

Lawyers' Rights Watch Canada

NGO in Special Consultative Status with the Economic and Social Council of the United Nations

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Promoting human rights by protecting those who defend them

Thursday, November 1, 2012

Human Rights Program
Department of Canadian Heritage
25 Eddy Street, 4th Floor
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Attention: Martha Labarge
Director General, Strategic Management and Human Rights,
Chair of the Continuing Committee of Officials on Human Rights
Via Email to: cpfdp-ccoeh@pch.gc.ca

To the Continuing Committee of Officials on Human Rights

Re: LRWC views on implementation of the recommendations and observations of the United Nations Committee Against Torture in reference to the Omar Khadr case.

Background

Canada is one of 153 States Party to the *Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment* (the Convention), and to the First Geneva Convention,¹ which prohibits mistreatment of detained combatants. Canada has implemented many of its obligations under the Convention in domestic law, including by making torture a crime under the *Criminal Code*,² the *War Crimes and Crimes Against Humanity Act*, and the *Geneva Conventions Act*, and by enacting the jurisdiction to prevent and punish torture wherever it occurs and irrespective of the nationality of the victim(s) or the perpetrator(s).

The Committee Against Torture (Committee) reviewed Canada's performance in respect of its obligations under the Convention as part of its obligations under Articles 11 and 20 of the Convention, the sixth such review since the Convention was established. The [Concluding Observations](#) published on 25 June 2012³ identify 18 specific subjects of concern and the Committee's recommendations for necessary remedial action by Canada.

As part of its review, the Committee sought, and the Government of Canada provided, a report on implementation of its Convention obligations, as well as a further set of responses to specific issues raised by the Committee. The Committee also received submissions from non-government entities including the report filed by [Lawyers Rights Watch Canada \(LRWC\)](#) jointly with the

¹ *Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*. Geneva, 12 August 1949.

² *Criminal Code of Canada*, RSC 1985 c. C-46, s.7 (3.7) and s.269.1.

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.

International Civil Liberties Group (ICLMG).⁴ The LRWC/ICLMG report identifies Canada's failures in its obligations under the Convention in the case of Canadian citizen Omar Khadr.

The Committee's Concluding Observations highlighted many of the concerns noted in the LRWC/ICLMG submissions, and included many similar recommendations in respect of Canada's Convention obligations. LRWC has been invited by the Continuing Committee on Human Rights (CCOHR) to provide comments on the Committee's observations. LRWC is grateful for the opportunity to participate in this dialogue which we assume will be ongoing until full implementation of the Committee's recommendations.

Summary of Recommendations

While the Concluding Observations contained 18 specific recommendations, LRWC has focused only on those recommendations directly related to the Omar Khadr case. LRWC calls for the following measures to comply with and implement the Committee's recommendations with respect to Canada's violations of the Convention in the Omar Khadr case. For ease of reference the recommendations or observations of the Committee regarding each recommended action are set out in the summary below.

1. LRWC calls on Canada to establish a Royal Commission into the treatment of Omar Khadr and provide redress for Omar Khadr

The Committee's Observations:

Paragraph 16

[T]he Committee urges the State party to promptly approve Omar Khadr's transfer application and ensure that he receives appropriate redress for human rights violations that the Canadian Supreme Court has ruled he experienced.

Paragraph 15

The State party should ensure that all victims of torture are able to access remedy and obtain redress, wherever acts of torture occurred and regardless of the nationality of the perpetrator or victim.

Paragraph 22

The Committee recommends that the State party strengthen its efforts to ensure that all allegations of ill-treatment and excessive use of force... are promptly and impartially investigated by an independent body and those responsible for such violation are prosecuted and punished with appropriate penalties.

2. LRWC calls on Canada to provide education and training about the Convention and the absolute prohibition on torture for the judiciary, the public and for police, security, intelligence and other public officials

The Committee's Observations:

Paragraph 8

The Committee recommends that the State party...raise awareness of [Convention] provisions among members of the judiciary and the public at large.

Paragraph 17

⁴ Canada: Briefing to the Committee against Torture, 48th Session, May 2012 on the Omar Khadr case from Lawyers' Rights Watch Canada & The International Civil Liberties Monitoring Group, online: http://www2.ohchr.org/english/bodies/cat/docs/ngos/LRWC_ICLMG_Canada_CAT48.doc

The State party should strengthen its provision of training on the absolute prohibition of torture in the context of the activities of intelligence services.

Paragraph 18

The Committee recommends that the State party....(b) Consider urgently implementing the model for oversight of the agencies involved in national security agencies, proposed by the Arar inquiry;

3. LRWC calls on Canada to co-operate with the Committee Against Torture and civil society on implementation and enforcement of Convention obligations

The Committee's Observations

Paragraph 23

The State party should compile statistical data relevant to the monitoring of the implementation of the Convention obligations at the national level, including data on complaints, investigations, prosecutions and convictions of cases of torture and ill-treatment, detention conditions, abuse by public officials, administrative detention, trafficking and domestic and sexual violence and on means of redress, including compensation and rehabilitation, provided to the victims.

Paragraph 24

The Committee recommends that the State party strengthen its cooperation with United Nations human rights mechanisms and its efforts in implementing their recommendations. The State party should take further steps ensuring a well-coordinated, transparent and publicly accessible approach to overseeing implementation of Canadian obligations under the United National human rights mechanisms, including the Convention.

Paragraph 4

The Committee is aware that the State party has a federal structure, but recalls that Canada is a single State under international law and has the obligation to implement the Convention in full at the domestic level.

4. LRWC calls on Canada to ratify the Optional Protocol to the Convention

The Committee's Observations

Paragraph 25

The Committee urges the State party to accelerate the current domestic discussions and to ratify the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment as soon as possible.

LRWC Views on the Implementation of Recommendations

1. Establish a Royal Commission into the treatment of Omar Khadr and provide redress for Omar Khadr

The right of Mr. Khadr to redress for violations of his protected rights is not open to debate. Notwithstanding the rulings of courts in Canada and in the United States confirming those violations, there is still not a complete record, and members of the Cabinet continue to act and make public statements in apparent ignorance of the known facts and the applicable law.

In *Hamdan v. United States of America*, United States Court of Appeals for Columbia Circuit on October 16, 2012 court vacated Hamdan's conviction by a Guantanamo Bay military tribunal ruling that 'providing material support to terrorism was not a war crime under either U.S. or international law prior to enactment of the Military Commissions Act of 2006 and prosecution was barred by the prohibition on ex post facto prosecutions. The court noted similarly that conspiracy and spying were not known as war crimes. Mr. Khadr's acceptance of a guilty plea on these charges which were created *ex post facto* by the Military Commission Act of 2006 over four years after the acts in question were alleged to have been committed does not legitimate the charges or the proceedings or his subsequent conviction. The charge of murder by an unprivileged alien combatant is false for a number of reasons. Under Canadian and international law, everyone has an absolute non-derogable right to freedom from prosecution for *ex post facto* crimes. No one can be lawfully held criminally responsible for *ex post facto* offences under either international or domestic laws.

Given these facts, LRWC recommends the establishment of a Commission of Inquiry to examine the violation of Omar Khadr's rights protected by Canadian and international law. The Supreme Court of Canada identified one group of violations of Omar Khadr's *Charter* rights from acts of Canadian officials who interrogated him at Guantánamo Bay prison. In March 2004, when Omar Khadr was 17 years old, U.S. officials subjected him to prolonged sleep deprivation and isolation by moving him to a different cell every three hours for a period of three weeks to prepare him for interrogations by DFAIT and CSIS agents. The Canadian agents proceeded with the interrogations despite having been advised of what had taken place. Justice Mosley of the Federal Court of Canada held that the four Canadian officials violated international human rights laws in the interrogation. He reviewed redacted materials produced by the government of Canada, concluding:

The practice described to the Canadian official in March 2004 [of steps taken by U.S. officials to prepare Khadr for scheduled interviews by Canadian officials] was, in my view, a breach of international human rights law respecting the treatment of detainees under UNCAT and the 1949 Geneva Conventions. Canada became implicated in the violation when the DFAIT official was provided with the redacted information and chose to proceed with the interview.⁵

In spite of Canada's Convention obligations, there has been no preliminary investigation into the violations committed by these officials.

In 2008, when adjudicating Mr. Khadr's right to disclosure from Canada, the Supreme Court of Canada ruled "the regime providing for the detention and trial of Mr. Khadr at the time of the CSIS interviews constituted a clear violation of fundamental human rights protected by international law"⁶. The Court accepted the ruling of the United States Supreme Court that the Guantanamo Bay process violated the Charter by denying habeas corpus and that the proposed trial procedures violated the Geneva Conventions. The Court further determined that "[b]y making the product of its interviews of Mr. Khadr available to U.S. authorities, Canada participated in a process that was contrary to Canada's international human rights obligations."⁷

⁵ *Khadr v. Canada (Attorney General)*, 2008 FC 807 (CanLII)

⁶ *Ibid* at para. 23.

⁷ *Ibid* at para. 27.

The Canadian Executive has not only failed to investigate promptly, or at all. The Canadian Executive has actively resisted attempts to seek adjudication and redress of these abuses through court proceedings, has contested demands for disclosure⁸ of the aforementioned interrogations and repatriation made to the Federal Court, the Federal Court of Appeal and the Supreme Court of Canada.⁹ Despite the Supreme Court of Canada's specification, that "we are acutely aware that the record before us is incomplete,"¹⁰ the record remains incomplete today, over four years later.

In the circumstances, LRWC calls for a Commission of Inquiry, as it has become apparent that this is the only means to conduct a full investigation and to determine the comprehensive responses to these deficiencies as required by law and to ensure establishment of policies and practices necessary to prevent similar violations. Canadian and international law obliges Canada to ensure full redress—civil and criminal—of the rights violations to which Canadian officials contributed by their acts or omissions. The redress to which Omar Khadr is entitled cannot be determined in the absence of a full and impartial investigation.

2. Provide education and training about the Convention and the absolute prohibition on torture for the judiciary, the public and for police, security, intelligence and other public officials

LRWC research for the publication, *Right to Know Our Rights: International law obligations to ensure international human rights education and training*¹¹ confirmed lack of familiarity amongst judges and lawyers in British Columbia with the Convention and the apparent absence of Convention training for police.¹² Although the sample of BC judges and lawyers surveyed about their familiarity with Convention obligations was too small to form the basis of statistically reliable conclusions, the results do indicate a problem: 38% of 17 respondent judges reported being "not at all familiar" and 23% "not very familiar" with the Convention against Torture. The situation was worse amongst 131 BC lawyer respondents; 73% of the respondent lawyers reported they were "not at all familiar" or "not very familiar" with the Convention (36% were not at all familiar and 37% not very familiar).

Education for police and law enforcement officials about the Convention and other international human rights treaty obligations was apparently non-existent. In addition, the LRWC report suggests that police training in Canada may not adequately address international human rights. "No [police educators] indicated that international human rights instruments are included in police education curricula."¹³ In the province of BC, police are trained by the Justice Institute of BC. While courses include training on policing ethics and professional standards, there is no coverage of international human rights treaties. Municipal police forces' continuing studies on human rights emphasises anti-harassment and anti-discrimination policies based on Canada's and BC's domestic human rights legislation, but no coverage of international human rights treaties.

⁸ The Supreme Court of Canada identified that Canada's refusal to comply with demands for disclosure made by Khadr's lawyers was itself a violation of Mr. Khadr's Charter rights. *Canada v Khadr*, [2008] 2 SCR 125, para. 33.

⁹ As of the date of drafting, canlii.com shows 32 published decisions relating to the two Khadr matters.

¹⁰ *Canada v Khadr*, [2008] 2 SCR 125, para. 37.

<http://www.canlii.org/en/ca/scc/doc/2008/2008scc28/2008scc28.html>

¹¹ *Right to Know Our Rights: International law obligations to ensure international human rights education and training*, Catherine Morris and Gail Davidson, May 2012, at pp. 78 & 85.

accessible at <http://www.lrwc.org/the-right-to-know-our-rights-international-law-obligations-to-ensure-international-human-rights-education-and-training/>

¹² *Ibid*, pp. 71, 72.

¹³ *Ibid*, p. 72.

While RCMP officers receive considerable training in the *Charter of Rights and Freedoms*, they receive little or no training based about international human rights treaties such as the ICCPR, CERD or UNCAT.¹⁴ The exceptions are police officers engaged in training of police forces in other countries. This is a serious problem in Canada, particularly in light of UN treaty bodies' concerns about persistent human rights violations of the rights of women, children and aboriginal peoples in BC, and concerns about Canada's implementation of the Convention against Torture.

Without adequate education in international human rights, police officers and other public officials responsible for enforcing Canada's legal duty to prevent and punish torture cannot be expected to understand the absolute and non-derogable nature of the prohibition against torture, the absolute duty to prevent and punish torture, and the legal framework which provides mechanisms in Canada to prevent and punish torture wherever it occurs, irrespective of the nationality or status of victims and suspected perpetrators.

In addition, there is a general need for education for all public officials, pursuant to Article 10 of the Convention, including Parliamentarians and all those involved in developing policies, regulations and legislation. This seems of particular concern given the Committee's clear concerns about the Ministerial-level direction to CSIS which the Committee indicates are not currently in line with Canada's obligations under the Convention.

Accordingly, Canada must work with the Provinces and Territories to ensure education training about the Convention at all levels and to ensure evaluation of the efficacy of such education. Levels that require education and training about the Convention include the: public, police and corrections officials, security and intelligence officials, law students, lawyers, judges and prosecutors.

We note that denunciation remains an objective of criminal sanctions and that successful prosecutions are ultimately one effective way to prevent and punish torture. In the absence of both public awareness and awareness among legal professionals including police, bar, and judiciary of the requirements and mechanisms of the Convention, such prosecutions are unlikely to take place.

3. Co-operate with the Committee Against Torture and civil society on implementation and enforcement of Convention obligations

Measures required to improve implementation and enforcement of Convention obligations include: compiling a national database, submitting reports to the Committee in a timely fashion and creating a process for ensuring transparency and consultation with civil society.

Compile National Data: The Committee highlighted the lack of comprehensive data at the national level in respect of all aspects of Canada's convention obligations. Compiling relevant statistical information will require the engagement of several branches of government:

¹⁴ Interview and email data, August 2012 through January 2012, Lawyers' Rights Watch Canada, *The Right to Know Our Rights: International Law Obligations to Ensure International Human Rights Education and Training*. Vancouver: Lawyers' Rights Watch Canada, 2012. Available at <http://www.lrwc.org/the-right-to-know-our-rights-international-law-obligations-to-ensure-international-human-rights-education-and-training/>

- Tracking complaints and investigation will require the collection of relevant data on complaints and follow-up by the RCMP, federal corrections officers, embassy staff, and the Canadian Human Rights Commission.
- The co-operation of the Attorneys-General and the courts of various provinces would provide an even more robust understanding of torture claims, including those made in the courts and human rights tribunals of those provinces and under the mandate of its police forces.
- The tracking should clearly identify claims of torture and abuse by public officials, and abuse while in detention or administrative detention, and the results of internal investigations and administrative enforcement .
- Criminal prosecutions and convictions should be tracked.
- Prosecutions can be compared to the level of criminal complaints and investigations, and also to civil or administrative complaints and claims to assess the level of occurrence, complaint, and enforcement, and to identify obstacles to bringing and adjudicating torture claims.
- Compensation to the victims should be tracked, as well as the avenue used to obtain redress and the time and cost of obtaining redress.
- Rehabilitation of victims should be tracked.

Submit reports to the Committee in a timely fashion: The Committee noted that Canada’s 6th periodic report was received three years late. In addition the Committee noted that the fact that Canada provided written replies to the list of issues three month late and only days before the review, “prevented the Committee from conducting a careful analysis of the information provided by the State party.”¹⁵

Canada’s next periodic report to the CAT is due 1 June 2016.

4. Ratify the Optional Protocol to the Convention

In response to the recommendations of several states¹⁶ that Canada ratify the Optional Protocol to the Convention, Canada replied,¹⁷

7. Canada accepts recommendations 2 and 3 as it is conducting the required analysis of its domestic legislation and policies in considering the possible signature/ratification of the CRPD and the OP-CAT.

LRWC questions why a review of the impact of this kind of instrument should take more than six years, and is unaware of such a review or any consultations on the Convention currently taking place federally or within the Provinces.

Paragraph 2 of the Working Group Report on Canada¹⁸ also called on Canada to,

¹⁵ 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, para. 3.

¹⁶ Brazil, Chile, Liechtenstein, Czech Republic, Denmark, Netherlands, France, Azerbaijan.

¹⁷ Reply from Canada, report from the 8th June 2009, A/HRC/11/17, Add.1, para 7.

http://lib.ohchr.org/HRBodies/UPR/Documents/Session4/CA/A_HRC_11_17_Add1_CAN_E.pdf

¹⁸ Report of the Working group, A/HRC/11/17, 5th October 2009 , para. 86 (2):

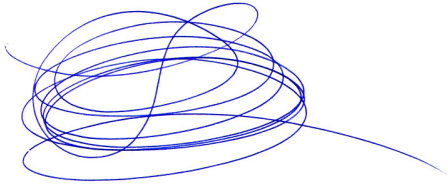
<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/152/99/PDF/G0915299.pdf?OpenElement>

2. ...establish an effective National Preventive Mechanism (Denmark; Liechtenstein; France; Czech Republic) as required under the Protocol (Liechtenstein) and further adopt additional measures to ensure its full implementation without any exceptions of the principle of non-refoulement (Czech Republic);

Canada has not submitted any implementation report under the UPR system, as some other countries have done.¹⁹

LRWC requests involvement in the implementation of the Committee's recommendations noted above. We look forward to hearing from you.

Respectfully submitted,



Gail Davidson, Executive Director, LRWC

¹⁹ Please see the list of other countries submitting implementation reports at <http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRImplementation.aspx> .

