

Canada

Briefing to the Committee against Torture, 48th Session May 2012 on Canada's failure to bar or prosecute George W. Bush for torture from Lawyers against the War

Lawyers against the War (LAW) is a Canada-based committee that advocates for adherence to international humanitarian law and against impunity for violators. LAW engages in education, produces legal analyses and has participated in legal actions to hold members of the Bush administration accountable for torture and other grave crimes.

Introduction: Visits to Canada by George W. Bush

George W. Bush (Bush) was President of the United States of America and Commander in Chief of the U.S. Armed Forces from January 20, 2001 to January 20, 2009. Evidence indicates that during his term in office, Bush authorized, directed, supervised, failed to supervise or otherwise was a party to the widespread and systemic use of torture by the U.S. and is therefore an alleged torturer.

As a party to the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (Convention)¹ Canada has an obligation to take effective measures to prevent and punish torture. A significant part of that duty obliges Canada to ensure that alleged torturers such as Bush do not receive safe haven from prosecution for torture in Canada. This report chronicles Canada's failure to enforce Canadian law and adhere to Convention duties triggered by visits to Canada by Bush.

Since his term as president of the U.S. and commander in chief of the U.S. Armed Forces came to an end, Bush has entered Canada on a number of occasions including, but not limited to, visits to:

- Calgary in the province of Alberta on March 28, 2009,
- Toronto in the province of Ontario on May 29, 2009,
- Edmonton in the province of Alberta on October 20, 2009,
- Saskatoon in the province of Saskatchewan on October 21, 2009,
- Montreal in the province of Quebec on October 22, 2009,
- Surrey in the province of British Columbia on October 20, 2011.

¹ *Convention Against Torture And Other Cruel, Inhuman Or Degrading Treatment Or Punishment*, G.A. res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], entered into force June 26, 1987 and was ratified by Canada 24 July 1987.

This report is focused on visits by Bush to Calgary Alberta on March 28, 2009 and to Surrey British Columbia on October 20, 2011. The law and principles cited in this report apply to all visits to Canada by Bush and others members of the former Bush administration who have been accused on reasonable grounds of criminal involvement in torture.

On both occasions LAW sent letters to the Prime Minister and ministers of Justice, Immigration, Public Safety, and Foreign Affairs advising them of Canada's legal duties to take effective measures to prevent and punish the torture authorized and directed by the Bush administration and to ensure that Bush not receive safe haven in Canada from prosecution for torture. LAW² advised of the obligation to bar Bush, as an alleged torturer, from entering Canada pursuant to the *Immigration and Refugee Protection Act*.

LAW advised Canadian officials of the legal obligation to "...arrest the alleged torturer [Bush] and to carry out proper criminal investigations, as provided for in Article 6, and to submit the case to its competent authorities for the purpose of prosecution, as stipulated in Article 7(1)"³ once the jurisdictional requirements of the Article 5 of the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (Convention)⁴ were satisfied by Bush's presence in Canada.

On the occasion of Bush's visit to Surrey British Columbia, Canada was also advised of the duty to arrest and prosecute the former president once he entered the country by letter and legal brief sent jointly by the Canada-based Canadian Centre for International Justice (CCIJ) and the New York-based Center for Constitutional Rights (CCR) and by a letter and legal brief from Amnesty International Canada (Amnesty). CCIJ and CCR sent a 69 page draft indictment backed up by some 4,000 pages of evidence of the widespread and systemic torture used by the U.S. under the command of Bush in U.S. controlled prisons around the world.⁵ Amnesty's letter calling on Canada to arrest and prosecute Bush was accompanied by a 27 page legal brief outlining the evidence of torture, Bush's complicity, and Canada's legal duty to arrest and prosecute Bush.⁶

Torture as a crime in Canada

Canada ratified the Convention on June 24, 1987. Amendments to the *Criminal Code*, R.S.C. 1985, c. C-46 enacting Sections 269.1 and 7(3.7) implemented Convention obligations to prosecute state officials for torture committed anywhere, by and against anyone.

² LAW sent letters to the Prime Minister and ministers of Justice, Immigration, Public Safety, Foreign Affairs and International Trade. These letters can be obtained from LAW or accessed at 222.lawyersagainsthewar.org

³ Manfred Nowak and Elizabeth McArthur, *The United Nations Convention against Torture: A Commentary*, Oxford University Press, 2008, p. 362.

⁴ *Convention Against Torture And Other Cruel, Inhuman Or Degrading Treatment Or Punishment*, G.A. res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], entered into force June 26, 1987 and was ratified by Canada 24 July 1987.

⁵ Canadian Centre for International Justice and the Center for Constitutional Rights, Letter to the Attorney General of Canada calling for the prosecution of George W. Bush and Draft Indictment for George W. Bush, 29 September 2011. accessible at <http://www.ccij.ca/programs/cases/guantanamo/index.php>

⁶ Canada/USA: Visit to Canada of Former US President George W. Bush and Canadian Obligations under International Law, AMR51/080/2011, October 2011. accessible at <http://www.amnesty.ca/files/CanadaBushSubmission.pdf>

The comments of Canada's representative, speaking to the Committee against Torture (Committee) in May 2005, emphasized adherence of Criminal Code provisions to Canada's obligations under the Convention. It is noteworthy that he emphasized the fact that Criminal Code provisions foreclose justification based on 'exceptional circumstances' and apply to all acts by all persons:

The Canadian Criminal Code provides a definition of torture that is in accordance with the definition contained in Article 1 of the Convention against Torture. It is no defence to a charge of torture that the accused was ordered by a superior or a public authority to perform an act of torture or that the torture is alleged to have been justified by exceptional circumstances, including a state of war, a threat of war, internal political instability, or any other public emergency. *Any act falling within the Convention's definition of torture is a criminal offence in Canada ...* The Canadian government does not sanction torture or cruel, inhuman or degrading treatment ... Canada is committed to international efforts to prevent and eliminate torture.⁷ [emphasis added]

The words used in Section 269.1 mirror the obligations imposed by the Convention and attach criminal liability to all torture within the jurisdiction created by 7(3.7) and apply to 'every official', 'every person', 'on any other person'. Section 2 of the Criminal Code defines every one or every person to include "Her Majesty and an organization". The language of the torture sections of the Criminal Code plainly apply to everyone, including Bush, and exclude all exceptions.

In 2005, the Committee recorded approval of this section of the Criminal Code:

...among positive aspects in the report of Canada were the definition of torture in the Canadian Criminal Code that was in accordance with the definition contained in article 1 of the Convention, and the exclusion in the Criminal Code of defences of superior orders or exceptional circumstances, including armed conflict, as well as the inadmissibility of evidence obtained by torture.⁸

Section 7(3.7) of the Criminal Code was enacted to comply with Article 5 of the Convention, which imposes on Canada a duty to expand the jurisdiction to prosecute alleged torturers wherever the torture occurred, whatever the nationality of the victim(s) and whatever the residence or nationality of the alleged perpetrator(s) when, *inter alia*:

- (c) the person who commits the act or omission is a Canadian citizen;
- (d) the complainant⁹ is a Canadian citizen; or
- (e) the person who commits the act or omission is, after the commission thereof, present in Canada.

⁷ Introductory speech at the Presentation of Canada's Fourth and Fifth reports to the Committee against Torture May 4, 2005.

⁸ *Committee against Torture Concludes Thirty-Fourth Session: Issues Concluding Observations on Reports of Canada, Switzerland, Finland, Albania, Uganda and Bahrain*, Press Release HR/4844, 20/05/2005.

⁹ 'complainant' means the victim of an alleged offence.

When any of these conditions exist, the suspect will be “deemed to commit that act or omission [torture] in Canada”. Section 7(5) provides that a prosecution for torture committed outside Canada “may be commenced in any territorial division in Canada and the accused may be tried and punished in respect of that offence in the same manner as if the offence had been committed in that territorial division.”

An essential component of Canada's duty to prevent and punish torture and other war crimes and crimes against humanity--wherever they occur--is to ensure that people suspected on reasonable grounds of torture are refused safe haven from prosecution in Canada. Section 35 of the *Immigration and Refugee Protection Act* (IRPA) implements Canada's duty in this area.

The IRPA, Section 35(1) (a) & (b), creates two categories of foreign nationals inadmissible to Canada on the grounds of violating ‘human or international rights’:

a) those committing an act outside Canada that constitutes an offence referred to in Sections 4 to 7 of the *Crimes Against Humanity and War Crimes Act*;

(b) senior officials in the service of a government that, in the opinion of the Minister, engages or has engaged in terrorism, systematic or gross human rights violations, or genocide, a war crime or a crime against humanity within the meaning of subsections 6(3) to (5) of the *Crimes Against Humanity and War Crimes Act*;

Torture is a crime in the *Crimes against Humanity and War Crimes Act*. Section 7 of the Act places special responsibility on ‘military commanders’ and other ‘superiors’ for crimes committed by their subordinates that they knew of, or were criminally negligent in failing to know of, and with respect to which they did not take necessary and reasonable steps to prevent.

Inadmissibility to Canada of a person suspected or accused of torture is established when there are “reasonable grounds to believe” the foreign national has engaged in torture or other international crimes. There is no requirement for personal involvement. Neither is there any requirement for proof of the accusations.

Canadian courts have ruled on the meaning of ‘reasonable grounds’ and whether the entry prohibition under Section 35 can be mitigated when reasonable grounds have been established. The Supreme Court of Canada ruled that “...the reasonable grounds to believe standard requires something more than a mere suspicion, but less than the standard applicable in civil matters on the balance of probabilities.”¹⁰ The Federal Court of Appeal has ruled that when the alleged crimes are grave and heinous, Section 35 of the IRPA cannot be mitigated.¹¹

Torture was considered a grave offence prior to the Convention. Torture is one of the few acts designated as a grave breach by all four Geneva Conventions (GCI – Article 50; GCII – Article 51; GCIII – Article 130; GCIV – Article 147). Canada, and other High Contracting Parties, are mandatorily required by all four Geneva Conventions to take criminal action against persons alleged to have committed torture in clear words that do not suggest, create

¹⁰ *Mugesera v Canada*, [2005] 2 S.C. R. 100, para. 114.

¹¹ *Varela v Canada*, 2008 FC 436, para. 44.

or appear to allow any exceptions to prosecution based on head of state status or otherwise. The common Article creates a mandatory obligation to prosecute or to extradite for prosecution and reads:

The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case. [emphasis added]

Evidence of Bush's involvement in authorizing a systemic regime of torture far exceeds the 'reasonable grounds' test and triggers a legal duty to bar his entry to Canada.

There is no exception that allows entry to suspects for short periods of time. By failing to enforce the relevant sections of the IRPA that bar Bush as an alleged torturer, the government of Canada is effectively granting domestic immunity and in so doing, encourages and gives license to other leaders to engage in these horrific crimes with impunity from prosecution in Canada.

Convention Duties triggered by Bush entering Canada

On October 20, 2011 and March 28, 2009 several factors triggered Canada's obligation to initiate criminal proceedings against Bush for torture under Articles 5.2 and 7.1 of the Convention and to make a preliminary inquiry into the facts as required by Article 6.2:

- Bush was 'alleged to have committed' torture, (the Convention, Article 7.1); and,
- Bush had been an official within the meaning of Section 269.1(d) of the Criminal Code. As Commander in Chief of the U.S. Armed Forces, Bush was a member of the U.S. Armed Forces and a "person who may exercise power, pursuant to a law in force in a foreign state". (Criminal Code Section 269.2 (d)); and,
- Bush, as stipulated in Article 5.2 of the Convention, was an "alleged offender...present in ...territory under [Canada's] jurisdiction". Canada's jurisdiction to prosecute was triggered under Section 7(3.7) (e) of the Criminal Code and the torture alleged against Bush was deemed by Section 7(3.7) to have occurred in Canada.
- Canada's jurisdiction to prosecute Bush was also triggered by the fact that Omar Khadr, a victim of torture during the period in question at Guantánamo Bay prison, is a Canadian citizen.

Given these factors, Canada was obliged to initiate criminal proceedings. As pointed out by former Rapporteur on Torture, Nigel S. Rodley, "Unless a state extradites an alleged torturer to another country to stand trial, it is obliged to institute criminal proceedings against any such

person within its jurisdiction, regardless of the latter's nationality or of where the crime was committed."¹²

Once an alleged offender is present in the territory, Canada must, in accordance with Article 5 either prosecute or extradite the alleged offender. The Convention does not leave an option of doing nothing. The duty to prosecute or extradite -- *aut dedere aut judicare* "essentially requires a state who has hold of someone who has committed a crime of international concern either to extradite the offender to another state which is prepared to try him or else to take steps to have him prosecuted before its own courts."¹³

It is trite law that when a state fails to enforce criminal legislation intended to prevent rights violations, to identify violators through prosecution, and to appropriately punish such violators, the state has failed in its duty to enforce the right itself. In the instant case, failure to initiate prosecution arguably encourages the continuation and re-occurrence of torture.

The Human Rights Committee has concluded that "...Those who violate Article 7 [of the International Convention on Civil and Political Rights], whether by encouraging, ordering, tolerating or perpetrating prohibited acts, must be held responsible."¹⁴

International Instruments regarding duties to prevent punish and remedy torture

Canada has also enacted other laws prohibiting torture and creating the jurisdiction to prosecute torture committed anywhere, by and against anyone: the *Crimes Against Humanity and War Crimes Act* ('War Crimes Act'), S.C. 2000, c. 24, enacted to implement the Rome Statute, and the *Geneva Conventions Act*, R.S.C. 1970, c. G-3, enacted to implement the Geneva Conventions.

Other international instruments prohibiting torture that are binding on Canada include:

- The Universal Declaration on Human Rights adopted and proclaimed by the General Assembly December 10, 1948. UDHR, G.A. res. 217A (III), U.N. Doc 1A/810 at 71;
- *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, of August 12, 1949*, (GC I);
- *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, of August 12, 1949*, (GC II);
- *Geneva Convention relative to the Treatment of Prisoners of War, of August 12, 1949* (GC III);
- *Geneva Convention relative to the Protection of Civilian Persons in Time of War, of August 12, 1949*, (GC IV, all entered into force October 21, 1950;
- the two Optional Protocols of 1977;

¹² Nigel S. Rodley, *The Treatment of Prisoners Under International Law*, Oxford University Press, Oxford, 1999. page 49.

¹³ M. Cherif Bassiouni, Edward M. Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law*, Martinus Nijhoff Publishers/Dordrecht/Boston/London, 1995, page 3.

¹⁴ Human Rights Committee, General Comment No. 20: Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Art. 7), 03/10/1992, at para. 13.

- *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Adopted by General Assembly resolution 3452 (XXX) of December 9, 1975;
- *The International Covenant on Civil and Political Rights*. G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976;
- *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, Adopted by the General Assembly resolution 43/173 of December 9, 1988;
- *The Rome Statute of the International Criminal Court*, entered into force July 1, 2002.
- *The Basic Principles and Guidelines on the Right to Remedy and Reparations for Victims of Violations of International Human Rights and Serious Violations of International Humanitarian Law*, Adopted April 2005, the 61st session of the Human Rights Commission.

In Canada, prosecutions of non-Canadians for torture that occurred outside Canada are controlled absolutely by the Attorney General of Canada. Under the War Crimes Act and the Geneva Conventions Act no such prosecutions can be initiated without the prior written consent of the Attorney General of Canada.

Section 504 of the Criminal Code establishes the right of “anyone who, on reasonable grounds, believes that a person has committed an indictable offence” to “lay an information in writing and under oath...and the justice shall receive the information, where it is alleged...that the person...has committed an indictable offence within the territorial jurisdiction of the justice;”. However Section 7(7) of the Criminal Code limits this right when the person named is not a Canadian citizen, providing:

If the accused is not a Canadian citizen, no proceedings in respect of which courts have jurisdiction by virtue of this section shall be continued unless the consent of the Attorney general of Canada is obtained not later than eight days after the proceedings are commenced.

The British Columbia Court of Appeal has interpreted this to mean that if the Attorney General of Canada does not give written consent within 8 days of the information being filed the information is null, rejecting the argument that consent was needed within 8 days of the court finding that there was sufficient evidence for process to issue.¹⁵

The Convention specifically “does not exclude any criminal jurisdiction exercised in accordance with internal law” (Article 5.3). Article 1.2 allows Canada, as a State Party, to apply national legislation or international instruments “of wider application.” Clearly any national law narrowing the jurisdiction to prosecute torture would be contrary to the Convention. Similarly an interpretation of the torture provisions of the Criminal Code that granted automatic immunity

¹⁵ *Davidson and Lawyers against the War v. Attorney General of British Columbia*, BC. Court of Appeal, CA033710, August 2006.

from prosecution to Bush as a former U.S. president would be contrary to the entire purpose and language of the Convention, which permits no exceptions.

Throughout, the words employed are intended to include every offender and every act of torture: Article 1 “*any act*”; and Article 4 “Each State Party shall ensure that *all acts of torture* are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act *by any person* which constitutes complicity or participation in torture.” Article 2.2 further excludes exceptions by providing that no exceptional circumstances may be invoked as a justification for torture. Other than the reference noted above to international instruments of ‘wider application’, there are no references to international law in the Convention as a determinant of domestic jurisdiction to prosecute an alleged torturer.

Evidence of Torture by U.S. officials

When Bush visited Canada there were indubitably reasonable grounds available to Canadian authorities to lay charges for counselling, aiding and abetting torture in violation of the Criminal Code of Canada Sections 269.1, 22(1), 22(2), 21(1)(b), 21(1).

The Supreme Court of Canada has ruled that to have reasonable grounds to arrest a suspect, police don’t have to have witnessed the acts complained but rather must “subjectively have reasonable and probable grounds” that are justifiable from an objective point of view.¹⁶ It is sufficient to have reviewed investigation and witness reports and to be satisfied that these provide reasonable grounds. We submit that the same standard applies to the reasonable grounds needed to trigger duties under the Convention to arrest, investigate and remit to the authorities for prosecution.

Evidence that, during his terms of office, Bush counseled aided and abetted the widespread and systemic use of torture by U.S. officials and agents in U.S. controlled prisons throughout the world is overwhelming. Documents, videos, eyewitness accounts and the reports from many legal and human rights specialists are now part of the public record and easily available online. This report refers to only a few sources of evidence.

When LAW sought to bring criminal charges against Bush for torture in November 2004, the evidence of torture used intentionally by U.S. officials was already substantial. Some examples of reports of torture available in 2004:

- Report of the International Committee of the Red Cross (ICRC) on the Treatment by the Coalition Forces of POWs during Arrest, Internment, and Interrogation, Feb. 2004.¹⁷
- Taguba, Maj. Gen. Antonio M., *Article 15-6 Investigation of the 800th Military Police Brigade* (available online at: <http://www.globalsecurity.org/intell/library/reports/2004/800-mp-bde.htm>)

¹⁶ R v. Storrey, 53 CCC (3d), (SCC) 316 at 324 cited by the Ontario Court of Appeal in R v. Golub, 117 CCC (3d) 193 at para. 20.

¹⁷ Neil A. Lewis, *Red Cross Finds Detainee Abuse in Guantánamo*, New York Times, 30 Nov. 2004. UCRC explanation <http://www.icrc.org/eng/resources/documents/misc/5yrl67.htm>

- Paust, Professor Jordan, “The Common Plan to Violate the Geneva Conventions,” *Jurist*, 25 May 2004
- Wallach, Evan J., *The Logical Nexus Between The Decision To Deny Application of The Third Geneva Convention To The Taliban and al Qaeda, and the Mistreatment of Prisoners in Abu Ghraib*, 29 Sep. 2004
- Human Rights Watch, *Guantánamo: Detainee Accounts*, Fall 2004: pp. 24 [compilation by Human Rights Watch of accounts by thirty-three former detainees at Guantánamo of their experiences there].

This report focuses upon more recent reports.

In a February 2006 report, a group of UN experts concluded that sleep deprivation for several consecutive days, enforced isolation, the use of dogs, and exposure to extreme temperatures were all being used at Guantánamo Bay prison by U.S. officials and that these interrogation methods met all five elements of torture (perpetrated by government official, with a clear purpose, committed intentionally, victims in a position of powerlessness and causing severe physical or mental pain or suffering.)¹⁸

In May 2006, the Committee called on the U.S. to close Guantánamo Bay prison, to eradicate the use of torture by military and civilian personnel and to rescind authority to use any interrogation method that constitutes torture or cruel, inhuman or degrading treatment or punishment.¹⁹

In June 2007 the Council of Europe Parliamentary Assembly report by Senator Dick Marty concluded that “the CIA [the U.S. Central Intelligence Agency] committed a whole series of illegal acts in Europe by abducting individuals, detaining them in secret locations and subjecting them to interrogation techniques tantamount to torture.”²⁰

In December 2008 the U.S. Senate Armed Services Committee concluded that “senior officials [Bush and others] in the United States government solicited information on how to use aggressive techniques, redefined the law to create the appearance of their legality, and authorized their use against detainees.”²¹

¹⁸ Situation of detainees at Guantánamo Bay Report of the Chairperson-Rapporteur of the Working Group on Arbitrary Detention, Leila Zerrougui; the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak; the Special Rapporteur on freedom of religion or belief, Asma Jahangir; and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt, E/CN.4/2006/120, 27 February 2006, at paras. 51 and 52.

¹⁹ Conclusions and recommendations of the Committee against Torture: UNITED STATES OF AMERICA, Doc. CAT/C/USA/CO/2 25 July 2006, paras 22, 24 and 26.

²⁰ Dick Marty, Council of Europe Parliamentary Assembly, Secret detentions and illegal transfers of detainees involving council of Europe member states: second report, CoE Doc. 11302 rev, 11 June 2007 at pp. 7 para. 9

²¹ *Senate Armed Services Committee Inquiry Into The Treatment Of Detainees In U.S. Custody*, Dec. 11, 2008., Executive Summary, p. xii. http://armed-services.senate.gov/Publications/Detainee%20Report%20Final_April%2022%202009.pdf

In May 2009 former Vice President Dick Cheney publicly stated that Bush authorized the use of 'enhanced interrogations techniques', including waterboarding, to obtain information from prisoners, "I mean it was a presidential-level decision. And the decision went to the president. He signed off on it."²²

In his 2010 memoirs, G. W. Bush admitted to authorizing the use of interrogation techniques that constitute torture such as water boarding.²³

Many have concluded that the available evidence establishes conclusively that Bush and other members of the Bush administration committed torture (and other war crimes and crimes against humanity).

As stated in 2008 by Maj. General Antonio M. Taguba, author of the U.S. Army's 2004 internal report on Abu Ghraib,

...the Commander-in-Chief [Bush] and those under him authorized a systematic regime of torture...After years of disclosures by government investigations, media accounts, and reports from human rights organizations, there is no longer any doubt as to whether the current [Bush] administration has committed war crimes. The only question that remains to be answered is whether those who ordered the use of torture will be held to account.²⁴

In January 2009, Manfred Nowak, then the United Nations Special Rapporteur on Torture was quoted as saying "The evidence is sitting on the table...There is no avoiding the fact that this was torture...The government of the United States is required to take all necessary steps to bring George W. Bush and Donald Rumsfeld before a court."²⁵

Professor Nowak clarified the duty of Canada and other states to take action if the U.S. failed to prosecute when he said,

If it should turn out...that the (US) government and its authorities are not willing to prosecute those where we have enough evidence that they instigated or committed torture, then there is also an obligation on all other 145 states party to the convention to exercise universal jurisdiction.²⁶

In February 2009, United Nations Special Rapporteur Martin Scheinin had reached the same conclusion,

²² 10 May 2009 CBS, Face the Nation. <http://www.enduringamerica.com/may-2009/2009/5/9/video-and-transcript-dick-cheney-on-face-the-nation-10-may.html>

²³ *Decision Points*, Crown Publishing Group 2010, p. 169-71.

²⁴ Maj. General Antonio M. Taguba (USA-Ret.), Preface to *Broken Laws, Broken Lives: Medical Evidence of Torture by U.S. Personnel and its Impacts*, A Report by Physicians for Human Rights, June 2008.

http://brokenlives.info/?page_id=69

²⁵ Scott Horton, *UN Rapporteur: Initiate criminal proceedings against Bush and Rumsfeld now*, Harpers Magazine, 21 Jan. 2009.

²⁶ Professor Manfred Nowak at a press conference in Vienna, Austria on Friday April 24th 2009.

...the United States has created a comprehensive system of extraordinary renditions, prolonged and secret detention, and practices that violate the prohibition against torture and other forms of ill-treatment...States must not aid or assist in the commission of acts of torture, or recognize such practices as lawful, ...Under international human rights law, States are under a positive obligation to conduct independent investigations into alleged violations of the right to life, freedom from torture or other inhuman treatment, enforced disappearances or arbitrary detention, to bring to justice those responsible for such acts, and to provide reparations where they have participated in such violations.²⁷ (emphasis added)

In February 2011 Bush cancelled a trip²⁸ to Switzerland because he faced the risk of prosecution for torture. Human Rights groups, including LAW had called on the Swiss government to arrest him and open a criminal investigation if he entered the country citing Switzerland's legal obligations under the Convention.²⁹ The New York-based Center for Constitutional Rights and the Berlin-based European Center for Constitutional and Human Rights, backed by many others, released and threatened to file a 45-page indictment backed up by a 2,500 page summary of evidence of Bush's role in authorizing, directing and supervising torture used at US controlled prisons including Bagram Afghanistan, Abu Ghraib Iraq, and Guantanamo Bay Cuba.³⁰

Reed Brody of Human Rights Watch commented, "I'm surprised he (Bush) would even consider visiting a country that has ratified the torture convention and which takes its responsibilities seriously."³¹

In June 2011 Human Rights Watch published an extensive report concluding that members of the Bush administration had used torture and should be prosecuted.³²

Violations of the Convention by Canada

Article 2– duty to prevent and punish torture

The overwhelming evidence – including his own published statements – supporting reasonable grounds for torture charges against Bush have been detailed above. It must also be noted that Canada's jurisdictional obligations have also been triggered by the use of torture in the Guantánamo Bay detention centre on Omar Khadr, a Canadian citizen and the only Western

²⁷ Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, A/HRC/10/3,4 February 2009.

²⁸ Bush was reported to be coming to Geneva to speak at the Keren Hayesod's annual dinner on February 12, 2011.

²⁹ Letter of Denunciation in Support of the Two Complaints against George W. Bush for Torture, February 7, 2011, available at

<http://www.icj.org/dwn/database/FINAL%20Bush%20Denunciation%20Letter%207%20Feb%202011%20English.pdf>

³⁰ Preliminary Indictment for Torture: George W. Bush Brought Pursuant to the Convention Against Torture; <http://ccrjustice.org/files/FINAL%207%20Feb%20BUSH%20INDICTMENT.pdf>

³¹ Stephanie Nebehay, *Bush's Swiss visit off after complaints on torture*, Reuters, 5 February 2011.

<http://www.reuters.com/article/2011/02/05/us-bush-torture-idUSTRE7141CU20110205>

³² Getting Away with Torture: The Bush Administration and Mistreatment of Detainees, Human Rights Watch, June 2011

citizen remaining there. Representatives for Khadr have brought two claims against the government in the Federal Court of Canada, both of which were appealed by the government to the Supreme Court of Canada, and both of which detail not only the complicity but the participation of Canada in breaches of its Convention obligations.³³

It should also be noted that article 2 brooks no exceptions - including a state of war or public emergency and certainly including the alleged 'war on terror'.

Article 2 places a duty on Canada to take effective legislative, administrative, and judicial measures to prevent acts of torture under its jurisdiction – including acts deemed to have been committed in Canada by virtue of Section 7(3.7) of the *Criminal Code* and Article 5 of the Convention.³⁴ By failing to "...arrest the alleged torturer [Bush] and to carry out proper criminal investigations, as provided for in article 6, and to submit the case to its competent authorities for the purpose of prosecution, as stipulated in article 7(1)"³⁵ Canada failed in these obligations. The refusal of the Attorney General of Canada to initiate the required prosecutions or extraditions and the further refusal to grant the required consent to such proceedings when initiated in Surrey British Columbia³⁶ constitute grave and deliberate breaches of Article 2 obligations by the executive.

The *erga omnes* nature of the obligation to take effective measures to prevent and punish torture by state agents throughout the world is emphasized throughout General Comment No. 2:

...States bear international responsibility for the acts and omissions of their officials and others, including agents, private contractors, and others acting in official capacity or acting on behalf of the State, in conjunction with the State, under its direction or control, or otherwise under colour of law.

Accordingly, each State party should prohibit, prevent and redress torture and ill-treatment in all contexts of custody or control...as well as contexts where the failure of the State to intervene encourages and enhances the danger of privately inflicted harm.³⁷

Canada failed to "adopt effective measures to prevent public authorities and other persons acting in an official capacity from directly committing, instigating, inciting, encouraging, acquiescing in or otherwise participating or being complicit in acts of torture as defined in the Convention."³⁸

³³ See *Canada (Prime Minister) v. Khadr*, 2010 SCC 3 and *Canada (Attorney-General) v. Khadr*, 2008 SCC 28

³⁴ *Convention Against Torture And Other Cruel, Inhuman Or Degrading Treatment Or Punishment*, G.A. res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], entered into force June 26, 1987 and was ratified by Canada 24 July 1987.

³⁵ Manfred Nowak and Elizabeth McArthur, *The United Nations Convention against Torture: A Commentary*, Oxford University Press, 2008, p. 362.

³⁶ Submission of the Center for Constitutional Rights and the Canadian Centre for International Justice to The Committee Against Torture on the Examination of the Sixth Periodic Report Of Canada: The Case of George W. Bush and Canada's Violation of its Obligations under The Convention *Against Torture*

³⁷ CAT General Comment No. 2, CAT/C/GC/2 24 January 2008, para. 15.

³⁸ CAT General Comment No. 2, CAT/C/GC/2 24 January 2008, para. 17.

Articles 5, 6, 7 & 12: Duty to take jurisdiction, investigate, and prosecute

Article 5 imposes a duty on Canada to take jurisdiction over torture suspects who enter Canada, obligations confirmed under the Criminal Code, Geneva Conventions Act, and War Crimes Act. Article 7 imposes a duty on Canada to bring prosecutions against suspected perpetrators where the evidence warrants, and this includes commanders responsible for ordering or sanctioning torture:

...The Committee considers it essential that the responsibility of any superior officials, whether for direct instigation or encouragement of torture or ill-treatment or for consent or acquiescence therein, be fully investigated through competent, independent and impartial prosecutorial and judicial authorities...³⁹

It is also true that justice delayed is justice denied: the Committee ruled in *Halimi-Nedzibi v. Austria*⁴⁰ that a 15-month failure to investigate allegations of torture was a violation of article 12 and that this violation occurred whether or not the torture allegations were confirmed.

The Committee has also clarified that duties under Article 12 are triggered by the facts being brought to the attention of state officials.⁴¹ Such facts came to the attention of state officials as early as 2002 when Omar Khadr was captured in Afghanistan and imprisoned first at Bagram and then at Guantánamo, in 2003 and 2004, when Canadian agents questioned him there, and certainly no later than 2008 when the Supreme Court of Canada confirmed the abuse of Khadr's constitutional rights after years of litigation.⁴²

Accordingly, Canada's failure to take jurisdiction over Bush when present in Canadian territory for amply documented allegations of war crimes and torture over a period of nearly ten years, including during the six visits to Canada between 2009-2011 identified above, constitutes repeated and ongoing violations of Article 12 duties.

Articles 10 & 11 – Duty to provide education and training about the Convention

Canada's failure to either bar Bush from Canada or to arrest and prosecute him indicates that personnel at every level responsible for enforcement of Canada's torture law are not properly trained. Members of the Vancouver City Police, the Calgary Municipal Police, the Metro Toronto Police, and the Royal Canadian Mounted Police evinced a complete ignorance of the provisions of the Criminal Code cited above that make torture committed anywhere, by and against any person a crime deemed to have been committed in Canada.

Elected representatives at the municipal, provincial and federal level also indicated ignorance of the prohibition against torture and Canada's duties to prevent and punish torture. Police officers stated they had been told that Bush was an 'internationally protected person' and that their duty was therefore to protect him from people protesting his presence in Canada, in spite of the

³⁹ CAT General Comment No. 2, CAT/C/GC/2 24 January 2008, para. 26.

⁴⁰ CAT 8/91 at para. 13.5.

⁴¹ *Blanco Abad v. Spain* (CAT 59/96) at para. 8.6

⁴² *Khadr v Canada*, (2008) SCC 28.

absolute nature of the prohibition on torture, which bars exceptions. One elected representative was of the opinion that any proceedings against Bush would have to be initiated by the International Criminal Court.⁴³

Inspector Ron Charlebois, then the Officer in Charge of Canada's War Crimes Division, advised LAW on the occasion of Bush's March 2009 visit to Calgary that,

...in keeping with Canada's War Crimes Program and our own internal policy, the RCMP War Crimes Section focuses its investigative efforts on persons who are suspected of having committed criminal offences under the *Crimes against Humanity and War Crimes Act*, and who are present (living) in Canada on an ongoing basis.

This approach is consistent with the primary objective of the War Crimes Program which is to ensure that Canada is not a 'safe haven' for such persons. For these reasons the RCMP War Crimes Section will not initiate an investigation of former US President George Bush further to his brief visit to Alberta.⁴⁴

The Officer in Charge of this important law enforcement unit in 2011 expressed the same policy. In response to LAW's letter asking the RCMP to ensure that Bush was either barred from Canada or arrested and prosecuted on entry, the Officer in Charge replied,

As you may know, the Canadian Crimes against Humanity War Crimes Program is comprised of several Federal Government Departments including Citizenship and Immigration Canada (CIC), Canada Border Services Agency (CBSA), DOJ and the RCMP.

Our specific role and mandate in this initiative is to conduct criminal investigations on cases that are referred to the RCMP through a committee composed of officials from the participating program agencies.

I would also like to bring to your attention that as a matter of program policy, our investigative efforts are focused on individuals who are alleged to have committed offenses relating to Crimes against Humanity and War Crimes legislation and who currently reside in Canada.⁴⁵

This focus on 'residence' is legally wrong, as both the Convention and Criminal Code are clear that jurisdiction requires only an alleged torturer's 'presence' in Canada. The only pre-condition for the exercise of jurisdiction is the presence of the alleged torturer in the territory and reliable information being available that the person has committed torture anywhere in the world.

⁴³ Protesters Shout for arrest of George Bush, Canadian Press, October 20, 2011 quoting Mayor Diane Watts as saying, "I think that you have to realize there is a process and a venue -- the international court -- he has to be charged, tried and convicted. There's a process to do that and they have every right to proceed with that."

⁴⁴ Inspector Ron Charlebois, Officer in Charge, RCMP War Crimes Section, letter to LAW, March 19, 2009.

⁴⁵ Inspector Philippe Thibodeau, Officer in Charge, RCMP War Crimes Section, email to LAW, October 14, 2011.

The Canadian government publication, *Torture & Abuse Awareness*, listed the U.S. as one of ten countries worldwide known to engage in torture and listed sleep deprivation as a form of torture. This training manual was apparently designed to acquaint Canadian officials with interrogation techniques considered torture and countries likely to engage in torture. However, in January 2008, shortly after Canadians learned of the existence and content of the manual, Maxime Bernier, then Minister of Foreign Affairs, made a public apology saying,

I regret the embarrassment caused by the public disclosure of the manual used in the department's torture awareness training...It contains a list that wrongly includes some of our closest allies. I have directed that the manual be reviewed and rewritten.⁴⁶

Sadly, the government of Canada is not only failing to provide required education and training for officials who require the knowledge; it is actively covering up and apologizing for the limited attempts to comply with these duties. As a consequence neither Provincial nor Federal authorities have the competence to carry out their obligations.

Conclusions

The Convention compels Canada to prosecute an alleged torturer “in the absence of an extradition request unless there is insufficient evidence to sustain a prosecution.”⁴⁷

This obligation is engaged for any alleged torturer present, even temporarily, in Canada.

No exception to the absolute prohibition on torture is permitted, not for former heads of state, not for times of war, and not to deal with acts of terrorism.

An essential component of Canada's duty to prevent and punish torture and other war crimes wherever they occur is ensuring that people suspected on reasonable grounds of involvement in such crimes don't find a safe haven from prosecution in Canada.

The Convention requires “that the responsibility of any superior officials, whether for direct instigation or encouragement of torture or ill-treatment or for consent or acquiescence therein, be fully investigated...”⁴⁸

By failing to enforce the relevant sections of the Criminal Code, Geneva Conventions Act, War Crimes Act, and IRPA that bar suspects in such crimes from entry and require their prosecution or extradition if present in the territory, the government of Canada is granting *de facto* domestic immunity to former head of state Bush and thereby encouraging and giving license to other leaders to engage in these horrific crimes with impunity from prosecution in Canada.

⁴⁶ Paul Hewitt, *Ottawa to rewrite controversial training manual*, The Star, January 19, 2008.

<http://www.thestar.com/News/article/295628>

⁴⁷ Manfred Nowak and Elizabeth McArthur, *The United Nations Convention against Torture: A Commentary*, Oxford University Press, 2008, p. 237.

⁴⁸ CAT General Comment No. 2, CAT/C/GC/2 24 January 2008, para. 26.

RECOMMENDATIONS

Considering Canada's obligations under the *Charter*, the Criminal Code, the Convention, and related international law, as well as the amply supported allegations of breach and findings of breach noted above, it is our opinion that Canada must:

1. Ensure prosecutions of alleged torturers who enter Canada, without exception, either by extradition or prosecution as required by the Convention;
2. Explicitly renounce the illegal policy of requiring residence rather than the presence in Canada of an alleged torture as the trigger for Canada's legal duty to prosecute for torture that occurred outside Canada under the Criminal Code or under the War Crimes Act;
3. Conduct an independent investigation to determine how, by whom and when decisions were made by Canadian authorities to allow George W. Bush to come to Canada on each of the occasions referred to and to be shielded from enforcement against him of the applicable provisions of the Convention, the Criminal Code, the IRPA and the War Crimes Act;
4. Conduct an independent investigation to determine how, by whom and on what grounds the decisions were made not to arrest, investigate or prosecute George W. Bush on each of the occasions that he entered Canada;
5. Provide education and training about Convention obligations including the universal jurisdiction provisions of the Criminal Code and the War Crimes Act and the purpose and proper enforcement of the inadmissibility provisions of the IRPA, for:
 - a. Federal and provincial law enforcement personnel, civil or military, public officials and others who may be involved in or responsible for the arrest of foreign nationals suspected of torture anywhere against anyone;
 - b. Personnel with the Canadian Crimes against Humanity War Crimes Program, Citizenship and Immigration Canada (CIC), Canada Border Services Agency (CBSA), the Department of Justice and RCMP, who are charged with the responsibility of supervising, authorizing, directing or carrying out the investigation and review of torture allegations against alleged torturers, including but not limited to foreign nationals, present in Canada and enforcement of the inadmissibility provisions of the IRPA.
 - c. Prosecutors and judges working in the criminal justice system;
 - d. Elected officials at the federal, provincial and municipal levels;
 - e. Members of the public seeking such information.

6. Adopt measures to ensure that the Attorney-General of Canada exercises the discretion to approve of a prosecution of non-Canadians for torture committed outside of Canada in accordance with Canada's international legal obligations and fundamental principles of justice;
7. Promote the participation of civil society organizations in the processes that affect and determine government policies and practices on torture including the use of universal jurisdiction to prosecute non-Canadians for torture deemed to have been committed in Canada;
8. Ensure the right of private individuals or groups to initiate and continue prosecutions relating to torture committed outside Canada without political interference by enacting amendments to Section 7(7) the Criminal Code by adding to existing subsection which reads: "7(7) If the accused is not a Canadian citizen, no proceedings in respect of which courts have jurisdiction by virtue of this section shall be continued unless the consent of the Attorney General of Canada is obtained within 8 day after the proceedings are commenced.", the following provisions,

"In the case of an information laid by a private individual or group under Section 504, no proceedings in respect of which courts have jurisdiction by virtue of this section shall be continued unless the consent of the Attorney General of Canada is obtained within 8 days after a judge or designated justice has completed a review under Section 507.1 and has decided to compel the appearance of the accused on the information.; and,

The consent of the Attorney General of Canada shall not be unreasonably withheld; and,

The refusal of the Attorney General of Canada to consent shall be subject to judicial review."

Respectfully submitted
April 19, 2012

Contact
Lawyers against the War
Gail Davidson
law@portal.ca
www.lawyersagainsthewar.org