Interim report in follow-up to Canada's appearance before the Committee against Torture

Introduction

1. On November 21 and 22, 2018, Canada appeared before the United Nations (UN) Committee against Torture for the review of its Seventh Report under the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.

2. In its December 21, 2018 Concluding Observations, the Committee asked Canada to provide information on follow-up to the Committee's recommendations on diplomatic assurances; adequate redress for the torture and ill-treatment of Canadians detained abroad; security certificates; and forced or coerced sterilization of Indigenous women.

Concluding Observation para. 29 – Diplomatic assurances

3. The Committee has recommended that Canada thoroughly consider the merits of each individual case involving diplomatic assurances, including the overall situation with regard to torture in the country of return. In this regard, Canada emphasizes that it does not expel, return or extradite a person when there are substantial grounds for believing, after a case-specific evaluation of all relevant facts including any assurances received, that he or she would be in danger of being subject to torture. As noted in Canada's seventh report, any diplomatic assurances received will be one component of the case-by-case assessment of risk faced by the individual in the receiving state. Assurances are not taken at face value. The reliability of the assurances received is evaluated on a case-specific basis. Canada's use of assurances is fully consistent with the Convention and principles of international law.

Concluding Observation para. 39 – Adequate redress for the torture and ill-treatment of Canadians detained abroad

4. The Committee has asked for information on specific measures taken in the cases of Messrs. Ahmad Abou-Elmaati, Abdullah Almalki, Muayyed Nurredin and Omar Khadr. As noted previously to the Committee, the details of the settlements between the parties are confidential and may not be disclosed. Canada notes that independent and competent legal counsel, whose role was to ensure that the interests of their clients were addressed, adequately represented Messrs. Abou-Elmaati, Almalki, Nurredin and Khadr.

5. The Committee has noted the "absence of prosecutions related to Canadian involvement in [the] alleged offences" against Messrs. Abou-Elmaati, Almalki and Nurredin. Canada notes in this regard that the settlements with, and apology to, these individuals arose solely in the context of a claim for a civil remedy and was not related to the investigation or prosecution of criminal offences. As noted at paragraph 18, the investigation of a criminal offence and the laying of criminal charges is primarily a matter for law enforcement and the responsibility for prosecuting these crimes is a matter of responsibility for provincial Attorneys General, and for the Attorney General of Canada in the three Territories. Police officers have responsibility and discretion over the investigation of a criminal offence and may lay charges where there are reasonable grounds to believe that an offence has been committed. While police charging and Crown prosecution practices vary across Canada, generally charges proceed only where there is a reasonable prospect of conviction and it is in

the public interest to prosecute. Prosecutorial discretion allows Crown counsel to respond appropriately to the unique circumstances of each case to ensure the administration of justice and that the public interest is served. Police and prosecutorial discretion are fundamental principles of the Canadian criminal justice system and are part of the checks and balances built into the Canadian justice system as a whole. Prosecutorial and investigative discretion are firmly entrenched in Canada's legal system and are carefully safeguarded.

6. The Committee has also asked for an update on Mr. Abousfian Abdelrazik's efforts to obtain redress for alleged complicity of Canadian officials in his treatment. The Committee expressed concern that Mr. Abdelrazik's lawsuit was indefinitely delayed. Canada notes that the trial is not postponed indefinitely. Rather, the Government of Canada had brought an application before the Federal Court to review and confirm the integrity of redactions that were previously applied to certain documents. Those redactions had been applied for reasons of national security and international relations. After considering the submissions of all parties, the Federal Court decided that the case raised an exceptional set of circumstances that justified adjournment of the trial until national security claims over portions of the documents could be fully adjudicated by a judge of the Federal Court. The Federal Court is currently seized of this application that will ultimately ensure that as much information as possible is released to Mr. Abdelrazik, while respecting the legitimate claims of national security privilege. The trial will resume after the application is decided.

Concluding Observation para. 47(c) – Security certificates

7. The Committee has asked for an update on the security certificate cases involving Messrs. Harkat, Jaballah and Mahjoub. Currently only two individuals, Messrs. Mahjoub and Harkat, are subject to a security certificate. Neither is currently in detention; they have both been released on conditions that were imposed and subject to regular review by the Federal Court.

8. The Federal Court found Mr. Jaballah's security certificate unreasonable in May 2016 and the Federal Court of Appeal dismissed Canada's attempt to appeal that decision in October 2016, without dealing with the merits of the case. In November 2018, Mr. Jaballah brought a civil claim for damages against Canada. This civil suit is ongoing.

9. The Federal Court found Mr. Mahjoub's certificate reasonable in 2013. The Federal Court of Appeal dismissed his appeal of this decision and related matters in July 2017 and the Supreme Court of Canada dismissed Mr. Mahjoub's application for leave to appeal in May 2018. In March 2018, Mr. Mahjoub received notice of the intention of the Canada Border Services Agency to seek a danger opinion from the Minister of Citizenship and Immigration pursuant to Canada's *Immigration and Refugee Protection Act* (IRPA). That process will assess the risks he might face upon return to Egypt, as well as the nature and severity of his actions or whether he poses a danger to the security of Canada, in order to determine whether he may be removed from Canada to Egypt. The process affords individuals the opportunity to respond in writing, and the danger opinion decision may be subject to an application for leave and judicial review in the Federal Court.

10. As noted in Canada's Seventh Report, in 2016, Mr. Harkat received a preliminary assessment prepared by officials, recommending that he not be allowed to remain in Canada given the nature and severity of acts committed or the danger he poses to the security of Canada, pursuant to the IRPA. Mr. Harkat was provided an opportunity to respond to the

recommendation and all relevant documents were forwarded to a delegate of the Minister of Citizenship and Immigration for a decision on whether he should be allowed to remain in Canada. On October 2, 2018, the Minister's delegate concluded that Mr. Harkat would not face a substantial risk of torture, cruel or unusual treatment or punishment, or a risk to his life or persecution on the prescribed grounds, if returned to Algeria and that, based on the nature and severity of the acts he committed in providing material support of terrorism, Mr. Harkat should be removed from Canada. The humanitarian and compassionate grounds raised in the submissions did not justify allowing him to remain in Canada. The decision of the Minister's delegate is currently the subject of an application for leave and for judicial review before the Federal Court of Canada and a decision on that application view is expected in 2020-2021.

11. Mr. Harkat has also filed an application for ministerial relief to the Minister of Public Safety in an effort to overcome his inadmissibility for engaging in terrorism, membership in a terrorist organization and being a danger to the security of Canada. Mr. Harkat must establish that it is not contrary to Canada's national interest to find him admissible. A decision is pending.

Concluding Observation 51(a) – Forced or coerced sterilization of Indigenous women

12. This portion of the report responds to the Committee's concerns with respect to forced or coerced sterilization. The health and safety of Indigenous women and girls is a top priority for Canada. The federal government contributes to collaborative efforts to eliminate discriminatory practices by improving the cultural competency and cultural humility of health practitioners through support for training and professional development, and to strengthen informed consent practices. The federal government is engaging with provincial and territorial governments, associations of health professionals, and Indigenous partners on next steps to address this issue.

13. Several proposed class actions and one individual action have been filed since October 2017 alleging sterilization of Indigenous women without proper or informed consent. The Government of Canada is named as a defendant in some of these legal actions, as are various provincial governments, health authorities, regulatory colleges, hospitals, and individual doctors. Governments in Canada will continue to work with the plaintiffs and co-defendants in the spirit of reconciliation. Where Canada defends litigation, it does so respectfully and always with the goal of fair, comprehensive and lasting resolution.

14. In December 2018, the Government of Canada's Ministers of Health and Indigenous Services sent a letter to provincial and territorial ministers, as well as medical associates and professional regulatory bodies, expressing concern over the reports on forced and coerced sterilizations of Indigenous women in some provinces and to initiate dialogue and collaboration to address this issue.

15. Forced or coerced sterilization is a serious violation of human rights and medical ethics and constitutes a criminal offence in Canada. It is a form of gender-based violence and evidence of a broader need to eliminate racism and discriminatory practices in health services and ensure cultural safety and humility, which includes removing barriers that Indigenous women face when accessing health services in Canada. Health care practitioners must be culturally competent so that they are able to provide health care services to Indigenous people in a

culturally safe way, which includes their ability to ensure that Indigenous women receive all of the information necessary to be able to give their informed consent.

Criminal Law and Policing

16. The criminal offence of assault (section 265 of the *Criminal Code*) prohibits touching of any kind without the consent of the person being touched, subject to any applicable legal defence. This offence applies in a medical setting where informed consent to a medical procedure is not present. For example, if the person either did not consent or any consent provided was obtained as a result of force, threats or fear of the application of force, fraud (i.e., deception or dishonesty) or the exercise of authority (subsection 265(3)). Both the surgeon who performs a coerced medical procedure and any person who does anything to assist the surgeon could be prosecuted for assault; general principles of criminal law hold accountable persons who aid or abet others in committing offences (section 21).

17. Because sterilization procedures have a significant impact on the body of the person subjected to the procedure, aggravated forms of assault are likely to apply where informed consent is not provided. Specifically, assault causing bodily harm (section 267), which is punishable by a maximum of 10 years imprisonment, or aggravated assault (section 268), which requires wounding or maiming and is punishable by a maximum of 14 years imprisonment, may apply.

18. The investigation of crime is primarily a matter for law enforcement, while the prosecution of crime is a matter of responsibility for provincial Attorneys General, and for the Attorney General of Canada in the three Territories. Police officers have sole responsibility and discretion over the investigation of a criminal offence and the laying of criminal charges except where the consent of the Attorney General is required by statute. However, some jurisdictions like British Columbia, Québec and New Brunswick, have pre-charge screening, whereby the prosecutors review proposed police charges. Charges are laid once a criminal investigation has been conducted by the appropriate police force or jurisdiction and the designated authority has determined that there are reasonable grounds to believe that a criminal offence has occurred. At the federal level, the Public Prosecution Service of Canada exercises its discretion in determining whether there is a reasonable prospect of conviction, and whether it is in the public interest to initiate a prosecution. Provincial prosecution services apply a similar standard when determining whether to pursue a prosecution. Prosecutorial discretion is firmly entrenched in Canada's legal system and is carefully safeguarded.

19. Under the Canadian Constitution, the federal, provincial and territorial governments share the responsibility for criminal justice and responding to the needs of victims of crime. All levels of governments in Canada recognize the difficulties that victims face while moving through the criminal justice process and are committed to providing support for victims and survivors of crime in this regard. In Canada, under the *Canadian Victims Bill of Rights*, victims of crime have the right to information, protection, participation and to seek restitution.

20. Canada's commitment and partnerships with resources such as victim services are essential to ensure quality and timely services for all victims of crime. The Royal Canadian Mounted Police (RCMP), Canada's national police service, delivers and provides awareness of support services for victims of crime and trauma, and Canada recognizes victim services as an integral component in the continuum of core policing services delivered to Canadians.

21. In addition to national police services, the RCMP provides policing services under contract to eight provinces, three territories, approximately 150 municipalities, and hundreds of Indigenous communities. All RCMP divisions are aware of the need to take a proactive, empathetic, and culturally aware and trauma-informed approach in supporting victims, including the referral of victims to the police of jurisdiction as applicable. The RCMP has reached out to the Canadian Association of Chiefs of Police to raise awareness of the issue. In addition, the RCMP Commissioner has publicly committed that any person reporting forced or coerced sterilization to the RCMP will be heard, treated with respect, and informed of available victim support services. The Ontario Provincial Police (OPP) has programs in place that encourage victims of crime to come forward. The OPP is in the process of further enhancing a victim-centred approach, which includes measures that encourage women to come forward to report torture and/or inhumane or degrading treatment, including forced or coerced sterilization.

22. The Government of Canada, through the RCMP, is committed to investigating reported allegations of forced or coerced sterilization that have taken place where the RCMP is the local police of jurisdiction, and will also ensure other allegations are brought to the attention of the appropriate police of jurisdiction. Ultimately, any investigation into an allegation would fall under the mandate of the police service where the offense is reported to have occurred, which could be the RCMP where it provides local police services under contract, or a provincial or municipal police service where it does not.

Informed Consent

23. Every province and territory has enacted legislation concerning consent to medical care and treatment. Medical treatment must only be provided with the consent of the patient, or of a legally authorised substitute decision maker in certain cases. For consent to be considered valid it must be provided voluntarily by a person capable of providing consent and it must refer to the treatment and provider who will perform or undertake the treatment. Consent must also be informed, meaning that certain issues must be discussed with the patient prior to consent being obtained, such as material, expected consequences of the proposed treatment, special or unusual risks of the treatment, alternatives to treatment (and their risks), the likely consequences if no treatment is undertaken, and the success rates of different/alternative methods of treatment. The principle of respect for autonomy, at least in part, underpins the right to informed consent.

24. Following the Supreme Court of Canada's landmark *E.(Mrs.) v. Eve* [1986] 2 S.C.R. 388 decision, non-therapeutic sterilizations have been limited to cases where the individual is capable of and provides informed consent. Provincial and territorial laws provide safeguards to ensure that the consent is truly informed and voluntary.

25. Where in a limited number of cases there may be a therapeutic justification for sterilization, like other therapeutic procedures, it may be carried out with the consent of a legally authorised substitute decision maker, when the patient does not have legal capacity to consent. However, this is strictly regulated under provincial and territorial law, and is only possible where there are no alternative effective treatments.

26. The laws in the provinces of Ontario and Prince Edward Island are prime examples of legislation requiring consent to care and treatment. In Ontario, the *Health Care Consent Act, 1996* sets out the rules for consent to treatment. Pursuant to this Act, a health practitioner

who proposes a treatment for a person must not administer the treatment unless he or she is of the opinion that the person is capable with respect to the treatment, and the person has given consent; or he or she is of the opinion that the person is incapable with respect to the treatment, and the person's substitute decision-maker has given consent on the person's behalf in accordance with the Act. In Prince Edward Island (PEI), consent to treatment is legislated through the *Consent to Treatment Act and Health Care Directives Act and Regulations*. Like Ontario, the Act sets out rules for consent to treatment where a person is both capable and incapable of providing informed consent. The health authority, which delivers services, employs the use of multiple consent forms across divisions that patients, or their substitute decision-maker, sign as consent for admissions and all invasive procedures. In all provinces and territories, sterilization without consent is not allowed under any circumstances.

27. Informed consent is matter to be addressed within the context of any physician-patient relationship. Policies are administered at the local level within the hospital, which means that in addition to health professionals, hospital administrators and the health authorities must be part of the measures to ensure full and informed consent in health care. Only health professionals, such as obstetricians and gynecologists, can perform procedures such as tubal ligation; for this reason, professional regulatory bodies must also be involved. The College of Physicians and Surgeons of each province has website pages explaining informed consent and determining capacity to consent.

Culturally-safe health services

28. The provision of health services is a matter of shared jurisdiction in Canada. Provinces and territories administer and deliver most of Canada's health care services, and the federal government provides supplementary health benefits to eligible First Nations and Inuit. The federal government also administers services for certain populations, including Indigenous peoples living on First Nations reserves. For this reason, the federal government, provincial and territorial governments, associations of health professionals, and Indigenous partners are engaging on next steps to address the issue of forced and coerced sterilization.

29. Canada recognizes the right of everyone to enjoy the highest attainable standard of physical and mental health, in line with the *International Covenant on Economic, Social and Cultural Rights*, and that fulfilling this right depends on realizing its other human rights commitments, including freedom from all forms of discrimination and protecting the most vulnerable. The Government of Canada also fully supports the *United Nations Declaration on the Rights on Indigenous Peoples* and is working to renew the relationships with Indigenous Peoples, based on the recognition of rights, respect, cooperation and partnership. This includes addressing allegations of forced or coerced sterilization.

30. In July 16, 2015, the First Nations Health Authority of British Columbia and the Government of Canada signed a *Declaration of Commitment to Advance Cultural Safety and Humility in Health and Wellness Services*. The Declaration defines cultural safety as an outcome based on respectful engagement that strives to address power imbalances, resulting in an environment free of discrimination, where people feel safe accessing health and other systems.

31. The Government of Canada is currently undertaking a range of actions to support the cultural safety and humility of health care practitioners in collaboration with provincial and territorial governments, Indigenous partners as well as health system and law enforcement partners. These include promoting training and awareness initiatives for medical practitioners as part of their formal and ongoing education and improving processes and communications between patients and providers to ensure informed consent.

32. The Government of Canada is also funding national Indigenous women's organizations to produce information products for healthcare providers and patients on culturally safe informed consent, and is funding the National Collaborating Centre on Indigenous Health to work with these organizations to convene a national forum on informed consent in January 2020. The forum will promote culturally-safe informed consent, and will mobilize action for Indigenous women's reproductive health, wellness, and rights.

33. Provincial and territorial governments are taking action to support greater cultural safety in the health care system. For example, in February 2019, the Government of the Northwest Territories released *Caring for Our People: Cultural Safety Action Plan* that will guide the territory in embedding cultural safety throughout the health and social services system to reduce cultural bias through policies, standards and training.

34. In Saskatchewan, the Saskatoon Health Region conducted an external review in 2017, after initial concerns were raised regarding cases of forced or coerced sterilization. In soliciting community input for the review, 16 Indigenous women contacted a hotline to report their experience, while nine health care providers contacted the hotline.

35. There has been an ongoing commitment by the Saskatchewan Health Authority (SHA) to implement the calls to action outlined in the external review. For example, the SHA created an advisory council with First Nations and Métis community partners, as well as Elders and the Grandmothers, to advise the SHA on the future of health care in the province. The council worked with SHA leaders to review the calls to action and detailed plans were created or implemented in relation to those recommendations.

36. The SHA continues to encourage anyone who has had a negative experience with the health system regarding their reproductive health to come forward. The Provincial Health Authority's First Nations and Métis Health Services Office is a point of contact for Indigenous persons who may have concerns or complaints regarding alleged coerced sterilization. A key task for the Office is the promotion of Indigenous cultural sensitivity, appropriateness and safety.

37. Provincial and territorial governments recognize learning or professional development opportunities which build cultural awareness and competency are essential to ensuring that Indigenous Peoples receive appropriate health care services safely and equitably. For example:

    - As part of the Government of British Columbia's focus on cultural safety, employees in regional health authorities, the Ministry of Health and First Nations Health Authority receive San'yas Indigenous Cultural Safety Training – designed by the British Columbia Provincial Health Services Authority to develop understanding and promote positive partnerships between service providers and Indigenous Peoples. To improve Indigenous cultural safety and competency in their respective health care

systems, the Governments of Ontario and Manitoba have also utilized this Indigenous-specific training program.

- The Government of Nova Scotia is working with First Nations to undertake a review of culturally safe and competent practices and training within health services. The provincial government has also engaged with First Nations to develop education modules on cultural safety in health care for Indigenous Peoples.
- In New Brunswick, employees of the Regional Health Authorities receive training by First Nations on recognizing the role of history in shaping health care experiences and understanding what health and wellness means to First Nations, while recognizing the diversity of these understandings.
- As part of the Government of Saskatchewan's commitment to reconciliation, in March 2019, the Saskatchewan Health Authority (SHA) formalized its commitment to the Truth and Reconciliation Commission's Calls to Action with a pipe and signing ceremony. The ceremony was an important step for the SHA in its move towards reconciliation with First Nations and Métis peoples. It is also foundational for the development and provision of culturally responsive, appropriate and safe health care services.

38. The Government of Canada has recently made contributions to maternal health programming to improve Indigenous women's birth experiences. For example:

- To support the Truth and Reconciliation Commission's Calls to Action to retain and increase the number of Indigenous health care professionals and promote Indigenous healing practices, in 2017, the Government of Canada made investments over five years to improve access to culturally-safe Indigenous midwifery services. Midwifery care in Indigenous communities was identified as a pathway that improves the health and well-being of the entire community and is an avenue that can help support the return of birthing to communities. There is some evidence that midwives not only support women in their reproductive health planning – which strengthens informed consent practices – but also provide support in preventing custodial loss of their children.
- In 2017, the Government of Canada increased supports to a Maternal Child Health Program, which provides home-visits by nurses and family visitors to over 8,100 pregnant women and families with young children in 309 First Nations communities. The Program provides case management; screening, assessment and referrals; as well as health promotion strategies to improve maternal child health and identify risk factors. Women who are supported during pregnancy and birth will be healthier and better equipped to make decisions about their reproductive health.
- The Government of Canada also made new investments to the Non-Insured Health Benefits Program in 2017, to strengthen maternal supports by ensuring that First Nations and Inuit women are provided coverage for an escort to accompany expectant mothers, in the event that they have to travel out of their community for the birth of their child, to ensure they do not have to give birth alone.

39. The Government of Canada has also established a new Advisory Committee on Indigenous Women's Wellbeing to provide advice, guidance and direction on current and emerging

issues affecting the health and wellness of First Nations, Inuit and Métis women, and to co-develop policy and service delivery options. The Committee consists of representatives from National Indigenous Organizations, National Indigenous Women's Organizations, the National Aboriginal Council of Midwives, the National Aboriginal Circle Against Family Violence, and the Society of Obstetricians and Gynaecologists of Canada.