

30 December 2013

Petitions Team
United Nations Committee against Torture
Office of the High Commissioner for Human Rights
Palais Wilson
52 rue de Pâquis
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Via email: petitions@ohchr.org

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

Dear Members of the Committee against Torture:

Hassan bin Attash, Sami el-Hajj, Muhammed Khan Tumani and Murat Kurnaz (collectively, “Complainants”) hereby submit their response to the submission of Canada on the admissibility and merits of Communication No. 536/2013. The Complainants maintain that the Communication is admissible and that Canada has violated its obligations under Articles 5(2), 6 and 7 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

The named Complainants, with the assistance of the Center for Constitutional Rights and the Canadian Centre for International Justice, and through their legal representative Katherine Gallagher of CCR, submitted a communication pursuant to Article 22 of the Convention with this Committee on 14 November 2012. On 22 January 2013, this Committee informed the Complainants’ legal representative that the Communication had been registered with the Committee as No. 536/2013, and that it had been communicated to Canada for its response. Canada’s response to the admissibility of the Communication and the merits was due on 22 July 2013; Canada requested an extension and was granted a two-month extension. Following a reminder from the Committee, Canada submitted its response on 8 October 2013, which was communicated to the Complainants on 29 October 2013. The Complainants’ reply is timely, submitted in accord with the Committee’s request that any response be submitted by 30 December 2013.

The Complainants are four individuals who were subjected to torture while detained in U.S.-run detention centers, including in Afghanistan and at Guantánamo Bay. These individuals filed the Communication against Canada for its failure to ensure custody over, investigate and prosecute,

former U.S. president George W. Bush when he visited Canada in 2011, as required by the Convention.

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

Respectfully submitted,



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I. INTRODUCTION

The named Complainants, with the assistance of the Center for Constitutional Rights (“CCR”) and the Canadian Centre for International Justice (“CCIJ”), and through their legal representative Katherine Gallagher of CCR, submitted a communication pursuant to Article 22 of the Convention with this Committee on 14 November 2012.¹ On 22 January 2013, this Committee informed the Complainants’ legal representative that the Communication had been registered with the Committee as No. 536/2013, and that it had been communicated to Canada for its response. Canada’s response to the admissibility of the Communication and the merits was due on 22 July 2013; Canada requested an extension and was granted a two-month extension. Following a reminder from the Committee, Canada submitted its response on 8 October 2013, which was communicated to the Complainants on 29 October 2013.² The Complainants’ reply is timely, submitted in accord with the Committee’s request that any response be submitted by 30 December 2013.

As set forth in detail in the Communication, and Annex II thereto, the Complainants are four individuals who were subjected to torture while detained in U.S.-run detention centers, including in Afghanistan and at Guantánamo Bay: **Hassan bin Attash**, a national of Yemen; **Sami el-Hajj**, a Sudanese citizen; **Mohammed Khan Tumani**, a Syrian citizen who was resettled in Portugal; and **Murat Kurnaz**, a German-born citizen of Turkey. Mr. Bin Attash is the only Complainant who remains detained by the U.S. at Guantánamo Bay.³ These individuals filed the Communication against Canada for its failure to ensure custody over, investigate and prosecute, former U.S. president George W. Bush when he visited Canada, as required by the Convention. Having first submitted a draft indictment setting forth the factual and legal basis for charging Mr. Bush with torture and approximately 4,000 pages of supporting materials (“Information Package”) to the Attorney General of Canada on 29 September 2011,⁴ as well as a follow-up letter on the day that Mr. Bush was present in Canada (20 October 2011), Matt Eisenbrandt of CCIJ initiated a private prosecution against Mr. Bush containing four counts of torture, one for each of the Complainants. That same day, Canadian officials intervened to effectively close the case. Mr. Bush was not questioned, investigated or prosecuted in Canada.

¹ Hassan Bin Attash, et al., Communication presented to the Committee against Torture Pursuant to Article 22 of the Convention against Torture, For Violation of Articles 5, 6, and 7 of the Convention, 12 November 2013 (“Communication”) available at <http://ccrjustice.org/files/CAT%20Canada%20Petition%20.pdf>. CCR and CCIJ recognize the significant contributions Justin Mohammed and Tamara Morgenthau made to the present submission.

² Submission of Canada Regarding the Admissibility and Merits of the Communication to the Committee Against Torture of Hassan Bin Attash et al., 8 October 2013 (“Canada Submission”) available at <http://ccrjustice.org/files/Canada%20Response%20to%20CAT.pdf>.

³ See Communication, pp. 9-10.

⁴ See Communication, Annex II, available at <http://ccrjustice.org/files/2011.09.29%20Bush%20Canada%20Indictment.pdf>.

With no action taken by any Canadian official to ensure his presence in Canada, he returned to the United States the same day.

As set forth in the Communication and further explained herein, “Canada undermined its stated commitment to combat torture, ignored the jurisdictional authority provided by the *Criminal Code* and violated its obligations under the Convention.”⁵ Specifically, Canada’s failure to exercise jurisdiction over a person alleged to have committed torture present in its territory constitutes a violation of Article 5(2), 6 and 7 of the Convention.

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

II. THE COMMUNICATION IS ADMISSIBLE

Canada argues that the Communication is inadmissible on two grounds. First, it claims that any alleged violation of Article 5(2) is unsubstantiated and constitutes “an abuse of the right of submission,” pursuant to Article 22(2) of the Convention.⁶ Second, it argues that the Communication is inconsistent with Article 22(1) of the Convention. Both arguments are misplaced. The Communication is admissible in its entirety.

A. Canada Violated Article 5(2)

Canada asserts incorrectly that Article 5(2) only provides the obligation to “establish” universal jurisdiction over the offence of torture when the perpetrator is present in Canada,⁷ and that Canada has done so by enacting s. 7(3.7) of the *Criminal Code*.⁸ However, the obligation in Article 5(2) to “take measures as may be necessary to establish its jurisdiction” requires not simply the enactment of domestic law to permit universal jurisdiction, but also the *exercise* of such jurisdiction where appropriate.⁹ See Section III(A)(2) *infra*.

⁵ Communication, p. 19.

⁶ Canada Submission, para. 58.

⁷ *Ibid.* at para. 56. Canada appears to suggest that the Complainants allege a violation of Article 5(2) based on Canada’s failure to extradite Bush, presumably to the United States, for prosecution. Canada misreads both the Communication and the requirements in Article 5(2). The Complainants are in agreement with Canada that the question of extradition does not arise on the facts of this Communication: first, as Canada acknowledges, it never contacted the United States regarding the request to investigate and prosecute Mr. Bush, or for assistance with any such investigation, thereby forestalling the opportunity – or necessity – for the United States to seek extradition *as an alternative* to a Canadian proceeding; and second, like Canada, Complainants understand that Bush will not face prosecution for torture in the United States, which is precisely why they brought this action in Canada, under the principle of universal jurisdiction, to counter the impunity Bush enjoys in the U.S. Moreover, as this Committee established in the *Habré* case (*Guengueng v. Senegal*), an extradition request is not required to trigger a State’s obligations under Article 5(2). See Manfred Nowak and Elizabeth McArthur, *THE UNITED NATIONS CONVENTION AGAINST TORTURE – A COMMENTARY* (Oxford: Oxford University Press, 2008) (“Nowak and McArthur Commentary”) 317. Indeed, “the only possibility to avoid prosecution is extradition.” *Ibid.* at 345. See also *ibid.* at 360 (“Prosecution is not subject to any condition other than the presence of the alleged torturer on the territory.”)

⁸ Criminal Code RSC 1985, c. C-46.

⁹ CAT, Article 5(2) provides: “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.”

B. The Communication Complies with Article 22(1) of the Convention

Canada argues that Article 22(1) precludes the Committee's consideration of the Communication. It submits that the Complainants are not and have never been subject to Canada's jurisdiction, and therefore fall outside the group of individuals who can activate the competence of the Committee.¹⁰ In so doing, Canada not only misconstrues the ambit of jurisdiction, but relies inappropriately on *Roitman Rosenmann v. Spain*,¹¹ and confuses the concept of jurisdiction with the concept of standing.

The Complainants are victims of torture, each of whom moved to initiate criminal proceedings in Canada when the individual that they allege bears individual criminal responsibility for torture was present in Canada. As such, Complainants are individually and directly affected by Canada's violation of Articles 5, 6 and 7 of the Convention arising out of its failure to exercise jurisdiction when an alleged torturer was present in its territory; initiate a preliminary inquiry against Mr. Bush, stemming from the information provided by the Complainants and available to it, ensure his presence; and submit the case to the competent authorities for the purpose of prosecution. Under the plain text of the Convention as well as this Committee's jurisprudence, the Complainants are competent to submit this Communication and it is admissible.

1) *The Ambit of "Jurisdiction" in Article 22(1)*

By ratifying and implementing the Convention, including enacting legislation to exercise its jurisdiction over alleged torturers present in its territory, and lodging a declaration under Article 22, Canada accepted jurisdiction over *all* victims of alleged torturers present in Canada. In *Guengueng v. Senegal*, this Committee concluded that the phrase "subject to its jurisdiction" in Article 22(1) "must take into account various factors that are not confined to the author's [complainant's] nationality" and that "the principle of universal jurisdiction enunciated in article 5, paragraph 2, and article 7 of the Convention implies that the jurisdiction of States parties must extend to *potential* complainants in circumstances similar to the complainants" (emphasis in original).¹² This is to say that when an alleged torturer is present in the territory of a State party and thus falls within the jurisdiction of that State, its jurisdiction extends to all victims of the alleged torturer because *any* of those victims is a potential complainant.¹³ In reaching this conclusion in *Guengueng*, the Committee properly relied on the universal jurisdiction provisions of Articles 5 and 7 that are at the heart of the Convention's scheme to "make more effective the struggle against torture."¹⁴

¹⁰ Canada Submission, paras. 66 and 68.

¹¹ *Roitman Rosenmann v. Spain*, Communication No. 176/2000, U.N. Doc. A/57/44 at 210 (2002).

¹² *Guengueng et al. v Senegal*, Communication No. 181/2001, U.N. Doc. CAT/C/36/D/181/2001 (2006), paras. 6.3 and 6.4. The Committee's interpretation in *Guengueng* is consistent with the jurisprudence of the Human Rights Committee ("HRC"). Article 1 of the *Optional Protocol to the International Covenant on Civil and Political Rights* is drafted in similar terms to Article 22(1) of the Convention. On several occasions, the HRC has adopted an *objective* and *functional* interpretation. See, for example, *Ibrahima Gueye et al. v France*, Communication No. 196/1985, A/44/40 (1989).

¹³ The "jurisdiction" only extends to the alleged torture and does not generally subject the victim to the State party's jurisdiction for other matters.

¹⁴ CAT, Preamble.

2) Canada's Conceptualization of Jurisdiction is Incorrect

Canada's understanding of "jurisdiction" is based on an incorrect reading of the Committee's decision in *Guengueng*.

First, Canada misreads *Guengueng* in asserting that the case "suggests the complainants need not be subject to the jurisdiction of the State party."¹⁵ Indeed, *Guengueng* does require complainants to be subject to the jurisdiction of the State party, but it also stands for the proposition that such jurisdiction extends to all victims of an alleged torturer present in the territory of a State party. *See* Section III (B)(1) *infra*.

Second, even according to Canada's reading of Article 22(1), which "requires the complainants must be/have been subject to the jurisdiction of the State with respect to the violations of which they claim to be victim,"¹⁶ the Complainants satisfy the jurisdictional requirement. To be clear: the violations which the Complainants bring before the Committee do *not* include that they have been tortured in violation of Articles 1 and 2; that is a claim which they sought to bring against Mr. Bush, not Canada. The violations which the Complainants assert in this action are the violations of Canada's obligations under Articles 5(2), 6 and 7 of the Convention to enact and exercise measures for universal jurisdiction, investigate credible information of torture when an alleged torturer is present in its territory, ensure the presence of said torturer throughout the investigation, and upon being satisfied that a sufficient basis for prosecution exists, prosecute that person. Mr. Bush, an alleged torturer, was present in Canada; the Complainants initiated a private prosecution against him that Canada closed without any investigation and without taking any measures to ensure his presence in Canada. These facts bring the Complainants squarely within Canada's jurisdiction and thereby satisfy the requirements of Article 22(1).

Canada also appears to argue that "jurisdiction" ought to be defined according to the domestic law of the country against which the complaint is launched.¹⁷ Such an approach would, in effect, render complaints to the Committee illusory with regard to claims concerning universal jurisdiction.¹⁸ However, even a reading of Canada's domestic law leads to a finding that victims of torture abroad can indeed be subject to Canadian jurisdiction. Canada provides no support in Canadian law for its claim that victims must be "present in the territory of Canada" to be subject to its jurisdiction.¹⁹ In fact, s. 7(3.7) of Canada's *Criminal Code*, the provision that implements Article 5(2) of the Convention, states, "[E]very one who, outside Canada, commits an act or omission that, if committed in Canada, would constitute an offence ... shall be deemed to commit that act or omission in Canada if... (e) the person who commits the act or omission is, after the commission thereof, present in Canada." This section does not merely give Canada universal jurisdiction over any alleged torturer present in Canada, but actually deems the torture to have been effectively committed in Canada.

¹⁵ Canada Submission, para. 65.

¹⁶ *Ibid.* at para. 65.

¹⁷ *Ibid.* at paras. 62, 63, 67.

¹⁸ The Complainants submit that there is one standard under Article 22 for all violations of the Convention. There is no difference in the requirements to submit a communication alleging a violation of Articles 5-7, as opposed to, for example, a violation of Article 3.

¹⁹ Canada Submission, para. 62.

Presumably, Canada would not argue that it does not have jurisdiction over a victim of torture committed *in Canada*. Therefore, when s. 7(3.7) of the Criminal Code makes any act of torture, wherever committed, the equivalent of torture committed *in Canada*, the Government of Canada has jurisdiction over the victims of any alleged torturer later found in Canada.²⁰

3) *The Facts of This Case Warrant the Same Outcome as Guengueng*

Even if the Committee disagrees with the Complainants' position that when an alleged torturer is present in the territory of a State party, that State's jurisdiction extends to all victims of the alleged torturer, the facts of the instant case nevertheless bring the Complainants within Canada's "jurisdiction" for the purposes of Article 22(1).

The facts of the instant case are parallel to the facts in *Guengueng*. There, Chadian victims complained against Senegal for its failure to prosecute alleged torturer Hissène Habré, who was living in Senegal. The Committee in *Guengueng* found that the Chadian complainants "accepted Senegalese jurisdiction in order to pursue the proceedings against Hissène Habré which they instituted" and that the CAT complaint against Senegal was admissible under Article 22.

The Complainants in the instant case are similarly situated. When the Attorney General of Canada refused to launch an inquiry into Mr. Bush, CCIJ and CCR, on behalf of the Complainants, launched a private prosecution in Canada. All four individuals gave authorization for a criminal information (i.e. a private prosecution) to be filed with a Canadian court concerning the torture they suffered and for which Mr. Bush is responsible. As such, they accepted Canada's jurisdiction in order to pursue the proceedings against Mr. Bush. On behalf of the Complainants, Mr. Eisenbrandt swore a criminal information outlining the allegations and charges against Mr. Bush.²¹ A justice of the peace – a government official acting in a judicial capacity – accepted the criminal information, and a hearing was scheduled.

Another government official then took direct action on the case by intervening and staying the proceedings.²² That same day, and potentially while Mr. Bush was still in Canada, a Deputy Regional Crown Counsel intervened in the case and directed a stay of proceeding. Canada asserts that there was "no personal exercise of discretion by the Attorney General of British Columbia," and that the decision to stay the proceedings was taken pursuant to an "independent exercise of prosecutorial discretion by the Criminal Justice Branch of the Ministry of Justice of

²⁰ Canada has brought two criminal prosecutions for crimes against humanity and genocide committed abroad, using Canada's *Crimes against Humanity and War Crimes Act* that implemented the Rome Statute of the International Criminal Court. *Crimes against Humanity and War Crimes Act*, S.C. 2000, c. 24. Both of the defendants in that case were present in Canada, which provided the basis for Canadian jurisdiction. *Ibid.* at s. 6. The *War Crimes Act* does not contain a provision like the *Criminal Code* deeming the crimes to have been committed in Canada but rather just provides jurisdiction over them. It is unlikely Canada would claim that the witnesses in those cases, some of whom were victims and testified from Rwanda or other countries, were not subject to Canadian jurisdiction.

²¹ See generally Communication, pp. 15-18.

²² *Ibid.* at p. 16-17. Canada provides no support for its claim that "[i]n Canadian law... 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." Indeed, although the government does have the right under the *Criminal Code* to intervene in a private prosecution, such action is not required and if the government does not intervene, a private prosecutor is permitted to conduct the prosecution. *Criminal Code*, s. 574(3) ("In a prosecution conducted by a prosecutor other than the Attorney General and in which the Attorney General does not intervene, an indictment may not be preferred under any of subsections (1) to (1.2) before a court without the written order of a judge of that court.")

British Columbia.”²³ However, Canada provides no support for this assertion, which is contrary to what the Deputy Regional Crown Counsel told Mr. Eisenbrandt when he stated that the Attorney General of British Columbia directed the stay.²⁴ Regardless of who ordered the stay, a provincial government official put an end to the private prosecution the same day it was filed. Canada admits that this was done in conferral with the federal Public Prosecution Service of Canada (“PPSC”) and that the PPSC did not have any potential charges against Mr. Bush because the RCMP never launched an investigation. Therefore, when the provincial official shut down the private prosecution, he did so without asking police to conduct the necessary inquiry under Article 6 and did not make his own independent assessment of the allegations against Mr. Bush.

This combination of factors demonstrates that the victims were subject to Canada’s jurisdiction as contemplated by Article 22(1) and interpreted in *Guengueng*.²⁵

That “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,”²⁶ is, with respect, irrelevant. Under this Committee’s jurisprudence, as reflective of the object and purpose of the Convention, including Article 22, initiating such a private prosecution (which, Complainants maintain is not a *necessary* factor for finding the terms of Article 22(1) satisfied) supports the understanding that the Complainants brought themselves within Canada’s jurisdiction and subjected themselves to the laws and practices of the Canadian justice system.²⁷

4) *Canada’s Reliance on Roitman Rosenmann Confuses Standing with Jurisdiction.*

Canada relies on the decision of this Committee in *Roitman Rosenmann* to argue that, on the facts of the instant case, the Complainants are not subject to the jurisdiction of Canada.²⁸ However, the section of *Roitman Rosenmann* on which Canada relies – paragraph 6.4 – does not concern the “subject to its jurisdiction” language of Article 22(1) but rather whether the complainant in that case had standing to bring the complaint.²⁹ These are distinct concepts, and in this regard *Roitman Rosenmann* and *Guengueng* address different issues.³⁰

²³ Canada Submission, para. 49.

²⁴ Communication, p. 17.

²⁵ Even if the Committee accepts Canada’s argument that the Complainants were not subject to Canadian jurisdiction, Canada did not address the fact that the person who filed the private prosecution, Matt Eisenbrandt, is a resident of Canada and was present in Canada when filing the prosecution. He is clearly subject to Canada’s jurisdiction according to Canadian domestic law.

²⁶ Canada Submission, para. 62. *See also ibid.* at para. 67.

²⁷ Indeed, asserting that the process for initiating a private torture prosecution is not sufficient to fall within Canada’s jurisdiction calls into question whether Canada has, in fact, enacted the “measures as may be necessary” to establish universal jurisdiction in accordance with the obligations of the Convention.

²⁸ Canada Submission, para. 66. *Roitman Rosenmann* is further distinguishable from the current action because there, the complainant was asserting a violation of Article 5(1)(c), not 5(2). Article 5(1)(c) contains a level of discretion for the establishment of jurisdiction (“if that State considers it appropriate”) that is not present in Article 5(2). Indeed, Article 5(2) provides *universal* jurisdiction without distinction as to victims.

²⁹ This distinction is critical to the analysis in section III(B)(1) *supra*. The result in *Roitman Rosenmann*, decided four years before *Guengueng*, does not undercut *Guengueng*’s conclusion that “the jurisdiction of States parties must extend to potential complainants.” Because *Roitman Rosenmann* was decided on the narrow issue of whether Mr. Roitman Rosenmann had standing to bring the CAT complaint, the Committee did not comment on the broader issue of whether he was subject to the State party’s jurisdiction. A correct reading of *Guengueng* and

A correct reading of *Roitman Rosenmann* leads to the conclusion that the Complainants in this case have standing. Mr. Roitman Rosenmann alleged that Spain violated its obligations under the Convention by failing to seek the extradition of Augusto Pinochet from the United Kingdom. In deeming his complaint inadmissible, the Committee observed that “for the complainant to be a victim of the alleged violation...he must be personally and directly affected by the alleged breach in question.”³¹ Although Mr. Roitman Rosenmann was a victim of Pinochet’s regime, he was not a victim of the alleged breach of the Convention by Spain because he was not a civil party to the Spanish criminal proceedings against Mr. Pinochet.³² Unlike in *Roitman Rosenmann*, the Complainants in this case – like the complainants in *Guengueng* – are “personally and directly affected by the alleged breach in question,”³³ namely Canada’s failure to investigate and prosecute, *precisely because* they were named in the attempted private prosecution in Canada.

III. CANADA VIOLATED ARTICLES 5(2), 6 AND 7 OF THE CONVENTION

Canada violated its obligations under Articles 5(2), 6 and 7 of the Convention, as follows:

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

The Complainants observe that these violations of the Convention are both inter-related and sequential.

Canada fails to demonstrate that it complied with the provisions of the Convention and its obligations as a State party. On the contrary, its submission makes plain that Canada either fundamentally misconstrued the nature of its obligations under Articles 6 and 7, or it wilfully breached its obligations. Canada relies on investigative discretion and prosecutorial discretion as justification for its inaction, submitting that there was insufficient “evidence” for a prosecution to go forward.³⁴ The obligations under Article 6 do not, however, require an assessment of the admissibility of *evidence for prosecution*. Article 6(1) requires a thorough assessment of

Roitman Rosenmann together shows that some torture victims may not have standing to bring a CAT complaint even when they might be subject to a State party’s jurisdiction for the purposes of Article 22(1).

³⁰ That the issue of standing is distinct from the issue of “subject to its jurisdiction” is supported by former Special Rapporteur on Torture, Manfred Nowak, who, in his treatise, analyzes “standing” before moving to jurisdiction under a separate heading. *See* Nowak and McArthur Commentary (“4.2 Article 22(1): Standing of the Applicant” and “4.4 Article 22(1): Individuals Subject to its Jurisdiction”).

³¹ *Roitman Rosenmann*, para. 6.4.

³² *Ibid.* The facts of *Roitman Rosenmann* are even another step removed from the instant case because in *Roitman Rosenmann* the alleged torturer was not in the territory of the State against which the complaint was brought, i.e. Spain. As a result, the case focused on Spain’s obligations to seek an extradition. The Committee framed the case in this way, “[T]he violation of the Convention lies in the refusal of the Spanish Minister for Foreign Affairs to transmit Resolutions adopted by the *Audiencia Nacional* to the relevant British authorities.”

³³ *See Ibid.*

³⁴ *See* Canada Submission, paras. 22, 34, 81 and 87.

available *information*, and then Article 6(2) requires the commencement of a preliminary investigation, which includes gathering evidence for a prosecution.³⁵ Canada erred in imputing a higher standard of proof at the investigative stage by incorporating an assessment of admissibility of evidence for trial into a decision whether to take action under Article 6, and in so doing, failed to fulfill its obligations under this Article. Moreover, Canada, by its own admission, breached its obligation to thoroughly review the materials put before it in the Information Package. Such a review would confirm, at minimum, that a basis exists for opening a preliminary inquiry.

In breaching its obligations under Article 6, Canada also failed to carry out its obligations under Article 7.³⁶ Likewise, both Articles contain the procedures necessary to ensure the realization of Article 5(2). Accordingly, Canada's inaction violated Article 5(2).

A. Canada Fundamentally Misconstrued and Mischaracterizes its Obligations under the Convention

1. *Articles 5(2), 6 and 7 must be read to ensure no safe haven for torturers and prevent impunity*

The Complainants agree with Canada that Articles 5(2), 6 and 7 must be read together and in the context of the Convention as a whole.³⁷ A proper reading of the three Articles, in light of the object and purpose of the Convention, makes clear that Canada violated each. The objective of the Convention is to prevent torture; the punishment of torturers, including State officials, is codified in the Convention *inter alia* to ensure no safe haven is provided for torturers and prevent impunity.³⁸ A primary mechanism in achieving this objective is universal jurisdiction contained in Article 5(2), which was enacted on the theory that States are unlikely to prosecute their own officials for torture committed on their own territory.³⁹ The Nowak and McArthur commentary explains that, "to eliminate safe havens for torturers would, therefore, require that States parties actively pursue their obligations under the passive nationality and universal jurisdiction principles and that they are willing to bring the perpetrators to justice before their own courts rather than to rely on the alternative of extradition."⁴⁰

³⁵ CAT, Article 6 (1) and (2) provides:

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.

2. Such State shall immediately make a preliminary inquiry into the facts.

³⁶ CAT, Article 7(1) provides: "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."

³⁷ Canada Submission, para. 7. See Communication, p. 19.

³⁸ CHRIS INGELSE, THE UN COMMITTEE AGAINST TORTURE: AN ASSESSMENT, 2001, p. 318; *Questions relating to the Obligation to Prosecute or Extradite* (Belg. v. Sen.), 2012 ICJ 144 (July 20) ("*Belgium v Senegal*"), para. 74. See also *Guridi v. Spain*, Communication No. 212/2002, U.N. Doc. CAT/C/34/D/212/2002 (2005), para. 6.7 (finding that "one of the purposes of the Convention is to avoid allowing persons who have committed acts of torture to escape unpunished").

³⁹ Nowak and McArthur Commentary, *supra* n.7, p. 387.

⁴⁰ *Ibid.*

The connection between Article 5(2) and the underlying objective of the Convention is affirmed in the *travaux préparatoires*. In the deliberations of the Commission's 1982 Working Group, Burgers and Danelius note that the U.S. delegate was an advocate for the inclusion of universal jurisdiction, and in the deliberations the advocate explained that:

Such jurisdiction was intended primarily to deal with situations where torture is a state policy and, therefore, the state in question does not, by definition, prosecute its officials who conduct torture. For the international community to leave enforcement of the convention to such a State would be essentially a formula for doing nothing. Therefore in such cases universal jurisdiction would be the most effective weapon against torture which could be brought to bear. It could be utilized against official torturers who travel to other States, a situation which was not at all hypothetical.⁴¹

Canada admits that the United States will not pursue prosecution against Bush administration officials. Therefore, other States parties, like Canada, are obligated to utilize universal jurisdiction when U.S. officials allegedly responsible for torture travel to their territory. This would counter the impunity that would otherwise prevail for acts of torture.

Linked to the obligation under Article 5,⁴² Articles 6 and 7 are a set of progressive steps which oblige "the forum State i.e. any State party on the territory of which a suspected torturer is present, to take him or her into custody, carry out a preliminary inquiry of the facts and to proceed either to prosecution or extradition."⁴³ Article 6 requires the preliminary steps of maintaining custody or otherwise ensuring presence and carrying out a preliminary inquiry. Article 7(1) then requires the forum State to submit the case to competent authorities for the purpose of prosecution.⁴⁴

The Nowak and McArthur commentary explains that, "the strongest obligation to avoid a safe haven for perpetrators of torture by bringing them to justice before their domestic courts applies to the forum State. This obligation arises from the mere fact that a suspected torturer is present, for whatever reason, in any territory under the jurisdiction of a State party."⁴⁵ This includes when an alleged perpetrator transits through a country.⁴⁶ When viewed together, these provisions reinforce the obligations of the forum State to deny a safe haven and impunity to torturers.⁴⁷

In this case, Canada took no action to fulfill its obligations. Indeed, Canada's submissions specifically acknowledge that "the RCMP advises they have not launched a criminal

⁴¹ J. HERMAN BURGERS AND HANS DANIELIUS, *THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER, CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT*, 1988, pp. 78-79.

⁴² Nowak and McArthur Commentary, *supra* n.7, p. 329.

⁴³ *Ibid.* at p.383; *See also*, Ingelse, *supra* n.38, p. 351.

⁴⁴ Nowak and McArthur Commentary, p. 345.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ *Belgium v Senegal*, para. 74. *See* Communication, pp. 20-22.

investigation into the conduct of Mr. Bush in respect of his actions as President of the United States.”⁴⁸

2. *Canada Violated Article 5(2)*

By failing to exercise jurisdiction over Mr. Bush, Canada violated its obligation under Article 5(2). Article 5(2) is not solely a procedural obligation to enact proper legislation to allow for universal jurisdiction, but requires exercising that jurisdiction when an alleged perpetrator is present in the State’s territory. The Complainants assert that Canada violated this provision because, when read with the obligations set forth in other articles of the Convention, it is evident that Canada has not taken “such measures as may be necessary to establish its jurisdiction...where the alleged offender is present in any territory under its jurisdiction.”

Article 5(2) requires, as a condition precedent, that States enact the necessary legislation to enable them to exercise universal jurisdiction over torture in their domestic criminal codes.⁴⁹ Fulfilling the obligations of the provision also entails exercising that jurisdiction. As Nowak and McArthur state, under Article 5(2) “the administrative and judicial authorities of States parties must also take specific steps in order to bring suspected torturers to justice.”⁵⁰ Amnesty International’s report on universal jurisdiction concludes: “The phrase ‘take such measures as may be necessary to establish its jurisdiction in cases where the alleged offender is present’ includes legislative measures, but is not limited to such measures. It includes executive and judicial steps to arrest, investigate, prosecute or extradite.”⁵¹

With this understanding of the full scope of obligations under Article 5(2), Nowak and McArthur applaud the United Kingdom for exercising universal jurisdiction under Article 5(2) to prosecute Faryadi Sarwar Zardad, an Afghani torture suspect.⁵² Equally, these authors criticize other countries for avoiding their obligations.⁵³

Canada has enacted the appropriate legislation for the government to exercise universal jurisdiction in the context of torture; but that is only one aspect of fulfilling Article 5(2) obligations. It is clear in this case that Canada took no action to exercise jurisdiction against Mr. Bush.

3. *Canada Violated Article 6*

In failing to consider the Information Package, retain custody or secure the presence of Mr. Bush, and commence a preliminary investigation, Canada violated its Article 6 obligations.

⁴⁸ Canada Submission, para. 42.

⁴⁹ Nowak and McArthur Commentary, *supra* n.7, p.254.

⁵⁰ *Ibid.* at p. 255. *See also ibid.* at p. 317. Further support for the fact that Article 5(2) requires exercising jurisdiction is found in the Working Group Discussions. During the discussions on Article 5(2) the French delegation proposed changing the wording of the provision to say ‘to establish its competence to deal with offences.’ *Ibid.* at p. 262. This change was not adopted, thereby suggesting that the Article requires more than establishing competence to deal with the offences but actually exercising jurisdiction over the perpetrators.

⁵¹ Amnesty International, *Universal Jurisdiction: the Duty of States to Enact and Enforce Legislation*, AI Index: IOR 53/012/2001, chapter 9, 4-5.

⁵² Nowak and McArthur Commentary, p. 296.

⁵³ *Ibid.*

Canada argues that it retains discretion under Article 6 to ensure the circumstances warrant action.⁵⁴ Based on the plain language (“shall”) and purpose of Article 6, the Complainants disagree that discretion exists at the stage of *whether* to investigate; at most, there may be an element of discretion in deciding what steps to take to carry out a thorough and proper investigation or as a result of such an investigation, or in deciding how to ensure the presence of a torture suspect.⁵⁵ Such “discretion,” if any, must be guided by the results of a full and impartial investigation, in light of the circumstances of the case, and exercised in light of the obligations undertaken as a signatory to the Convention; it cannot be exercised in a manner that renders Canada’s obligations illusory. In any case, Canada acted impermissibly to wholly avoid the responsibility of exercising jurisdiction in accordance with Article 6.⁵⁶

As Canada explains, the normal course of action during the investigation stage is that “the police question complainants, witnesses and suspects and they may conduct searches and seize evidence.”⁵⁷ The Complainants confirm that there was no effort made to contact them or question any of them at any point by any Canadian official. Moreover, Canada does not claim to have questioned the suspect, Mr. Bush, about the allegations of torture made against him. Canada’s admission that the Royal Canadian Mounted Police (“RCMP”) has never investigated allegations made against Mr. Bush – despite submission of a case against him, with over 4,000 pages of information from sources including by Mr. Bush himself, official U.S. government documents, memoranda issued directly by, as well as under the direction, of Mr. Bush, United Nations reports, International Committee of the Red Cross (“ICRC”) reports, statements by the Complainants, the U.S. military, and congressional investigatory reports – is *prima facie* evidence of a violation of Article 6 of the Convention.⁵⁸

a) Article 6(1)

Article 6(1) contains, first and foremost, an obligation to examine information available to the State party in whose territory an alleged torturer is present. The language in this provision is unambiguous and does not allow for a State party to simply refuse to conduct a *review* of the information. By its plain terms – “after an examination” – a State party is obligated to actually examine the information available to it. Based on the purpose of the Convention and as evident by the follow-up steps and obligations that flow from it, such an examination must not be so cursory that it does not allow for a full and proper assessment of whether there may be a case against a named person for acts of torture. Nor must such an examination be undertaken with

⁵⁴ Canada Submission, para. 81.

⁵⁵ *See Belgium v Senegal*, para. 86:

While the choice of means for conducting the inquiry remains in the hands of the States parties, taking account of the case in question, Article 6, paragraph 2 of the Convention requires that steps must be taken as soon as the suspect is identified in the territory of the State, in order to conduct an investigation of that case. That provision must be interpreted in the light of the object and purpose of the Convention, which is to make more effective the struggle against torture. The establishment of the facts at issue, which is an essential stage in that process, became imperative in the present case at least since the year 2000, when a complaint was filed against Mr. Habré.

⁵⁶ Nowak and McArthur Commentary, *supra* n.7, p. 340.

⁵⁷ Canada Submission, para. 23.

⁵⁸ Canada notes that “[a]llegations of international crimes are considered by an inter-departmental committee,” Canada Submission, para. 21, but it fails to provide any information about whether the case (including the 4,000+ pages in the Information Package sent to the Attorney General in September 2011) against Mr. Bush was considered by that committee, and if so, what decisions it took and the basis for such decisions.

either a pre-ordained outcome or a level of scepticism that the review is not undertaken on the merits and in an objective manner. Canada has put forward no evidence or claim that it, in fact, carried out such a review; on the contrary, its submission makes it quite clear that Canada did not.⁵⁹

Contrary to Canada's assertions, the information contained in the Information Package was sufficient to trigger Article 6(1) obligations. Article 6(1) specifically states that action is to be taken based upon available "information." The question for the authorities at this stage, as Nowak and McArthur explain, "is whether the information is sufficient and reliable enough to arrest the person and carry out proper criminal investigations."⁶⁰ The information must be credible.⁶¹ It can include information from victims, governments, inter-governmental and non-governmental organizations and other sources, such as the media or truth commissions.⁶²

The Information Package in this case includes, most notably, official memoranda issued by Mr. Bush or subordinates in his chain of command (including legal memoranda authorizing acts that are widely recognized to constitute torture and cruel, inhuman or degrading treatment),⁶³ and direct admissions from Mr. Bush that he ordered or authorized practices that have been found to constitute torture under U.S. and international law, including waterboarding.⁶⁴ The Information Package also contains detailed declarations about the Complainants' torture.⁶⁵ Finally, although Canada dismisses reports included in the Information Package, these highly-detailed reports – from the U.S. government (including the Central Intelligence Agency Inspector General),⁶⁶ the ICRC, the United Nations (including the Special Rapporteur on Torture, Cruel, Inhuman or Degrading Treatment)⁶⁷ as well as the European Parliament⁶⁸ – provide abundant information about the Bush administration's use of torture and Mr. Bush's personal and direct role in

⁵⁹ See, e.g., Canada Submission, paras 22-23 and *supra* p.11, confirming *inter alia* Complainants were not questioned by RCMP. See also *ibid.* at 42 (RCMP did not investigate allegations against Bush in 2009, in September 2011 or in October 2011, when Bush was present in its territory); para. 43 (Attorney General of Canada did not investigate, or order an investigation, of allegations against Bush when brought to his attention in September 2011 and again in October 2011, when Bush was present in Canada).

⁶⁰ Nowak and McArthur Commentary, *supra* n.7, p. 319.

⁶¹ *Ibid.* at p. 340.

⁶² *Ibid.*

⁶³ See Communication, Annex 2, Appendix at Exs. 16, 9, 10, 11, 13, 14, 17, 18, 19, 22, 24, 42 and 53.

⁶⁴ See *Ibid.* at Exs. 20, 25 and 51. See also *ibid.* at 51.

⁶⁵ See Communication, pp. 9-10, and n.35, which contains the criminal information filed by the Complainants against Bush.

⁶⁶ See Communication, Annex 2, Appendix at Exs. 5, 12, 40, 47 and 48. See also *ibid.* at Exs. 3, 32, 34 and 39.

⁶⁷ *Ibid.* at Exs. 8, 15, 21, 43, 44 and 49. Furthermore, the Complainants' attempted private prosecution was also accompanied by a letter of support signed by, among others, two former Special Rapporteurs on Torture, Theo Van Boven and Manfred Nowak. The letter states that the information provided to support the private prosecution against Mr. Bush set forth reasonable and probable grounds to believe he committed torture. See Letter in Support of Private Prosecutions Filed Against George W. Bush for Torture to Robert Nicholson, Minister of Justice and Attorney General of Canada, 19 Oct. 2011, available at http://ccrjustice.org/files/2011-10-19_UPDATED_FINAL_Letter_of_Support_SIGNED.pdf.

⁶⁸ Communication, Annex 2, Appendix at Exs. 6, 7 and 27.

authorizing, directing, condoning, and facilitating the use of torture against detainees, including that of the Complainants.⁶⁹

Canada's attempt to discredit this information *en masse* is unconvincing; this is especially true when one considers that it wrongfully surveyed the information in a speculative manner (i.e., "most likely would not be admitted") and applied the standard of *evidence* admissible *at trial* as opposed to *information* to warrant opening a *preliminary investigation*.⁷⁰ Inaction under Article 6(1) cannot be justified based on a perception of a lack of available evidence admissible for trial.

Canada's explanation for its inaction demonstrates its misconception – or disregard – of its obligations. It argues that "admissible evidence" was not provided and speculates that there was no reasonable prospect that sufficient evidence to support a charge against Mr. Bush could have been assembled.⁷¹ Specifically, Canada asserts that there was an "absence of a reasonable expectation of assistance from the U.S. for an investigation" and that therefore it had no basis to take Mr. Bush into custody.⁷² However, as discussed above, Article 6(1) contemplates an examination of the available *information*, and does not depend on what the State party may or may not later obtain. Based on its own admissions, Canada took no investigatory steps to assemble a package to lay criminal charges against Mr. Bush.

Moreover, the decision to detain or otherwise "ensure...presence," contrary to Canada's submission, precedes consideration of the results of the criminal investigation. Even if the decision about ensuring Mr. Bush's presence should have been made in accordance with purely domestic law standards, the evidence in the Information Package would have satisfied the reasonable-and-probable-grounds-to-believe test set out in Canadian jurisprudence for arrest. Canada incorrectly dismisses the Information Package on the basis that it contains hearsay evidence from secondary sources, but it is well established in Canadian jurisprudence that reasonable and probable grounds can be based on hearsay evidence.⁷³ Moreover, Canadian courts and tribunals, at all levels, rely on secondary sources from reputable inter-governmental organizations such as the United Nations and ICRC, as well as non-governmental organizations, finding them to be reliable and credible sources.⁷⁴

It is evident from the submissions that Canada incorrectly incorporated a judicial or quasi-judicial role into the assessment of Article 6, i.e., Canada submits that the police could not rely on Mr. Bush's admissions because they "would *most likely* not be admitted in court of law for the truth of their contents" (emphasis added).⁷⁵ The police, however, are not supposed to make a

⁶⁹ Complainants observe that the Information Package does not contain an exhaustive record of all information regarding Mr. Bush's involvement in torture. There is additional information in the public domain, and based on the well-recognized information sharing between the United States and Canada, *see. e.g.*, Communication, Annex 2, Appendix at Ex. 29. Presumably significant materials are available to Canada outside of the public domain.

⁷⁰ Canada Submission, para. 98.

⁷¹ *Ibid.* at pp. 4, 24-25.

⁷² *Ibid.* at p. 4.

⁷³ *R. v. Brown* (N.S.C.A.) [1987] N.S.J. No. 2; *R. v. Reilly* [2008] O.J. No. 164; *Eccles v. Bourgue et al.*, [1975] 2 S.C.R. 739,

⁷⁴ *Mahjoub v. Canada* (Minister of Citizenship and Immigration) (F.C.) 2006 FC 1503, paras. 72- 74.

⁷⁵ Canada Submission, para. 98 As described below, the Complainants do not concede Canada's characterizations regarding the admissibility of specific evidence in the Information Package, particularly Canada's

decision about the admissibility of evidence in court. The distinction between the role of the police and the prosecutor is described by the Supreme Court of Canada in *Hill v Hamilton-Wentworth Regional Police Services Board*:

Police are concerned primarily with gathering and evaluating evidence. Prosecutors are concerned mainly with whether the evidence the police have gathered will support a conviction at law. The fact-based investigative character of the police task distances it from a judicial or quasi-judicial role. The possibility of holding police civilly liable for negligent investigation does not require them to make judgments as to legal guilt or innocence before proceeding against a suspect. Police are required to weigh evidence to some extent in the course of an investigation: *Chartier v. Attorney General of Quebec*, [1979] 2 S.C.R. 474. But they are not required to evaluate evidence according to legal standards or to make legal judgments. That is the task of prosecutors, defence attorneys and judges.⁷⁶

Canadian jurisprudence also recognizes that an investigation does not stop at the point of detention or the laying of charges. The Supreme Court of Canada has affirmed that “police can continue their investigation subsequent to arrest.”⁷⁷

b) Article 6(2)

In failing to commence a preliminary inquiry following its failure to properly examine the information available to it, Canada violated Article 6(2). The purpose of the preliminary inquiry is to gather evidence which can then be used by the authorities to decide whether to prosecute (or extradite).⁷⁸ It is during the investigation that the State commences active information-gathering, questioning the alleged torturer, interviewing witnesses and victims (such as the Complainants), making inquiries, and searching for documentary evidence.⁷⁹

In *Belgium v Senegal*, the International Court of Justice (“ICJ”) discussed the nature of the obligation under Article 6(2). The Court confirmed that the purpose of this preliminary investigation is to gather facts and evidence which can then be used by the competent authorities to determine whether to proceed with prosecution. The ICJ also confirmed that during this stage there is an obligation to seek assistance from the territorial or national State:

In the opinion of the Court, the preliminary inquiry provided for in Article 6, paragraph 2, is intended, like any inquiry carried out by the competent authorities, to corroborate or not the suspicions regarding the person in question. That inquiry is conducted by those authorities which have the task of drawing up a case file and collecting facts and evidence; this may consist of documents or witness statements relating to the events at issue and to the suspect’s possible involvement in the matter concerned. Thus the co-

claim regarding Mr. Bush’s statements in media interviews and his memoir. Regardless, as described in detail in this section, Article 6(1) requires a State party to act on information available to it rather than admissible evidence.

⁷⁶ *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, paras. 49, 50.

⁷⁷ *R v Storrey*, [1990] 1 S.C.R. 241, paras. 25-28.

⁷⁸ Nowak and McArthur Commentary, *supra* n.7, p. 340.

⁷⁹ *Ibid.*

operation of the Chadian authorities should have been sought in this instance, and that of any other State where complaints have been filed in relation to the case, so as to enable the State to fulfill its obligation to make a preliminary inquiry.⁸⁰

A State violates its obligations under Article 6(2) by not commencing an inquiry. The ICJ found “it is not sufficient, as Senegal maintains, for a State party to the Convention to have adopted all the legislative measures required for its implementation; it must also exercise its jurisdiction over any act of torture which is at issue, starting by establishing the facts.”⁸¹ This obligation is triggered as soon as the suspect is identified in the forum State’s territory, and is controlled by the low standard of “reason to suspect.”⁸²

Senegal’s violations mirror the inaction of Canada in this case. Canada had sufficient information to give it a reason to suspect Mr. Bush was responsible for torture. As a result, Canada had an obligation to investigate. Canada attempts to distinguish the *Belgium v. Senegal* case by noting that Mr. Habré lived in Senegal for many years.⁸³ This is irrelevant. First, the requirement of Article 5(2) is “presence” and not residency. Second, Canada had ample notice of Mr. Bush’s alleged involvement in torture. It was on notice about allegations against Mr. Bush as early as 2004,⁸⁴ and less than two months after leaving office Mr. Bush visited Canada again (March 2009).⁸⁵ The head of the RCMP’s War Crimes Section was aware of allegations against Mr. Bush but he indicated that the RCMP would not initiate an investigation because the RCMP only investigates those who “are present (living) in Canada on an ongoing basis,” an impermissible justification under the Convention.⁸⁶ Mr. Bush returned to Canada on 19 September 2011 to speak at an event in Toronto. Notably, during this visit the RCMP “facilitated traffic and security” rather than arrest Mr. Bush.⁸⁷ That same month, CCR, CCIJ and other human rights organizations submitted detailed information to Canadian authorities in anticipation of Mr. Bush’s return to Canada nearly one month later, on 20 October 2011.⁸⁸

It is evident from Canada’s submissions that Canada fundamentally misunderstood or wilfully misconstrued the nature of the obligation under Article 6(2). Canada acknowledges that no investigation was commenced. As a justification, Canada relies on investigative discretion, an unfounded claim of a lack of available evidence and the administrative complexity of the investigation. An unfounded perception or speculation that an investigation will not result in sufficient evidence cannot prompt a decision to simply forego an investigation. The preliminary

⁸⁰ *Belgium v Senegal*, para. 83.

⁸¹ *Ibid.* at para. 85.

⁸² *Ibid.* at paras. 86, 88.

⁸³ Canada Submission, para. 82.

⁸⁴ *See Davidson v British Columbia (Attorney General)* 2006 BCJ No. 2630.

⁸⁵ *See* Nicholas Köhler, “George W. speaks in Calgary,” MACLEANS, 17 Mar. 2009. *available at* <http://www2.macleans.ca/2009/03/17/george-w-speaks-in-calgary/>.

⁸⁶ Charlie Smith, “RCMP won’t investigate George W. Bush; British MP George Galloway banned from Canada,” STRAIGHT.COM, 20 Mar. 2009, *available at* <http://www.straight.com/news/rcmp-wont-investigate-george-w-bush-british-mp-george-galloway-banned-canada>.

⁸⁷ Brendan Kennedy, “George W. Bush Comes and Goes, Toronto Barely Notices,” TORONTO STAR, 21 Sept. 2011, *available at* http://www.thestar.com/news/gta/2011/09/21/george_w_bush_comes_and_goes_toronto_barely_notices.html.

⁸⁸ *See* Communication, p. 15, n.57.

investigation under Article 6(2) is required for the authorities to prepare a report to provide to other States under Article 6(4) and to its own competent authorities to determine whether to proceed with prosecution, a decision made under Article 7.

In assessing whether the Information Package contains evidence admissible in a trial, Canada conflated its obligations under Articles 6 and 7. This conflation fails to recognize that Canada has an independent obligation to carry out an investigation under Article 6(2) that indeed could lead to (additional) admissible evidence. Canada's interpretation completely obfuscates the obligation to carry out an investigation.

Canada also cannot rely on the complex nature of the investigation to shirk its obligations.⁸⁹ Although an investigation may take time and is dependent on the complexity of the circumstances of each case,⁹⁰ this Committee held in *Guengueng* that "a State party cannot invoke the complexity of its judicial proceedings or other reasons stemming from domestic law to justify its failure to comply with these obligations under the Convention."⁹¹ Furthermore, as mentioned above, Canada had sufficient notice of both Mr. Bush's alleged crimes and his impending visit to commence an investigation. That Canada readied itself to provide security for Mr. Bush rather than investigate the serious allegations against him is deeply misguided and contrary to its obligations as a State party to the Convention.

Canada claims that the State in which the alleged torturer resides will most often have the best access to evidence and witnesses,⁹² and that in the present case this information "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."⁹³ It nevertheless failed to make any inquiry to the United States for such information. If Canada is to be taken at its word, it simply reached an independent conclusion that there was "no realistic prospect of obtaining sufficient evidence through reasonable efforts or due diligence"⁹⁴ – neither of which Canada demonstrates it exercised.

Regardless of Canada's opinion as to whether U.S. cooperation would be forthcoming, it still should have made a good faith effort to seek assistance from the United States, its closest ally. Canada has a long history of cooperation with the United States on matters of assistance in criminal investigations and prosecutions. For example, the *Treaty Between Canada and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters* obliges the United States to, at minimum, consider a Canadian request for assistance.⁹⁵

⁸⁹ Canada Submission, para. 83.

⁹⁰ Nowak and McArthur Commentary, *supra* n.7, p. 342.

⁹¹ *Guengueng*, para. 9.8.

⁹² Canada Submission, para. 99.

⁹³ *Ibid.* at para. 92. The Complainants recall that the Vice-President of the United States under the Bush administration, Dick Cheney, has made numerous public statements and admissions about the authorization and use of acts recognized as torture, including waterboarding, on numerous occasions. Mr. Cheney has traveled to Canada at least twice since leaving public office, including in September 2011 and most recently on 31 October 2013, and thus could be readily available for questioning by Canadian officials, as, at minimum, a source of "information" about alleged torture during the Bush administration.

⁹⁴ *Ibid.* at para. 103.

⁹⁵ *Treaty Between Canada and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters*, Can TS 1990/19.

Moreover, Canada has signed the *Four Country Memorandum of Understanding with Respect to Investigations Relating to Genocide, War Crimes and Crimes Against Humanity* with the United States, Australia and the United Kingdom; this suggests that there is additional cooperation between Canada and the United States where allegations of international crimes arise.⁹⁶ Nevertheless, the Complainants maintain that due to the large amount of information already in the public domain, assistance from the United States was not necessary to gather sufficient information against Mr. Bush either to warrant ensuring his presence in Canada for the duration of a preliminary investigation or to lay charges against him.

Finally, Canada's reliance on investigative discretion is unreasonable in light of Canada's jurisprudence which sets a low threshold for commencing investigations. The Supreme Court of Canada in *Hill v Hamilton-Wentworth* found, "At the outset of an investigation, the police may have little more than hearsay, suspicion and a hunch...[I]ater, in laying charges, the standard is informed by the legal requirement of reasonable and probable grounds to believe the suspect is guilty."⁹⁷ The evidence submitted in the Information Package satisfies this low threshold to commence an investigation. Canada was obligated to fulfill that requirement and cannot now shield itself under the guise of discretion.

4. *Canada Violated Article 7*

The object of Article 7(1) is to "prevent any act of torture from going unpunished."⁹⁸ Non-action by the forum State cannot be used as an excuse for failing to prosecute an alleged torturer. It would make a mockery of the Convention if a State were able to use the breach of its Article 6 obligations to investigate as a basis for asserting that it lacked sufficient evidence to prosecute under Article 7.

As far back as 2000, this Committee indicated that in order to comply with its obligations under Article 7, Canada must "prosecute every case of alleged torture under its jurisdiction where it did not extradite the alleged torturer and the evidence warranted it."⁹⁹ As recent as 2012, the Committee, fully aware of Canada's failure to prosecute Mr. Bush when he was in Canada, expressed its concerns about Canada's compliance with Article 7. The Committee thereby "recommend[ed] that the State party take all necessary measures with a view to ensuring the exercise of the universal jurisdiction over persons responsible for acts of torture, *including foreign perpetrators who are temporarily present in Canada*" (emphasis added).¹⁰⁰

In its failure to prosecute Mr. Bush, Canada violated Article 7 of the Convention. First, it failed to exercise its independent obligation to prosecute a suspected torturer who was present in Canada. Second, officials in Canada actively thwarted the Complainants from their own attempt to prosecute Mr. Bush.

⁹⁶ Available at <http://cbsa.gc.ca/security-securite/wc-cg/wc-cg2011-eng.html>.

⁹⁷ *Hill v Hamilton-Wentworth*, para. 68.

⁹⁸ Nowak and McArthur Commentary, *supra* n.7, p. 358.

⁹⁹ *Ibid.* at p. 357.

¹⁰⁰ Communication, p. 14, n.51, quoting Concluding observations of the Committee against Torture, Canada, CAT/C/CAN/CO/6, 25 June 2012.

a) Canada Failed to Exercise its Independent Obligation to Prosecute a Suspected Torturer

i) The Obligation to Prosecute

The forum State under Article 7(1) has been described by Nowak and McArthur as having the “strongest obligation” to bring suspected torturers before domestic courts.¹⁰¹ It is not subject to any condition other than the presence of a suspect, and thus the purpose and duration of the suspect’s presence are irrelevant.¹⁰² Prosecution by the forum State when sufficient evidence exists can only be avoided where extradition has been sought and such extradition is in accordance with international law.¹⁰³

In the instant case, Canada acknowledges that there was no request for Mr. Bush’s extradition by the United States or any other State.¹⁰⁴ Therefore, following the preliminary inquiry procedure (which was not undertaken, as discussed above), Canada should have conducted a prosecution for torture. In failing to do so, Canada violated Article 7(1). The short duration of Mr. Bush’s visit, or the fact that the purpose was merely to deliver a speech, are irrelevant.

ii) The Sufficiency and Admissibility of the Evidence

Even without any further evidence Canada had sufficient evidence from the Information Package to prosecute under section 7(1). As described above, the Complainants’ primary position is that, under Article 6, Canada only needed sufficient *information* to detain Mr. Bush and launch a preliminary inquiry. In addition, however, the Complainants assert that Canada was in possession of sufficient *evidence* to submit the case to its competent authorities for the purpose of prosecution under Article 7(1) based on the Information Package.

According to Article 7(2) of the Convention, the “standards of evidence required for prosecution...shall in no way be less stringent than those which apply [to prosecutions by the territorial, national and flag States]”.¹⁰⁵ The purpose of Article 7(2) is to ensure that “suspected torturers...[are] not prosecuted or convicted by exercising universal jurisdiction on the basis of insufficient or inadequate *evidence*” (emphasis added).¹⁰⁶

The Complainants agree that any prosecution of Mr. Bush by Canada ought to be conducted in accordance with the rules of evidence that would be applicable to crimes prosecuted under s. 269.1 of the *Criminal Code* – that is, the same standards applicable to any criminal prosecution in Canada. However, it is disingenuous for Canada to assert that it could not exercise universal jurisdiction on the basis of insufficient or inadequate evidence when it did not conduct a preliminary investigation to determine whether such evidence could be obtained.

Canada then challenges the quality of the Information Package on two grounds: 1) the “inappropriateness” of speaking about the sufficiency of the evidence, and 2) the Information Package is inadmissible under the laws of evidence in Canada.

¹⁰¹ Nowak and McArthur Commentary, *supra* n.7, p. 345.

¹⁰² *Ibid.* at pp. 345, 360.

¹⁰³ *Ibid.* at pp. 345, 365.

¹⁰⁴ Canada Submission, para. 88.

¹⁰⁵ Nowak and McArthur Commentary, p. 366.

¹⁰⁶ *Ibid.*

First, Canada states that it is “entirely inappropriate to speak in specific terms about the sufficiency of the evidence against Mr. Bush,”¹⁰⁷ but by taking this position Canada cannot substantiate its claim that insufficient evidence was the reason for its failure to prosecute. In *Guengueng*, the Committee found that a State party has the obligation to prosecute “unless it could show that there was not sufficient evidence to prosecute, at least at the time when the complainants submitted their complaint.”¹⁰⁸ Therefore, the onus is on Canada to provide support for its claim that the evidence was insufficient.¹⁰⁹

Furthermore, Canada’s assertion, if accepted, would render the Committee unable to test Canada’s contention that it acted in compliance with Article 7(1). The Complainants agree that Canadian prosecutorial authorities have discretion to determine whether evidence is sufficient to procure a conviction; however, in addressing this Committee, reasons must be provided as to how this conclusion was reached. In the absence of such reasons, the Committee cannot judge whether the conclusions of the prosecutorial authorities in Canada were in compliance with the Convention.

Canada also asserts that the information submitted lacks the quality of “evidence” under domestic laws of evidence because it is inadmissible in a Canadian court as hearsay. Canada states that exceptions to the rule against hearsay are only available when “sufficient guarantees of reliability are met and the inability to obtain the evidence through a non-hearsay means is established.”¹¹⁰ It thereby concludes that some of the information, such as Mr. Bush’s *Decision Points* memoir, “would most likely not be admitted in a court of law for the truth of [its] contents.”¹¹¹

This is an inaccurate statement of Canadian law. Mr. Bush’s confirmation that he authorized waterboarding and other interrogation techniques constitutes an admission,¹¹² which is a valid exception to the rule against hearsay.¹¹³ Moreover, with regard to admissions, there “is no requirement that necessity and reliability or other conditions precedent be established, as is the case with the traditional common law hearsay exceptions”.¹¹⁴ Therefore, the admissions of Mr. Bush in *Decision Points* and media interviews are admissible in a Canadian court of law.

¹⁰⁷ Canada Submission, para. 98. In spite of this assertion, Canada then proceeds to speak in specific terms about certain evidence, including Mr. Bush’s memoir and media interviews.

¹⁰⁸ *Guengueng*, para. 9.8.

¹⁰⁹ CCR and CCIJ were not the only organizations to submit information to the Attorney General. *See* Communication, p. 15, n. 57.

¹¹⁰ Canada Submission, para. 95.

¹¹¹ *Ibid.* at para. 98.

¹¹² George W. Bush, *Decision Points* (New York: Crown Publishing Group, 2010) 165, 169-171. An admission constitutes any out of court statement that is made by a party to the proceeding. It should be distinguished from a declaration against interest (which is made by a declarant who is *not* a party to the proceeding) and a confession (a statement made by an accused person to a person in a position of authority).

¹¹³ Admissions are presumptively admissible, *see R v SGT*, 2010 SCC 20, para. 20.

¹¹⁴ David Watt, *Watt’s Manual of Criminal Evidence* (Toronto: Carswell, 2011) at 557-558.

b) Officials in Canada Actively Blocked the Complainants from an Attempt to Prosecute a Suspected Torturer

In *Guengueng*, the Committee found that the decision of the Senegalese Court of Cassation to “put an end to any possibility of prosecuting Hissène Habré in Senegal” was a violation of Article 7.¹¹⁵ Like the situation in *Guengueng*, the decision in this case to stay the proceedings in the private prosecution described in section II(B)(3) *supra* effectively put an end to prosecuting Mr. Bush in Canada. Canada also violated its obligations under Article 7 by bringing to a close the only actual legal process in place.

IV. ADDITIONAL EXAMPLES HIGHLIGHTING THE VIOLATIONS

Additional support that the information provided in this case was sufficient to trigger obligations under the Convention can be found in other examples where countries have either carried out their obligations or failed to do so. Two positive cases include the French prosecution against Ely Ould Dah and the Zardad case referenced above.¹¹⁶

The Ely Ould Dah prosecution in France was commenced based on a complaint filed by two ex-Mauritanian soldiers who had asylum in France.¹¹⁷ They accused Ely Ould Dah, a Mauritanian army lieutenant visiting France to participate in a training course, of responsibility for their torture. Based on this complaint, Ould Dah was arrested and placed under investigation. Ould Dah was then released under judicial supervision and he absconded to Mauritania. France, however, continued with the prosecution *in absentia* and Ould Dah was convicted.¹¹⁸ The prosecution received positive acknowledgment from this Committee, which also noted concern that France did not retain custody. With regards to Article 6, the Committee stated:

The Committee regrets that the State party did not take the necessary steps to keep Mr. Ould Dah in its territory and ensure his presence at his trial, in conformity with its obligations under article 6 of the Convention (art. 6).

The Committee recommends that, where the State party has established its jurisdiction over acts of torture in a case in which the alleged perpetrator is present in any territory under its jurisdiction, it should take the necessary steps to have the person concerned taken into custody or to ensure his or her presence, in conformity with its obligations under article 6 of the Convention.¹¹⁹

¹¹⁵ *Guengueng*, para. 9.7

¹¹⁶ See Manfred Nowak, “Torture and Enforced Disappearance,” in Catarina Krause and Martin Scheinin (eds.) *International Protection of Human Rights: A Textbook* (Åbo Akademi University, 2009) 164, available at [http://www.univ-rouen.fr/servlet/com.univ.utils.LectureFichierJoint?CODE=1285773636670&LANGUE=0](http://www.univ-rouen.fr/servlet/com.univ.utils.LectureFichierJoint?CODE=1285773636670&LANGUE=0;).; Crown Prosecution Service, “CPS Secures Historic Torture Conviction,” 18 July 2005, http://www.cps.gov.uk/news/latest_news/135_05/; Human Rights Watch, “Universal Jurisdiction in Europe: the State of the Art” U.K. and Wales, Section B, http://www.hrw.org/reports/2006/ij0606/13.htm#_Toc137876552. The Zardad case was a prosecution brought under the U.K.’s obligations under Article 5(2). The prosecution was triggered by a BBC documentary, and thus based on hearsay and information in the media.

¹¹⁷ For more information, see <http://www.fidh.org/en/africa/Mauritania/Ely-Ould-Dah-Case/>.

¹¹⁸ Nowak and McArthur, *supra* n.7, pp. 299-300.

¹¹⁹ CAT/C/FRAU/CO/3, para. 14, available at [http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/9a3c621ae2783bcfc12571680045b1ad/\\$FILE/G0641156.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/9a3c621ae2783bcfc12571680045b1ad/$FILE/G0641156.pdf).

In contrast to these examples are Germany's failure to detain and commence an investigation of Zokirjon Almatov and Austria's failure to take action to detain and investigate Izzat Ibrahim Khalil Al Duri. Both decisions were criticized as violations of the forum States' duties under the Convention. Al Duri, the Deputy of former Iraqi President Saddam Hussein, travelled to Austria in 1999 to undergo medical treatment. A complaint was filed by the Green Party seeking his arrest and investigation, but al-Duri left Austria without incident.¹²⁰ Similarly, when Uzbekistan's then-Minister of Internal Affairs, Zokirjon Almatov, travelled to Germany, a complaint was filed by victims and Human Rights Watch. The complaint included a statement of support by then Special Rapporteur Theo Van Boven and was based, at least in part, on the result of fact finding missions that he had carried out in Uzbekistan.¹²¹ Nonetheless, the German prosecutor failed to take any action or commence an investigation.¹²² Germany attempted to justify its inaction by saying "the likelihood of a successful investigation was non-existent given that it would have to be carried out partly in Uzbekistan and that the Uzbek government was unlikely to cooperate."¹²³

These situations have been criticized as examples of forum States abusing their discretion to avoid fulfilling their obligations under the Convention, specifically Articles 5(2) and 6. With respect to the Almatov case, Nowak and McArthur note that there were significant numbers of witnesses available outside Uzbekistan who could testify in addition to a number of international officials who offered to testify.¹²⁴ Additionally, Nowak and McArthur criticize the decision for overlooking the findings on torture made by the Special Rapporteur, further showing that such information should be considered at this stage of the analysis.¹²⁵ With respect to both cases, Nowak and McArthur conclude that the inaction violated Articles 5(2) and 6:

There can be no doubt that the Governments of Austria (in the Al Duri case) and Germany (in the Almatov case) also violated their obligations under Articles 5(2) and 6. In particular, both governments had an obligation under Article 6 to ensure the presence of the suspected torturers. Secondly, there were under an obligation to carry out a preliminary investigation of the facts. If no other State had requested extradition of Mr. Al-Duri or Mr. Almatov, Austria and Germany, as forum States, would have had no choice but to bring forth individuals to justice before their domestic courts.¹²⁶

¹²⁰ See, e.g., Nowak, "Torture and Enforced Disappearance," *supra* n.116, 165.

¹²¹ A/JRC/4/33/Add.1 para. 75: *available at* <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/120/41/PDF/G0712041.pdf?OpenElement>.

¹²² See, e.g., Human Rights Watch, "Theo Van Boven's Letter to Monika Harms, Federal Prosecutor of Germany," 12 June 2006, <http://www.hrw.org/news/2006/06/12/theo-van-boven-s-letter-monika-harms-federal-prosecutor-germany>; Human Rights Watch, "Germany: Uzbek Security Chief Accused of Crimes Against Humanity," 14 Dec. 2005, <http://www.hrw.org/news/2005/12/14/germany-uzbek-security-chief-accused-crimes-against-humanity>.

¹²³ Nowak and McArthur Commentary, *supra* n.7, pp. 295-296.

¹²⁴ *Ibid.* at p. 296.

¹²⁵ *Ibid.* at p. 296.

¹²⁶ *Ibid.* at p. 319. Additionally, in criticizing the lack of action Nowak and McArthur note that Almatov's responsibility for the torture was well-documented. This statement is based on secondary reports by Human Rights Watch, Amnesty International, the United Nations High Commission for Human Rights, the Organization for Security and Cooperation in Europe and the former Special Rapporteur Van Boven. See *ibid.* at p.295.

These two instances are remarkably similar to the instant case and further highlight that Canada's inaction violated the Convention.

A final example is the Pinochet case. The United Kingdom's obligations when Mr. Pinochet was present in its territory garnered attention from the Committee. The discussions show that, despite the extradition request from Spain, the U.K. had an obligation under Articles 4 to 7 of the Convention to refer the matter to the authorities to consider whether to initiate criminal proceedings in the U.K.¹²⁷ The Chairman of the Committee noted the obligation of States to at least consider the possibility of prosecution: "[w]hether they decided to prosecute would depend on the evidence available, but they must at least exercise their jurisdiction to consider the possibility."¹²⁸ Specifically, noting Article 6, Committee member Sørensen commented that:

In the matter of Mr. Pinochet, pursuant to article 6 of the Convention, the United Kingdom authorities should merely have taken "legal measures to ensure [Mr. Pinochet's] presence". As for the examination of available information, when Chile's report had first been considered by the Committee, the delegation had estimated that some 100,000 persons had been tortured, which would appear to be sufficient reason to "ensure Mr. Pinochet's presence".¹²⁹

V. CONCLUSION

For the foregoing reasons, the Complainants respectfully request that the Committee find that Canada failed to uphold its obligations under Articles 5(2), 6 and 7 of the Convention, and order the relief sought in the Communication.

Respectfully submitted,

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¹²⁷ CAT/C/SR.360 at para. E(f); Ingelse, *supra* n.38, p.351.

¹²⁸ CAT/C/SR.354 at para. 39.

¹²⁹ *Ibid.* at para. 46.