

Lawyers' Rights Watch Canada

NGO in Special Consultative Status with the Economic and Social Council of the United Nations
www.lrwc.org; lrwc@portal.ca; Tel: +1 604 738 0338; Fax: +1 604 736 1175

3220 West 13th Avenue, Vancouver, B.C. CANADA V6K 2V5

Consular protection and diplomatic intervention: International law duties to provide access to remedies for human rights violations against Canadians abroad

Submission to the
Standing Committee on Foreign Affairs and International Development,
Parliament of Canada

by Lawyers' Rights Watch Canada (LRWC)*
12 March 2018

Lawyers' Rights Watch Canada (LRWC) is a Canadian organization of lawyers and other human rights defenders who conduct research, education and advocacy on implementation of international standards for protection of the independence judges and lawyers, access to justice, and security of defenders around the world. LRWC has Special Consultative status with the United Nations (UN) Economic and Social Council (ECOSOC).

Table of Contents

1	Introduction and summary	1
2	The variable impacts of Canada's discretionary consular protection in selected cases	1
2.1	Twelve hostages: Rescued, ransomed, died or murdered	1
2.2	Sixteen Canadians unlawfully jailed abroad including one child	2
3	Canada's obligations to provide remedies: Treaties and customary international law	5
3.1	Grave violations of treaty-based rights of unlawfully detained persons	5
3.1.1	Canada's treaty obligations to provide remedies for rights violations abroad	6
3.1.2	Rights of children including youth held hostage or unlawfully detained abroad.....	6
3.2	Customary international law: Violations of peremptory (jus cogens) norms.....	6
4	Recommendations to ensure the right of access to remedies	7
4.1	Implement international recommendations: Passing a "Protection of Canadians Abroad Act"	8
4.2	Expand Canada's definition of "trafficking" to include hostages for ransom.....	9
4.3	Utilize complaint mechanisms provided by human rights treaties.....	9
4.4	Take firm action to insist on consular access to protect all citizens including dual citizens.....	10
4.5	Take leadership to improve global standards for consular protection.....	10
	References.....	12

* This report was drafted by Catherine Morris, BA, JD, LL.M., LRWC's UN Liaison Director and edited by Gail Davidson, Executive Director of LRWC. Endnotes have been removed from this submission due to length restrictions. A fully referenced version of this report may be found at <https://www.lrwc.org/canada-consular-protection-and-diplomatic-intervention/>

Consular protection and diplomatic intervention: International law duties to provide access to remedies for human rights violations against Canadians abroad¹

1 Introduction and summary

People from Canada and other countries are routinely deprived of their internationally protected rights through hostage taking and other unlawful actions outside their countries. Victims include human rights defenders, humanitarian workers, journalists, academics, business people and travelers. Some of the many Canadian victims are identified in Section 2 below. Lack of access to effective remedies, including consular protection and diplomatic intervention, has contributed to devastating consequences for victims and impunity for perpetrators. This report summarizes Canada's international law obligations to ensure rights to life, liberty, freedom from torture, enforced disappearance and hostage-taking, and access to effective remedies when these rights are violated abroad (Section 3 below). Canada does not currently recognize consular protection or diplomatic intervention as the right of all Canadians subjected to grave violations of internationally protected rights. Instead, Canada provides consular services on a discretionary basis. The absence of human rights-based criteria for provision of consular services and diplomatic intervention has resulted in inconsistency, inequality, and discrimination and has exposed Canadians abroad to grave violations of rights without access to legal protection, oversight, or remedies. There is an urgent need to reform Canada's laws and policies on consular protection and related issues to comply with Canada's international human rights obligations and to prevent and remediate grave human rights violations against Canadian citizens and, where possible, permanent residents and persons with close Canadian ties. LRWC's recommendations are found in Section 4.

2 The variable impacts of Canada's discretionary consular protection in selected cases

Canada's discretionary approach to providing consular protection has shocked and disappointed many victims and exposed government officials to public criticism and accusations of discrimination and malfeasance.² This section highlights government responses and results in the cases of 27 Canadian men, women and children unlawfully imprisoned abroad: 12 hostages and 15 people unlawfully detained. The following summaries are based on publicly available information.

2.1 Twelve hostages: Rescued, ransomed, died or murdered

- **Rescued: Three Canadian children under five years of age, with their parents, Canadian Joshua Boyle and American Caitlan Coleman**, were held hostage by the Taliban-affiliated Haqqani Network from October 2012 to October 2017. The children's parents were captured while travelling in Afghanistan. All three children were born in captivity. The parents were tortured and threatened with death. The children witnessed abuse of their parents including captors' sexual assault of their mother. In early 2017, after fruitless government efforts seemed to have stagnated, the victims' family engaged a private security consultant. The family was freed in Pakistan on 12 October 2017. The security consultant has criticized Canada's "risk averse" strategies, unclear policies and threats to prosecute victims' families and representatives if they negotiate ransoms with captors.³
- **Ransomed: Canadian journalist Amanda Lindhout** was held hostage in Somalia along with fellow journalist, Nigel Brennan, for 15 months from 23 August 2008 to 25 November 2009. Ms. Lindhout was tortured and sexually assaulted. Ms. Lindhout's family initially cooperated with the Canadian government despite concern about lack of information and coordination. Canada refused to pay the ransom demanded but was reportedly willing to pay the captors "expense money" of \$250,000. After a year, the government withdrew its hostage negotiation team because lack of progress could no longer justify the expense but warned the family that if they privately paid a ransom they could be prosecuted. The family engaged a private security consultant who successfully negotiated the release of Ms. Lindhout and Mr. Brennan for a privately-raised ransom of \$600,000.⁴
- **Ransomed: Canadian diplomat Robert Fowler and former Canadian diplomat Louis Guay** were held hostage in Niger for 130 days from 14 December 2008 to 21 April 2009 and released after a reported payment to captors of approximately \$1 million and release of prisoners from Mali was arranged through an intermediary on Canada's behalf.⁵

- **Ransomed: CBC journalist Mellissa Fung** was held 28 days in Afghanistan from 12 October to 8 November 2008. She was tortured by means of stabbing and sexual assault. She was ransomed through prisoner exchange facilitated by Qatar. Canada denied involvement in the prisoner exchange.⁶
- **Died: British Columbia filmmaker Beverly Giesbrecht** was kidnapped by the Taliban in Pakistan in October 2008 along with her driver and interpreter, who were released in October 2009. Ms Giesbrecht had gone to Pakistan to make a film about Taliban women. Ransom demands reportedly varied from \$2 million and the release of a Guantánamo Bay prisoner to \$1,200. She pleaded for help by video and phone. Subjected to beatings and other abuse, she is believed to have died in captivity of medical neglect in 2010. Canadian officials did not report her death until 2011. Ms. Giesbrecht's friends found Canada's attempts to ensure her release to be inadequate and unreliable. Canada's Department of Foreign Affairs said it was investigating the kidnapping and death but reportedly told the Royal Canadian Mounted Police (RCMP) secretly to cease investigations.⁷
- **Negotiated release: Ontario traveller Colin Rutherford** was captured by the Taliban in Afghanistan on 4 November 2010 and released on 11 January 2016. The family took over negotiations after 14 months of fruitless Canadian government efforts; the terms of his release are unknown.⁸
- **Murdered: Canadian businessman John Ridsdel** was kidnapped in the Philippines on 21 September 2015 and beheaded by his captors on 25 April 2016. Family members expressed concern that Canadian officials left them on their own with little information. They tried to raise the demanded ransom on their own.⁹
- **Murdered: Retired Canadian Robert Hall** was kidnapped along with John Ridsel in the Philippines on 21 September 2015 and beheaded by his captors on 13 June 2016. Family members expressed concern that Canadian officials seemed to do "little to save him." They tried to raise a ransom on their own. Mr. Hall's sister, Bonice Thomas, called for an inquiry.¹⁰

Summary of concerns of Canadian hostages and their families

Families of hostages have expressed disappointment with Canada's response to hostages who are at risk of death. Concerns include lack of sustained vigour, persistence, resources and coordination of actions.¹¹ Families have complained of being "left out, let down, under-informed and overburdened by Ottawa's demand for their silence."¹² In some cases, Canadian officials have reportedly withdrawn or threatened to withdraw services when families engaged private services to obtain release.¹³ When hostages have been held by captors designated as terrorists, Canadian officials have threatened family members with prosecution for facilitating terrorism if they attempt to negotiate privately with captors for release of their loved ones.¹⁴ Although no hostage's family member has actually been prosecuted, Canadian officials have warned of prosecution to prevent independent remedial action by family members.¹⁵ There is mistrust of Canada's claims "never" to pay ransoms and suspicion that official discretion results in a discriminatory hostage "hierarchy" by which some captives receive better consular protection and diplomatic intervention than others. Despite continual statements affirming a no-ransom policy,¹⁶ Canada reportedly has been involved in paying ransoms in some cases¹⁷ and offers "expense" payments to captors in others.¹⁸

2.2 Sixteen Canadians unlawfully jailed abroad including one child

In 2016, approximately 1,400 Canadians were detained abroad.¹⁹ Concern about inadequacy of Canada's consular protection practices has been raised repeatedly²⁰ in relation to Canadians detained abroad in State prisons, even when their detention is in violation of international human rights law that guarantees a fair trial by an independent judiciary, access to legal representation, and freedoms from torture and ill-treatment and enforced disappearance. Examples include the following unlawfully detained persons:

- **Currently arbitrarily detained for over a decade and tortured: Mohamed El Attar, a Canadian bank teller born in Egypt**, has been arbitrarily detained in Egypt since being convicted and sentenced to 15 years in prison in 2007 for allegedly spying for Israel. The charges are believed to be unfounded. There are allegations of a coerced confession after he was held incommunicado and subjected to torture and ill-treatment for three weeks with no consular visits and no access to a lawyer. Violation of

his fair trial rights include reported lack of evidence to support conviction, lack of judicial reasons for the verdict, and absence of an appeal process. It is believed he is being persecuted for converting from Islam to Christianity. LRWC has no information about frequency of Canadian consular visits or other interventions. Advocates have referred to him as “forgotten.”²¹

- **Currently arbitrarily detained for over a decade and tortured: Huseyin Celil, a Canadian imam born in Xinjiang Uighur Autonomous Region, China**, has been arbitrarily detained, tortured and ill-treated in China since being extradited to China from Uzbekistan in 2006, convicted of terrorism and sentenced to life in prison. In 2017 his sentence was reportedly reduced because of his participation a re-education program. He is believed to have been convicted for his advocacy for persecuted Uighur people. He has been reportedly denied visits from Canadian consular officials for more than 11 years. Canada has been criticized for doing “little” to secure his release.²²
- **Currently arbitrarily detained for over a decade and tortured: Bashir Makhtal, a Canadian information technologist born in Ethiopia**, has been arbitrarily detained in Ethiopia since 2006. Mr. Makhtal’s family members have criticized Canada for having “dropped the ball” and for lacking interest in vigorous pursuit of Mr. Makhtal’s transfer to a Canadian prison.²³
- **Suspicious death during arbitrary detention; suspected torture: Kavous Seyed-Emami, a sociology professor and environmental activist with Canadian-Iranian dual citizenship**, was arrested in Iran on 24 January 2018 during a crackdown against peaceful, country-wide protests. He was interrogated in Evin prison until he died on 9 February 2018. His widow, Maryam Mombeini and sons reject Iranian authorities’ explanation that he committed suicide after “confessions.” Iran refuses to release the body or allow an independent autopsy or investigation. Torture is suspected. His death was the third recent suspicious death in custody labelled “suicide” by Iran.²⁴ Iran denies consular assistance to Canadian dual citizens. Canadian consular officials are assisting the family after Dr. Sayed-Emami’s death. It is not known what attempts Canadian officials made to provide consular assistance before his death. On 6 March, Iranian authorities prevented Ms. Mombeini, also a dual citizen of Canada and Iran, from leaving Iran. Minister of Foreign Affairs Chrystia Freeland issued a 7 March Twitter statement demanding “that, as a Canadian, she be given the freedom to return home.”²⁵ Canada’s ability to intervene in cases in Iran is hampered by severance of diplomatic relations since 2012.
- **Arbitrarily detained in a secret location, denied Canadian consular services and deported from Kenya: Canadian lawyer and democracy activist, Mr. Miguna Miguna**, a dual citizen of Canada and Kenya, was arrested in Kenya on 6 February 2018 by 34 unidentified men, unlawfully held in a secret location for a week, then forcibly deported to Canada without due process. He was denied access to Canadian consular officials. Mr. Miguna complained that Canadian officials “needed to make noise...and they never did.”²⁶ After his return to Canada, a Kenyan court overruled the deportation, ordering Kenya’s immigration department to facilitate his return to Kenya.²⁷ It is unknown what Canada has done to object to Mr. Miguna’s unlawful incommunicado detention.
- **Arbitrarily detained for three years: Hassan Diab, a Canadian sociology professor born in Lebanon**, was ordered extradited from Canada to France on 14 November 2014 on allegations of involvement in a 1980 bombing in Paris. He was never charged. Except for a 10-day period in May 2015, he was detained in solitary confinement in France from 14 November 2014 until his release on 13 January 2018. Several orders for his interim release made by French investigative judges were overturned on appeal. On 12 January 2018, a French investigative judge dismissed all allegations against Dr. Diab, refused to approve charges, and ordered his immediate release, which took place 12 January 2018. Consular services provided by Canada to Dr. Diab in France reportedly consisted of “monitoring” and consular visits every six months. It is unknown whether Canada conducted diplomatic intervention concerning his lengthy detention without charges, particularly in view of the lack of evidence supporting the allegations, noted by Canadian²⁸ and French courts, coupled with evidence that there was no legitimate need to detain Dr Diab on an interim basis. This case has led Canada to promise a review of the *Extradition Act*.²⁹ Dr. Diab has called for a public inquiry.
- **Arbitrarily detained two years and released after high level political intervention: Mohamed Fahmy, a Canadian journalist born in Egypt**, was arbitrarily detained and ill-treated in Egypt from December 2013 to September 2015. Mr. Fahmy and his family report excellent support from the

Canadian Ambassador and local consular officials in Egypt, but criticized Canadian diplomatic intervention from Ottawa as “weak” and reliant on mid-level officials rather than high level support. In 2015 Prime Minister Stephen Harper reportedly wrote and telephoned Egypt’s president, after which Mr. Fahmy was released. Since returning to Canada, Mr. Fahmy has recommended reforms to Canadian laws and policies to better protect Canadians unlawfully imprisoned abroad.³⁰

- ***Arbitrarily detained two years and released after high level political intervention: Kevin Garratt and Julia Garratt, Canadian Christian aid workers and long-time residents of China,*** were arrested by Chinese officials in August 2014 on false, politically motivated charges of spying. The couple were ill-treated in an extralegal detention center for several months and denied all contacts except for monthly visits with a Canadian consular representative. Julia Garratt was released in February 2015 with restrictions pending trial and did not return to Canada until May 2016. A court in Dandong, China, convicted Kevin Garratt of espionage on 13 September 2016 and he was deported to Canada two days later. Prime Minister Stephen Harper (in 2014) and Prime Minister Justin Trudeau (August 2016) personally advocated for release during official visits to China. Canadian government intervention plus Canada’s promise in August 2016 to negotiate an extradition treaty with China are seen as possible factors in Kevin Garratt’s release and return to Canada in September 2016.³¹
- ***Arbitrarily detained 112 days and released after diplomatic intervention: Homa Hoodfar, a Canadian professor and women’s rights defender born in Iran,*** was arbitrarily detained and subjected to ill-treatment, including denial of necessary medical treatment, in Iran for 112 days in 2016 (June to 26 September). She had been arrested and barred from leaving Iran in March 2016 and subjected to interrogation. Despite lack of diplomatic relations with Iran which prevented Canada from providing consular services directly, the Canadian government’s engagement in “careful and quiet diplomacy” through several other countries is credited with her release.³²
- ***Arbitrarily detained 645 days: Salim Alaradi, a Canadian business man born in Libya,*** was detained without charge for 645 days in United Arab Emirates from August 2014 to June 2016. He spent a portion of this time in incommunicado detention. His family complained that the Canadian government failed to inform them of allegations he had been tortured. After observing evidence of torture during a consular visit in January 2015, consular officials visited Mr. Alaradi weekly. However, Canadian officials said privacy laws prevented provision of this information to the family. The Alaradi family’s Canadian lawyer was quoted as stating that it was necessary to “strike a ‘fine balance’ between asserting his client’s rights to Foreign Affairs and recognizing that the department’s officials operate with wide discretion... ‘If you become too belligerent with Foreign Affairs, they can just disengage. Often, those consular officers are the only lifeline that you have to your client.’”³³
- ***Canadian official malfeasance in arbitrary detention for over a decade including torture: Omar Khadr, a Canadian, age 15,*** was captured by United States (US) forces in Afghanistan on 27 July 2002 and imprisoned, first in Bagram prison in Afghanistan and then at Guantánamo Bay until his transfer to Canada. During US captivity, authorities stripped his rights and denied access to remedies. Violations included torture, denial of fair trial rights, and prolonged and indefinite illegal detention. On 29 September 2012 the US released him to a Canadian prison to serve the balance of an eight-year sentence unlawfully imposed by a US military tribunal in October 2010. On 7 May 2015 the Alberta Court of Appeal ordered his release pending the outcome of an appeal from conviction launched in the US in 2013. In 2010, the Supreme Court of Canada determined that Canada violated Khadr’s rights in a manner that could not be justified in a free and democratic society and that breaches by Canadian authorities had caused ongoing violations.³⁴ In July 2017, Canada paid compensation to Mr. Khadr for its part in the grave violations against him while in US detention.³⁵ Those responsible have never been identified and no reforms have been put in place to prevent reoccurrence.
- ***Canadian official malfeasance in arbitrary detention and torture for 374 days: Maher Arar, a telecommunications engineer with dual Canadian and Syrian citizenship*** was arbitrarily arrested by US authorities in September 2002 while en route to Canada, detained without access to counsel or judicial oversight for two weeks, and forcibly transported to Syria where he was detained, tortured and ill-treated. He was released on 5 October 2003 after Syrian authorities declared him completely innocent. In 2005, the UN Committee against Torture expressed concern with Canada’s role in his

expulsion from the US to Syria and his torture.³⁶ The 2006 *Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar* (O'Connor Inquiry)³⁷ determined that he was the innocent victim of extraordinary rendition by the US and found that Canadian authorities contributed to these grave abuses by sharing inaccurate information with the US and Syria, knowing that the information was likely to result in illegal detention and torture and by blocking efforts to secure his release. Canada compensated him in 2007 for its part in the violations against him.³⁸

- **Canadian official malfeasance in arbitrary detention and torture for 22 months: Abdullah Almalki, a Canadian communications engineer born in Syria**, was arbitrarily detained and tortured in Syria from 2002-2004. During seven months in 2002-2003, he received no Canadian consular visits.³⁹
- **Canadian official malfeasance in arbitrary detention and torture for 22 months: Ahmad El Maati**, a Kuwaiti-born Canadian truck driver, was arrested in Syria in 2002 and transferred to Egypt where he was arbitrarily detained and tortured until 2004.⁴⁰
- **Canadian official malfeasance in arbitrary detention and torture for 34 days: Muayyed Nureddin**, a Canadian geologist, was arbitrarily detained and tortured in Syria for 34 days from 2003 to 2004. In June 2012, the UN Committee against Torture recommended that Canada pay compensation to Msrs. Almalki, El Maati and Nureddin. All three received compensation in 2017 for Canada's involvement in violations against them, which included failure to provide adequate consular services.⁴¹

Summary of concerns in cases of Canadians arbitrarily detained abroad

These cases disclose inconsistencies in purpose, frequency and effect of consular visits and consular protection, and failure to provide adequate or any information to victims' families, sometimes citing "privacy legislation." Canada's *Privacy Act* protects individuals from release of information without their consent, but there are exceptions for release of information when "disclosure would clearly benefit the individual to whom the information relates."⁴² It is not clear whether family members are made aware of this exception. There is significant concern about failure to ensure adequate consular protection for dual citizens of certain countries that do not recognize dual citizenship, including China, Egypt, Iran, and Syria. Malfeasance by consular officials and other Canadian authorities has been found in several cases including the Arar, Khadr, Almalki, El Maati, and Nureddin cases. There is a perception of discrimination and that "some Canadians who face human rights violations abroad receive less political support than others might, because of their personal, family, political or religious background."⁴³

3 Canada's obligations to provide remedies: Treaties and customary international law

Hostages have no access to judicial oversight or legal remedies in countries where they are held captive. Persons arbitrarily detained in State-run prisons abroad are faced with laws, policies and tribunals that deny rights and remedies for violations. Most often the only remedies available to hostages and unlawfully detained persons and their families are those available through consular protection and diplomatic intervention or through international human rights treaty bodies or the special procedures of the UN Human Rights Council. Canada's duties to prevent and remedy grave violations of Canadians' internationally protected rights abroad arise from treaties and customary international law. Failure to provide effective remedies by the State(s) in which such violations occur does not obviate Canada's duty to act vigorously to secure the requisite prevention and remediation through consular protection and diplomatic intervention. Reform of Canada's discretionary consular protection policies is needed to guarantee Canadians abroad the right to appropriate diplomatic and consular protection.

3.1 Grave violations of treaty-based rights of unlawfully detained persons

The following is a list of grave violations of internationally protected rights typically⁴⁴ suffered by hostages and arbitrarily detained persons. These rights are all protected by treaties binding on Canada:

- **Unlawful deprivation of the right to liberty ("arbitrary detention")** in violation the *International Covenant on Civil and Political Rights* (ICCPR);⁴⁵
- **Threats to the right to life** in violation of the ICCPR,⁴⁶ including actual or threatened extra-judicial execution or failure to provide necessities such as adequate food, water, shelter and health care;
- **Torture and ill-treatment** in violation of the ICCPR Article 7 and the *Convention Against Torture*

and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT),⁴⁷ including beatings and sexual assaults as well as mock executions or threats of extra-judicial killing;⁴⁸

- **Enforced disappearance** through prolonged, indefinite, unlawful incommunicado detention in undisclosed locations without judicial oversight in violation of many ICCPR provisions;⁴⁹ enforced disappearance is also a form of torture⁵⁰ of which the victims include the disappeared and their relatives subjected to unremitting torment about the whereabouts or condition of their loved ones;⁵¹
- **Hostage-taking** in violation of the Hostages Convention;⁵²
- **Human trafficking** in violation of the Trafficking Protocol⁵³ when hostages are held for ransom.

3.1.1 Canada's treaty obligations to provide remedies for rights violations abroad

The ICCPR requires each State Party to the treaty to prevent and remedy violations committed against individuals within the State's territory and to ensure rights and remedies to all persons subject to its jurisdiction.⁵⁴ The UN Human Rights Committee holds that a State's jurisdiction and duties under the ICCPR may extend beyond its territorial boundaries.⁵⁵ The CAT requires States Parties to prevent and remedy torture wherever it occurs and whatever the nationality of victims and perpetrators.⁵⁶ "Jurisdiction" is an elastic term which Canada applies to a range of matters including issuing passports,⁵⁷ regulating corporate conduct abroad,⁵⁸ prosecuting suspected perpetrators of certain crimes committed extraterritorially. Canada also advocates for human rights worldwide.⁵⁹ Internationally, the extraterritorial application of international human rights treaties is evolving to favour extension of State duties to protect rights beyond national borders where there is a significant relationship between the State and the person whose rights are affected.⁶⁰ Where Canada has no control over the conduct of a State or non-state actor perpetrating violations, Canada's proper role is to exert due diligence to the full extent of diplomatic intervention, consular services and international cooperation to ensure the internationally protected rights of citizens and permanent residents abroad. While consular officials have a duty not to interfere in the internal affairs of other States,⁶¹ the measures recommended in this report do not constitute "interference."⁶² The UN Human Rights Council has pointed out that "international cooperation in the field of human rights is essential for the full achievement of the purposes of the United Nations, including the effective promotion and protection of all human rights."⁶³

3.1.2 Rights of children including youth held hostage or unlawfully detained abroad

Denial of remedies for children taken hostage or arbitrarily detained is starkly illustrated in the cases of four Canadian children discussed above, including three Canadian children under five years of age, all born in captivity. Canada also failed to ensure adequate consular services and diplomatic protection to prevent and remedy torture and other grave violations against a Canadian youth during a decade of unlawful detention abroad.⁶⁴ International law guarantees that children have all the same rights as adults plus additional rights that recognize the special needs of the child. The UN *Convention on the Rights of the Child* (CRC) confirms that, "the child, by reason of his [or her] physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth."⁶⁵ Article 4 of the CRC obliges States to undertake measures to ensure and protect the economic, social and cultural rights of children, "to the maximum extent of [the state's] available resources and, where needed, within the framework of international co-operation" (emphasis added). Canada's treaty obligations of international cooperation would necessarily include diplomatic intervention to persuade relevant States to protect the rights of children taken hostage or unlawfully detained, including exercising the duty to investigate the crimes of hostage-taking and crimes of torture, enforced disappearance by State officials or non-state actors. Canada should also ensure that children subjected to grave human rights violations abroad may (by their representatives) avail themselves of the individual communication mechanism of the UN Committee on the Rights of the Child.

3.2 Customary international law: Violations of peremptory (*jus cogens*) norms

The violations referred to above contravene not only human rights treaties. They also violate overriding peremptory (*jus cogens*) norms of customary international law (CIL).⁶⁶ Internationally recognized *jus cogens* crimes include arbitrary deprivation of or threats to the right to life,⁶⁷ unlawful deprivation of the

right to liberty,⁶⁸ torture and ill-treatment,⁶⁹ enforced disappearance,⁷⁰ hostage taking,⁷¹ and human trafficking (insofar as it constitutes a form of slavery).⁷² Such grave violations of CIL attract international obligations beyond Canada's borders.⁷³ CIL constitutes a primary source of international law arising from norms consistently practiced by a preponderance of States out of a sense of legal obligation.⁷⁴ CIL is binding on all States whether or not they have ratified relevant treaties.⁷⁵ The Supreme Court of Canada (SCC) recognizes *jus cogens* and defines it as "...a higher form of customary international law. In the same manner that principles of fundamental justice are principles 'upon which there is some consensus that they are vital or fundamental to our societal notion of justice'... *jus cogens* norms are customs accepted and recognized by the international community of states from which no derogation is permitted."⁷⁶ Violations of *jus cogens* norms are of such gravity that they trigger obligations to the international community as a whole (*erga omnes*).⁷⁷ *Erga omnes* is Latin term meaning "towards all." Violations of *jus cogens* trigger *erga omnes* obligations that require all States to exercise due diligence prevent such violations and to ensure investigation, extradition, prosecution, and accountability of suspected perpetrators in accordance with international human rights standards.⁷⁸

The 2000 report by John R. Dugard, Special Rapporteur on diplomatic protection to the International Law Commission, noted that remedies provided by international human rights treaties are weak⁷⁹ and that diplomatic protection should be strengthened in order to protect human rights. He proposed an international legal duty of States to exercise diplomatic protection to an injured person (on request) "if the injury results from a grave breach of a *jus cogens* norm attributable to another State."⁸⁰ As Dugard noted, "[i]f a State party to a human rights convention is required to ensure to everyone within its jurisdiction effective protection against violation of the rights contained in the convention and to provide adequate means of redress, there is no reason why a State of nationality should not be obliged to protect its own national when his or her most basic human rights are seriously violated abroad (emphasis added).⁸¹

4 Recommendations to ensure the right of access to remedies

The O'Connor Inquiry⁸² into the rendition, unlawful detention and torture of Maher Arar recommended that Canada take a more coordinated and coherent approach in attempting to obtain the release of Canadians unlawfully detained abroad. Canada must also reform its discretionary consular protection policies that have been criticized as murky, secretive, inconsistent, ineffective and open to charges of discrimination, even in cases involving *jus cogens* crimes of prolonged arbitrary detention, torture and ill-treatment, hostage-taking, enforced disappearances and unlawful threats of execution. Canada's laws and policies on diplomatic intervention and consular protection must be updated to incorporate international human rights law and standards established over the past 70 years as treaties have been adopted and CIL has developed.⁸³

Canada's discretionary approach to providing diplomatic and consular protection is based on the concept of Crown prerogative⁸⁴ as well as the 1963 *Vienna Convention on Consular Relations* (VCCR).⁸⁵ The VCCR provides no individual right to consular protection other than the right of citizens to be informed upon arrest of their right of communication with, and access to, consular officials of their home State. Canada's legislation on consular protection, the *Foreign Missions and International Organizations Act*,⁸⁶ provides no direction as to the nature or scope of consular services to persons other than Canadian consular staff.⁸⁷ Instead, Canada's policy is that it "may" provide consular services to Canadians in certain circumstances, including cases of missing persons, abductions or other crimes against citizens.⁸⁸ According to the Canadian Consular Services Charter, "[e]ach consular case is unique and the assistance we can provide will vary depending on circumstances." Canada's official website states that in the case of arrest and detention, if a person's "international human rights are known to have been violated, the Government of Canada may take steps to pressure the foreign authorities to abide by their international human rights obligations and provide basic minimum standards of protection" (emphasis added).⁸⁹ Neither Crown Prerogative nor the VCCR preclude Canada from passing legislation to guarantee citizens the right to consular protection.

4.1 Implement international recommendations: Passing a “Protection of Canadians Abroad Act”

Canada now has an opportunity to implement Dugard’s recommendation by passing a “Protection of Canadians Abroad Act” to ensure that Canadians abroad have the remedy of consular protection as of right when they have been subjected to serious international human rights violations. Such legislation would identify a duty to ensure remedies for citizens, and to the extent feasible, permanent residents and those with close Canadian ties, who are subjected to threatened or actual grave violations of internationally protected rights outside Canada including rights to life, liberty and freedoms from hostage taking and other arbitrary detention, torture, slavery, sexual servitude and enforced disappearance. Consular services and diplomatic intervention would be directed toward securing cessation and remediation of the rights violations. Canada should not threaten to prosecute the families or representative of victims or otherwise criminalize their peaceful attempts to secure the release of their captive loved ones.⁹⁰ Children subjected to hostage taking or arbitrary detention abroad should be assured of specialized consular services on the same footing as children subjected to parental abduction.

It is common ground that officials must not release information that would unduly violate victims’ privacy or jeopardize their safety or rights. However, the secrecy shrouding Canada’s responses in some cases of hostage taking or arbitrary detention abroad has led to denial of the right of victims, their family members and the public to know the truth.⁹¹ Families of hostages and others subjected to enforced disappearance have “the right to know about the progress and results of an investigation, the fate or the whereabouts of the disappeared persons and the circumstances of the disappearances, and the identity of the perpetrator(s).”⁹² Denial of information to families and the public in Canada’s current discretionary system of consular protection and diplomatic intervention fails to fulfill these international law duties. Secrecy and the absence of judicial or other public oversight of consular officials’ actions provides a shield for internationally unlawful behaviour. Not every victim has the resources to press for public inquiries such as those examining Canadian action and inaction in the cases of Maher Arar, Abdullah Almalki, Ahmad El Maati and Muayyed Nureddin. A key component of Canada’s international law duty to prevent and remedy grave rights violations is to put in place processes to establish the truth, determine and impose remedies required by law, and ensure necessary reform to prevent reoccurrence.

Disputes over consular protection should be addressed by an independent commissioner empowered to investigate, mediate, adjudicate or make recommendations in particular cases. The “Protection of Canadians Abroad Act” should be developed in consultation with all stakeholders, including civil society organizations and representatives of Canadians who have been unlawfully imprisoned abroad.

***Recommendation 1:* That Canada guarantee Canadians the right to diplomatic intervention and consular protection when they suffer grave human rights violations abroad by enacting a “Protection of Canadians Abroad Act.”**

***Recommendation 2:* That Canada guarantee that it will not seek to control the peaceful efforts of a hostage’s representatives to secure release of hostages by threatening or initiating criminal prosecution.**

***Recommendation 3:* That Canada ensure that specialized consular services are provided to children subjected to hostage-taking or arbitrary detention, possibly by ensuring that they are specifically included in the mandate and services of the Vulnerable Children’s Consular Unit.**

***Recommendation 4:* That Canada implement all recommendations on consular protection arising from the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar and the Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin.**

4.2 Expand Canada's definition of "trafficking" to include hostages for ransom

Canada's consular and other related services for persons subjected to human trafficking should be extended to include those taken hostage for ransom (whether monetary or non-monetary). Hostage-taking should properly be considered a form of "human trafficking" within the inclusive definition of "trafficking" in the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* (Trafficking Protocol)⁹³ which states in Article 3(a) that "trafficking in persons" means:

recruitment, transportation, transfer, harbouring or receipt of persons, by means of: the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs (emphasis added).

Human trafficking has been considered a form of slavery. The conception of slavery goes beyond forced labour and includes treating human beings as though they are "possessions, like livestock or furniture, and to sell or transfer them to others."⁹⁴ Such commodification of persons accurately describes hostage taking.

The description of "exploitation" in Article 3 of the Trafficking Protocol above is inclusive, not exhaustive, yet the laws and policies of Canada⁹⁵ define "exploitation" narrowly and exhaustively. This has the effect of excluding hostage-taking for ransom from the definition unless the purpose of the trafficking fits the taxonomy of forced labour (including sexual exploitation) or organ harvesting.⁹⁶ This narrow interpretation may be an inadvertent failure to implement the full scope and intention of the Trafficking Protocol.⁹⁷ Canada's laws, policies and services should be fully compliant with the expansive language of Article 3 of the *Trafficking Protocol*.

Recommendation 5: Ensure that Canadian law, policies and services protecting persons from human trafficking include situations of hostages held for ransom by expanding the definition of "exploitation" in Criminal Code S. 279.04.

4.3 Utilize complaint mechanisms provided by human rights treaties

The ICCPR provides a complaint process for States to complain about other States' violations of the treaty. The UN Human Rights Committee expects every State to exert its legitimate interests in the enforcement of the ICCPR among all States Parties. The Committee⁹⁸ has confirmed that each State Party is "obligated to every other State Party to comply with its undertakings under the treaty."⁹⁹ A State Party to the ICCPR that has been injured by another State's breach of the treaty is entitled to invoke the other State Party's responsibility to seek "cessation of the internationally wrongful act, and assurances and guarantees of non-repetition..." as well as reparations for the injured State's beneficiaries (e.g. injured citizens).¹⁰⁰ However, the inter-State remedy within the ICCPR has never been used for reasons attributed partly to the requirement that both States must have made the requisite declaration under Article 41 of the Covenant, and partly due to "diplomatic sensibilities."¹⁰¹ It is open to Canada to complain to the Human Rights Committee about denial of consular access for Canadian citizens who have dual citizenship with Egypt and Syria, since they are States Parties to the ICCPR and have made Article 41 Declarations.¹⁰² It is not known why Canada has never availed itself of this mechanism when relevant States have persistently refused Canadian consular access to detained Canadian dual citizens in clear and grave cases of arbitrary detention. Diplomatic sensibilities cannot in law justify failure of consular protection or diplomatic intervention in cases of grave human rights violations against Canadians. Wherever possible, Canada should avail itself of the inter-State mechanism of the ICCPR and other human rights treaties as a matter of consistent policy to protect the rights of Canadians subject to grave international human rights law violations abroad. Canada should also provide Canadian children with the individual communication mechanism of the *Optional Protocol to the Convention on the Rights of the Child on a Communications*

*Procedure.*¹⁰³ This would ensure that, in appropriate cases, children taken hostage or arbitrarily detained have access (through their representatives) to the UN Committee on the Rights of the Child to obtain recommendations for remediation of rights violations. Ratification by Canada of the *International Convention for the Protection of All Persons from Enforced Disappearance*¹⁰⁴ would allow Canada to seek remedies from other States Parties who are involved in or acquiescent in hostage taking or arbitrary detention in secret locations. It would also allow Canadians to access the Convention's individual complaint mechanism in appropriate cases.

Recommendation 6: That Canada engage in diplomatic protection in all cases where fundamental rights of Canadians are gravely threatened or violated abroad, including the use of remedies available through human rights treaties to which Canada is a party.

Recommendation 7: That Canada ensure that Canadian children subjected to unlawful captivity abroad have direct access to appropriate remedies of the UN Committee on the Rights of the Child by ratifying the *Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure*.¹⁰⁵

Recommendation 8: That Canada ensure appropriate access by Canada and Canadians to remedies provided by the Committee on Enforced Disappearance by ratifying the *International Convention for the Protection of All Persons from Enforced Disappearance (CED)*,¹⁰⁶ including to its State and individual communication mechanisms (Articles 30 to 33).

4.4 Take firm action to insist on consular access to protect all citizens including dual citizens

The O'Connor Inquiry recommended that "Canadian officials should normally insist on respect of all of a detainee's consular rights."¹⁰⁷ Refusal by some States to recognize the dual Canadian citizenship of their nationals has complicated the consular protection of a number of Canadians. However, as Professor Forcese states, "dual nationality is no bar to diplomatic protection in modern international law and no excuse for inaction where dual nationality citizens are removed to torture."¹⁰⁸ Canada should ratify the *Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes*.¹⁰⁹ Ratification of the Optional Protocol would give Canada standing to petition the International Court of Justice about other States' failure to allow consular access to Canadians pursuant to VCCR Article 36.¹¹⁰ Such a remedy is particularly relevant in cases where Canadian dual citizens are being denied consular visits countries that are not subject to the ICCPR interstate complaint mechanism, or where States ignore the treaty body's recommendations.

Recommendation 9: That Canada ensure its standing to petition the International Court of Justice about the failure by another States to allow consular access to Canadians, by ratifying the *Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes*.¹¹¹

4.5 Take leadership to improve global standards for consular protection

In addition to remedying the deep gaps and inconsistencies between Canada's international human rights obligations and its domestic laws, Canada has an opportunity to take internationally leadership to promote international law reform on consular relations in accordance with Dugard's recommendations.¹¹²

Recommendation 10: That Canada engage in diplomacy and support efforts to advocate State practice and international law reform on diplomatic intervention and consular protection that is consistent with customary international law for protection of international human rights, including revision of the VCCR.

References

¹This report is drawn largely from Catherine Morris, *Canadian Child Hostages Overseas: The Ultimate Commodity*, Vancouver: LRWC, 2017, <https://www.lrwc.org/canada-canadian-child-hostages-overseas-the-ultimate-commodity-working-paper-by-catherine-morris/>. Endnotes have been removed from this submission due to length restrictions. A fully referenced version of this report may be found at <https://www.lrwc.org/canada-consular-protection-and-diplomatic-intervention/>.