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**COMMENTARY: Justice department justifies contracting out of torture**

By Reem Bahdi

February 01 2008 issue

Muayyed Nurreddin, Abdullah Almalki and Ahmad El Maati are all Canadian citizens. However, they have been constructed as non-citizens who have effectively been told that they should not expect the full benefit or protection of Canada's prohibition on torture. Their constructed non-citizen status was recently highlighted by the Department of Justice (DOJ) before the Iacobucci Inquiry.

Appointed to chair an "Internal Inquiry," retired Supreme Court Justice Frank Iacobucci has been tasked with determining whether Canadian officials caused – directly or indirectly – the overseas detention and torture of Almalki, El Maati and Nureddin. Pursuant to its mandate as interpreted by Justice Iacobucci, the inquiry has been conducted largely in secret.

However, in a rare public appearance before the commission, DOJ argued that even if Ottawa did share information with torturing states and thus helped facilitate the men's arrest and detention abroad, this would not put Canada in breach of its obligations under the *International Convention Against Torture* (CAT). The CAT, according to the DOJ, simply requires Canadian officials to prevent torture on its own soil, but creates no obligation for Canadian officials vis-à-vis events that take place in foreign countries.

The DOJ's submissions were not focused on whether Canada has a responsibility to the three Canadian citizens in relation to Syria's conduct. Rather, the issue being addressed is whether international law sets any standards for the conduct of Canadian officials in the circumstances. The DOJ essentially argued that Canadian officials operate in a state of lawlessness.

Interestingly, borders do not always frustrate protection from torture in Canadian law. If the Syrian officials who actually inflicted the torture on these Canadian men found themselves in Canada, they could be prosecuted under the Criminal Code. And, if Almalki, El Maati and Nurreddin were non-citizens at risk of being deported to torture, Canadian law would provide them some measure of protection as well. But the border has different significance for Almalki, El Maati and Nurreddin, according to the DOJ. They appear to have no legal protection — even if they are Canadian citizens and even if the focus is on made-in-Canada decisions rendered by Canadian officials.

At least this is how the DOJ has interpreted Canada's obligations under the CAT.

Sadly, the DOJ's logic can be harnessed to justify the contracting out of torture, and undermines the very purpose of the CAT, which aims to prohibit torture in all its forms. The DOJ offered both the inquiry and the Canadian public an overly formalistic and ultimately unpersuasive reading of Canada's legal obligations. The CAT does indicate that states are responsible for implementing its provisions within their territory. The territorial reference is meant to underline that states must clearly prevent torture committed on their soil, but it does not stipulate that responsibility for torture categorically ends at one's border. In other words, nothing in the CAT relieves Canadian government officials from responsibility should they facilitate torture on foreign soil.

The CAT stresses that torture cannot be committed by anyone, under any circumstances, for any reason whatsoever. And, like all human rights treaties, this treaty must be interpreted in light of a fundamental international legal principle: states must take positive and effective measures to ensure the human rights of those living within their territories. When states are tempted to finesse their obligations, they should consider a statement by the U.N. Special Rapporteur on Torture:

"I remind governments around the world that they are not only obliged to refrain at all times from using torture — they also have a duty not to transfer persons in their custody to countries where they are at risk of being tortured; a duty to refrain from encouraging torture anywhere in any way; and a duty to actively prevent torture, inter alia by bringing torturers to justice."

Curiously, Canada's stance before international bodies differs from DOJ's position before the Iacobucci Inquiry. In their report to the U.N.'s Committee Against Torture, Canadian officials accepted, at least implicitly, that the CAT prohibits contributing to torture either directly or indirectly. Noting the Arar Inquiry, Canadian representatives told members of the U.N. committee that "Canada takes allegations of torture seriously, especially where it is alleged that Canadian officials may have been implicated, however indirectly, in incidents of torture."

Canada's legal obligations are clear. For greater emphasis and to help reaffirm the futility and immorality of torture, the B.C. Civil Liberties Association has proposed anti-torture legislation to codify Canada's obligations under domestic and international law (for further information, see <http://www.bccla.org/antiterrorissue/torturenutshell.htm>).

Everyone – citizen and non-citizen alike – should be secure in the knowledge that Canadian officials will not participate directly or indirectly in torture.

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