



Government of Canada
Permanent Mission of Canada
to the United Nations and the
Conference on Disarmament

Gouvernement du Canada
Mission permanente du Canada
auprès des Nations Unies et de
la Conférence du désarmement

Note No.: YTGR-406

Reference: CAT/ 536/2013 - Hassan Bin Attash et al. – Canada's submission on admissibility and merits

The Permanent Mission of Canada to the Office of the United Nations at Geneva presents its compliments to the Office of the High Commissioner for Human Rights and has the honour to submit to the Committee against Torture Canada's submission regarding the admissibility and merits of communication CAT/ 536/2013 of Mr. Hassan Bin Attash et al.

The Permanent Mission of Canada to the Office of the United Nations at Geneva avails itself of this opportunity to renew to the Office of the High Commissioner for Human Rights the assurances of its highest consideration.

Geneva, 8 October 2013.



Canada

**SUBMISSION OF CANADA
REGARDING THE ADMISSIBILITY AND MERITS OF THE
COMMUNICATION TO THE COMMITTEE AGAINST TORTURE OF
HASSAN BIN ATTASH ET AL.**

COMMUNICATION NO. 536/2013

October 7, 2013

Table of Contents

EXECUTIVE SUMMARY	3
I. INTRODUCTION.....	5
II. AUTHORS' COMPLAINT AND CANADA'S POSITION	5
III. FACTUAL BACKGROUND.....	6
A. KEY PROVISIONS OF CANADA'S CRIMINAL CODE.....	6
a) <i>The Crime of Torture</i>	6
b) <i>Extended Criminal Jurisdiction</i>	7
c) <i>Private Prosecutions</i>	8
d) <i>Attorney General Consent to prosecutions for foreign acts of torture</i>	10
B. POLICE INVESTIGATIVE DISCRETION.....	11
C. CANADA'S WAR CRIMES PROGRAM	12
D. PROSECUTORIAL DISCRETION	14
E. PRESENCE OF GEORGE W. BUSH IN CANADA IN 2011	16
IV. ARGUMENTS ON ADMISSIBILITY	18
V. ARGUMENTS ON THE MERITS	22
A. ARTICLE 5 – CANADA HAS EXTENDED JURISDICTION OVER FOREIGN ACTS OF TORTURE....	22
B. ARTICLES 6 & 7 – THE SCOPE OF THE OBLIGATIONS TO DETAIN, INVESTIGATE AND PROSECUTE	23
a) <i>The Insufficiency of the Evidence</i>	27
b) <i>The difficulties of foreign prosecutions / the effective prosecution of foreign crimes</i>	29
c) <i>No violation of Articles 6 and 7</i>	30
C. THE QUESTION OF IMMUNITIES.....	31
VI. IN CONCLUSION.....	32

**SUBMISSION OF CANADA
REGARDING THE ADMISSIBILITY AND MERITS OF THE
COMMUNICATION TO THE COMMITTEE AGAINST TORTURE OF
HASSAN BIN ATTASH ET AL.**

COMMUNICATION NO. 536/2013

EXECUTIVE SUMMARY

The four authors of this communication allege that a former foreign Head of State, former President of the United States of America (U.S.), Mr. G. W. Bush, committed the crime of torture as defined by the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Convention) and the *Criminal Code* of Canada. The authors claim that Canada violated Articles 5, 6 and 7 of the Convention because it did not detain Mr. Bush and submit the case against him for prosecution when he was found to be present in Canada in 2011.

In this submission, Canada presents facts and argument on both the inadmissibility and the lack of merit of this communication. On the question of admissibility, Canada asserts that the Committee lacks competence to consider the alleged violations as the authors are non-citizens and are not and have not been subject to the jurisdiction of Canada, which is a requirement for a complaint under Article 22 of the Convention. Canada further asserts that the authors have failed to substantiate a violation of the Convention by Canada.

On the question of the merits of the communication, Canada submits that while the exercise of extended criminal jurisdiction by State parties to the Convention is an effective weapon in the fight against impunity, it does not displace obligations of procedural fairness and natural justice owed to persons alleged to have committed crimes. The text of the Convention as a whole makes it clear that criminal prosecution should be pursued only when sufficient evidence is available such that it is possible to respect the rights imbedded in a fair criminal process.

Canada submits that Articles 5 through 7 of the Convention must be read together and in relation to the treaty as a whole. Canada notes that the obligation to proceed *ex officio* with a criminal investigation into alleged acts of torture rests with the territorial State (where the crimes were committed). The Convention obligation of the forum State to investigate allegations of torture committed by a foreign perpetrator in another State arises only with the presence of the alleged perpetrator in any territory under its jurisdiction. Canada further submits that the obligation under Article 6 to take measures to ensure the continuing presence of an alleged perpetrator is not absolute. Paragraph 1 of Article 6 recognizes that there may be occasions when the circumstances do not warrant ensuring the continued presence of an individual for the purpose of criminal proceedings.

Canada submits that its actions in relation to the visit of former U.S. President George W. Bush to Canada were not inconsistent with its obligations under the Convention on the basis of the reasonable application of both police investigative discretion and prosecutorial discretion. Canada asserts that no prosecution could go forward based on the information package assembled by counsel for the authors; it is insufficient to meet the evidentiary burden required to lay charges or obtain a conviction. Most of the publicly available information is not evidence

admissible in a Canadian criminal trial. Canada submits that at the relevant time its police services did not have access to other evidence sufficient to warrant the laying of criminal charges against Mr. Bush for torture. Canada notes that although some of the alleged acts of torture relevant to this communication occurred outside the territory and jurisdiction of the United States, the acts of Mr. Bush relevant to the allegations against him were executive acts, any evidence of which would exist only in the United States.

Without sufficient evidence, no charges could properly be laid by the police and no prosecution could properly be allowed to proceed by Crown prosecutors. In the absence of a reasonable expectation of assistance from the U.S. for an investigation into the allegations against Mr. Bush, Canada had no basis on which to take him into custody; his detention for the purposes of Article 6 was not warranted. Canada did not have evidence sufficient to warrant submitting a case against Mr. Bush to its competent authorities for the purpose of prosecution as required by Article 7.

Canada asks the Committee to consider carefully all the facts and argument and agree not only that this communication is inadmissible but also that it fails to establish a violation of the Convention by Canada.

**SUBMISSION OF CANADA REGARDING THE ADMISSIBILITY AND MERITS OF
THE COMMUNICATION TO THE COMMITTEE AGAINST TORTURE OF
HASSAN BIN ATTASH ET AL.**

COMMUNICATION NO. 536/2013

I. INTRODUCTION

1. By letter dated 22 January 2013, the Secretary-General of the United Nations (High Commissioner for Human Rights) requested that Canada submit to the Committee against Torture (Committee) information and observations with respect to the communication received by the Committee under Article 22 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Convention) on behalf of Hassan bin Attash, Sami el-Hajj, Muhammed Khan Tumani and Murat Kurnaz (the authors).
2. This communication was submitted on behalf of the authors by Counsel for the American Center for Constitutional Rights (New York) and the Legal Director of the Canadian Centre for International Justice (Vancouver). The authors allege that Canada has violated Articles 5, 6 and 7 of the Convention for failure to detain former U.S. President George W. Bush during a one day visit in October 2011 for the purpose of an investigation and possible prosecution for crimes of torture.

II. AUTHORS' COMPLAINT AND CANADA'S POSITION

3. The communication alleges that former President of the United States of America (U.S.), George W. Bush, "bears individual responsibility for the torture he personally authorized and supervised and for the acts of his subordinates which he failed to prevent or punish."¹ The authors of the communication allege that they are victims of torture at the hands of U.S. officials while in U.S. detention facilities during the Bush administration. The communication alleges that Canada violated Articles 5, 6 and 7 of the Convention in respect of a visit by Mr. Bush to Canada in October 2011 because it did not extradite or prosecute him (Article 5.2), it did not take measures to ensure his continuing presence in Canada (Article 6.1) and it did not submit him to prosecution or extradition (Article 7.1).²
4. It is Canada's position that this communication is inadmissible on several grounds. Canada argues that the authors' communication is inadmissible in whole or in part on grounds of non-substantiation and incompatibility with Article 22 of the Convention. In particular, Canada submits that the Committee is not competent to consider a communication by individuals not subject to the jurisdiction of Canada.

¹ *Re: Hassan bin Attash, Samiel-Hajj, Muhammed Khan Tumani and Murat Kurnaz v. Canada – Communication*, at p.11.

² *Ibid.*, at p. 18.

5. Canada argues that this communication is without merit as it does not establish any violation of the Convention by Canada. In this submission, Canada will describe its laws and practices with respect to the prosecution of individuals for serious crimes, such as torture. Canada's domestic law criminalizes torture and provides extraterritorial jurisdiction over the crime of torture consistent with its obligations under Article 5 of the Convention. The laws and practice of Canada foster accountability for perpetrators of serious crimes, including certain serious foreign crimes, such as torture.
6. Canada submits that it was not in possession of evidence sufficient to warrant the laying of charges against Mr. Bush by the police nor did it have a reasonable expectation of being able to obtain such evidence at that time. Canada observes that the information package³ relied upon by counsel for the authors for the purpose of the private information (indictment) and sent to this Committee for the purpose of the communication is entirely insufficient for the laying of criminal charges. Canada further observes that without a reasonable expectation of obtaining the assistance required to assemble a case for the prosecution, Canada does not detain for the purpose of an investigation. Canada does not charge someone for criminal offences where there is no reasonable expectation of achieving a conviction.

III. FACTUAL BACKGROUND

7. In its explanation of the Canadian criminal justice system as it relates to this communication, the focus is on federal investigations and federal prosecutions. This is because the key facts related to the questions of criminal investigation and prosecution raised by this communication fall mostly within the jurisdiction of the federal level of government.

A. Key Provisions of Canada's Criminal Code

a) *The Crime of Torture*

8. Consistent with its obligations under Article 4 of the Convention, Canada has enacted the crime of torture in its criminal law, under s.269.1 of the *Criminal Code*,⁴ which reads:

269.1 (1) Every official, or every person acting at the instigation of or with the consent or acquiescence of an official, who inflicts torture on any other person is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

(2) For the purposes of this section,

³ *Ibid.*, Annex II, "Factual and Legal Basis for the Prosecution of George W. Bush" and documents referenced in "Bush Torture Case – Appendix at p.65 et seq.

⁴ *Ibid.*, s.269.1.

“official” means

- (a) a peace officer,
- (b) a public officer,
- (c) a member of the Canadian Forces, or
- (d) any person who may exercise powers, pursuant to a law in force in a foreign state, that would, in Canada, be exercised by a person referred to in paragraph (a), (b), or (c),

whether the person exercises powers in Canada or outside Canada;

“torture” means any act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person

- (a) for a purpose including
 - (i) obtaining from the person or from a third person information or a statement,
 - (ii) punishing the person for an act that the person or a third person has committed or is suspected of having committed, and
 - (iii) intimidating or coercing the person or a third person, or
 - (b) for any reason based on discrimination of any kind,
- but does not include any act or omission arising only from, inherent in or incidental to lawful sanctions.

(3) It is no defence to a charge under this section that the accused was ordered by a superior or a public authority to perform the act or omission that forms the subject-matter of the charge or that the act or omission 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.

(4) In any proceedings over which Parliament has jurisdiction, any statement obtained as a result of the commission of an offence under this section is inadmissible in evidence, except as evidence that the statement was so obtained.⁵

b) Extended Criminal Jurisdiction

9. Consistent with its obligations under Article 5, paragraph 2 of the Convention, Canada’s *Criminal Code* extends prescriptive and adjudicative jurisdiction over the crime of torture where the offence occurs outside Canada and neither the victim nor the alleged offender is a citizen of Canada. The relevant portion of s.7 (3.7) of the Code reads:

(3.7) Notwithstanding anything in this Act or any other Act, every one who, outside Canada, commits an act or omission that, if committed in Canada, would constitute an offence against ... section 269.1 shall be deemed to commit that act or omission in Canada if

- (a) ...

⁵ R.S., 1985, c. 10 (3rd Supp.), s. 2. The last prosecution under this provision was the court martial of three Canadian soldiers, Brocklebank, Matchee and Brown, for the beating death of a Somali teenager in 1993.

(e) the person who commits the act or omission is, after the commission thereof, present in Canada.

c) Private Prosecutions

10. Private prosecutions are an important but rarely used element of Canada's criminal law. As set out in s.504 of the Code, anyone may lay an information in respect of an indictable offence.

504. Any one who, on reasonable grounds, believes that a person has committed an indictable offence may lay an information in writing and under oath before a justice, and the justice shall receive the information, where it is alleged

(a) that the person has committed, anywhere, an indictable offence that may be tried in the province in which the justice resides, and that the person

(i) is or is believed to be, or

(ii) resides or is believed to reside,

within the territorial jurisdiction of the justice; ...

11. Where an information is laid by a private individual, the relevant judge must hold a hearing to confirm the charges, at which the allegations and evidence are examined to determine if they warrant the issuance of a summons or warrant for the arrest of the accused in order to compel him or her to appear in court to answer to the charges. The Attorney General must be given a copy of the information and notice of the time of the hearing. The procedure for private prosecutions is governed by s.507.1 of the Code, which reads:

Referral when private prosecution (explanatory note in the Code)

507.1 (1) A justice who receives an information laid under section 504, other than an information referred to in subsection 507(1), shall refer it to a provincial court judge or, in Quebec, a judge of the Court of Quebec, or to a designated justice, to consider whether to compel the appearance of the accused on the information.

(2) A judge or designated justice to whom an information is referred under subsection (1) and who considers that a case for doing so is made out shall issue either a summons or warrant for the arrest of the accused to compel him or her to attend before a justice to answer to a charge of the offence charged in the information.

(3) The judge or designated justice may issue a summons or warrant only if he or she

(a) has heard and considered the allegations of the informant and the evidence of witnesses;

(b) is satisfied that the Attorney General has received a copy of the information;

(c) is satisfied that the Attorney General has received reasonable notice of the hearing under paragraph (a); and

(d) has given the Attorney General an opportunity to attend the hearing under paragraph (a) and to cross-examine and call witnesses and to present any relevant evidence at the hearing.

(4) The Attorney General may appear at the hearing held under paragraph (3)(a) without being deemed to intervene in the proceeding.

(5) If the judge or designated justice does not issue a summons or warrant under subsection (2), he or she shall endorse the information with a statement to that effect. Unless the informant, not later than six months after the endorsement, commences proceedings to compel the judge or designated justice to issue a summons or warrant, the information is deemed never to have been laid.

(6) If proceedings are commenced under subsection (5) and a summons or warrant is not issued as a result of those proceedings, the information is deemed never to have been laid.

(7) If a hearing in respect of an offence has been held under paragraph (3)(a) and the judge or designated justice has not issued a summons or a warrant, no other hearings may be held under that paragraph with respect to the offence or an included offence unless there is new evidence in support of the allegation in respect of which the hearing is sought to be held. ...

12. Private individuals who lay an information must have reasonable grounds to believe that the person accused has committed an indictable offence (information is laid before a court under oath) but they are not bound by the public law duties that apply to either police services or public prosecutors. Private individuals seeking to lay an information do not have to meet a threshold of reasonable prospect of conviction. Moreover, private prosecutions may be subject to abuse.⁶ These considerations underpin the policy choice, reflected in the *Criminal Code*, of requiring that Crown prosecutors (on behalf of the relevant Attorney General) receive a copy of the information in a private prosecution and be given the opportunity to attend a hearing into the allegations of the informant and the evidence of witnesses before the judge may issue process (the summons or warrant for the arrest of the accused).
13. It is not uncommon, in busy jurisdictions, for a court to face delays of some weeks or even months in the scheduling of hearings. Where the consent of the Attorney General of Canada is required within 8 days for a prosecution to proceed, as was the case here, it is prudent for the informant to seek, and indeed obtain, that consent prior to the laying of a private information.
14. Crown prosecutors (on behalf of the Attorney General) may intervene in a private

⁶ As some commentators have noted, victim-initiated complaints can result in inappropriate use of courts of the forum State. Investigations initiated by governmental officials, whether police services or investigating judges is seen as a prudent approach to be preferred to private initiatives which could be politically motivated: Ratner, Abrams & Bischoff, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, Third Edition, (2009) Oxford: Oxford University Press at p.207.

prosecution, may take over the conduct of a private prosecution or may direct a stay of the private prosecution, or they may take no action.

15. The procedures necessary to the laying of a private prosecution are well known in the legal community in Canada, or at a minimum the requisite knowledge is easily attainable. Not only is the *Criminal Code* a publicly available statute but this procedure has been the subject of a published decision of the British Columbia Court of Appeal. In 2004, Gail Davidson and Lawyers Against the War attempted to bring a private prosecution against Mr. George W. Bush, then the President of the United States, for counselling, aiding and abetting torture. Ms. Davidson attended before a Justice of the Peace in Vancouver and swore an information, under s.504 of the Code, alleging that President Bush had committed crimes of torture contrary to s.269.1 of the Code between February 2002 and November 2004. In 2006, the British Columbia Court of Appeal dismissed the appeal of Ms. Davidson from decisions of a Provincial Court judge and a Supreme Court justice dismissing the proceedings: *Davidson v. British Columbia (Attorney General)*.⁷ The appeal was dismissed because, as the Court of Appeal noted, “the appellant failed to obtain the consent of the Attorney General of Canada not later than eight days after the information was laid.”⁸

d) Attorney General Consent to prosecutions for foreign acts of torture

16. There are several provisions of the *Criminal Code* that require the consent of the appropriate Attorney General before an information may be laid or in order for a prosecution to be continued.⁹ The requirement for the consent of the Attorney General exists for various offences for various reasons, including the advisability of considering the implications of international law or international relations, questions related to the administration of justice and concerns with the potential for frivolous or malicious private prosecutions.
17. The consent of the Attorney General of Canada is required in order for a Canadian court to proceed with a prosecution of a non-citizen for acts of torture committed outside Canada. The requirement for Attorney General consent applies equally to public and private prosecutions. The authority to decide whether consent will be granted is delegated to the Chief Federal Prosecutors in consultation with the relevant Deputy Director of the Public Prosecution Service of Canada. The relevant provision of the Code, s.7(7), reads as follows:

(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

⁷ *Davidson v. British Columbia (Attorney General)*, 2006 BCCA 447 (CanLII).

⁸ *Ibid.*, para.4.

⁹ The requirement in s.7(7) of the *Criminal Code* for the consent of the Attorney General to continue a prosecution applies to the other crimes over which Canada has extended its criminal jurisdiction beyond its territory as set out in other subsections of s.7, including the crime of hijacking (s.7(2)), crimes against the person or property of an internationally protected person (s.7(3)), crimes of kidnapping and hostage taking (s.7(3.1)) and terrorism offences (s.7(3.74)). Attorney General consent is required to commence a prosecution in respect of the crime of abduction of child by a parent or guardian (s.283), advocating genocide (s.318) and the wilful promotion of hatred (s.319(2)).

Attorney General of Canada is obtained not later than eight days after the proceedings are commenced.

18. The general objective of the requirement for the consent of the Attorney General is the prevention of unwarranted prosecutions.¹⁰ In the case of a private prosecution of non-citizens for foreign crimes, the requirement of the consent of Attorney General of Canada to prosecute is also one means of preventing the unwarranted detention of an individual so as not to violate the right to liberty.
19. The consent of the Attorney General of Canada to continue a prosecution, as required by s.7(7) of the Code, is a matter subject to prosecutorial discretion.¹¹ The nature of prosecutorial discretion is discussed below under a specific heading.

B. Police Investigative Discretion

20. Police services in Canada, such as the Royal Canadian Mounted Police (RCMP), investigate crimes and may lay criminal charges where there are reasonable grounds to believe that an offence has been committed. Generally speaking, there are three main levels of policing in Canada: federal, provincial and municipal. The RCMP is Canada's national police service and is responsible for enforcing federal laws throughout Canada, including the *Crimes Against Humanity and War Crimes Act*. Provincial and municipal police services enforce the *Criminal Code* and provincial laws within the province. The RCMP also performs these functions in provinces and territories where the relevant government has contracted with it to do so. In certain circumstances, the RCMP undertakes *Criminal Code* investigations as Canada's federal police service either acting alone or in cooperation with provincial and / or municipal police services.
21. Allegations of foreign acts of torture in respect of persons present in Canada can be received from a variety of sources including victims, witnesses, foreign governments, local ethnic communities, non-governmental organizations and the media. Investigations in Canada into allegations of foreign acts of torture or into serious international crimes focus on individuals who are present in Canada. Allegations of international crimes are considered by an inter-departmental committee,¹² which decides on the appropriate course of action.
22. It is a fundamental principle of the Canadian criminal justice system that the police have investigative discretion. That is, the police are independent from the control of the government during the course of criminal investigations, including with respect to whether to launch an investigation and how an investigation is to be conducted.¹³ Police services are also independent of Crown prosecutors and the Attorneys General. The Attorney General of Canada cannot commence or conduct a criminal investigation nor direct that the police launch an investigation. Police discretion, like prosecutorial

¹⁰ See *Davidson, supra*, at FN7 of the decision, for various academic and judicial observations on the reasons for Attorney General consent.

¹¹ See, for example, *Zhang v. Canada (Attorney General)*, 2006 FC 276 (CanLII) at paras.13 & 14.

¹² Program Coordinating Operations Committee (PCOC).

¹³ *R. v. Campbell*, [1999] 1 S.C.R. 565 at paras.27-36.

discretion, is one part of the checks and balances built into the Canadian justice system as a whole.¹⁴

23. In the investigative stage, the police question complainants, witnesses and suspects and they may conduct searches and seize evidence. The goal of the police investigation is the collection of enough evidence to lay a criminal charge. Even if sufficient evidence is collected, the police have the discretion as to whether or not to lay charges or to refer charges to the prosecution for review, as appropriate. For example, for tactical reasons the police may delay the laying of charges in order to continue to gather further evidence without alerting suspects that are under investigation.
24. It is generally the practice of police services in Canada to neither confirm nor deny the existence of a criminal investigation concerning a specific individual. Police services usually refrain from discussing on-going investigations in public fora so as to protect the integrity of the investigative process and due to the privacy interests of complainants and suspects. In the case of suspects, restraint on the release of public information concerning an investigation also respects the presumption of innocence. Occasionally, some aspects of particular investigations are disclosed to the public when such disclosure may further the investigative process or the disclosure would be in the public interest, for example, to warn about a public safety risk.
25. The role of the police is distinct and separate from that of Crown prosecutors. The police exercise their investigative discretion independently and are expected to do so objectively. Police are subject to their own codes of discipline and their own practice directives.
26. Although the police and Crown prosecutors have separate responsibilities within the criminal justice system, it is sometimes necessary for Crown prosecutors to work closely with the police, particularly on the question of the sufficiency of evidence in complex cases. Crown counsel may assist the police on request by reviewing the available evidence for sufficiency and admissibility prior to the laying of charges.
27. Special task forces or interdisciplinary committees that facilitate a close working relationship while maintaining the independence of roles and responsibilities of police and Crown prosecutors can be crucial in advancing a coherent justice system approach to serious criminality, patterns of offences or crimes with complex legal elements. Canada's war crimes program is an example of the inter-disciplinary, inter-departmental approach to the investigation and possible prosecution of one type of serious, complex crime – international crimes.

C. Canada's War Crimes Program

28. Foreign acts of torture can be prosecuted in Canada under the *Criminal Code*¹⁵ as well as

¹⁴ *R. v. Beare*, [1988] 2 S.C.R. 387 at para.51.

¹⁵ See the *Criminal Code* provisions at paras.8 & 9 above.

under Canada's *Crimes Against Humanity and War Crimes Act* (CAHWCA)¹⁶ where torture is the underlying act of the alleged war crime or crime against humanity. The Government of Canada has in place an interdepartmental program (the "war crimes program") to facilitate the investigation and prosecution of international crimes (genocide, crimes against humanity and war crimes). Although the mandate of the war crimes program does not include the *Criminal Code* offence of torture, members of the program (RCMP and Department of Justice) would assist provincial or federal prosecutors with regard to allegations of foreign acts of torture given their expertise and their contacts from their work relating to the crime of torture as an underlying act to international crimes.

29. Several federal departments work together in this program in order to effectively pursue the investigation and prosecution of persons in Canada who are alleged to have committed international crimes.¹⁷

- The RCMP conducts criminal investigations, with assistance from the Department of Justice's Crimes Against Humanity and War Crimes Section (CAHWC Section).
- The Public Prosecution Service of Canada (PPSC) is responsible for the conduct of prosecutions. To date, the PPSC has completed two prosecutions under the CAHWCA. Mr. Désiré Munyaneza was convicted of war crimes, crimes against humanity and genocide on May 22, 2009.¹⁸ In a separate proceeding, Mr. Jacques Mungwarere was found not guilty of crimes against humanity on July 15, 2013.¹⁹
- The CAHWC Section of the Department of Justice, an interdisciplinary team of lawyers, researchers, historians and analysts, supports the work of the RCMP and the PPSC and provides comprehensive legal and strategic advice in the highly specialized area of international crimes to the other federal program partners. The Department's International Assistance Group assists the RCMP with mutual legal assistance requests.

30. The Program Coordinating Operations Committee (PCOC) considers allegations involving international crimes. The first decision point for the inter-departmental

¹⁶ *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24.

¹⁷ As appropriate, Canada's war crimes team also works not only to prevent the admission of individuals to Canada but also to pursue extradition or transfer to an international criminal tribunal or to remove them from Canada by way of immigration process.

¹⁸ *R. v. Munyaneza*, 2009 QCCS 2201: Mr. Munyaneza, a Rwandan national, was arrested in Canada on October 2005 and charged with two counts of genocide, two counts of crimes against humanity, and three counts of war crimes pursuant to the CAHWCA in relation to the 1994 genocide in Rwanda. On May 22, 2009, the Superior Court of Quebec convicted Mr. Munyaneza of all seven counts of war crimes, crimes against humanity and genocide and he was sentenced to life imprisonment without parole for 25 years. The decision is currently under appeal before the Court of Appeal of Quebec.

¹⁹ The PPSC commenced criminal proceedings against Mr. Mungwarere on November 6, 2009, following an RCMP investigation. He was charged with crimes against humanity and genocide in relation to the 1994 genocide in Rwanda. The Ontario Superior Court acquitted Mr. Mungwarere as the judge was not convinced beyond a reasonable doubt of the guilt of the accused. Mr. Mungwarere had been detained since his arrest in 2009.

committee is whether Canada has an international obligation to prosecute the alleged international crime. If the case involves torture as a war crime constituting a grave breach of the Geneva Conventions of 1949, for example, the answer is yes and the alleged crime is automatically placed on the program's criminal inventory for further consideration.

31. The RCMP conducts criminal investigations, with assistance from the Department of Justice's team of lawyers, researchers, historians and analysts. The RCMP, as a law enforcement agency, has the right to conduct criminal investigations on its own initiative and can open investigations into allegations *proprio motu* without consultation or direction by the other partners in the war crimes program or otherwise. The close cooperation and coordination that exists within the war crimes program is a policy choice, not a legal imperative.
32. Once completed, investigations into allegations of international crimes are submitted to the Public Prosecution Service of Canada.²⁰ A prosecution under the *Crimes against Humanity and War Crimes Act* requires the consent of the Attorney General of Canada. As noted above, a prosecution of foreign acts of torture under the *Criminal Code* also requires the consent of the Attorney General of Canada. Prosecutorial decisions regarding consent are made under the authority of the Attorney General of Canada, which has been delegated to the PPSC.

D. Prosecutorial Discretion

33. It is another fundamental principle of the Canadian criminal justice system that the Attorney General, when exercising prosecutorial responsibilities, enjoys complete independence from any outside influences, including any partisan political influences.²¹ Crown counsel acting as prosecutors (Crown prosecutors) are agents of the Director of Public Prosecutions who fulfils his functions on behalf of the Attorney General.²² Crown prosecutors share the independence attributed to the Attorney General in respect of the prosecutorial function.
34. The core decisions of Crown prosecutors, including decisions on whether to prosecute at all, or to stay a private or a public prosecution,²³ are discretionary and cannot be constrained or influenced by others. However, their discretionary powers are not without

²⁰ If, at the outset, the allegations do not warrant inclusion in the criminal inventory of the war crimes program (e.g. seriousness of offence, responsibility, alternative recourse) or, if after investigations there is "no reasonable prospect of conviction" or prosecution is deemed not in the public interest, the RCMP may, in collaboration with the CAHWC Section, coordinate with other federal partners for possible alternative enforcement measures. Such measures may include removal from Canada pursuant to the *Immigration and Refugee Protection Act* or revocation of citizenship pursuant to the *Citizenship Act*.

²¹ *Krieger v. Law Society of Alberta*, 2002 SCC 65, [2002] 3 SCR 372 at para.30; Don Stuart, Ronald J. Delisle & Tim Quigley, *Learning Canadian Criminal Procedure*, Tenth Edition, Toronto: Carswell, 2010 at p.617.

²² See s.3(3) of the *Director of Public Prosecutions Act*, S.C. 2006, c. 9, s. 121: *Director of Public Prosecutions Act*.

²³ See *Krieger*, *supra*, in which the Supreme Court of Canada noted that decisions on whether or not to prosecute, whether to stay either a private or a public prosecution, whether to accept a guilty plea to a lesser charge, whether to withdraw a charge and whether to take control of a private prosecution as among the core discretionary powers of public prosecutors.

limits: prosecutorial discretion is the judgment engaged when applying a set of principles or tests to a set of facts, not a unilateral power to act.

35. Courts in common law jurisdictions tend to be deferential when asked to review the exercise of prosecutorial discretion, which they see as a critical element of the proper functioning of the justice system and important to the preservation of judicial independence.²⁴ However, the exercise of prosecutorial discretion, including a decision concerning Attorney General consent for the continuation of a prosecution under s.7 of the *Criminal Code*, is subject to judicial review and courts will intervene to prevent the abuse of the trial process. That said, a court will not overturn the decision of a prosecutor within the core of the exercise of prosecutorial discretion unless it is established that there was misconduct bordering on corruption, violation of law, bias against or for an individual or an offence.²⁵ This test is well established in Canadian law.
36. Crown prosecutors review decisions of the police to lay charges against individuals. These reviews can take place before (pre-charge review) or after (post-charge review) the information is sworn by the police. Where the consent of the Attorney General is required, consent is considered during a pre-charge review.
37. Policies exist to guide individual prosecutors in the exercise of their functions. Prosecutorial discretion allows Crown counsel to respond appropriately to the unique circumstances of each case in order to ensure that justice is done and the public interest is served. General policy guidelines, which are public documents, help ensure a consistency of approach to decision-making across judicial jurisdictions and in respect of categories of crimes.
38. The decision to continue or terminate a prosecution can be one of the most difficult for Crown prosecutors to make. The general public relies upon Crown prosecutors to vigorously pursue provable charges, while protecting individuals from the serious repercussions of a criminal charge where there is no reasonable prospect of conviction. Every charge must be reviewed in order to determine i) whether the available evidence meets a certain threshold of sufficiency; and ii) whether the public interest requires proceeding with a prosecution.²⁶
39. The evidentiary threshold used by the Public Prosecution Service of Canada (federal Crown prosecutors) is “a reasonable prospect of conviction,” which is a higher threshold than “*prima facie* case” but is not as high as a “probability of conviction” (more likely than not).²⁷ Once this threshold is met, prosecutors must also consider whether or not a

²⁴ See e.g. *R. v. Power*, [1994] 1 S.C.R. 601; 89 C.C.C. (3d) 1; See also *R. v. D.P.P. Ex parte Kebilene and others*, [1999] 4 All E. R. 827 (House of Lords) at 835 in which Lord Steyn suggested the decision to prosecute was not amenable to judicial review absent dishonesty, bad faith or exceptional circumstance. See, also, Don Stuart, *Charter Justice in Canadian Criminal Law*, Third Edition, (Scarborough: Thomson Canada Limited, 2001) at pp.136-140.

²⁵ *R. v. Power*, [1994] 1 S.C.R. 601; 89 C.C.C. (3d) 1; *Zhang v. Canada (Attorney General)*, 2007 FCA 201 <http://beta.canlii.org/t/1rmb>.

²⁶ See Steven Penny, Vincenzo Rondinelli & James Stribopoulos, *Criminal Procedure in Canada* (Markham: LexisNexis Canada Inc., 2011) at p.449 and Stuart, Delisle & Quigley, *supra*, at p.620.

²⁷ Public Prosecution Service of Canada, the *Federal Prosecution Service Deskbook*, Part V, Chapter 15: *Federal Prosecution Service Deskbook*.

prosecution is required in the public interest. "Generally, the more serious the offence, the more likely the public interest will require that a prosecution be pursued."²⁸ An assessment of the public interest may also require considering whether any special circumstances exist, including the impact on Canada's international relations. However, no public interest can justify the prosecution of an individual if there is no reasonable prospect of conviction. The public interest is not even considered unless the threshold test for sufficiency of the evidence is met.

40. As noted above, the decision to grant the consent of the Attorney General under s. 7(7) of the Code is an exercise of prosecutorial discretion undertaken by the PPSC. The factors which must be considered are again the sufficiency and availability of the evidence and the public interest in proceeding with a prosecution.²⁹ The decision regarding consent is guided by the principle that no one should be subjected to a criminal prosecution if there is no reasonable prospect of bringing the case to trial or no reasonable prospect of achieving a conviction. This principle informs every exercise of prosecutorial discretion in Canada.

E. Presence of George W. Bush in Canada in 2011

41. As noted at page 15 of the communication, George W. Bush visited Canada two times in 2011. Each visit was very short and for the purpose of delivering speeches. Mr. Bush spoke in Toronto, Ontario on September 19, 2011 and in Surrey, British Columbia on October 20, 2011.
42. 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.³⁰ 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.
43. In advance of these visits to Canada, as noted in the communication, the representatives of the authors sent information (the "information package") to the Attorney General of Canada seeking an investigation into the allegations of the involvement of Mr. Bush in acts of torture. Canada notes that the Attorney General of Canada does not investigate crimes; the investigation of crime is a matter for police services and not Crown prosecutors (or Attorneys General) in Canada. Canada observes, however, that in the weeks before the October 2011 visit of Mr. Bush to Canada, the question of whether to launch an investigation as well as the issue of a possible prosecution was brought to the attention of Canadian officials by representatives of the authors.

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ The RCMP also advise that they received a complaint against Mr. Bush on May 20, 2009. Canada notes that the timing of this earlier complaint is not relevant to this communication, which addresses the 2011 visits by Mr. Bush. The RCMP advises that a determination was also made in 2009 that a criminal investigation was not warranted for the same reasons as in 2011.

44. As explained in the communication, the representatives of the authors asked the Attorney General of Canada to “launch a criminal investigation”³¹ on the basis of the “information package” they provided to him (same information package as in Annex II to the communication). These representatives also indicated to the Attorney General that if he took no action to investigate Mr. Bush, they would support “individual survivors of torture who wish to lay an information against him under section 504 of the *Criminal Code*.”³² Canada notes that the letters annexed to the communication demonstrate that the representatives of the authors, if not the authors themselves, recognized that what was needed was an investigation into the alleged crimes of Mr. Bush in order for the police to gather evidence admissible in a criminal trial. In other words, the authors themselves must be taken to understand that the “information package” was not evidence admissible in a Canadian criminal trial.
45. Canada further notes that the authors’ representatives appeared not to have appreciated that no private information should be laid in the absence of sufficient evidence and, importantly, that no private information could be continued successfully without the consent of the Attorney General of Canada. Canada observes that the representatives of the authors did not seek the consent of the Attorney General of Canada to pursue a private prosecution; nor have they explained why they did not seek that consent when they wrote to him.
46. 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. The timing was also inadequate for a properly informed decision to be made on the issue of consent under s. 7(7), assuming it had been requested. As with all serious crimes, such decisions require thorough consideration of the evidence and careful preparation by investigators and/or prosecutors. The PPSC advises that even a decision as seemingly “simple” as the precise wording of charges and the number and nature of counts, which is made only after evidence is analyzed and reviewed, takes time.
47. On the morning of Mr. Bush’s visit to British Columbia, Canada on October 20, 2011, the Legal Director of the Canadian Centre for International Justice, Mr. Eisenbrandt, attended court in Surrey, British Columbia to lay an information (the “private information”) against Mr. Bush, as indicated by the authors in the communication. The Justice of the Peace scheduled a hearing into the “private information” for the next available date, January 9, 2012, and sent a copy to the British Columbia Crown prosecutor for the region.³³ As indicated in the communication, the representatives of the authors also sent the “private information” directly to the Attorney General of Canada.

³¹ Author’s Communication, Annex IV, letter dated October 14, 2011 at p.1.

³² Author’s Communication, Annex III (letter dated September 29, 2011) and Annex IV (letter dated October 14, 2011) at p.2.

³³ Generally speaking, Crown prosecutors for the provinces prosecute the crime of torture and other *Criminal Code* offences. In certain circumstances, such as where the alleged crimes involve foreign offences requiring the consent of the Attorney General of Canada, the prosecution can be taken up by federal Crown prosecutors.

48. The Criminal Justice Branch of the Ministry of Justice of British Columbia then sought confirmation from the PPSC as to whether there was consent under s. 7(7) for the prosecution of Mr. Bush on the four counts in the indictment. The PPSC informed the Criminal Justice Branch that there was no consent. Canada notes that there was no consent because no request for consent had been made. Canada also observes that since the RCMP had not launched or conducted a criminal investigation, it had not previously sent any potential charges to the PPSC for review.
49. On the afternoon of October 20, 2011, a Crown prosecutor for the Province of British Columbia, exercising the authority of the Attorney General of British Columbia to intervene pursuant to s.579(1) of the *Criminal Code*,³⁴ directed a stay of proceedings with respect to the “private information.” Canada notes that the decision to direct a stay of the “private prosecution” was an independent exercise of prosecutorial discretion by the Criminal Justice Branch of the Ministry of Justice of British Columbia; there was no personal exercise of discretion by the Attorney General of British Columbia. No reasons for directing the stay were expressed.
50. Canada notes that, although it was a provincial Crown prosecutor who directed the stay of the private prosecution, the absence of consent on the part of the Attorney General of Canada, which is a federal matter, would in any case have resulted in the discontinuation of the proceedings once the 8 day time limit had passed.
51. Canada states that at the time of the visits to Canada by Mr. Bush in 2011, none of the relevant agencies were in possession of evidence sufficient to warrant the laying of charges against him, nor did they have a reasonable expectation of being able to obtain such evidence at that time.

IV. ARGUMENTS ON ADMISSIBILITY

52. In this part of its submission, Canada argues that the communication is inadmissible in whole or in part on several grounds.

A. Non-Substantiation of Alleged Violation of Article 5.2

53. Canada submits that this communication is unsubstantiated in part and in its entirety. Canada will argue the second part of this assertion on the merits, but it asks that the Committee consider the allegation of a violation of Article 5.2 of the Convention to be inadmissible pursuant to paragraph 2 of Article 22, as an abuse of the right of submission, as the allegation has not been substantiated.

³⁴ R.S.C., 1985, c. C-46: <http://laws-lois.justice.gc.ca/eng/acts/C-46/index.html>. Section 579(1) states: The Attorney General or counsel instructed by him for that purpose may, at any time after any proceedings in relation to an accused or a defendant are commenced and before judgment, direct the clerk or other proper officer of the court to make an entry on the record that the proceedings are stayed by his direction, and such entry shall be made forthwith thereafter, whereupon the proceedings shall be stayed accordingly and any recognizance relating to the proceedings is vacated.

54. Canada's *Criminal Code* provides extended jurisdiction over the crime of torture as required by the terms of Article 5 of the Convention. In particular, as it is relevant to this communication, paragraph e) of subsection 3.7 of section 7 of the *Criminal Code* extends Canada's criminal jurisdiction over all acts of torture committed outside of Canada if "the person who commits the act or omission is, after the commission thereof, present in Canada."
55. Canada observes that paragraph 2 of Article 5 of the Convention reads as follows:
- Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in Paragraph 1 of this article.
56. Canada submits that text of Article 5, both in paragraph 1 and paragraph 2, requires States parties to establish jurisdiction over the crime of torture in the specified circumstances. Canada notes that the communication, at page 12, acknowledges that Canada has extended its jurisdiction over foreign acts of torture as required by Article 5.2. The authors then go on to allege that Canada "failed in its duty to extradite or prosecute", apparently as a basis for their allegation that Canada has violated its obligations under Article 5.
57. Canada submits that the question of extradition as an alternative to prosecution does not arise on the facts of this communication. Canada was not in receipt of a request for the extradition of Mr. Bush at the time of his visits to Canada in 2011. Moreover, Canada places no reliance on the possibility of extradition as a response to the allegations in this communication.
58. Canada asserts, therefore, that this communication does not raise the obligation of Canada to prosecute if it does not extradite. On the facts, this communication only raises the issue of the obligation under Article 5.2 to establish extended jurisdiction, which Canada has clearly done. The relevant obligation of States parties to make use of the extended jurisdiction is the subject of other provisions of the Convention, notably Articles 6 and 7. This communication therefore only properly concerns whether Canada violated the scope of Articles 6 and 7 as, on the facts, there is no violation of Article 5.2.
59. Canada reiterates that this communication is inadmissible in respect of the allegation of a violation of Article 5.2 as the allegation is wholly unsubstantiated and an abuse of the right of submission.

B. Incompatibility of the communication with Article 22.1 of the Convention

60. Canada submits that this communication is inadmissible in its entirety because the Committee lacks the competence to consider it. As the authors are not subject to the jurisdiction of Canada, they are not eligible to submit a communication against Canada under Article 22 of the Convention and, therefore, the Committee is not competent to receive and consider it.

61. The relevant portion of paragraph 1 of Article 22 reads as follows:

A State Party to this Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention.

62. Canada observes that the communication itself provides certain details concerning the past and current location of each of the authors without establishing in any way that any of the authors were present in the territory of Canada or subject to its jurisdiction at any time relevant to the complaint. Moreover the authors have made no attempt to establish that they were subject to the jurisdiction of Canada at any relevant time. Canada does not accept that the authors were subject to its jurisdiction by reason of the laying of the “private information” or at any relevant time and states that they are not now within the jurisdiction of Canada.

63. Canada has not and does not accept the competence of this Committee to hear communications from individuals not subject to its jurisdiction. Canada observes that Article 22 created an individual complaints mechanism such that any complaint must be brought by an individual or a group of individuals within the jurisdiction of the State party who claim to be victims of a violation of that State’s obligations to protect the rights guaranteed by the Convention.

64. Canada notes that the Committee has taken a potentially contrary view in *Guengueng et al. v. Senegal* (2001).³⁵ The *Guengueng* communication involved Article 5.2 and Article 7 of the Convention. It was brought by alleged victims of torture in Chad who sought the prosecution of the alleged perpetrator, Hissène Habré, former Head of State of Chad, in Senegal, where Mr. Habré had been residing for many years. This Committee rejected the inadmissibility argument of Senegal based on its lack of jurisdiction over the victims. It seems that the Committee placed its emphasis on the fact that the communication was not about the alleged acts of torture committed by Mr. Habré in Senegal, but rather the alleged failure of Senegal to prosecute Mr. Habré for perpetrating acts of torture. The Committee also appears to have taken the view that the Chadian claimants had become subject to the jurisdiction of Senegal in instituting proceedings against Mr. Habré in the Senegalese courts.³⁶

65. Canada notes that the Committee, in *Guengueng*, expressed the view 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).³⁷ Canada submits that this view, which suggests that complainants need not be subject to the jurisdiction of the State party, is inconsistent with the explicit text of Article 22,

³⁵ *Guengueng et al. v. Senegal*, Communication No.181/2001 (May 17, 2006), CAT/C/36/D/181/2006.

³⁶ *Ibid.*, at para.6.3.

³⁷ *Ibid.*, at para.6.4.

paragraph 1 of the Convention, which clearly requires that complainants must be / have been subject to the jurisdiction of the State with respect to the violations of which they claim to be victim.

66. Canada further notes the views of the Committee in *Rosenmann v. Spain* (2002).³⁸ The *Rosenmann* communication involved allegations of various violations of the Convention by Spain because it had not done enough to pursue extradition proceedings and insist on the extradition of Augusto Pinochet to it from the United Kingdom. The complainant in that communication was a Spanish citizen of Chilean origin who alleged he was a victim of torture under the Chilean administration of General Pinochet. The Committee observed, in considering that the communication was inadmissible, that the complainant was not a victim of the alleged violations by Spain (failure to adequately pursue the prosecution of the perpetrator) because he was not “personally and directly affected by the alleged breach in question” and “was not a civil party to the criminal proceedings in Spain”.³⁹
67. Canada submits that the authors of this communication have never been subject to the jurisdiction of Canada and, moreover, cannot be considered to have submitted to its jurisdiction for the purpose of the private prosecution. Canada is not competent to discuss the legal implications of criminal proceedings brought by private individuals under the laws of Senegal, as considered by this Committee in *Guengueng*, and does not know whether such proceedings result in the private individuals becoming subject to the jurisdiction of Senegal even when they are not present within territory under its jurisdiction other than for the purpose of the proceedings themselves. In Canadian law, however, a criminal prosecution – even where it is brought by a private individual – is a legal contest in which the State enforces its criminal law against the alleged perpetrator. Informants are not a “party” to the prosecution and cannot be said to “accept” or be subject to the jurisdiction of Canada simply by attempting, through representatives, to pursue a criminal prosecution.
68. Furthermore, Canada submits that victims of torture have no personal right to the prosecution of their alleged torturers such that they have standing under Article 22 to raise issues of the appropriate exercise of prosecutorial discretion in any State through which the alleged perpetrator may pass. Canada relies on the views of this Committee in *Rosenmann* in this respect.
69. On this issue of remedial rights under the Convention, Canada further notes that Article 13 provides that victims of torture shall have the right to complain to a State party with respect to any torture to which they have been subjected in any territory under its jurisdiction and to have the complaint promptly and impartially examined by that State party. However, Article 13 stops short of guaranteeing to victims a personal right to a criminal prosecution of those they allege to be guilty of torture. Article 13 must be read consistently with the Convention as a whole, which, as explained further below, makes it clear that States parties retain discretion as to whether to detain an individual for purposes

³⁸ *Rosenmann v. Spain*, Communication No.176/2000 (April 30, 2002), CAT/C/28/D/176/2000.

³⁹ *Ibid.*, at para.6.4.

of pursuing an investigation (Article 6) and whether a complaint warrants the laying of charges (Article 7).

70. Canada reiterates that the Committee lacks the competence to consider this communication. Paragraph 2 of Article 22 requires this Committee to consider inadmissible any communication that is incompatible with the provisions of the Convention. A communication brought by persons not subject to the jurisdiction of the State party is incompatible with Article 22, paragraph 1 of the Convention.

V. ARGUMENTS ON THE MERITS

71. Regardless of whether any aspect of the communication is admissible, Canada submits that the authors have not established any violation of the Convention by Canada. In this part of its submission, Canada discusses the scope of its obligations under the Convention to prosecute persons who commit, outside its jurisdiction, the offence of torture and who are later found present in Canada.
72. Canada submits that the obligation of States parties to prosecute foreign acts of torture requires a reading of Articles 5, 6 and 7 together and in the context of the Convention as a whole. Canada further submits, as discussed above, that the principle of *aut dedere aut judicare*, which is found in Article 5.2 as well as Article 7.1, does not arise on the facts of this communication such that the focus of any consideration of the merits of the communication must be the interpretation of the obligations to detain and prosecute as set out in Articles 6 and 7.
73. Canada notes that this communication deals with the offence of torture found in s.269.1 of the *Criminal Code*, which enacts an offence consistent with the definition of torture in Article 1 of the Convention and which satisfies the obligation to criminalize torture found in Article 4 of the Convention. This submission does not address any obligations under any other treaties with respect to allegations of crimes against humanity or war crimes arising out of alleged acts of torture. Canada further notes that allegations of war crimes or crimes against humanity do not form any part of the communication.

A. Article 5 – Canada has extended jurisdiction over foreign acts of torture

74. As discussed above, Canada takes the position that the allegation of a violation by Canada of Article 5.2 is inadmissible for non-substantiation as:
- i) the authors' communication acknowledges that Canada has extended its criminal jurisdiction to permit the prosecution of alleged perpetrators of foreign acts of torture when such persons are present in Canada;
 - ii) the question of extradition does not arise on the facts and is not relied upon by Canada in its defence; and
 - iii) except for the reference to extradition, which is not in issue, Article 5.2 does not impose the obligation to prosecute.
75. In the alternative, should the Committee be of the view that the authors' allegation of a violation of Article 5.2 is admissible, Canada submits that this allegation is without merit.

76. As discussed above and as acknowledged by the authors' communication, Canada has extended its jurisdiction over foreign acts of torture in a manner consistent with Article 5.2.
77. Canada is of the view that Article 5.2 obligates States parties to extend their criminal jurisdiction to foreign acts of torture in the circumstances specified therein. To the extent that Article 5.2 may be said to contain an obligation to prosecute, Canada submits that this obligation encompasses only the obligation to prosecute if an alleged foreign perpetrator is not extradited. It contains no additional content on the obligation to prosecute. In any event, Canada reiterates that it was not in receipt of any request for the extradition of Mr. Bush. As a result, this aspect of Article 5.2 has no relevance to the issues raised by to this communication.
78. Canada submits that the scope of the obligation of a State party to take steps to prosecute for acts of torture, including foreign acts of torture, apart from the reference to the general principle of *aut dedere aut judicare* in Article 5.2, is found in Articles 6 and 7 of the Convention. In addition, or in the alternative, for the reasons set out in greater detail below under the discussion of the scope of the obligations to detain and to prosecute under the Convention, Canada asserts that it has not violated any obligation to prosecute that may be read into Article 5.2.

B. Articles 6 & 7 – The scope of the obligations to detain, investigate and prosecute

79. The authors allege a violation of Article 6.1 and Article 7.1. As already noted, Canada is of the view that these two articles must be read together and within the Convention as a whole.
80. Article 6 of the Convention reads as follows:

1. Upon being satisfied, after an examination of information available to it, that the circumstances so warrant, any State Party in whose territory a person alleged to have committed any offence referred to in article 4 is present shall take him into custody or take other legal measures to ensure his presence. The custody and other legal measures shall be as provided in the law of that State but may be continued only for such time as is necessary to enable any criminal or extradition proceedings to be instituted (emphasis added).

2. Such State shall immediately make a preliminary inquiry into the facts (emphasis added).

3. Any person in custody pursuant to paragraph 1 of this article shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national, or, if he is a stateless person, with the representative of the State where he usually resides.

4. When a State, pursuant to this article, has taken a person into custody, it shall

immediately notify the States referred to in article 5, paragraph 1, of the fact that such person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary inquiry contemplated in paragraph 2 of this article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.

81. Canada observes that paragraph 1 of **Article 6** requires each State party to take an alleged perpetrator present in its territory into custody or take other similar measures to ensure his or her continued presence. However, this obligation is not absolute. States parties retain a certain amount of discretion in that a State must act only “upon being satisfied, after an examination of information available to it, that the circumstances so warrant.” In their discussion of this article, Professors Burghers and Danelius note the element of discretion available to States parties and suggest that detention may not always be appropriate. The example they give is in respect of timing: the key point being that States parties not delay taking the suspected torturer into custody if the delay would “render the general obligation to extradite or prosecute illusory.”⁴⁰ Canada submits that timing is not the only consideration. Canada observes that upon an examination of the information available, the circumstances may not warrant restricting the liberty of an alleged perpetrator in order to ensure his continued presence.
82. Canada further observes that Article 6 contains additional obligations on States parties once an alleged torturer is in custody, including the obligation under paragraph 2 to immediately make a preliminary investigation into the facts. Where the crime occurred in another State, some or all of the key facts will not, of course, exist within the forum or detaining State. Moreover, where an alleged perpetrator is in transit through a State or a temporary visitor rather than someone resident in the State, it is unlikely that the forum State will have undertaken an investigation in advance, *proprio motu*, in the hope or expectation that the alleged perpetrator might transit through or make a short visit. Canada notes that the facts of this communication are significantly different from that of the case of Hissène Habré,⁴¹ as Mr. Habré was resident in Senegal for many years and the government of the Republic of Senegal had a great deal of time in which to launch and complete an investigation into the alleged acts of torture.
83. Canada submits that the investigation of a case of the magnitude of the allegations made by the authors is a complex matter. By way of example, Canada’s war crimes program is currently working on allegations against another individual from another State involving direct and command responsibility for torture (as a crime against humanity). The context is entirely different but the allegations are far simpler than the allegations that form the basis of this communication. In that other case, the RCMP investigation took about three years from the time of the allegations to the handing over of the file to the CAHWC Section.

⁴⁰ J. Herman Burghers & Hans Danelius, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Dordrecht: Martinus Nijhoff Publishers, 1988) (hereinafter B & D) at p.134. See also *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, ICJ No. 144 (2012).

⁴¹ *Guengueng, supra; Belgium v. Senegal, supra.*

84. Canada submits that, in a common law jurisdiction, any decision on whether to detain an alleged perpetrator in transit through the forum State will require a consideration of the results of the criminal investigation. Under Canadian law, the power of arrest is predicated upon reasonable and probable grounds to believe an offence has been committed. As a general rule, no one may be held in detention more than 24 hours before being brought before a justice. Unless charges are laid within that time period, detention cannot continue. In the Canadian criminal justice system, the investigation must precede the detention. As noted above, in the circumstances of complaints against Mr. Bush, the RCMP in the independent exercise of its discretion had not conducted such an investigation. There was no realistic prospect, in October 2011, that sufficient evidence (assuming it existed) to support a charge against Mr. Bush could have been assembled so as to justify detention. Article 6, particularly when read in conjunction with Article 7.2, cannot reasonably be interpreted to require taking a person into custody under such circumstances.

85. Article 7 of the Convention reads as follows:

1. The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution (emphasis added).

2. These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State. In the cases referred to in article 5, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in article 5, paragraph 1 (emphasis added).

3. Any person regarding whom proceedings are brought in connection with any of the offences referred to in article 4 shall be guaranteed fair treatment at all stages of the proceedings.

86. Canada observes that **Article 7** contains the basic obligation of all States parties to either extradite or prosecute any person alleged to have committed the crime of torture if such person is found in any territory under their jurisdiction. The obligation is “to bring the case to its competent authorities for the purpose of prosecution.” As Professors Nowack and McArthur note, the obligation on States parties to prosecute

would necessarily be subject to the evidence gathered against the accused and to the informed decision of the prosecutor to indict the accused before a criminal court. If the prosecutor is of the opinion that the evidence gathered by the criminal investigation authorities is not sufficient to convince the judges to find the accused guilty, even the strongest obligation under international law to prosecute a suspected torturer would not help. ... international law cannot effectively oblige a public prosecutor to indict and prosecute a suspected torturer if the evidence available to the prosecution is not sufficient to proceed with the

87. Canada submits that this quote accurately captures an essential point: the Convention only obligates States parties to pursue prosecutions of cases that are fit for prosecution. If the State party's prosecuting authorities are of the view that the evidence is insufficient to obtain a conviction, the State party does not violate its obligation under Article 7.1 to "submit the case to its competent authorities" by not prosecuting an alleged perpetrator. The quote also supports the view, which Canada submits is the correct view, that international law (the Convention) cannot and does not obligate police services to conduct an unwarranted investigation when such police services, acting independently and in an exercise of their police investigative discretion, determine that an investigation is unwarranted. As noted above, and as further explained below, the RCMP concluded they neither possessed key evidentiary elements, nor were they likely to obtain them, and so did not launch an investigation. Canada submits that this was an entirely reasonable conclusion.
88. Canada reiterates the point that this case is about the duty to prosecute and does not raise the question of extradition. Canada states that its actions in relation to former President G. W. Bush were in no way related to an expectation that it would receive a request for his extradition while he was present in Canada. Canada had every expectation that Mr. Bush would return immediately to his State of nationality. Canada notes that no other State party with extended jurisdiction over the alleged acts of torture attributed to Mr. Bush sought his extradition from Canada.
89. The only question that arises under Article 7, therefore, is whether Canada failed to respect its obligation to "submit the case" for prosecution in accordance with the criminal law of Canada and the normal procedures relating to serious crimes, including the normal standards of evidence.
90. Canada asserts that everyone present in Canada is equal before the law and equally subject to the law.⁴³ The police and Crown prosecutors operate independently and exercise their respective discretionary powers unaffected by political or other interference. The legal tests and general policies that guide their work do not permit these public officials to accord former Heads of State either more or less attention or rights than any other person alleged to have committed a crime, including foreign acts of torture.
91. Canada further observes that Article 7.2 obligates States parties to proceed with the prosecution of alleged perpetrators of torture in the same manner as it would for any ordinary offence of a serious nature under its laws and to ensure that the standards of evidence are in no way less stringent. As Professors Burghers and Danelius note, the

⁴² Manfred Nowak & Elizabeth McArthur, *The United Nations Convention Against Torture: A Commentary* (Oxford: Oxford University Press, 2008) (hereinafter N & McA) at p.361. See also the decision of the ICJ in *Belgium v. Senegal*, *supra* at paras.89 *et seq.*

⁴³ *Roncarelli v. Duplessis*, [1959] S.C.R. 121, which stands for the proposition that every official action must be supported by law and even the highest government officials are not above the law. In short, everyone is equal before the law.

*lack of evidence may frequently be a serious obstacle to bringing proceedings in a country other than that in which the torture took place. It may be difficult to call witnesses and collect other evidence, in particular where the State in which the offences were committed is not willing to co-operate in investigating the case. The second sentence [of paragraph 2] makes it clear, however, that although the principle of universal jurisdiction has been regarded as an essential element in making the Convention an effective instrument, there has been no intention to have the alleged offenders prosecuted or convicted on the basis of insufficient or inadequate evidence.*⁴⁴

92. Canada notes that the allegations in respect of Mr. Bush in this communication involve his actions as Head of State in ordering, condoning or acquiescing in acts of torture by U.S. officials. The evidence necessary to prove his level of involvement, if any, in the alleged torture of the authors or other alleged victims of torture by the U.S. government resides, for the most part, within the very centre of the U.S. administration and with present and former U.S. officials residing in the United States. The cooperation of the current U.S. administration and U.S. law enforcement agencies would be essential to an effective prosecution of Mr. Bush.
93. In 2011, Canadian officials had no reasonable expectation that Canada would receive the necessary assistance, in a timely fashion, such as would warrant commencing an investigation into this case, let alone detaining Mr. Bush for the purpose of obtaining evidence sufficient to proceed with a prosecution in Canada.⁴⁵

a) The Insufficiency of the Evidence

94. Whether or not Canada can be said to have violated its obligation to detain and prosecute Mr. Bush, is in part a question of the sufficiency of the evidence upon which to lay criminal charges against him in a Canadian court. Canada submits that the information available to it, including the “information package” provided by the authors to both the Attorney General of Canada and this Committee, was not sufficient to warrant the laying of criminal charges. Canada observes that the “information package” is not evidence at all.
95. Under Canadian law, which is consistent with the provisions of the *International Covenant on Civil and Political Rights* in this respect, a defendant is presumed to be innocent until proven guilty and the Crown is required to prove guilt beyond a reasonable doubt. Criminal cases in Canada are decided upon proof and not upon suspicion or hearsay. Hearsay, which is “evidence of a statement made to a witness by a person who is not himself called as a witness” is “inadmissible when the object of the evidence is to

⁴⁴ B & D, *supra*, at p.138.

⁴⁵ The U.S. administration under President Obama made it clear, as of 2009, that it would not pursue prosecution of members of the former administration. See, for example the 2009 speech by U.S. Attorney General Eric Holder regarding the U.S. Department of Justice investigation into “the interrogation of specific detainees at overseas locations”: <http://www.justice.gov/ag/speeches/2009/ag-speech-0908241.html>.

establish the truth of what is contained in the statement.”⁴⁶ While there are exceptions to the hearsay rule they are available only when sufficient guarantees of reliability are met and the inability to obtain the evidence through a non-hearsay means is established.

96. Hearsay evidence is secondary evidence and therefore can be problematic:

The trier of fact will be more assured of accuracy in his decision if descriptions of events are given in open court rather than through an intermediary. Trustworthiness of decision-making is enhanced for a number of reasons which may be grouped under two heads. First, the witness who speaks in open court is subject to a perjury prosecution should he lie; this witness who speaks in open court is encouraged to speak honestly and without exaggeration by the solemnity of the occasion and by the presence of the party against whose interest he speaks; the witness's manner of speaking his demeanour, will be available for review by the trier of fact, who will thus be better able to evaluate his credibility. The second group of reasons resides in our adversary system and in the faith we repose in 'the greatest legal engine ever invented for the discovery of truth' – cross-examination. The description of a past event by a witness has resident within it the possibility of error due to at least four dangers. The description may be defective because first, the witness did not perceive the incident accurately; second, the witness does not now remember the incident accurately; third, the witness's language describing the incident may be ambiguous or otherwise defective and the communication of his thought may therefore be misunderstood; fourth, the witness may be presently insincere in his account and wish to deliberately mislead the trier of fact. These four dangers may be guarded against by canvassing their existence through cross-examination which, of course, is only possible when the individual with personal knowledge is present in the witness stand; the adversary may be greatly prejudiced if the description comes in through the relation of another who has no ability to aid in exposing possible defects in the declarant's perception, memory, communication or sincerity (footnotes omitted).⁴⁷

97. Facts in dispute in a criminal trial are proven through sworn testimony, the production of real evidence, such as documents (with proof of authenticity) and / or circumstantial evidence:

- Sworn testimony requires witnesses who are both competent (knowledgeable at first hand) and compellable. The adversarial model requires that evidence be presented orally through the examination and cross-examination of witnesses. For this reason, police question victims, witnesses and suspects in order not only to collect evidence but to assess its reliability and availability for use at trial.
- Confessions are inadmissible unless they have been freely obtained, a defendant cannot be compelled to testify and no one can be compelled to incriminate

⁴⁶ *R. v. O'Brien* (1977), 38 C.R.N.S. 325 at p.327 (S.C.C.).

⁴⁷ Ron Delisle, Don Stuart & David Tanovich, *Evidence: Principles and Problems*, Eighth Edition (Toronto: Carswell, 2007) at p.676.

himself. Admissions by the accused to the court must be validly made.⁴⁸

- Documents are subject to the “best evidence rule,” which states that when the terms of a document are material, proof of the terms of the document must be by production of the original unless the proponent is unable to do so (original lost, destroyed or in the possession of another who will not provide it).
- Circumstantial evidence is evidence of facts which inferentially prove the principal fact by establishing a condition of surrounding and limiting circumstances, whose existence is a premise from which the existence of the principal fact may be concluded by logical reasoning.

Some facts may be the subject of judicial notice, but not the essential elements of the offence.

98. Canada submits that it would entirely inappropriate for it to speak in specific terms about the sufficiency of evidence against Mr. Bush. At most Canada can offer a few general observations:

- The bulk of the “facts” supplied in the “information package” are the conclusions of the studies or reports of organizations, including entities within the U.S. government. The conclusions of third party studies are not evidence; proof of the facts upon which the conclusions are based could be evidence.
- The bulk of the documents listed as “exhibits” are secondary materials. The “Directive” of September 17, 2001, whether or not it would be a key piece of evidence, does not form part of the “information package,” even as a copy. It is said not to be a public document and is merely described as “discussed in numerous news stories.”
- Discussion of legal analysis in cases dealing with facts not related to the allegations against Mr. Bush is not evidence.
- Reference to the alleged torture of others such as the complainants is not necessarily sufficient to prove a link between the alleged torture and the actions of Mr. Bush; nor has any actual sworn testimony from victims been provided.
- The statements of Mr. Bush in media interviews and in his memoir, *Decision Point*, would most likely not be admitted in a court of law for the truth of their contents.

b) The difficulties of foreign prosecutions / the effective prosecution of foreign crimes

99. Canada observes that the State in whose territory the torture is alleged to have occurred and the State of the alleged offenders’ nationality usually will have the best access to essential evidence, witnesses and alleged perpetrators. Canada notes that, while the courts of the United States may not have any better access than Canada to any alleged victims of U.S. torture not still in U.S. detention facilities, access to potentially key witnesses and potentially key documents capable of proving the links between the alleged acts of torture and the alleged acts of participation or complicity (“did order, authorize,

⁴⁸ See *Criminal Code* s.655.

aid, abet, counsel, condone or exercise command responsibility over acts of torture”⁴⁹) exists, if at all, in the U.S.

100. Where the territorial State (State in which the alleged crimes took place) or the State of nationality cooperates in the investigation, the forum State (State in which the alleged perpetrator is present) is likely to be assisted in the investigation, permitted on-site visits and access to witnesses for both questioning and as witnesses to testify at trial. Without the cooperation of the territorial State or State of nationality, the availability of evidence cannot be assumed by the Committee. As some commentators have noted, it is not unknown for a forum State to fail to achieve sufficient evidence to establish guilt on the criminal standard of proof.⁵⁰
101. Criminal investigations by foreign States which have no direct link to the acts of torture or the evidence establishing participation by individuals in the government decisions laying the groundwork for a policy of torture must necessarily rely on other States for legal assistance. The study of the immunity of State officials from foreign criminal jurisdiction underway in the International Law Commission to date has noted that States with no territorial or national connection to the offences or the offender have generally chosen not to exercise their extraterritorial criminal jurisdiction. There are some notable exceptions, however, which are discussed in the second report to the ILC on immunity in 2010.⁵¹ Canada observes that in some of these exceptional cases, the State of nationality of the alleged offender waived immunity (for example, Chad waived its immunity in respect of the acts of Hissène Habré while Head of State).

c) No violation of Articles 6 and 7

102. To conclude, Canada reiterates that Articles 6 and 7 must be read together. They also should be read with the context of the particular criminal justice system of the State party in question. Canada’s criminal law follows the common law tradition of the United Kingdom rather than the civil law tradition of countries such as France. Canada does not proceed by way of a *juge d’instruction*.
103. In Canada, decisions to arrest or detain must be informed by longer-term considerations of trial fairness. This is the front end impact of the principle of *in dubio pro reo* (the benefit of the doubt favours the accused).⁵² If there is insufficient evidence to proceed to the laying of charges based on reasonable grounds to believe an offence has been committed, and there is no realistic prospect of obtaining sufficient evidence through reasonable efforts or due diligence, there is no authority to detain a suspect. Indeed, detention for even a few days where it was apparent in advance that no charges would be

⁴⁹ See the unsigned “Information / Dénonciation” accompanying the communication.

⁵⁰ Robert Cyr, Hakan Friman, Darryl Robinson & Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure* (Cambridge: Cambridge University Press, 2008) at p.51.

⁵¹ Second report on immunity of State officials from foreign criminal jurisdiction by Roman Anatolevich Kolodkin, Special Rapporteur to the International Law Commission, A/CN.4/631, 10 June 2010.

⁵² N & McA explain that if the forum State does not receive the legal assistance necessary for the gathering of sufficient evidence from the territorial State within a reasonable time period, the “strict procedural standards” of paragraph 2 of Article 7 “might even require the forum State to stop the criminal proceedings and release the suspected torturer under the principle of *in dubio pro reo*.”

forthcoming and no viable investigation could be undertaken would be an abuse of the criminal power of the State and a violation of the rights of the alleged perpetrator.

104. 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 Article 7 on the facts of this communication. Rather, what the authors allege is a "failure" to detain and prosecute is consistent with Canada's obligations under Articles 6 and 7 and, in particular, Article 7 paragraph 2, which charges States parties to accord suspected torturers the same legal safeguards available under domestic law for all suspects of serious crimes.
105. Applying Canada's rules of evidence to the "information package" leads to the conclusion that no prosecution could go forward based on it. This alone removes the basis for the authors' communication. Without sufficient evidence on which to prove the allegations, no charges could properly be laid by the police and no private prosecution could properly be allowed to continue by Crown prosecutors, even assuming a request to do so had been properly made. 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 and would have been inconsistent with Article 7.2.
106. The absence of consent on the part of or on behalf of the Attorney General for the continuation of the "private prosecution," the exercise of prosecutorial discretion by the Crown prosecutor for British Columbia in directing a stay of the "private prosecution" and the exercise of investigative discretion by the RCMP in deciding that a criminal investigation was not warranted in the circumstances of the complaints received can all be seen, therefore, as entirely consistent with the Convention. To engage the criminal justice system of Canada against any individual alleged to be guilty of torture without a reasonable expectation of obtaining the evidence necessary to attempt a prosecution would be a serious violation of the right of any suspect.

C. The question of immunities

107. Canada observes that there is a lack of international consensus on the ability of national courts to prosecute former foreign Heads of State in the face of customary international law rules on State immunity. As discussed above, Canada did not proceed to detain Mr. Bush because at the time it did not have in its possession evidence sufficient to commence a prosecution and, moreover, had no reasonable expectation of timely assistance from the U.S. in any gathering of evidence. As Canada did not act upon its extended criminal jurisdiction in this case, the question of the application of any State immunity from which Mr. Bush may or may not benefit does not arise on the facts.

VI. IN CONCLUSION

108. Canada submits that this Committee should consider this communication to be inadmissible, in particular because the authors are not within the jurisdiction of Canada and were not within its jurisdiction at any time relevant to their claims against Canada under Articles 5, 6 and 7. The Committee is not, on the terms of Article 22, competent to entertain this communication.
109. Should the Committee consider this communication to be admissible in whole or in part, Canada respectfully submits that it is entirely without merit as the authors have failed to substantiate a violation of the Convention by Canada. Canada asserts that there has been no violation of the Convention by it in respect of its decision not to submit former President G.W. Bush to arrest and prosecution for alleged crimes of torture during his visits to Canada for speaking engagements. At the time of his visit to Canada in October 2011, which is the basis of this communication, Canada was not in possession of evidence sufficient to warrant laying charges against Mr. Bush for crimes of torture. Nor did Canada have any reasonable expectation that it would receive necessary assistance from the U.S., in a timely fashion, so as to warrant detaining him for the purpose of obtaining evidence sufficient to proceed with a prosecution. Canada therefore requests that this communication be considered to be wholly without merit due to the authors' failure to substantiate any violation of the Convention by Canada.
110. Canada would be pleased to provide additional argument on either admissibility or merits should that assist the Committee in formulating its views as to the complex factual and legal questions that arise on the allegations of the authors.

Ottawa, Canada
October 7, 2013

