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Canadian Child Hostages Overseas: The Ultimate Commodity

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Catherine Morris & Gail Davidson (editor)

August 2017

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Canadian Child Hostages Overseas: The Ultimate Commodity

Written by Catherine Morris, Research Director, Lawyers' Rights Watch Canada

Edited by Gail Davidson, Executive Director, Lawyers' Rights Watch Canada

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Lawyers' Rights Watch Canada
Vancouver BC
www.lrwc.org, lrwc@portal.ca

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The cover photograph is adapted from a screenshot selected from the captors' propaganda video of the family released in December 2016. The screenshot was modified by Elizabeth Morris, etherwork.net, so as to respect the privacy and dignity of the children. The image is used with permission of Joshua Boyle's family. At the time of publication, Joshua Boyle and Caitlan Coleman and the children remain incommunicado in captivity in an unknown location. Please do not reproduce or circulate this image without the express, written permission of Catherine Morris or the parents of Joshua Boyle. Catherine Morris may be reached at cmorris@uvic.ca.

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

Canadian child hostages overseas: The ultimate commodity

Catherine Morris, BA, JD, LLM
UN Liaison Director, Lawyers' Rights Watch Canada
25 August 2017

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... over 500 million children are victims of violence, exploitation and abuse annually... We believe, like you, that all children ... have the right to grow up in safety.

- UNICEF Canada

“States Parties shall ensure to the maximum extent possible the survival and development of the child.”

- *Convention on the Rights of the Child*

Canada’s consular services: Ambiguous & discriminatory

Canada’s practices for recovery of hostages have been criticized as lacking in coordination, leadership, resources and effectiveness. Concerns have also been raised about discrimination and ambiguity in the provision of consular services to kidnapping victims, and apparent picking and choosing whom they help and how. This has resulted in release and rescue of some hostages and the injury and deaths of others.

- Lawyers’ Rights Watch Canada

Acronyms and abbreviations

CAT: *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.* Canada, US, Afghanistan and Pakistan are States Parties to this treaty.

CEDAW: *Convention on the Elimination of All Forms of Discrimination against Women International.* Canada, Afghanistan and Pakistan are States Parties to this treaty. The US has signed it.

CRC: *Convention on the Rights of the Child.* Canada, Afghanistan, and Pakistan are States Parties to this treaty. The US has signed it.

Erga omnes: is a Latin term meaning “towards all” and refers to legally binding obligations owed toward all of humanity. See note 72.

Hostages Convention: *Convention against the Taking of Hostages.* Canada, US, Afghanistan and Pakistan are Parties to this treaty.

ICCPR: *International Covenant on Civil and Political Rights.* Canada, the US, Afghanistan and Pakistan are Parties to this treaty.

ICESCR: *International Covenant on Economic, Social and Cultural Rights.* Canada, Afghanistan and Pakistan are States Parties to this treaty, and the US has signed it.

Jus cogens: (from Latin: compelling law; English: peremptory norm) refers to certain fundamental, overriding principles of international law, from which no derogation is ever permitted. See note 71.

Trafficking Protocol: *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the UN Convention against Transnational Organized Crime.* Canada, the US and Afghanistan are States Parties to this treaty. Pakistan has not ratified or signed it.

UDHR: *Universal Declaration of Human Rights*

UN WGAD: UN Working Group on Arbitrary Detention.

UN WGEID: UN Working Group on Enforced and Involuntary Disappearances

VCCR: *Vienna Convention on Consular Relations*

Canadian child hostages overseas: The ultimate commodity

Catherine Morris, BA, JD, LLM¹
UN Liaison Director, Lawyers' Rights Watch Canada²
25 August 2017

1. Introduction, purpose, and overview: A paradox of rights without remedies

1.1 Introduction and purpose

What are Canada's responsibilities when its citizens' rights to life and liberty are violated abroad? This report explores Canada's obligations under international human rights law as they apply to a current case of Joshua Boyle, age 34, a Canadian citizen from birth, and his wife, Caitlan Coleman, 31, a citizen from birth of the United States of America (US) and their two infant children both born in captivity (the Boyle/Coleman family).

Kidnapped in Afghanistan in October 2012, the parents have been held hostage by the Taliban-affiliated Haqqani Network for nearly five years and the two children since birth. The parents have no military or government ties and no connection to the Taliban or any involvement in armed conflicts in the region.

During their captivity, the Boyle/Coleman family have had no access to remedies despite ongoing grave violations of their internationally protected human rights to life and liberty, and to freedom from torture, enforced disappearance, and hostage-taking. The rights of the Boyle/Coleman family's relatives in Canada and the US have also been seriously violated by this prolonged hostage-taking.

The purpose of this report is to provide Canadian officials with analyses and recommendations on provision of remedies to Canadian hostages abroad, particularly the Boyle/Coleman family. After a brief overview, the report sets out a timeline (Section 2 below), followed by a summary of Canada's international human rights obligations to ensure the rights to life, liberty, freedom from torture and ill-treatment, protection from enforced and involuntary disappearance and hostage-taking, and access to effective remedies when these rights are violated (Section 3 below). The report identifies international human rights obligations³ of four countries involved in the situation

¹ Catherine Morris is an adjunct professor in the Faculty of Law at the University of Victoria where she taught international human rights for over a decade. She is the managing director of Peacemakers Trust, a Canadian charitable organization for research and education on peacebuilding and conflict transformation. She monitors human rights in several countries for Lawyers' Rights Watch Canada and serves as its UN Liaison director. The report was edited by Gail Davidson, Executive Director of Lawyers' Rights Watch Canada. Special thanks to Gar Pardy for his advice on the issue of consular protection.

² Lawyers' Rights Watch Canada (LRWC) is a Canadian organization of lawyers and other human rights defenders who conduct campaigns, research and education on implementation of international standards for protection of the independence and integrity of the judiciary and legal profession, access to justice and the security of human rights defenders around the world. LRWC has special consultative status at the United Nations (UN) Economic and Social Council (ECOSOC).

³ The report discusses international human rights obligations under a number of treaties and instruments including:

of the Boyle/Coleman family, namely Canada, the US, Afghanistan and Pakistan. In light of the development of international human rights law over the past century, the report examines Canada's obligations to engage in diplomatic and consular protection of citizens whose rights have been or are being violated abroad (Section 3.4 below). The report concludes with recommendations (Section 4 below).

1.2 Overview of facts and concerns

Joshua Boyle and Caitlan Coleman were taken hostage in Afghanistan on or about 8 October 2012. At the time of the kidnapping Ms. Coleman was five months pregnant. The two adults and their two infant children, both born in captivity, are believed to be currently held in the region of Afghanistan's border with Pakistan. Neither the date nor the circumstances of their reported transport among locations in that region are known. Also unknown is the involvement of any State officials in the kidnapping, enforced transport or continued unlawful captivity, torture, ill-treatment, and exploitation of the Boyle/Coleman family.

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- *International Covenant on Civil and Political Rights* (ICCPR), UN General Assembly, 16 December 1966, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>;
 - *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT), UN General Assembly 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>. Note that the absolute prohibition of torture and ill-treatment is a customary international law (CIL) obligation as well as a treaty-based norm; the International Court of Justice (ICJ) confirmed in 2012 that “the prohibition of torture is part of CIL and it has become a peremptory norm (*jus cogens*).” See Questions Relating to the Obligation to Prosecute or Extradite (*Belgium v Senegal*), Judgment of 20 July 2012, *ICJ Reports* 2012, para. 99, available at <http://www.icj-cij.org/docket/files/144/17064.pdf>;
 - *International Covenant on Economic, Social and Cultural Rights* (ICESCR), UN General Assembly, 16 December 1966, available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/ICESCR.aspx>;
 - *Convention on the Rights of the Child* (CRC), UN General Assembly, 20 November 1989, available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>;
 - UN General Assembly, *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography* (OP-CRC-SC), UN General Assembly, 16 March 2001, available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPSCCRC.aspx>;
 - *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW), UN General Assembly, 18 December 1979, available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx>;
 - *International Convention against the Taking of Hostages* (Hostages Convention), UN General Assembly, 17 November 1979, No. 21931, available at: <http://hrlibrary.umn.edu/instree/takinghostages.html> (see also <http://legal.un.org/avl/ha/icath/icath.html>);
 - *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime* (Trafficking Protocol), UN General Assembly, 15 November 2000, available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/ProtocolTraffickingInPersons.aspx>.
- The violations against the Boyle/Coleman family also constitute violations of CIL, which is a primary source of international law arising from norms consistently practiced by a preponderance of States out of a sense of legal obligation (Latin, “*opinio juris*”). CIL is binding on all States. See the definition of the Cornell Law School, Legal Information Institute (LII), available at: https://www.law.cornell.edu/wex/customary_international_law. The violations against the Boyle/Coleman family also constitute several serious war crimes, but this scope of this report does not include discussion of international humanitarian law (law of war) or international crimes punishable by the International Criminal Court (ICC) pursuant to the *Rome Statute of the International Criminal Court (last amended 2010)* (Rome Statute of the ICC), UN General Assembly, 17 July 1998, ISBN No. 92-9227-227-6, available at: <http://www.refworld.org/docid/3ae6b3a84.html>.

The ransom demanded by the captors for the lives and freedom of the Boyle/Coleman family is the release of certain members of the Haqqani Network imprisoned by Afghanistan, including the founder's son, Anas Haqqani.⁴ Since Anas Haqqani was sentenced to death by an Afghanistan Primary Court in August 2016, the Haqqani Network has threatened to kill Mr. Boyle, Ms. Coleman and the two children if Anas Haqqani or other Haqqani Network prisoners are executed.

While in captivity, Mr. Boyle and Ms. Coleman have been subjected to numerous grave human rights violations, including torture and other acts of cruel, inhuman or degrading treatment or punishment (hereinafter "torture and ill-treatment"). The children are believed to have witnessed torture and ill-treatment of their parents. On video, Caitlan Coleman reported that her children have witnessed her being sexually assaulted. It is suspected that Mr. Boyle has been beaten and confined in leg-chains. All four members of the family have been forced to appear in propaganda videos made by their captors.⁵ The captivity of the Boyle/Coleman family in an undisclosed location outside all protection of law, itself constitutes torture of the captive family as well as their relatives in Canada and the US. For elaboration, see Sections 3.1.3 and 3.1.4 below.

The nature, extent, and timing of consular services to the Boyle/Coleman family since their capture in 2012 are unknown. Canadian consular officials are reportedly in regular contact with the Boyle/Coleman family's relatives in Canada but have had no direct contact with Joshua Boyle or Caitlan Coleman during their almost five years of captivity. Canada's policies for recovery of Canadian citizens held hostage and the treatment of the victims' families are unclear, inconsistent, and do not comply with rights-based legal obligations to victims and their families. Canada's practices for recovery of hostages have been criticized as lacking in coordination, leadership, resources and effectiveness. Concerns have also been raised about discrimination and ambiguity in the provision of consular services to kidnapping victims, and apparent picking and choosing whom they help and how. This has resulted in release and rescue of some hostages and the injury and deaths of others.

2. Timeline, October 2012 to July 2017: The ongoing "Kafkaesque nightmare"

- **On 8 October 2012** Joshua Boyle sent an email to Caitlan Coleman's parents for the last time before the couple went missing in Afghanistan. Ms. Coleman was five months pregnant at that time.⁶ That day or the next day, 9 October 2012, was the last withdrawal from their bank account.
- **In October 2012** the families of Joshua Boyle and Caitlan Coleman were notified by their respective governments that Mr. Boyle and Ms. Coleman had been kidnapped.

⁴ Rahimullah Yusufzai, "Life in captivity," *The News on Sunday*, July 2, 2017, available at: <http://tns.thenews.com.pk/life-captivity/>.

⁵ Eric Tucker, "Canadian man, American wife held in Afghanistan," *AP/Global News*, 4 June 2014, available at: <http://globalnews.ca/news/1373996/canadian-man-american-wife-held-in-afghanistan/>; Jesse Winter, "Kidnapped Canadian-American couple plead for their lives in new video," *Toronto Star*, 30 August 2016, available at: <https://www.thestar.com/news/world/2016/08/30/kidnapped-canadian-american-couple-plead-for-their-lives-in-new-video.html>.

⁶ Associated Press, "Family pleads for couple missing in Afghanistan," *CBC*, 30 December 2012, available at: <http://www.cbc.ca/news/world/family-pleads-for-couple-missing-in-afghanistan-1.1238415>; also see James and Lynn Coleman, A Message from the Parents of Caitlan Coleman, *YouTube*, 13 December 2012, <https://www.youtube.com/watch?v=mDR4QhCsCvc>

- **On 13 December 2012** the American parents of Caitlan Coleman released a YouTube message to then unknown captors, indicating that Ms. Coleman required medical attention for a liver ailment and pleading for the couple's release.⁷
- **In early 2013** the couple's first child, a boy, was born in captivity, possibly in Afghanistan.⁸ The birth date is not known.
- **In July and September 2013** "proof of life" videos were emailed to the family of Ms. Coleman by an Afghan intermediary who indicated he had communication with the Taliban.⁹ In the video Ms. Coleman and Mr. Boyle were seen and heard pleading for mercy. The baby did not appear in the videos.
- **During 2013** US military officers were reportedly preparing a prisoner swap by which Mr. Boyle, Ms. Coleman and their first child, along with other civilian prisoners, were to be released in exchange for the release of Afghan detainees from Guantánamo Bay prison.¹⁰
- **On 31 May 2014** it became apparent that the negotiated exchange for release of civilian hostages had not taken place reportedly because of lack of inter-agency coordination and cooperation in the US as well as a lack of adequate US policy on how to address hostage situations.¹¹ No civilian prisoners of the Taliban were released. Instead, the US released five Taliban prisoners held at Guantánamo Bay in exchange for the Taliban's release of US Army Sergeant Bowe Bergdahl.
- **On 4 June 2014**, after it became evident that a US-negotiated prisoner exchange had not occurred, the families of Mr. Boyle and Ms. Coleman publicly released the videos they had received in July and September 2013.¹²
- **On 23 April 2015** it was reported that Taliban sources told journalists that a prisoner exchange for the release of the Boyle/Coleman family was still sought.¹³
- **On 11 June 2015** Lt.-Col. Jason Amerine testified at a US Senate hearing that during his efforts to obtain the release of Army Sergeant Bowe Bergdahl, he had obtained information that "there were civilian hostages in Pakistan that nobody was trying to free so they were added to our

⁷ James and Lynn Coleman, *ibid.*

⁸ Associated Press, "US family seeks pregnant daughter missing in Afghanistan," *The Guardian*, 31 December 2012, available at: <https://www.theguardian.com/world/2012/dec/31/us-family-pregnant-missing-afghanistan>

⁹ Tucker, *supra* note 5.

¹⁰ Dan Lamothe, "Special Forces officer: American hostages held overseas 'failed' by U.S. government," *Washington Post*, 11 June 2015, available at:

<https://www.washingtonpost.com/news/checkpoint/wp/2015/06/11/special-forces-officer-american-hostages-held-overseas-failed-by-u-s-government/>; Also see US Committee on Homeland Security and Governmental Affairs, Statement of LTC Jason Amerine, USA, June 11, 2015, available at: <http://www.hsgac.senate.gov/download/?id=d06624eb-d681-4b7b-8eca-ac2563fdc538>

¹¹ David Pugliese, "Plan to release Canadian hostages stymied by U.S. gov't infighting, lawmakers hear," *Ottawa Citizen*, available at: <http://ottawacitizen.com/news/politics/u-s-special-forces-officer-says-he-was-stymied-in-plan-to-obtain-release-of-canadian-hostages-in-pakistan>; Michael Ames, "Why Is the FBI Trying to Bury a Special Forces War Hero?" *Newsweek*, 2 September 2015, <http://www.newsweek.com/controversial-green-beret-retires-quietly-high-award-389282>; Jeff Stein, "Controversial Green Beret Retires Quietly With High Award," *Newsweek*, 31 October 2015, available at: <http://www.newsweek.com/controversial-green-beret-retires-quietly-high-award-389282>

¹² Tomo News US, Couple kidnapped by Taliban: Joshua Boyle and Caitlan Coleman videos released, YouTube, 4 June 2014, available at: <https://www.youtube.com/watch?v=YNzrJCSMaMA>; Tucker, *supra* note 5.

¹³ Shane Harris, An American Mom and Her Baby Are Being Held Hostage by The Taliban, *The Daily Beast*, 23 April 2015, available at: <http://www.thedailybeast.com/an-american-mom-and-her-baby-are-being-held-hostage-by-the-taliban>.

mission.”¹⁴ Lt. Col. Amerine was referring to Mr. Boyle and Ms. Coleman and their child, along with other civilians. This was the first reported indication that Mr. Boyle and/or Ms. Coleman may have been moved to another location.¹⁵

- **On 8 May 2016** six Taliban prisoners were hanged by the Afghan government. These executions were condemned by the United Nations (UN) Special Rapporteur (SR) on summary executions and the SR on torture and other cruel, inhuman or degrading treatment. The SRs reported that the executions had taken place “despite the absence of fair trial guarantees and the continued practice of torture to obtain confessions.”¹⁶ In reprisal, the Taliban began a series of targeted killings of judges and court officials.¹⁷ In April 2016, the Taliban had reportedly threatened to kill foreign captives should the executions take place.¹⁸
- **In June 2016** a letter from Mr. Boyle was delivered through intermediaries to his parents in Canada reporting that another child, a boy, had been born prematurely to the couple, that the captors had ensured that their post-partum needs were met, and that the child was healthy.¹⁹ The birth date is not known.
- **On 30 June 2016** the parents of Ms. Coleman released a video in which they pleaded with the Taliban captors for the release of their daughter, her husband and their grandchildren. They addressed by name Taliban leader “Mawlawi Akhundzada and his deputies Siraj Haqqani and Mohammad Yaqoob.”²⁰
- **On 29 August 2016** it was reported that an Afghanistan Primary Court had convicted and sentenced to death Anas Haqqani who had been captured in Qatar and released into Afghan custody by US officials in October 2014.²¹ It is not known whether the trial of Anas Haqqani was conducted in accordance with fair trial standards required by international human rights law binding on Afghanistan.²²
- **On 30 August 2016** a video was released on a Taliban YouTube network, in which Mr. Boyle and Ms. Coleman, apparently reading in part from a script, stated that they and the two children

¹⁴ US Committee on Homeland Security and Governmental Affairs, Statement of LTC Jason Amerine, USA, June 11, 2015, available at: <http://www.hsgac.senate.gov/download/?id=d06624eb-d681-4b7b-8eca-ac2563fdc538>

¹⁵ U.S. government botched chance to rescue Canadian hostages in Pakistan, American soldier says,” *National Post*, 12 June 2015, available at: <http://news.nationalpost.com/news/canada/u-s-government-botched-chance-to-rescue-canadian-hostages-in-pakistan-american-soldier-says>

¹⁶ Office of the UN High Commissioner for Human Rights, Afghanistan: UN rights experts condemn the execution of six persons without fair trial guarantees, 10 May 2016, available at:

<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=19941&LangID=E>

¹⁷ Afghan court sentences senior Taliban leader Anas Haqqani to death, *Zee News*, 29 August 2016, available at: http://zeenews.india.com/news/asia/afghan-court-sentences-senior-taliban-leader-anas-haqqani-to-death_1923601.html

¹⁸ Email report in possession of the author reportedly based on a website that has now been taken down.

¹⁹ Michelle Shephard, “Delivering his own son by flashlight: Kidnapped Canadian’s correspondence gives glimpse of life in captivity,” *Toronto Star*, 16 September 2017, available at:

<https://www.thestar.com/news/world/2016/09/16/delivering-his-own-son-by-flashlight-kidnapped-canadians-correspondence-gives-glimpse-of-life-in-captivity.html>.

²⁰ “Watch the full Coleman family plea video here,” *Circa News (YouTube)*, 30 June 2016,

<https://www.youtube.com/watch?v=Rfp0-LJqbpY>; “Parents of Caitlan Coleman’s desperate Ramadan plea,” *Circa News (YouTube)*, https://www.youtube.com/watch?v=5_hMrJyYakY

²¹ Declan Walsh, “2 Haqqani Militant Leaders Are Captured, Afghan Officials Say,” *New York Times*, 16 October 2016, available at: https://www.nytimes.com/2014/10/17/world/asia/haqqani-leaders-arrested-afghanistan-khost.html?_r=0

²² Afghanistan ratified the ICCPR (*supra* note 3) in 1983. Article 14 stipulates that all persons charged with offences are entitled to “a fair and public hearing by a competent, independent and impartial tribunal established by law.”

are threatened with death unless the Afghan government stops executing Taliban prisoners.²³ A senior member of the Taliban reported that the video was aimed at pressuring the Afghanistan government not to execute Anas Haqqani.²⁴

- **In December 2016** a video,²⁵ purportedly filmed on 3 December 2016 by the hostage takers and released on a “Taliban Media” YouTube channel, showed Mr. Boyle and Ms. Coleman and their two children. This was the first time the two children had been seen. In the film, Mr. Boyle and Ms. Coleman are seen urging the US government to take steps to end “atrocities” and threats against them. In the film, Ms. Coleman pleads for an end to “the Kafkaesque nightmare in which we find ourselves,” stating that the children have “seen their mother defiled.” A reference by Ms. Coleman to her “surviving children” suggests at least one additional pregnancy with one or more children who did not survive.
- **On 22 December 2016** the parents of Mr. Boyle were interviewed by the CBC. They reported that one of the letters received from their son mentioned that their captors did not understand “the irreverence of the Irish,” and in the next sentence, “Oh, by the way, I’ll need dental work.” Joshua Boyle’s mother added: “Obviously he’s referring to being beaten or whatever for that attitude.” They also reported “hearing Joshua’s leg chains jangling” when they listened to the December 2016 video.²⁶
- **On 2 June 2017** it was reported that Afghan President Ashraf Ghani has signed orders to execute eleven Taliban and Haqqani network prisoners currently subject to death sentences.²⁷ Anas Haqqani is reportedly not on this execution list. The Taliban have threatened to retaliate by killing their foreign captives if the executions take place.²⁸

²³ Message from Caitlan Coleman and Joshua Boyle, video, LiveLeaks, 30 August 2016, available at: https://www.liveleak.com/view?i=290_1472583475; also see Shane Harris, and Sami Yousafzai, “American Mom Held by Afghan Militants Pleads for U.S. Help,” *Daily Beast*, 30 August 2016, available at: <http://www.thedailybeast.com/articles/2016/08/30/american-mom-held-by-afghan-militants-pleads-for-u-s-help.html>; also see Bill Roggio, “‘Blood will be spilled’ if Anas Haqqani is executed, Taliban threatens,” *The Long War*, 6 September 2016, available at: <http://www.longwarjournal.org/archives/2016/09/blood-will-be-spilled-if-anas-haqqani-is-executed-taliban-threatens.php>.

²⁴ “Hostage video aimed at pressuring Afghan government over militant case: Taliban source,” *Reuters*, 31 August 2017, available at: <http://www.reuters.com/article/us-afghanistan-usa-hostage-idUSKCN1160W6>

²⁵ Michelle Shephard, and Mitch Potter, “\$150,000 could have freed family held by Taliban, report claims,” *Toronto Star*, 7 February 2017, available at: <https://www.thestar.com/news/world/2017/02/06/150000-could-have-freed-family-held-by-taliban-report-claims.html>. Also see “Taliban new Video shows American Hostages -Caitlan Coleman and Joshua Boyle with hes [sic] children,” Taliban Media, YouTube, 19 December 2016, available at: <https://www.youtube.com/channel/UCqyEnauJgHnUStxNmEARWQ>

²⁶ “They looked like such a beautiful family” Canadian parents of son, grandchildren held by Taliban, *CBC*, 22 December 2016, available at: <http://www.cbc.ca/radio/asithappens/as-it-happens-thursday-edition-1.3907169/they-looked-like-such-a-beautiful-family-canadian-parents-of-son-grandchildren-held-by-taliban-1.3907174>; also see Media Statement from the parents of the Canadian-American Family of Joshua Boyle & his wife Caitlan Coleman, 3 December 2016, available by scrolling down at CBC: <http://www.cbc.ca/news/canada/ottawa/boyle-family-video-afghanistan-captivity-1.3907378>.

²⁷ Radio Free Europe, with reporting from AFP and Reuters, “Taliban Vows Revenge as Kabul Eyes Prisoner Executions over Bombing,” RFE, 3 June 2017, available at: <https://www.rferl.org/a/taliban-vows-revenge-kaubl-eyes-prisoner-executions-haqqani-network-over-truck-bombing/28526018.html>

²⁸ Ibrahim Nasar, Taliban Threatens Retaliation If Afghan Government Executes 11 Jailed Insurgents, *VOA*, 2 June 2017, available at: <https://www.voanews.com/a/taliban-threatens-retaliation-if-afghan-government-executes-jailed-insurgents/3884834.html>; See the official statement of the Islamic Emirate of Afghanistan, “Remarks by spokesman of Islamic Emirate regarding allegations by Kabul spy agency and execution of prisoners,” 1 June 2017, available at: <http://alemarah-english.com/?p=15425>

- **On 21 June 2017**, the Taliban released proof of life videos of two American University professors, Kevin King, a US citizen, and Timothy John Weeks, an Australian citizen, pleading for their release. As of 21 June 2017, foreign hostages included the Boyle/Coleman family as well as Professors King and Weeks.

3. State duties to provide remedies for serious violations of human rights: International law obligations of Canada, the US, Afghanistan, and Pakistan

This section identifies grave violations of the rights of the Boyle/Coleman family, rights protected by international human rights treaties other international law binding on Canada, the USA, Afghanistan and Pakistan. The section emphasizes Canada's obligations to act effectively to protect the fundamental rights of citizens abroad and to ensure access to remedies for violations. Also highlighted is the apparent lack of political will to develop and use viable and accessible domestic and international mechanisms to protect victims of hostage taking and other serious rights violations.

The Boyle/Coleman family are victims of ongoing and grave violation and deprivation of their internationally protected rights to life and liberty, and their freedoms from torture and ill-treatment, enforced disappearance, and hostage taking. These rights are guaranteed by many international instruments including the *International Covenant on Civil and Political Rights* (ICCPR),²⁹ the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT),³⁰ and the *International Convention against the Taking of Hostages* (Hostages Convention).³¹ The ICCPR imposes duties on States Parties 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.³² The UN Human Rights Committee³³ consistently holds that a State's jurisdiction and duties may extend beyond its territorial boundaries. The CAT specifically imposes on States Parties duties to prevent and remedy torture committed outside their borders. See Sections 3.1.3, 3.3, and 3.4 below for further elaboration of Canada's responsibilities to protect human rights extraterritorially.

The Boyle/Coleman family is outside the effective reach of domestic remedies available to them in Canada (or elsewhere) through national law enforcement agencies or courts. This does not obviate Canada's duty to act vigorously to save their lives and secure their release. Although all members of the Boyle/Coleman family are subjected to serious and continuing violation of their rights, the only available remedy is consular protection and diplomatic intervention to urge other

²⁹ ICCPR, *supra* note 3.

³⁰ CAT, *supra* note 3.

³¹ Hostages Convention, *supra* note 3.

³² ICCPR, Article 2, *supra* note 3.

³³ For example, see UN Human Rights Committee, *General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, para. 4, available at:

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=8&DocTypeID=11.

The UN Human Rights Committee is the body of independent experts established by the ICCPR, *supra* note 3, and mandated to monitor States Parties' implementation of the ICCPR. The interpretations of the UN Human Rights Committee and other treaty monitoring bodies (including through general comments, recommendations to states parties following examination of their periodic reports, and jurisprudence) are authoritative. See Judgment of the International Court of Justice, 30 November 2010, paras. 66-68, available at <http://www.icj-cij.org/docket/files/103/16244.pdf>.

States and, where necessary, non-state actors, to comply with international law and obligations. Appropriate remedies may also include State interventions with relevant treaty bodies or international courts.³⁴

Canada takes the position that diplomatic intervention and consular services are provided to citizens abroad on a discretionary basis and not as a matter of right, even when citizens' international human rights are being seriously violated and their lives are at risk. This discretionary approach fails to respect seven decades of development of international human rights law. The *Vienna Convention on Consular Relations* (VCCR)³⁵ gives States the right to protect their citizens, but specifies no individual right to consular protection other than the right of citizens to be informed upon arrest of the right of communication with, and access to, consular officials of their home State. The VCCR leaves it up to States to decide what diplomatic intervention and consular protection they will provide to individuals. The absence of clear, human rights-based criteria for diplomatic intervention and provision of consular services in Canada raises concerns about inequality and discrimination³⁶ and highlights the need for Canadian legislation to confirm and ensure the right of Canadians outside the country and at risk of grave human rights violations, to consular protection directed at ensuring remediation of the actual or threatened violations.³⁷ This is discussed in section 3.4 below.

3.1. Summary of violations that compel States to provide remedies to the hostages

All members of the Boyle/Coleman family have been subjected to gross violations of rights guaranteed by treaties including the ICCPR, the CAT and the Hostages Convention, all of which require States parties to prevent and remedy violations. The Boyle/Coleman family's continued

³⁴ Craig Forcese. "The Obligation to Protect: The Legal Context for Diplomatic Protection of Canadians Abroad." *University of New Brunswick Law Journal* 57 (2007): 102-33.

³⁵ United Nations, *Vienna Convention on Consular Relations* (VCCR), 24 April 1963, available at: <http://www.refworld.org/docid/3ae6b3648.html>.

³⁶ Gar Pardy, *Canadians Abroad: A Policy and Legislative Agenda*, Ottawa: Rideau Institute and Canadian Centre for Policy Alternatives, 2016, available at: https://www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2016/03/Canadians_A_broad.pdf; Parliament of Canada, Standing Committee on Foreign Affairs and International Development, Number 038, 2nd Session, 40th Parliament, 5 November 2009, available at: <http://www.ourcommons.ca/DocumentViewer/en/40-2/FAAE/meeting-38/evidence>; Michelle Shephard and Mitch Potter, "Canadians sympathize with hostages—if they fit the right profile," *Toronto Star*, 2 December 2016, <https://www.thestar.com/news/canada/held-hostage/2016/12/02/canadians-sympathize-with-hostages-if-they-fit-the-right-profile.html>.

³⁷ See 2011 draft legislation sponsored by Irwin Cotler, Bill C-359, *Protecting Canadians Abroad Act*, <https://openparliament.ca/bills/41-2/C-359/>; Gar Pardy, *ibid.*; Amnesty International, and Fahmy Foundation, Protection Charter, 16 January 2016, available at: <https://www.amnesty.ca/news/protection-charter-mohamed-fahmy-and-amnesty-international-propose-more-effective-action-defend>. In June 2017, a petition was presented in Parliament by Member of Parliament, Gord Johns, "calling on the government to increase consular services for kidnapped or abducted citizens and to create a permanent Canadian cadre with international experts in the area of terrorist kidnapping, dedicated solely to assisting families. Importantly, the signatories are asking the Canadian government to commit to keeping families informed about the government's rescue actions and use a plan that includes dedicated personnel who will immediately become active once a Canadian is kidnapped abroad." See <https://openparliament.ca/debates/2017/6/13/gord-johns-1/>. See Petition presented to the House of Commons on June 13, 2017 (Petition No. 421-01510), available at: <https://petitions.ourcommons.ca/en/Petition/Details?Petition=e-696>. As of time of the House of Commons recess beginning 22 June 2017, the government's response had not been tabled.

captivity, torture and ill-treatment, and exposure to the possibility of summary execution is made possible by persistent denial of access to effective remedies.

It must be emphasized that under international law the two children have all the same rights as their parents in addition to rights in recognition of special needs. The *Convention on the Rights of the Child* (CRC) confirms the international law principle that, "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth" (CRC Preamble). 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). This has not been done for the Boyle/Coleman children.

Grave violations of the fundamental rights of the Boyle/Coleman family include:

- Threats to the right to life³⁸ (see section 3.1.1 below);
- Unlawful deprivation of liberty³⁹ (see section 3.1.2 below);
- Torture and ill-treatment⁴⁰ (see section 3.1.3 below);
- Enforced disappearance⁴¹ (see section 3.1.4 below);
- Hostage-taking⁴² and human trafficking⁴³ (see section 3.1.5 below);
- Deprivation of the children's rights to survival; physical, mental, spiritual, moral and social development; and protection from violence and harm, which all States Parties to the CRC have a duty to ensure "to the maximum extent of their available resources and, where needed, within the framework of international co-operation" (emphasis added)⁴⁴
- Deprivation of protection of the children from economic or social exploitation, by holding them and their parents for purposes of prisoner exchange;⁴⁵
- Deprivation of protection of the family⁴⁶ including protection of Ms. Coleman before and after childbirth, and protection of the parents' ability to care for their dependent children;

³⁸ UDHR Article 3, and ICCPR Article 6.

³⁹ UDHR Article 3; ICCPR Article 9; Hostages Convention, *supra* note 3, and punishable as a war crime by the ICC article 8). The European Court of Human Rights in *El-Masri v. The Former Yugoslav Republic of Macedonia* (Application no. 39630/09), ruled that incommunicado confinement outside any judicial framework for 23 days was inhuman and degrading treatment contrary to the CAT, *supra* note 3.

⁴⁰ UDHR Article 5; ICCPR Article 7; CAT, *supra* note 3, ratified by Canada (1987), the US (1994), Afghanistan (1987) and Pakistan (2010); the CEDAW, *supra* note 3, ratified by Canada (1981), Afghanistan (2003) and Pakistan (1996), and signed by the US (1980), a violation of CIL *jus cogens* norms against torture; and punishable by the International Criminal Court (ICC) as a war crime (Article 8) or a crime against humanity (Article 7) in the case of a systematic pattern of torture).

⁴¹ Enforced disappearance is a violation of *jus cogens* norms of CIL. Also see ICCPR articles 7, 9, 10 and 16.

⁴² Hostages Convention, *supra* note 3.

⁴³ Human trafficking is increasingly considered to be a form of slavery, which a *jus cogens* crime. *David Weissbrodt and Anti-Slavery International*, Abolishing Slavery and its Contemporary Forms, OHCHR, available at: <http://www.ohchr.org/Documents/Publications/slaveryen.pdf>. For discussion, see section 3.5 below.

⁴⁴ CRC, Article 3, 4, 6, 19, 27, *supra* note 3, ratified by Canada (1991), Afghanistan (1994) and Pakistan (1990) and signed by the US (1995). Also see ICCPR Article 24.1.

⁴⁵ ICESCR Article 10, *supra* note 3.

⁴⁶ UDHR, Article 12, and ICCPR Article 17, CRC Article 16, ICESCR Article 10. For elaboration, see Sonja Starr, and Lea Brilmayer, "Family Separation as a Violation of International Law," *Berkeley Journal of International Law* 21(2003): 213-287, available at: <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1239&context=bjil>.

- Gender-based discriminatory violence, including reported sexual assault of Ms. Coleman;⁴⁷
- Deprivation of the right to physical and psychological safety and well-being;⁴⁸ and other violations of economic social and cultural rights;⁴⁹
- Deprivation of a number of civil and political rights, including unlawful interference with the family and their privacy.⁵⁰

Violations discussed further below include the threat of extra-judicial execution, unlawful deprivation of the right to liberty, torture and ill-treatment, enforced disappearance, hostage taking, and human trafficking.

3.1.1. Threat to the right to life

The right to life has been described as the “cornerstone” of international human rights.⁵¹ The right to life has two components:

- the non-derogable prohibition of unlawful deprivation of life, and
- accountability for unlawful threats to or deprivation of life.

“Deprivation of life” refers not only to killing but also to the failure to provide minimum survival requirements such as safe and adequate food, water, shelter and health care including reproductive health care.⁵²

The right to life and the prohibition of unlawful deprivation of life set out in the *Universal Declaration of Human Rights* (UDHR)⁵³ and is guaranteed as a non-derogable right⁵⁴ by the ICCPR.⁵⁵ Each State Party to the ICCPR, including Canada (1976), the US (1992), Afghanistan

⁴⁷ CEDAW, *supra* note 3. See the CEDAW Committees General Recommendations 12 and 19. UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 12: Violence against women*, 1989, available at: <http://www.refworld.org/docid/52d927444.html>; UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 19: Violence against women*, 1992, available at: <http://www.refworld.org/docid/52d920c54.html>

⁴⁸ ICESCR, *supra* note 3, acceded to by Canada (1976) and by Afghanistan (1983), and ratified by Pakistan (2008) and signed by the US (1977).

⁴⁹ Deprivation of the right to the opportunity of an adequate standard of living including adequate food, clothing and housing and living conditions ICESCR Article 11.

⁵⁰ ICCPR, Article 17, UDHR Article 12.

⁵¹ Christof Heyns and Thomas Probert, Securing the Right to Life: A cornerstone of the human rights system, *EJIL-Talk*, 11 May 2016, available at: <https://www.ejiltalk.org/securing-the-right-to-life-a-cornerstone-of-the-human-rights-system/>

⁵² See *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions on a gender-sensitive approach to arbitrary killings*, 6 June 2017, A/HRC/35/23, available at: http://www.ohchr.org/Documents/Issues/Executions/A_HRC_35_23.docx

⁵³ UDHR, *supra* note 41.

⁵⁴ ICCPR, Article 4, *supra* note 3. The prohibition of unlawful deprivation of life is also a *jus cogens* norm. Human Rights Committee, *CCPR General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant*, 4 November 1994, CCPR/C/21/Rev.1/Add.6, para. 10, available at: <http://www.refworld.org/docid/453883fc11.html>; UN Human Rights Committee, *CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency*, 31 August 2001, CCPR/C/21/Rev.1/Add.11, para 11, available at: <http://www.refworld.org/docid/453883fd1f.html>.

⁵⁵ ICCPR, *supra* note 3.

(1983) and Pakistan (2010), undertakes the twin legal obligations to protect the right to life of all persons within its territory and subject to its jurisdiction and to prevent and remedy violations.⁵⁶ The UN Human Rights Committee has emphasized the State obligation to provide an effective remedy⁵⁷ including any necessary changes in laws and practices to prevent impunity and recurrence of violations.⁵⁸

The obligation to conduct prompt, thorough, and impartial investigations and to ensure accountability for serious human rights violations is an essential component of the duty to protect the right to life.⁵⁹ The UN Human Rights Committee also warns that failures by a State Party to investigate allegations of violations or to ensure accountability of perpetrators may give rise to separate breaches of the ICCPR.⁶⁰ Any State in which the Boyle/Coleman family is suspected to be held captive has a duty to ensure effective investigations and remediation.

The UN Human Rights Committee also points out that the death penalty is to be reserved for “most serious crimes,” interpreted restrictively to mean that the death penalty should be a “quite exceptional measure” which must never be imposed without fair trials, adequate defence, the right of appeal, and the right to seek pardon or commutation of the sentence.⁶¹ Afghanistan, as a State Party to the ICCPR, is obliged to ensure these rights to all those charged with offences in Afghanistan, including imprisoned members of the Haqqani Network.⁶²

Sections 3.3 and 3.4 below discuss Canada’s responsibility to protect citizens’ international human rights when they are outside the country.

3.1.2. Deprivation of the right to liberty

The right to liberty is recognized by the UDHR Article 9 and guaranteed by the ICCPR Article 9.⁶³ The ICCPR provides that: “No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.” The UN Human Rights Committee, in its 2014 General Comment 35, refers to hostage taking as an “egregious” form of unlawful

⁵⁶ UN Human Rights Committee, General Comment 31, paras. 4 and 8, *supra* note 33.

⁵⁷ *Ibid.*, paras. 16, 18.

⁵⁸ *Ibid.*

⁵⁹ States should use the Minnesota Principles as guidelines for investigation. The Minnesota Protocol specifies that investigations must be effective to identify and apprehend all persons involved in and responsible for the violations (and threatened violations) and to bring all suspected perpetrators before a competent court established by law for prosecution and punishment in accordance with fair trial standards. United Nations, *The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016): The Revised United Nations Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Execution*, available at: <http://www.ohchr.org/Documents/Issues/Executions/MinnesotaProtocolInvestigationPotentiallyUnlawfulDeath2016.pdf>.

⁶⁰ UN Human Rights Committee, General Comment No. 31, paras 15 and 18, *supra* note 33.

⁶¹ UN Human Rights Committee, *CCPR General Comment No. 1: Article 6 (Right to Life)*, 9 November 1982, para 7. Note that a draft update of this General Comment is underway; the 2015 draft is available at <http://www.ohchr.org/EN/HRBodies/CCPR/Pages/GC36-Article6Righttolife.aspx>

⁶² Office of the UN High Commissioner for Human Rights, Afghanistan: UN rights experts condemn the execution of six persons without fair trial guarantees, 10 May 2016, available at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=19941&LangID=E>

⁶³ UN Human Rights Committee, *General comment no. 35, Article 9 (Liberty and security of person)*, 16 December 2014, CCPR/C/GC/35, available at: <http://www.refworld.org/docid/553e0f984.html>

deprivation of liberty and that there must be no derogation from norms against hostage-taking.⁶⁴ Unlawful deprivation of liberty entails risks of torture and ill-treatment.⁶⁵

3.1.3. Torture and other cruel, inhuman or degrading treatment or punishment

The right to freedom from torture and ill-treatment is guaranteed by the UDHR Article 5, ICCPR Article 7, and the CAT, which was ratified by Canada (1987), the US (1994), Afghanistan (1987), and Pakistan (2010). Section 269.1 of the *Criminal Code* of Canada, enacted in compliance with the CAT, defines torture as “any act or omission by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person” for the purpose of “...intimidating or coercing the person or a third person...”⁶⁶ The most common methods of torture include beating, sexual assault, threats, humiliation, and witnessing the torture of others.⁶⁷ Incommunicado detention outside the framework of judicial protection is recognized as a form of prohibited ill-treatment of hostages under Article 7 of the ICCPR, as well as family members at home “because of anxiety and anguish they suffer as a result of the disappearance of their relatives.”⁶⁸ All members of the Boyle/Coleman family, including relatives in Canada and the US are victims of torture. Forms of torture and ill-treatment of the family include:

- sexual assault of Ms. Coleman;⁶⁹
- assault of Mr. Boyle and confinement in chains;

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*, para 56.

⁶⁶ CAT, *supra* note 3.

⁶⁷ UN Voluntary Fund for Victims of Torture (UNVFVT), Interpretation of Torture in the Light of the Practice and Jurisprudence of International Bodies, 2011, available at:

http://www.ohchr.org/Documents/Issues/Torture/UNVFVT/Interpretation_torture_2011_EN.pdf

⁶⁸ *Ibid.*, citing the Committee on Civil and Political Rights Communications 107/1981, *Quinteros v. Uruguay*, 21 July 1983, para. 14; 540/1993, available at <http://hrlibrary.umn.edu/undocs/newscans/107-1981.html>; *Celis Laureano v. Peru*, 25 March 1996, para. 8.5; 458/1991, available at: <http://hrlibrary.umn.edu/undocs/540-1993.html>; *Mukong v Cameroon*, 24 July 1994, para. 9.4; 440/1990, available at:

<http://hrlibrary.umn.edu/undocs/html/vws458.htm>; *El-Megreisi v. Libyan Arab Jamahiriya*, 23 March 1994, para. 5.4, 950/2000, available at: <http://hrlibrary.umn.edu/undocs/html/vws440.htm>; *Sarma v. Sri Lanka*, 31 July 2003, para. 9.5; 1295/2004, available at: <http://hrlibrary.umn.edu/undocs/950-2000.html>; *El Alwani v. Libyan Arab Jamahiriya*, 11 July 2007, paras 6.5 and 6.6, available at:

http://www.worldcourts.com/hrc/eng/decisions/2007.07.11_El_Alwani_v_Libya.htm; and, *Grioua v Algeria*, 10 July 2007, paras. 7.6 and 7.7, 1327/2004, available at:

http://www.worldcourts.com/hrc/eng/decisions/2007.07.10_Grioua_nee_Atamna_v_Algeria.htm. Also see the European Court of Human Rights, in *El-Masri v. The Former Yugoslav Republic of Macedonia* (Application no. 39630/09), which ruled that incommunicado confinement outside any judicial framework for 23 days was inhuman and degrading treatment contrary to the CAT. In 2001, the UN Special Rapporteur on Torture pointed the 1980 acknowledgement of the UN Working Group on Enforced and Involuntary Disappearances “enforced disappearance itself constitutes ipso facto torture and other prohibited ill-treatment.”

⁶⁹ The UNVFVT, *supra* note 72, describes sexual assault of women as a “a grave violation of women’s integrity and therefore may amount either to torture or to cruel, inhuman and degrading treatment.” The UNVFVT quotes the SR on Torture, then Manfred Nowak, who stated: “It is widely recognized, including by former Special Rapporteurs on torture and by regional jurisprudence, that rape constitutes torture when it is carried out by or at the instigation of or with the consent or acquiescence of public officials.” Violence against women, including sexual assault is also a violation of the CEDAW, *supra* note 3, ratified by Canada (1981), Afghanistan (2003) and Pakistan (1996), and signed by the US in (1980).

- witnessing the torture and ill-treatment of their mother and father by the two children;⁷⁰
- enforced disappearance, through prolonged, indefinite, unlawful incommunicado detention in an undisclosed location without judicial oversight (see more on enforced disappearance in section 3.1.4 below).

The international law prohibitions against torture and ill-treatment are absolute and may not be derogated under any circumstances whatsoever. Torture is also a violation of *jus cogens* norms.⁷¹ Torture by non-state actors violates the CAT when there is suspected acquiescence of one or more relevant States through failure to exercise due diligence to investigate, prevent and hold suspected perpetrators accountable. Each State Party to the CAT owes a duty to all humankind (*erga omnes*)⁷² to prevent and punish torture wherever it occurs and whatever the nationality of victims and perpetrators. This duty includes obligations to ensure accountability of perpetrators and provide remedies to victims for all acts of torture and ill-treatment.⁷³

Failure by States to exercise due diligence to investigate and to hold perpetrators accountable may constitute acquiescence. Failure to hold security, intelligence or other state-sponsored agencies accountable for turning a blind eye to torture committed by non-state actors may also constitute acquiescence. The CAT requires States to prevent, punish, and remedy torture and ill-treatment by:

- taking effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction or control (Article 2.1);

⁷⁰ The UNVFVT, *supra* note 72, also considers watching the torture of close family members as a form of torture, citing the case of International Criminal Tribunal for Ex-Yugoslavia, Prosecutor vs. Moinina Fofana and Allieu Kondewa, August 2007, para. 15, which stated that:

... a third party could suffer serious mental harm by witnessing acts committed against others, particularly against family or friends. The Chamber is also of the opinion that the Accused may be held liable for causing serious mental harm to a third party who witnesses acts committed against others only where, at the time of the act, the Accused had reasonable knowledge that this act would likely cause serious mental suffering on the third party.

⁷¹ ICRC IHL Data Base, Rule 90. Torture and Cruel, Inhuman or Degrading Treatment, available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule90 “*Jus cogens* (from Latin: compelling law; English: peremptory norm) refers to certain fundamental, overriding principles of international law, from which no derogation is ever permitted. See Ian Brownlie, *Principles of Public International Law* (5th ed., Oxford, 1998).” According to Cornell Law School LII: https://www.law.cornell.edu/wex/jus_cogens. See M. Cherif Bassiouni, “International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*,” *Law and Contemporary Problems* 59(4)(1998): 63-74, available at: <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1016&context=lcp>

⁷² “*Erga omnes*” is Latin term meaning “towards all.” The international law term “*erga omnes*” obligations refers to rights or obligations owed toward everyone. See *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*; Second Phase, International Court of Justice (ICJ), 5 February 1970, available at: http://www.worldcourts.com/icj/eng/decisions/1970.02.05_barcelona_traction.htm. In this case, the ICJ

Barcelona Traction case stated that:

an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes* (Para 33).

The ICJ pointed out that such obligations are derived “from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination” (para 34).

⁷³ Bassiouni, *supra* 76, at 65-55.

- ensuring that individuals alleging that they have been subjected to torture have their cases examined by competent authorities (Article 13);
- ensuring that authorities conduct prompt, thorough and impartial investigations when there are reasonable grounds to believe an act of torture has been committed (Article 12);
- arresting any person alleged to have committed torture and making a preliminary inquiry into the facts (Article 6);
- prosecuting any persons suspected of committing the offence of torture or extraditing to a jurisdiction willing and able to prosecute pursuant to fair trial standards (Article 7);
- ensuring to victims and survivors of torture and ill-treatment an enforceable right to fair and adequate compensation (Article 14).⁷⁴

Amendments to Canada’s *Criminal Code* to comply with CAT include section 269.1, which attaches criminal liability to “every official,” “every person,” or “any other person” who commits torture. Section 7 (3.7) of the *Criminal Code*, enacted to comply with Article 5 of the CAT, expands Canada’s jurisdiction to prosecute suspects irrespective of where the torture occurs, the nationality of the victim(s) and the residence or nationality of the alleged perpetrator(s). Canada’s jurisdiction to prosecute torture occurring outside Canada is triggered when the suspect or the victim is a Canadian citizen, or when the suspected perpetrator enters Canada. Section 465(5) provides that when any of these conditions exist, the torture is deemed to have been committed in Canada and a prosecution “may be commenced in any territorial division in Canada and the accused may be tried and punished in respect of that offence in the same manner as if the offence had been committed in that territorial division.”

The language of the torture sections of the *Criminal Code* plainly applies to everyone, including the Haqqani Network captors. Canada has a duty of due diligence to ensure the prevention, prosecution and accountability for acts of torture committed by non-state actors against the Boyle/Coleman family.

3.1.4. Hostage-taking and the international crime of enforced disappearance

Hostage-taking fits the definition of the international crime of enforced disappearance when captors refuse to disclose the whereabouts of their hostages, keep the hostages in incommunicado imprisonment, deny them contact with their relatives, and place them outside the protection of the law with no access to judicial oversight or any other remedies including consular services. This describes the situation of the Boyle/Coleman family.

Enforced disappearance is one of the worst human rights violations. It is a violation of multiple rights⁷⁵ protected by the ICCPR, including rights to life, liberty, freedom from torture and ill-treatment, the integrity of family life, protection of the law, and access to judicial oversight and

⁷⁴ This summary is drawn from relevant parts of Hans Danelius, “Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment,” United Nations Audiovisual Library of International Law, 2008, available at: http://legal.un.org/avl/pdf/ha/catcidtp/catcidtp_e.pdf

⁷⁵ United Nations Commission on Human Rights, “Report submitted January 8, 2002, by Mr. Manfred Nowak, independent expert charged with examining the existing international criminal and human rights framework for the protection of persons from enforced or involuntary disappearance, pursuant to paragraph 11 of Commission Resolution 2001/46,” E/CN.4/2002/71, 36.

remedies.⁷⁶ Victims of enforced disappearance include the disappeared⁷⁷ as well as their relatives who are subjected to unremitting anguish and uncertainty about the fate or condition of their disappeared loved ones.

The defining characteristics – and particular cruelties – of enforced disappearance are that the crime:

- places the disappeared outside all protection of the law;
- inflicts severe suffering on the disappeared and their families;⁷⁸
- is continuous until the disappeared is released or the circumstances of the disappearance are established including disclosure of the whereabouts of the disappeared.⁷⁹

By definition, the crime of enforced disappearance involves government officials, at least by acquiescence through lack of appropriate action to prevent or terminate such acts.⁸⁰

States Parties to the ICCPR, including Canada, the US, Afghanistan and Pakistan, have treaty obligations to investigate and remedy enforced disappearances suspected to be committed by state or non-state actors. The duties of States Parties to the ICCPR to investigate and remedy enforced disappearances have been confirmed by the UN Human Rights Committee.⁸¹ There must be no

⁷⁶ Also see Sarkin, Jeremy. "Why the Prohibition of Enforced Disappearance Has Attained *Jus Cogens* Status in International Law." *Nordic Journal of International Law* 81(4) (2012): 537-584 at 538-39.

⁷⁷ The UN *Declaration on the Protection of all Persons from Enforced Disappearance* describes disappeared persons as those who have been

arrested, detained, or abducted against their will or otherwise deprived of liberty by government officials, or by organized groups or private individuals acting on behalf of, or with the direct or indirect support, consent, or acquiescence of the government, followed by a refusal to disclose the fate or whereabouts of the persons concerned or by a refusal to acknowledge the deprivation of their liberty, which places such persons outside the protection of the law.

UN General Assembly, *Declaration on the Protection of all Persons from Enforced Disappearance*, General Assembly resolution 47/133, 18 December 1992, A/RES/47/133, 8 December 1992, available at:

<http://www.un.org/documents/ga/res/47/a47r133.htm>. The right to freedom from enforced disappearance has been articulated as an absolute, non-derogable right in the *International Convention for the Protection of All Persons from Enforced Disappearance* (CED). The CED has not been ratified by Canada, the US, Afghanistan or Pakistan. In the CED, a necessary element of the crime of enforced disappearance is "support, consent, or acquiescence of the government" (emphasis added).

⁷⁸ *Declaration on the Protection of all Persons from Enforced Disappearance*, General Assembly resolution 47/133 of 18 December 1992, A/RES/47/133, 8 December 1992, Article 1, available at:

<http://www.un.org/documents/ga/res/47/a47r133.htm>

⁷⁹ Working Group on Enforced or Involuntary Disappearances (WGEID), *General Comment on Enforced Disappearance as a Continuous Crime*, Report of the Working Group on Enforced or Involuntary Disappearances, 2010, A/HRC/16/48, at p 23, available at:

http://www.ohchr.org/Documents/Issues/Disappearances/GeneralCommentsDisappearances_en.pdf

⁸⁰ *Ibid.*, at 1.

⁸¹ UN Human Rights Committee, General Comment No. 31, para 8, *supra* note 33. Investigations are to be undertaken according to *The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016): The Revised United Nations Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Execution* (Minnesota Protocol), available at:

<http://www.ohchr.org/Documents/Issues/Executions/MinnesotaProtocolInvestigationPotentiallyUnlawfulDeath2016.pdf>.

support, consent or acquiescence by any State.⁸² Acquiescence may be indicated by lack of due diligence in the duty to seek release of captives and to investigate and hold suspected perpetrators accountable.

The “right to truth” (also known as the “right to know the truth”) about the whereabouts of the disappeared persons is an essential right recognized by international human rights law.⁸³ The right of families of disappeared persons to know the truth includes “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).”⁸⁴

3.1.5. Hostage-taking and human trafficking: “The ultimate commodity”

The Hostages Convention⁸⁵ prohibits hostage-taking and requires States Parties to prevent and remedy this grave offence. The Hostages Convention has been ratified by Canada (1985), the US (1984), and acceded to by Afghanistan (2003) and Pakistan (2000).⁸⁶

Article 3.1 of the Hostages Convention imposes a positive duty on States to provide remedies to hostages held in their territories:

The State Party in the territory of which the hostage is held by the offender shall take all measures it considers appropriate to ease the situation of the hostage, in particular, to secure his release and, after his release, to facilitate, when relevant, his departure.

While the wording of this Article gives discretion to the State to do what “it considers appropriate,” this qualification is limited by the obligation that States “shall” take all measures, in particular to secure hostages’ release. States Parties must adhere to this Article in good faith.⁸⁷ It is not an appropriate exercise of discretion to do little or nothing that is likely to be effective to investigate, secure hostages’ release, cooperate with other States whose nationals are affected, or provide other

⁸² *Declaration on the Protection of all Persons from Enforced Disappearance*, *supra* note 84.

⁸³ WGEID. *General Comment on the right to the truth in relation to enforced disappearance, Report of the Working Group on Enforced or Involuntary Disappearances*, 2010, Document A/HRC/16/48, at p. 26, available at: http://www.ohchr.org/Documents/Issues/Disappearances/GeneralCommentsDisappearances_en.pdf. See also Yasmin Naqvi, “The right to the truth in international law: Fact or fiction?” *ICRC Review* 88(862)(June 2006), available at: <http://aldeilis.net/truth/001.pdf>.

⁸⁴ See the full parameters of the right to truth set out in paras 1-10 of the WGEID. *General Comment on the right to the truth in relation to enforced disappearance, Report of the Working Group on Enforced or Involuntary Disappearances*, 2010, Document A/HRC/16/48, at p. 26, available at: http://www.ohchr.org/Documents/Issues/Disappearances/GeneralCommentsDisappearances_en.pdf

⁸⁵ Hostages Convention, *supra* note 3. For discussion of the negotiations on the drafting of the Hostages Convention, see Ben Saul, “International Convention against the Taking of Hostages,” United Nations Audiovisual Library of International Law, available at: http://legal.un.org/avl/pdf/ha/icath/icath_e.pdf.

⁸⁶ See ratifications at https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsg_no=xviii-5&chapter=18&lang=en. The conditions of exclusion of application of the Hostages Convention set out in Article 12 do not appear to apply in the particular circumstances of this case. See Kimberley N. Trapp. *State Responsibility for International Terrorism. Problems and Prospects*. Oxford: Oxford University Press, 2011, at 110-111. It is beyond the scope of this report to elaborate on the highly complex interface between the Hostages Convention and international humanitarian law in the armed conflict in the region.

⁸⁷ United Nations, *Vienna Convention on the Law of Treaties* (VCLT), 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, available at: <http://hrlibrary.umn.edu/instreet/viennaconvention.html>.

remedies consistent with the States' international human rights law obligations. The Legal and Constitutional Affairs Division of the Commonwealth Secretariat points out that: "Although the [State] Party has a discretion, it must, as a minimum, try to find out where the hostage is being held, demand release and consider all feasible options to secure his or her release."⁸⁸

The growing practice⁸⁹ of hostage-taking for ransom (whether monetary or non-monetary) converts human beings into "the ultimate commodity."⁹⁰ The term "human trafficking" is wholly appropriate in cases of hostage-taking for ransom.⁹¹ In the case of the Boyle/Coleman family, the ransom demanded is non-monetary, namely the exchange of the hostages for prisoners held by Afghanistan or for consideration such as non-execution of prisoners. This situation fits the inclusive definition of "trafficking" in the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* (Trafficking Protocol)⁹² 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).

This description of "exploitation" in Article 3 above is inclusive, not exhaustive, yet the laws and policies of Canada⁹³ and the US,⁹⁴ define "exploitation" narrowly and exhaustively. This has the effect of excluding hostage-taking for ransom from the definition unless the purpose of the

⁸⁸ Criminal Law Section, Legal and Constitutional Affairs Division, Commonwealth Secretariat "Hostages Convention," Chapter 7 in *Implementation Kits for the International Counter-Terrorism*. London: Commonwealth Secretariat, available at UNODC: http://www.unodc.org/pdf/crime/terrorism/Commonwealth_Introduction.pdf. Chapter seven is available at http://www.unodc.org/pdf/crime/terrorism/Commonwealth_Chapter_7.pdf.

⁸⁹ Seth Loertscher, and Daniel Milton, *Held Hostage: Analyses of Kidnapping Across Time and Among Jihadist Organizations*, Combatting Terrorism Center at West Point, at 26, 39, available at: <https://ctc.usma.edu/v2/wp-content/uploads/2015/12/Held-Hostagereportc2.pdf>

⁹⁰ Boaventura de Sousa Santo, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation*, Cambridge University Press, 2002, at 9, as paraphrased by Cecilia M. Bailliet, "Towards Holistic Transnational Protection: An Overview of International Public Law Approaches to Kidnapping" *Denver Journal of International Law and Policy*, 38(4)(2010): 581-622, at 583, available at:

<http://www.ohchr.org/Documents/HRBodies/HRCouncil/TerrorismHostage/Academic.Baillietarticle.pdf>

⁹¹ Cecilia M. Bailliet, "Towards Holistic Transnational Protection: An Overview of International Public Law Approaches to Kidnapping" *Denver Journal of International Law and Policy*, 38(4)(2010): 581-622, at 585, available at: www.ohchr.org/Documents/HRBodies/HRCouncil/TerrorismHostage/Academic.Baillietarticle.pdf

⁹² Trafficking Protocol, *supra* note 3. Canada ratified the Trafficking Protocol in 2002; the US in 2005; Afghanistan acceded in 2011. Pakistan has not ratified it. See the ratifications at

https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&clang=en

⁹³ Canada's legislation on human trafficking is summarized at <http://www.justice.gc.ca/eng/cj-jp/tp/legis-loi.html>. Canada's definition of "trafficking" is found in Government of Canada, *A Handbook for Criminal Justice Practitioners on Trafficking in Persons*, Chapter 2, <http://www.justice.gc.ca/eng/rp-pr/cj-jp/tp/hcjpotp-gtpupjp/p1.html>. The definition of "trafficking" and "exploitation" are found in the *Criminal Code of Canada*, s. 279, particularly s.279.01 to s.279.04.

⁹⁴ See the USA, Human Trafficking vs. Human Smuggling: Fact Sheet, US Department of State, n.d., <https://www.state.gov/documents/organization/226276.pdf>.

trafficking fits the specific taxonomy of forced labour (including sexual exploitation) or organ harvesting.⁹⁵ This narrow interpretation appears to be a failure to implement the full scope and intention of the Trafficking Protocol.⁹⁶

While it is not known whether the Boyle/Coleman family is being subjected to forced work (beyond forced participation in propaganda videos), the definition of “slavery” goes beyond the conception of forced labour. The 1926 *Slavery Convention* defines slavery as “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised”⁹⁷ treating human beings as though they are “possessions, like livestock or furniture, and to sell or transfer them to others” (emphasis added).⁹⁸ Trading in slaves is defined as

“all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging

⁹⁵ Canada’s definition of “trafficking” in the *Criminal Code of Canada* excludes hostage-taking for monetary or nonmonetary ransom unless the form of exploitation does involves causing hostages to “provide, or offer to provide, labour or a service. See, Government of Canada, National Action Plan to Combat Human Trafficking, 2012, available at: <https://www.publicsafety.gc.ca/cnt/rsres/pblctns/ntnl-ctn-pln-cmbt/ntnl-ctn-pln-cmbt-eng.pdf>.

⁹⁶ VCLT, Article 26, *supra* note 95, states that a treaty “shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” A State’s obligation to perform its treaty obligations in good faith extends to interpretation of the scope of the treaty. The plain language of the Trafficking Protocol indicates that exploitation is to be defined as broadly inclusive. The *travaux préparatoires* of the Trafficking Protocol provide evidence that the drafters intended the term “at a minimum” to “allow States Parties to go beyond the offences listed in this definition in criminalizing. The drafters intended to make it possible for the Protocol to cover future forms of exploitation (i.e. forms of exploitation that are not yet known).” See e.g., Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, *Revised draft Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*, 5-16 June 2000, at note 31, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/V00/528/43/PDF/V0052843.pdf>. See the final record of *travaux préparatoires* at https://www.unodc.org/pdf/crime/final_instruments/383a1e.pdf Good faith interpretation of the Trafficking Protocol would include within the scope of Article 3 victims of hostage-taking for ransom by insurgent non-state actors. See Mogus O Brhane, “Trafficking in Persons for Ransom and the Need to Expand the Interpretation of Article 3 of the UN Trafficking Protocol,” *Anti-Trafficking Review* 4, 2015, pp.120-141, available at: www.antitraffickingreview.org. Expansive interpretation would ensure that hostages taken for monetary (or non-monetary) ransom, and whose lives are at stake, are assured access to justice and remedies for the violations against them. It is also arguable that hostage-taking with a view to ransoming the family, including the children, in a prisoner exchange, is a violation of the CRC-OP-SC, article 2, *supra* note 3, which defines sale of children as “any act or transaction whereby a *child is transferred* by any person or group of persons to another for remuneration or any other consideration” (emphasis added). Article 6, requires all States Parties to the CRC-OP2 to “afford one another the greatest measure of assistance in investigation” or criminal proceedings in respect of such offences.

⁹⁷ League of Nations, *Convention to Suppress the Slave Trade and Slavery (slavery Convention)*, 25 September 1926, 60 LNTS 253, Registered No. 1414, Article 2, available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/SlaveryConvention.aspx> as discussed in David Weissbrodt and Anti-Slavery International, *Abolishing Slavery and its Contemporary Forms*, OHCHR, 2002, available at: <http://www.ohchr.org/Documents/Publications/slaveryen.pdf>. The *Slavery Convention* has been signed but not ratified by Canada (1953) and the US (1956), Afghanistan (1954), and acceded to by Pakistan (1955). In 1956, the *Slavery Convention* was augmented by the 1956 *Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery*, available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/SupplementaryConventionAbolitionOfSlavery.aspx>. The Supplementary Convention confirms the definition of slavery in the 1926 *Slavery Convention* and has been acceded to by the US (1967), Afghanistan (1966) and ratified by Canada (1963) and Pakistan (1958).

⁹⁸ Weissbrodt, *Ibid.*, para 20.

him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves” (emphasis added).

The Boyle/Coleman family have been treated as trade commodities with commonly accepted indicators of slavery including denial of freedom of movement and total control over them, accompanied by violence and threats of death.⁹⁹

3.2. The challenge posed by armed non-state actors

The fact that the Boyle/Coleman family is held in captivity by non-state actors poses significant practical challenges in enforcement of international human rights law.¹⁰⁰ All States must exercise utmost due diligence in prevention, investigation and accountability of non-state actors for torture, hostage taking, threats to life and enforced disappearance, particularly through international cooperation in the mutual enforcement of international human rights obligations.¹⁰¹

3.3. The right of access to justice and remedies

The above summary of serious, ongoing violations of the rights of all members of the Boyle/Coleman family is only partial, based on what little information is available about the family’s situation.¹⁰² The violations constitute breaches of numerous treaties, including the ICCPR, the CAT, and the Hostages Convention,¹⁰³ to which all the relevant countries are States’ Parties. Any injured State Party to a treaty is entitled to invoke the responsibility of another State Party to the treaty to seek “cessation of the internationally wrongful act, and assurances and guarantees of non-repetition...” and reparations in the interest of the injured State’s beneficiaries (e.g. injured citizens).¹⁰⁴

The UN Human Rights Committee, General Comment 31,¹⁰⁵ an authoritative interpretation of the ICCPR, provides that each State Party is “obligated to every other State Party to comply with its undertakings under the treaty.”¹⁰⁶ The UN Human Rights Committee expects every State to exert

⁹⁹ *Ibid.*, para 21-22.

¹⁰⁰ Andrew Clapham, “Human rights obligations of non-state actors in conflict situations,” *International Review of the Red Cross* 88 (863) (September 2006): 491-523, available at: https://www.icrc.org/eng/assets/files/other/irrc_863_clapham.pdf

¹⁰¹ Bassiouni, *supra* note 76.

¹⁰² For a range of violations suffered by victims of hostage-taking see paragraph 25 of UN Human Rights Advisory Council, Human rights and issues related to terrorist hostage-taking - Report of the Human Rights Council Advisory Committee, a/HRC/24/47. 4 July 2013, available at: http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/24/47

¹⁰³ The States Parties to these treaties have duties to towards all the other States Parties to these treaties (*erga omnes partes*). For discussion on the difference between *erga omnes* and *erga omnes partes* obligations, see Linos-Alexander Sicilianos, “The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility,” *European Journal of International Law* 13 (2002), 1127–11, available at: <http://ejil.org/pdfs/13/5/1578.pdf>. Also see United Nations International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001, Article 48, available at: http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf

¹⁰⁴ See Article 48, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001, available at: http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf

¹⁰⁵ UN Human Rights Committee, General comment no. 31, *supra* note 33.

¹⁰⁶ *Ibid.*, para. 4. General Comment 31 states that:

its legitimate interests in the enforcement of the ICCPR among all States Parties.

States have duties to ensure the enforcement of treaty rights within their territories and control. A number of treaties indicate no territorial boundaries to their application including the CAT, the *International Convention on Economic, Social and Cultural Rights* (ICESCR), the *Convention to End Discrimination against Women* (CEDAW), and the CRC. The ICCPR provides that a State has a positive duty to ensure rights to all within its territory and subject to its jurisdiction (Article 2). While the US takes the position that the ICCPR does not apply outside its territory or control, the UN Human Rights Committee differs and has consistently interpreted Article 2.1 expansively and paraphrased it as requiring States to “respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction” (emphasis added).¹⁰⁷

“Jurisdiction” is an elastic term which Canada applies to a range of issues from the duty to issue passports and allow citizens’ entry to their own country,¹⁰⁸ to regulating corporate conduct abroad,¹⁰⁹ to prosecuting those who commit certain crimes extraterritorially, to advocating for protection of human rights defenders worldwide.¹¹⁰ Canada increasingly applies extraterritorial jurisdiction to those outside the country. To do otherwise regarding gross violations of the most fundamental rights of Canadian citizens abroad treats fundamental rights as though they were mere privileges, making a perverse mockery of Canada’s solemn promises to the international community and its own citizens.

Internationally, the extraterritorial application of international human rights treaties is evolving to favour the extension of the State responsibility to protect rights beyond borders where there is a relationship between the State and the persons whose rights are affected.¹¹¹ Where a State has no control over the conduct of other States or non-state actors within other States, the State’s proper role is to exert due diligence to the full extent of diplomatic pressure, consular services, and international cooperation to ensure the internationally protected rights of its citizens and permanent residents abroad. Violations of *jus cogens* norms, including the crime of torture, are of such gravity that they attract obligations to the international community as a whole (*erga omnes*). Obligations

To draw attention to possible breaches of Covenant obligations by other States Parties and to call on them to comply with their Covenant obligations should, far from being regarded as an unfriendly act, be considered as a reflection of legitimate community interest (paragraph 2).

¹⁰⁷ *Ibid.*, para. 10.

¹⁰⁸ *Abousfian Abdelrazik (Applicant) v. The Minister of Foreign Affairs and the Attorney General of Canada (Respondents)* [2010] 1 F.C.R. 267

¹⁰⁹ United Nations. *Guiding principles on business and human rights: implementing the United Nations "Protect, Respect and Remedy" framework*, 2011 available at: http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

¹¹⁰ Government of Canada, *Voices at risk: Canada’s guidelines on supporting human rights defenders*, June 2017, available at:

http://international.gc.ca/world-monde/issues_development-enjeux_developpement/human_rights-droits_homme/rights_defenders_guide_defenseurs_droits.aspx?lang=eng

¹¹¹ For further discussion, see Scott Sheeran, and Sir Nigel Rodley, eds, *Routledge Handbook of International Human Rights Law*, London/New York: Routledge, 2013; Fons Coomans, and Menno T. Kamminga, eds, *Extraterritorial Application of Human Rights Treaties*, Antwerp/Oxford, Intersentia, 2004; Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy*, Oxford: OUP, 2011. See a bibliography at <http://globaltrust.tau.ac.il/the-extraterritorial-application-of-human-rights-a-digest-of-sources/>

regarding violation of *jus cogens* crimes require all States to exercise due diligence prevent such crimes and to ensure investigation, extradition, prosecution, and accountability of suspected perpetrators in accordance with international human rights standards.¹¹²

3.4. Canada's policy framework for consular protection in light of international human rights law

Canada's legal and policy framework for consular services has been sharply criticized in relation to a number of high-profile cases involving hostage-taking or arbitrary detention in foreign prisons.¹¹³ Canada's policies on diplomatic and consular protection are based on the right of States to protect citizens abroad.¹¹⁴ This right is codified in the 1963 *Vienna Convention on Consular Relations* (VCCR).¹¹⁵ Canada's policy is to exercise its right to protect citizens on a discretionary

¹¹² *Barcelona Traction, Light and Power Company, Limited* (Belgium v. Spain); Second Phase, International Court of Justice (ICJ), 5 February 1970, available at:

http://www.worldcourts.com/icj/eng/decisions/1970.02.05_barcelona_traction.htm. In this case, the ICJ Barcelona Traction case stated that:

an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes* (Para 33).

The ICJ pointed out that such obligations are derived "from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination" (para 34).

¹¹³ E.g. the case of arbitrary detention of Mohammed Fahmy, a Canadian journalist arbitrarily detained in Egypt; the case of Maher Arar, a Syrian-born Canadian arbitrarily detained and tortured 2002-03 in Syria (with complicity by Canadian and USA governments); the case of journalist Amanda Lindhout, held hostage in Somalia for 15 months in 2008-09; the 2008-09 kidnapping and captivity in Niger of Canadian diplomats Robert Fowler and Louis Guay, and other cases. For analysis of Canada's consular protection policies, see Craig Forcece, *supra* note 35. Also see Gar Pardy, *supra* note 37.

¹¹⁴ International Court of Justice (ICJ) which stated in 1924:

It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own right — its right to ensure, in the person of its subjects, respect for the rules of international law.

While general principles of international law and customary international law require exhaustion of local remedies as a pre-condition for the exercise of diplomatic protection, there is no requirement that local remedies be exhausted when there are no effective remedies available. See John R. Dugard, Diplomatic Protection, [Agenda item 3], Second report on diplomatic protection, A/CN.4/514, 2001, at para 31, available at:

http://legal.un.org/ilc/documentation/english/a_cn4_514.pdf. It is also argued that the requirement of exhaustion of remedies does not apply to *erga omnes* obligations: see Annemarieke Vermeer-Künzli, "A Matter of Interest: Diplomatic Protection and State Responsibility Erga Omnes," *International and Comparative Law Quarterly* 56 (3) (July 2007): 553–558. Also see UN International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001, available at: http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf. See UN International Law Commission, Second report on diplomatic protection by John R. Dugard, Special Rapporteur, Agenda item 3, A/CN.4/514, 28 February 2001 http://legal.un.org/ilc/documentation/english/a_cn4_514.pdf

¹¹⁵ VCCR, *supra* note 35. While general principles of international law and customary international law traditionally require exhaustion of local remedies as a pre-condition for the exercise of diplomatic protection, there is no requirement that local remedies be exhausted when there are no effective remedies available. See Dugard, Second report, *supra* note 123.

basis. Canada's discretionary approach to diplomatic intervention and consular protection is also based on the Canadian concept of "Crown prerogative" which the Supreme Court of Canada (SCC) upheld in 2010 (see discussion of Crown prerogative below).¹¹⁶

Canada's laws and policies on diplomatic intervention and consular protection fail to recognize and incorporate international human rights laws and standards that have developed over the past 70 years. Canada's discretionary approach has led to frequent failure of its duty to protect citizens and permanent residents abroad even when their most fundamental rights are violated or threatened.

The *Toronto Star* series on hostage taking of Canadians reported that "rescue, ransom, escape or death are the only four outcomes for hostages."¹¹⁷ Of eight Canadians taken hostage since 2008, three were released after ransoms of money were paid, one was released in a prisoner exchange, one was released on terms that are unknown, one died in captivity, and two were murdered by their captors.

Families of hostages do not experience respect for their right to know the truth about the fate and circumstances of their disappeared loved ones. Instead, families complain of being "left out, left down, under-informed and overburdened by Ottawa's demand for their silence."¹¹⁸ In some cases, Canadian officials have reportedly withdrawn or threatened to withdraw consular services when families have engaged private services to obtain the release of hostages.¹¹⁹ Canadian officials have also threatened families with prosecution under Canada's 2001 anti-terrorism legislation if they arrange payment of ransoms to captors,¹²⁰ although no family member has ever been prosecuted. In 2015, the US changed its policy and no longer threatens families with prosecution for arranging ransoms.¹²¹ Families face a harsh dilemma: They risk prosecution or abandonment by their government if they take their own actions to free their captive loved ones but are kept in the dark about the knowledge, action or inaction of government officials.

¹¹⁶ *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44, at para 43.

¹¹⁷ Michelle Shephard, and Mitch Potter, "Rescue, ransom, escape or death are the only four outcomes for hostages," *Toronto Star*, 6 December, available at: <https://www.thestar.com/news/canada/held-hostage/2016/12/06/rescue-ransom-escape-or-death-are-the-only-four-outcomes-for-hostages.html>.

¹¹⁸ Michelle Shephard, and Mitch Potter, "What Canada should do when its citizens are kidnapped abroad," *Toronto Star*, 7 December 2016, available at: <https://www.thestar.com/news/canada/held-hostage/2016/12/07/what-canada-should-do-when-its-citizens-are-kidnapped-abroad.html>

¹¹⁹ Mitch Potter, and Michelle Shephard, "Trudeau is 'totally missing the point,' relatives of Canadian hostages say," *Toronto Star*, 12 December 2016, available at: <https://www.thestar.com/news/canada/2016/12/12/canadian-hostages-deaths-in-philippines-a-low-point-in-2016-trudeau-says.html>.

¹²⁰ Mitch Potter, and Michelle Shephard, "Canada does not negotiate with terrorists. Except ...," *Toronto Star*, 4 December 2016, available at: <https://www.thestar.com/news/canada/held-hostage/2016/12/04/canada-does-not-negotiate-with-terrorists-except-.html>; Colin Freeze, "Canada's no-ransom policy is flawed, hypocritical: ex-CSIS official," *Globe and Mail*, 11 May 2017, available at: <https://www.theglobeandmail.com/news/national/former-csis-official-pans-ransom-policy/article34953428/>. See *Criminal Code* (R.S.C., 1985, c. C-46), sections 83.02 to 83.04, available at: <http://laws-lois.justice.gc.ca/eng/acts/C-46/page-13.html#docCont>

¹²¹ See US White House archives, Fact Sheet: U.S. Government Hostage Policy, 24 June 2015, available at: <https://obamawhitehouse.archives.gov/the-press-office/2015/06/24/fact-sheet-us-government-hostage-policy>.

The utility of prohibiting ransoms to hostage-takers remains controversial, and no international consensus has been reached.¹²² So far, no research has found that payment of ransoms has the effect of increasing the likelihood of hostage takings. On the contrary, practice indicates that acceding to ransom demands has saved the lives of hostages and that refusing to do so has cost lives. Citizens of countries that negotiate with hostage-takers, including payment of ransoms, do not appear to be disproportionately targeted for kidnapping. However, hostages from countries that pay ransoms are far more likely to be released than those from countries with “no-ransom” policies.¹²³

There is a contradiction between what Canadian officials say and what they do. In 2016, Canada’s Prime Minister claimed Canada has a no-ransom policy,¹²⁴ but there are reports that Canada has cooperated in the payment of ransoms in selected cases.¹²⁵

Canada’s discretionary approach to consular protection makes government officials susceptible to accusations of discrimination. Varied results are illustrated by the following brief summaries of cases of eight hostages:

- **Canadian journalist Amanda Lindhout** was held hostage in Somalia for 15 months during 2008-2009 and released after her mother arranged a private ransom (contrary to advice of Canadian officials who have been criticized for reportedly withdrawing consular services to the family after the family wished engage in hostage negotiations).¹²⁶
- **Canadian diplomat Robert Fowler and former Canadian diplomat Louis Guay** were held hostage in Niger for 130 days in 2008-2009, and released after a ransom was paid through an intermediary.¹²⁷

¹²² UN Human Rights Advisory Council, Human rights and issues related to terrorist hostage-taking - Report of the Human Rights Council Advisory Committee, a/HRC/24/47, 4 July 2013, available at: http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/24/47

¹²³ Christopher Mellon, Peter Bergen and David Sterman to Pay Ransom or Not to Pay Ransom? An Examination of Western Hostage Policies, *New America*, January 2017, available at: <https://na-production.s3.amazonaws.com/documents/hostage-paper-final.pdf>; Seth Loertscher, and Daniel Milton, *Held Hostage: Analyses of Kidnapping Across Time and Among Jihadist Organizations*, Combatting Terrorism Center at West Point, at 26, 39, available at: <https://ctc.usma.edu/v2/wp-content/uploads/2015/12/Held-Hostagereportc2.pdf>

¹²⁴ Lee Berthiaume, “Canada ‘does not and will not’ pay ransom to terrorists, Justin Trudeau says,” *National Post*, 26 April 2016, available at: <http://nationalpost.com/news/canada/canada-does-not-and-will-not-pay-ransom-to-terrorists-prime-minister-trudeau-says/wcm/1b4aea7b-4ca8-40ce-998d-62541fd21e2f>

¹²⁵ Terry Glavin, “Canada does not pay ransom to terrorists ... except when we do,” *National Post*, 27 April 2016, available at: <http://nationalpost.com/opinion/terry-glavin-canada-does-not-pay-ransom-to-terrorists-except-when-we-do/wcm/d9fe43e9-081b-4976-b675-37cb239e06e5>; Mitch Potter, and Michelle Shephard, “Canada does not negotiate with terrorists. Except ...,” *Toronto Star*, 4 December 2016, available at:

<https://www.thestar.com/news/canada/held-hostage/2016/12/04/canada-does-not-negotiate-with-terrorists-except.html>; Andrew Ellis, Canada must do more for the taken, *The Globe and Mail*, 11 May 2017, available at <https://www.theglobeandmail.com/opinion/canada-must-do-more-for-the-missing/article34949556/>

¹²⁶ Leslie Young, “Canadians kidnapped abroad freed with ransom, prisoner trades or died in captivity,” *Global News*, 26 April 2016, <http://globalnews.ca/news/2662963/canadians-kidnapped-abroad-freed-with-ransom-prisoner-trades-or-died-in-captivity/>; Mitch Potter, and Michelle Shephard, “When a Canadian is kidnapped, the family is also held hostage,” *Toronto Star*, 30 November 2016, available at: <https://www.thestar.com/news/canada/held-hostage/2016/11/30/when-a-canadian-is-kidnapped-the-family-is-also-held-hostage.html>

¹²⁷ Colin Freeze, “Ransom paid for Canadian diplomats, leaked cable suggests,” *The Globe and Mail*, 3 February 2011, available at: <https://www.theglobeandmail.com/news/politics/ransom-paid-for-canadian-diplomats-leaked-cable-suggests/article1893847/>

- **CBC journalist Melissa Fung** was held for 28 days in Afghanistan in October 2008, and released in a prisoner exchange.¹²⁸ The Canadian and Afghanistan governments denied that a ransom was paid and the Canadian government denied involvement in the prisoner exchange. Ms. Fung reports that Afghan military intelligence officials were involved in transporting her during her release.¹²⁹
- **British Columbia filmmaker and blogger Beverly Giesbrecht** was captured by Taliban in Pakistan in 2009. A ransom video was made in late 2009. Ransom demands fluctuated and at one point the ransom demanded was reported to be as low as \$1,200. Concerns about discrimination were expressed after it was alleged that Canada's Department of Foreign Affairs Department secretly instructed the Royal Canadian Mounted Police to stop investigating the case. Beverly Giesbrecht was reported to have died in captivity in late 2010.¹³⁰
- **Ontario tourist Colin Rutherford** was captured by Taliban in 2010 and released in January 2016 after family members took over negotiations from the Canadian government. Release was assisted by an intermediary country, Qatar. It is reported to be unclear whether a ransom was paid or a prisoner exchanged.¹³¹
- **Canadian businessman John Ridsdel** was kidnapped in the Philippines in 2016 and murdered by his captors in April 2016. Family members tried to raise the demanded ransom on their own and expressed concern that the Canadian government left them on their own with little information.¹³²
- **Retired Canadian Robert Hall** was kidnapped in the Philippines in 2016 and murdered by his captors in June 2016. Family members tried to raise the demanded ransom on their own and expressed concern that the Canadian government seemed to do "little to save him."¹³³

The situations of Robert Fowler, Louis Guay, and Melissa Fung suggest that both ransoms and prisoner exchanges are *de facto* Canadian remedies in selected cases.

¹²⁸ Leslie Young , "Canadians kidnapped abroad freed with ransom, prisoner trades or died in captivity," Global News, 26 April 2016, <http://globalnews.ca/news/2662963/canadians-kidnapped-abroad-freed-with-ransom-prisoner-trades-or-died-in-captivity/>

¹²⁹ "'Dying is not an option': CBC journalist Fung describes Afghan captivity," CBC News, 12 November 2008, available at: <http://www.cbc.ca/news/world/dying-is-not-an-option-cbc-journalist-fung-describes-afghan-captivity-1.717650>

¹³⁰ Leslie Young , "Canadians kidnapped abroad freed with ransom, prisoner trades or died in captivity," Global News, 26 April 2016, <http://globalnews.ca/news/2662963/canadians-kidnapped-abroad-freed-with-ransom-prisoner-trades-or-died-in-captivity/>

¹³¹ Joshua Berlinger, "Canadian Colin Rutherford freed after 5 years as Taliban captive in Afghanistan," *CNN*, 11 January 2016, available at: <http://www.cnn.com/2016/01/11/americas/candian-captive-freed-afghanistan/index.html>.

¹³² Rosemary Barton and Lisa Laventure, "Kept in the dark," *CBC*, 30 November 2016, <http://www.cbc.ca/news/thenational/kept-in-the-dark-the-kidnapping-of-canadians-john-ridsdel-and-robert-hall-1.3875812>; text at <http://newsinteractives.cbc.ca/index.php/longform/kept-in-the-dark-canadian-hostages-ridsdel-hall-kidnapping>

¹³³ "Sister of Robert Hall, killed Canadian hostage, says government did little to save him," *CBC*, 23 September 2016, <http://www.cbc.ca/radio/asithappens/as-it-happens-friday-edition-1.3776066/sister-of-robert-hall-killed-canadian-hostage-says-government-did-little-to-save-him-1.3776071>

Canada's legislation on consular protection is limited to the *Foreign Missions and International Organizations Act*¹³⁴ which provides no guidance as to the nature or scope of consular services to persons other than Canadian consular staff¹³⁵ (except for regulation of consular fees to citizens for production of passports and other travel documents).¹³⁶ Canada takes the position that it "may" provide consular services in certain circumstances, including cases of missing persons, abductions and other crimes against citizens.¹³⁷ Canada states it has made issues affecting Canadian children and their parents a primary focus of its 21st Century Consular Plan and mentions a Vulnerable Children's Consular Unit (VCC Unit) launched in 2013 to assist in cases of international child abduction.¹³⁸ The full mandate and activities of the VCC Unit do not appear to be publicly available. The VCC Unit's services have not been extended toward protection of the captive Boyle/Coleman children. According to the Canadian Consular Services Charter: "Each consular case is unique and the assistance we can provide will vary depending on circumstances." The Government of Canada's website also 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).¹³⁹ Overall, Canada takes the position that its provision of consular services is discretionary. Canada's policy is murky, inconsistent, ineffective and open to criticisms of discrimination, even in cases involving arbitrary detention, torture and ill-treatment, hostage-taking, enforced disappearances and the threat of execution. Decision making processes by Canadian officials to determine whether to provide consular services and diplomatic intervention, and what services to provide, are opaque and closed to input from victims' families.

A discretionary approach to provision of consular services is based on a narrow understanding of Canada's international law obligations that fails to take adequate account of Canada's contemporary obligations to respect and ensure, without any discrimination, the international human rights of all individuals subject to Canadian jurisdiction.¹⁴⁰ Canada's approach is based on the concept of "Crown prerogative" which the Supreme Court of Canada (SCC) has defined as "the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown."¹⁴¹

¹³⁴ Government of Canada, *Foreign Missions and International Organizations Act*, S.C. 1991, c. 41, available at: <http://laws-lois.justice.gc.ca/eng/acts/F-29.4/page-1.html>

¹³⁵ See Section 3 and 4 of Government of Canada, *Foreign Missions and International Organizations Act*, S.C. 1991, c. 41 (FMIO Act), available at: <http://laws-lois.justice.gc.ca/eng/acts/F-29.4/page-1.html>, which enacts into Canadian law several sections of the *Vienna Convention on Consular Relations*, appended to the FMIO Act, Schedule II, available at <http://laws-lois.justice.gc.ca/eng/acts/F-29.4/page-5.html#h-16>.

¹³⁶ Government of Canada, *Consular Fees (Specialized Services) Regulations*, SOR/2003-30, available at: <http://lois-laws.justice.gc.ca/eng/regulations/SOR-2003-30/FullText.html>; these regulations are made pursuant to S.11 of the *Department of Foreign Affairs, Trade and Development Act*, S.C. 2013, c. 33, s. 174, available at: <http://laws-lois.justice.gc.ca/eng/acts/F-27.5/page-1.html#h-6>.

¹³⁷ Government of Canada. *Canadian Consular Services Charter*, available at <https://travel.gc.ca/assistance/emergency-info/consular/canadian-consular-services-charter>

¹³⁸ Government of Canada, 21st Century Consular Plan, Available at: <https://travel.gc.ca/assistance/emergency-info/consular/plan>

¹³⁹ Government of Canada. "Arrest and Detention," available at <https://travel.gc.ca/assistance/emergency-info/arrest-detention>

¹⁴⁰ ICCPR, Article 2, *supra* note 3.

¹⁴¹ The Supreme Court of Canada, in the *Khadr* case, *supra* note 125, accepted the definition of prerogative power as the "residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the

Crown prerogative powers are a common law right of the Executive (the Prime Minister and the caucus of the ruling party) of government. Although the exercise of prerogative powers is subject to judicial review, the scope and utility of such judicial oversight in Canada remains unclear.¹⁴²

It is open to the government to clarify and limit its Crown prerogative through legislation. However, in the case of consular protection, the Government of Canada has failed to enact legislation 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 as hostage-taking, prolonged unlawful detention, torture and ill-treatment, and the threat of death. Such failure puts Canada in violation of its duty to respect and ensure the most fundamental international human rights obligations.

Canada has a clearly-articulated duty to “ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy...”¹⁴³ According to the UN Human Rights Committee, General Comment 31:

All branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level -- national, regional or local -- are in a position to engage the responsibility of the State Party.¹⁴⁴

In the case of human rights violations against Canadians who are outside the reach of protection by Canada’s domestic law enforcement agencies and courts, the executive branch must undertake the responsibilities of ensuring rights protection to the fullest extent possible. This includes consular protection and diplomatic intervention.

In 2000, a report by Mr. John R. Dugard, Special Rapporteur on diplomatic protection to the International Law Commission, pointed out that remedies provided by international human rights treaties are weak.¹⁴⁵ He concluded that diplomatic protection, “should be strengthened and encouraged” as an important instrument in the protection of human rights (para 29). He also proposed the imposition of an international legal duty on States to exercise diplomatic protection to an injured person (upon request) “if the injury results from a grave breach of a *jus cogens* norm attributable to another State.”¹⁴⁶ Dugard comments:

If 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

Crown” citing *Reference as to the Effect of the Exercise of the Royal Prerogative of Mercy Upon Deportation Proceedings*, [1933] S.C.R. 269, at p. 272, per Duff C.J., quoting A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (8th ed. 1915), at p. 420.

¹⁴² *SCC, Khadr*, *supra* note 125, at para 43. David Schneiderman, “Khadr and Prerogative Power,” *Rights Review* 3:1 (Spring 2010), excerpt available at: <https://www.law.utoronto.ca/blog/faculty/khadr-and-prerogative-power>.

¹⁴³ ICCPR, Article 2, *supra* note 4.

¹⁴⁴ UN Human Rights Committee, General comment no. 31, *supra* note 33

¹⁴⁵ International Law Commission, Diplomatic protection: First report on diplomatic protection, by Mr. John R. Dugard, Special Rapporteur, A/CN.4/506 and Add.1, 7 March and 20 April 2000, para 29, 31, 61., available at: http://legal.un.org/ilc/documentation/english/a_cn4_506.pdf

¹⁴⁶ *Ibid.*

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.¹⁴⁷

In 2006, the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, pointed out in his annual report to the UN Human Rights Council that “victims of terrorism and their families have a human right to an effective remedy.”¹⁴⁸ That same year, the UN General Assembly adopted by consensus the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (Principles and Guidelines on the Right to a Remedy).¹⁴⁹ Article 12 (d) provides that:

Obligations arising under international law to secure the right to access justice and fair and impartial proceedings shall be reflected in domestic laws. To that end, States should [...] [m]ake available all appropriate legal, diplomatic and consular means to ensure that victims can exercise their rights to remedy for gross violations of international human rights law or serious violations of international humanitarian law” (emphasis added).

This resolution was adopted by consensus of the members of the UN General Assembly.¹⁵⁰ However, to date, Canada has passed no such laws.

In a 2012 report of the UN Human Rights Council Advisory Committee on human rights and issues related to hostage-taking, Canada stated its opinion “that terrorism is sufficiently covered under international law, particularly through Security Council resolutions which are binding on all member states.”¹⁵¹ This position is difficult to justify given gaps in protection for Canadian victims of hostage-taking, arbitrary detention, and torture and ill-treatment in other countries. Urgent change to policy and protocols is needed if Canada is to work effectively with US, Afghanistan and Pakistan governments and non-state actors to insist that they all fulfill their human rights obligations by working urgently to achieve the Boyle/Coleman family’s safe release.

Canada’s consular protection policy illustrates an outmoded and no longer legitimate position that fails to take into account developments in international human rights law over the past century that recognize individual rights and impose State duties to protect and ensure rights. The Canadian government is in violation of its obligations to take effective measure to protect rights and remedy

¹⁴⁷ *Ibid.* It is acknowledged that the International Law Commission rejected this view and maintained the discretionary approach at the 56th Session. Supplement No. 10 (A/59/10) 2004 at 27, available at: http://legal.un.org/ilc/documentation/english/reports/a_59_10.pdf.

¹⁴⁸ The Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, E/CN.4/2006/98, 28 December 2005, available at: <http://www.refworld.org/pdfid/441181f10.pdf>

¹⁴⁹ UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law: resolution / adopted by the General Assembly*, 21 March 2006, A/RES/60/147, available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx>.

¹⁵⁰ Adopted without vote, 64th plenary meeting. Issued in GAOR, 60th session.

¹⁵¹ Canada, Note Verbale, YTGR0469, 19 September 2012, available at <http://www.ohchr.org/Documents/HRBodies/HRCouncil/TerrorismHostage/CanadaNV1oct12.pdf>

violations of Canadians abroad by failing to ensure effective, transparent policies for release of hostages and access to remedies by captives' families at home who are also victims.

The issue of Canada's inadequate consular protection policies and practices has been raised repeatedly,¹⁵² not only in relation to hostages, but also regarding Canadians detained abroad in State prisons in violation of internationally guaranteed human rights, including to rights to a fair trial; access to legal representation; access to an independent judiciary; and freedoms from torture and ill-treatment and prosecution on illegitimate charges. About 1,400 Canadians are detained abroad, many of whom have been subjected to, or imprisoned as a result of, serious human rights violations.¹⁵³ Prominent examples include:

- **Mohamed El Attar**, a Canadian bank teller born in Egypt, has been arbitrarily detained and tortured in prison in Egypt since 2007. Charges have been described as “bizarre” and are believed to be spurious. It is believed he is being persecuted because of his Christian religion.¹⁵⁴ There is no information as to the frequency or effectiveness of Canadian consular visits to Mr. El Attar. Advocates have referred to him as “forgotten.”
- **Huseyin Celil**, a Canadian imam born in Xinjiang Uighur Autonomous Region, China, has been arbitrarily detained, tortured and ill-treated in China since 2006. He is believed to be persecuted because of his Uighur and Muslim identity and political opinions.¹⁵⁵ It has been alleged that he was not given access to Canadian consular officials¹⁵⁶ and has been tortured while in custody. Canada has been criticized for doing “little” to secure his release.
- **Bashir Makhtal**, a Canadian information technologist born in Ethiopia, has been arbitrarily detained in Ethiopia since 2006.¹⁵⁷ Mr. Makhtal's family members have criticized Canada for having “dropped the ball” and lacking interest in vigorous pursuit of Mr. Makhtal's transfer to a Canadian prison.¹⁵⁸
- **Mohamed Fahmy**, a Canadian journalist born in Egypt, was arbitrarily detained, tortured and ill-treated in Egypt 2013-2015.¹⁵⁹ While Mr. Fahmy stated he received excellent support from

¹⁵² Government of Canada, The Report of the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar: Analysis and Recommendations, 2006, available at: <http://publications.gc.ca/collections/Collection/CP32-88-1-2006E-AR.pdf>

¹⁵³ Mohamed Fahmy, Canada needs a law protecting citizens imprisoned abroad, CBC, 1 January 2017, available at: <http://www.cbc.ca/news/opinion/canadians-imprisoned-abroad-1.3917023>

¹⁵⁴ Michelle Shephard, “A forgotten Canadian has spent 10 years in Egyptian prison. Advocates are telling Trudeau to get him back,” *Toronto Star*, 9 March 2017, available at: <https://www.thestar.com/news/world/2017/03/09/a-forgotten-canadian-has-spent-10-years-in-egyptian-prison-advocates-are-telling-trudeau-to-get-him-back.html>.

¹⁵⁵ Debra Black, “Wife of Burlington man jailed in China urges Canada to fight for his release,” *Toronto Star*, 3 February 2016, available at: <https://www.thestar.com/news/immigration/2016/02/03/wife-of-burlington-man-jailed-in-china-urges-canada-to-fight-for-his-release.html>;

¹⁵⁶ Geoffrey York, “Canada 'harping on human rights,’” *Globe and Mail*, 2 May 2007, available at: <https://www.theglobeandmail.com/news/national/canada-harping-on-human-rights/article684182/>.

¹⁵⁷ Debra Black, “Efforts underway to bring Canadian home from Ethiopian prison,” *Toronto Star*, 30 June 2016, available at: <https://www.thestar.com/news/world/2016/06/30/efforts-underway-to-bring-canadian-home-from-ethiopian-prison.html>

¹⁵⁸ Debra Black, “Federal government accused of 'purposely delaying' prison transfer from Ethiopia,” *Toronto Star*, 17 July 2015, available at: <https://www.thestar.com/news/canada/2015/07/17/federal-government-accused-of-purposely-delaying-prison-transfer-from-ethiopia.html>

¹⁵⁹ Catherine Tsalikis, “Mohamed Fahmy: Reflections on prison, press freedom and the protection of Canadians abroad,” *Open Canada*, 18 November 2016, available at: <https://www.opencanada.org/features/mohamed-fahmy-reflections-prison-press-freedom-and-protection-canadians-abroad/>

the Canadian Ambassador and consular officials in Egypt, he and his family have criticized the Canadian government's assistance as limited and inconsistent.¹⁶⁰

- **Homa Hoodfar**, a Canadian professor and women's rights defender born in Iran, was arbitrarily detained and ill-treated, including denial of necessary medical treatment, in Iran for 112 days in 2016. In that case, the Canadian government's "decision to engage in careful and quiet diplomacy" is credited with her release.
- **Salim Alaradi**, a Canadian business man born in Libya, was detained for 505 days in United Arab Emirates, 2015-2016.¹⁶¹ The family complained that the Canadian government failed to inform his family members of allegations that he had been tortured in custody. The Canadian government advised that privacy laws prevented providing information to the family.¹⁶²
- **Omar Khadr**, a Canadian-born boy was captured and detained by the US in Afghanistan on 27 July 2002 at age 15. He was released by the US from Guantánamo Bay prison to Canada on 29 September 2012. He was not released on bail by Canada until May 2015. He was compensated by Canada in 2017 for its part in human rights violations against him, including torture and ill-treatment.¹⁶³
- **Maher Arar**, a Canadian engineer born in Syria, was arbitrarily detained by the US in 2002 and detained, tortured and ill-treated in Syria until 2003. He was compensated by Canada in 2007 for its part in the violations against him.¹⁶⁴
- **Abdullah Almalki**, a Canadian communications engineer born in Syria, was arbitrarily detained and tortured in Syria from 2002-2004. For a period of seven months in 2002-2003, he received no visits from Canadian consular officials. He was compensated by Canada in March 2017 for its part in violations against him, including Canada's failure to provide adequate consular services.¹⁶⁵
- **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. He was

¹⁶⁰ Amnesty International, Protection Charter: Mohamed Fahmy and Amnesty International propose more effective action to defend the rights of Canadians imprisoned abroad, 26 January 2016, available at:

<https://www.amnesty.ca/news/protection-charter-mohamed-fahmy-and-amnesty-international-propose-more-effective-action-defend>.

¹⁶¹ Ashifa Kassam, "Salim Alaradi leaves UAE for Canada after being detained nearly two years," *Guardian*, 2 June 2016, available at: <https://www.theguardian.com/world/2016/jun/02/salim-alaradi-freed-uae-canada>; "Salim Alaradi tortured in UAE and Canada knew, claims human rights lawyer," CBC, 5 January 2016, available at:

<http://www.cbc.ca/news/canada/windsor/salim-alaradi-tortured-in-uae-and-canada-knew-claims-human-rights-lawyer-1.3389794>.

¹⁶² "Salim Alaradi tortured in UAE and Canada knew, claims human rights lawyer," CBC, 5 January 2016, available at: <http://www.cbc.ca/news/canada/windsor/salim-alaradi-tortured-in-uae-and-canada-knew-claims-human-rights-lawyer-1.3389794>.

¹⁶³ See LRWC's advocacy on the Khadr case at: <http://www.lrwc.org/lrwc-research-education-and-advocacy-on-the-omar-khadr-case/>.

¹⁶⁴ Government of Canada, The Report of the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar: Analysis and Recommendations, 2006, available at:

<http://publications.gc.ca/collections/Collection/CP32-88-1-2006E-AR.pdf>;

¹⁶⁵ Hon. Frank Iacobucci, QC, Commissioner, Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin, 2008, available at: http://epe.lac-bac.gc.ca/100/206/301/pco-bcp/commissions/internal_inquiry/2010-03-09/www.iacobucciinquiry.ca/pdfs/documents/final-report-copy-en.pdf;

Jim Bronskill, "Ottawa compensates and apologizes to three Canadians tortured in Syria," *The Canadian Press/Toronto Star*, 17 March 2017, available at: <https://www.thestar.com/news/canada/2017/03/17/ottawa-compensates-and-apologizes-to-three-canadians-tortured-in-syria.html>

compensated by Canada in March 2017 for its part in violations against him, including Canada's failure to provide adequate consular services.¹⁶⁶

- **Muayyed Nureddin**, a Canadian geologist, was arbitrarily detained and tortured in Syria for 34 days from 2003 to 2004. He was compensated by Canada in March 2017 for its part in violations against him, including Canada's failure to provide adequate consular services.¹⁶⁷

The Conclusions of the O'Connor Inquiry¹⁶⁸ into the rendition, unlawful detention and torture of Mr. Arar include recommendations that Canada take a more coordinated and coherent approach in attempting to obtain the release of Canadians detained abroad. The O'Connor report recommended specific policies and adequate training for officials to situations where Canadians are detained in countries where there are credible risks of torture or ill-treatment. The report¹⁶⁹ stated that "Canadian officials should normally insist on respect of all of a detainee's consular rights."¹⁷⁰

The Conclusions of the Iacobucci Inquiry¹⁷¹ into the arbitrary detention and torture abroad of Abdullah Almalki, Ahmad El Maati, and Muayyed Nureddin, included findings that consular services were deficient in the case of all three men. The Iacobucci report found that malfeasance by Canadian officials had indirectly contributed to the detention, torture and ill-treatment of them by Syrian officials and ill-treatment of Mr. Elmaati by Egyptian officials. Canadian officials had failed to make sufficiently strenuous attempts to provide consular visits to Mr. Almalki during a seven month period in 2002-2003, resulting in Mr. Almalki's receiving no consular visits during that time. Visits by Canadian officials to Mr. El Maati and Mr. Nureddin were neither prompt nor sufficiently frequent. Canadian officials also misused consular visits to elicit answers to questions being posed by other agencies and, without notice or consent, shared information with US officials. Consular officers failed to assess whether the men had been tortured and failed to report the men's claims of torture to the Department of Foreign Affairs and International Trade(DFAIT). The

¹⁶⁶ Iacobucci, Internal Inquiry, *ibid.*; Jim Bronskill, "Ottawa compensates and apologizes to three Canadians tortured in Syria," *The Canadian Press/Toronto Star*, 17 March 2017, available at: <https://www.thestar.com/news/canada/2017/03/17/ottawa-compensates-and-apologizes-to-three-canadians-tortured-in-syria.html>.

¹⁶⁷ Iacobucci, Internal Inquiry, *ibid.*, Jim Bronskill, *ibid.*.

¹⁶⁸ Government of Canada, *The Report of the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar: Analysis and Recommendations*, 2006, p 275, 349-50, available at: <http://publications.gc.ca/collections/Collection/CP32-88-1-2006E-AR.pdf>

¹⁶⁹ Review of the Findings and Recommendations Arising from the Iacobucci and O'Connor Inquiries. Report of the Standing Committee on Public Safety and National Security, Parliament of Canada, 2009, available at: <http://www.ourcommons.ca/Content/Committee/402/SECU/Reports/RP4004074/securp03/securp03-e.pdf>

¹⁷⁰ Some States refuse to recognize the dual citizenship of their nationals, and this has complicated the consular protection of several Canadians, including Maher Arar, Abdullah Almalki, Ahmad El Maati, and Mohamed Fahmy. See *Convention on Certain Questions Relating to the Conflict of Nationality Law*, 13 April 1930, League of Nations, Treaty Series, vol. 179, p. 89, No. 4137, available at: <http://www.refworld.org/docid/3ae6b3b00.html>. Article 4 provides that: "A State may not afford diplomatic protection to one of its national against a State whose nationality such person also possesses." Canada ratified this Convention in 1934. Professor Craig Forcese is of the opinion that that dual nationality is not a bar to diplomatic protection in modern international law and no excuse for inaction where dual nationality citizens are removed to torture," which, as a violation requiring *erga omnes* obligations, "must attract a response, not least from countries whose nationals are being rendered." Craig Forcese, "The Capacity to Protect: Diplomatic Protection of Dual Nationals in the 'War on Terror'" *European Journal of International Law* 17 (2)(2006), at 391, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1623451

¹⁷¹ Review of Findings and Recommendations Arising from the Iacobucci and O'Connor Inquiries, *supra* note 178.

Iacobucci report emphasised that Canada’s Manual of Consular Instructions states that “one of the primary functions of Canadian missions is to “protect the lives, rights, interests, and property of Canadian citizens [. . .] when these are endangered or ignored in the territory of a foreign state.”¹⁷²

These cases and the conclusions of the O’Connor and Iacobucci inquiries illustrate the deep gaps and inconsistencies between Canada’s international human rights obligations and its domestic laws, policies and practices for diplomatic and consular protection of citizens abroad. Systemic problems in coordination among several government cabinet Ministers and their departments, including Global Affairs Canada (formerly DFAIT) and the Canadian Security Intelligence Service, are exacerbated by the lack of adequate law and policy that is firmly grounded in international human rights law. These cases also illustrate the need for a review of international law on consular relations, including the 1993 VCCR.¹⁷³

4. Recommendations

LRWC recommends that Canada undertake the following:

4.1 Immediate action

- Immediately take all possible steps to ensure the prompt release and safe transport to Canada of Canadian citizen Joshua Boyle, his wife Caitlan Coleman and their two infants sons;
- Cooperate with and provide information to the Boyle/Coleman family relatives in Canada, regarding efforts by Canada to promote the safety and release of the Boyle/Coleman family. In particular, Canada should:
 - Ensure close and timely consultation and cooperation with the Boyle family in Canada and any private experts they engage to assist them, and ensure the family and representatives are aware of all actions contemplated or taken by way of consular protection of and/or diplomatic intervention for the two Boyle/Coleman children and their parents, Joshua Boyle and Caitlan Coleman;
 - Immediately withdraw barriers, including threats of prosecution, to the family and others raising funds and paying ransoms to ensure the survival and to secure the release of the Boyle/Coleman family;
 - Extend the services of the Vulnerable Children’s Consular Unit toward the Boyle/Coleman family;

4.2 Immediate international remedial action

- Consult closely with US authorities, insisting that all possible measures be taken to ensure the safety and release of the Boyle/Coleman children and their parents, Caitlan Coleman and Joshua Boyle; including inter-agency cooperation and adherence to the family’s rights of access to remedies in accordance with international human rights law binding on the US; Urge Afghanistan to cancel the death penalty for Anas Haqqani and other Taliban members under death penalty in Afghanistan, and pending cancellation or suspension of executions, to remove

¹⁷² Quoted at para 97 of Iacobucci, Internal Inquiry, *supra* note 174.

¹⁷³ Gar Pardy, *supra* note 37; Dugard, First report, *supra* note 154, para 29, 31, 61.

the possibility that some or all members of the Boyle/Coleman family will be killed in reprisal for execution of Anas Haqqani or other Taliban members.

- Urge Afghanistan and Pakistan to act immediately to implement Article 3 of the Hostages Convention by taking all possible measures to secure the release of the Boyle/Coleman family and other hostages that may be held in their country and after release to facilitate their departure to Canada;
- Urge Afghanistan and Pakistan to increase their constructive engagement, including through international cooperation and intermediaries, toward immediate release of the Boyle/Coleman family, and while pursuing all possible avenues for release, seek to ensure access to health care for all members of the family;
- Urge Afghanistan and Pakistan to exercise their utmost due diligence in prevention, investigation and accountability of the Haqqani Network for alleged torture, hostage taking, threats to life and enforced disappearance of the Boyle/Coleman family; urge and offer all possible international cooperation and assistance in conducting prompt, thorough and impartial investigations into these crimes within their jurisdictions;
- Urge the US, Afghanistan and Pakistan to ratify the *Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure*;
- Urge the US, Afghanistan and Pakistan to ratify the *International Convention for the Protection of All Persons from Enforced Disappearance*;

4.3. Domestic reform

- Develop and equip Canada's hostage response system to ensure cabinet-level leadership of a well-coordinated, multi-departmental team that is properly led, staffed and funded to enable quick and competent engagement in high-level diplomatic cooperation that will maximize possibilities of rapid and safe release of hostages;
- Create rights-based criteria and standards of assessment and evaluation for equal and non-discriminatory provision of timely consular services to all Canadians and permanent residents subjected to serious human rights violations outside Canada, including victims of hostage-taking, arbitrary detention, torture and ill-treatment, and possible extra-judicial deprivation of life. Such consular services should be directed toward securing cessation and remediation of the human rights abuses;
- Ensure that Canadian policies and practices for consular protection utilize an expansive definition of "exploitation" consistent with Article 3 of the *Trafficking Protocol* so as to ensure inclusion of victims of hostage taking for monetary or non-monetary ransom;
- In consultation with all relevant stakeholders, including civil society organizations, enact a "Protection of Canadians Abroad Act" that will assure to all Canadian citizens and permanent residents the right to timely and purposeful consular protection and access to other remedies for serious human rights violations, in accordance with international human rights law binding on Canada;
- Ratify the *Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure* to ensure that children have direct, individual access to the UN Committee on the Rights of the Child to obtain recommendations of remedies for violations of their rights;¹⁷⁴

¹⁷⁴ UN General Assembly, *Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure*, General Assembly resolution A/RES/66/138, 19 December 2011, entered into force 14 April 2014 available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPICCRRC.aspx>

- Ratify the *International Convention for the Protection of All Persons from Enforced Disappearance*;
- Ratify the UN *Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes*, which would allow Canada to take States to the ICJ for failure to permit consular access to its citizens pursuant to VCCR Article 36;¹⁷⁵
- Implement the 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*;¹⁷⁶
- Seek international review and updates of international law on consular relations, including revision of the *Vienna Convention on Consular Relations* in light of developments in international human rights law since the VCCR's coming into force in 1967, a half-century ago.

¹⁷⁵ United Nations, *Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes*, 24 April 1963, available at: <http://www.refworld.org/docid/3ae6b37514.html>.

¹⁷⁶ Review of the Findings and Recommendations Arising from the Iacobucci and O'Connor Inquiries, *supra* note 178.

**Canadian child hostages overseas:
The ultimate commodity**

Catherine Morris, BA, JD, LL.M
Lawyers' Rights Watch Canada
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