

**SUPPLEMENTAL SUBMISSION OF CANADA REGARDING
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) transmitted to Canada communication No.536/2013 submitted to the Committee against Torture (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). By letter dated 7 January 2014, the Secretariat of the United Nations (Office of the High Commissioner for Human Rights) transmitted a further submission on behalf of the authors in response to Canada's submission (authors' response).
2. This supplemental submission by Canada (Canada's reply) briefly addresses several aspects of the authors' response. Canada also continues to rely upon its submission, dated October 7, 2013, on the admissibility and merits of communication No.536/2013.

II. Key Considerations

3. The resolution of this communication requires the Committee to carefully consider three broad issues:
 - i) who may bring a complaint against a State party under Article 22 of the Convention
 - ii) the scope of the obligation of States parties to prosecute an alleged perpetrator of torture who is present in the State, and
 - iii) the sufficiency of evidence required to establish a violation of Articles 5, 6 or 7 of the Convention.
- i) *The authors do not have standing to bring this complaint against Canada*
4. Article 22 of the Convention establishes the competence of the Committee over complaints brought by or on behalf of individuals or groups of individuals. Individual complaints mechanisms are one method of monitoring States parties for compliance with their human rights obligations under the specific treaty. The Article 22 mechanism is a focussed mechanism with fixed parameters. Not everyone can bring a complaint before the Committee; States parties to the Article 22 mechanism have not accepted that everyone can bring a complaint.

Locus standi / Ratione locus

5. Paragraph 1 of Article 22 gives *locus standi* only to individuals (alleged victims) subject to

the jurisdiction of the State party against which the complaint is made. The authors are not and have never been subject to the jurisdiction of Canada and, therefore, lack *locus standi* to bring this complaint. As Canada explained in its submission dated October 7, 2013, this communication is inadmissible.

6. Canada has not confused jurisdiction with standing. It asserts that in the absence of its jurisdiction over the authors, they lack standing to bring this communication before the Committee. The Committee lacks the competence at law to consider their communication. This limitation is clear in the text of the Convention itself and cannot be changed through rules written by the Committee.
7. Novak and McArthur, in their text on the Convention, recognize that the plain reading of Article 22 of the Convention "requires that the complainant was under jurisdiction (sic) of the State at the time of the violation."¹ They state:

In order to submit a complaint to the Committee, victims of alleged violations of any of their rights under the Convention must also prove that they were actually subject to the jurisdiction of the State party. In its practice the Committee has consistently held that the jurisdiction of States parties goes beyond their territory and also applies to persons and territories where the authorities of the respective State party exercise effective control, either *de jure* or *de facto*.²

8. In reviewing the *Rules of Procedure* of the Committee (Rules), Canada has noted that until August 2002 (Rev.4³) the Rules stated:

Rule 107

1. With a view to reaching a decision on the admissibility of a communication, the Committee or its Working Group shall ascertain:

(a) That the communication is not anonymous and that it emanates from an individual subject to the jurisdiction of a State party recognizing the competence of the Committee under article 22 of the Convention (emphasis added);

(b) That the individual claims to be a victim of a violation by the State party concerned of the provisions of the Convention. The communication should be submitted by the individual himself or by his relatives or designated representatives or by others on behalf of an alleged victim when it appears that the victim is unable to submit the communication himself, and the author of the communication justifies his acting on the victim's behalf;

¹ Manfred Nowak & Elizabeth McArthur, *The United Nations Convention Against Torture: A Commentary* (Oxford: Oxford University Press, 2008)(Nowak & McArthur) at p.746, para.72 and p.750, para.85 (*ratione loci*)

² *Ibid.*, at p.783, para.169

³ *Rules of Procedure*, CAT/C/3/Rev.4, 9 August 2002

(c) ...⁴

However, starting with the fourth revision of the Rules (Rev.4), paragraphs (a) and (b) were combined and the reference to the jurisdiction of the State party, which reflected the text of Article 22, was removed. The relevant paragraph of the current rule, which has not changed in substance since 2002, reads as follows:

Rule 113

With a view to reaching a decision on the admissibility of a complaint, the Committee, its Working Group or a Rapporteur designated under rules 104 or 112, paragraph 3, shall ascertain:

(a) That the individual claims to be a victim of a violation by the State party concerned of the provisions of the Convention. The complaint should be submitted by the individual himself/herself or by his/her relatives or designated representatives, or by others on behalf of an alleged victim when it appears that the victim is unable personally to submit the complaint, and, when appropriate authorization is submitted to the Committee;

(b) ...⁵

9. And yet, in 2005, in *Agiza v. Sweden*,⁶ the Committee still acknowledged the importance, for the right of complaint, of the victim being within the jurisdiction of the State. In *Agiza*, the Committee considered the actions of a State party in removing an individual before he could bring a communication before the Committee. The Committee observed that a State party making a declaration under Article 22 undertakes to confer upon persons within its jurisdiction the right to invoke the complaints mechanism of the Committee.

The Committee observes, moreover, that by making the declaration under article 22 of the Convention, the State party undertook to confer upon persons within its jurisdiction the right to invoke the complaints jurisdiction of the Committee. That jurisdiction included the power to indicate interim measures, if necessary, to stay the removal and preserve the subject matter of the case pending final decision. In order for this exercise of the right of complaint to be meaningful rather than illusory, however, an individual must have a reasonable period of time before execution of a final decision to consider whether, and if so to in fact, seize the Committee under its article 22 jurisdiction. In the present case, however, the Committee observes that the complainant was arrested and removed by the State party immediately upon the Government's decision of expulsion being taken; indeed, the formal notice of decision was only served upon the complainant's counsel the following day. As a result, it was impossible for the complainant to consider the possibility of invoking article 22, let alone seize the Committee. As a result, the Committee concludes that

⁴ Rules of Procedure, CAT/C/3/Rev.3, 13 July 1998

⁵ Rules of Procedure, CAT/C/3/Rev.6, 13 August 2013

⁶ *Agiza v. Sweden*, CAT No.233/2003, 24 May 2005

the State party was in breach of its obligations under article 22 of the Convention to respect the effective right of individual communication conferred thereunder.⁷

Canada notes that the communication in *Agiza* was admissible; it further notes that the author, Mr. Agiza, had been within the jurisdiction of the State party at the relevant time, prior to his removal in violation of Article 3 of the Convention. That is, while the author of a communication need not be within the jurisdiction of the State party at the time of filing the complaint, he or she must have been within the jurisdiction of the State party at some point relevant to the alleged violations of rights by the State. The authors of the present communication, in contrast, have never been within the jurisdiction of Canada.

10. Canada further notes that the complaints mechanisms for other human rights treaties within the United Nations' system contain a similar requirement that the complainant be within or under the jurisdiction of the State party. For example, the *Rules of Procedure of the Human Rights Committee* include the requirement, set out in Article 1 of the *Optional Protocol to the International Covenant on Civil and Political Rights* (Protocol), that the individual be subject to the jurisdiction of the State party. The relevant Article and Rule are set out here:

Article 1

A State Party to the Covenant that becomes a Party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant. No communication shall be received by the Committee if it concerns a State Party to the Covenant which is not a Party to the present Protocol (emphasis added).

Rule 96

With a view to reaching a decision on the admissibility of a communication, the Committee, or a working group established under rule 95, paragraph 1, of these rules shall ascertain:

(a) That the communication is not anonymous and that it emanates from an individual, or individuals, subject to the jurisdiction of a State party to the Optional Protocol;

(b) ...⁸

11. Dominic McGoldrick, in his text on the Human Rights Committee, notes that Rule 90 (now Rule 96) of the *Rules of Procedure of the Human Rights Committee* is "basically taken from" the provisions of the Protocol.⁹

⁷ *Ibid.*, at para.13.9

⁸ *Rules of Procedure of the Human Rights Committee*, CCPR/C/3/Rev.10, 11 January 2012

⁹ Dominic McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (Oxford: Oxford University Press, 1991), at p.135 para.4.14. See also the discussion of who may bring a complaint under the Protocol, at p.169 para.4.67.

12. Canada maintains that, regardless of the present formulation of its *Rules of Procedure*, this Committee lacks the competence to entertain the present communication. Canada asserts that it has not accepted the competence of the Committee to consider communications from individuals who have never been within its jurisdiction.
13. Canada further maintains that the attempt by Mr. Eisenbrandt, the Legal Director of the Canadian Centre for International Justice, to commence a private prosecution in Canada against Mr. Bush did not bring the authors within the jurisdiction of Canada. Canada directs the Committee's attention to Annex V of the authors' communication, which contains an unsigned and unsworn version of the document entitled "Information / Dénonciation." In this document, Mr. Eisenbrandt's name appears as the person laying charges. The authors are named in the document as victims of torture. The status of victim does not bring an individual within the jurisdiction of a court in Canada.
14. Canada observes that the person seeking to commence a private prosecution in Canada must appear before the judge who receives the "information" as the laying of criminal charges proceeds by an individual swearing to the truth of the information and any supporting facts. The individual must be within the jurisdiction of the court for purposes of the enforcement of any orders against them, for example in respect of the production of evidence or so that they may be held to account for malicious prosecution or for other matters. Victims of an alleged crime are not required to be before the court in order to commence a prosecution; victims may be unknown or no longer alive. Unless they are themselves attempting to commence a private prosecution, victims are similar in this respect to other witnesses.
15. Canadian courts have jurisdiction over the offence of torture, wherever it is committed, and, as is relevant to this communication, over the alleged perpetrator if that individual is present within their jurisdiction. Generally speaking, Canadian courts do not have jurisdiction over victims (or witnesses) if they are not in Canada.¹⁰ The Supreme Court of Canada in *R. v. Libman*¹¹ addressed the jurisdiction of Canadian courts over individuals accused of crimes and over victims of those crimes: the accused is a party to the criminal trial; the victims are not. Canadian courts need not have jurisdiction over victims in order to proceed with a prosecution.
16. The laying of charges through representatives does not bring victims of torture, with no other ties to Canada, under the jurisdiction of a Canadian court or, more broadly, within the jurisdiction of Canada. None of the provisions of Canada's *Criminal Code* - nor anything

¹⁰ Where a foreign State in which a witness is located consents, the testimony of that witness before a Canadian court may be taken by video link or audio link. Section 714.6 of the *Criminal Code*, R.S., c. C-34 states that in such circumstances, "the evidence is deemed to be given in Canada, and given under oath or affirmation in accordance with Canadian law, for the purposes of the laws relating to evidence, procedure, perjury and contempt of court." That is, witnesses and victims outside Canada may be said to come within the jurisdiction of a Canadian court when they testify before that court by video or audio link. This exception to the general rule has no application on the facts of this complaint.

¹¹ *Libman v. The Queen*, [1985] 2 S.C.R. 178, <http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/79/index.do>, is a leading case on the jurisdiction of courts in criminal trials. It dealt with a trans-national crime in which the victims were in the United States of America.

in the Convention – gives Canada jurisdiction over a victim of torture who is not in Canada. Canada notes with agreement the general statement by Ian Brownlie of the principle of international law regarding the scope of State jurisdiction over witnesses, victims or evidence within the jurisdiction of another State:

The governing principle is that a state cannot take measures in the territory of another state by way of enforcement of national laws without the consent of the latter. Persons may not be arrested, a summons may not be served, police or tax investigations may not be mounted, orders for production of documents may not be executed, on the territory of another state, except under terms of a treaty or other consent given. ...¹²

17. The authors have not established that they personally were subject to the jurisdiction of Canada at any time relevant to this communication. The attempt by Mr. Eisenbrandt to lay charges in respect of the alleged torture of the authors did not render the authors subject to the jurisdiction of Canada. Even if the authors' intent or wish was to bring themselves within the jurisdiction of Canada through the use of a proxy in the laying of a private prosecution, they were not in fact or in law within the jurisdiction of Canada.

The authors are not victims of the alleged failure to prosecute

18. Nowak and McArthur in their text on the Convention point out that a "victim" is a person whose human rights have been violated by a State party. Consequently, the right to submit a complaint under Article 22 only refers to violations of the CAT provisions which entail *subjective rights of individuals*. Every right of an individual creates a corresponding obligation of States, but not every obligation of States corresponds to a particular individual right ...¹³ (emphasis in the original).
19. These academics also observe that it is not always easy to assess whether an alleged violation has had a direct effect on a particular individual such that the individual could be said to be a victim of the violations alleged. The authors note that the Committee has taken seemingly opposite positions in *Rosenmann v. Spain* and *Habré v. Senegal*, observing that the Committee seems to follow a "fairly liberal (pro-victim) approach."¹⁴
20. Canada maintains its position that victims of torture cannot be said to have a right to the prosecution of alleged perpetrators. What is more, victims of torture cannot be said to have a right to the prosecution of alleged perpetrators in the absence of an evidentiary basis on which to prosecute.

¹² Ian Brownlie, *Principles of Public International Law*, Sixth Edition (Oxford: Oxford University Press, 2003) at p.306. This statement introduces a discussion of ways in which States have deviated from this principle. Canada does not see anything in that discussion that diminishes the principle in the context of this communication. The Convention does not change the fact that one State cannot enforce the orders of its courts in another State without that State's consent.

¹³ Nowak & McArthur, *supra* FN 1, at p.782

¹⁴ *Ibid.*, at p.783, para.168

ii) The Convention does not require anticipatory investigations

21. Canada observes that this communication is not about the guilt or innocence of a particular person or whether the authors are or are not victims of torture. Rather, this communication asks the Committee to consider the scope of the obligation of State parties to the Convention to investigate, and where the circumstances warrant, proceed to detain and prosecute alleged torturers. Canada is aware that some writers consider that States parties such as Canada, with significant investigative and prosecutorial resources, should undertake anticipatory investigations in the expectation that alleged perpetrators of acts of torture outside their jurisdiction will at some point be present within their territory (and thereby trigger their extended criminal jurisdiction). Canada takes a different view.
22. Canada observes that significant time and effort is required to investigate and prosecute anyone accused of authorizing torture. Anticipatory investigations of persons outside the jurisdiction of a State party would limit resources available for the investigation and prosecution of persons already present within territory under the jurisdiction of a State party. Canada asserts that a plain reading of paragraph 1 of Article 6 supports its view that the obligations of States parties under Articles 6 and 7 only begin with the presence of the alleged perpetrator within territory under the jurisdiction of a State party.
23. Canada further observes that when an alleged perpetrator does become present within territory under its jurisdiction, Article 6(1) obligates a State party to take into custody any person alleged to have committed torture (or take other legal measures to ensure his presence) upon being satisfied that the circumstances so warrant (after an examination of the information available to it). Contrary to what the authors allege at page 8 of their response, Canada did not breach and did not admit to breaching its obligation under this Article. The Royal Canadian Mounted Police (RCMP) fulfilled this obligation in considering the complaints received in September 2011 concerning the alleged conduct of Mr. Bush and reaching the conclusion, in the circumstances, that the available information did not warrant the opening of an investigation at that time.¹⁵ Opening an investigation was not warranted because it was recognized that police services in Canada would be unlikely to have access to key evidence. It follows that to have taken Mr. Bush into custody during his 2011 visits was also not warranted because, as Canada explained in its submission dated October 7, 2013, in the common law tradition individuals are not taken into custody before or during the early stages of an investigation.
24. On the question of whether an investigation was warranted at the time in light of the circumstances and the information available, the authors appear to consider that Canada acted in bad faith in 2011 in not seeking the assistance of the United States of America (the U.S.) in the matter of a potential prosecution of Mr. Bush. Canada asserts its view that the Convention does not obligate States parties to make futile requests for assistance to States that may have information critical to an investigation and, therefore, to an effective prosecution.

¹⁵ Canada's submission dated October 7, 2013 at para.42

25. As Canada noted in its submission dated October 7, 2013, the RCMP did in fact consider the question of seeking the assistance of the U.S. but concluded that such assistance would not be forthcoming under the current U.S. administration's publicly stated policy that it will not pursue the prosecution of members of the former administration. Canada asserts that it was entirely correct of the RCMP to assume without asking that the U.S. would not assist Canada in 2011 to pursue a prosecution of Mr. Bush.
26. Canada refers the Committee to the principle of international law articulated in the quote of Ian Brownlie's book, which is cited above. One State cannot pursue the collection of evidence in another State without the consent and assistance of that State.
27. Canada denies any element of bad faith and asserts that its police services acted in an appropriate manner in this regard.

iii) Proof of State party violation requires more than publicly available information

28. The authors of this communication do not allege that they are victims of acts of torture for which Canada is responsible. Rather, the authors allege that they are victims of violations by Canada of its obligations, as a State party to the Convention, to investigate and prosecute an individual allegedly responsible for authorizing their torture. In effect, the authors are alleging that they are victims of a miscarriage or denial of justice by Canada.
29. Canada submits that the authors have not established a miscarriage or denial of justice. The authors have only established that individuals representing their concern to see Mr. Bush prosecuted could not advance a private prosecution of Mr. Bush in Canada in 2011, which Canada does not deny. The authors claim that the information package provided to a court in Canada and to the Committee is evidence of a failure on the part of investigative and / or prosecutorial services within Canada's criminal justice system.
30. The information package provided by the authors to the Committee forms one part of the relevant information on which the Committee will form its views but it is not sufficient to found a violation of the Convention by Canada. The Committee must also take into consideration Canada's criminal justice system, which was explained in its submission dated October 7, 2013, and how that system was applied in light of all the relevant facts.
31. The Committee, in formulating its views as to whether Canada violated the Convention as alleged by the authors, will have to consider a number of matters, including:
 - Is it reasonable to consider that a conviction of Mr. Bush for crimes of torture could be obtained in a reasonably well-functioning common law system on the basis of the evidence derived from publicly available information?
 - Was it unreasonable for police services in Canada to conclude that obtaining evidence sufficient to connect the actions or inactions of Mr. Bush to specific acts of the torture of any specific individuals would require the assistance of the U.S. government?
 - Is it unreasonable for a State party, in the face of public statements at the highest

level of the government of another State, to conclude that it would be futile to make a request for the assistance of that other State?

- Is there evidence of bad faith, incompetence or manifest error on the part of Canadian officials, officials who are independent of political or governmental influence in law and in fact?

32. Canada submits that the authors have not provided this Committee with sufficient evidence to establish that Canada has violated its obligations under Articles 5, 6 or 7 of the Convention. The authors state, and Canada accepts, that it did not open an investigation into the allegations that Mr. Bush is guilty of the crime of torture. However, Canada states that the RCMP considered the publicly available information and concluded that, in the circumstances, opening an investigation was not warranted at that time.
33. Canada further observes that even if an investigation had been begun in the months leading up to his visits in 2011, it is not reasonable to assume that the investigation would have progressed sufficiently to warrant the laying of charges and, therefore, the taking into custody of Mr. Bush at the time of his visit.
34. In order to form the view that Canada violated Articles 5, 6 or 7, this Committee must be prepared to second-guess the reasoning of the RCMP in respect of the decision not to pursue an investigation. Given the rules governing the liberty of the individual in the criminal justice system in Canada, this Committee also must be prepared to determine, *proprio motu*, that there was enough evidence available or attainable in 2011 to warrant the prosecution of Mr. Bush by Canada – as without evidence to justify the laying of criminal charges, alleged perpetrators are not taken into custody in Canada. Is this Committee competent to reach such conclusions? Canada asserts that this Committee is not competent to assess the exercise of police investigative discretion or prosecutorial discretion in the absence of proof of misconduct amounting to a miscarriage or denial of justice by Canadian officials.
35. In the Canadian criminal justice system, judges do not intervene to tell prosecutors which crimes to prosecute or when to prosecute them,¹⁶ nor do they intervene to tell police services which crimes to investigate or when to investigate them. As the Supreme Court of Canada has pointed out:

Discretion is an essential feature of the criminal justice system. A system that attempted to eliminate discretion would be unworkably complex and rigid. Police necessarily exercise discretion in deciding when to lay charges, to arrest and when to conduct incidental searches, as prosecutors do in deciding whether or not to withdraw a charge, enter a stay, consent to an adjournment, proceed by way of indictment or summary conviction, launch and appeal and so on.¹⁷

Unwarranted judicial intervention of this type would destroy the independence of the police and / or prosecutorial services. Canada submits that the Committee too should be

¹⁶ *R. v. Power*, [1994] 1 S.C.R. 601, <http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1120/index.do>, at pp.626-629

¹⁷ *Ibid.*, at p.624; L'Heureux-Dubé J. quoting La Forest J. in *R. v. Beare*, [1988] 2 S.C.R. 387, at pp.410-11

loathe to intervene and impose its view in favour of that of experienced decision-makers within a domestic justice system in the absence of evidence of misconduct.

36. Canada further submits that, even if this Committee forms the view that there was / is enough available or attainable evidence that would be admissible under Canadian law – not merely publicly available information – on which to properly prosecute Mr. Bush, this view does not lead inexorably to a conclusion that Canada has violated the Convention. The Committee must also form the view that no other view was reasonable at the time such that there was bad faith, gross incompetence or some other manifest error on the part of Canadian officials.
37. Canada denies there was any miscarriage or denial of justice in Canada in respect of its obligations under Articles 5, 6 or 7 of the Convention. Canada submits that the authors have failed to substantiate their allegations of violations of the Convention by Canada.

III. Clarification

38. In paragraphs 94 through 98 of Canada's submission dated October 7, 2013, there is a discussion, in general terms, of the sufficiency of evidence on which to lay charges. This discussion was intended to highlight the difference between on the one hand, information contained in the materials provided to the Committee by the authors and used by Mr. Eisenbrandt as the basis for the private prosecution and on the other hand, evidence admissible in a Canadian court in a criminal trial.
39. Canada maintains its position that, in 2011, it was reasonable for Canadian police services, in this case the RCMP, in the exercise of their discretion, to determine that the ability to gather evidence necessary to attempt to prove the alleged involvement of Mr. Bush in the alleged torture of the authors or other alleged victims of torture would require the assistance of the U.S. administration and U.S. law enforcement agencies. The gathering of evidence and the interviewing of witnesses within the jurisdiction of a foreign State requires the consent and co-operation of that State. Canada again refers the Committee to the principle of international law that is articulated in the quote of Ian Brownlie's book, which is cited above.
40. The last bullet in paragraph 98 stated that the "statements of Mr. Bush in media interviews and in his memoir, *Decision Points*, would most likely not be admitted in a court of law for the truth of their contents. That bullet should read as follows: "The statements of Mr. Bush in media interviews and in his memoir, *Decision Points*, could be found to be admissible against him as admissions made by him.
41. The important point about statements is that to be evidence they must be verified to the satisfaction of the court. The Canadian criminal trial follows the essentially oral nature of criminal trials in the common law tradition. Documents, video and audio tapes must be authenticated by a witness or witnesses capable of verifying the accuracy and fairness of the item.

IV. In Conclusion

42. Canada maintains that this Committee should take the view that this communication is inadmissible, in particular because the authors were not within the jurisdiction of Canada at any time relevant to their claims against Canada under Articles 5, 6 and 7. The Committee is not, under the terms of Article 22 of the Convention, competent to entertain this communication.
43. Should the Committee take the view that this communication is 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.

Ottawa, Canada
April 10, 2014

