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TORTURE

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AMNESTY
INTERNATIONAL



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1. INTRODUCTION

The Government of Canada strongly condemns abuse and torture of any kind...¹

While the Canadian government has taken a number of important steps since its last review by the UN Committee against Torture (the Committee) in May 2012 to strengthen policies and measures implementing the prohibition against torture and other forms of cruel, inhuman or degrading treatment or punishment (other ill-treatment), this brief highlights several areas where further reforms and action are still urgently needed. These shortcomings are reflected in law, policy and decisions which serve to weaken and undermine the government's assertion that Canada "strongly condemns abuse and torture of any kind." The broad themes include concern about torture or ill-treatment within Canada, complicity in torture and other ill-treatment abroad, access to remedies and redress for survivors of torture, and continuing failure to accede to the *Optional Protocol*² to the *Convention against Torture*.³

This brief builds on previous submissions made to this Committee with respect to Canada's record of compliance with the *UN Convention against Torture and other forms of Cruel, Inhuman or Degrading Treatment or Punishment* (the Convention), including reviews in 2000,⁴ 2004⁵ and 2012,⁶ as well as a follow-up submission made in 2013.⁷ It sets out the organization's concerns regarding violence against Indigenous women and girls, policing of Indigenous protests, redress for survivors of torture, *refoulement* and other forcible transfers to a risk of torture, access to refugee protection, immigration detention, solitary confinement, accession to the Optional Protocol and Canada's ineffective approach to implementing international human rights obligations.

¹ The Honourable Ralph Goodale, Minister of Public Safety and Emergency Preparedness and the Honourable Chrystia Freeland, Minister of Foreign Affairs, *Statement of apology to Mr. Almalki, Mr. Abou-Elmaati, Mr. Nureddin*, 17 March 2017.

² UN General Assembly, *Optional Protocol to the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment*, 9 January 2003, A/RES/57/199, available at <http://www.refworld.org/docid/3de6490b9.html> ["Optional Protocol"].

³ UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987, accession by Canada 24 June 1987), available at: <http://www.refworld.org/docid/3ae6b3a94.html> ["the Convention"].

⁴ Amnesty International, *It's Time: Amnesty International's Briefing to the United Nations Committee against Torture with respect to the Third Report of Canada*, November 2000.

⁵ Amnesty International, *Redoubling the Fight Against Torture: Amnesty International's Brief to the UN Committee against Torture with respect to the Committee's Consideration of the Fourth Periodic Report from Canada*, 8 October 2004.

⁶ Amnesty International, *Canada: Briefing to the UN Committee against Torture*, April 2012, available at: https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/CAN/INT_CAT_NGO_CAN_48_8244_E.pdf.

⁷ Amnesty International, *Canada: Follow-Up Procedure to the Forty-Eighth Session of the Committee Against Torture*, 8 May 2013, available at: https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/CAN/INT_CAT_NGS_CAN_12916_E.pdf.

2. CANADA'S INTERNATIONAL HUMAN RIGHTS IMPLEMENTATION GAP

In addition to a number of new areas of concern, many of the issues that are highlighted in this brief reflect concerns and recommendations that the Committee has directed at Canada during previous reviews, but which have not been implemented; some repeatedly so.⁸ Not only have these recommendations not been implemented, there has been no public consultation about, or reporting of, the government's decision not to implement these recommendations. Canadians would, in fact, not be readily able to determine the status of these recommendations, whether decisions about implementation have been made, what concerns the government may have about implementation, and which level of government and/or governmental department may have objections.

Amnesty International has frequently highlighted the concern that the system in place in Canada for coordinating and ensuring the implementation of international human rights obligations, including the Concluding Observations and Views of treaty bodies and recommendations made by the Special Procedures as well as making decisions about ratifying international human rights treaties, is inadequate.⁹ It is not transparent and accessible to the public and lacks meaningful and accountable coordination and decision-making among the federal, provincial and territorial governments. Similarly, numerous UN treaty bodies have noted Canada's failings with respect to implementation and have repeatedly called for the system to be improved. Notably, in 2012, this Committee called on Canada to:

[...] take further steps in ensuring a well-coordinated, transparent and publicly accessible approach to overseeing implementation of Canadian obligations under the United Nations human rights mechanisms, including the *Convention*.¹⁰

In this context, Amnesty International had repeatedly called for a meeting to be convened of federal, provincial and territorial Ministers responsible for human rights, to initiate a much-needed reform process. A Ministerial human rights meeting had not been held in the country since 1988. Such a meeting was finally convened in December 2017.¹¹ At the meeting governments did commit to a reform agenda, including to establish a senior level mechanism to better coordinate human rights implementation among the country's 14 federal, provincial and territorial governments, develop a stakeholder engagement strategy to strengthen the role of Indigenous peoples' organizations and civil society groups and to meet again.¹² There has been no further indication of government plans, however, for these reforms and no date has been set for another intergovernmental human rights meeting.

⁸ For instance, the Committee has called on Canada to implement the absolute ban on *refoulement* to a risk of torture in reviews conducted in 1993, 2000, 2005 and 2012, a reform that has still not been adopted. See *infra* notes 59, 60, 61 and 62.

⁹ Amnesty International, *From Promise to Reality: Amnesty International's Recommendations for the 2017 Federal/Provincial/Territorial Human Rights Meeting*, 7 December 2017, available online: <http://www.amnesty.ca/news/ministerial-human-rights-meeting-canada's-opportunity-get-human-rights-implementation> ["*From Promise to Reality*"].

¹⁰ Committee against Torture, *Consideration of reports submitted by States parties under article 19 of the Convention: Concluding observations of the Committee against Torture*, UNCAT, 48th Session, UN Doc CAT/C/CAN/CO/6, 25 June 2012, para 24 ["*Concluding observations 2012*"].

¹¹ See *From Promise to Reality*, *supra* note 9 and press release cited below, *infra* note 12.

¹² Amnesty International, Press Release, "Federal, Provincial and Territorial Ministers from across the country gather to discuss Human Rights" (12 December 2017), online: <https://www.newswire.ca/news-releases/federal-provincial-and-territorial-ministers-from-across-the-country-gather-to-discuss-human-rights-663728343.html>.

2.1 RECOMMENDATIONS TO THE STATE PARTY:

- Commit to holding a follow up Ministerial-level intergovernmental meeting on international human rights implementation at an early date and provide an update on progress in following through on commitments made at the December 2017 meeting.
- Prioritize the development of an international human rights implementation stakeholder engagement strategy with the active participation and involvement of Indigenous peoples' organizations and civil society groups.

3. VIOLENCE AGAINST INDIGENOUS WOMEN, GIRLS AND TWO-SPIRIT PEOPLE (ARTICLES 1, 16)

3.1 MISSING AND MURDERED INDIGENOUS WOMEN, GIRLS AND TWO-SPIRIT PEOPLE

While concerns about alarming levels of violence against Indigenous women and girls in the country remain high, the government has not taken steps to develop a “coordinated and comprehensive national plan of action” to combat such violence, as recommended by the Committee in 2012.¹³

There have been a number of significant developments since the 2012 review, including:

- In May 2014, a report issued by the Royal Canadian Mounted Police (RCMP) concluded that 1,017 women and girls identified as Indigenous were murdered between 1980 and 2012—a homicide rate roughly 4.5 times higher than that of all other women in Canada. The report contradicted earlier claims by police and government over many years, repeatedly downplaying the extent of the crisis. The report was also, however, incomplete in its statistical analysis, meaning that it certainly under-represented the true levels of the violence.¹⁴
- In December 2014, the Inter-American Commission on Human Rights (IACHR) released its lengthy report into the situation of missing and murdered Indigenous women in the province of British Columbia. The report confirmed that “Indigenous women and girls in Canada have been murdered or have gone missing at a rate four times higher than the rate of representation of Indigenous women in the Canadian population which is 4.3%.”¹⁵ The report also noted that “[a]ccording to the information received, the police have failed to adequately prevent and protect Indigenous women and girls from killings and disappearances, extreme forms of violence, and have failed to diligently and promptly investigate these acts.”¹⁶ The IACHR made

¹³ *Concluding observations 2012*, *supra* note 10, para 20, calling on Canada to “enhance its efforts to end all forms of violence against aboriginal women and girls by, inter alia, developing a coordinated and comprehensive national plan of action, in close cooperation with aboriginal women’s organizations, which includes measures to ensure impartial and timely investigation, prosecution, conviction and sanction of those responsible for disappearances and murder of aboriginal women, and to promptly implement relevant recommendations made by national and international bodies in that regard, including the Committee on the Elimination of Racial Discrimination, the Committee on the Elimination of Discrimination against Women and the Missing Women Working Group.”

¹⁴ Jackie Hansen, “Missing and murdered Indigenous women and girls: Understanding the numbers”, *Amnesty International Canada* (blog), online: <https://www.amnesty.ca/blog/missing-and-murdered-indigenous-women-and-girls-understanding-the-numbers>.

¹⁵ *Missing and Murdered Indigenous Women in British Columbia, Canada*, Inter-American Commission on Human Rights, OEA/Ser.L/V/II. Doc. 30/14 (21 December 2014), at 11.

¹⁶ *Ibid*, at 12.

numerous recommendations to Canada, including “the creation of a national-level action plan or a nation-wide inquiry into the issue of missing and murdered Indigenous women and girls, in order to better understand and address the problem through integral approaches.”¹⁷

- In March 2015 the UN Committee on the Elimination of Discrimination against Women (CEDAW) released its comprehensive report under article 8 of the *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*,¹⁸ inquiring into “alleged grave and systematic violations [...] namely that: aboriginal women and girls experience extremely high levels of violence in Canada [...]” and that the failure to address the threats to the lives of Indigenous women and girls constitutes a grave violation of their rights.¹⁹ CEDAW found that the levels of violence faced by Indigenous women and girls are disproportionately high and that Canada’s efforts to prevent the violence and protect the rights of Indigenous women and girls were inadequate. The report from the inquiry laid out a comprehensive set of recommendations to Canada, including to “establish a national public inquiry into cases of missing and murdered aboriginal women and girls” leading to the development of an “integrated national plan of action and a coordinated mechanism, in consultation with representatives of the aboriginal community, to address all forms of violence against aboriginal women [...]”²⁰
- One of the first commitments made by the government of Prime Minister Justin Trudeau after coming to power in October 2015 was to establish a national inquiry to examine and make recommendations with respect to missing and murdered Indigenous women and girls in Canada.²¹ The Inquiry was established in September 2016 and was initially given a deadline to submit a final report by 1 November 2018. The Inquiry has experienced considerable internal challenges, including the resignation of one of the five original Commissioners. While some family members and community groups have been critical of the Inquiry’s methods and progress, others have been very supportive and expressed appreciation for the opportunity to share testimony about loved ones who are missing or have been murdered.²² Amnesty International has repeatedly called on the government to establish a parallel process to carry out independent review of cases of missing and murdered Indigenous women and girls where evidence before the Inquiry indicates significant shortcomings in the original investigation, but the government has to date declined to take that step.

In March 2018 the Inquiry sought a two-year extension. In June 2018 the federal government responded, granting an extension of only six months, through to 30 April 2019.²³

- CEDAW carried out its review of the combined eighth and ninth periodic reports of Canada in October 2016. CEDAW’s Concluding Observations include several recommendations for action to advance progress in addressing violence against Indigenous women and girls, including implementing, without delay, recommendations from CEDAW’s earlier inquiry, and the establishment of a “mechanism for the independent review of cases in which there are allegations of inadequate or partial police investigations.”²⁴
- In August 2017, the Committee on the Elimination of Racial Discrimination (CERD) reviewed Canada’s twenty-first, twenty-second and twenty-third periodic report. CERD reiterated past concern about the “continued high rates of violence against Indigenous women and girls” in Canada.²⁵ CERD welcomed the launch of the National Inquiry in 2016, but called for immediate action to be taken, including enacting a “national action plan on violence against Indigenous women, inclusive of the federal, provincial and

¹⁷ *Ibid*, at 124.

¹⁸ *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women*, 6 October 1999, 2131 UNTS 83 (entered into force 22 December 2000).

¹⁹ Committee on the Elimination of Discrimination against Women, *Report of the inquiry concerning Canada of the Committee on the Elimination of Discrimination against Women under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, CEDAW, UN Doc. CEDAW/OP.8/CAN/1, 30 March 2015, paras 3 and 214.

²⁰ *Ibid*, paras 220(a) and (b).

²¹ The Commission was announced in December 2015. See Maura Forrest, “As MMIW inquiry requests an extension, a timeline of its rocky 18 months”, *The National Post* (6 March 2018), online: <https://nationalpost.com/news/politics/as-mmiw-inquiry-requests-an-extension-a-timeline-of-its-rocky-18-months>.

²² Geordon Omand, “Indigenous leaders divided in support for MMIW inquiry’s extension request”, *CTV News* (7 March 2018), online: <https://www.ctvnews.ca/canada/indigenous-leaders-divided-in-support-for-mmiw-inquiry-s-extension-request-1.3832531>.

²³ Justin Brake, “‘Political expediency’ responsible for MMIWG inquiry being denied full extension: Buller”, *APTN National News* (5 June 2018), online: <http://aptnnews.ca/2018/06/05/political-expediency-responsible-for-mmiwg-inquiry-being-denied-full-extension-buller/>.

²⁴ Committee on the Elimination of Discrimination against Women, *Concluding observations on the combined eighth and ninth periodic reports of Canada*, CEDAW, 65th Session, UN Doc. CEDAW/C/CAN/CO/8-9, 25 November 2016, para 27.

²⁵ Committee on the Elimination of Racial Discrimination, *Concluding observations on the combined twenty-first to twenty-third periodic reports of Canada*, CERD, 93rd Session, UN Doc. CERD/C/CAN/CO/21-23, 13 September 2017, para 23.

territorial jurisdictions, with special provisions to end the high rates of violence against Indigenous women and girls” and the establishment of an “independent review mechanism for unsolved cases of missing and murdered Indigenous women and girls where there is evidence of bias or error in the investigation.”²⁶

On the basis of these, and numerous other reports and reviews, there is already an ample record²⁷ of recommendations regarding action that can and must be taken by governments in Canada to address the continuing concerns about widespread and systemic violence against Indigenous women and girls across the country.

3.2 FORCED OR COERCED STERILIZATION OF INDIGENOUS WOMEN

In April 2018, in advance of Canada’s third examination under the UN Human Rights Council’s Universal Periodic Review process, Amnesty International publicized concerns about extensive forced or coerced sterilization of Indigenous women in Canada dating back to the 1970’s and including recent cases in the province of Saskatchewan between 2008 and 2012.²⁸ Amnesty International has called for all allegations of forced or coerced sterilizations of Indigenous women and girls in Canada to be investigated, reparations be provided to survivors and their families, and for all government policies across Canada to be reformed to explicitly prohibit sterilization without free, full and informed consent.²⁹ During the Universal Periodic Review (UPR) the government of Argentina recommended that Canada “take the necessary steps to investigate complaints lodged regarding the forced sterilization of women from vulnerable groups and, where appropriate, punish those responsible and assist affected women.”³⁰ In its response to the UPR outcome, Canada accepted this recommendation.³¹ A lawsuit has been filed in Saskatchewan on behalf of more than 60 Indigenous women, most of whom report being sterilized in the past 10-15 years, including as recently as 2014.³²

3.3 RECOMMENDATIONS TO THE STATE PARTY:

- Implement outstanding recommendations from CEDAW, the Inter-American Commission on Human Rights and other international human rights bodies regarding measures to prevent and address violence against Indigenous women and girls in Canada.
- Launch a process to develop a National Action Plan to prevent gender-based violence, including provisions that recognize and address the heightened vulnerability to violence of Indigenous women, girls and two-spirit people.
- Ensure that allegations of forced or coerced sterilizations of Indigenous women and girls in Canada are investigated, individuals against whom credible evidence of culpability exists are prosecuted in accordance with national and international standards of due process, reparations are provided to survivors and their families, and all government policies across Canada are reformed to explicitly prohibit sterilization without free, full and informed consent.

²⁶ *Ibid*, para 24.

²⁷ *Review of Reports and Recommendations on Violence Against Indigenous Women in Canada*, Legal Strategy Coalition on Violence against Indigenous Women, February 2015, available online: <http://www.leaf.ca/wp-content/uploads/2015/02/Analysis-of-Implementation.pdf>.

²⁸ Amnesty International, *Forced or Coerced Sterilization of Indigenous Women and Girls*, 12 April 2018, <https://www.amnesty.ca/sites/amnesty/files/Addendum%20to%20AIC%20UPR%20Briefing%20Forced%20Sterilization%20March%202018.pdf>.

²⁹ *Ibid*.

³⁰ Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Canada*, UNGA, 39th Sess, Agenda item 6, UN Doc A/HRC/39/11, 11 July 2018, para 142.212 [“UPR Report”].

³¹ *Ibid*, para 17.

³² Alex Soloducha, “Sask. Indigenous women file lawsuit claiming forced sterilization”, *CBC News* (10 October 2017), online: <https://www.cbc.ca/news/canada/saskatchewan/sask-indigenous-women-file-lawsuit-claiming-coerced-sterilization-1.4348848>.

4. POLICING OF INDIGENOUS PROTESTS

Between 2003 and 2008, community members from the Tyendinaga Mohawk Territory in Eastern Ontario carried out a series of blockades, land occupations and other protest actions sparked by the federal government's longstanding failure to restore or protect lands wrongfully severed from the Territory.³³ While these protests inconvenienced members of the public and had the potential to lead to tension and conflict, no credible evidence has ever been brought forward to suggest that they represented a significant threat to public safety.³⁴ Given that the land at the heart of the dispute had been wrongfully taken from the First Nation, efforts by community members to assert their rights and protect the land would not necessarily be unlawful, much less criminal.³⁵ Despite this, the Ontario Provincial Police (OPP) responded to the protests and land occupations with a massive deployment of officers that, by its nature, allowed for the possibility of using lethal force.³⁶

Between June 28-29, 2007 and again between April 21-28, 2008, hundreds of OPP officers were deployed to surround and contain protesters.³⁷ These forces included members of the Tactics and Rescue Unit, who are trained as snipers and who are typically deployed in response to violent situations that represent a significant threat to police and public safety. During the April 2008 incident, the situation escalated to the point that police, panicked by a false report that a rifle had been sighted among Mohawk occupiers of the Thurlow Aggregates Quarry, drew handguns and leveled high-powered assault rifles at unarmed activists and bystanders.³⁸

In 2016, after a lengthy process under the province's access to information regime, Amnesty obtained unredacted audio and video recordings of the cells where five Mohawk men were detained following their forceful arrest on April 25, 2008. These video records prove their allegations that, while held in locked cells, the five men were kept with nylon restraints binding their wrists for periods ranging from three to 13 hours, contrary to standard police practice and without credible justification. Amnesty International is concerned that the plastic restraints may have been deliberately misused in an attempt to inflict pain and discomfort on the men, or to humiliate them during their detention and has pointed to widespread concerns in the community that such actions may have been motivated by a combination of racial bias and a desire to retaliate against the men for their roles in the protest.³⁹

In its 2012 Concluding Observations, the Committee called on Canada "to strengthen its efforts to ensure that all allegations of ill-treatment and excessive use of force by the police are promptly and impartially investigated by an independent body and those responsible for such violation are prosecuted and punished with appropriate penalties."⁴⁰ The Committee also recommended specifically that "the State party and the government of the

³³ The land in question is within the Tyendinaga Mohawk Territory as set out in the 1793 Simcoe Deed, also known as Treaty No. 3½. The federal government oversaw the transfer of the Culbertson Tract out of the hands of the Tyendinaga Mohawk Nation in the early 19th Century. The Mohawks have consistently sought its return. In 1995, the Mohawk Council of Tyendinaga submitted a claim for redress under the federal Specific Claims Policy. The federal government then conducted an eight-year review of the history and legal status of the land. In 2003, the federal government acknowledged that the removal of the Culbertson Tract land was unlawful under the terms of the Simcoe Deed and the federal government had an "outstanding lawful obligation" to redress this wrong. At the time of writing, the lands had still not been restored to the Mohawk people nor have they been protected for future use by the Mohawk people. For more background, see Jonah Gindin, "Stone by stone, rail by rail", *Briarpatch Magazine* (9 June 2008), online: <https://briarpatchmagazine.com/articles/view/stone-by-stone-rail-by-rail>. See also Amnesty International's *Excessive and Dangerous* report, *infra* note 34.

³⁴ Amnesty International, *Excessive and dangerous police response during Mohawk land rights demonstrations on the Culbertson Tract*, 31 May 2011, at para 1, online: <https://www.amnesty.ca/news/news-item/amnesty-international-calls-for-public-review-of-police-handling-of-tyendinaga-mohawk>.

³⁵ *Ibid*, at para 124.

³⁶ *Ibid*, at para 1.

³⁷ *Ibid*, at para 2.

³⁸ *Ibid*, at para 3.

³⁹ Julien Gignac, "Amnesty calls for independent probe into OPP treatment of Mohawk protesters", *Toronto Star* (15 June 2018), online: <https://www.thestar.com/news/canada/2018/06/15/amnesty-calls-for-independent-probe-into-opp-treatment-of-mohawk-protesters.html>.

⁴⁰ UNCAT *Concluding Observations 2012*, *supra* note 10 at para 22.

Province of Ontario should conduct an inquiry into the Ontario Provincial Police's handling of incidents at Tyendinaga."⁴¹

Such an inquiry has never been carried out. In its response to the Committee's 2016 list of issues, Canada stated that there are no plans for such an inquiry and instead refers to internal reviews by the OPP which it says are "consistently" conducted "to ensure they are best meeting the needs of the public and the police service."⁴²

In Amnesty International's view, Canada's response is not only inadequate, it is actually misleading. Under the *Framework for Police Preparedness for Aboriginal Critical Incidents* ("Framework"), the OPP has a formal requirement to conduct internal reviews after the conclusion of operations carried out in response to Indigenous land protests.⁴³ The Ministry of Community Safety and Correctional Services ("Ministry"), however, has confirmed to Amnesty that no such mandatory internal review was conducted in respect to OPP operations at Tyendinaga, despite the scale of force deployed and the close brush with the use of lethal force.

To our knowledge, the only review ever conducted by the OPP in respect to this incident was an extremely limited and profoundly inadequate examination of the use of plastic restraints on men arrested during the 2008 incident. That review was not carried out until 2016 and it took place only after Amnesty International obtained the video recordings, something that the OPP and the Ministry had resisted during more than seven years of delays and appeals under the access to information regime.

The internal review into the use of plastic restraints was so cursory that it did not even include any effort to contact any of the five men. The report of this review, shared with Amnesty International, downplays the risk of harm to the men that might have resulted from partially immobilizing their arms and potentially restricting blood circulation. The report speculates that the plastic restraints may have been used for the men's own safety, despite there being no evidence that the men posed any threat to each other. Such speculation also ignores the fact that the inconsistent use of the restraints created a potentially unsafe situation since some men had their hands tied behind their backs while others did not and ties were not immediately reapplied to some of the men who managed to break them, thus leaving some men with their hands free while others were still restrained. The OPP review failed to consider or even acknowledge the possibility that the use of restraints may have been intended to humiliate or harm the men, despite the fact that such action could potentially warrant charges under the Criminal Code of Canada.⁴⁴

Amnesty International recently appealed to the Premier of Ontario to order an independent investigation into the treatment of the Mohawk men by the OPP.⁴⁵ To date no such action has been taken and Amnesty International has not received a reply from the past or current Premier.

Furthermore, there has been no broader review of the implementation of policies and procedures adopted by the OPP in response to the 1995 police killing of an Indigenous man during a land occupation at Ipperwash Provincial Park. Such a review was one of the recommendations of the 2007 provincial inquiry into that killing.⁴⁶ Moreover, eleven years later, Ontario has yet to implement a provincial peacekeeping policy or undertake an independent evaluation of the OPP's *Framework*, as recommended by the Inquiry.

4.1 RECOMMENDATIONS TO THE STATE PARTY:

- Ensure that an independent investigation is conducted into the treatment of the Mohawk men detained by the Ontario Provincial Police in April 2008 in connection with protests held at Tyendinaga, Ontario.
- Ensure that an independent evaluation is carried out of the implementation of the Ontario Provincial Police's *Framework for Police Preparedness for Aboriginal Critical Incidents* as recommended by the Ipperwash Inquiry.

⁴¹ *Ibid.*

⁴² Committee against Torture, *Consideration of reports submitted by States parties under article 19 of the Convention pursuant to the optional reporting procedure: Canada*, UNCAT, 13 September 2016, UN Doc CAT/C/CAN/7 at para 144.

⁴³ Ontario Provincial Police, *Framework for police preparedness for Aboriginal critical incidents*, Revised October 2016, online: <https://www.opp.ca/index.php?&lng=en&id=115&entryid=58597ce38f94acef2d50f210>.

⁴⁴ Documents on file with Amnesty International

⁴⁵ Gignac, *supra* note 39.

⁴⁶ The Honourable Sidney B. Linden, Commissioner, *Report of the Ipperwash Inquiry*, (Toronto: Ministry of the Attorney General, Queen's Printer for Ontario, 2007) vol 4 at 110.

5. JUSTICE AND ACCOUNTABILITY (ARTICLES 12 AND 14)

5.1 INDIVIDUAL REDRESS

In 2012 the Committee raised serious concerns about Canada's failure to provide redress to Canadian citizens who had survived serious human rights violations, including torture, at the hands of foreign governments in cases involving national security accusations and in which there were allegations of complicity on the part of Canadian law enforcement, security and/or diplomatic officials.

In particular the Committee highlighted the cases of Omar Khadr, Abdullah Almalki, Ahmad Elmaati and Muayyed Nureddin, including by prioritizing them for an interim report back to the Committee by June 2013.⁴⁷

Following the election of the government of Prime Minister Trudeau in October 2015, the federal government's refusal to provide redress to these four men ended. Abdullah Almalki, Ahmad Elmaati and Muayyed Nureddin received compensation and an official apology in March 2017⁴⁸ and Omar Khadr in July 2017.⁴⁹

Unfortunately, that willingness to provide redress for Canadian responsibility for national security –related human rights violations has not extended to the case of another Canadian citizen, Abousfian Abdelrazik, who similarly experienced torture and other human rights violations at the hands of a foreign government but with clear Canadian complicity in the circumstances leading to those violations. Mr. Abdelrazik was arrested and imprisoned in Sudan between 2003 and 2006, during which time he was subjected to extensive torture. He was never charged or tried. His return to Canada was delayed until 2009 due to the Canadian government's refusal to provide him with a passport. He only obtained the passport after a Federal Court ruling required the government do so. That ruling also found that Canadian officials, particularly agents of the Canadian Security and Intelligence Service (CSIS), had contributed to the circumstances leading to his arrest, imprisonment and human rights violations in Sudan.⁵⁰

Amnesty International has repeatedly called on the Canadian government to provide redress to Mr. Abdelrazik for Canada's role in his arbitrary arrest, unlawful imprisonment and torture. We expressed disappointment that the government withdrew from mediation towards compensation in April 2018, the day before negotiations were to begin.⁵¹ More recently, Amnesty International objected to last minute government delaying tactics before Mr. Abdelrazik's long-awaited lawsuit against the Canadian government was set to begin on 17 September 2018.⁵² On 18 September 2018 the Federal Court "reluctantly" granted the government's request for an adjournment, indefinitely delaying the trial.⁵³

⁴⁷ UNCAT *Concluding observations 2012*, *supra* note 10, para 16.

⁴⁸ Amnesty International, "Amnesty International welcomes compensation and apology for Canada's role in the torture and other human rights violations endured by Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin" (17 March 2017), online: Amnesty International Canada <https://www.amnesty.ca/news/amnesty-international-welcomes-compensation-and-apology-canada's-role-torture-and-other-human>.

⁴⁹ Romeo Dallaire and Alex Neve, "Canada failed Omar Khadr. We owe him compensation and an apology", *The Globe and Mail* (8 July 2017), online: <https://www.theglobeandmail.com/opinion/canada-failed-omar-khadr-compensation-and-an-apology-was-the-right-move/article35623662/>.

⁵⁰ See "Factual background" in *Abdelrazik v Canada (Minister of Foreign Affairs)*, 2009 FC 580, [2010] 1 FCR 267, at paras 8 to 41.

⁵¹ Amnesty International, Press Release, "Prime Minister Trudeau Must Take Action to Ensure Justice for Abousfian Abdelrazik" (17 April 2018), online: <https://www.amnesty.ca/news/prime-minister-trudeau-must-take-action-ensure-justice-abousfian-abdelrazik>.

⁵² Tonda MacCharles, "Ottawa seeks indefinite delay in \$27-million torture lawsuit by Canadian citizen detained in Sudan", *Toronto Star* (15 September 2018), online: <https://www.thestar.com/news/canada/2018/09/15/ottawa-seeks-indefinite-delay-in-27-million-torture-lawsuit-by-canadian-citizen-detained-in-sudan.html>.

⁵³ Amnesty International, Press Release, "Amnesty International deeply disappointed by adjournment of Abousfian Abdelrazik's Human Rights Case" (18 September 2018), online: <https://www.amnesty.ca/news/amnesty-international-deeply-disappointed-adjournment-abousfian-abdelrazik's-human-rights-case>.

5.2 STATE IMMUNITY ACT

In 2012 the Committee also highlighted ongoing concerns about the restrictions under Canada's *State Immunity Act*,⁵⁴ which bar civil lawsuits against foreign governments in Canadian courts, seeking compensation for torture that occurs outside Canada.⁵⁵ Amnesty International has repeatedly called on the Canadian government to enact an exception in the *State Immunity Act* for lawsuits seeking compensation for human rights violations, including torture, that are recognized crimes under international law.

In 2014, the Supreme Court of Canada rejected a constitutional challenge to the *State Immunity Act*, brought by the family of Zahra Kazemi, a Canadian/Iranian photojournalist who was imprisoned, tortured – including being raped – and subsequently died in custody in Iran in 2003.⁵⁶ The ruling considered the views and recommendations that this Committee has offered with respect to article 14 of the Convention but ultimately concluded those views were not conclusive or binding.

[...] the appellants rely on comments made by the United Nations Committee against Torture, a committee established to monitor and report on states' compliance with the *CAT*... The Committee has clearly expressed the view that art. 14 requires states to provide a means of redress to all victims of torture, regardless of where the torture was committed. For example, in its *General comment No. 3 (2012): Implementation of article 14 by State parties*, U.N. Doc. CAT/C/GC/3, released in December 2012, the Committee stated:

The Committee considers that the application of article 14 is not limited to victims who were harmed in the territory of the State party or by or against nationals of the State party. The Committee has commended the efforts of States parties for providing civil remedies for victims who were subjected to torture or ill-treatment outside their territory. This is particularly important when a victim is unable to exercise the rights guaranteed under article 14 in the territory where the violation took place. Indeed, article 14 requires States parties to ensure that all victims of torture and ill-treatment are able to access remedy and obtain redress.

...

Similarly, granting immunity, in violation of international law, to any State or its agents or to non-State actors for torture or ill-treatment, is in direct conflict with the obligation of providing redress to victims. When impunity is allowed by law or exists de facto, it bars victims from seeking full redress as it allows the violators to go unpunished and denies victims full assurance of their rights under article 14. The Committee affirms that under no circumstances may arguments of national security be used to deny redress for victims.

In my view, despite their importance, the Committee's comments should not be given greater weight than the pronouncements of state parties and judicial authorities. If anything, the Committee's comments only indicate that there is an absence of consensus around the interpretation of art. 14 [...].

Further, while the Committee's comments may be helpful for purposes of interpretation, they do not overrule adjudicative interpretations of the articles in the *CAT*. At best, they form part of a dialogue within the international community where no consensus has yet developed on an interpretation of art. 14 that would recognize the existence of a mandatory universal civil jurisdiction for acts of torture committed outside the boundaries of contracting states.⁵⁷

Notably, the judgement effectively challenged the government to take up the task of legislating an exception to the State Immunity Act:

The Parliament has the power and the capacity to decide whether Canadian courts should exercise civil jurisdiction. Parliament has the ability to change the current state of the law on exceptions to state immunity, just as it did in the case of terrorism, and allow those in situations like Mr. Hashemi and his mother's estate to seek redress in Canadian courts. Parliament has simply chosen not to do it yet.⁵⁸

⁵⁴ *State Immunity Act*, RSC 1985, c S-18 [“*State Immunity Act*”].

⁵⁵ UNCAT *Concluding Observations 2012*, *supra*, note 10, para 15.

⁵⁶ *Kazemi Estate v Islamic Republic of Iran*, 2014 SCC 62.

⁵⁷ *Ibid*, at paras 146-148 [citations omitted].

⁵⁸ *Ibid*, at para 170.

5.3 RECOMMENDATIONS TO THE STATE PARTY:

- Promptly provide fair reparations, including compensation and an official apology to Abousfian Abdelrazik for the role Canadian officials played in the circumstances leading to the torture and other serious human rights violations he suffered in Sudan between 2003 and 2009.
- Enact an exception in the *State Immunity Act* for lawsuits seeking compensation for torture and other human rights violations recognized as crimes under international law.

6. NON-REFOULEMENT (ARTICLE 3)

The Committee has repeatedly raised concerns over Canada's failure to comply with its *non-refoulement* obligations and called on Canada to ensure that legislation and practice conform to this prohibition, in 1993,⁵⁹ 2000,⁶⁰ 2005⁶¹ and 2012.⁶² Similarly the Human Rights Committee has called on Canada to incorporate the absolute prohibition on *refoulement* to torture in periodic reviews conducted in 1999,⁶³ 2005⁶⁴ and 2015.⁶⁵

The State Party has failed to take up this crucial recommendation, repeated by UN bodies on seven occasions over the span of 25 years and has never offered an explanation for its decision to maintain this provision in Canadian law in contravention of the *Convention* and other international human rights obligations.

6.1 MONITORING AND ASSURANCES

The Canadian government continues to maintain that seeking and relying upon diplomatic assurances and monitoring arrangements may justify proceeding with deportation, extradition or other form of prisoner transfer even when a substantial risk of torture exists. In two separate recommendations offered during the 2012 review of Canada, this Committee urged Canada to end the reliance on assurances and monitoring in such circumstances:

- refrain from the use of diplomatic assurances as a means of returning a person to another country where there are substantial grounds for believing that he would be in danger of being subjected to torture;⁶⁶ and
- adopt a policy for future military operations that clearly prohibits prisoner transfers to another country when there are substantial grounds for believing that he or she would be in danger of being subjected to torture and recognizes that diplomatic assurances and monitoring arrangements will not be relied upon to justify transfers when such substantial risk of torture exists."⁶⁷

These concerns have not been addressed. With respect to diplomatic assurances in cases of deportation and extradition, the government of Canada's position that seeking and relying upon such assurances in the face of a substantial risk of torture is justified was, unfortunately, recently upheld by the Supreme Court of Canada.⁶⁸

⁵⁹ Committee against Torture, *Concluding observations*, UNCAT, 9th Sess, UN Doc A/48/44(SUPP), 26 June 1993, paras 284-310.

⁶⁰ Committee against Torture, *Concluding observations*, UNCAT, 25th Sess, UN Doc A/56/44, 22 November 2000, paras 54-59.

⁶¹ Committee against Torture, *Consideration of reports submitted by States parties under article 19 of the Convention: Conclusions and Recommendations of the Committee against Torture*, UNCAT, 34th Sess, UN Doc CAT/C/CR/34/CAN, 7 July 2005, paras 5(b) and 5(e).

⁶² *Concluding observations 2012*, *supra* note 10, para 9.

⁶³ UN Human Rights Committee, *Consideration of reports submitted by States parties under article 40 of the Covenant: Concluding observations of the Human Rights Committee*, UNHRC, 65th Sess, UN Doc CCPR/C/79/Add.105, 7 April 1999, para 13.

⁶⁴ UN Human Rights Committee, *Consideration of reports submitted by States parties under article 40 of the Covenant: Concluding observations of the Human Rights Committee*, UNHRC, 85th Sess, UN Doc CCPR/C/CAN/CO/5, 20 April 2006, paras 15 and 16.

⁶⁵ UN Human Rights Committee, *Consideration of reports submitted by States parties under article 40 of the Covenant: Concluding observations of the Human Rights Committee*, UNHRC, 114th Sess, UN Doc CCPR/C/CAN/CO/6, 13 August 2015, para 13.

⁶⁶ *Concluding observations 2012*, *supra* note 10, para 9.

⁶⁷ *Concluding observations 2012*, *supra* note 10, para 11.

⁶⁸ *India v Badesha*, 2017 SCC 44, paras 46-52.

Concerns about the approach taken to forcible transfers involving the Canadian Armed Forces have arisen again in connection with joint drug enforcement operations in the Pacific, involving the US Coast Guard and Canadian naval forces. There have been credible reports that persons apprehended in those operations are ill-treated in violation of the prohibition on torture and other ill-treatment, including being shackled to the decks of US Coast Guard ships for weeks at a time, often without sufficient food, and being forced to sleep while being held in harsh conditions. The Canadian response to date has been to dismiss concerns about Canadian responsibility because the “people the military helps the Coast Guard intercept are not, in fact, Canadian detainees, as they remain formally in US custody the whole time.”⁶⁹

6.2 RECOMMENDATIONS TO THE STATE PARTY:

- Incorporate the article 3 absolute prohibition on *refoulement* to torture into Canadian law.
- Adopt a policy ending the use of diplomatic assurances and monitoring arrangements in cases where an individual faces deportation, extradition or other forms of forcible transfer when a substantial risk of torture exists.

7. REFUGEE PROTECTION

7.1 “SAFE THIRD COUNTRY” AGREEMENT

In 2004 the Canadian and US government concluded a so-called Safe Third Country Agreement⁷⁰ under which the majority of refugee claimants passing through one country on their way to the other country are barred from making refugee claims at official land border posts. Overwhelmingly, the effect of the Agreement is to prohibit refugee claims made by individuals passing through the United States on their way to Canada.⁷¹ As the agreement only applies to claims made at official border posts, individuals who cross the border irregularly and then later present themselves to Canadian officials are allowed to lodge their refugee claims, unless they have already been found “ineligible”⁷² at an official border post in advance.

Amnesty International is concerned about the compatibility of the agreement with Canada’s obligations under the Convention, including the obligations to prove the safety of the third country (in this case, the United States) in the individual circumstances of the refugee claimant and to allow the claimant to rebut any presumption of safety. The organization, along with the Canadian Council for Refugees and the Canadian Council of Churches challenged the Agreement in the Federal Court of Canada in 2006. In a 2007 ruling the Federal Court overturned the Agreement on several grounds, including a finding that the United States did not meet its obligations under Article 3 of the Convention.⁷³ That ruling was reversed on appeal to the Federal Court of Appeal in 2008⁷⁴ on procedural grounds,

⁶⁹ Amnesty International, “Defence Minister Must Provide Answers as Joint Canada-USA Maritime Anti-Drug Trafficking Operation Draws Concerning Parallels to Afghan Detainee Scandal” (17 July 2018), online: <https://www.amnesty.ca/news/defence-minister-must-provide-answers-joint-canada-usa-maritime-anti-drug-trafficking-operation>. See also attached to the press release an open letter to the Minister from Amnesty International and the British Columbia Civil Liberties Association.

⁷⁰ *Agreement between the Government of Canada and the Government of the United States of America for cooperation in the examination of refugee status claims from nationals of third countries*, United States and Canada, 5 December 2002, online: <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/mandate/policies-operational-instructions-agreements/agreements/safe-third-country-agreement/final-text.html> [“Safe Third Country Agreement”].

⁷¹ Vic Satzewich, “Canada welcomes refugees, but shuts the door on asylum seekers”, *The Globe and Mail* (8 August 2017), <https://www.theglobeandmail.com/opinion/canada-welcomes-refugees-but-shuts-the-door-on-asylum-seekers/article35905842/>.

⁷² An ineligibility finding bars an asylum seeker from making a refugee claim even if they might have succeeded in their claim for protection had they been allowed to make it. In returning claimants to the United States, Canadian border officials routinely make ineligibility findings against them.

⁷³ *Canadian Council for Refugees v R*, 2007 FC 1262, [2008] 3 FCR 606, paras 161, 262 and 273.

⁷⁴ *Canadian Council for Refugees v Canada*, 2008 FCA 229. The Court of Appeal found that US compliance with the law was irrelevant to the question at bar, which was not whether the Canadian government’s decision was *correct*, but simply whether it was made in compliance with statutory obligations.

and further leave to appeal to the Supreme Court of Canada was denied.⁷⁵ The Agreement has therefore remained in force.

Following the election of Donald Trump as President of the United States, leading immediately to a variety of measures restricting the rights of asylum seekers, refugees and undocumented migrants in the United States, there was a notable increase in the number of individuals in the United States, wishing to seek asylum in Canada.⁷⁶ Because of the Agreement, most such individuals who intend to seek asylum in Canada are forced to enter Canada at unofficial border crossings since they would be turned back at official ones. This has led some individuals to make dangerous journeys across the border, particularly in harsh winter weather. It has also led to a troubling narrative in Canada portraying individuals who cross the border this way as being “illegal” migrants and claimants, who are crossing the border “illegally”, which has noticeably led to erosion in public support for refugees in the country.⁷⁷

Amnesty International, the Canadian Council for Refugees and the Canadian Council of Churches, joined by individual applicants from El Salvador, launched a new Federal Court challenge to the Agreement, in July 2017.⁷⁸ Hearings are not expected to begin until March or April 2019. Noting the concern about a sharp rise in irregular border crossings by asylum seekers, in “dangerous or life-threatening conditions” the UN Committee on the Elimination of Racial Discrimination called on Canada in August 2017 to “rescind or at least suspend the Safe Third Country Agreement with the United States of America to ensure that all individuals who attempt to enter [Canada] through a land border are provided with equal access to asylum proceedings.”⁷⁹ The Committee prioritized this recommendation for a report back from Canada by August 2018. At the time of finalization of the submission, Canada had not yet reported to CERD.

7.2 RECOMMENDATIONS TO THE STATE PARTY:

- Rescind or suspend the application of the Safe Third Country Agreement with the United States.
- Ensure that while the Safe Third Country Agreement remains in place, all refugee claimants excluded under the Agreement are provided an opportunity to rebut the presumption that the United States is safe in their individual circumstances.

⁷⁵ Canadian Council for Refugees, Media Release, “Supreme Court Denial of Leave on Safe Third Regretted” (5 February 2009), online: <http://ccrweb.ca/en/bulletin/09/02/05>.

⁷⁶ Data collected by the Government of Canada shows a noticeable uptick in interceptions by the RCMP at the Canada-US border in the summer of 2017, when President Trump’s ban on Muslims entering the United States made its way through US courts, heightening xenophobic discourse and leading up to the white supremacist rally in Charlottesville, Virginia at the end of the summer of 2017. See numbers at Government of Canada, “2017 Asylum Claims” (14 September 2018), online:

<https://www.canada.ca/en/immigration-refugees-citizenship/services/refugees/asylum-claims-2017.html>. See also Celine Cooper, “A ‘safe country’ dilemma for Canada”, *Open Canada* (25 July 2018), online: <https://www.opencanada.org/features/safe-country-dilemma-canada/>. See also the NPR story about migrants walking across the border into Canada. Lorne Malton, “Fearing deportation from US, migrants walk to Canada”, *NPR Whyy* (26 December 2017), online: <https://www.theglobeandmail.com/opinion/canada-welcomes-refugees-but-shuts-the-door-on-asylum-seekers/article35905842/>.

⁷⁷ See The Canadian Press, “Canadian attitudes towards immigration hardening, poll suggests”, *Toronto Star* (7 November 2017), online: <https://www.thestar.com/news/canada/2017/11/07/canadian-attitudes-towards-immigration-hardening-poll-suggests.html>. See also Monique Scotti, “Overwhelming majority of Canadians say refugee rules must change: Ipsos poll”, *Global News* (29 March 2017), online: <https://globalnews.ca/news/3339834/canadians-refugee-rules-must-change-ipsos-poll/>. See also Rod Nickel and David Ljunggren, “Almost half of Canadians want refugees illegally crossing into Canada deported: Poll”, *Global News* (20 March 2017), online: <https://globalnews.ca/news/3321089/illegal-border-crossing-canada-refugees-deported-poll/>. See also Stephen Smith, “Majority of Canadians see asylum seeker situation as ‘crisis,’ says new poll”, *CIC News: Canada Immigration Newsletter* (3 August 2018), online: <https://www.cicnews.com/2018/08/majority-of-canadians-see-asylum-seeker-situation-as-crisis-says-new-poll-0810999.html> citing Angus Reid Institute, “Two-thirds call irregular border crossings a ‘crisis,’ more trust Scheer to handle issue than Trudeau” (3 August 2018), online: <http://angusreid.org/safe-third-country-asylum-seekers/>. Advocates have attempted to defuse and reorient the conversation. See, *inter alia*, Lobat Sadrehashemi and Lorne Waldman, “Sadrehashemi and Waldman: Four myths about Canada’s border crossings”, *The Ottawa Citizen* (15 May 2018), online: <https://ottawacitizen.com/opinion/columnists/sadrehashemi-four-myths-about-canadas-border-crossings>.

⁷⁸ Amnesty International, “The US is less safe than ever for refugees, evidence filed in court challenge shows” (4 July 2018), online: <https://www.amnesty.ca/news/us-less-safe-ever-refugees-evidence-filed-court-challenge-shows>. See attached to the press release a backgrounder entitled “Why the US is not safe for refugees: Challenging the Safe Third Country Agreement.”

⁷⁹ Committee on the Elimination of Racial Discrimination, *Concluding observations on the combined twenty-first to twenty-third periodic reports of Canada*, UNCERD, 93rd Sess, UN Doc CERD/C/CAN/CO/21-23, 13 September 2017, paras 33 and 34.

7.3 IMMIGRATION DETENTION

In 2012 the Committee called on Canada to reverse legislative reforms introducing mandatory detention for designated groups of individuals who enter Canada irregularly.⁸⁰ The Committee also called on Canada to enact reforms to ensure that immigration detention is truly a measure of last resort, a reasonable time limit for detention is set and alternatives to detention are made available.⁸¹

Soon after coming to power following the October 2015 federal election, the Trudeau government informed numerous civil society groups that it was preparing to reverse the mandatory detention provisions introduced into the *Immigration and Refugee Protection Act*.⁸² However, three years later that has not occurred.

With respect to immigration detention more widely, in July 2018 the government unveiled a new Alternatives to Detention program, in partnership with a number of community organizations, significantly expanding the range of alternative measures to be used as a means of substantially reducing the need for and length of immigration detention.⁸³ A November 2017 Ministerial Direction⁸⁴ to the Canada Border Services Agency (CBSA) from Public Safety Minister Ralph Goodale and a related National Directive adopted by CBSA⁸⁵ both establish that children will only be held in immigration detention in “extremely limited circumstances.”

No steps have been taken, however, to set a maximum time limit for immigration detention, meaning that prolonged and even indefinite detention remains a serious concern.⁸⁶ Promised legislation for oversight of the CBSA has not been brought forward, leaving it the only major federal law enforcement agency with significant policing powers without independent oversight.⁸⁷

7.4 RECOMMENDATIONS TO THE STATE PARTY:

- Repeal provisions in the *Immigration and Refugee Protection Act* requiring the mandatory detention of any designated groups of irregular arrivals.
- Update the November 2017 Ministerial Direction and National Directive to prohibit detaining children for immigration purposes in all circumstances.
- Set a maximum period of time for holding any individual in immigration detention.
- Establish an independent mechanism for oversight of the CBSA.

⁸⁰ *Concluding observations 2012*, supra note 10 at para 13.

⁸¹ *Ibid.*

⁸² *Immigration and Refugee Protection Act*, SC 2001, c 27 [“IRPA”].

⁸³ CBC News, “Border agency deploys technology to cut the number of refugee claimants being detained: CBSA hopes to use more community monitoring instead of holding centres”, *CBC News* (24 July 2018), online: <https://www.cbc.ca/news/politics/cbsa-border-agency-immigration-detention-1.4759567>. See also CBSA, “Alternatives to Detention Program: Backgrounder”, *Government of Canada* (24 July 2018), online: <https://www.canada.ca/en/border-services-agency/news/2018/07/alternatives-to-detention-program.html>.

⁸⁴ CBSA, News Release, “Minister Goodale issues new direction on keeping children out of Canada’s immigration detention system and keeping families together” (6 November 2017), online: https://www.canada.ca/en/border-services-agency/news/2017/11/minister_goodaleissuesnewdirectiononkeepingchildrenoutofcanadasi.html.

⁸⁵ CBSA, “National Directive for the Detention or Housing of Minors”, *Canada Border Services Agency* (6 November 2017), online: <https://www.cbsa-asfc.gc.ca/security-securite/detent/nddhm-dndhm-eng.html>. See Amnesty International’s concerns raised by the then refugee rights campaigner at Amnesty International Canada: Gloria Nafziger, “An end to immigration detention of children?” (29 November 2017), *Amnesty International* (blog), online: <https://www.amnesty.ca/blog/end-immigration-detention-children>.

⁸⁶ Lengthy detentions that appear to have no end in sight are common. The story of Ebrahim Toure is one such example. See Brendan Kennedy, “Immigration detainee Ebrahim Toure finally free after more than five years”, *Toronto Star* (21 September 2018), online: <https://www.thestar.com/news/investigations/2018/09/21/immigration-detainee-ebrahim-toure-finally-free-after-5-12-years.html>.

⁸⁷ See discussion about CBSA oversight in a report by the BCCLA. Laura Track and Josh Paterson, “Oversight at the Border: A Model for Independent Accountability at the Canada Border Services Agency”, *BCCLA* (June 2017), online: <https://bccla.org/wp-content/uploads/2017/06/FINAL-for-web-BCCLA-CBSA-Oversight.pdf>. Amnesty International has also called for CBSA oversight. Amnesty International, Press Release, “Amnesty International demands independent oversight for CBSA following death of third detainee” (17 May 2016), online: <https://www.amnesty.ca/news/amnesty-international-demands-independent-oversight-cbsa-following-death-third-detainee>.

7.5 IMMIGRATION SECURITY CERTIFICATES

In 2012, the Committee called on Canada to extensively review the use of immigration security certificates and take up recommendations made by the Working Group on Arbitrary Detention in 2005 that terrorism suspects be detained in keeping with a framework of criminal procedure, in accordance with relevant international legal safeguards.⁸⁸ The security certificate process is used to detain individuals on national security grounds, pending deportation, in proceedings which deny them access to the full evidence against them. While the number of people held pursuant to immigration security certificates has continually declined, there has been no such review and no improvements to the security certificate process. There have been notable developments:

- In 2014 the Supreme Court of Canada ruled that reforms to the security certificate process which introduced a Special Advocate to protect the interests of the individual subject to the certificate met the requirements of the *Canadian Charter of Rights and Freedoms*.⁸⁹
- In 2015, reforms enacted under Bill C-51⁹⁰ expanded the nature and range of evidence that can be withheld not only from the individual concerned but also from his or her Special Advocate, obliging the government only to disclose information “relevant to the ground of inadmissibility stated in the certificate.”⁹¹

The government continues to seek to deport Mohammed Harkat, who has been subject to an immigration security certificate for close to sixteen years, to Algeria, where Amnesty International is concerned he would be subjected to incommunicado detention and face a substantial risk of torture or other ill-treatment.⁹²

7.6 RECOMMENDATION TO THE STATE PARTY:

- Abolish the immigration security certificate system and ensure that arrest, detention and deportation proceedings involving national security related allegations against non-citizens be conducted in full conformity with Canada’s international human rights legal obligations, including with respect to *non-refoulement* and fair trial guarantees.
- Refrain from deporting Mohammed Harkat to Algeria, where he faces a substantial risk of torture or other ill-treatment.

8. SOLITARY CONFINEMENT (ARTICLES 1 AND 16)

In December 2017⁹³ and January 2018,⁹⁴ courts in the provinces of Ontario and British Columbia ruled that the sections of the *Corrections and Conditional Release Act*⁹⁵ that allow for indefinite solitary confinement are in breach of section 7 of the *Charter*, and are therefore of no force and effect.

⁸⁸ *Concluding observations 2012*, *supra* note 10 at para 12.

⁸⁹ *Canada (Citizenship and Immigration) v Harkat*, 2014 SCC 37.

⁹⁰ Bill C-51, *Anti-terrorism Act, 2015*, 2nd Sess, 41st Parl, 2015 (assented to 18 June 2015), SC 2015, c 20.

⁹¹ See *ibid*, s 54(2) which amends the *IRPA*, *supra* note 82, s 77(2)-(3).

⁹² *Judge loosens some of terror suspect Mohamed Harkat’s release conditions*, Ottawa Citizen, 24 January, 2018, <https://ottawacitizen.com/pmn/news-pmn/canada-news-pmn/judge-loosens-some-of-terror-suspect-mohamed-harkats-release-conditions/wcm/fb7eedf1-be6c-4c28-87c9-51ec5ac09347>.

⁹³ *Corporation of the Canadian Civil Liberties Association v Her Majesty the Queen*, 2017 ONSC 7491.

⁹⁴ *British Columbia Civil Liberties Association v Canada (Attorney General)*, 2018 BCSC 62.

⁹⁵ *Corrections and Conditional Release Act*, SC 1992, c 20, ss 31-37.

The BC court found the law unconstitutional because it permits indefinite segregation – effectively ruling that a hard time-limit is required – and because there is no independent decision-maker to decide on segregation placements. The BC court ruled additionally that the sections are constitutionally invalid to the extent that they discriminate against Indigenous prisoners, and to the extent that they authorize any period of “administrative segregation” for prisoners with mental illness or who are disabled.

Relying on evidence from lay witnesses, including correctional staff and prisoners who had experienced solitary confinement, as well as expert evidence, the BC Court found that solitary confinement places prisoners at significant risk of serious psychological harm, including mental pain and suffering, and increased risk of self-harm and suicide. The Canadian government has appealed the ruling of the BC court, and that appeal is set to be heard in November 2018.⁹⁶

In June 2017, the federal government introduced Bill C-56⁹⁷ which would amend aspects of the legal regime permitting solitary confinement in the weeks prior to the BC trial. The federal government has taken no action on this Bill since it was introduced, and it remains in the House of Commons having only completed the first stage – introduction and first reading. The Bill purports to impose a time limit on administrative segregation placements that will be phased in from 21 to 15 days, but that time limit can be unilaterally extended by the prison warden and is not a hard cap.⁹⁸ The Bill would also implement independent review of placements in solitary confinement beyond the time limit, but the reviewer is only empowered to give a recommendation to the warden, not an order, for a prisoner to be released from segregation.⁹⁹

These reforms are such that Canadian law would still allow for the possibility of prolonged solitary confinement, as defined by Rule 44 of the Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), which considers all prolonged solitary confinement to constitute cruel, inhuman or degrading treatment or punishment, or torture.¹⁰⁰ Furthermore, the Bill contains nothing to eliminate discriminatory impacts on Indigenous or mentally ill prisoners.

The government also introduced a new directive¹⁰¹ to prisons on solitary confinement in the middle of the BC trial, which prohibited administrative segregation for prisoners with a “serious mental illness with significant impairment” and prisoners actively engaging in self-injury or who are at an elevated risk for suicide, and for prisoners who are pregnant, have significant mobility impairments, or who are in palliative care. The new directive also mandated a minimum of two hours outside of the cell daily, permitted daily showers, and provided immediate access to certain personal items. The BC court determined that the new directive did not go far enough, and found that the law itself that establishes the regime is unconstitutional.¹⁰²

8.1 RECOMMENDATIONS TO THE STATE PARTY:

- Impose “administrative segregation” or any other form of solitary confinement only in exceptional cases as a last resort, for as short a time as possible and subject to independent review, and only pursuant to the authorization of a competent authority.

⁹⁶ The Canadian Press, “Rights groups will fight to uphold BC Supreme Court decision on indefinite solitary confinement”, *CBC News* (19 June 2018), online: <https://www.cbc.ca/news/canada/british-columbia/rights-groups-will-fight-to-uphold-b-c-supreme-court-decision-on-indefinite-solitary-confinement-1.4712721>.

⁹⁷ Bill C-56, *An Act to amend the Corrections and Conditional Release Act and the Abolition of Early Parole Act*, 1st Sess, 42nd Parl, 2017 [“Bill C-56”].

⁹⁸ Bill C-56 establishes a maximum of 21 days in segregation with a proposed transition to a maximum of 15 days within 18 months of coming into force. See *ibid*, ss 4-5. This, despite the UN Special Rapporteur on Torture having called on states to ban the solitary confinement of prisoners, except in very exceptional circumstances and only if a strict 15-day limit on such solitary confinement is imposed, further noting that solitary confinement beyond this 15-day limit may constitute torture or ill-treatment. See Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment, *Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment*, 5 August 2011, UN Doc A/66/268, para 26.

⁹⁹ Bill C-56, *supra* note 97, s 35.3(1).

¹⁰⁰ UN Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), adopted by UN General Assembly resolution 70/175, 17 December 2015, Annex, Rule 43(1).

¹⁰¹ Kathleen Harris, “Liberals move to halt landmark legal challenge to solitary confinement of prisoners”, *CBC News* (21 June 2018), online: <https://www.cbc.ca/news/politics/solitary-confinement-segregation-prison-1.4171833>.

¹⁰² Liz Guilbault, “BC solitary confinement trial denied adjournment” (4 July 2017) *Canadian Civil Liberties Association: Rights Watch Blog*, online: <http://rightswatch.ca/2017/07/04/bc-solitary-confinement-trial-denied-adjournment/>.

- Repeal all laws, rules and policies allowing “administrative segregation” or any other form of solitary confinement beyond 15 days.
- Enshrine in law an unconditional prohibition on holding minors and people with mental health illness in any form of solitary confinement.
- Ensure that solitary confinement is not used disproportionately against Indigenous prisoners.

9. OPTIONAL PROTOCOL TO THE CONVENTION AGAINST TORTURE¹⁰³

The Committee called on Canada to ratify the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment during its reviews of Canada’s periodic reports in 2005¹⁰⁴ and 2012.¹⁰⁵ In May 2016, Canada’s then Minister of Foreign Affairs committed Canada to accession to the Optional Protocol, noting that for Canada it would not be “optional” any longer, and announced that consultations towards that outcome would be initiated with provincial and territorial governments.¹⁰⁶ More than two years later accession has not yet occurred, and there has been no public update regarding progress.

At the time of Canada’s third Universal Periodic Review in May 2018, numerous governments called on Canada to accelerate the consultations and the process of accession to the Optional Protocol. In its response to the UPR recommendations, tabled with the Human Rights Council on 18 September 2018, the government indicates that federal, provincial and territorial governments are “considering whether Canada should become a party to the OP-CAT”, “are currently considering potential accession to the OP-CAT” and that “a decision on Canada’s accession has not yet been determined.”¹⁰⁷ These most recent indications appear to be a weaker commitment to accession than was announced in May 2016.

9.1 RECOMMENDATION TO THE STATE PARTY:

- Reconfirm that Canada intends to accede to the Optional Protocol to the Convention against Torture, provide a public report on the progress of consultations with provincial and territorial governments, and seek to accelerate those consultations towards a successful outcome.

¹⁰³ *Optional Protocol*, *supra* note 2.

¹⁰⁴ *Concluding observations 2005*, *supra* note 61, para 5(j).

¹⁰⁵ *Concluding observations 2012*, *supra* note 10, para 25.

¹⁰⁶ Amnesty International, Press Release, “Amnesty International welcomes Canada’s commitment to join torture prevention treaty” (3 May 2016), online: <https://www.amnesty.ca/news/amnesty-international-welcomes-canada-s-commitment-join-torture-prevention-treaty>.

¹⁰⁷ *Report of the Working Group on the Universal Periodic Review; Canada: Views on conclusion and/or recommendations, voluntary commitments and replies presented by the State under Review*, UN Doc A/HRC/39/11/Add.1, 18 September 2018, paras 5 and 6.

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CANADA

SUBMISSION TO THE UNITED NATIONS COMMITTEE AGAINST TORTURE

65TH SESSION, 12 NOVEMBER- 7 DECEMBER 2018

This document builds on previous submissions made to this Committee with respect to Canada's record of compliance with the *UN Convention against Torture and other forms of Cruel, Inhuman or Degrading Treatment or Punishment* (the Convention), including reviews in 2000, 2004 and 2012, as well as a follow-up submission made in 2013. It sets out the organization's concerns regarding violence against Indigenous women and girls, policing of Indigenous protests, redress for survivors of torture, *refoulement* and other forcible transfers to a risk of torture, access to refugee protection, immigration detention, solitary confinement, accession to the Optional Protocol and Canada's ineffective approach to implementing international human rights obligations.