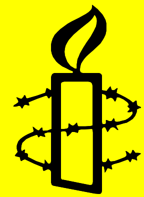
AMNESTY INTERNATIONAL



A SUMMARY- Canada: briefing to the UN Committee against Torture

INTRODUCTION

This brief lays out concerns about a variety of ways in which Canadian action or inaction risks complicity in torture or other ill-treatment, through such means as inadequate efforts to protect Indigenous women from violence, prisoner transfers, deportations, national security relationships with foreign governments and failure to ensure justice and accountability for torture. The brief also lays out some ongoing concerns about the use of conducted energy devices and allegations of excessive force by police that have arisen in connection with various protests.

This is an abridged version of *Canada: briefing to the UN Committee against Torture* (AI Index: AMR 20/004/2012, published in English. Fuller analysis and sources can be found in the original available at: http://www.amnesty.org/en/library/asset/AMR20/004/2012/en/b46d9371-1b2c-414b-90e9-b97c3953cb48/amr200042012en.pdf

I. INDIGENOUS PEOPLES

A) VIOLENCE AGAINST INDIGENOUS WOMEN - ARTICLES 12 AND 13

Indigenous women and girls in Canada suffer greatly disproportionate rates of violence. As of March 2010, the Native Women's Association of Canada had documented 582 cases of missing and murdered Indigenous women and girls, mostly from the past three decades. However, the disappearance and killings of marginalized women and girls often attracts little public attention or demand for action.

The federal government's response to the levels of violence faced by Indigenous women, announced in October 2010, is a piecemeal set of programs and initiatives, some of which, such as Criminal Code amendments to streamline the process of obtaining police wire taps, are of questionable relevance. The federal government has taken no measures to ensure that police accurately and consistently record the Indigenous identity of victims of crime, and has refused to develop national guidelines or protocols to address the systemic threats to the welfare and safety of Indigenous women.

Recommendations:

1. Canada should work with Indigenous women's organizations to develop a coordinated, comprehensive, national plan of action to end violence against Indigenous women and girls.

2. Such a plan of action must include measures to address social and economic factors placing Indigenous women at risk, ensure unbiased investigation of missing persons cases, and enable accurate police recording and public disclosure of rates of violence against Indigenous women.

B) POLICING INDIGENOUS PROTESTS - ARTICLE 16

In September 1995, the Ontario Provincial Police (OPP) deployed a force of approximately 200 officers, including snipers, to respond to the occupation of Ipperwash Provincial Park by a small group of Indigenous protesters. One Indigenous man was allegedly badly beaten by police and another, Dudley George, was fatally shot by a police sniper who was subsequently criminally charged and convicted.

In 2003, the Ontario provincial government instituted a public inquiry into the events at Ipperwash, following calls for such an inquiry by many organizations and individuals, and by the UN Human Rights Committee. The Inquiry report, released in 2007, made numerous recommendations, and called for an independent evaluation of the institutionalization of an OPP Framework that had been adopted in 2000 for developing "strategies that minimize the use of force to the fullest extent possible" in indigenous land rights protests. The report also called for the provincial government to adopt, "as soon as it is practical to do so," a province-wide "peacekeeping" policy in order to "codify the lessons learned at Ipperwash and reassure both Aboriginal and non-Aboriginal Ontarians that peacekeeping is the goal of both police and government in this province, that treaty and Aboriginal rights will be respected, that negotiations will be attempted at every reasonable opportunity, and that the use of force must be the last resort."

Despite its public commitments, the provincial government has yet to implement a provincial peacekeeping policy and subject the OPP framework to an independent review.

Amnesty International's case study suggests that significant gaps remain in the implementation of the framework and the provincial government is not holding the OPP accountable. In separate incidents in June 2007 and April 2008, hundreds of heavily armed OPP officers were deployed to surround and contain protesters from the Tyendinaga Mohawk Territory in Ontario. These forces included members of the Tactics and Rescue Unit, commonly known as the sniper squad. No credible evidence has ever been brought forward to show that the protesters were armed or represented a significant threat to public safety. However, in an incident in April 2008 the situation escalated to the point that OPP officers, in response to a false report that a rifle had been sighted, drew handguns and leveled high powered assault rifles at unarmed activists and bystanders. The provincial government has failed to conduct an independent probe of these incidents and the OPP has refused to confirm to Amnesty International whether it has even conducted an internal review.

Recommendations:

1. Canada should ensure that all jurisdictions in the country adopt and implement binding policies publicly affirming that in responding to Indigenous occupations and protests, particularly within the context of land related resources disputes, the use of force will be contemplated only as a last resort and only as strictly necessary to protect life or ensuring the safety of others.

2. Canada should press the government of the Province of Ontario to implement fully the recommendations of the Ipperwash Inquiry, including an independent review of the Framework for Police Preparedness for Aboriginal Critical Incidents, and to conduct a specific probe into the OPP handling of incidents at Tyendinaga.

II. JUSTICE AND ACCOUNTABILITY

A) REDRESS - ARTICLE 14

Canadian law bars survivors of torture from obtaining redress against foreign governments responsible for their torture, through provisions of the State Immunity Act (SIA) which grants immunity to foreign governments from the civil jurisdiction of any court in Canada except in lawsuits based on commercial activities, or due to criminal activities, injuries or losses occurring in Canada.

To date, all the court challenges brought against this restriction have failed on the asserted basis that the prohibition against torture as a rule of *jus cogens* under international law does not extend to a requirement to provide a civil remedy against a foreign state for torture committed abroad. The granting of this immunity to foreign governments furthers impunity for the torture they have ordered or tolerated.

Recommendation:

Canada should amend the State Immunity Act to allow lawsuits against foreign governments based on crimes under international law, such as torture.

B) UNIVERSAL JURISDICTION: PROSECUTION, EXTRADITION AND DEPORTATION- ARTICLES 5, 7, 8

i) Prosecution vs. Deportation

In the 25 years since Canadian criminal law was amended to provides for universal jurisdiction, there has never been a universal jurisdiction prosecution for torture and there have been only two criminal prosecutions initiated during the 11 years since the Crimes Against Humanity and War Crimes Act came into force.

The government continues to pursue deportation over persecution, and has claimed on a number of occasions that it is "not obligated to conduct full-blown trials, at the cost of millions of taxpayer dollars, to prosecute every inadmissible individual for crimes committed in distant countries, often decades ago.... Our preeminent goal.... is defending Canada and upholding the integrity of our immigration system by enforcing these deportation orders."

Recommendation:

Canada should adopt a policy, backed up by sufficient resources, which ensures that extradition or criminal investigations, when appropriate, will be pursued over deportation when there are reasonable grounds to believe that an act of torture has been committed outside Canada by an individual present in Canada. The policy should ensure that such individuals will be arrested and taken into custody or that other legal measures will be taken to ensure their presence pending a determination whether to institute criminal or extradition proceedings and to make a preliminary inquiry into the facts. If sufficient admissible evidence is available Canada must submit the case to its competent authorities for the purposes of investigation or prosecution, unless an extradition request has been made by another state.

ii) Investigation and Prosecution of Visitors to Canada

In September 2011, Amnesty International provided Canadian authorities with a detailed factual and legal analysis of George W. Bush's criminal responsibility for acts of torture he ordered and authorized during his eight year presidency. At the same time, the Canadian Centre for International Justice and the US-based Centre for Constitutional Rights provided the Attorney General of Canada with an extensive and detailed draft indictment against Bush.

The Canadian government declined to arrest, investigate and prosecute George Bush while he was in the country, in contravention of its obligations under the Convention. It furthered intervened to stay a private prosecution proceeding against the former president initiated in Provincial Court in British Columbia on behalf of four individuals who had endured torture while in US custody.

Recommendation:

Canada should dedicate resources to ensuring that universal jurisdiction can and will be exercised in cases of individuals who are only temporarily present in Canada against whom there are credible allegations of responsibility for crimes under international law, including torture.

III. TORTURE AND NATIONAL SECURITY MEASURES

A) THE ROLE OF CANADIAN AUTHORITIES IN THE TORTURE AND ILL-TREATMENT OF CANADIAN NATIONALS ABROAD - ARTICLES 1, 2, 3, 4, 5, 11, 14

This Committee has monitored closely the concern that Canada's national security and intelligence practices may directly or indirectly expose Canadian citizens and other individuals to a risk of torture or other ill-treatment in other countries, and requested Canada to provide detailed information about the status of implementing a comprehensive review and oversight mechanism for security and intelligence operations in Canada. Canada has not yet taken any steps to establish such a mechanism. The failure to do so and the ongoing need for a comprehensive review and oversight mechanism is well illustrated by the following cases.

i) Maher Arar

Maher Arar, a Canadian citizen, was arrested by US officials in September 2002 while returning to Canada from a family holiday in Tunisia. He was held for two weeks in the United States and then subject to extraordinary rendition to Syria, via Jordan, where he was imprisoned unlawfully for a year and subjected to torture and inhuman prison conditions.

The Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, established upon Maher Arar's return to Canada, found that the actions and omissions of Canadian officials contributed to the circumstances leading to his torture and made detailed and comprehensive recommendations as to reforms that should be adopted to avoid similar cases in the future. Maher Arar received an official apology and $10.5 million in compensation from the Canadian government.

Five years and there has yet been no public reporting as to the status of implementing the recommendations made in the Factual and Policy Reports of the Commission.

Recommendations:

1. Canada should provide a publicly accessible implementation plan with a timeline, for all of the recommendations from the Arar Inquiry.

2. Canada should move immediately to implement the model of comprehensive review and oversight of law enforcement and security agencies involved in national security activities, proposed in the Policy Report from the Arar Inquiry.

ii. Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin

The actions of Canadian officials have been also found, in an inquiry headed by the government appointed former Supreme Court of Canada justice Frank Iacobucci, to have "resulted indirectly" in the torture and mistreatment of three other Canadian citizens, named, Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin. Ahmad Abou-Elmaati was held in Syria from November 2001 to January 2002 and in Egypt from January 2002 to March 2004. Abdullah Almalki was held in Syria from May 2002 to July 2004. Muayyed Nureddin was held in Syria from December 2003 to January 2004.

The government has provided neither an apology nor compensation to any of the three men in response to the findings of the inquiry. The men have instead been forced into protracted litigation in an effort to obtain redress.

Recommendation:

Canada should ensure that Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin, all found through a judicial inquiry to be torture survivors, are immediately provided with adequate and appropriate redress.

iii) Omar Khadr

Canadian citizen Omar Khadr was apprehended by US forces in Afghanistan in July 2002 when he was 15 years old. He has been held in detention at Guantánamo Bay since October 2002. In October 2010 he was sentenced to an eight year prison term pursuant to a plea agreement. Under the terms of the plea deal he is required to serve at least one year of that sentence at Guantánamo Bay after which he is eligible for transfer to Canada. An application for transfer to Canada was submitted on his behalf in approximately May 2011 but as of March 9, 2012 no decision on his transfer application has been reached. He remains in detention at Guantánamo Bay.

Omar Khadr has made credible allegations that he was tortured and/or ill-treated by US officials in both Afghanistan and Guantánamo Bay. Those allegations have never been independently investigated. Canadian courts, including the Supreme Court of Canada, have ruled that Canadian officials were complicit in the violation of Omar Khadr's rights by virtue of a number of interrogation sessions he was subjected to by Canadian officials at Guantánamo Bay in

circumstances where he was without counsel, and they knew that he was young and had been subjected to extensive sleep deprivation.

Recommendations:

1. Canada should promptly approve the application made by Omar Khadr to be returned to Canada.

2. Canada should ensure that Omar Khadr is provided with an adequate remedy for the human rights violations that the Supreme Court of Canada has ruled he experienced.

B) TORTURE AND OTHER ILL-TREATMENT IN THE CONTEXT OF CANADIAN INTELLIGENCE ACTIVITIES Articles 1, 2, 4, 5, 15

i) Inbound Intelligence

In January 2012, a letter from Minister of Public Safety Vic Toews to Richard Fadden, the Director of the Canadian Security Intelligence Service (CSIS), dated December 7, 2010, was made public pursuant to an Access to Information Request. The letter directs CSIS to make use of information that "may have been derived from the use of torture or mistreatment" in "exceptional circumstances where there exists a threat to human life or public safety" as "ignoring such information solely because of its source would represent an unacceptable risk to public safety."

It is incumbent upon Canada to ensure that all aspects of law enforcement and security activities uphold and respect the absolute ban on torture and other ill-treatment, consistent with the *jus cogens* and *erga omnes* prohibition of torture and other prohibited ill-treatment. This is consistent with the recommendations of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment

Recommendation:

Canada should establish a clear policy barring the Canadian Security Intelligence Service and other Canadian law enforcement and security agencies from making use of information received from other domestic or international law enforcement or security agencies, when there is a real risk that it was obtained as the result of torture or other prohibited treatment.

ii) Outbound intelligence

The Ministerial Direction on Information Sharing with Foreign Entities, provided to CSIS on July 28, 2011 also deals with situations where CSIS is faced with the question of whether to provide information to foreign agencies when doing so would give rise to a substantial risk of "torture or other cruel, inhuman or degrading treatment or punishment." The Direction lays out a number of criteria to be taken into account relating to national security threats and possible measures to mitigate the risk of mistreatment. It, however, clearly leaves open the possibility that information will be provided to foreign entities even though there is a substantial risk that it will lead to torture or other prohibited ill-treatment.

Recommendation:

Canada should withdraw the Ministerial Direction to the Canadian Security Intelligence Service: Information Sharing with Foreign Entities and replace it with a policy that conforms with Canada's obligations under the Convention and other international human rights instruments, including not to provide information to foreign governments when doing so gives rise to a substantial risk of torture or other prohibited ill-treatment.

V. REFOULEMENT

A) IMMIGRATION AND REFUGEE PROTECTION ACT- ARTICLE 3

Canadian law continues to provide for an exception to the principle of *non-refoulement* in the case of persons who are found to be inadmissible to Canada on grounds of security, violating human or international human rights, serious

criminality or organized criminality, regardless of whether they are asylum seekers, protected persons or even permanent residents. According to the Supreme Court of Canada, while "deportation to torture will generally violate the principles of fundamental justice protected by s. 7" of the Canadian Charter of Rights and Freedoms, it "might be justified in exceptional circumstances." The Court has not, however, defined what those "exceptional circumstances" may be.

Recommendation:

Canada must amend all relevant laws to explicitly implement the unconditional nature of the *non-refoulement* provisions in article 3 of the Convention.

B) PRISONER TRANSFERS IN AFGHANISTAN: REFOULEMENT AND EXTRATERRITORIAL JURISDICTION - ARTICLES 2, 3

In December 2005, Canada concluded an agreement with the government of Afghanistan under the terms of which prisoners apprehended by Canadian Forces during the course of military operations in Afghanistan would be transferred into the custody of Afghan officials.

Amnesty International immediately raised concern that such transfer would subject prisoners to a strong risk of torture or other ill-treatment, and was, therefore, contrary to Article 3 of the Convention. It called on the government to cease transferring prisoners to Afghan officials until such time as the real risk of torture or other ill-treatment no longer existed. The government refused to do so, arguing that the terms of the agreement provided sufficient protection against torture.

Amnesty International's attempts at obtaining a court order halting prisoner transfers due to the concerns about torture were unsuccessful. Under Canadian law, it is not possible to independently argue or enforce international treaties in Canadian courts unless they have been domestically incorporated. The legal basis of the court actions was, therefore, the Canadian Charter of Rights and Freedoms (the Charter). In March 2008, the Federal court held that the Charter cannot apply to the conduct of Canadian soldiers operating outside of Canada, and "the appropriate legal regime to govern the military activities currently underway in Afghanistan is the law governing armed conflict—namely international humanitarian law."

The conclusions arrived at in this case are deeply troubling. To rule that detainees held outside Canada by Canadian forces have rights under international law but not under the Charter is to overlook that no meaningful enforcement mechanism other than the Charter is actually available in Canada with respect to the overseas military activities of Canadians soldiers and their impacts on internationally-protected rights, particularly the right to be free from torture of detainees transferred by Canada into the custody of Afghan prison officials.

Recommendations:

1. Canada should confirm that it will not authorize Canadian military forces or other personnel to transfer prisoners to any foreign authorities when doing so gives rise to a substantial risk that the prisoners will be subject to torture; and that assurances from foreign governments and monitoring arrangements will not be relied upon to justify transfers when such substantial risk exists.

2. Canada should incorporate all provisions of the Convention in national law and, in particular, take all steps to ensure that provisions of the Convention that give rise to extraterritorial jurisdiction can be domestically enforced by Canadian courts.

VI. REFUGEES AND MIGRANTS

Amnesty International is deeply concerned about recently tabled legislation, Bill C-31: *Protecting Canada's Immigration System Act.* The bill purports to crack down on the practice of "human smuggling" and reduce the numbers of refugee claimants coming from countries that the government perceives to be "safe", including Roma refugee claimants from Central European countries and refugee claimants from Mexico.

A) MANDATORY DETENTION - ARTICLES 2, 11, 16

The bill proposes a policy of mandatory and unreviewable detention of asylum seekers whose arrival is designated as irregular (including possible survivors of torture and children as young as 16 years old) for a minimum period of one year. Amnesty International considers the detention to be arbitrary as it is solely based on asylum seekers' manner of arrival in Canada, and it recalls that international legal standards establish that refugee claimants should not be detained other than in exceptional cases.

B) DENIAL OF APPEAL RIGHTS - ARTICLE 3

Bill C-31 also removes the right to appeal a negative refugee decision for groups of persons who are designated as "an irregular arrival" and also for individuals coming for a country of origin that the Minister of Citizenship and Immigration designates to be "safe." In the absence of an appeal, judicial review by "leave" from the Federal Court becomes the only available remedy for refused refugee claimants, which does not include the full reconsideration of the merits of the claim.

The proposal introduces discrimination with respect to access to justice and removes a necessary safeguard against wrongful rejection of refugee claims, increasing the risk of an error being made and a consequential violation of Canada's *non-refoulement* obligation under the Convention.

Recommendation:

Canada should withdraw Bill C-31 and only proceed with further law reform with respect to human smuggling and refugee protection in a manner that fully respects international law, including the Convention against Torture.

VII. POLICING

A) CONDUCTED ENERGY DEVICES AND OTHER "LESS THAN LETHAL" POLICE WEAPONRY - ARTICLES 1, 2, 11, 16

Amnesty International continues to be concerned by the use of less-than-lethal weapons, particularly Conducted Energy Devices (CEDs) such as TASERS, and considers that their use may, in some circumstances, be tantamount to torture or ill-treatment.

There are no consistent and coherent standards applicable to all policing forces across the country. Guidelines developed by the federal government in October 2010 are not binding and do not adopt a threshold of harm standard which would justify the use of a TASER.

Recommendations:

1. Canada should amend the Guidelines for the Use of Conducted Energy Weapons to require that CED's will only be used in situations involving an imminent threat of death or serious (potentially life threatening) injury which cannot be contained by less extreme options.

2. Canada should adopt a clear legislative framework to govern the testing and approval for use of all weapons used by police and other law enforcement agencies, which clearly incorporates international human rights standards including provisions of the UN Convention against Torture.

B) POLICING OF THE JUNE 2010 G8 AND G20 PROTESTS - ARTICLES 11, 16

More than one thousand people were arrested in the large scale public protests in Toronto when Canada hosted the G8 and G20 Summits in June 2010, the overwhelming number of whom appear to have been involved in legitimate acts of protest.

Detailed and credible allegations have been made by many individuals of abuse and ill-treatment at the hands of police and of inhuman prison conditions in the temporary detention centre, such as this testimony at a public citizen's inquiry, provided by John Pruyn, who wears a prosthetic leg.

> The police ordered me to walk … I said I can't. Then one of the police grabbed my artificial leg and yanked it right off my leg for no apparent reason … He pulled it off, and then told me to put it back on. I just looked at him … I could not believe what he was saying. Of course, I can't put my leg back on with my hands tied behind my back … so then he says 'hop'. And again I said 'I can't'. The he says 'you asked for it'. So then one police grabbed me under each arm and they started to drag me backwards. As they were dragging me backwards we went over pavement and I had on a short sleeve shirt and my elbows were digging right into the pavement and they were gouged out, both elbows, both sides … we go to the paddy wagon and he slammed me onto the ground. They kicked me some more and then they went through my pockets for a quick search.

To date, both levels of government, Federal and Provincial, have rejected calls for a comprehensive public inquiry to examine all the events that led to civil rights violations and bodily harm, and the role played by all policing, intelligence and political actors.

Recommendation:

Canada should work with the province of Ontario to convene a joint, comprehensive public inquiry into all aspects of the policing and security operations at the G8 and G20 Summits.