompt Investigation

10. Accountability mechanisms for state security agencies

In 2004, the Canadian government established the Arar Commission to investigate and report on the actions of Canadian officials 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 Qaida" 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.

Right now, only three out of 20 or so (the number isn't clear) agencies with national security responsibilities have independent review mechanisms that can receive complaints from the public about their conduct and evaluate if the agencies are respecting Canadian laws. According to Justice O'Connor, they are 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. There are many issues when it comes to these three review mechanisms:

- They often lack the resources to properly do their work, with small staffs and budgets dwarfed by the size of the agencies they are meant to keep accountable;
- They can hold secret hearings with secret outcomes;
- Their reports can be censored by the agencies they are supposed to review, as well as the ministers responsible for them;
- They often can't assess if an agency has broken the law because of poor-record keeping practices;
- They have no authority to enforce specific changes.

Two pieces of legislation have been introduced in the recent years to try and increase the accountability of Canada's security and intelligence agencies: An act creating the National Security and Intelligence Committee of Parliamentarians (NSICP), which became law in 2017; and Bill C-59, the National Security Act of 2017, which is being debated in the Senate as we write these lines.

Composed of 11 Members of Parliament (MPs) and Senators, the NSICP's mandate is to review all national security activities. While members will include opposition MPs and Senators, they are appointed by the Prime Minister, weakening the committee's independence from the government. It also won't be able to accept complaints from the public. There are also several other problems with it:

- The Committee won't have the power to compel people to appear or to obtain documents;
- The Committee members won't have access to all the documents and information necessary to do their work;
- The government will be able to block investigations on vague and broad grounds of ongoing national security operations;
- The Committee won't be able to seek judicial review of decisions to block access to information, limit investigations, or keep sections of their reports from being made public.

As for Bill C-59, it proposes to create a new review body, the National Security and Intelligence Review Agency (NSIRA), and an Intelligence Commissioner who would have oversight specifically over surveillance activities. The NSIRA will be able to review all Canadian national security activities. This review is desperately needed, but it's also important to remember that no amount of review can make up for bad laws like Bill C-51, the Anti-terrorism Act of 2015.
We think the NSIRA is strong overall, but there are weak points too:

1. The government would appoint the members, even though that's who they're reviewing. The members should be appointed by Parliament.
2. The NSIRA is not able to make binding recommendations. This is the case with existing review agencies, and we know that most of the time the agencies either don't accept or don't follow the recommendations.
3. It is essentially a super-SIRC (the current CSIS review body), so it comes with many of the same old problems.

The NSIRA will also incorporate a complaints mechanism, which is good, but current inadequacies with complaint-based review mechanisms such as SIRC raise other questions:

- How can you complain if you don't know that you are being spied on?
- Hearings are secret, so if you bring a complaint, you cannot talk about them.
- A complainant will not necessarily be allowed to hear the government's response to the complaint during the hearing.
- The recommendations may be so top secret, they won't even tell the complainant what they are.
- There is no compensation or reimbursement of legal fees or redress even if abusive conduct was found.
- SIRC — and the courts — have also been intentionally misled by CSIS on several occasions in the past.

Unfortunately, Bill C-59 does not address any of those problems.

The new Intelligence Commissioner would replace the Communications Security Establishment Commissioner – the CSE's current review body — and would give the new commissioner the power to approve the Ministerial authorizations for intelligence gathering before they become operational. This will apply to both CSIS and the CSE. Integrating oversight before a surveillance activity is carried out is a first in Canada. It's a significant and welcomed addition. However, we think the government could make it a lot stronger:

- The Commissioner must report to the new NSIRA, but the act does not specify what NSIRA must do with those reports. The law should be more specific.
- The Commissioner should not be appointed by the government, but through Parliament.
- The Commissioner should be a full-time position – not part-time, as it is currently written.
- Avenues for appeal and consulting should be added.
- The Commissionner should have mandatory, public reporting. In the US, similar oversight bodies working in secret have granted near 100% approval to surveillance warrants. To avoid that, we need a bit of sunlight on the process.

11. The Optional Protocol

Canada has neither signed nor ratified the Optional Protocol to the Convention against Torture. The Committee against Torture, as well as the ICLMG, numerous governments and many other human rights organizations, have called on Canada to ratify this important Protocol several times. The current government has committed to ratifying it in 2016 but has since watered down its commitment.

We recommend that CAT urge Canada, once again, to ratify the Optional Protocol as soon as possible.

Ottawa, October 15, 2018.

Anne Dagenais Guertin, Communications and Research Coordinator, ICLMG
communications@iclmg.ca