

CANADIAN CIVIL LIBERTIES ASSOCIATION

REPORT TO THE UN COMMITTEE AGAINST TORTURE 48th Session, May 2012

Regarding List of Issues to be Considered in Connection of the Sixth Periodic Report of Canada (CAT/C/CAN/6)

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I. CANADIAN CIVIL LIBERTIES ASSOCIATION (“CCLA”)

CCLA thanks the Members of the UN Committee Against Torture (“Committee”) for this opportunity to report on our concerns in connection with review of Canada’s sixth periodic report. CCLA’s report corresponds directly to the List of Issues set out by the Committee (CAT/C/CAN/Q/6).

CCLA is an independent, non-governmental, national organization dedicated to the furtherance of civil liberties in Canada.

Founded in 1964, CCLA has thousands of paid supporters drawn from all walks of life. A wide variety of persons, occupations and interests are represented in CCLA’s national membership.

CCLA was constituted to promote respect for and observance of fundamental human rights and civil liberties and to defend and foster the recognition of those rights and liberties. In its advocacy, CCLA directs its attention to the reconciliation of civil liberties and other competing public interests. CCLA’s major objectives include the promotion and legal protection of individual freedom and dignity against unreasonable invasion by public authority, and compliance with Canadian constitutional and international legal obligations. CCLA has been granted leave to intervene in many important court cases at all levels of courts across the country, including as well the Supreme Court of Canada and the Federal Court of Canada. CCLA regularly makes submissions to Parliamentary committees and other policy consultation processes.

II. IMPACT OF ANTI-TERRORISM MEASURES UPON HUMAN RIGHTS SAFEGUARDS IN CANADA – Addressing the COMMITTEE’s Concerns

The Committee has asked the State party to provide information on the impact of Anti-Terrorism measures upon “human rights safeguards in law and practice and how those measures comply with the State party’s obligations under international law, especially the Convention, in accordance with relevant Security Council resolutions, in particular resolution 1624 (2005).”¹

CCLA will provide the Committee with detailed information on these issues in the body of this Report, by providing specific information on Canada’s compliance with Articles 2, 3, 5, 7, 8, 11, 12, 14, 16, of the Convention in particular, and Canada’s compliance with international human rights law, refugee law, and humanitarian law in general.

CCLA’s legal analysis emerges from the following operating principles we wish to share with the Committee:

¹ Committee Against Torture, Forty-Seventh Session, 31 October-25 November 2011, 4 January 2012, “List of issues to be considered in connection with the consideration of the sixth periodic report of Canada”, CAT/C/CAN/Q/6 at paragraph 30.

1. CCLA categorically condemns terrorist activity as being illegal and immoral; incompatible with respect for human rights and dignity; and posing a serious threat to international peace and security.

2. CCLA recognizes and supports Canada's legal duty² to protect the nation and its residents from terrorist attacks, and to cooperate with its international allies to globally fight terrorism. At the same time CCLA believes that this legal duty demands compliance with the *Canadian Constitution* and Canada's binding international legal obligations including those pursuant to the Convention. CCLA believes that human rights compliant counter-terror initiatives are needed, as noted by UN Security Council Resolution 1456³. CCLA believes that human rights compliant initiatives will be useful to properly target, prosecute, and punish terrorist activity; and will be useful in prevention and diversion of terrorist activity.

3. CCLA is seriously concerned that Canada's counter-terror initiatives have failed to fully comply with its international legal obligations, including those pursuant to the Convention, and the *jus cogens* absolute prohibition against torture, cruel, inhuman and degrading treatment from which there can never be justifiable derogation. CCLA believes that absolute compliance with the prohibition is an unequivocal prerequisite to effectively fight terrorist activity. In CCLA's view, any acquiescence or condonation or participation in torture creates new victims; creates new human rights violations; undermines rule of law and legal frameworks; and increases the likelihood of mistakenly targeting or punishing innocent individuals and diverting focus from actual wrongdoers who should be prosecuted. Furthermore, CCLA believes that these errors can inadvertently contribute to the conditions that are conducive to terrorism.

4. CCLA's concerns are compounded by our observation that torture violations do not occur in a vacuum; they are invariably accompanied by a host of other serious human rights violations such as denials of: security of the person, *habeas corpus*, due process rights, fair trial rights; and violations of the principle of *non-refoulement*. Unfortunately in Canada, we have seen the destructive interplay of these human rights violations in the following situations, in which the Committee has also expressed interest in its List of Issues:

- Bill C31
- Security Certificates
- Violence Against Women
- Principle of *Non-Refoulement*
- Diplomatic Assurances

² Art 6 ICCPR Right to Life, and UN Security Council Resolution 1373

³ S/RES/1456 (2003); para. 6: "States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law."

- Allegations of Transfers of Afghan Detainees to Torture
- Detention
- Concerns regarding oversight, review, and accountability of intelligence operations in Canada
- Omar Khadr
- Policing Responses to the G20, Montreal student protests, Use of Tasers
- Failures to provide a remedy to victims of torture seeking to sue Foreign States for torture experienced abroad by Foreign States and their officials
- Other Issues: Proposed US-Canada Security Perimeter; Reintroduction of Anti-Terrorist Act Provisions of investigative hearings and preventive detention; Definition of Terrorism

III. ARTICLE 2

A. BILL C31: Proposed Refugee Legislation, Mandatory Detention, Irregular Arrivals

5. *The Committee has asked the State party to report on Bill C-4, mandatory detention and designation of irregular arrivals.*

6. CCLA informs the Committee that Bill C-4 did not pass. On February 16th, 2012, Bill C31 4 was introduced in Parliament, and like Bill C-4, contains provisions regarding “irregular” arrivals, “mandatory detention”, and other violations of fundamental rights and freedoms set out below.

7. CCLA objects to the excessive Ministerial discretion conferred by Bill C31 that permits designation of two or more persons as “irregular”. CCLA argues such overbroad discretion may result in failures of due process and natural justice, in abuse of process, and in creation of discriminatory categories among asylum-seekers in contravention of international human rights and refugee law.

8. CCLA objects to the “12 month mandatory detention” of “irregular arrivals”, and the denial of the right to challenge such detention before an independent judicial or quasi-judicial body. CCLA argues that Bill C31 provisions in this regard constitute a failure of *habeas corpus* and the right to be free from arbitrary detention; constitute cruel, inhuman and degrading treatment; and wrongfully punishes legitimate asylum-seekers, all of which are in violation of the Convention, and international human rights and refugee legal standards.

9. CCLA objects to the Ministerial discretion to designate expedited claims processing for certain countries. The lack of clear legislative criteria creates overbroad discretion prone to abuse of process, or politicization, and the real possibility of *refoulement* in contravention of the Convention and international human rights and refugee law.

10. CCLA objects to the five-year moratorium on seeking permanent resident status, and the ability to sponsor newcomers, as further constraining the rights and freedoms of refugees, and potentially impeding or unduly delaying family reunification, in violation of international legal standards pertaining to the rights of the child and refugees.

11. CCLA objects to the detrimental impact of Bill C31 upon children and youth. Any youths aged 16 and above are subject to the mandatory 12-month detention periods which, CCLA has argued above, violates international law. Children below age 16, will be subject to a process that ostensibly will consider their best interests in determining whether to remove the child into State custody, or detain the child with the parent or adult guardian with whom the child travelled. CCLA argues that these schemes do not provide the “best interests of the child”; rather, they present grim choices that constitute additional trauma to children who have just fled persecution. CCLA argues that Bill C31 contravenes international legal standards on the rights of the child and refugees, and

⁴ Bill C-31, *An Act to Amend the Immigration and Refugee Protection Act, the Balanced Refugee Reform Act, the Marine Transportation Security Act and the Department of Citizenship and Immigration Act* (short title: Protecting Canada’s Immigration System Act),

may constitute cruel, inhuman and degrading treatment in violation of the Convention.

12. Bill C31 purports to target and punish “human smuggling” and “human trafficking”. CCLA agrees with these objectives in principle. However, CCLA argues that Bill C31 fails to effectively target human smugglers or traffickers, and rather, in actuality, will punish legitimate refugees and asylum-seekers.

13. CCLA RECOMMENDS that Canada not pass Bill C31 given the serious and unjustifiable potential violations of the principle of *non-refoulement*, *habeas corpus*, the right to be free from arbitrary detention, the objective of family unification, and the corresponding legal guarantees found in the Convention, the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child, and the UN 1951 Convention Relating to the Status of Refugees and the Optional Protocol.

B. SECURITY CERTIFICATES

14. *The Committee has asked for information on the Security Certificate process, amendments made pursuant to the Supreme Court decision in Charkaoui, and the situation of detentions and corresponding safeguards enshrined in international standards, concerns over Special Advocates raised in the Universal Periodic Review Process, and whether there have been any judicial determinations of extended periods of detention amounting to cruel and inhumane treatment.*

a. Background

15. Security Certificates have existed in Canada since 1978, administered under the various immigration schemes in force. Post 9/11 Security Certificates have been administered under the *Immigration Refugee and Protection Act, 2001*. The stated purpose of Security Certificates is to remove from Canada, non-Canadians (i.e. permanent residents, refugees, asylum-seekers, foreign nationals) who pose a threat to Canada. Intelligence agencies provide information suggesting threat to the Ministers of Immigration and Public Safety. The Ministers will then decide whether to issue a Security Certificate.

16. Security Certificates permit the arrest and detention of Named Individuals, pending deportation proceedings. Since 2001, Security Certificates have been used to detain and impose sanctions against five men of Arab descent, who are alleged to have links to terrorist activities: Mahmoud Jaballah, Adil Charkaoui, Mohammed Harkat, Hassan Almrei, and Mohamed Zeki Mahjoub. The Security Certificate against Hassan Almrei was overturned in 2011, after the Court found that the Certificate was based on outdated and faulty information, and that CSIS had failed to disclose exculpatory evidence. The Security Certificate of Mr. Charkaoui was found to be void in 2009.

b. Special Advocates

17. In 2007, the Supreme Court of Canada heard the merged claims of Hassan Almrei, Mohamed Harkat, and Adil Charkaoui in the case of *Charkaoui v. Canada (Minister of Citizenship and Immigration)*, [2007] 1 SCR 350, referred to as *Charkaoui 1*. A unanimous Supreme Court found that the Security Certificate process was

unconstitutional and of no force and effect, due to unjustifiable denials of due process and fundamental justice, and because extended detention periods and delayed review constituted cruel and unusual treatment. The Supreme Court suspended its declaration for one year to provide Parliament with an opportunity to legislate a new process.

18. Canada amended the IRPA to provide for the use of Special Advocates, security cleared advocates who are permitted access to sensitive national security information. Two Special Advocates are assigned to the case of each individual. In *Charkaoui II*, the Supreme Court held that a Named Individual had the right to know the evidence against him, and because of national security considerations, this evidence would be provided to the Special Advocate. Special Advocates are entitled to attend the *ex parte* secret hearings, have access to the national security information or evidence, and to represent the interests of the individual at hearings by accessing and testing the information and evidence. Special Advocates are permitted to challenge the Ministers' claims that disclosure of the evidence to the individual would be injurious to national security, and to cross-examine witnesses.

19. CCLA is concerned that the Special Advocate process – while an improvement upon the pre-2007 Security Certificate procedure – remains fraught with due process, fairness and fundamental justice concerns: introduction of Special Advocates only provides a partial solution towards the individuals right to know the case against him or her; Special Advocates are unable to discuss the contents of the file with the Named Individual or counsel; and the Named Individual is unable to discuss or instruct the Special Advocate.

c. Secret Evidence, Torture and CIDT, and the Burden of Proof

20. CCLA is seriously concerned that information or evidence tainted by torture has been used to form the basis of Security Certificates. All five men have argued that information procured from torture was used against them. In the case of Hassan Almrei, Special Advocates successfully challenged the underlying basis of Mr. Almrei's certificate with the result that the Federal Court found that the Minister and CSIS may have relied upon information obtained by torture, among other procedural irregularities and errors. In the case of Adil Charkaoui, the Supreme Court of Canada found that part of the underlying basis of the Security Certificate against him included information from interrogations of Abu Zubayda who had been tortured – with the result that the Canadian government undertook to disregard the Abu Zubayda 'torture' information. Mssrs Jaballah, Mahjoub and Harkat are currently before the Courts challenging the constitutionality of their Certificates.

21. CCLA is concerned that CSIS has provided the Ministers with information tainted by torture. Justice Blanchard wrote in his view that CSIS policies and practices “do not provide for an effective mechanism to ensure that such information is actually excluded from the evidence relied on by the Ministers”⁵ in their decision to issue a Security Certificate. In December 2011, the Montreal Gazette reported on a newly unearthed memo written in 2008 by former CSIS director Jim Judd, arguing in favour of using information procured through torture – or “torture leads” that are subsequently corroborated – in the Security Certificate process.

⁵ Mahjoub 2010 (Federal Court). para 18

22. CCLA is seriously concerned that the burden of proof to exclude primary and derivative information procured from torture in Security Certificate proceedings, may be shifted back to the Named Individual. CCLA notes that shifting the burden back to the Named Individual has been criticized by the Special Rapporteur on Torture, and is inconsistent with the Convention and this Committee's interpretation of Article 15 of the Convention. CCLA agrees with the approach put forward by Special Advocates in *Jaballah*⁶: once the Named Individual has established, based on the general practices of CSIS or the agency in question, "that there is a plausible connection between the use of torture or CIDT and the information adduced by the Ministers, then there is a presumption that all the information originating from that agency was obtained by or involved the use of torture or CIDT. To rebut the presumption, the Ministers must show that there are no reasonable grounds to believe that a particular item of information originated from or involved the use of torture or CIDT, and further, that remaining information underlying the Certificate is not tainted by torture. In the absence of evidence to the contrary, the presumption compels a finding of fact that there are reasonable grounds to believe that the information was obtained by the use of torture or CIDT."

23. CCLA argues that CSIS should retain all operational notes and evidentiary recordings. Destruction of these notes or recordings, and sole reliance upon 'summaries', deprives the Named Individual of basic due process and fairness rights to know the case against them and make full answer and defence. Further, operational notes and recordings may contain exculpatory evidence. CCLA notes that the Supreme Court of Canada ordered CSIS to retain all operating notes in *Charkaoui I*.

24. CCLA acknowledges that the Air India Inquiry presided over by Supreme Court Justice John Major, commended Security Certificates as a tool to detain individuals who are believed to be a threat to national security, in the absence of evidence that would sustain criminal charges. However, CCLA believes that Security Certificates do not sufficiently provide national security protections to Canadians, and create great harm to potentially innocent individuals and to the administration of justice in Canada

d. Principle of *Non-refoulement*

25. CCLA argues that Security Certificates violate the principle of *non-refoulement* and Article 3 of the Convention, in that they seek to deport individuals to the risk of torture. CCLA notes however, that risk assessments have been carried out in the case of Convention Refugees. In the case of Hassan Almrei, he successfully demonstrated a risk of torture on several occasions and avoided deportation.

e. Recommendations

26. CCLA recommends that the Special Advocates be permitted greater latitude in the communications structures with Named Individuals – and be permitted to discuss contents of secret evidence with the Named Individual and counsel, and obtain instruction -- in order to protect due process and fundamental justice, and to properly comply with the constitutional concerns raised by the Supreme Court of Canada in

⁶ In *Jaballah*, FC 2012, see paragraphs 14-17

Charkaoui 1.

27. CCLA recommends that where Named Individuals can establish a reasonable link to Torture and CIDT, the burden of proof should shift to the Ministers to prove that primary or derivative evidence should not be disqualified, and to prove that the remaining information underlying the Certificate has not been tainted by torture.

28. CCLA recommends that all intelligence agencies particularly CSIS should ensure that information procured from torture or CIDT is identified, and is not used to form the basis of Security Certificates. Officials should be properly trained to assess unsourced information to determine if it has been procured from torture.

29. CCLA recommends that the remaining three Security Certificates be quashed, and that the men either be charged under the Criminal Code and released on bail conditions under trial, or that they be released.

f. Conclusions

The Canadian Civil Liberties Association continues to be concerned that Canada's Security Certificate process unjustifiably impairs key constitutional rights, including due process and compliance with the principles of fundamental justice.

We are concerned that Named Individuals continue to be unaware of the full details of the case against them, and continue to be impaired in making full defence. We argue that the introduction of Special Advocates does not cure these concerns, because the Special Advocate is also constrained in communications with the Named Individual.

We are concerned that evidence obtained from torture has been found by Canadian courts to have formed the bases of some Certificates.

We are concerned that Named Individuals face possible deportation to countries, where these Individuals fear they risk being tortured.

Finally we are concerned that by using Security Certificates against non-Canadians, we are creating a second tier of justice for non-Canadians or permanent residents.

CCLA believes that the Security Certificate process is not compliant with the Canadian Charter of Rights and Freedoms, does not demonstrably enhance national security, and does not uphold Canada's international law commitment to the absolute prohibition against torture.

C. VIOLENCE AGAINST WOMEN

30. CCLA is extremely concerned about the alarmingly high rates of violence and death reported among Aboriginal women, and the disproportionately high percentages of Aboriginal women incarcerated in Canadian prisons. The Elizabeth Fry Society reports upon the criminalization of Aboriginal Women: although aboriginal people make up only

3% of the population, over 30% of federally sentenced women are aboriginal women.⁷

31. CCLA is extremely concerned that the Canadian government has not adequately approached the issue of domestic violence as a serious crime, and as a violation of the Convention. Domestic violence is not a private “matter” excusing State inaction. .

32. CCLA urged the Canadian government to take steps to protect Canadian citizen Nathalie Morin and her three Canadian children – who have been unable to leave Saudi Arabia without a male family member or guardian’s consent to an exit visa -- and who were allegedly being subject to severe domestic violence amounting to torture and/or CIDT, by Ms. Morin’s common-law spouse and father of her three children. CCLA has written to the Minister of Foreign Affairs⁸, the Honourable John Baird, urging the immediate assistance of the Canadian government for Nathalie Morin and her three children, to move them to safety, provide medical assistance, and to facilitate their earliest return to Canada. When the Canadian government responded that this was a private matter, CCLA reminded the Canadian government of its obligations under the Convention and under CEDAW, and requirements to investigate allegations of torture and to urge fellow State party Saudi Arabia to uphold its obligations under CEDAW. Furthermore, Canada and Saudi Arabia are both parties to the UN Convention Against Torture, the UN Convention on the Elimination of Discrimination Against Women, and the UN Convention on the Rights of the Child, all of which together impose legal obligations upon States to protect women and children from torture, cruel, inhuman or degrading treatment, even when perpetrated by private actors

Recommendations

33. Canada must investigate and address the root causes of disproportionately high violence against Aboriginal women, and the disproportionately high incarceration of Aboriginal women.

34. Efforts to investigate, remedy, or provide redress to Aboriginal women – including inquiries into murders or disappearances such as the British Columbia inquiry – must provide meaningful participation to the Aboriginal communities and in particular to Aboriginal women.

35. Canada must recognize that domestic violence is a violation of the Convention. Canada must comply with its Convention obligations by actively investigating and punishing domestic violence cases, and protecting and rehabilitating victims.

⁷ See fact sheets available on Elizabeth Fry website, at <http://www.elizabethfry.ca/eweek2011e/factsht.htm>. See also the Statistics Canada Report: *Violent Victimization of Aboriginal Women in the Canadian Provinces, 2009*, Minister of Industry, 2011, available at <http://www.statcan.gc.ca/pub/85-002-x/2011001/article/11439-eng.pdf>

⁸ To read CCLA’s letter of August 16th, 2011, please click here [Aug 16 2011 CCLA-MFA-N.Morin](#) or visit here http://ccla.org/wordpress/wp-content/uploads/2011/08/Aug_16_2011_CCLA-MFA-N.Morin_.pdf

IV. ARTICLE 3

36. *The Committee has asked for information on Canada's duty to unconditionally respect the absolute nature of Article 3, and how Canada complies with its Article 3 obligations when its law provides legislative exceptions to the principle of non-refoulement. The Committee has asked in this regard about Canada's immigration and refugee process, diplomatic assurances, the Afghan detainees, and an update on some specific cases.*

37. CCLA is concerned that the Canadian government seeks to create exceptions to the absolute nature of Article 3 of the Convention, and corresponding provisions in international refugee law and international humanitarian law.

a. Principle of Non-Refoulement

38. CCLA is concerned that Canada interprets the IRPA as permitting removals, deportation, or extradition, despite the risk of torture. Canada has argued that Parliament did not intend an absolute bar to *non-refoulement*, evidenced by the absence of such language in ss 118(2) of IRPA⁹. The Canadian Supreme Court in *Suresh* acknowledged the *jus cogens* status of the absolute prohibition against torture, the principle of *non-refoulement*, and the abhorrence Canadians felt toward torture; and yet indicated that in certain "exceptional circumstances" deportation to torture may be justified. The deportation component of Security Certificates, and the deportation provisions set out in Bill C31, all undermine Canada's commitment to the absolute nature of Article 3 of the Convention. Further, CCLA is concerned that deportation orders may not be subject to an appeal on the merits.

b. Diplomatic Assurances

39. CCLA is concerned that the Canadian government continues to rely on diplomatic assurances in national security cases involving the removal of individuals to the risk of torture, cruel, inhuman or degrading treatment. The UNHCR has expressed similar concern for the rising use of diplomatic assurances worldwide in national security cases, and their inability to provide an effective or legal safeguard against torture.¹⁰

⁹ For example, the Supreme Court of Canada in *Gavrila and Nemeth*, heard appeals of two Convention refugees each challenging extradition on the basis that they feared torture. Canada argued that it had obtained diplomatic assurances, and the wording of ss.118 IRPA did not proscribe all removals to the risk of torture.

¹⁰ See UNHCR Note on Diplomatic Assurances and International Refugee Protection, August 2006, available at <http://www.unhcr.org/refworld/docid/44dc81164.html>, at para. 3 "However, the use of diplomatic assurances is not confined to the area of extradition. Increasingly, assurances that the person who is to be removed will not be subjected to torture or other forms of ill-treatment are resorted to in the context of removal procedures such as expulsion or deportation,⁴ and also where individuals are transferred to other countries through informal measures which do not offer any procedural safeguards. This practice,

40. Diplomatic assurances are, in our view, flawed:

- All States under international law are legally obligated to prevent and protect against torture. By requesting a Diplomatic Assurance, at best Canada would be creating exceptions for the transferee and implicitly condoning the illegal treatment of other detainees in the Receiving Country.
- Diplomatic assurances are not legally binding.
- In the case of refugees or asylum-seekers, they have fled a particular country for fear of persecution. To consider deporting or extraditing them to the country they have fled, on the basis of diplomatic assurances only, raises serious concerns about transferring to the risk of torture or CIDT, and violation of the principle of *non-refoulement* and of international refugee law.
- The CCLA is concerned that deportations may occur without providing individuals with a proper appeal on the merits.
- The CCLA agrees with the ICJ Eminent Jurists Panel, and the Special Rapporteur on protecting and promoting fundamental human rights while countering terrorism, that transfer to the risk of a manifestly unfair trial can violate the principle of *non-refoulement*.

41. In *Suresh*¹¹, the Supreme Court of Canada noted the distinction between seeking diplomatic assurances against application of the death penalty (which may be legal in other jurisdictions), and against application of torture (an illegal process):

Para 124: *“It may be useful to comment further on assurances. A distinction may be drawn between assurances given by a state that it will not apply the death penalty (through a legal process) and assurances by a state that it will not resort to torture (an illegal process). We would signal the difficulty in relying too heavily on assurances by a state that it will refrain from torture in the future when it has engaged in illegal torture or allowed others to do so on its territory in the past.”*¹²

42. In the European Court of Human Rights decision in *Saadi*, the Court refused to allow Italy to deport an individual deemed a national security threat to Tunisia where he faced

which is sometimes referred to as “rendition” or “extraordinary rendition”, is resorted to with increasing frequency to remove persons whom the sending State suspects of involvement in terrorist activities and/or considers a danger to national security, including to countries which are reported to practice or condone torture.⁵

¹¹ *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1.S.C.R. 3, 2002 SCC 1, at para. 124.

¹² The Supreme Court continues at para 124: “This difficulty becomes acute in cases where torture is inflicted not only with the collusion but through the impotence of the state in controlling the behavior of its officials. Hence the need to distinguish between assurances regarding the death penalty and assurances regarding torture. The former are easier to monitor and generally more reliable than the latter.”

the threat of torture, despite Tunisia's diplomatic assurances. The Court noted that diplomatic assurances are unreliable when sought from countries known to have engaged in torture at para. 148:

148. Furthermore, it should be pointed out that even if, as they did not do in the present case, the Tunisian authorities had given the diplomatic assurances requested by Italy, that would not have absolved the Court from the obligation to examine whether such assurances provided, in their practical application, a sufficient guarantee that the applicant would be protected against the risk of treatment prohibited by the Convention (see Chahal, cited above, § 105). The weight to be given to assurances from the receiving State depends, in each case, on the circumstances obtaining at the material time.

43. The UNHCR in the context of refugees has noted:

“The risk of torture is not diminished when the country of refuge receives assurances from the refugee’s country of origin that torture will not occur. Such assurances should be given no weight when a refugee is being refouled. The situation of a refugee is not analogous to that of an extradited person, because the country of refuge has already recognized the refugee to have a well-founded fear of being persecuted in the country of origin. Once the country of refuge has made this finding, absent a significant change of circumstances in that country of origin, it would be fundamentally inconsistent with the protection afforded by the 1951 Convention for the country of refuge to look to the very agent of persecution for assurance that the refugee will be well-treated upon refoulement. The same is true for asylum-seekers pending a final determination of their asylum claim.”

44. CCLA remains concerned that diplomatic assurances enable the transferring State to effectively “shirk” or “circumvent” the legal obligations to prevent and protect against torture, as it has little or no control over the Receiving State following the transfer. Even assurances which specify monitoring schedules are not necessarily adhered to post-transfer, as this Committee found in *Agiza v. Sweden*¹³.

45. CCLA lauds this Committee’s finding that the principle of *non-refoulement* requires remedy for a breach, stating at paras. 13.6- 13.814:

“The Committee observes that the right to an effective remedy for a breach of the Convention underpins the entire Convention, for otherwise the protections afforded by the Convention would be rendered largely illusory. In some cases, the Convention itself sets out a remedy for particular breaches of the Convention, while in other cases the Committee has interpreted a substantive provision to contain within it a remedy for its breach. In the Committee’s view, in order to reinforce the protection of the norm in

¹³ The Committee also ruled that Sweden had breached Article 22 of the Convention by its failing to cooperate fully with the Committee regarding Mr. Agiza’s right to bring a complaint. State parties to the Convention are legally obligated to recognize the right to file individual complaints, and to fully cooperate with the Committee’s decision to hear such complaints. *Agiza* at para. 13.4

¹⁴ *Ibid.*

question and understanding the Convention consistently, the prohibition on refoulement contained in article 3 should be interpreted the same way to encompass a remedy for its breach, even though it may not contain on its face such a right to remedy for a breach thereof.”¹⁵

46. The UN Special Rapporteur on Torture has noted that “the fact that such assurances are sought shows in itself that the sending country perceives a serious risk of the deportee being subjected to torture or ill-treatment upon arrival in the receiving country. Diplomatic assurances are not an appropriate tool to eradicate this risk.” (2005)

47. In addition to the cases the Committee has asked about, CCLA requests the Committee to enquire about Parminder Singh, who was deported to India on terrorism charges, and reportedly tortured, despite the provision of diplomatic assurances. The Canadian court should have heeded the ECHR decisions in *Chahal* 16 and in *Saadi*.

c. Afghan Detainees

48. CCLA has repeatedly called for a public inquiry into the transfer of Afghan detainees, by Canadian forces in Afghanistan, to the Afghan National Directorate of Security (“NDS”). Our position has always been that Canada is legally obligated in international law and under the specific rules applicable to the International Security Assistance Force (of which Canada is part), to ensure that detainees are not transferred to the risk of torture. To do so is to violate the legal principle of *non-refoulement* found in international humanitarian law. Allegations of torture trigger Canada’s legal responsibility to investigate its role in complicity in torture. Any specific and systemic failures by Canada, at every stage, must be identified, rectified and redressed. These failures can most effectively come to light and be addressed through a public inquiry. By not taking these steps, Canada compounds any legal and moral errors in contributing — however unintentionally — to torture and other serious human rights violations suffered by detainees we have transferred.

i. Federal Court of Appeal

49. In 2008, CCLA intervened in the Federal Court of Appeal arguing that the *Charter* should restrain Canadian Forces in Afghanistan from transferring detainees into the

¹⁵ At para. 13.6,. See also paras. 13.7: “The Committee observes that in the case of an allegation of torture or cruel, inhuman or degrading treatment having occurred, the right to remedy requires, after the event, an effective, independent and impartial investigation of such allegations. The nature of refoulement is such, however, that an allegation of breach of that article relates to a future expulsion or removal; accordingly, the right to an effective remedy contained in article 3 requires, in this context, an opportunity for effective, independent and impartial review of the decision to expel or remove, once that decision is made, when there is a plausible allegation that article 3 issues arise. The Committee’s previous jurisprudence has been consistent with this view of the requirements of article 3, having found an inability to contest an expulsion decision before an independent authority, in that case the courts, to be relevant to a finding of a violation of article 3.”

¹⁶ *Chahal v. United Kingdom* (1996) European Court of Human Rights, supra note.

custody of Afghan forces, potentially leading to the detainees' torture and a violation of fundamental human rights. CCLA argued that the Charter applies to Canadian forces acting abroad when Canada's actions threaten fundamental human rights such as the right to be free from torture. CCLA contended that government agents acting abroad have a basic *Charter* obligation to refrain from violating fundamental human rights. Members of Canadian forces should not be ordered, CCLA said, to engage in conduct that violates the most basic human rights protections, just as Canadians back home should not have to worry that such action is taking place in their name. On 17 December 2009, the Federal Court of Appeal found that the *Charter* did not apply in such circumstances, but that international law did apply to the actions of Canadian officials. On May 21, 2009, the Supreme Court of Canada refused to hear an appeal of the lower courts' decisions.

ii. Application of International Humanitarian Law to Afghan Detainee Transfer

50. Canada is signatory to and bound by the 1949 Geneva Conventions, the 1977 Additional Protocols, and the 1998 Rome Statute, which apply to armed conflict. Further, international humanitarian law (IHL) applies to countries involved in multinational operations in armed conflict¹⁷ and therefore applies to Canada in its capacity as a member of the International Security Assistance Force ("ISAF") in Afghanistan.

51. Canada entered into an agreement with Afghanistan regarding the transfer of detainees. This agreement specifies that the parties will treat detainees as "prisoners of war", in accordance with the Third Geneva Convention 1949 Relative to the Treatment of Prisoners of War. Although the Third Geneva Convention applies to international armed conflicts¹⁸, it applies to Canada and Afghanistan pursuant to their legal agreement to apply the Third Convention's standards to protect detainees.

52. CCLA notes that the principle of *non-refoulement* in IHL applies to prevent the transfer of prisoners of war and detainees to the risk of torture. Further, IHL requires a transferring State to monitor transferees, and upon discovery of torture or CIDT, to request the receiving State to cease its unlawful treatment immediately. If the receiving State refuses, the transferring State is to remove the transferees into custody:

(i) Torture is expressly prohibited at all times in IHL. Common Article 3 of the 1949 Geneva Conventions absolutely prohibits torture in conflicts "not of an international nature". The 1977 Additional Protocols also prescribe humane treatment (see Article 75(1)) of persons "in the power of a Party to the conflict who do not benefit from more

¹⁷ See for instance, <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/57JQ7L>

¹⁸ Armed conflict can either be international, non-international or internal. Characterization of the conflict determines which laws and rules apply to the conflict.

Following the overthrow of the Taliban by the US in 2001, the conflict in Afghanistan ceased to be an international conflict (i.e. ceased to be a conflict between or among the armed forces of at least two States), and became a "non-international conflict" (i.e. a struggle between insurgents and the Afghan State; Canada and other members of the ISAF are assisting Afghanistan in maintaining security).

favourable treatment under the Conventions or Protocol”, and prohibit torture (see Article 75(2)). Customary international humanitarian law is also considered to prohibit torture against persons *hors de combat*, which would include detainees (see Rules 87 and 90 of the ICRC Study on Rules of Customary International Humanitarian Law, available at <http://www.icrc.org/web/eng/siteeng0.nsf/html/customary-law-rules-291008>).

(ii) The Third Geneva Convention 1949 establishes the humane treatment of prisoners of war. Under Article 12, any State that transfers a prisoner of war must ensure the Receiving State will apply the Convention. If the Transferring State learns that the Receiving State failed to apply the Convention, the Transferring State must request the correction of the situation, or request the return of the prisoners of war. Article 130 of the Third Convention lists “torture” as a “grave breach of the Geneva Convention”.

(iii) The Fourth Geneva Convention 1949 Relative to the Protection of Civilians in Time of War may also apply to the Afghan Detainees if for some reason they were not specifically protected by the Third Geneva Convention. The Fourth Convention protects individuals who find themselves in the hands of a Party to an armed conflict or an Occupying Power, of which they are not nationals. The Fourth Convention does not protect individuals who would be protected by the First, Second or Third Geneva Conventions. (The First Geneva Convention 1949 protects the wounded and sick in the Field, the Second Geneva Convention 1949 protects the wounded, sick and shipwrecked at sea, and the Third Geneva Convention 1949 as stated above protects Prisoners of War). Article 45 of the Fourth Geneva Convention 1949 permits transfers of individuals only to another State which is a member of the Convention, and only after the Detaining Party has satisfied itself of the willingness and ability of the Receiving State to apply the Convention and treat the detainees humanely. If the Detaining Party learns that the detainees are being mistreated after transfer, the Detaining Party must take “effective measures to correct the situation or shall request the return of the protected persons.”

(iv) The Rome Statute of the International Criminal Court in Article 8 defines war crimes as a “grave breach” of the 1949 Geneva Conventions, including “torture”, and “unlawful deportation, or transfer or unlawful confinement”.

iii. International Human Rights Law and the Principle of *Non-Refoulement*

53. International human rights law applies at all times (i.e. during peace and during armed conflict or emergencies), and governs the conduct of States towards individuals in their control. Torture is prohibited in international law in the Universal Declaration of Human Rights, and in the International Covenant on Civil and Political Rights (ICCPR, Article 7), and in the Convention. Further, the absolute prohibition against torture is *jus cogens*, a peremptory norm of international law. There can be no derogation from the absolute prohibition against torture, not even in times of emergency or war.

54. The principle of *non-refoulement*, a component of the prohibition against torture, absolutely prohibits the transfer of an individual by one State to another State, if the individual faces a risk of torture. This principle, which is considered to be customary international law, applies to the transfer of “effective control” over an individual from the jurisdiction of one State to another, and therefore would apply to the actions of Canada

transferring detainees to the NDS. The principle also requires the Transferring State to engage in procedural and substantive safeguards to ensure that an individual is not being transferred to the risk of torture, and that the Receiving State would not then transfer the individual to a Third State where the individual would face the risk of torture.

iv. New Evidence of Torture of Afghan Detainees

55. In October 2011, the United Nations released a report documenting serious evidence of the torture of detainees in Afghanistan. The UN Assistance Mission in Afghanistan, interviewed over 379 detainees from 2010 to 2011, who gave first-hand accounts of their experiences of torture and other serious human rights violations, committed by the Afghan National Directorate of Security (NDS) and the Afghan National Police. The report entitled “Treatment of Conflict-Related Detainees in Afghan Custody¹⁹” is released by the offices of the UNAMA and the UN High Commissioner for Human Rights.

Recommendations

CCLA recommends that the Canadian government hold a public inquiry into the transfer of Afghan Detainees to the Afghan NDS and allegations of subsequent torture.

Prompt investigation into allegations of transfer to torture, and prompt identification and redress of systemic causes, and remedies provided to victims, are necessary for compliance with Canada’s obligations under the Convention and in international law.

V. ARTICLES 5, 7, 8

56. *The Committee has requested information on Canada’s choice to deport rather than to criminally prosecute alleged perpetrators of international crimes.*

57. CCLA recognizes Canada’s duties at international law to exercise its jurisdiction to prosecute those guilty of war crimes, crimes against humanity and other serious crimes of international law.

58. CCLA notes the European Court of Human Rights held that national security imperatives cannot upset the absolute nature of Article 3.

In *Saadi*, the UK intervened, advancing a balancing test similar to *Suresh*. The European Court of Human Rights rejected the test:

(the) “Court notes first of all that States face immense difficulties in modern times in protecting their communities from terrorist violence. It cannot therefore underestimate the scale of the danger of terrorism today and the threat it presents to the community.

¹⁹ To access the report visit

http://unama.unmissions.org/Portals/UNAMA/Documents/October10_%202011_UNAMA_Detention_Full-Report_ENG.pdf

That must not however call in to question the absolute nature of Article 3.”

a. Most Wanted List

59. In July 2011, the Canadian government disseminated a list of 30 “Most Wanted” men, with names and faces. CCLA is concerned that the purpose of this list was to apprehend and deport these individuals. If these individuals are indeed guilty of the serious crimes alleged, CCLA argues that Canada should consider prosecution of these men; deportation may ultimately result in freeing legitimate criminals. CCLA is also concerned that the “Most Wanted” list undermines the presumption of innocence and due process rights guaranteed in international law and the Canadian constitution.

b. Leon Mugesera

60. CCLA is concerned that Canada chose to deport Leon Mugesera to Rwanda to face trial for war crimes charges, even though Mr. Mugesera had appealed to this Committee regarding his fears of torture and unfair trial, and even though this Committee had asked Canada to wait until it could consider Mr. Mugesera’s case. CCLA is concerned that Canada’s actions in Mugesera, as well as in Ahani, undermine its commitments to this Convention, to the ICPR, and generally to the work of the UN Special Mechanisms and Procedures.

61. CCLA is concerned that the *Mugesera* Federal Court Decision of January 2012 undermines Canada’s commitment to international law and fails to recognize the paramountcy of the absolute prohibition against torture, as a peremptory norm of international law, and the companion principle of *non-refoulement*²⁰. CCLA is also concerned that *Mugesera* heavily relies upon the use of Diplomatic Assurances without regard to the concerns expressed by human rights advocates and the Supreme Court of Canada in *Suresh*; applies the balancing test that has been denounced by the European Court of Human Rights in *Chahal* and *Agiza*, by the UN Human Rights Committee in its periodic review of Canada; and applies, in our view, an inappropriately high degree of deference to the Minister’s pre-removal risk assessment determination that there is not a risk of torture for Mr. Mugesera. CCLA reiterates that Canada should have waited for this Committee’s determination of Mr. Mugesera’s case.

c. Abdullah Khadr

62. CCLA wishes to inform the Committee of a positive judgment of the Ontario Court of Appeal, in which extradition was denied and the Court noted the option of Canada to prosecute. In *R v. Khadr*, the United States sought extradition of Abdullah Khadr (an elder brother of Omar Khadr) from Canada:

- i. Mr. Khadr is a Canadian citizen suspected of supplying weapons to Al Qaeda forces in Pakistan and Afghanistan.
- ii. Allegedly the US Government paid the Pakistani intelligence agency – the Inter-Services Intelligence Directorate (the “ISI”) – a half million dollars to abduct Abdullah Khadr in Islamabad in 2004.

²⁰ The UN Special Rapporteur on Counter-Terrorism, then Mr Martin Scheinen, has noted that the principle of *non-refoulement* is *ius cogens*.

iii. Mr. Khadr was held by the ISI in secret detention for 14 months, during which period he was allegedly beaten, interrogated as a source of “anti-terrorism intelligence”, and denied *habeas corpus*. The ISI denied CSIS access to Mr. Khadr while he was in detention. After interrogating him, the ISI was prepared to release Mr. Khadr, but apparently were instructed by the Americans to hold Mr. Khadr for a further six months in secret detention to enable the US to conduct a criminal investigation, and possibly start a process for his rendition to the US.

iv. The court of first instance, the Ontario Superior Court, found that although torture may not have occurred, “*the sum of human rights violations suffered by Khadr is both shocking and unjustifiable*”. The Court held that “(b)ecause of the requesting State’s misconduct, proceeding with the extradition committal hearing threatened the court’s integrity. Responding to that threat was a judicial matter to be dealt with by the extradition judge, not an executive decision reserved to the Minister”. The judge ordered a stay, finding that to permit the proceedings to continue in light of the Requesting State’s misconduct would constitute an abuse of judicial process.

v. The Ontario Court of Appeal upheld the lower court’s decision, stating there “*is no appeal against the extradition judge’s finding that the human rights violations were shocking and unjustifiable,*” and “(t)he extradition judge did not err in concluding at para. 150 that “[i]n civilized democracies the rule of law must prevail.”

vi. The Ontario Court of Appeal rejected the US Attorney General’s assertion that a stay of extradition proceedings would allow “*an admitted terrorist collaborator to walk free.*” Rather, the Ontario Court of Appeal found that Khadr would still be liable to be prosecuted in Canada for his alleged terrorist crimes, and it remained open to the Attorney General to “exercise his lawful powers to commence a prosecution in Canada”.

vii. Justice Sharpe of the Ontario Court of Appeal noted that “***the rule of law must prevail even in the face of the dreadful threat of terrorism***”, and when it “***serves in the short term to benefit those who oppose and seek to destroy***” such values.

d.Hassan Diab

63. On June 6th, 2011, the Justice Maranger of the Ontario Superior Court ordered Ottawa professor Hassan Diab, committed for extradition to France. France requested Professor Diab’s extradition in connection with the bombing of a Paris synagogue in October 1980. CCLA wishes to inform the Committee of further details in this case:

i. Professor Diab has denied any involvement with the bombing, stating that he was not even in France at the time, and denouncing violence of any kind. French officials claim Professor Diab was present in France on a false passport, and have put forward handwriting records allegedly matching his handwriting to that on a hotel registration card. Professor Diab’s lawyers countered these assertions with international handwriting experts’ testimony that the handwriting did not match.

ii. The extradition of an individual engages s.7 Charter rights to life, liberty and security of the person, and the right not to be deprived of these rights “except in accordance with the principles of fundamental justice”, and the individual’s due process and fair trial rights in international law.

iii. Given the high stakes to the individual, an extradition judge must engage in a limited qualitative assessment of the evidence — if the evidence is “*so unreliable that the judge would conclude that it would be dangerous or unsafe to convict, then the case should not go to a jury and is therefore not sufficient to meet the test for committal.*” (*United States of America v. Ferras*, [2006] 2 S.C.R. 77).

iv. In his decision, Justice Maranger noted that France had put forward a “*weak case*”, and that the “*prospects of conviction in the context of a fair trial seem unlikely.*” At paragraph 121 of his decision, Justice Maranger states “*I found the French report convoluted, very confusing, with conclusions that are suspect. Despite this view, I cannot say that it is evidence that should be completely rejected as “manifestly unreliable”*”. As such, Justice Maranger found that he was required to order Professor Diab’s committal.²¹

64. CCLA is concerned that an individual could be ordered for committal on the basis of evidence characterized as “*weak*”, “*confusing*”, “*convoluted*”, and “*unlikely*” to result in conviction in a fair trial. How is committal based on such evidence reconciled with the rights to liberty, due process and fair trial – protected in our Charter and in international law?

65. Furthermore, allegations that the French judicial process may not permit the individual sought to challenge this evidence in a trial, and may permit reliance on ‘secret evidence’ that will not be disclosed or permit a full answer and defence or challenge, raise concerns about due process and fair trial. We reiterate that the right to fair trial is protected in Canadian law and in international law — the ‘UN Special Rapporteur on the protection of human rights and fundamental freedoms while countering terrorism’ has stated that extradition to the risk of a manifestly unfair trial can violate the principle of non-refoulement.

66. Professor Diab is appealing the decision, on several grounds, including that his committal is wrongly based on manifestly unreliable evidence, contrary to the test for extradition set out by the Supreme Court of Canada in *Ferras*. The CCLA remains concerned that if the test for extradition in *Ferras* is undermined, it may lead to unfair processes and injustices for persons suspected of crimes by foreign states. In April 2012, the media reported that France may not wish to actually try Dr Diab in court, but wants him extradited for investigative purposes.

e. *Sriskandarajah v. United States*; and *Nadarajah v. United States of America*

67. CCLA has been granted leave to intervene in the two cases being heard together before the Supreme Court of Canada in 2012. In both cases, the individuals are sought by the US to face charges of terrorist activity. However, the alleged activity took place in Canada, and did not target the United States. The CCLA is arguing that the “*right to remain in one’s own country*” – guaranteed by the Charter and in international law – encompasses the right to be tried in one’s own country for crimes of universal jurisdiction or are crimes in the Canadian Criminal Code, particularly where the accused is physically in Canada, and Canada is also the situs of alleged illegal activity.

VI. ARTICLE 11

²¹ To read the decision click here [Diab Decision June 6](#), or visit here <http://ccla.org/wordpress/wp-content/uploads/2011/06/Diab-Decision-June-6.pdf>

68. *The Committee has asked the State Party for information on the treatment of persons subjected to any form of arrest, detention or imprisonment with a view to preventing torture, its rules, and information on the situation of women prisoners.*

69. CCLA has intervened in a Coroner's inquest relating to the suicide of a young woman who was incarcerated for many years. The young woman committed suicide after guards were told that her cries were only to get attention. She had been subject to many periods of segregation and suffered from mental illness. CCLA and the Ombudsman for Prisons and jail are concerned that there is an overuse of segregation in Canadian jails to deal with mentally ill persons. Previous reforms suggested by the Arbour Commission were not implemented. There are also reports of the abusive use of `administrative detentions` that are not subject to any regulatory framework. CCLA has been calling for an investigation by the federal government, implementation of the recommendations of the Arbour Commission, and a strengthening of the oversight mechanisms for prison guards.

VII. ARTICLES 12 and 13

70. *The Committee has requested information, in light of its previous recommendations, (i) on the competence of the Commission for Public Complaints Against the RCMP, to investigate and report on all activities of the RCMP; (ii) measures taken to ensure external, independent mechanisms exist for investigations of complaints regarding conduct of law enforcement personnel in all jurisdictions; (iii) implementation of the recommendations of Justice Dennis O'Connor (State party's report, para. 20) in particular as to the establishment of a comprehensive review and oversight mechanisms for security and intelligence operations in Canada; outcomes of the Federal Inquiry into the three Arab-Canadians presided over by Justice Frank Iacobucci – and the allegation that lawyers for the three men were “shut out of the process and have had no access to information”; (iv) follow up on the Khadr case mentioned in the Committee's follow-up letter of 29 April 2009.*

71. CCLA is seriously concerned that there is inadequate review and oversight of the RCMP. Justice O'Connor in policy recommendation 10 called for the RCMP's information-sharing practices and arrangements be subject to an independent, arms-length review body; in 2009 the Parliamentary Committee Review of the Findings and Recommendations Arising from the Iacobucci and Arar Inquiries expressed concern “that new policies and agreements have not been reviewed by an independent body in accordance with Justice O'Connor's recommendation 10.” CCLA notes the findings of Justice Dennis O'Connor regarding the Commission for Public Complaints against the RCMP, citing delays in reviews, its lack of sufficient powers to “effectively review the way the RCMP carries out its mandate”, and its “much less rigorous” review than that of CSIS by SIRC. CCLA recommends that, as with the independent civilian review model of SIRC with CSIS, there should be independent civilian review of the key agencies pursuing national security work, including the RCMP, CBSA, and DFAIT.

72. A Parliamentary Committee expressed concern that “No one agency has an overview of the mosaic of intelligence collected by the various Canadian organizations, which would be necessary to implement an effective government-wide anti-terrorism strategy.”

73. Justice John Major presiding over the Air India Inquiry into the fatal bombing of Air India Flight 182 in 1985, found that serious errors in how information was collected, shared or withheld, between CSIS and the RCMP contributed to failures of intelligence in preventing the bombing.

74. The CCLA observes the Canadian government's statement in its National Security Policy 2004, "*We also need to ensure that there are effective mechanisms for oversight and review so that, in protecting an open society, we do not inadvertently erode the very liberties and values we are determined to uphold.*"

Recommendations

75. CCLA agrees with the findings of Justice O'Connor, and with the findings of Justice John Major that: (i) Canada must create an integrated oversight and review mechanism of the integrated national security activities of Canada's agencies; (ii) any Canadian agency mandated to perform national security work should have independent civilian review of its national security activities; (iii) a centralized co-ordinating body or office mandated to oversee, and review information flows among agencies; this office would receive and coordinate sensitive national security information and determine whether it should be forwarded to other Canadian agencies.

a. Iacobucci Commission of Inquiry

76. Justice O'Connor determined that allegations of torture of three Canada-Arab men should be the subject of a separate inquiry. This inquiry was presided over by retired Supreme Court of Canada Justice Frank Iacobucci. Justice Iacobucci defined his mandate as an inquiry to conclude whether or not these men had been tortured in Syria, and in one case also in Egypt; and whether or not Canadian officials had contributed directly or indirectly to the mistreatment. The Iacobucci Commission was conducted with less transparency than the Arar Commission, and even the three individuals involved and their counsel had limited access to the proceedings. Further, unlike the Arar Commission, the Iacobucci Commission was not mandated to make recommendations. However, the findings of the Iacobucci Commission provide helpful direction to Canadian officials regarding the collection and sharing of information with foreign agencies. The findings are contained in the thirteen chapters of the Report released in 2008.

77. Justice Iacobucci found that Abdullah Almalki, Ahmad Abou-Elmaati, and Muayyed Nureddin, were each detained and interrogated in Syria, during separate travels to the region, and that each man was tortured. In the case of Mr. Elmaati, he was detained and tortured again in Egypt, after being transferred to Egypt by Syria.

78. In each case, Justice Iacobucci found that CSIS, the RCMP, and DFAIT had indirectly contributed to the "*mistreatment*" suffered by these individuals. These Canadian agencies had shared or passed on "*inflammatory, unqualified, and potentially inaccurate information*", when they knew or ought to have known that these men were being detained and interrogated in countries with records of the using torture during interrogation and other serious human rights abuses.

79. CCLA highlights for the Committee the following findings of Justice Iacobucci. CCLA believes Canadian agencies should conduct themselves in a manner that comports with Justice Iacobucci's findings, as necessary to avoid complicity in the torture of Canadian citizens or residents abroad:

- Canadian agencies must never pass on information to foreign agencies that is not qualified. Canadian agencies have a duty to ensure the investigative foundation of any information they pass on.
- Canadian agencies must be very careful in labeling individuals, and to ensure the accuracy of any such labels. In the cases of Mr. Elmaati and Mr. Almalki, the use of labels such as "imminent threat" was found to have contributed to their mistreatment and torture by Syrian officials.
- Canadian agencies cannot recycle imported intelligence, without assessing its accuracy. Justice Iacobucci did not accept the arguments of the Canadian government that the information it had provided about Mr. Almalki to US officials, had originally been provided by US agencies. Justice Iacobucci noted the duty of CSIS to verify the investigative foundation of any information, and to qualify such information – and to consider the potential serious consequences to individuals.
- The CCLA notes our concern about the repetition of faulty or false information suggesting a credibility to that information, and about the proliferation of false or faulty information in global information exchanges through such recycling of information by agencies without attempts to assess the investigative foundations and veracity of such information.
- The CCLA also notes that the UN Special Rapporteur on Counter Terrorism has reported that States often claim they are relying on summaries provided by foreign intelligence – and the Special Rapporteur noted that such claims are often used as a justification to use information without determining if it is the product of torture. In our view, the duty to assess whether information has been contaminated by torture does not cease based upon the form or state of the information received.
- Justice Iacobucci reiterated the findings of Justice O'Connor in the Arar Commission report that "the use of loose or imprecise language about an individual can have serious or unintended consequences".
- Canadian agencies must ensure that any information passed on to foreign agencies is subject to caveats. This applies even to oral information passed on. Caveats must always be subject to writing.
- In cases where a Canadian is in a situation where there is the risk of serious human rights abuses or the person's liberties are at stake, Canadian agencies must follow-up on whether the caveats associated with any information are being followed.
- Canadian agencies must consider the potential consequences for serious human rights abuses to Canadians detained abroad, if they submit questions for a

foreign government to ask during interrogation (e.g CSIS sent Syria questions for Syrian officials to ask Mr. Elmaati), or if the RCMP requests to see a detained Canadian in relation to an anti-terror investigation (the RCMP repeatedly requested, but did not succeed in seeing Mr. Elmaati in Egypt which Justice Iacobucci found contributed to his 'mistreatment by Egyptian authorities). Sending questions can legitimize the interrogation and detention processes already underway and encourage a Detaining State to continue mistreatment of an individual. Repeatedly asking to interview an individual can send a signal to a Detaining State that an individual is a threat, and can contribute to 'mistreatment'.

- Justice Iacobucci found that when CSIS requested to see Mr. Amalki it did not contribute to his mistreatment (although other actions of CSIS did contribute) – however, Justice Iacobucci states that Canadian agencies must on a case-by-case basis, consider all circumstances including a Detaining State's record of human rights and the potential consequences to a detainee, in determining whether or not to request seeing a detained individual. In other words, CSIS and the RCMP must consider the potential impact to a Canadian detained abroad, if they request access to that individual –in light of the circumstances and particularly the human rights record of the country and its reported use of torture and serious human rights violations in interrogation of detainees.
- DFAIT's branches must immediately inform DFAIT Consular Affairs when a Canadian is taken into detention. Justice Iacobucci noted that it is common for serious human rights violations including torture to occur during interrogation in the days immediately following detention – this is why it is crucial that DFAIT ISI upon learning of the detention abroad of a Canadian, immediately inform DFAIT Consular Affairs. In the cases of Mssrs. Elmaati and Almlaki, DFAIT ISI did not immediately inform DFAIT Consular Affairs; in the case of Mr. Nureddin, DFAIT ISI did promptly inform DFAIT Consular Affairs of his detention(s).
- DFAIT Consular Affairs, must pursuant to the *Vienna Convention on Consular Relations*, Articles 36 and 37, immediately seek to visit with the detained Canadian. Consular Staff must be trained to identify the signs of torture and serious human rights abuses. Staff must realize that detained individuals are traumatized by experiences of torture and may not speak up in visits with Canadian consular staff for fear of reprisal and /or for fear that the visits may be attended or overheard by the Detaining State's officials.
- Justice Iacobucci denounced the Governments arguments that visits from family could satisfy the obligation for Canadian consular staff to visit detained Canadians – he stated that families were not trained to identify torture or serious human rights abuses, or to inform detainees of their rights or to seek information about treatment. Further, Justice Iacobucci stated that such an argument would hardly be reassuring to Canadians detained abroad who do not have family, or accessible family.
- Justice Iacobucci noted that although the RCMP provided its RCMP Supertext Database only to US officials (without caveats as determined by the Arar Commission) – this information had somehow made its way into the hands of the Syrian government. The CCLA notes the dangers of Canadian agencies

providing information to the US or any foreign power, without written caveats in place – particularly in light of the Canada-US Security Perimeter Action Plan which envisages “greater information sharing and pooling” and removals of “obstacles” thereto.

- Justice Iacobucci rejected DFAIT arguments that repeating denied requests for consular visits with Mr. Almalki would have made a difference, given that Syria refused to recognize his dual citizenship. Justice Iacobucci pointed out that repeated requests in the case of Maher Arar – also a dual Canadian-Syrian citizen – did result in DFAIT Consular Staff gaining access to Mr. Arar. Justice Iacobucci noted that challenges to gaining access should not deter DFAIT Consular Staff from seeking to obtain access to Canadians detained abroad.

RECOMMENDATIONS OF THE CCLA

80. The CCLA concurs with the findings and recommendations of Justice O’Connor, and the findings and comments of Justice Iacobucci. We summarize the key findings we believe must apply to Canada’s intelligence agencies conducting counter-terrorism work at home and abroad as follows:

- Information sharing among domestic agencies and with foreign agencies is a necessity for Canada’s national security. However, such information sharing must contain caveats as to the reliability of the information and its use and dissemination.
- Cooperative investigations between Canadian and foreign agencies are justified in post 9/11 counter-terror operations. However, rules for cooperation between domestic and foreign security agencies must be as clear as possible beforehand and where practical reduced to writing. The mistakes made by the RCMP’s Project AO program in exchanging information with the US and Syria, indicate how dangerous it is to rely upon implicit or verbal understanding when dealing with foreign agencies. As Justice O’Connor points out, written agreement may avert future errors; “once in the foreign jurisdiction, intelligence will be used in accordance with the laws of foreign jurisdiction which may not be the same as Canadian law. Reducing to writing, even if only in exchange of letters, can greatly assist in ensuring accountability in decision-making and in reviewing integrated activities, including information-sharing.”
- Arrangements with foreign agencies must be subject to periodic reviews. The CCLA strongly supports this recommendation, particularly in light of the known suffering experienced by Canadians detained and interrogated abroad; plans for greater “information sharing and pooling” in the proposed Canada-US Security Perimeter, and the differing perspectives of the US on ‘enhanced interrogation’ techniques’ and its arrangements with foreign agencies; and the 2011-announced Global Counter-Terrorism Forum – a network of 29 countries and the European Union, of which Canada is a founding member.

- Agencies must provide trainings for staff to learn to identify and distinguish information that may be the result of human rights abuses. Such training should reflect the particular environment(s) in which corresponding agency staff are operating at home or abroad. The CCLA believes that such information must be identified and rejected by Canadian agencies, so it is not admitted in or relied upon to initiate proceedings, and so it not further circulated by Canada to domestic or foreign agencies.
- Consular staff in particular, must be trained to learn to identify the signs of abuse or torture of Canadians abroad. The CCLA is deeply concerned that in terror and non-terror cases, Canadians have been subject to torture and serious human rights abuses while detained abroad. In the context of terror cases, States have demonstrated a greater willingness to overlook human rights violations against detained foreigners, and Canada must ensure that States conform with international law when dealing with Canadians abroad. The CCLA reiterates the dangers of impunity, which contribute to cultures of violence and disregard of rule of law, with a regressive effect on the international legal order and upon human dignity.
- DFAIT must take action when it is aware of a serious risk or likelihood of torture or serious human rights abuses of a Canadian detained abroad. The duty of States to provide diplomatic protection to nationals detained abroad has been contentious in international law. For its part, DFAIT proclaims it does not interfere in the lawful administration of a foreign States national laws. The CCLA argues that where there is evidence of the violation of a peremptory jus cogens norm – torture—Canada must act to protect its national detained abroad – we believe the legal justification of this argument lies in the superior hierarchical position of the peremptory norm absolutely prohibiting torture. As a *jus cogens* norm applicable *erga omnes*, Canada has a duty to ensure it is observed. We note as well that the Supreme Court of Canada has ruled that “comity ends where serious human rights violations begin”, and we believe that torture as one of the most serious human rights violations, vitiates any duty of Canada to defer to a torturing States laws.
- Information should never be exchanged or solicited from a foreign government known to engage in torture or other serious human rights abuses. **The CCLA believes this prohibition extends to Consular Staff being prohibited from disseminating information obtained from Canadian detainees abroad, to foreign agencies known to engage in serious human rights abuses.**
- CSIS must not find people guilty by association.
- Reviews must not be conducted solely by internal audits, but require a public or civilian review mechanism. The CCLA notes that while CSIS has the ‘exemplary’ civilian review mechanism of SIRC, there is no civilian independent review mechanism for other key agencies carrying out national security work such as the RCMP, CBSA, and DFAIT. In particular, the review processes for the RCMP

may be considered inadequate given its intrusive powers.²²

- Justice O'Connor has recommended that an "Independent Complaints and National Security Review Agency" ("ICRA") have the power to review all RCMP operations, and ensure the organization is in compliance with the law. He also recommends that ICRA review activities of the CBSA, and that SIRC review the activities of DFAIT, CIC, Transport Canada and FINTRAC.
- The CCLA agrees that integrated national security initiatives require integrated review mechanisms. Justice O'Connor recommended "legislative gateways" be created between the ICRA, the SIRC, and the Office of the CSE Commissioner, to provide for "the exchange of information, referral of investigations, conduct of joint investigations, and coordination and preparation of reports." The CCLA notes that the 2009 Standing Committee on Public Safety National Security agreed, and recommended the creation of an Integrated National Security Review Coordinating Committee ("INSRCC"), whose members would be the ICRA Chair, the SIRC Chair, the CSE Commissioner, and an independent person to Chair the Committee. Similarly, the Major Commission (2010) building on Justice O'Connor recommendation, has called for the enhanced powers of the National Security Advisor that would enable settling of disputes between agencies, and enable coordination and decision-making regarding information exchange. The CCLA notes that in 2009, the Standing Committee expressed concern that none of Justice O'Connor's policy review recommendations to-date had been implemented, and found unsatisfactory the Government's position that it was waiting for the Air India Commission's report.

b.Omar Khadr

81. CCLA has historically and continually called for the repatriation of Omar Khadr to Canada. Omar Khadr is a Canadian citizen, who in 2002 at age 15, was found seriously wounded in Afghanistan by Americans, detained at Bagram airforce base, and eventually transferred to detention with adult detainees in Guantanamo Bay. Canadian CSIS officials interrogated him-- knowing him to be a minor, without counsel, separated from family, wounded, and subject to sleep deprivation,--and then passed on the fruits of their interrogation to US officials. In **2008**, the Supreme Court of Canada²³ condemned the 2002 Guantanamo Bay regime as constituting a "clear violation of fundamental human rights protected by international law"; and found Canada's participation as being contrary to the principles of fundamental justice protected by our Charter. The Court ordered Canada to provide Mr. Khadr's lawyers with descriptions of the interrogation information passed on to US lawyers. In **2010**, the Supreme Court²⁴ held that Canada had violated the Charter and international law by interrogating a minor in the stated conditions, which breach had a likely continuing causal effect upon Mr. Khadr's ongoing detention and the charges against him. The Court ordered Canada to provide Mr. Khadr

²² See Report of the Standing Committee on Public Safety and National Security, June 2009.

²³ *Canada (Justice) v Khadr*, 2008 SCC 28, [2008] 2 SCR 125.

²⁴ *Canada (Prime Minister) v Khadr*, 2010 SCC 3, [2010] 1 SCR 44

with a remedy, and stated that repatriation might be an appropriate remedy; but stopped short of ordering repatriation citing deference to the Crown prerogative over foreign affairs.

82. The CCLA notes that in *Khadr (2010)*, the Supreme Court characterized the sleep deprivation and other conditions to which Mr. Khadr was subjected as being “improper treatment”; however the UN Special Rapporteur on Torture has found sleep deprivation tactics violate the absolute prohibition against torture, cruel, inhuman and degrading treatment or punishment.

83. SIRC in 2009 released its review²⁵ of CSIS’s role regarding Mr. Khadr and found:

“SIRC believes that CSIS failed to take into account that while in US custody, Khadr had been denied certain basic rights which would have been afforded to him as a youth... SIRC recommends that CSIS develop a policy framework to guide its interactions with youth. As part of this process, the Service should ensure that these interactions are guided by the same principles that are entrenched in Canadian and international law as they relate to youth.”

CCLA endorses these findings and recommendations of SIRC.

84. Notwithstanding the *First International Protocol of the UN Convention on the Rights of the Child* which Canada and the US have ratified – and which recognizes that child soldiers are often conscripted against their will into armed conflict, do not act freely, and must be rehabilitated and not prosecuted -- Mr. Khadr was facing charges before a US Military Commission of having thrown a grenade that killed a US sergeant, conspiring to aid Al-Qaeda in carrying out terrorist attacks, and planting roadside bombs targeting US forces. In August 2010, a Military Judge held that Mr. Khadr’s “confessions” taken after his arrest in 2002 when he was badly injured, hooded, subject to sleep deprivation and apparent threats of harm, would be admissible. Shortly thereafter, Mr. Khadr retracted his years of proclaimed innocence and pleaded guilty. Observers speculated that Mr. Khadr’s guilty plea was to avoid a trial before the US Military Commission, which had lower evidentiary and due process standards than the seasoned Federal Criminal Court, and did not comply with the fairness and due process protections of the International Covenant on Civil and Political Rights or the US Constitution.

85. Mr. Khadr is currently seeking repatriation to Canada. The Canadian government has the option under the International Transfer of Offenders Act to deny Mr. Khadr’s repatriation if it is believed he poses a threat to Canadian national security.

86. The CCLA urges the Canadian government to repatriate Mr. Khadr without delay. The CCLA notes that the 2010 Supreme Court of Canada order, to provide Mr. Khadr with a remedy for the breach of his constitutional and international law safeguards, remains outstanding. Repatriation to Canada through a timely transfer will enable Mr. Khadr to serve the remainder of his sentence in proximity to his Canadian family members, and begin the process of rehabilitation and healing following an ordeal that has consumed much of his life.

²⁵ CSIS’s Role in the Matter of Omar Khadr (SIRC STUDY 2008-05), Security Intelligence Review Committee, July 8, 2009.

c. Other Canadian Nationals Detained Abroad on Terrorism Charges

87. CCLA wishes to inform the Committee of the case of Abousfian Abdelrazik, a Canadian citizen and refugee, who was detained and alternately stranded in Sudan for more than six years, and allegedly the victim of torture. Justice Zinn of the Federal Court of Canada found that Canada (CSIS) had “directly or indirectly” requested the detention of Mr. Abdelrazik in Sudan, and condemned Canada’s role in Mr. Abdelrazik’s detention at paragraph 91 of his decision:

“(91) An allegation that Canada was complicit in a foreign nation detaining a Canadian citizen is very serious, particularly when no charges are pending against him and in circumstances where he had previously fled that country as a Convention refugee. However, in my view, the evidence before the Court establishes, on the balance of probabilities, that the recommendation for the detention of Mr. Abdelrazik by Sudan came either directly or indirectly from CSIS.”

CCLA is concerned that CSIS may have contributed to the detention of Mr. Abdelrazik in Sudan, where he was allegedly tortured.

88. On a positive note, Justice Zinn found that DFAIT had provided consular aid and visits to Mr. Abdelrazik. However, Justice Zinn found that CSIS made several requests to interview Mr. Abdelrazik while he was in detention; in light of the findings of Justice Iacobucci’s Commission (above), CCLA queries whether CSIS considered if their visits might contribute to the torture or abuse of Mr. Abdelrazik by Sudanese officials.

89. Mr. Abdelrazik is now in Canada, and has commenced proceedings to sue the Canadian government for its role in contributing to his detention and alleged torture in Sudan.

90. At the time of writing, two other Canadian men remain detained abroad in connection with alleged terrorist activity. Bashir Maktal is currently being detained in Ethiopia, and Huseyn Celil in China. CCLA requests the Committee to ask the Canadian delegation what steps if any are being taken to ensure proper treatment, and appropriate assistance in light of the specific circumstances of each case, to these men.

VIII. ARTICLE 14

91. The Committee has asked for updated information, based on its prior recommendations, to ensure the provision of compensation through its civil jurisdiction to all victims of torture.

92. CCLA wishes to inform the Committee that Canada in March 2012 adopted the ***Justice for Victims of Terrorism Act*** (<http://laws-lois.justice.gc.ca/eng/acts/J-2.5/page-1.html#preamble>). The purpose of this Act is to deter terrorism by establishing a cause of action that allows victims of terrorism to sue perpetrators and supporters of terrorism.

The *Justice for Victims of Terrorisms Act* creates a cause of action and an amendment was brought to the State Immunity Act (sect. 6.1) <http://laws-lois.justice.gc.ca/eng/acts/S-18/> to allow for the lifting of the immunity against certain states. The Government will enact a list within the next six months of States that it deems “to have supported terrorism since 1985”. Section 6.1 allows governments to apply to be “removed” from the list when they are deemed no longer to support terrorism, and the list must be reviewed every two years. It is also possible to sue entities that have supported terrorism.

The *Justice for Victims of Terrorism Act* restricts the ability to sue. to lawsuits against countries that the Canadian government has deemed to have supported terrorism.

CCLA is concerned that the listing and delisting provisions in the Act may constitute denial of due process and equality before the law (if one is a victim of terrorism from a State not listed), and that it potentially politicizes access to justice.

CCLA provided written submissions to Parliament, inviting the government to amend the *State Immunity Act* to clearly enable victims to sue for acts of torture as well as acts of terrorism.

93. CCLA is deeply concerned that Canadian courts have interpreted the State Immunity Act as barring lawsuits for acts of torture, against Foreign States²⁶. CCLA is currently intervening on the *Kazemi* cases in the Quebec Court of Appeal, to argue that Article 14 and the meaning of the *jus cogens* absolute prohibition against torture, demands Canada to provide compensation through civil jurisdiction for victims of torture, and to ensure accountability and deny impunity to torturers.

94. CCLA rejects the arguments that the absence of a specific exemption for torture in the *State Immunity Act* means that Parliament did not intend for the exemption. CCLA argues the principle of international law that treaties be interpreted in the context of contemporary legal rules: this is particularly true where humanitarian concerns²⁷ or human rights are engaged. The International Court of Justice stated: “*treaties that affect human rights cannot be applied in such a manner as to constitute a denial of human rights as understood at the time of their application. A Court cannot endorse actions which are a violation of human rights by the standards of the time merely because they are taken under a treaty which dates back to a period when such action was not a violation of human rights.*”²⁸

²⁶ In the cases of Maher Arar, Houshang Bouzari (leave to appeal to Supreme Court of Canada denied), and in Zahra Kazemi where only her son who felt the shock of her death when he learned of it in Quebec was permitted to sue; Ms. Kazemi’s Estate was barred..

²⁷ See *Reservations to the Convention on the Prevention of and Punishment of the Crime of Genocide*, Advisory Opinion, ICJ Reports 1951, p. 15 at p. 23; see also *Legal Consequences for States of the Continued Presence of South Africa in Namibia (Wouth West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports 1971, p. 16, at para. 53.

²⁸ *Gabickovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, ICJ Reports 1997, p. 7 at pp. 114-115.

95. The Supreme Court of Canada, in its decision in *Kuwait Airlines Corporation and Republic of Iraq and Bomardier Aerospace.*, 2010 SCC 40, stated that “the evolution of international law and of the common law has led to the development of new exceptions to the principles of immunity” beyond those explicitly listed in the SIA, is far from a settled question in our law.”

IX. ARTICLE 16

96. *The Committee has asked for information on the outcome of the G8 and G20 Summits in Toronto, and the use of tasers.*

a. G20 and Montreal Student Protests

97. CCLA is concerned that the right to peaceful protest , in recent years, is being eroded. CCLA notes that international law requires police to protect and facilitate enjoyment of the right to peaceful protest. The right to peacefully protest is an integral part of a democratic order and is as important as the right to vote. The government and security responses to the exercise of freedom of peaceful assembly is a test of whether a government is a democracy or an autocracy, as events around the world demonstrate. Violent disruptions of peaceful protests are unacceptable no matter where they occur.

98. The G20 protests in Toronto in 2010 saw the use of kettling, mass arrests, rubber bullets. In Montreal, recently, tear gas was used repeatedly on protesters, and the police are using more and more force as the public protests continue.

99. The accountability framework is completely inefficient where complaints for the G20 two years ago have not yet been addressed. This situation creates a vacuum that does not respect the rule of law as constitutional violations and illegal actions on the part of the authorities go unpunished. We urge the Committee to ask Canada to provide an account of its policing accountability mechanisms and their efficiency.

b. Tasers

100. On April 7, 2011, an 11-year-old boy in Prince George, B.C. was reportedly stunned by RCMP officers with Taser. This incident, in the CCLA’s view, raises serious concerns about the RCMP’s policy on the use of Conducted Energy Weapons (“CEWs”) and reinforces the CCLA’s repeated demands for uniform national standards for the use of CEWs by law enforcement. The CCLA in April 2011 wrote²⁹ to the Commissioner of the RCMP and expressed concerns about the use of CEWs on young persons because they may be more vulnerable to medical risks associated with being stunned by such weapons. Unlike the national Guidelines for the Use of Conducted Energy Weapons published by Public Safety Canada last year, the RCMP’s current CEW policy does not impose any restriction or caution against the use of CEWs on young children. The CCLA urges the RCMP to update its CEW policy such that the use of CEWs on medically high

²⁹ <http://ccla.org/wordpress/wp-content/uploads/2011/04/2011-04-27-letter-to-RCMP-re-Taser-on-boy-scanned-copy.pdf>

risk groups, including children, will be avoided except in the rare cases where other de-escalation techniques requiring less force would not be effective in diffusing an imminent risk of death or serious bodily harm. The CCLA also asks the RCMP to include, as a part of its CEW training, information on the heightened medical risks associated with the use of CEWs on children and other vulnerable groups. Furthermore, the CCLA urges the RCMP to act in accordance with the National Guidelines and to make the RCMP officers' CEW reports in this case publicly available as soon as possible.

X. OTHER ISSUES

a. Security Perimeter

101. CCLA is concerned whether the proposed Canada-US Security Perimeter will comply with international law and the Charter, particularly relating to the privacy and mobility rights of individuals; the collection and sharing of sensitive national security intelligence between both countries; and proper review, accountability, and oversight of integrated and cross-border policing and intelligence functions. CCLA is particularly concerned that the recommendations and findings of three Federal Commissions of Inquiry into national security issues have not been fully implemented, but Canada is moving ahead with greater 'information sharing'. How will the border agreement affect citizens, travelers and migrants on both sides of the border? Will international and constitutional guarantees be upheld? Does the agreement include redress mechanisms, as well as judicial, independent oversight in sensitive areas such as intelligence gathering and listing?

102. CCLA has drafted a set of twelve core legal principles, in cooperation with the American civil liberties group the ACLU, and the UK privacy group Privacy International to which we believe both governments must adhere in any Canada-US Security Perimeter arrangement:

CORE LEGAL PRINCIPLES THAT MUST BE COMPLIED WITH IN ANY CANADA-U.S. SECURITY PERIMETER AGREEMENT

In February 2011, U.S. President Obama and Canadian Prime Minister Harper reached an agreement to create a "North American Security Perimeter." This plan outlined the following objectives: "addressing threats early," trade facilitation, integrated cross-border law enforcement, and critical infrastructure and cybersecurity.

However, greater harmonization of U.S. and Canadian security policies such as a continental entry-exit system must not lead to large scale surveillance systems. Both countries recognize a constitutional right to travel, and the legal systems of both countries recognize that privacy is a fundamental right.

In order to ensure that implementation of the Security Perimeter comports with both nations' longstanding values of privacy and civil liberties, we call on both leaders to require that the proposed Canada-U.S. Security Perimeter Cooperation Agreement adhere to following principles:

1. HIGHER STANDARDS PREVAIL: Where there are differing standards of legal

safeguards between the two countries, the standard granting the greater protections to individuals should be adopted.

2. **ADHERENCE TO EXISTING OBLIGATIONS:** Both countries must uphold the International Covenant on Civil and Political Rights, the 1951 International Convention Relating to the Status of Refugees (including the principle of *non-refoulement*), the UN Convention Against Torture, and the UN Convention on the Rights of the Child, and all other relevant international human rights laws to which either country is party.

3. **LEGITIMATE, NECESSARY AND PROPORTIONAL:** States must comply with the International Covenant on Civil and Political Rights' prohibition against arbitrary or unlawful deprivation of an individual's right to privacy. In order to ensure that a limitation on the right to privacy is not arbitrary, it should be legitimate, necessary and proportional as follows:

- a. It must be essential to achieving a specific, legitimate aim that is specified in advance.
- b. It must be the least intrusive means possible of achieving such an aim.
- c. It must be proportional to the interest to be protected.
- d. To ensure these principles are met, any limitation must be based on individualized suspicion or evidence of wrongdoing.

4. **COLLECTION:** States should only engage in targeted, lawful collection of personal information.

- a. Surveillance and "intelligence" about domestic subjects must be individually targeted, based upon individualized suspicion of wrongdoing, and subject to judicial oversight.
- b. The creation of dossiers, watchlisting, "intelligence" collection, investigation and infiltration must never be based on individuals' exercise of their rights to freedom of expression and religion.
- c. New technologies permitting broader forms of surveillance must be subject to full public consultation and debate, authorized by law, necessary and proportional, and subject to independent assessment and oversight.

5. **LIMITS ON INFORMATION SHARING:** Any information exchanges between security and intelligence agencies must be subject to clear controls and limits – both between Canadian and U.S. agencies and among domestic agencies. In particular, information shared among or between national intelligence agencies must be subject to a public, written agreement between the national agencies with respect to purpose, use, storage, dissemination.

- a. Any information sharing must be restricted to its particular purpose, and not used, disseminated or stored for secondary uses.
- b. The storage of personal information must be subject to rules limiting the duration of its retention to reasonable periods.
- c. Information should never be shared with third countries that are suspected of engaging in or condoning serious violations of human rights, including torture or cruel, inhuman, or degrading treatment or punishment.

6. **OVERSIGHT AND ACCOUNTABILITY:** Information collection, sharing, use, dissemination, and storage practices must be subject to independent oversight, review, and accountability procedures. This applies to all intelligence agencies, in both countries, engaged in information sharing practices. In Canada, the federal Privacy Commissioner for example, would have the expertise to monitor and review all

information sharing agreements and practices. In the United States, such independent oversight could be provided by the Privacy and Civil Liberties Oversight Board – an institution created by Congress in 2007 yet which has stood vacant ever since as presidents Bush and Obama have refused to nominate members to the Board.

7. **NONDISCRIMINATION:** In the treatment of personal information, there must not be any discrimination between U.S. and Canadian citizens, or between citizens and permanent residents of either country.

8. **DUE PROCESS:** No person should be subject to impingements on their right to travel or other ill effects without full due process, including:

- a. The right to notice of the deprivation and of the legal and factual bases for the deprivation.
- b. The right to access and review the evidence against them.
- c. The right to challenge the accuracy or reliability of the evidence against them, and to receive redress.
- d. The right to challenge adverse designations through an adversarial process before a judge and subject to judicial review.
- e. Cooperation between countries and jurisdictional issues shall not be permitted to form a barrier to individuals seeking redress.

9. **WATCH LISTS:** Watch lists must be narrowly focused on persons who pose a genuine and immediate threat. No person should be placed on a watch list (or denied access to a “trusted traveler” whitelist) unless:

- a. They are given full due process as outlined above, including the right to notice that they have been included on a watch list or excluded from a whitelist.
- b. There are tight, well-defined criteria by which individuals are added to a watch list, or excluded from a whitelist.
- c. The watch list is subject to independent oversight, including rigorous procedures for the removal of names that should not be on the list.
- d. The agencies involved in placing names on the watch list or denying access to a whitelist refrain from using “guilty by association” in targeting individuals.

10. **DATA MINING:** Security screening determinations or any other decisions that produce legal effects or significantly affect the data subject may not be based solely on automated processing of data. A form of appeal and other due process rights must be provided when automatic decision making processes are used.

11. **CYBERSECURITY:** All cybersecurity measures must comply with the principles listed above.

12. **FOREIGN INFORMATION SHARING AND MUTUAL ASSISTANCE:** Steps must be taken to ensure that domestic law enforcement can never use foreign law enforcement to circumvent legal safeguards that apply to the domestic agency. A law enforcement agency must not carry out surveillance on one country’s citizens on behalf of another country’s law enforcement agencies in circumstances where those agencies are prohibited from carrying out such surveillance on their own.

CCLA requests the Committee to ask the State party if it will ensure the above core legal principles, reflecting international legal standards, will be adhered to by the State party.

b. Anti-Terrorism Act – definition “terrorist activity”

103. CCLA is currently intervening before the Supreme Court of Canada to challenge the definition of “*terrorist activity*” in the Anti-Terrorism Act (which amends the Criminal Code), as being too vague and overbroad and proscribing behavior that ought not to be sanctioned; for example, the overbreadth of the definition may capture or chill legitimate behaviours relating to freedom of religion, freedom of expression, freedom of speech or opinion, and public participation.

c. Investigative Hearings and Recognizance with Conditions

104. CCLA is concerned the Government is seeking to re-introduce controversial provisions permitting investigative detentions, preventive detention and recognizance with conditions. These provisions may be applied to individuals who are not criminally charged, who therefore are subjected to criminal sanctions without charge, and with no meaningful opportunity to appeal or challenge the order to appear and give testimony or the bail conditions or detention imposed against them. CCLA is further concerned that the provisions may be triggered pursuant to evidentiary thresholds that are lower than those used in laying criminal charges. Finally, by detaining or tipping off individuals under suspicion, the State loses an important opportunity to surveil and gather evidence – and in turn, to prosecute, convict and punish those guilty of terrorist activities.