

Thursday, November 01, 2012

Human Rights Program
Department of Canadian Heritage
25 Eddy Street, 4th Floor
Gatineau QC K1A 0M5
Attention: Martha Labarge
Director General, Strategic Management and Human Rights,
Chair of the Continuing Committee of Officials on Human Rights

Via Email to: cpfdp-ccoehr@pch.gc.ca

To the Continuing Committee of Official on Human Rights

**Re: Lawyers against the War views on implementation of the recommendations
and observations of the United Nations Committee Against Torture**

The United Nations Committee Against Torture (the Committee) reviewed the [report of Lawyers against the War \(LAW\)](#)¹ during its review of Canada's compliance with the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (the Convention) on May 21-22 during its 48th Session. The Committee released its [Concluding Observations on Canada](#) on 25 June 2012.²

The LAW report alleged that Canada repeatedly violated Convention obligations by allowing George W. Bush, President of the United States of America and Commander-in-Chief of the United States Armed Forces from 2000 – 2008, to enter Canada and then failing to arrest and prosecution him for torture thereby providing safe haven from prosecution for torture. The LAW report also states that Canada has also violated Convention obligations by failing to provide adequate, or any, education and training to law enforcement officials including police, civil servants, judicial officials and elected representatives, about Canada's legal obligations under the Convention.

Particularly lacking is education and training about Canada's duty to prosecute torture suspects—wherever and against whomever the torture occurred—once the jurisdiction to prosecute has been triggered. In the case of George W. Bush the jurisdiction to prosecute under section 7 of the Criminal Code was triggered each time he entered Canada.

The joint report to the Committee from the [Center for Constitutional Rights and the Canadian Centre for International Justice](#) also reported that, by failing to arrest, investigate and prosecute Bush for torture once he entered the country, Canada violated Convention obligations,

¹ Canada – Briefing to the Committee against Torture, 48th Session May 2012: Canada's failure to bar or prosecute George W. Bush for torture, April 19th 2012.

² Consideration of reports submitted by States parties under article 19 of the Convention – Concluding Observations of the Committee against Torture – Canada, CAT/C/CAN/CO/6, 25 June 2012

undermined the efficacy of the Convention and denied remedies to victims of torture authorized by the Bush administration.

The facts set out in the LAW report indicate that Canada's repeated refusal to either bar Bush, as a torture suspect, from Canada, or to arrest and prosecute or extradite him upon entry onto Canadian territory was intentional. The LAW report cites six separate occasions when Canada opted to provide George W. Bush with safe haven from prosecution for torture in Canada. On each of these occasions the responsible ministries had been made aware of the requirements of the Convention and the provisions enacted to comply with Convention obligations in the Criminal Code and the Immigration and Refugee Protection Act. Since November of 2004, LAW alone has sent several briefs to government officials setting out the verifiable facts that establish George W. Bush as a torture suspect and the law requiring Canada to deny him safe haven from prosecution in Canada. Although the LAW report focused on visits to Canada by George W. Bush, Canada had wrongfully extended the same safe haven to other torture suspects formerly members of the Bush administration such as Donald Rumsfeld and Dick Cheney.

To cure Convention violations identified in the LAW report and ensure future compliance with Convention obligations, the following measures are necessary:

1. **Law reform:** Amendments to the *Criminal Code* to restrict the power of the Attorney General of Canada to arbitrarily prevent torture prosecutions of foreign nationals in Canada and allow prosecutors and private individuals to initiate torture prosecutions subject to existing judicial oversight provisions in the *Criminal Code*, without the consent of the Attorney General of Canada or any other official..
2. **Education:** Education and training about the universal and underogable obligation to prevent and punish torture arising from both the Convention and Canadian law needs to be provided on an ongoing basis for officials responsible for enforcing the law, including: judges, lawyers, police, Canadian Border Service Agency officials, elected representatives and public servants.
3. **Policy reform:** Investigations are needed to determine how and by whom decisions were made and policy created that allowed George W. Bush to repeatedly enter Canada and that thwarted his prosecution for torture. These investigations must be conducted in accordance with international standards requiring competence, transparency and independence from the government departments alleged to be complicit in the acts and omissions under investigation. The results of the investigation must be made available to the public in accordance with the public's right to know. Civil Society groups should be involved in creating the mode and terms of the investigation.

Law reform

The Committee agreed that the Canadian law (specifically the universal jurisdiction provisions of the *Criminal Code* allowing the prosecution of torture perpetrated outside Canada by foreign

nationals) and Convention obligations apply to all torture suspects entering Canada and expressed concern with Canada's policy of selectively refusing to enforce the law.

The Committee agreed that law reform is required "in order to allow persons to invoke the law directly in [Canada's] courts... to ensure that provisions of the Convention that give rise to extraterritorial jurisdiction can be directly applied before domestic courts."³ The use of the word 'directly' refers, in LAW's opinion, to the right of a prosecutor or a private individual to initiate a prosecution in accordance with existing judicial checks and free from political interference.

Current Canadian law provisions allow the Attorney General of Canada to arbitrarily bar torture prosecutions of foreign nationals. The requirement that the Attorney General of Canada consent to such prosecutions, exposes the prosecutorial process to political interference, provides immunity for selected suspects and unreasonably restricts the right of individuals to initiate prosecutions where the state fails or refuses to do so.

The Supreme Court of Canada has recognized that the historical right and duty of citizens to inform under oath before a justice of the peace regarding the commission of a crime, is fundamental to the integrity of the criminal law system and part of Canada's constitution.⁴ The right of a private individual to file a criminal information provides a necessary check against arbitrarily selective prosecutions. Maintenance of this right is central to the proper use of universal jurisdiction to prosecute state crimes such as torture.

The Committee further emphasized the importance of universal jurisdiction not just being in place, but also in force and, in clear language recommended that Canada,

take all necessary measures with a view to ensuring the exercise of the universal jurisdiction over persons responsible for acts of torture, including foreign perpetrators who are temporarily present in Canada, in accordance with article 5 of the Convention....⁵

In making these recommendations the Committee was acknowledging the criminal law as the primary tool to prevent and punish torture and ensure proper public oversight. The Chief Justice of the Supreme Court of Canada, Beverley McLachlin also emphasized the imperative of using the criminal law to protect freedom from torture when she said,

The most basic human rights are those guaranteed by the criminal law – the right to life; to liberty; to freedom from arbitrary detention, abuse and torture...Rights, that had they been in place and in force, would have made impossible the atrocities of the holocaust.⁶

³ Consideration of reports submitted by States parties under article 19 of the Convention – Concluding Observations of the Committee against Torture – Canada, CAT/C/CAN/CO/6, 25 June 2012, at para. 8.

⁴ *R. V. Dowson* [1983] 2 S.C.R. 144, at para. 155.

⁵ Consideration of reports submitted by States parties under article 19 of the Convention – Concluding Observations of the Committee against Torture – Canada, CAT/C/CAN/CO/6, 25 June 2012, at para. 14.

⁶ The Right Honourable Beverley McLachlin P.C. Chief Justice of Canada, *The Changing Face of International Criminal Law* p.14.

The Committee recommended that Canada, “[e]nsure effective and transparent reporting of torture and oversight of torture within Canada’s jurisdiction including the universal jurisdiction established by the Criminal Code.”⁷

LAW agrees with the Committee’s recommended that Canada “incorporate all the provisions of the Convention into Canadian law.”

Education

The LAW report noted the specific Convention obligation to provide education and training and the absence of that training in Canada.

Article 2 of the Convention makes torture a crime of universal jurisdiction: torture committed by anyone, against anyone, anywhere, is a crime. This universal jurisdiction has been clearly and unambiguously adopted into Canadian criminal law at s.7 (3.7) of the Criminal Code:

(3.7) Notwithstanding anything in this Act or any other Act, every one who, outside Canada, commits an act or omission that, if committed in Canada, would constitute an offence against, a conspiracy or an attempt to commit an offence against, being an accessory after the fact in relation to an offence against, or any counselling in relation to an offence against, section 269.1 [torture] shall be deemed to commit that act or omission in Canada if:

[...]

(c) the person who commits the act or omission is a Canadian citizen;

(d) the complainant is a Canadian citizen; *or*

(e) the person who commits the act or omission is, after the commission thereof, present in Canada. [emphasis added]

Awareness of these provisions amongst law enforcement officials remains very poor. Anecdotally, both politicians and police do not understand these obligations or the universal and absolute nature of the prohibition on torture. For example, in response for calls for the arrest of George W. Bush on the occasion of his visit to Calgary in 2009, the mayor incorrectly stated that any such prosecution had to be brought at the international Criminal Court,⁸ while an investigator in the RCMP War Crimes section stated that their investigations focused only on those “who are present (living) in Canada on an ongoing basis.”⁹ Another elected official voiced the belief that freedom of speech guarantees protected the right of foreign nationals suspected on reasonable grounds of torture to enter Canada. RCMP officers tasked with ‘protecting’ Bush during his October 2011 visit to Surrey stated the belief that George W. Bush (and Dick Cheney) was an internationally protected person and therefore their duty was to protect him from people calling for his arrest and prosecution. Members of the Vancouver City Police voiced the same belief during the September 2011 visit to Vancouver by Dick Cheney.

⁷ Ibid at para. 17.

⁸ Protesters Shout for arrest of George Bush, Canadian Press, October 20, 2011 quoting Mayor Diane Watts as saying, “I think that you have to realize there is a process and a venue -- the international court -- he has to be charged, tried and convicted. There's a process to do that and they have every right to proceed with that.”

⁹ Inspector Ron Charlebois, Officer in Charge, RCMP War Crimes Section, letter to LAW, March 19, 2009.

That such statements are made and not immediately exposed as legally false demonstrates that journalists, police, and elected representatives are largely ignorant not only of Convention duties to prevent torture suspects from having safe haven from prosecution in Canada, but also of *Criminal Code* and other provisions specifically enabling them to carry out those obligations under Canadian law.

The Committee expressed concerns about the need for education about Convention obligations for judicial and law enforcement officials at the same time noting the need for proper oversight and remediation of Convention violations by security, police and intelligence officials. The Committee recommends that Canada.

“raise awareness of [Convention] provisions among members of the judiciary and the public at large”¹⁰

...and

“strengthen its provision of training on the absolute prohibition of torture in the context of the activities of intelligence services.”¹¹

With respect to oversight of the Committee recommended that Canada, “[c]onsider urgently implementing the model for oversight of the agencies involved in national security agencies, proposed by the Arar inquiry;”¹²

Policy reform

Canadian policy and practice must be reformed to comply with legal obligations arising from the Convention and Canadian law. The following policies must be changed:

- the policy and practice of arbitrarily failing to bar select torture suspects, such as Bush and other former high ranking members of the Bush administration, from entering Canada under the *Immigration and Refugee Protection Act*;
- the policy of refusing to accept complaints regarding or to initiate investigations of select torture suspects on the expressed ground of the brevity of their visit to Canada;
- the policy and practice whereby the Attorney General of Canada has arbitrarily refused to consent to the prosecution for torture of George W. Bush and other senior Bush Administration figures notwithstanding compelling, reliable, and public evidence of his involvement in authorizing, directing, supervising, funding and failing to stop the widespread use of torture by U.S. agents;
- the policy and practice of not providing adequate or any education and training about the Convention or the related domestic legislation to public officials tasked with enforcing their provisions.
- The policy of shrouding in secrecy, rather than investigating and prosecuting, possibly illegal acts by police, security and intelligence agents.

¹⁰ *Ibid* at para. 8.

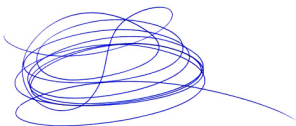
¹¹ *Ibid* at para. 17.

¹² *Ibid* at para. 18 (b).

LAW asks to be included in the planning and decision making process preparatory to implementation of the Committee recommendations to amend to law to allow direct access to universal jurisdiction, to provide education and training about the Convention and to bring policy and practice in line with Convention obligations and Canadian law.

Please advise LAW of the next step in the process. LAW would like to appoint one or more LAW members to work on these issues with the government departments assigned the task of implementation. We look forward to hearing from you.

All of which is respectfully submitted.



Gail Davidson for LAW