

17 July 2014

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United Nations Committee against Torture  
Office of the High Commissioner for Human Rights  
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Via email: [petitions@ohchr.org](mailto:petitions@ohchr.org)

**Re: CAT/536/2013, Hassan bin Attash et al., Communication against  
Canada, Reply to Supplemental Submission**  
*(Alleged Violation of Articles 5(2), 6 and 7 of the Convention against  
Torture)*

Dear Members of the Committee against Torture:

Hassan bin Attash, Sami el-Hajj, Muhammed Khan Tumani and Murat Kurnaz (collectively, “Complainants”), with the assistance of the Center for Constitutional Rights (“CCR”) and the Canadian Centre for International Justice (“CCIJ”), and through their legal representative Katherine Gallagher of CCR, submitted a communication pursuant to Article 22 of the Convention with this Committee on 14 November 2012.<sup>1</sup> As set forth in detail in the Communication, and Annex II thereto, the Complainants are four individuals who were subjected to torture while detained in U.S.-run detention centers, including in Afghanistan and at Guantánamo Bay. The Complainants maintain that Canada failed to uphold its obligations under the Convention by failing to investigate, detain or prosecute a person alleged to have committed torture present in its territory, George W. Bush, which constitutes a violation of Articles 5, 6 and 7 of the Convention.

The Complainants respectfully submit this response to Canada’s Supplemental Submission, dated 10 April 2014, which was communicated to the Complainants on 9 May 2014. The Complainants previously submitted their response (dated 30 December 2013) to Canada’s initial submission (dated 8 October 2013), and incorporate responses made therein without repetition. This submission addresses only those arguments not previously addressed by the Complainants.

The Complainants recall that they submitted an urgent letter to the Committee on 8 May 2014, in which they alerted the Committee to George W. Bush’s return visit to Canada on 12 May 2014 and urged the Committee to issue interim measures to prevent a further breach of Canada’s obligations under Articles 5, 6 and 7, as well as its obligations under Article 14. The Complainants are concerned that Mr. Bush is able to travel to and from Canada during the pendency of this Communication without incident, as he did in May. The Complainants note that Canada references information available to it “in 2011” throughout its submissions. Even if Canada

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<sup>1</sup> Hassan Bin Attash, et al., Communication presented to the Committee against Torture Pursuant to Article 22 of the Convention against Torture, for Violation of Articles 5, 6, and 7 of the Convention, 12 November 2013 (“Communication”) available at <http://ccrjustice.org/files/CAT%20Canada%20Petition%20.pdf>. The Committee registered the Communication as No. 536/2013.

were justified in not acting on the information available to it in 2011, a contention which the Complainants strenuously reject, Canada cannot be justified in allowing an individual against whom it has had more than sufficient time to launch an investigation, and whose alleged victims it knows stand ready to cooperate in any investigation, to be present in its territory without *any* steps taken to investigate the case against him. Canada's status as a willing "safe haven" for a torturer runs directly counter to the obligations it undertook as a signatory to the Convention, and undermines the anti-torture regime established by the international community.

The Complainants continue to stand ready to provide any additional information or clarification as requested by the Committee, including by and through their legal representative, in writing or orally pursuant to Rule 117(4).

## I. THE COMMUNICATION IS ADMISSIBLE

Although Canada continues to maintain that the Communication is inadmissible, the arguments put forward by Canada remain misplaced. The Communication is admissible and the Committee is competent to review this matter.

### A. Canada's Restricted Interpretation of Article 22(1) is Incorrect

Canada spends the majority of its most recent submission citing sources in an effort to demonstrate that Article 22(1) of the Convention requires the Complainants to be "subject to [the] jurisdiction" of a State party. The Complainants do not disagree. However, when then examining the parameters of a State party's jurisdiction, Canada mentions only once the Committee decision that is directly applicable to this case, *Guengueng v. Senegal*. In that decision, the Committee concluded that Article 22(1) "must take into account various factors that are not confined to the author's [complainant's] nationality" and that "the principle of universal jurisdiction enunciated in article 5, paragraph 2, and article 7 of the Convention implies that the jurisdiction of States parties must extend to *potential* complainants in circumstances similar to the complainants" (emphasis in original).<sup>2</sup> As outlined in the Complainants' previous submissions, this means that when an alleged torturer is present in the territory of a State party, that State's jurisdiction extends to all victims of the alleged torturer because any of those victims is a potential complainant. If it were otherwise, the *universal* jurisdiction so carefully constructed in the Convention would not be operational, and a core purpose of the Convention – to allow no safe havens for torturers – would be defeated.<sup>3</sup>

Nowhere in its supplemental submission does Canada challenge this basic principle. Rather, Canada simply rephrases its original contention that victims of torture with no

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<sup>2</sup> *Guengueng et al. v Senegal*, Communication No. 181/2001, U.N. Doc. CAT/C/36/D/181/2001 (2006), paras. 6.3 and 6.4. As described in the Complainants' previous submission, the Committee's interpretation in *Guengueng* is consistent with the jurisprudence of the Human Rights Committee ("HRC"). Article 1 of the *Optional Protocol to the International Covenant on Civil and Political Rights* is drafted in similar terms to Article 22(1) of the Convention. On several occasions, the HRC has adopted an objective and functional interpretation. See, for example, *Ibrahima Gueye et al. v France*, Communication No. 196/1985, A/44/40 (1989).

<sup>3</sup> Canada's reliance on jurisdictional provisions related to the *International Covenant on Civil and Political Rights* (paras. 10-11) is misplaced, as the ICCPR does not contain the same universal jurisdiction regime at the *Convention Against Torture*.

previous connection to Canada cannot become subject to Canadian jurisdiction by virtue of their alleged torturer being on Canadian soil. This conclusion is unsupported by the language of *Guengueng* and is contrary to the Convention's adoption of a universal jurisdiction regime for torture.<sup>4</sup>

In the alternative, the Complainants continue to assert that specific facts of this case, namely the filing of a private prosecution on behalf of and with the permission of the Complainants against Mr. Bush, as evidenced through the declarations and summaries of the allegations related to the Complainants prepared specifically for "submission to Surrey Provincial Court, October 18, 2011,"<sup>5</sup> brings the instant case within the ambit of *Guengueng*.

## II. CANADA VIOLATED ARTICLES 5, 6 AND 7 OF THE CONVENTION

The Complainants maintain that Canada violated its obligations under Articles 5, 6 and 7 of the Convention, as follows:

- Violation of Article 5 by failing to exercise universal jurisdiction;
- Violation of Article 6(1) and 6(2) by failing to properly examine the information provided by the Complainants, failing to take measures to ensure custody over Mr. Bush (including, but not limited to, physically taking him into custody), and failing to commence a preliminary inquiry of the facts; and
- Violation of Article 7(1) by failing to submit the case against Mr. Bush to the competent authorities for the purpose of prosecution.

In its supplemental submission, Canada has largely reasserted and rephrased the positions it initially took in its October 2013 submission with continued and misplaced emphasis on the need for "evidence". However, Canada also appears to have altered its description of events in response to the Complainants' previous submission.

### A. Canada's Assertions regarding Article 6(1) Have Changed

In its initial submission of October 2013, Canada focused heavily on its argument that the CCR, CCIJ and/or the Complainants had not submitted admissible evidence to Canadian officials. This assertion was made specifically with regard to the Article 6 obligation to detain an alleged torturer. At paragraphs 104 and 105, Canada stated, "Canada further reiterates its assertions that the 'information package' relied upon to support the private information is not evidence and that Canada did not have evidence sufficient to warrant the laying of charges against Mr. Bush at the relevant time (or any time thereafter). Canada submits that it did not violate either Article 6 or 7 on the facts of this communication.... Applying Canada's rules of evidence to the 'information package' leads to the conclusion that no prosecution could go forward based on it.... Without sufficient evidence on which to prove the allegations, no

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<sup>4</sup> Canada does concede that the Committee has followed a "fairly liberal (pro-victim) approach." Canada Supplemental Submission, para. 19. Canada does not provide justification as to why the Committee should deviate from that position in this case.

<sup>5</sup> See Book of Supporting Materials, pp. 3-19, available at:

[http://www.ccrjustice.org/files/Private%20Prosecution\\_Oct\\_18\\_2011.pdf](http://www.ccrjustice.org/files/Private%20Prosecution_Oct_18_2011.pdf). See also Letter from CCR/CCIJ to Minister of Justice and Attorney General of Canada, 20 Oct. 2011, available at: [http://www.ccrjustice.org/files/2011-10-20\\_Letter\\_to\\_AG\\_re\\_sworn\\_Information.pdf](http://www.ccrjustice.org/files/2011-10-20_Letter_to_AG_re_sworn_Information.pdf).

charges could properly be laid by the police ... Without any realistic means for Canada to obtain any evidence regarding the alleged crimes committed, the detention of Mr. Bush for the purposes of Article 6 was not warranted...<sup>6</sup>

With regard to the RCMP's consideration of the information that had been submitted, Canada stated, "The RCMP advises that they have not launched a criminal investigation into the conduct of Mr. Bush in respect of his actions as President of the United States. The RCMP advises that on September 11, 2011, they received complaints concerning the alleged conduct of Mr. Bush. No investigation was launched at that time, as the RCMP determined that a criminal investigation was not warranted, since it was foreseen that it was highly unlikely that the RCMP would be able to gather sufficient evidence to lay an information before a judge."<sup>7</sup> Canada also stated, "Canada further observes that *the timing and volume of information provided by the representatives of the authors to Canadian officials would not have permitted a thorough investigation* within the few weeks before the visit of Mr. Bush."<sup>8</sup> (emphasis added) The implication of Canada's previous submission is that the RCMP did not review all the information presented to it due to the large volume and, additionally, that no investigation was launched because it was certain Canada could not obtain admissible evidence from the United States.

After the Complainants noted that the obligation to detain under Article 6(1) is based only on available *information* and not admissible evidence, Canada has now asserted a new fact in an attempt to avoid a violation of Article 6(1). Canada now states, "Canada did not breach and did not admit to breaching the obligation under the Article. The Royal Canadian Mounted Police (RCMP) fulfilled this obligation in considering the complaints received in September 2011 concerning the alleged conduct of Mr. Bush and reaching the conclusion, in the circumstances, that the available information did not warrant the opening of an investigation at that time. Opening an investigation was not warranted because it was recognized that police services in Canada would be unlikely to have access to key evidence." (emphasis added) It appears that Canada is now asserting, contrary to its earlier position and in an attempt to avoid infringement of Article 6(1), that the RCMP fully reviewed the information received about Mr. Bush and then concluded that an investigation was not warranted. (As set forth fully in their prior submissions, the Complainants assert that Canada had in its possession, through the supporting materials provided to it and the Complainants themselves, sufficient information to proceed to *investigate* Mr. Bush.)<sup>9</sup>

#### B. Canada Continues to Incorrectly Insist that Convention Obligations are Triggered by "Evidence"

As summarized in section A *supra*, while Canada appears to now understand the distinction between "information" and "evidence" for the purposes of Article 6, it nonetheless reverts at the end of its submission to the argument that "evidence" remains the key issue. For example, Canada asserts that the Committee should take into account a number of matters in reaching its decision, and the first consideration

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<sup>6</sup> Canada 2013 submission, paras. 104-105

<sup>7</sup> Canada 2013 submission, para. 42.

<sup>8</sup> Canada 2013 submission, para. 46.

<sup>9</sup> Canada's use of the description "anticipatory investigation" in regard to an investigation of Mr. Bush is misplaced. Canada was well aware that Mr. Bush would be in Canada in 2011 (and again in 2014), as it expended significant resources in providing for his visits. See 30 Dec. 2013 Response, p. 15, n. 87.

should be, “Is it reasonable to consider that a conviction of Mr. Bush for crimes of torture could be obtained ... on the basis of the evidence derived from publicly available information?”<sup>10</sup> Likewise, Canada asserts that “this Committee also must be prepared to determine, *proprio motu*, that there was enough evidence available or attainable in 2011 to warrant the prosecution of Mr. Bush by Canada...”<sup>11</sup> As the Complainants have previously emphasized, this is not the correct standard for either Article 6 or 7. Article 6 requires detention of the alleged torturer and the launching of a preliminary inquiry on the basis of available information. The inquiry is the procedure through which admissible evidence can be obtained to conduct a prosecution under Article 7.

C. The Convention Contains No Requirement That Bad Faith, Gross Incompetence or Manifest Error Must Be Proven

Finally, the Complainants note that Canada has attempted to create, with no basis or citation, an additional requirement before the Committee can find a violation of the Convention. Canada concludes by stating, “The Committee must also form the view that no other view was reasonable at the time such that there was *bad faith, gross incompetence or some other manifest error* on the part of Canadian officials.” (emphasis added) Canada provides no support for this heightened standard and no such requirement exists under the Convention. Articles 5, 6 and 7 define the steps a State party must take – and which, the Complainants assert, Canada failed to take.

### III. CONCLUSION

The Complainants respectfully request that the Committee proceed to find the Communication admissible, declare that Canada violated its obligations under Articles 5, 6 and 7 of the Convention, and order the relief sought.

Respectfully submitted,



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<sup>10</sup> Canada Supplemental Submission, para 31. *See also* para. 36.

<sup>11</sup> Canada Supplemental Submission, para 34.