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Torture of Afghan Detainees

Canada's Alleged Complicity and the Need for a Public Inquiry

Omar Sabry

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Executive Summary

> In any constitutional climate, the administration of justice thrives on exposure to light — and withers under a cloud of secrecy.
> — *Toronto Star Newspapers Ltd. v. Ontario, Supreme Court of Canada*

THIS REPORT DISCUSSES Canada's shortcomings and violations of international law relating to its transfer of hundreds of detainees to Afghan National Security Forces (ANSF), most frequently the National Directorate of Security (NDS), Afghanistan's intelligence service, despite substantial risks that they would be subjected to torture. This occurred during Canada's mission in Afghanistan, and particularly between December 18, 2005, when a Transfer Arrangement was signed between the governments of Canada and Afghanistan, and the end of Canadian Forces (CF) combat operations in that country in late 2011.

Afghanistan's egregious human rights record in detention facilities, especially those under the NDS, is no secret. Various credible reports made public before and throughout Canada's mission described the widespread use of torture in places of detention, particularly in Kandahar, where CF transferred detainees. These reports came from such sources as the United Nations, Human Rights Watch, the Afghanistan Independent Human Rights Commission, the US Department of State, and Canada's own Department of Foreign Affairs and International Trade (DFAIT), among other organizations.

Despite an abundance of such information about torture and other abuse, Canada entered into an arrangement with the Government of Afghanistan that allowed for the transfer of detainees to their custody but did not allow Canada to monitor their conditions post-transfer. When difficulties such as limited capacity for detainee monitoring, delays in notifying the International Committee of the Red Cross of transfers, and reports of conditions and abuse in detention facilities arose, Canada entered into another arrangement that continued to allow for the transfer of detainees but also allowed Canadian personnel to monitor their conditions after transfer. Both arrangements contained diplomatic assurances against torture, which have been shown to be ineffective and unreliable in States with consistent patterns of human rights abuses, such as Afghanistan.

Under the new arrangement, Canada lost track of many detainees transferred in 2006 and 2007, continued to find incidents of torture after the new arrangement was signed, occasionally suspended transfers for various reasons, including allegations of abuse, but then resumed transfers on at least six occasions. The government's conduct in this regard has been haphazard and unprincipled, in addition to being in violation of international law.

In transferring hundreds to the custody of the NDS in Kandahar, Canada failed to prevent the torture of many Afghan detainees. In so doing, it violated international law. In particular, the transfers were in violation of the prohibition of torture, which is a peremptory norm of international law that can never be suspended under any circumstances, including those involving armed conflict. They also violated the Convention Against Torture, which prohibits transfers when there are substantial risks of torture, other international human rights law instruments, and the Geneva Conventions. Canada's military chain of command and other Canadian officials, including Ministers of the Crown, bear potential legal liability for transfers if they knew, or should have been expected to know, about substantial risks of torture.

There have been three major attempts at transparency and accountability on this issue to date. These efforts were either narrow in scope or were stymied by the government. The first was a lawsuit brought forward by Amnesty International and the British Columbia Civil Liberties Association (BCCLA) in 2007 against the Government of Canada before the Federal Court, arguing that Canada's transfer of detainees to the NDS in Kandahar was illegal under international law as well as the *Canadian Charter of Rights of Freedoms*. The second process was an investigation by the Military Police Complaints Commission (MPCC), a quasi-judicial administrative tribunal, into whether Military Police officers failed to investigate transfer orders made

by Task Force Commanders in Kandahar. The third process consisted of a study by the House of Commons Special Committee on the Canadian Mission in Afghanistan of Canada's laws, regulations and procedures for the handling of Afghan detainees.

Whether before the Federal Court of Canada or the Military Police Complaints Commission or the House of Commons Special Committee on the Canadian Mission in Afghanistan, the government refused to release relevant information, invoking national security confidentiality concerns. When the House of Commons issued an Order for the government to release uncensored documents to Members of Parliament, the government refused to comply. The compromise the government conceded was to create an *ad hoc* committee to review documents before they could be released. What ensued, however, was that the government ended the work of this committee before it could finish its review, and the outcome was the release of 362 documents, many of them heavily censored.

For all of the above reasons, the Government of Canada should launch a transparent and impartial judicial Commission of Inquiry into the actions of Canadian officials, including Ministers of the Crown, relating to Afghan detainees. The government should also develop clear policies that would prevent future reliance on diplomatic assurances against torture, including in situations involving armed conflict and extradition, and reaffirm Canada's commitment to the prohibition of torture by immediately signing and ratifying the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.

1. Introduction

DURING CANADA'S MISSION in Afghanistan, Canadian Forces (CF) transferred hundreds of detainees they had captured in the course of their combat operations to Afghanistan's intelligence service, the National Directorate of Security (NDS). In NDS custody, many of these detainees were subjected to torture and other cruel, inhuman or degrading treatment.

Canadian Joint Task Force-Afghanistan Commanders (henceforth "JTF-A Commanders") in Kandahar, where most Canadian troops were based during the period of concern, continued to issue transfer orders for detainees despite an abundance of information that indicated substantial risks of torture for detainees upon transfer.[1] This information consisted of publicly available and credible reports about human rights conditions in NDS and other Afghan detention facilities, further discussed in Section 2.2 below; reports from the Provincial Reconstruction Team (PRT) in Kandahar and the Canadian embassy in Kabul directly addressed to Canadian officials and containing information about deficiencies in Canada's handling of detainees, further discussed in Section 4 below; and incontrovertible cases, acknowledged by the Canadian government, of particular individuals known to have been in Canadian custody who were abused at the hands of Afghan authorities after being transferred (also in Section 4).

In international law, the prohibition of torture has risen to the status of *jus cogens*, a central tenet of customary international law that can never be suspended in any circumstances, even in times of armed conflict. There are many multilateral treaties prohibiting the crime of torture and other forms of

ill treatment, such as the UN Convention Against Torture (UNCAT), the Geneva Conventions, and the Rome Statute of the International Criminal Court, as further discussed in Section 6. Under the UNCAT, States are barred from transferring any individual, regardless of their legal status or criminal record, to the custody of another State if there are substantial grounds for believing that this individual would be in danger of being subjected to torture.

On this issue, the government refused to release uncensored documents to Members of Parliament; mounted legal challenges that narrowed the scope of, and interfered with, the proceeding of an investigation by the Military Police Complaints Commission (MPCC) into the role of Military Police in the issue; refused to release documents in Federal Court proceedings on grounds of national security; refused to launch a public inquiry into the matter; and continued to transfer detainees to situations involving substantial risks of torture and other abuse for a period that lasted over five years.

In continuing to subject individuals to a substantial risk of torture in Afghanistan, Canada violated the human rights of Afghan detainees. Although there is limited information about the government's policies, regulations and legal opinions that formed the basis for its practices, the information that has been released thus far indicates the possibility that Canada may well have been complicit in the commission of crimes of torture and other cruel or inhuman treatment against Afghan detainees in the custody of the NDS in Kandahar, between 2006 and 2011.

As Richard Colvin,[2] former DFAIT Officer in Afghanistan in 2006–07, stated in oral testimony before the House of Commons Special Committee on the Canadian Mission in Afghanistan, "If we are complicit in the torture of Afghans in Kandahar, how can we credibly promote human rights in Tehran or Beijing?"[3]

2. Background

2.1 Canada's Mission in Afghanistan

On October 7, 2001, Prime Minister Jean Chrétien announced that Canada would begin participating in an international military mission in Afghanistan. In December of the same year, about 40 troops from Joint Task Force 2 (JTF2), a Special Forces unit, arrived in Afghanistan, marking the beginning of Canadian military presence in that country. Most Canadian Forces deployed were under the International Security Assistance Force (ISAF), a multinational force under NATO command. Some, however, were deployed under Operation Enduring Freedom, a US-led multinational force distinct from ISAF.

With the formation of the Karzai government in 2002, the conflict in Afghanistan became a non-international armed conflict between the government, supported by foreign forces including CF, and insurgents, rather than between foreign forces and the Afghan government.[4] Foreign military forces engaging in combat were present in Afghanistan with the consent of the Afghan government, as indicated by the Afghanistan Compact and other bilateral and multilateral agreements. In the Afghanistan Compact, which was the result of the London Conference on Afghanistan in 2006, the Afghan government and the international community resolved to "reaffirm their commitment to the protection and promotion of rights provided for in the Afghan constitution and under applicable international law, including the international human rights covenants and other instruments to which

Canadian soldiers lead detainees from a residential compound in southwest Kabul, following a raid in 2004. Source: Canadian Armed Forces.

Afghanistan is a party."[5] The UN Security Council unanimously endorsed the Afghanistan Compact on February 15, 2006.[6]

In August 2003, Canada began contributing to ISAF's Operation ATHENA in Kabul. Two years later, in August 2005, Canadian troops started transitioning to Kandahar Province. In January 2006, CF began combat operations in Kandahar as part of Operation ATHENA, in concert with other ISAF forces, with as many as 3,000 Canadian troops deployed at any one time. In February 2006, Brigadier General David Fraser assumed command of the multinational brigade Regional Command South, also based in Kandahar, until February 2008, when Major General Marc Lessard assumed its command.

When Canadian troops transitioned to Kandahar, Canada also assumed responsibility for the Provincial Reconstruction Team (PRT) for Kandahar, taking over from the United States. PRTs were developed by the latter in 2003 to assist in the stabilization and reconstruction of different provinces through bringing together military, development and diplomatic actors, and have been used in the context of failing States, notably in Iraq and Afghanistan. Afghanistan was covered by 26 PRTs, each led by one foreign government. The Kandahar PRT was located in Kandahar City, in a former fruit-canning plant that was heavily fortified.

Canada reflected this 'whole-of-government' approach in Kandahar, where Canadian personnel from DFAIT, the Canadian International Development Agency (CIDA), civilian police, and Canadian Forces assisted the Af-

ghan government in the provision of security and development. Canadian Military Police were based at Kandahar Airfield (KAF), about a 30-minute drive from the Kandahar PRT.[7] KAF was also the main base for Canada's military deployment to Afghanistan, Joint Task Force-Afghanistan (JTF-A). JTF-A command reported to the Canadian Expeditionary Force Command (CEFCOM) in Ottawa, which was established on February 1, 2006, and which in turn reported to the Chief of the Defence Staff.

To aid in the implementation of this whole-of-government approach, an inter-departmental Afghanistan Task Force (to be distinguished from Canada's military deployment, Joint Task Force-Afghanistan) was created in the Privy Council Office in May 2007, with David Mulroney as appointed director.[8] This Task Force attempted to enhance coordination between headquarters and the field, and between military and civilian government departments.

In November 2010, Canada announced its priorities in Afghanistan until withdrawal in 2014, which included education, health, security, regional diplomacy, and humanitarian assistance. Canada briefly contributed in May 2011 to Operation ATTENTION, which focused on training and professional development for Afghan security forces. Canada ended combat operations in Kandahar in July 2011, although Operation ATHENA continued until December 2011.

The most intense fighting of the armed conflict occurred in Kandahar. For this reason, it was of critical importance for the stabilization of the country. A total of 162 Canadians were killed in Afghanistan during Canada's military mission.[9]

Table 1 contains some of the most notable events in the course of Canada's combat operations in Afghanistan.

2.2 Human Rights Conditions in Afghan Detention Facilities

In the context of this armed conflict, and particularly in light of the transfer by Canadian Forces of hundreds of detainees to Afghan authorities, it is important to note that the flagrant human rights record of the Government of Afghanistan is no secret: numerous reports published before and throughout Canada's mission in the country were consistently stating torture is rife in Afghan detention facilities, particularly in facilities run by the NDS.[10] These reports condemned the widespread and systematic abuse of detainees. This section discusses relevant parts of only some of these reports.

TABLE 1 Timeline of the Canadian Mission in Afghanistan

Year		Event
Prime Minister Jean Chrétien		
2001	Oct. 7	**Announcement** of beginning of mission
	Dec.	**Military presence** begins — arrival of about **40 troops** from Joint Task Force 2 (JTF2), a Special Forces unit
2002	Feb. 2	**First regular combat troops** — members of the Princess Patricia's Canadian Light Infantry arrive in Afghanistan for a six-month mission in Kandahar under US command
Prime Minister Paul Martin		
2004	Feb. 9	**Command of ISAF** (International Security Assistance Force) — by Lt. Gen. Rick Hillier over 6 months, leading 5,500 soldiers from more than 30 countries
	Aug. 8	**The bulk of Canadian troops withdraw from Kabul** — Lt. Gen. Rick Hillier relinquishes command of ISAF
2005	Dec. 18	**Transfer Arrangement for Detainees** signed between Canada and Afghanistan
Prime Minister Stephen Harper		
2006	Feb. 28	**Command of multinational ISAF-led force** in southern Afghanistan — by Brig. Gen. David Fraser
	Aug.	**Transition to Kandahar Province** — approximately 2,000 Canadian soldiers
2007	May 3	**New Transfer Arrangement for Detainees** — signed between Canada and Afghanistan, granting Canadian personnel access to detainees that Canada transferred to Afghan custody
	Oct.	**Independent panel to evaluate whether Canada should extend its military mission in Afghanistan** — ordered by Prime Minister Stephen Harper, led by former Liberal cabinet minister John Manley
2008	Jan. 22	**Independent panel** recommends that Canada **remain in Afghanistan beyond 2009**, **but shift the focus** of its efforts from combat to training of Afghan security forces
	March 13	**House of Commons** votes to **extend Canada's mission** in Afghanistan until 2011
	July 15	**Canada transfers control of Kandahar city to US troops**, two weeks after relinquishing command of Zhari and Arghandab districts. Canada retains responsibility for Dand and Panjwaii districts
2011	Jan. 12	**Canada transfers command of Provincial Reconstruction Team in southern Afghanistan over to US control**, marking the beginning of the formal withdrawal from the country
	June 6	**Canada's last major combat operation in Afghanistan comes to an end**
	July 5	**Canadian commanders formally hand over command in Kandahar to US troops**, effectively ending Canada's combat mission in Afghanistan nine years and seven months after special forces soldiers first arrived late in 2001

Source Adapted from The Canadian Press

Afghanistan Independent Human Rights Commission

The Afghanistan Independent Human Rights Commission (AIHRC), the organization that was entrusted by the Canadian government with monitoring detainee conditions under the 2005 Transfer Arrangement, further discussed below, regularly shared concerns about torture and ill treatment in detention facilities. In its annual report for 2003–04, the organization found that "torture continues to take place as a routine part of police procedures.

The AIHRC has found torture to occur particularly at the investigation stage in order to extort confessions from detainees."[11]

In its 2005 annual report, the organization found, "[t]orture continues to take place as a routine part of [Afghan National Police] procedures and appears to be closely linked to illegal detention centers and illegal detention, particularly at the investigation stage in order to extort confessions from detainees. Torture was found to be especially prevalent in Paktia and Kandahar provinces, linked to the high numbers of illegal detainees. High numbers of complaints of torture were received from all regional offices in the past year."[12]

In its 2006 annual report, the organization reported, "the incidence of torture on detained or imprisoned persons was still occurring throughout the past year, although cases of torture have declined."[13] In May 2006, the AIHRC estimated that around 30 per cent of detainees in Kandahar jails, where most Canadian-transferred detainees were kept, had been beaten and tortured. The 2008 annual report says, "torture, lack of defence lawyer[s], illegal arrest and captivity, and abuse of Afghanistan's legal procedures still exist."[14]

A regional head of the AIHRC in Kandahar told the *Globe and Mail*, "[t]he NDS is torturing detainees... I've heard stories of blood on the walls. It's a terrifying place: dark, dirty, and bloody."[15] In 2009, the AIHRC published a study on detention facilities in Afghanistan that concluded that "torture is a commonplace practice in Afghanistan's law enforcement institutions," but that its limited access to detainees hindered its ability to understand the true scope of torture and ill treatment in Afghan prisons.[16]

In a 2012 report titled *Torture, Transfers, and Denial of Due Process: The Treatment of Conflict-Related Detainees in Afghanistan*, the AIHRC stated, "While mistreatment is a problem for detainees throughout the Afghan justice system, research and experience have shown that conflict-related detainees are particularly vulnerable to abuse and torture."[17] The report establishes, based on interviews with 118 detainees under NDS or ANP custody conducted between February 2011 and January 2012, that detainees were subjected to the following forms of abuse:

- Beating (most often with kicks, punches, electric cables, wooden sticks, and plastic pipes, and rubber hoses)
- Suspension (being hung by the wrists or ankles from chains on the wall, fixtures, or the ceiling)
- Electric shock

- Threatened sexual abuse
- Twisting and wrenching of the genitals
- Forced prolonged standing
- Burning (with cigarettes)
- Biting (by interrogators)[18]

United Nations

Reports from various bodies within the UN system detailed similar concerns. In March 2006, Louise Arbour, then UN High Commissioner for Human Rights, wrote a report in which she noted the following on conditions in Afghanistan: "Multiple security institutions managed by the [NDS], the Ministry of the Interior and the Ministry of Defence, function in an uncoordinated manner, and lack central control. Complaints of serious human rights violations committed by representatives of these institutions, including arbitrary arrest, illegal detention and torture, are common."[19]

The UN Secretary General, in reports on Afghanistan to the UN Security Council, also clearly noted his concerns about ill treatment in Afghan detention facilities.[20] He states the following in March 2007: "in a significant proportion of cases pre-trial detention timelines had been breached, suspects had not been provided with defence counsel, and ill-treatment and torture had been used to force confessions. Access to the National Directorate of Security and Ministry of the Interior detention facilities remained problematic for the Afghan Independent Human Rights Commission and [the UN Assistance Mission in Afghanistan]."[21]

In a 2011 report titled *Treatment of Conflict-Related Detainees in Afghan Custody*, the UN Assistance Mission in Afghanistan (UNAMA) reported that 125 of 273 conflict-related detainees (that is, almost half) who had been in NDS detention throughout Afghanistan, including Kandahar, had been subjected to interrogation techniques that constituted torture.[22] The report found the following account demonstrative of how the NDS treated conflict-related detainees in Kandahar: "[t]he beating and abuse continued for three days. They interrogated me three times during the day and twice at night. They would hang me in the afternoon after the interrogation. They tied my hands along with my chest with my turban and hung me on the ceiling."[23]

Around the time this report was published, NATO ordered an immediate halt to detainee transfers to 16 facilities, but later resumed transfers to most

of them after attesting they were complying with human rights standards.[24] This had no bearing on the CF, who had stopped transferring detainees in mid-2011, prior to completing Canada's combat operations at the end of 2011.

A UNAMA report with the same title and published in January 2013 reported that there were no substantial improvements in the treatment of detainees: many were beaten with hoses and pipes, and threatened with sodomy.[25] Despite over a year of efforts to train officials handling detainees in human rights, total incidents of torture had in fact risen by January 2013. A third report from UNAMA published in February 2015 found that 161 of 611 interviewed detainees were tortured in NDS custody, and forms of torture included severe beatings, electric shocks, suspensions, stress positions and threats of sexual assault.[26]

Human Rights Watch

Human Rights Watch (HRW) released reports in 2002, 2003 and 2004 that included concerns about torture by Afghan detention authorities.[27] In mid-2006, Sam Zarifi, at the time HRW Deputy Asia Director, directly communicated concerns with NATO officials, including Canadian officials, on detainee abuse by the NDS, both in Brussels and in Kabul.[28] In late 2006, Mr. Zarifi communicated the same concerns in Ottawa with the Afghanistan desk at DFAIT.[29]

In November 2006, HRW wrote a public letter to NATO Secretary General Jaap de Hoop Scheffer, noting at least one instance in which the NDS hid a detainee from the International Committee of the Red Cross.[30] The organization learned in December 2009 that a man died in the custody of the NDS, and marks of severe physical abuse were noted on his body.[31] They also obtained interview transcripts with NDS detainees from the Afghanistan Justice Project, an organization established to document crimes committed by all parties to conflict in Afghanistan, indicating that three men were subjected to a combination of being beaten with cables and rifles, subjected to electric shocks, deprived of sleep, hung upside down, and threatened with death.[32]

US Department of State Human Rights Reports

Successive human rights reports by the US Department of State also reported serious concerns about torture in prisons. For example, their 2005 report said prisoners were "reportedly beaten, tortured and denied adequate food."[33] Also from the 2005 report, the following: "There continued to be instances

in which security and factional forces committed extrajudicial killings and torture... Torture and abuse consisted of pulling out fingernails and toenails, burning with hot oil, sexual humiliation and sodomy."[34]

The 2006 report made the same statement, and added the following: "Prison guards routinely denied visitors, food, and outside exercise as a means of discipline and to ensure good behavior."[35] This continued well into 2009, when the annual report described the following kinds of torture: beatings, use of a scorching bar, flogging by cable, battering by rod, electric shock, deprivation of sleep, food and water, abusive language, sexual humiliation and rape.[36]

DFAIT Human Rights Reports

Canada's own human rights reports on Afghanistan produced by the Department of Foreign Affairs and International Trade (now the Department of Foreign Affairs, Trade and Development) noted the prevalence of torture in detention facilities. Its 2003 report observes, "common methods of torture included beating with an electric cable or metal bar, electric shocks, sleep deprivation and hanging detainees by their arms or upside down for several days."[37]

Its 2005 report states: "While the state does not condone physical abuse, military, intelligence and police forces have been involved in arbitrary arrests, kidnapping, extortion, torture and extrajudicial killing of criminal suspects." Its 2006 report, released in January 2007, says, "Extrajudicial executions, disappearances, torture and detention without trial are all too common" by military, intelligence and police officers, a phrase that was also used in the 2004 report.[38] The report singled out the NDS for its widespread use of torture. The *Globe and Mail*, which obtained an uncensored version of the same report, titled *Afghanistan-2006: Good Governance, Democratic Development and Human Rights* and marked 'CEO' for Canadian Eyes Only, pointed out that the following sentences were blacked out in the censored version of the report:[39]

- "Extra judicial executions, disappearances, torture and detention without trial are all too common."
- "The overall human rights situation in Afghanistan deteriorated in 2006."

- "Military, intelligence and police forces have been accused of involvement in arbitrary arrest, kidnapping extortion, torture and extrajudicial killing."
- "Widespread allegations of corruption and human-rights violations exist with respect to the Afghanistan National Police (ANP) and Ministry of [the] Interior (MOI)."

DFAIT's 2007–08 human rights report for Afghanistan alludes to reports by the UN High Commissioner for Human Rights that allegations of torture and ill treatment of detainees and prisoners continue.[40]

On March 9, 2007, there was a meeting in Ottawa with representatives from the Canadian Forces, Foreign Affairs, National Defence, and other government departments to discuss issues relating to the handling and transfer of Afghan detainees. Richard Colvin, DFAIT Officer on the Provincial Reconstruction Team in Kandahar and later at the Canadian embassy in Kabul, and Gabrielle Duschner, then Policy Advisor to CEFCOM Commander General Michel Gauthier, have both confirmed that Colvin stated at that meeting, "The NDS tortures people, that is what they do, and if we don't want detainees tortured, we shouldn't give them to the NDS."[41]

These reports on the widespread use of torture and other forms of cruel and inhuman treatment in Afghan detention facilities, even though they have been dismissed by the government as too general and not directly relevant to detainees transferred by Canada, were in fact accepted by Justice Anne Mactavish of the Federal Court of Canada as serious, relevant and credible in a February 7, 2008 judgment which is further discussed in Section 5.1 of this report. Justice Mactavish argued that this evidence "clearly establishes the existence of very real concerns as to the effectiveness of the steps that have been taken thus far to ensure that detainees…are not mistreated." Additionally, in *Maya Evans v. Secretary of State for Defence*, the UK High Court of Justice reviewed evidence of torture by the NDS, to whom British troops, like Canadian Forces, were transferring detainees. The Court found that "the scale of torture and serious mistreatment evidenced by the background material would be sufficient to justify the conclusion that transferees were at real risk of such ill-treatment."[42]

3. Canada's Operational Framework for Handling Detainees

IT IS AGAINST this background of egregious human rights conditions in Afghan places of detention that Canadian Forces (CF) had a broad discretion to detain suspected insurgents or Afghan civilians, even if they were not directly participating in hostilities, to keep them in temporary holding facilities run by the CF, and to either release or transfer them to Afghan National Security Forces (ANSF), most frequently the National Directorate of Security (NDS), as mentioned above, and, to a lesser extent, the Afghan National Police (ANP).

CF began capturing suspected insurgents and others at the outset of Canada's mission, as early as January 2002. From 2002 until the end of 2005, however, Canada transferred its detainees to US Forces, rather than Afghan authorities. According to statistics released by the government in September 2010, the CF transferred around 40 detainees to American custody until the end of 2005 (see Section 4.1 below). In transferring detainees to US custody, Canada relied on American assurances that detainees would be treated humanely. When the US government began making statements suggesting that detainees would not be entitled to protections under the Geneva Conventions and refused to confirm that they would provide updates on the lo-

cation and status of detainees, the Canadian government decided to halt transfers to US custody in late 2005.

Canada then began transferring detainees to Afghan custody, mainly Afghanistan's intelligence agency, the NDS. Transfer decisions rested primarily with the Commander of Joint Task Force-Afghanistan (JTF-A) in Kandahar, a position that was filled by a succession of different commanders, including the following during the period of concern: Brigadier General David Fraser, Colonel Steven Noonan, Major General Tim Grant, Brigadier General Guy Laroche, Brigadier General Denis Thompson, and Lieutenant General Jonathan Vance. However, the CEFCOM Commander and the Chief of the Defence Staff, both further up the hierarchy than the JTF-A Commander, could also make decisions on whether to halt or resume detainee transfers, and could withdraw the authority to make transfer decisions from JTF-A Commanders.[43]

3.1 Transfer Arrangement of December 18, 2005

On December 18, 2005, General Rick Hillier, then Chief of the Defence Staff, and the Afghan Minister of Defence signed the *Arrangement for the Transfer of Detainees Between the Canadian Forces and the Ministry of Defence of the Islamic Republic of Afghanistan*.[44] This arrangement was not made public until March 2006.

According to released DND documents, former Prime Minister Paul Martin was briefed on the outline of this agreement more than six months before it was signed.[45] In a letter dated May 27, 2005 from Defence Minister Bill Graham to PM Paul Martin, the former Prime Minister was informed that Canada planned to negotiate an arrangement with the Government of Afghanistan that would include "explicit undertakings" on how detainees would be treated. The same letter explained that Canada wished for an agreement under which detainees could "be afforded treatment consistent with the standards set out in the Third Geneva Convention [on the Treatment of Prisoners of War], regardless of the legal status of those detainees," and that Canada would send information on detainees to the International Committee of the Red Cross (ICRC).[46]

Senior members of the Judge Advocate General division in the Department of National Defence, including the Judge Advocate General himself, Major General Jerry Pitzul, drafted the agreement. It also received support

from DFAIT and the Privy Council Office, according to oral testimony by Bill Graham.[47]

The 2005 Transfer Arrangement stipulated the following:[48]

- Canadian Forces would treat detainees in accordance with the provisions of the Third Geneva Convention (Paragraph 3);
- The ICRC would visit detainees in Canadian or in Afghan custody at any time. Such visits could be delayed only in exceptional circumstances, such as for reasons of military necessity (Paragraph 4);
- Afghan authorities would be responsible for respecting the provisions of the Third Geneva Convention in their custody of detainees transferred to them by CF (Paragraph 5);
- CF would maintain "accurate written records accounting for all detainees that have passed through their custody. Such written records should, at a minimum, contain personal information (as far as known or indicated), gender, physical description and medical condition of the detainee, and, subject to security considerations, the location and circumstances of capture" (Paragraph 7);[49]
- Upon transfer of any detainee to Afghan authorities, Canada would notify the ICRC "through appropriate national channels" (Paragraph 9);
- CF and Afghan authorities would both recognize "the legitimate role of the Afghan Independent Human Rights Commission within the territory of Afghanistan, including in regard to the treatment of detainees" (Paragraph 11).

Some of the provisions of this arrangement amount to diplomatic assurances against torture. In testimony before the House of Commons Special Committee on the Canadian Mission in Afghanistan, David Sproule, Canadian Ambassador to Afghanistan from October 2005 until April 2007, stated, "we obtained assurances from the highest levels of the Afghan government through the December 2005 Arrangement."[50] Mr. Sproule also added that the arrangement was not a treaty, but rather a military agreement, and therefore not binding law.[51]

The terms of the Transfer Arrangement left responsibility for monitoring to the ICRC and the Afghanistan Independent Human Rights Commission (AIHRC), an organization whose role is acknowledged in the 2004 Constitution of Afghanistan.[52] Under this arrangement, AIHRC was notified every

time a detainee was transferred to Afghan authorities, and the ICRC was notified every time CF detained individuals, even if they were not subsequently transferred.[53] There were no provisions therein that granted CF right of access to Afghan detention facilities in order to monitor the conditions and treatment of transferred detainees. Thus, for about 18 months from early 2006 to mid-2007, Canada continued to transfer between 129 and 225 detainees, according to statistics released by the government (shown in Section 4.1), to the custody of the Afghan authorities without monitoring their conditions after they were transferred.

For more than a year after the 2005 Arrangement was signed, Defence Minister Gordon O'Connor and Chief of the Defence Staff General Rick Hillier refused to revise its terms in order to protect transferred detainees from substantial risks of torture, despite reports from the embassy in Kabul and the PRT in Kandahar on serious risks of torture and mistreatment of Canadian-transferred detainees, among other issues, beginning in May 2006.[54]

Some of these messages and reports were brought to the attention of four different divisions of DFAIT (the human rights division, the division dealing with international law, the defence relations division, and the peacekeeping division), the Department of National Defence, the Canadian Expeditionary Force Command (CEFCOM),[55] Task Force Afghanistan,[56] the RCMP, and the Privy Council Office. At least 15 briefings and reports were sent to or otherwise brought to the attention of senior military and civilian officials such as Chief of the Defence Staff General Hillier, CEFCOM Commander Michel Gauthier, Afghanistan Task Force Director David Mulroney, National Security Advisor Margaret Bloodworth, and Assistant Deputy Minister Colleen Swords. Some of these emails are discussed in Section 4.4, and shown in Appendix C.

3.2 Transfer Arrangement of May 3, 2007

On April 23, 2007, a *Globe and Mail* investigation led by Graeme Smith which consisted of 30 in-person interviews with men who were detained by CF in Kandahar and later transferred to Afghan custody, revealed a pattern whereby these detainees said they were "beaten, whipped, starved, frozen, choked and subjected to electric shocks during interrogation" by Afghan authorities.[57] Victims who spoke to Smith identified their Canadian captors by describing Canadian vehicles, which were different from British or American models used in the same districts in Kandahar, indicating they had indeed been in Canadian custody prior to their transfer to Afghan authorities.

In the immediate aftermath of the publication of this report, the Canadian embassy in Kabul sent Ottawa two reports offering a solution, one on April 24 and another on April 25. The solution suggested was for Canada to adopt approaches practised by British and Dutch Forces; namely, to adopt much more robust measures to protect detainees from torture and ill treatment.[58]

On May 3, 2007, ten days after the release of the *Globe and Mail* report, Canada and Afghanistan signed a second Transfer Arrangement governing the transfer of detainees, the *Arrangement for the Transfer of Detainees Between the Government of Canada and the Government of the Islamic Republic of Afghanistan*. This Arrangement supplemented the first Transfer Arrangement of 2005, which remained in effect. Unlike the December 2005 Arrangement, which was signed by Chief of the Defence Staff General Hillier, this one was signed by the Ambassador of Canada in Afghanistan on behalf of the Government of Canada, and the Afghan Minister of Defence. It was thus not strictly a military arrangement.

This Transfer Arrangement stipulated the following:

- Government of Canada personnel would have unrestricted access to detention facilities where detainees transferred by Canadian Forces were kept, in addition to the ICRC, the AIHRC and relevant UN bodies (Paragraph 2);
- Afghan authorities must inform Canada of any ill treatment, including torture, of transferred detainees (Paragraph 3);
- Afghan authorities were responsible for upholding their international legal obligations against the use of torture and cruel, inhuman or degrading treatment (Paragraph 4);
- Afghan authorities were not to transfer detainees who were in Canadian custody to the custody of third parties without the written consent of the Government of Canada (Paragraph 5);
- To facilitate access and keeping track of detainees, Afghan authorities must detain individuals transferred by Canadian Forces in a limited number of facilities (Paragraph 7);[59]
- During visits to detention facilities, representatives would be allowed to interview detainees in private, without the presence of Afghan authorities (Paragraph 9);

- In the event of allegations of abuse, the Afghan government would investigate them in accordance with domestic and international law, and inform the Government of Canada, the AIHRC and the ICRC of such measures of corrective action (Paragraph 10).

According to JTF-A Commander General Tim Grant, the signing of this new arrangement was not the result of specific concerns of post-transfer treatment; rather, it was to develop a more robust monitoring regime that would provide the Task Force Commander with information to make more informed transfer decisions, for which General Grant acknowledged Commanders bore legal responsibility.[60] It is important to note, however, that the signing of the 2007 Arrangement came at a time of high political pressure associated with this issue: intense media coverage of allegations of torture, parliamentary scrutiny of the conduct of Canadian Forces, a lawsuit before the Federal Court of Canada which aimed to halt detainee transfers, and an investigation by the Military Police Complaints Commission, all further discussed in Section 5.

Following the signing of the May 2007 Arrangement, David Mulroney, Director of the Afghanistan Task Force, agreed that DFAIT take on responsibility for site visits to detainees after they were transferred, and this was incorporated into standard operating procedures.[61] Essentially, this meant that at the moment of release or transfer, lead responsibility for detainees moved from the Department of National Defence and the Canadian Armed Forces, to DFAIT. Site visits were conducted mostly by DFAIT, although on occasion National Defence, the RCMP, and Correctional Service Canada participated.[62]

As such, DFAIT monitoring visits began in early June 2007, a month after the signing of the arrangement. However, for the first five months after the new arrangement was signed, the government did not send an officer to be dedicated in a full-time capacity to monitoring. Prior to that, several officers, some of whom were in Afghanistan on short visits, conducted the monitoring.[63]

3.3 Canadian Forces Standard Practices for Handling Detainees

On February 18, 2006, Brigadier General David Fraser issued a standing order (Theatre Standing Order 321-A, or TSO-321A) giving Canadian soldiers the power to detain any individual based on a reasonable belief that they

were adverse in interest to Canadian Forces or their allies.[64] The purpose of this order was to standardize military policy and procedures in the handling of individuals captured by the CF. These included those who were not directly taking part in hostilities, but who demonstrated hostile engagement or intent towards Canadian or other coalition soldiers. When a standing order such as TSO-321A is issued, it is binding and therefore must be followed by members of the CF.

TSO-321A provided details regarding responsibility for the treatment and handling of detainees, their detention, and their transfer to the NDS. In addition, it provided for a Detainee Officer position, intended to act as a liaison with the ANSF, ISAF forces, the ICRC, and other organizations on detainee issues.[65] When the 2007 Transfer Arrangement was signed, a new TSO (TSO-321) was issued to reflect the changes in the arrangement.[66] Under this TSO, the Detainee Officer was responsible for providing information about detainees to the JTF-A Policy Advisor, CEFCOM headquarters in Ottawa, Regional Command South, and other organizations as directed by the JTF-A Commander, and for overseeing the detainee handling process, from point of capture until release or transfer.[67] Detainee transfer decisions were made with the advice of the Deputy Commander, Legal Advisor, the Task Force Provost-Marshal, and the designated Detainee Officer.[68]

All detainees captured by CF were held in a temporary Canadian Detainee Transfer Facility at Kandahar Airfield. When CF captured a detainee, the capturing unit would inform the chain of command that a detainee had been taken. This information would travel to the JTF-A Policy Advisor, the Political Director of the Kandahar PRT, the Canadian embassy in Kabul, and DFAIT. The detainee would then be processed, and then subjected to Tactical Questioning by personnel who had undergone training prior to deployment on such issues as methods of interrogation, the collection of evidence, procedures for transferring, gaining tactical information, and the treatment of prisoners of war.[69]

A Tactical Questioning Report would then be completed and sent to the JTF-A Commander, with a recommendation on whether to release or transfer the detainee. The latter would notify CEFCOM in Ottawa. JTF-A Commander David Fraser testified that he sometimes phoned CEFCOM Commander Michel Gauthier to inform him of a capture and impending transfer to Afghan authorities.[70] Within 96 hours of their capture, detainees were either released or transferred to Afghan authorities.[71] The Commander could request the return of a transferred detainee for identification purposes or follow-up questioning.

The Canadian Security Intelligence Service (CSIS) also played a role in the questioning of Canadian-captured detainees, along with Military Police intelligence officers, beginning in 2006.[72] Mr. Michel Couloumbe, Assistant Director of Foreign Collection at CSIS, confirmed that at the request of CF, CSIS interviewed an unspecified number of detainees after their capture by CF and before their release or transfer to US or Afghan authorities, from 2002 until October or November 2007.[73] Although Mr. Coulombe stated CSIS did not make transfer decisions, unidentified sources say they often made recommendations on whether to transfer detainees.[74] A study on the role of CSIS in interviewing Afghan detainees by the Senate Intelligence Review Committee (SIRC), an external review body which reports to Parliament on CSIS activities, found that CSIS was involved in interviewing detainees at the request of CF, that the latter were ultimately responsible for transfers to Afghan authorities, and that CSIS had no knowledge of alleged torture and other abuse of transferred detainees.[75]

If a decision to transfer was made, a 'legal test' had to be met: the JTF-A Commander had to be satisfied there were no substantial grounds for believing there was a real risk that a detainee would be in danger of torture or other forms of mistreatment at the hands of Afghan authorities.[76]

CEFCOM Commander Michel Gauthier, who oversaw the entire Canadian deployment to Afghanistan, provided on September 12, 2007 a document containing guidelines for standards to be applied in assessing the risks of torture before any individual transfer was made. In this document, he stated the following:

> The chain of command bears potential legal liability should we transfer a detainee into Afghan custody when we know, or can be reasonably expected to know, that substantial grounds exist for believing that the detainee faces a real risk of subsequent abuse or mistreatment. It is for this reason that I am particularly concerned about the chain of command obligation to satisfy itself that all relevant information regarding the treatment of detainees while in Afghan custody is actively sought and considered. This information includes, but is not limited to, reports produced by DFAIT personnel following visits to Afghan detention facilities, periodic assessments from DFAIT on the Government of Afghanistan's compliance with the Canada-Afghanistan Detainee Transfer Arrangements, any updates from Afghanistan's own investigations into existing allegations of mistreatment, and updates or reports from the Afghan Independent Human Rights Commission.[77]

It remains unclear how commanders assessed the risk of torture and other abuse, and specifically what information they actually took into account in making such a decision when each transfer decision was made. There is no publicly available information that explains exactly how human rights reports and specific allegations of torture played a role in decision making for transfers. Testimony before the House of Commons Special Committee on the Canadian Mission in Afghanistan and before the Federal Court by former JTF-A Commanders contains only general statements about the kind of information taken into account in making transfer decisions.

After the May 3, 2007 Transfer Arrangement was signed, Canadian officials began conducting site visits to places of detention. As such, Standard Operating Procedures for monitoring the conditions of transferred detainees were developed by DFAIT, with a standardized reporting format for these visits.[78]

4. Canada's Transfer of Afghan Detainees Leading to Torture and Other Abuse

UNDER THE 2005 Transfer Arrangement, Canada did not monitor its own transferred detainees, and instead relied on the AIHRC, which had very limited capacity for such monitoring, and the ICRC, which as a matter of policy only reports its findings to detaining authorities, i.e. Afghan authorities. While the 2007 Transfer Arrangement was an improvement over the 2005 one due to Canada's monitoring regime for detainees, monitoring visits by Canadian personnel began uncovering allegations of torture, some of the most disturbing of which are discussed in this section.

4.1 Limited Diffusion of Information on Detainees

In general terms, the Government of Canada has not been transparent about its detainee practices, both vis-à-vis the public and between relevant government departments. It failed to provide to Parliament or the Canadian public any information about detainees in Afghanistan, even how many had been captured or transferred, claiming this information would be injurious

A prisoner leans against the entrance to a wing of Sarpoza Prison in Kandahar, in this 2009 file photo. Source: Dene Moore/The Canadian Press.

to Canadian national security. The government finally released some statistics on detainees in September 2010, over four years after Canada began transferring detainees to Afghan authorities.

By contrast, the Dutch government immediately informed the Dutch Parliament as soon as a detainee had been captured, other stages of detention in Dutch custody, transfer to Afghan custody, and monitoring of their conditions after transfer. The UK also announced publicly the number of their detainees. As of May 2007, when the 2007 Transfer Arrangement was signed, Canada had transferred six times as many detainees as the British, whose combat operations were similar in intensity and who had twice as many troops involved in combat, and six times as many detainees as the Dutch.[79]

As an example of this lack of transparency, the *Globe and Mail* reported the existence of documents indicating that a group created around March 2007, the Strategic Joint Staff, began reviewing all Access to Information requests related to the issue of Afghan detainees. The group began advising DND Director of Access to Information and Privacy Ms. Julie Jansen, and subsequently fewer documents were being released in response to ATIP requests. In an emailed response to the *Globe and Mail*, Ms. Jansen stated information on detainee transfer logs, medical records, witness statements and other processing forms could not be released for operational security reasons.[80] Lieutenant Colonel Dana Clarke of the Strategic Joint Staff further explained, "the release of this information may be very prejudicial to the safe-

ty of CF and allied personnel, may be of significant information operations value to the enemy and may assist in undermining the effectiveness of Canada's efforts to support the stability of the Government of Afghanistan."[81]

Even within DFAIT and between DFAIT and other departments, the diffusion of information on detainees was restricted. After a new Canadian ambassador (Mr. Arif Lalani) arrived in Afghanistan in late April 2007, reports on detainees drafted by Mr. Colvin were sent only to an increasingly small number of officials, as can be seen in redacted versions of those emails. According to Richard Colvin, for his first report, sent after Lalani's arrival, the latter reduced the list of recipients from over seventy to five individuals.[82]

Site visit reports by DFAIT, which included information about the abuse of detainees, tended to stay within a small circle of individuals at CEFCOM as well as at Task Force Headquarters, located at Kandahar Airfield.[83] In August 2007, messages about detainees began to include a line that said, "not for forward distribution," to ensure the information reached only the individuals selected.[84] In an August 2007 email by DFAIT official Cory Anderson, addressed to seven email addresses from within the Privy Council Office, DND, CEFCOM, Public Safety, and FTAG, Anderson wrote, "all future reports of visits to facilities will only be distributed to these inter-departmental addresses. In addition, the reports and all messages regarding the reports are not for forward distribution."[85] When DFAIT began conducting site visits, their visit reports would thus only reach these carefully selected individuals, who did not include the Military Police, for example, among many others.[86]

In addition to reaching an increasingly limited number of individuals in government, emails were also censored before they were sent. Mr. Lalani has admitted, after persistent questioning by Members of Parliament, that he asked Mr. Colvin to remove a section of a report that explained that rapid notification to the ICRC was important because of the heightened risk of torture in the first few days after transfer.[87] Mr. Colvin testified before the MPCC that the most important sections were deleted before this report was sent, including sections describing how shortcomings in Canadian practices from a year earlier still had not been rectified.[88]

Canadian personnel in the field updated detainee logbooks for released and transferred detainees, but versions of these that have been made public are almost entirely blacked out, rendering them illegible.[89]

In September 2010 and February 2011, numbers of detainees captured by Canadian Forces, released or transferred to Afghan custody were released for the years 2001–09. These figures are shown in *Table 2*.

TABLE 2 Statistics on Detainees Captured by Canadian Forces

Year	Detained	Released	Transferred
2001	0	0	**0**
2002	17	5	**12** (71%)
2003	4	4	**0** (0%)
2004	39	18	**21** (54%)
2005	8	1	**7** (88%
2006	142*	11	**129** (91%)
2007	142†	43	**96** (68%)
2008	87‡	71	**18** (21%)
2009	225§	N/A	**92** (41%)
2010	N/A	N/A	**N/A**
2011	N/A	N/A	**N/A**
Totals	**664**	**153**	**375 (56%)**

Source Canadian Forces Statistics on Afghanistan Detainees
* Two died while receiving medical care for injuries incurred on the battlefield.
† Three were detained in late 2007, but were transferred (and counted as such) in 2008.
‡ One was detained in late 2008, but was transferred (and counted as such) in 2009.
§ One died in hospital from wounds sustained on the battlefield.

4.2 AIHRC's Limited Capacity for Monitoring

JTF-A Commander General Tim Grant sent a letter on February 20, 2007 to Engineer Noorzai, the head of the Afghanistan Independent Human Rights Commission (AIHRC), stipulating that the CF would inform the organization every time a detainee was transferred, and that the AIHRC would inform CF or the Canadian embassy immediately should they learn that a detainee had been mistreated.[90] The AIHRC, however, had very limited capacity for monitoring. Richard Colvin stated before a parliamentary committee that they were not allowed into NDS prisons in Kandahar, and that as such, "for the purposes of monitoring our detainees, [the AIHRC] were...quite useless."[91]

The AIHRC themselves repeatedly complained of a lack of capacity to monitor all detainees, as well as being barred by Afghan authorities from accessing detention facilities, particularly NDS facilities in Kandahar. An AIHRC investigator in Kandahar, Amir Mohammed Ansari, said in an interview with the *Globe and Mail*, "We have an agreement with the Canadians, but we can't monitor these people. Legally, we have permission to visit prisoners inside the NDS prison, but they don't allow it."[92] He further explained that he had only two assistants to monitor all prisoners captured in Kanda-

har Province, and that as a result he did not have an estimate of the number of detainees, let alone their conditions.

Another investigator with the AIHRC told the Canadian Press the organization could not visit detainees under NDS custody, but was able to meet detainees after they were transferred to the regular prison system.[93] On April 29 2007, members of the AIHRC were allowed into a prison run by the NDS, but were followed by two NDS agents while they attempted to interview detainees. It is unclear whether they succeeded in speaking privately with any detainees. An inspector with the AIHRC said, "The place where these men are being held is not fit for humans...the conditions are terrible." He further stated that inside the prison, 24 men were crammed into two cells, that some detainees were not allowed to sleep, and that at times, there was not enough food for everyone.[94]

4.3 ICRC Notification Delays

While the ICRC conducts regular monitoring of places of detention in situations of armed conflict, it relays the findings of their visits to detaining authorities only, and not to any other authorities.[95] This policy of constructive engagement is also a longstanding practice of the organization; it helps it continue to have access to conflict zones and places of detention, and helps protect the security of their workers. ICRC detention visits are not a guarantee of the protection of detainees; the obligation to refrain from torture and other abuse of detainees primarily rests with detaining authorities (who are in this case Canada and Afghanistan).

Visits to places of detention are at the core of the ICRC's work in situations of armed conflict. Before any visit is conducted, the organization demands that they have access to all detainees within their field of interest, access to all premises and facilities used by and for detainees, authorization for repeat visits, the ability to interview detainees in private, and the ability to obtain a list of detainees within their field of interest.[96]

For the ICRC to be able to monitor Canadian-transferred detainees effectively, however, they needed prompt information and accurate written records of details about transferred detainees. For months on end, CF kept such poor records of detainees and sent them after such long delays that the ICRC often could not subsequently locate the detainees. In oral testimony, Richard Colvin described the long process Canada followed upon transfer of a detainee under the 2005 Transfer Arrangement: Canadian Military

Police would first inform the CF command element at Kandahar Airfield (KAF), who then would inform Canadian Expeditionary Force Command (CEFCOM) in Ottawa,[97] who in turn informed the Canadian embassy in Geneva, who then informed ICRC headquarters in Geneva, who finally notified the ICRC in Kandahar. According to Colvin, this process took days, weeks, and in some cases, two months.[98] By contrast, Dutch and British forces directly informed ICRC delegates present in Kandahar, either immediately after transfer, or within 24 hours in the case of the British.[99] Mr. Colvin states that ten months after Ottawa was first alerted about Canada's weak notification system, delays until the ICRC were informed of transfers were still long, often two weeks or more.

This poor record-keeping also meant Canadian officials themselves could not locate transferred detainees, and thus could not ascertain whether particular detainees were still detained, released, transferred to third parties, had died under torture, or were executed. Following the signing of the second Transfer Arrangement on May 3, 2007, the government was unable to account for at least 50 detainees who had been transferred before the new arrangement was signed, approximately a quarter of the total number of detainees transferred by that date.[100] These 50 individuals had essentially disappeared, neither listed as released nor in custody. In addition, from the record of redacted documents released by the government, it is likely there were only two visits to try to find them, after which monitoring visits began to be focused on detainees transferred after May 3, 2007.[101]

This problem of notification delays seems to have been addressed eventually, however. In a hearing before the Military Police Complaints Commission, Ed Jager, who was DFAIT Political Advisor in Kandahar between July 2007 and sometime in 2008, testified that beginning in late July 2007, a year and a half after Canada began conducting transfers to ANSF, Canada started notifying ICRC representatives in Kandahar directly.[102] It is unclear, however, if this continued until the end of Canada's military mission.

4.4 Incidents of Torture and Other Abuse

Although most of the allegations of abuse pointed to mistreatment under Afghan custody, one case in particular consisted of allegations of abuse of three individuals under Canadian custody. In late 2006 and early 2007, Professor Amir Attaran of the University of Ottawa Faculty of Law obtained documents through ATIP requests that included detainee logs, details of individ-

ual arrests, and detainee witness statements.[103] Based on these documents, Attaran filed a complaint with the Military Police Complaints Commission alleging that at least one Afghan detainee, and perhaps three, "taken captive by the Canadian Forces appears to have been beaten while detained and interrogated by them."[104] The three detainees in question were transferred to the Afghan National Police (ANP) shortly after their capture.

The allegations made by Attaran led the Chief of the Defence Staff General Rick Hillier to order a military Board of Inquiry into In-theatre Handling of Detainees in Afghanistan, and the CF Provost-Marshal ordered the CF National Investigation Service to conduct a criminal and service investigation into the conduct of CF personnel involved. The final report of the Board of Inquiry concluded there was no evidence suggesting that members of the CF had mistreated detainees in Afghanistan.[105]

The same allegations prompted the MPCC to launch a public interest investigation into this incident, which concluded the allegations were not factually substantiated. In early March 2007, the *Globe and Mail* learned that the three detainees who were allegedly mistreated by CF had disappeared while they were in Afghan custody. This made the probe more difficult to conduct and raised further questions regarding the rigour of Canada's record-keeping practices for detainees.

4.4.1 June 14, 2006 Incident

Given the human rights record of Afghan authorities in places of detention and the ineffectiveness of diplomatic assurances against torture, even with robust monitoring regimes, it is no surprise that credible allegations of torture were made by detainees who had been transferred by CF.

On June 14, 2006, CF captured and later transferred an Afghan detainee to the custody of the Afghan National Police, who severely beat him. General Walter Natynczyk, Chief of the Defence Staff (who succeeded General Rick Hillier) in testimony before the House Standing Committee on National Defence in 2009, stated this detainee was never in Canadian custody.[106] The next day, General Natynczyk retracted his statement in a press conference and acknowledged he indeed was in the custody of the CF, announced the formation of another Board of Inquiry to investigate this case, and released an uncensored document of the incident in question.[107]

The released document had in fact previously been disclosed to Amnesty International and the BCCLA (British Columbia Civil Liberties Association) in redacted form in 2007, and it was later noted that the earlier document

had blacked out the following statement: "We then photographed the individual prior to handing him over, to ensure that if the ANP did assault him, as has happened in the past, we would have a visual record of his condition."[108] The Board of Inquiry that was convened also found "the practice of corporal punishments being meted out [by the Afghan National Police] on apparent whim in the street and elsewhere was common and was observed and commented upon by most Canadian Forces members."[109] This indicates that even before June 14, 2006, i.e. less than six months after Canada began transferring detainees to Afghanistan, there were acknowledged cases of abuse, consistent with the human rights reports mentioned earlier.

There is some evidence indicating that as a result of an incident involving abuse by the ANP, CF started transferring more detainees to the NDS rather than the ANP. In his cross-examination before the Federal Court, Colonel Steven Noonan refused to specify whether this was the June 14, 2006 incident.[110]

Although there was a report sent by the PRT in Kandahar to the government on June 2, 2006 about the treatment of detainees at Sarpoza Prison, the June 14 incident was the first confirmed incident of a detainee captured by CF and abused in Afghan custody since Canada began transferring detainees to the NDS and the ANP.

It should be noted, however, that although there were not many specific allegations of torture and other abuse acknowledged by the government prior to June 2007, this was due to the fact that the 2005 Transfer Arrangement did not provide for a monitoring regime by the Canadian government in order to be able to detect such allegations.

4.4.2 Incidents Relayed by Detainees to Canadian Journalists

The *Globe and Mail* report by Graeme Smith mentioned earlier consisted of the first detailed allegations by CF-transferred detainees.[111] Of those interviewed by Smith, one farmer said he was one of the lucky ones, explaining that the worst of what he suffered during two months of interrogation in Afghan custody was when an Afghan interrogator punched out the teeth on the left side of his mouth. Most of those held for extended periods of time there described having been whipped with electric cables, usually a bundle of wires about the length of an arm. Some reported falling unconscious due to the extreme pain they experienced during those beatings. Detainees also said interrogators jammed pieces of cloth between their teeth, after which they would hear the sound of a generator, followed by "the hot flush of electricity coursing through their muscles, seizing them with spasms."[112]

A victim said he was hung upside down by his ankles while he was beaten for eight days, and another said interrogators placed a plastic bag over his head while they squeezed his windpipe.

Another farmer by the name of Gul Mohammed, captured by Canadian troops and then handed over to Afghan soldiers, was beaten with rifle butts, deprived of sleep, shocked with electrical probes, and beaten with bundles of cables. A driver by the name of Sherin, who spent six weeks in NDS custody, says interrogators punched his face, pulled his beard, and beat him with bundles of electric cables for 60 strokes at a time.

A tailor by the name of Abdul Wali recounts that Afghan soldiers beat him, and that the beatings were constant except when Canadian troops visited the facility. Worse beatings occurred later under the custody of Afghan police as well as the NDS, both of whom detained him. A 44-year-old man by the name of Noor Mohammed Noori states Afghan police officers pushed his face onto the filthy floor of an interrogation room in February 2007. He also states two officers pinned him down, placed an iron bar across the back of his legs, and sat on either end of the bar, crushing him with their weight. A third officer sat on the back of his head, and they then proceeded to beat his back with electric cables until he fell unconscious, and then woke him with a splash of water and continued their physical abuse. Mr. Noori was bruised to the point that one of his tribesmen could not recognize him upon his release.

Several detainees also describe how cold temperatures were used as a tool of abuse, and complained of being forced to strip half-naked and to stand through cold winter nights in sub-freezing temperatures in Kandahar.

Shortly after the publication of the *Globe and Mail* report by Graeme Smith, a document from CEFCOM titled *Fact Check on Detainee Related Coverage 23–27 Apr 07* shows the CF tried to independently verify that the individuals mentioned in the *Globe and Mail* report were indeed in Canadian custody. The document shows, for example, that CF were active in areas surrounding the capture location of Mahmad Gul, who had had his teeth knocked out by an Afghan interrogator, and that Sherin, mentioned earlier, was indeed in Canadian custody.[113]

On October 29, 2007, Michèle Ouimet published a news report in *La Presse* titled "*C'est vous, Canadiens, qui êtes responsables de la torture....*". Like Graeme Smith's report, Ouimet's article was based on first-hand interviews with several individuals who were captured by CF and subsequently transferred to Afghan custody. Ouimet reported that despite new arrangements that had been made by Canada in May 2007, transferred detainees

were still being tortured by the NDS in Kandahar. Individuals she spoke to describe having been beaten with bricks, deprived of sleep, having fingernails pulled out, being subjected to electric shocks, and having to stand for two days and two nights on end with their arms in the air, which led their feet to become so swollen their leg cuffs would not move.

A Sarpoza Prison official in Kandahar who preferred to remain anonymous told Ouimet, "Yes, the detainees are tortured by the secret service before being brought to us at Sarpoza." ("Oui…les détenus sont torturés par les services secrets avant d'être emmenés chez nous, à Sarpoza.").

A transferred detainee also stated the CF told him prior to transfer not to be afraid, and gave him a document that affirmed that there was no more torture in Afghanistan. The NDS later tore up this document and threw it away, and this detainee was then "tortured for 20 days."[114]

4.4.3 Incidents Documented in DFAIT Detention Site Visits

Two days after the *Globe and Mail* report by Graeme Smith was published, representatives from DFAIT and Correctional Service Canada (CSC) visited an NDS facility for a preliminary inspection.[115] Even though they were accompanied by NDS officers throughout the visit, one detainee said he was kicked and beaten while blindfolded, and that NDS interrogators "stepped on his belly." Another said he was beaten, subjected to electric shocks, and bound by his feet and hands and made to stand for ten days.[116]

JTF-A Commander Brig. Gen. Tim Grant testified in an MPCC public hearing that at some point during the last week of April, at the direction of CEFCOM Commander Lt. Gen. Michel Gauthier, detainee transfers were suspended.[117] However, they were resumed on or about May 19, 2007, less than a month later.[118] Tim Grant also testified that prior to the resumption of transfers, he expressed the view that appropriate monitoring would consist of at least three visits to each detainee. This suggestion was not followed, and it was decided in Ottawa that even one visit per detainee was not necessary.[119]

The first detainee monitoring visits occurred on June 4, 2007 by PRT personnel in Kandahar. During the course of the visit, one detainee said he was "beaten with electric cables while blindfolded" at an NDS facility before being transferred to Sarpoza prison in Kandahar, a prison operated by the Afghan Ministry of Justice.[120]

It was also discovered by DFAIT that four of the detainees transferred by CF to the NDS in Kandahar were later transferred to the NDS in Kabul. DFAIT officials thus went to the NDS facility in Kabul on June 6 and 7, 2007

to find these detainees. The four detainees they spoke to reported maltreatment or torture at the NDS in Kandahar. The first detainee refused to talk, the second seemed traumatized and had no new growth on two toenails, which suggests his toenails were pulled out, the third was beaten with cables and wires and given electric shocks (and had visible scars), and the fourth was hit on his feet with a cable or big wire, and forced to stand for two days.[121] The fourth detainee also relayed to the Canadian monitoring team that at the Kandahar facility ISAF representatives visited, he and others told them that other detainees had their fingers cut and burned with a lighter in NDS custody. Consequently, he was not given food or water for a few days for having spoken to ISAF.[122]

It was later determined that only the second detainee was transferred by CF to the NDS, which meant the embassy still had to find the other three. Richard Colvin notes 'good sources' who said they were likely at an NDS black site in Kabul, rendering them out of reach for human rights monitoring.[123]

As a result of this report, transfers by CF were suspended another time, according to testimony by Lt. Gen. Michel Gauthier.[124] On June 22, 2007, however, transfers resumed again. Chief of the Defence Staff General Rick Hillier was "satisfied that the conditions for transfer have been met."[125] It is unclear, however, what those conditions were. In June or July 2007, for example, the NDS sent Ambassador Arif Lalani in Kabul the results of an investigation into alleged torture: a one-page sheet with two paragraphs, saying they had looked into three cases and found there was no basis to them.[126]

In July 2007, there was only one monitoring visit made by DFAIT, and in August there were no visits. The next visit, on September 11, 2007, one detainee claimed he was punched in the mouth and hit on the buttocks and upper thigh.[127] During the next visit on September 23, 2007, a detainee said he was beaten with a power cable on his sides and buttocks, and that he was forced to stay awake for three to four days with his hands raised above his head.[128]

By early November 2007, there had only been two visits since the September complaints of torture to DFAIT officials, and none in October. On November 5, 2007, DFAIT officials visited the NDS facility in Kandahar and interviewed only one detainee, who said he was knocked unconscious, held to the ground and beaten with electric wires and a rubber hose. This detainee then pointed to a chair in the room and said the wires and hose were under it. The officials did indeed find them under the chair, and noted a bruise on his back.[129]

The report for this visit led to another suspension of transfers, but DFAIT continued to conduct monitoring visits. On November 7, 2007, DFAIT inter-

viewed two detainees, who said they were both beaten with electric cables and forced to stand for long periods of time. One was threatened with execution if he did not cooperate during his interrogation.[130] On November 10 and then November 11, 2007, detainees said others in the facility were abused with wires and sticks during NDS interrogations.[131] On November 27, 2007, one detainee said he was slapped during interrogation, and another said he was beaten several times with cables and told he would be killed or sexually assaulted.[132]

On November 27, 2007, Brig. Gen. Guy Laroche, who became JTF-A Commander on August 1, 2007, taking over from Brig. Gen. Tim Grant, wrote to his superior, CEFCOM Commander General Michel Gauthier, complaining his command was not receiving adequate information on the findings of monitoring visits, and that the findings of investigations for previous allegations of abuse were not being communicated to him.[133] This was in light of guidelines sent by General Gauthier on September 12, 2007, as described above in Section 3.3, instructing command to consider DFAIT and other reports to assess risks of abuse.

On January 22, 2008, the government announced it had suspended detainee transfers until such time as transfers could be resumed "in accordance with Canada's international obligations."[134] This decision was made by Colonel Christian Juneau, acting as Deputy JTF-A Commander, and followed the "credible allegation of mistreatment" described above on November 5, 2007.[135] Also in late January 2008, however, CEFCOM Commander Lt. Gen. Michel Gauthier received an assessment signed by David Mulroney, on behalf of several government departments, stating, "A context once again exists in which it could be appropriate to resume detainee transfers."[136] This betrayed the lack of a coherent government policy on the legality of Canada's handling of detainees, and what could be interpreted as a government acknowledgement that prior to the November 2007 suspension, detainee transfers were not in accordance with Canada's international obligations.

During this suspension in transfers, the Federal Court ruled on February 7, 2008 on a challenge by Amnesty International and the BCCLA to seek an injunction to the transfers (further discussed in Section 5.1). While the Court did not grant the injunction, it did argue that given the numerous and troubling allegations, "Canadian Forces will undoubtedly have to give very careful consideration as to whether it is indeed possible to resume such transfers in the future without exposing detainees to a substantial risk of torture."[137]

Three weeks later, as of February 26, 2008, transfers resumed.[138] JTF-A Commanders who appeared before the MPCC during the course of its in-

vestigation claimed that DFAIT was conducting more frequent monitoring visits, an RCMP training program was given to NDS officers, video cameras were purchased for NDS interviews, and one of the individuals responsible for the November 5, 2007 torture incident was relieved of his duties.[139]

Brig. Gen. Guy Laroche testified that that over a nine-month period between 2007 and 2008, 8 of 38 detainees transferred by CF claimed to have been mistreated, which amounts to 21 per cent of the transferred detainees in that period.[140] However, Ambassador Ron Hoffman testified that in the year 2008, there were no allegations of mistreatment by Canadian-transferred detainees.[141]

In a detention visit in late March 2008, Kandahar PRT personnel spoke to a detainee who said he was hung from the ceiling and beaten by ANP officers.[142]

In a meeting on May 9, 2009 in Kandahar with Canadian commanders, an NDS Officer boasted that they were able to "torture" or "beat" detainees during interrogations, prompting another suspension in transfers by CF. Transfers then resumed again, and were suspended again in September 2009, allegedly because Afghan intelligence officers requested more evidence justifying the transfer of detainees.

During DFAIT detention visits, not all transferred detainees were visited. During some visits, no individual interviews at all were conducted. In an email from March 5, 2008, the visit report stated, "During our visit, we visually assessed the condition of all Canadian-transferred detainees currently held at the facility. A cursory examination of their condition revealed nothing out of the ordinary."[143] On another occasion, the site visit report said the conditions of detainees were "visually assessed."[144] There were many other site visit reports where no detainees were interviewed, and the following line included: "We did not observe any material changes in the overall conditions of detention."[145]

Chief of the Defence Staff General Walter Natynczyk confirmed on December 3, 2009 to the House Standing Committee on National Defence that CF had suspended transfers to Afghan custody on four separate occasions.[146] Defence Minister Peter MacKay publicly announced in November 2009 that there were three suspensions in transfers within the previous year alone, once when the NDS refused Canadian access to its facilities, and twice for allegations of abuse.[147]

In testimony before the House of Commons Special Committee on Canada's Mission in Afghanistan, Linda Garwood-Filbert, who was Correctional Component Director on the PRT in Kandahar, stated that in 2007 Canadian

personnel visited NDS facilities 12 times, and ANP facilities twice.[148] In testimony before the same committee, David Mulroney stated on November 26, 2009 there had been 175 site visits up to that point.[149] A spokesperson for Defence Minister Peter MacKay stated that as of September 2010, there had been more than 250 detention site visits by Canadian officials.[150]

With the end of litigation and the MPCC's investigation, further discussed in Section 5, documents and other evidence by government departments or officials decreased in volume. As a result, many questions remain unanswered. It is not clear, for example, exactly when Canada stopped transferring detainees to Afghan authorities, how many claims of abuse the government received until the end of Canada's mission, how conditions changed, if at all, for JTF-A Commanders in their making of transfer decisions, and whether there were any further suspensions until 2011.

4.5 Feasible Alternatives to Transfers to the NDS in Kandahar

Throughout the entire period during which Canada transferred detainees to Afghan authorities, no feasible alternatives to transferring detainees to the NDS in Kandahar were tried. It is clear from evidence, however, that the government was aware of at least four other options:

1. Have a detention facility run by Canadian personnel exclusively or with other ISAF countries, with the consent of Afghan authorities
2. Have a detention facility run by Afghan authorities, but with more direct involvement in its management by Canadian soldiers, corrections officers and other personnel, exclusively or with other ISAF countries
3. Transfer detainees to another organization in the Afghan government, such as the Ministry of Justice or the Ministry of the Interior
4. Transfer detainees to the NDS in Kabul, rather than in Kandahar

On October 24, 2007, Richard Colvin stated in an email that in his opinion the only way to ensure detainees were not abused was to either transfer them to one of the 'open' NDS facilities in Kabul (as opposed to Kandahar), with regular detainee monitoring by Canadian officials, or transfer them to an Afghan organization other than NDS — either the Ministry of Defence or the Ministry of Justice.[151] In testimony before the MPCC, Mr. Colvin stated this

memo was in fact never sent for various reasons, including that his posting in Afghanistan had already ended by the time he drafted it.[152]

Alternatives 1 and 2 above, if either had been implemented, would have greatly reduced the risk of torture and other abuse for detainees captured by CF. Either would have ensured that detention conditions and treatment could meet international standards such as the Standard Minimum Rules for the Treatment of Prisoners,[153] as well as the binding prohibition of torture and other ill treatment, as discussed further in Section 6 below. The second alternative was in fact actively promoted by two of Canada's principal NATO allies in the spring of 2006,[154] most likely the UK and the Netherlands, and perhaps as a result of these efforts, there was a series of government documents suggesting that the government was looking at possibilities for building a detention facility.[155]

In his cross-examination during the course of Federal Court litigation, Colonel Steven Noonan, who was JTF-A Commander from August 2005 until March 2006, stated that reasons neither of the first two alternatives was adopted included funding, training and equipment concerns, the concern that Canadian personnel would be diverted from other tasks by manning a detention facility, and the fear of another "Abu Ghraib situation" if a prisoner was abused by CF.[156] In the same case, Colleen Swords, DFAIT Assistant Deputy Minister, stated during her cross-examination that there were discussions in government about creating a wing inside an existing Afghan detention facility where detainees transferred by some NATO allies active in the south and east of Afghanistan, closer to the frontlines of the insurgency, would be kept.[157] It is possible that this was not implemented due to the reasons given by Colonel Noonan.

The presence of the Provincial Reconstruction Team (PRT) in Kandahar would have facilitated the management of a separate detention facility, given that there were personnel from Foreign Affairs, Development, Corrections, Police and the Armed Forces. This would have helped fulfil a central function of a PRT; namely, the promotion of the rule of law, of which the prohibition of torture is a most basic tenet.

It is unclear to what extent the government considered transferring detainees to other arms of the Afghan government, such as the Ministry of Justice or the Ministry of Interior Affairs. Sarpoza Prison in Kandahar, for example, was under the Ministry of Justice, and was in practice much easier for Canadian personnel to access and monitor.[158] Since human rights reports from various sources single out the NDS for its poor treatment of people in detention, it is only reasonable to expect that Canada should have assessed

potentially lower risks of torture in other facilities. The Canadian embassy in Kabul recommended in 2006 or 2007 that CF transfer detainees to Sarpoza directly.[159] This recommendation was not accepted.

Lastly, it is not clear whether transfers to the NDS in Kabul would have significantly lowered the risk of torture. However, Kabul was further away from the frontlines of the armed conflict, and the Canadian embassy was in Kabul, making it likely that a more rigorous monitoring regime would have been possible. According to publicly accessible information, this also was not implemented, even temporarily to assess the merits of this alternative.

5. Lawsuit and Investigations into Canadian Practices

THERE HAVE BEEN three major attempts at accountability and transparency in relation to the government's handling of this issue thus far, with unfavourable results for the protection of detainees from abuse and Canada's compliance with international law. First, Amnesty International Canada and the British Columbia Civil Liberties Association challenged the transfers before the Federal Court, arguing that the *Canadian Charter of Rights and Freedoms* applies to Afghan detainees in Canadian custody, and sought an immediate injunction to transfers for substantial risks of torture. The Military Police Complaints Commission (MPCC) conducted an investigation into the role of Military Police, in particular their failure to investigate transfer orders. Finally, mainly due to interference from the government in the MPCC's investigation, the House of Commons Special Committee on the Canadian Mission in Afghanistan attempted to conduct its own investigation. They also were not able to complete their study, due to the government's refusal to release to its members uncensored documents. This section discusses these three processes.

5.1 Lawsuit by Amnesty International and the BCCLA

Amnesty International Canada and the British Columbia Civil Liberties Association jointly launched an application in 2007 before the Federal Court of Canada for judicial review of the conduct of CF regarding detainee transfers following the signing of the agreement on December 18, 2005. The applicants argued the transfers were in violation of international law as well as sections 7 and 12 of the *Canadian Charter of Rights and Freedoms*, which protect life, liberty and security of the person and the right not to be subjected to cruel and unusual punishment, respectively.

The Department of National Defence missed the initial deadline to respond to the complaint, and later requested an extension to put together materials to defend their policy on detainees.[160] As a result, the applicants also sought an immediate injunction against detainee transfers until the case for judicial review was resolved. Although there was no directly affected person at the basis of the litigation, Amnesty International and the BCCLA were granted public interest standing.[161]

The Federal Court issued several rulings on legal issues associated with this case. Those on the applicability of the *Charter* and the motion for an injunction are the most important in this regard. As such, the relevant sections of those rulings are discussed in this section.

5.1.1 Federal Court 'Injunction Judgment'

The applicants' motion for an injunction of the transfers was scheduled to be heard on May 3, 2007, the day the government signed the 2007 Transfer Arrangement, which led to the motion being adjourned. Since the applicants found that the new Transfer Arrangement also did not have sufficient protections for detainees, they filed another motion for an injunction against transfers in November 2007. At the time, the government had suspended transfers due to credible allegations of abuse following a detention visit on November 5, 2007, as described in Section 4.4.3.[162]

The Federal Court dismissed the applicants' motion for an injunction against transfers.[163] Justice Anne Mactavish applied the following test for injunctive relief established by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada:* (1) There is a serious issue to be tried; (2) Irreparable harm will result if the injunction is not granted; and (3) The balance of convenience favours the granting of an injunction. The judge ruled that since a suspension of transfers was in effect at the time, and "[g]iven the current

uncertainty surrounding the future resumption of transfers, and the lack of clarity with respect to the conditions under which those transfers may take place, the applicants have not satisfied [Stage 2] of the injunctive test."[164] Since it was found that the applicants failed to satisfy Stage 2 of the test, Stage 3 was not considered.

However, the ruling also criticized the conduct of the government, and found "[t]he evidence adduced by the applicants clearly establishes the existence of very real concerns as to the effectiveness of the steps that have been taken thus far to ensure that detainees transferred by the CF to the custody of Afghan authorities are not mistreated."[165]

Justice Mactavish noted eight complaints of abuse of Canadian-transferred detainees to Canadian personnel conducting site visits between May 3 and November 5, 2007, including allegations of having been kicked, beaten with electric cables, given electric shocks, cut, burned, shackled, and forced to stand for days on end with their arms raised over their head.[166] She also found that while it was possible these allegations were fabricated, the methods of torture they recount are consistent with the kinds of torture practised in Afghan detention facilities, as found by several credible sources, including DFAIT human rights reports.[167] In addition, detainees had physical signs that corroborated their allegations, and Canadian personnel conducting site visits on more than one occasion found that detainees seemed "traumatized."[168]

The ruling also noted the government fell short in keeping adequate records on detainees, even after the new Transfer Arrangement was signed. Justice Mactavish considered that

> The documentation relating to the period between the negotiation of the second Arrangement on May 3, 2007, and the suspension of transfers on November 6, 2007, is replete with references to the ongoing difficulties facing the CF and the Department of Foreign Affairs and International Development ("DFAIT") in tracking down detainees once they leave Canadian custody.[169]

She also went so far as to point to evidence about the effectiveness of post-transfer monitoring regimes, further discussed in Section 6.2.1 below, arguing it raises serious questions as to the usefulness of post-transfer monitoring as a means of preventing torture.[170]

For all of the above reasons, the ruling found that CF would have to give careful consideration to whether it was in fact possible to resume transfers in the future without exposing detainees to a substantial risk of torture. She added, "careful consideration will also have to be given as to what, if any,

safeguards can be put into place that will be sufficient to ensure that any detainees transferred by CF personnel into the hands of Afghan authorities are not thereby exposed to a substantial risk of torture."[171] As stated earlier, transfers resumed three weeks later, as of February 26, 2008.

5.1.2 Federal Court 'Charter Judgment'

The Federal Court issued its ruling on the applicability of the *Canadian Charter of Rights and Freedoms* to Afghan detainees in Afghanistan on March 12, 2008. The Court ruled that, since the Government of Afghanistan had not consented to the application of the *Charter* during the course of Canada's involvement in the armed conflict in that country, it does not apply, even when the fundamental human rights of Afghan detainees are affected.[172] The ruling was framed as an answer to the following questions:

> (1) Does the Canadian Charter of Rights and Freedoms apply during the armed conflict in Afghanistan to the detention of non-Canadians by the Canadian Forces or their transfer to Afghan authorities to be dealt with by those authorities?
>
> (2) If the answer to the above question is "no" then would the Charter nonetheless apply if the applicants were ultimately able to establish that the transfer of the detainees in question would expose them to a substantial risk of torture?[173]

The Court found that section 32 on the Application of Charter entailed that non-Canadians detained by CF are not entitled to *Charter* protections, based on Supreme Court (SCC) jurisprudence in *R v. Hape*. In the latter case, Justice Louis Lebel, writing for the majority, argued that a state may not enforce its laws in the territory of another state "absent either the consent of the other state or, in exceptional cases, some other basis under international law."[174]

The applicants in this case argued that the appropriate test to determine the applicability of the *Charter* in the conduct of CF in Afghanistan is whether they had "effective military control of the person."[175] The Court rejected this argument, stating that the Government of Afghanistan, a legitimate, internationally recognized government, did not consent to the applicability of Canadian laws on Afghan soil, including the *Charter*.[176] By a similar line of reasoning, the Court answered Question 2 above with a "no," arguing the *Charter*'s applicability is not a function of the nature of its po-

tential violation, but rather of the consent or lack thereof of the Government of Afghanistan.

The applicants pointed to another argument in the majority opinion for *R v. Hape*; namely, that "[d]eference to the foreign law ends where clear violations of international law and fundamental human rights begin."[177] The Court found, however, that in the same judgment, the SCC left open the possibility that in a future case relating to the actions of Canadian officers outside of Canada, the *Charter* could be applicable because of the "impact of those activities on Charter rights in Canada."[178] The Federal Court found that in the case of Afghan detainees, the actions of CF in Afghanistan did not have an impact on *Charter* rights in Canada.

The Court found, however, that Afghan detainees are protected under international law, and in particular by international humanitarian law, which applies during times of armed conflict.[179] The CF, the judgment argued, "cannot act with impunity with respect to the [Afghan] detainees...[n]ot only can [they] face disciplinary sanctions and criminal prosecution under Canadian law should their actions in Afghanistan violate international humanitarian law standards, in addition, they could potentially face sanctions or prosecutions under international law."[180]

The Court also noted in its judgment the Canadian government's lack of transparency on the handling of Afghan detainees, finding that they "have refused to provide any information with respect to the identity or whereabouts of specific individuals who have been detained by the Canadian Forces, on the grounds of national security."[181]

Shortly after the 'Charter Decision' was issued, in May 2008, the Supreme Court found in *Canada v. Khadr* that the "principles of international law and comity of nations, which normally require that Canadian officials operating abroad comply with local law and which might otherwise preclude application of the *Charter* to Canadian officials acting abroad, do not extend to participation in processes that violate Canada's binding international human rights obligations."[182] In other words, while normally the *Charter* would not apply to the conduct of Canadian officials outside Canada, this is not the case when their conduct violates Canada's legal obligations under international human rights law.

If this argument were to be applied to Canada's handling of Afghan detainees, it would be found that while the *Charter* would in principle not apply in Afghanistan since the latter is a sovereign country with its own laws, this inapplicability would not extend to conduct by CF and other Canadian officials that violates their binding obligations under international human

rights and humanitarian law. If it is found that their conduct in relation to Afghan detainees, i.e. continually exposing hundreds of detainees to substantial risks of torture, is in violation of international human rights law, then the *Charter* would apply. Notwithstanding the SCC's findings in *Canada v. Khadr*, the 'Charter Judgment' was unanimously upheld on appeal to the Federal Court of Appeal (FCA) on December 17, 2008.[183] The FCA distinguished the *Khadr* case on the grounds that Omar Khadr is a Canadian citizen, whereas detainees captured in Afghanistan had "no attachment whatsoever to Canada or its laws."[184]

Subsequently, the SCC refused to grant leave to consider a further appeal in May 2009.[185] Even though it is not standard practice for the SCC to give reasons for the dismissal of applications, its dismissal of this case does not mean that it is in agreement with the FCA ruling. Following the case's dismissal, Grace Pastine, Litigation Director of the BCCLA, said the appeal was not granted likely due to a lack of facts about specific cases, which she attributed to the "secrecy of the Canadian Forces and the federal government and their refusal to grant access to counsel. It was not because there wasn't a danger of torture and ill treatment [to Afghan detainees]."[186]

5.2 Investigation by the Military Police Complaints Commission

In addition to their efforts before the Federal Court of Canada, Amnesty International Canada and the BCCLA also made a complaint on February 21, 2007 to the Military Police Complaints Commission (MPCC), an independent, quasi-judicial body established by the House of Commons to oversee the actions of Canadian Military Police.[187]

Their complaint letter alleged that the Canadian Forces Provost-Marshal and other members of the Military Police transferred detainees, or allowed them to be transferred, to Afghan authorities on at least 18 occasions despite evidence of substantial risks of torture known to the government.[188] The MPCC began a public interest investigation into this complaint on February 26, 2007,[189] and called for public interest hearings in March 2008.[190]

In April 2008, before the hearings could begin, the Attorney General made an application in Federal Court to prohibit the MPCC from holding public hearings and thereby from proceeding with their investigation. The Federal Court ruled in favour of the government, arguing the MPCC was not the appropriate body to investigate the practices of the government at large,

and "has no jurisdiction to inquire into the conduct of the military at large, much less the conduct of persons who are not members of the military."[191] Justice Sean Harrington who issued the ruling, however, also observed that the ruling does not give the Military Police or any member of the CF "free reign to ignore or violate Canadian and international laws pertaining to human rights."[192] As a result of this ruling, public interest hearings were given the narrower mandate of investigating the Military Police's failure to investigate the actions of other officers responsible for transfers.

Before the Federal Court ruling mentioned in the above paragraph, an updated complaint by Amnesty International and BCCLA on June 12, 2008 sought to expand the temporal scope of the investigation until the date of the complaint, and alleged the Military Police failed to investigate "crimes or potential crimes by senior officers," since the Task Force Commanders ordering transfers were either aware or wilfully ignorant of "known risks of torture."[193] Since the Federal Court issued its ruling after the second complaint was filed, the investigation was narrowed to the 'failure to investigate' component between May 3, 2007 and June 12, 2008.

The MPCC thus conducted an investigation into the following question: did the members of the Military Police in question fail to meet a positive duty to investigate the transfer orders of Task Force Commanders in Afghanistan between May 3, 2007 and June 12, 2008? The Commission's investigation included testimony from 40 witnesses.

On June 27, 2012, the MPCC determined in their Final Report that the eight officers could not be found responsible for failing to investigate decisions by Canadian commanders to transfer Afghan detainees to the NDS.[194] The MPCC's report found that none of the officers in question received direct reports of torture in Afghan custody, since they did not have access to information that was available to CEFCOM in Ottawa and Task Force Afghanistan at Kandahar Airfield (KAF). At KAF, the person responsible for gathering and maintaining information about post-transfer detainee matters was not from the Military Police. In general terms, it was found that information from DFAIT about detainees did not reach Military Police.[195]

The MPCC also noted in its report, however, the narrow focus of its investigation into the practices of Canadian Military Police. "It is for others to examine the overall appropriateness of Canada's detainee transfer policies, and the results achieved," the report stated.[196] It should also be noted that, even though the MPCC is an independent body, it is also a branch of the government, and has lawyers with top security clearances. Nonethe-

less, the government refused on many occasions to give uncensored documents to that body in the course of its investigation.

A considerable part of the final report consisted of explaining the different ways in which the government interfered with the progress of the investigation. It explained:

> With the Commission's decision to conduct public interest hearings in March 2008, and through to November 2009, the doors were basically slammed shut on document disclosure. The Commission did not receive a single, new document from the Government throughout that time period despite many requests...the Government's uncooperative stance was also demonstrated in the difficulties experienced by the Commission in accessing witnesses for pre-hearing interviews and even into the hearings themselves.[197]

The government invoked section 38 of the *Canada Evidence Act* to attempt to block MPCC interviews of witnesses and access to their testimony, initially refused to provide any redacted documents until all remaining documents had been reviewed, and had an inconsistent policy on redactions of documents.[198]

For example, Richard Colvin, one of the 40 witnesses who appeared before the MPCC, was to appear for a pre-hearing interview and then testify at a hearing. However, before he was able to do so, he was prevented from providing information to the Commission which he considered relevant and necessary. Mr. Colvin, for a considerable period of time, could not provide documents to the Commission, be interviewed by Commission counsel, or testify before the Commission, all based on the government's invocation of section 38 of the *Canada Evidence Act*, which prohibits the disclosure of information that would be injurious to Canada's national security, national defence or international relations.[199] A few months later, the government retracted its invocation of section 38 over the entirety of Mr. Colvin's evidence, and he was eventually able to testify in public.

The government's interference was also noted in a Federal Court ruling on September 29, 2011. Justice Yves de Montigny observed:

> It is fair to say that many issues and concerns have arisen in connection with the scope, pace and completeness of document production by the government in response to Commission summons, and in response to requests for documents identified by witnesses during their testimony. These issues of document production have caused significant delays to the MPCC hearing of

> the complaint, and have raised concerns as to how documents were being vetted and selected by the government for disclosure to the Commission.[200]

5.3 Investigatory Efforts by the House of Commons

Before the completion of the MPCC's investigation, and in light of repeated and systematic efforts by the government to hinder its progress, the House of Commons Special Committee on the Canadian Mission in Afghanistan decided to pursue its own study of the transfer of detainees from CF to Afghan authorities, pursuant to two motions adopted by the committee on October 28, 2009.[201] These motions were "that the committee review the laws, regulations and procedures governing the transfer of Afghan detainees from the Canadian Forces to Afghan authorities...and that the committee report its findings and recommendations to the House of Commons," and "that the committee hold hearings regarding the transfer of Afghan detainees from the Canadian Forces to Afghan authorities".[202]

Based on these motions, the committee began holding hearings with the presence of relevant witnesses, including DFAIT personnel, military generals and other officials. In the course of the study, the government refused to give the Committee or the House access to uncensored documents relating to the transfer of Afghan detainees, claiming that their release would be injurious to national security, national defence or international relations under section 38 of the *Canada Evidence Act*. In particular, they claimed it would undermine the operational security of CF in Afghanistan.[203]

Given the government's continued reluctance to release documents, on November 26, 2009, the Committee reported a motion to the House of Commons that "a serious breach of privilege has occurred and members' rights have been violated, that the Government of Canada...have intimidated a witness of this Committee, and obstructed and interfered with the Committee's work and with the papers requested by this Committee."[204] Pursuant to this motion, the House of Commons passed on December 10, 2009 an order demanding the release of the following original and uncensored documents to Members of Parliament:[205]

> all documents referred to in the affidavit of Richard Colvin, dated October 5, 2009;

all documents within the Department of Foreign Affairs written in response to the documents referred to in the affidavit of Richard Colvin, dated October 5, 2009;

all memoranda for information or memoranda for decision sent to the Minister of Foreign Affairs concerning detainees from December 18, 2005 to the present;

all documents produced pursuant to all orders of the Federal Court in Amnesty International Canada and British Columbia Civil Liberties Association v. Chief of the Defence Staff for the Canadian Forces, Minister of National Defence and Attorney General of Canada;

all documents produced to the Military Police Complaints Commission in the Afghanistan Public Interest Hearings;

all annual human rights reports by the Department of Foreign Affairs on Afghanistan;

all documents referred to by the Chief of the Defence Staff in his December 9, 2009 press conference, and all other relevant documents; and

accordingly the House hereby orders that these documents be produced in their original and uncensored form forthwith.

On December 30, 2009, Parliament was prorogued at the request of Prime Minister Stephen Harper, effectively blocking the release of the requested documents, which prevented the Special Committee from continuing its study. As a result, they could not meet officially, compel testimony, or grant immunity to witnesses. They did, however, continue to meet informally, without the presence of Conservative MPs.[206] Notably, at an informal hearing of the Committee, a constitutional law scholar argued the refusal to release uncensored documents to Parliament is a violation of the Canadian Constitution, and that as such, the government could be found to be in contempt of Parliament.

When Parliament reopened in early March 2010, Minister of Justice Rob Nicholson announced on March 5, 2010 that the government had appointed former Supreme Court Justice Frank Iacobucci to undertake a review of the documents requested in the Order of the House prior to their release, to ensure no information that would be injurious to Canada's national security was released. On March 25, the government tabled over 2,500 pages of documents to the House of Commons, although Opposition MPs claimed they

were "highly censored."[207] On April 1, the government tabled an additional 6,000 pages, which were also heavily censored, and according to NDP MP Jack Harris, many of them had already been released in the past, and were available publicly in censored form.[208]

In response to a question of parliamentary privilege relating to the House of Commons Order quoted above, the Speaker of the House ruled on April 27, 2010 that it is within the powers of the House to have access to the documents mentioned in the December 10 order, and called on the government and the opposition to reach an agreement regarding the provision of these documents, without compromising national security and the confidentiality of the information they may contain.[209]

In an effort to comply with the Speaker's ruling, Prime Minister Stephen Harper, Michael Ignatieff, Leader of the Liberal Party, and Gilles Duceppe, Leader of the Bloc Québécois signed a memorandum of understanding (MOU). The NDP refused to participate in this endeavour. The MOU established an *Ad Hoc* Committee of Parliamentarians external to the House of Commons, consisting of one MP from each participating party, which had access in confidence to the uncensored documents listed in the House's Order, in addition to relevant documents between 2001 and 2005.

Through their review of documents, the committee was to decide which documents were of relevant importance to the House, and particularly to the Special Committee on the Canadian Mission in Afghanistan. Disputes between members of the Committee would be referred to a Panel of Arbiters, consisting of former Supreme Court Justices Frank Iacobucci and Claire L'Heureux-Dubé and Justice Donald Brenner of British Columbia, who would have final say in determining how information would be released to MPs or the public without compromising Canada's national security, national defence or international relations.[210]

On June 15, 2011, Justices Frank Iacobucci and Claire L'Heureux-Dubé wrote a letter to Minister of Justice Rob Nicholson, advising him that following the May 2011 federal election, the newly elected government informed the Panel of Arbiters that "it is unlikely" the MOU that established the Panel would be renewed, even though they had not completed the review of all relevant documents, and had in fact only reviewed an "initial set of documents."[211] Nonetheless, the letter states the government asked the Panel to table documents they had reviewed up to that point. "We understand that no further work is now expected of the Panel," the letter read.

On June 22, 2011, the government announced the release of over 4,200 pages of 362 documents.[212] Again, many of these documents were heavily

censored, and many had previously been released, some in the course of litigation before the Federal Court and some during the MPCC's investigation. Nonetheless, in a press conference, Foreign Affairs Minister John Baird and Defence Minister Peter MacKay stated the redacted documents show that CF "acted in accordance with international law."[213]

Since the process to release these documents was initiated through a study by the Special Committee on the Canadian Mission in Afghanistan, the purpose of their release was for the Committee to examine them as they continued their study. The documents, however, were released after the federal election of May 2, 2011, which resulted in a majority Conservative government. Subsequent to its re-election, the government of Prime Minister Stephen Harper decided not to reappoint the Special Committee, thereby preventing the study from continuing, which helped to further obfuscate the matter vis-à-vis the Canadian public. However, given the many heavy redactions in released documents, it is unclear to what extent the latter would have aided the Committee to proceed with its investigation.

6. Canada's International Legal Obligations in Relation to Afghan Detainees

THE RELEASED DOCUMENTS, given the many redactions that remained intact after having been reviewed by the *ad hoc* committee and the Panel of Arbiters, cannot lead to determinative statements about the full extent of Canada's violations of international law obligations, as well as where individual responsibility lay in the government for the practices relating to Afghan detainees throughout Canada's mission in Afghanistan. For this reason, this section on international law may not be taken as a conclusive determination of the extent of Canada's violation of international law. The only way to reach such a determination is through launching a Commission of Inquiry into the matter.

6.1 The Prohibition of Torture as a Peremptory Norm of International Law

The principle of the prohibition against torture has risen to the level of *jus cogens*, or a peremptory norm of international law from which no deroga-

tion or reservation is permitted under any circumstances whatsoever, even in times of public emergency, including armed conflicts.[214] It is therefore a part of customary international law that is particularly binding on all States, regardless of whether or not they have ratified treaties prohibiting torture.[215] Many legal scholars and human rights advocates have also argued that the right against *refoulement* (or return where there is a substantial risk of torture), which is derived from the right not to be tortured, also shares the *jus cogens* character of the torture prohibition.[216] That is, if there is an absolute prohibition of torture, then there must be an absolute prohibition of subjecting any human being to a substantial risk of torture.[217]

The legal implication for the prohibition of torture's characterization as *jus cogens* entails that it has *erga omnes* character; that is, an obligation towards all members of the international community.[218] As such, all States are under a binding obligation to seek out, investigate, prosecute or extradite perpetrators of torture on their territory under the principle of universal jurisdiction, regardless of where it may have been committed.

The International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts, which was passed by the UN General Assembly in 2001, states: "A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State."[219]

The Supreme Court of Canada, in *Suresh v. Canada*, held that "the fact that such a principle [of the prohibition of torture] is included in numerous multilateral instruments, that it does not form part of any known domestic administrative practice, and that it is considered by many academics to be an emerging, if not established peremptory norm, suggests that it cannot be easily derogated from."[220] There is similar jurisprudence from British courts supporting the classification of the prohibition against torture as *jus cogens*.[221] The International Criminal Tribunal for the former Yugoslavia argued that the prohibition of torture "has evolved into a peremptory norm or *jus cogens* that is a norm that enjoys a higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules."[222]

6.2 International Human Rights Law

International human rights law, which applies both in times of peace and in times of armed conflict, bans the use of torture.[223] It also prohibits any State from sending a person to the authorities of another State if there is a substantial risk that he or she will be tortured. This body of law applies to all State parties at all times, even outside the territory of that State if it retains effective control over a person, such as a detainee, or a territory, such as an occupied territory. While international law permits the suspension of some legal obligations during times of emergency if there is a 'grave threat to the life and security of a nation,'[224] the prohibition of torture is not an obligation that can be suspended at any time.

The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), ratified by Canada in 1987, defines torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."[225] States can never justify the use of torture,[226] are obliged to prevent other acts of cruel, inhuman or degrading treatment or punishment that may not amount to torture as it is defined in Article 1,[227] and to investigate and prosecute offenders.[228]

According to jurisprudence from the International Criminal Tribunal for the former Yugoslavia, the difference between torture and cruel and inhuman treatment is that the former has a more purposive element and exceeds the latter in severity of the pain and suffering.[229] The severity of pain may be assessed on a case-by-case basis, as this would depend on factors such as the duration of the act in question, mental health, gender, and age.

The following non-exhaustive list has been found to constitute torture in jurisprudence by the Committee Against Torture, the authoritative body that monitors compliance with the UNCAT[230]: rape, electric shocks, severe beatings, suspension by the wrists, exposure to severe cold for extended periods of time, as well as many other physical and psychological forms of torture.[231] There are many other kinds of physical and psychological forms of torture.

Of more immediate importance for this report, Article 3 of the UNCAT states:

> 1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.[232]

In its General Comment on this Article, the Committee Against Torture (CAT) stated the risk does not have to be "highly probable" for a state to decide against the transfer of an individual to the custody of another State; it must be based on grounds more than "mere theory or suspicion," must be "real and present," and be linked to persons acting in an official capacity,[233] all criteria that were present for Canadian-transferred detainees. In 2005, the CAT called on Canada to "unconditionally undertake to respect the absolute nature of article 3 in all circumstances."[234] In particular, it expressed concern at the failure of the Supreme Court of Canada to recognize at the level of domestic law the absolute nature of Article 3 of the UNCAT in *Suresh v. Minister of Citizenship and Immigration*, and the role of Canadian authorities in the rendition of Maher Arar to Syria, where torture was widely practised, among other concerns.

The CAT also found that Denmark violated Article 3 of the UNCAT by transferring 34 individuals to allied forces in February-March 2002 during a military operation in the same armed conflict in Afghanistan, in circumstances where allegations of ill treatment in allied forces custody arose. During the same year, Canada transferred 12 detainees to US forces, who were engaging in excessive force during arrests, arbitrary arrests and indefinite detention, and mistreatment in detention.[235] The CAT established that

> Article 3 of the Convention and its obligation of non-refoulement applies to a State party's military forces, wherever situated, where they exercise effective control over an individual. This remains so even if the State party's forces are subject to operational command of another State. Accordingly, the transfer of a detainee from its custody to the authority of another State is impermissible when the transferring state was or should have been aware of a real risk of torture.[236]

The Human Rights Committee, which monitors compliance with the UN Covenant on Civil and Political Rights, has argued, "State parties must not expose individuals to the danger of torture or cruel, inhuman or de-

grading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*."[237] The same committee has also upheld the same prohibition against *refoulement* in several cases that involved Canada.[238]

It is important to note that just as a persistent pattern of gross human rights violations in a country may not necessarily amount to substantial grounds for believing an individual would be in danger of being subjected to torture, it is incumbent on those who make transfer decisions to explain why such a pattern would not entail that an individual is personally at risk of being tortured should he or she be transferred to the custody of another State.

The CAT has stated, in response to a claim by the UK that certain parts of the Convention Against Torture did not apply to the actions of the UK government in Afghanistan and Iraq, that Convention protections extend to all territories under the jurisdiction of a State party and considers that this principle includes all areas under the *de facto* effective control of the State party's authorities, and that States should apply provisions to transfers of detainees within a State party's custody to the custody whether *de facto* or *de jure* of any other State.[239] Both the Committee Against Torture and the UN Special Rapporteur on Torture have reminded Denmark, Norway and Sweden, who were also ISAF members in Afghanistan, of their obligations under international human rights law when transferring individuals from their effective custody to the custody of another State.

In addition to the obligation of *non-refoulement* under Article 3, States also have an obligation to criminalize any activity that "constitutes complicity or participation in torture,"[240] and must prevent torture and other ill treatment "with the consent or acquiescence of a public official or other person acting in an official capacity."[241]

The Committee Against Torture, which, as noted above, is responsible for overseeing the implementation of UNCAT, has considered the following acts to amount to complicity: incitement, instigation, superior orders or instructions, consent, acquiescence and concealment.[242] In evidence provided to the UK parliamentary Joint Committee on Human Rights for the House of Commons and the House of Lords, Philippe Sands, a public international law expert, establishes that complicity includes tacit consent for the continuation of crimes of torture, even if there is no assistance to their commission in more direct ways.[243]

In examining the sequence of events laid out in this report of continued transfers with repeated suspensions and resumptions, the evidence suggests that Canada was in violation of its obligation of *non-refoulement* under Arti-

cle 3 of the UNCAT. In addition, given that for a period of five years or more, Canada transferred detainees to the NDS in Kandahar, despite many human rights reports and allegations of abuse by Canadian-transferred detainees, these transfers may well amount to "complicity and participation in torture" under Article 4(1), and a failure to prevent crimes of torture through the "acquiescence of a public official or other person acting in an official capacity" under Article 16.

6.2.1 The Ineffectiveness of Diplomatic Assurances against Torture

Diplomatic assurances against torture are designed with the intention of fulfilling a State's obligations of *non-refoulement* under international law. They may or may not be binding, and could take the form of a memorandum of understanding, an exchange of letters, or a *note verbale*, and they may or may not include post-transfer detainee monitoring mechanisms, as can be seen in comparing the 2005 and 2007 Transfer Arrangements.[244]

Both of Canada's Transfer Arrangements described above contain provisions that amount to diplomatic assurances against torture and inhumane treatment, and members of the government acknowledged this. As mentioned above, Ambassador to Afghanistan David Sproule (October 2005–April 2007) stated, "we obtained assurances from the highest levels of the Afghan government through the December 2005 arrangement."[245] Before the same committee, Mr. Douglas Scott Proudfoot, former Director of Policy and Advocacy in the Afghanistan Task Force, stated, "we had political direction to seek assurances of humane treatment, and it was in that context that we did additional work that culminated in the 2007 supplementary arrangement."[246] Thus, the government has described both arrangements as containing assurances against torture, and said that those assurances were not binding as a matter of law.

Diplomatic assurances against torture are unreliable in ensuring that detainees are not transferred to face torture, are not legally enforceable, and monitoring regimes associated with such assurances cannot prevent torture, but can only detect acts of torture after they occur. In addition, some acts of torture may not be detectable if monitoring visits occur irregularly or between long delays, if detaining authorities can hide detainees from monitors, and in circumstances where detainees may be reluctant to speak about their abuse for fear of retaliation. Therefore, even the best post-trans-

fer monitoring regimes do not provide adequate safeguards for the prevention of torture.[247]

Both the UN Committee Against Torture (CAT)[248] and the UN Human Rights Committee[249] have recognized that any assurances by States that have a history of a lack of respect for the prohibition of torture and ill treatment will have lower value than those given by more rights-respecting States. The CAT has also stated that governments should "only rely on 'diplomatic assurances' in regard to States which do not systematically violate the Convention's provisions, and after a thorough examination of the merits of each individual case."[250] In 2009, in response to an argument by the Government of Spain that a return made with diplomatic assurances does not violate the UNCAT, the Committee found, "under no circumstances must diplomatic guarantees be used as a safeguard against torture or ill-treatment where there are substantial grounds for believing that a person would be in danger of being subjected to torture or ill-treatment upon return."[251] The same body argued on another occasion that diplomatic assurances should only be used for States "which do not systematically violate the Convention's provisions," and after a thorough assessment of the merits of each individual case.[252]

Former UN High Commissioner for Human Rights (and former Justice of the Supreme Court of Canada) Louise Arbour has argued forcefully against the use of diplomatic assurances against torture. Even post-transfer monitoring, she argues, is not likely to prevent torture, since it often occurs in secret by perpetrators who are able to hide abuses from detection, and victims often do not speak out in fear of reprisal.[253] This would be particularly true in situations of detention, where their liberty is greatly restrained, and where they are particularly vulnerable to further abuse. Additionally, Arbour argues it is difficult to make the case that receiving States will respect a non-legally binding bilateral agreement if they do not respect the binding prohibition against torture in international law.[254]

Former Special Rapporteur on Torture Manfred Nowak has argued before the Council of Europe that the use of diplomatic assurances is an illegitimate attempt at circumventing the absolute prohibition of torture in international law. The very fact of seeking an agreement that includes diplomatic assurances implies there is an acknowledgement on the part of the sending State that the receiving State practices torture. This was acknowledged by Colleen Swords, who, in response to a question in a House Committee about Article 4 of the UNCAT, stated, "there are a lot of problems in Afghanistan…[a]s a result of that, we entered into the December 2005 MOU.

If we thought there were no problems, we wouldn't have done that."[255] The current Special Rapporteur on Torture Juan Méndez has also argued that diplomatic assurances cannot be considered an effective safeguard against torture, and that they do not relieve the sending State of its obligations.[256]

Various authoritative institutions such as the European Parliament,[257] the UN Working Group on Arbitrary Detention,[258] the UN Committee Against Torture and the Inter-American Commission for Human Rights have followed the opinions of Special Rapporteurs Manfred Nowak and Juan Méndez on the ineffectiveness of diplomatic assurances.

Finally, both sending and receiving States have an interest in denying that transferred individuals were subjected to torture, particularly in agreements that identify independent organizations to undertake monitoring, and where those organizations receive their funding from the sending or receiving country (which was the case with the AIHRC in Afghanistan).

As pointed out by Andrea Prasow before the House of Commons Special Committee on the Canadian Mission in Afghanistan, there has been ample jurisprudence by the European Court of Human Rights against the use of diplomatic assurances for situations where there is a risk of torture. In *Chahal v. UK*, the Court found that the UK could not return a Sikh separatist to India since there was a substantial risk that he would be tortured, even if they had relied on diplomatic assurances against torture from the Indian government.[259] The applicant was a Sikh separatist who was politically active in the UK, and had played an important role in the founding of the International Sikh Youth Federation, an organization that was outlawed as a terrorist group by the UK in February 2001. Similar judgments were issued in *Saadi v. Italy*,[260] *Trabelsi v. Italy*,[261] and *Al Saadoon v. UK*.[262]

In the transfer of detainees to the NDS in Kandahar, the Government of Canada became aware of continued instances of torture, particularly after DFAIT began conducting monitoring visits. Despite assurances in the Transfer Arrangement, detainees were still being mistreated or tortured, and a risk of torture remained throughout the entirety of the period in which transfers were made. Yet, the government continued to rely on these assurances, and did not order a permanent halt to transfers to the NDS in Kandahar to protect detainees from substantial risks of torture. Rather, when some concerning allegations arose, JTF-A Commanders or their superiors on several occasions chose to temporarily suspend transfers, and subsequently resumed them. In doing so, they resumed reliance on assurances from Afghan authorities that detainees would be treated humanely, despite their consistent record of abuse.

6.3 International Humanitarian Law in Non-International Armed Conflicts

The Law of Armed Conflict (also called international humanitarian law, or IHL), the body of international law that regulates conduct during armed conflict and military occupation, strongly prohibits acts of torture and other cruel, humiliating and degrading treatment.[263] The central principles of IHL are those of necessity for the use of force, distinction between civilians and combatants, and proportionality between the destructive effect of actions and their undesirable collateral effects.[264]

The core of IHL consists of the Four Geneva Conventions of 1949 (henceforth "GCs") and their Additional Protocols. The GCs provide rules for the treatment of the wounded, sick and shipwrecked (First and Second GCs), prisoners of war (Third GC), and civilians (Fourth GC), and include provisions for both international and non-international armed conflicts. Depending on whether any given conflict is qualified as international (between two or more States) or non-international (between a State and non-State actors or between non-State actors), different provisions of IHL will apply. When provisions are in force, however, they apply to all parties to conflict equally, regardless of who is on the 'just' side of the conflict.

All four Geneva Conventions of 1949, as well as their two Additional Protocols of 1977 (all of which Canada has ratified), prohibit the use of torture.[265] The prohibition of torture is also codified in the grave breaches provisions of Articles 50, 51, 130 and 147 respectively of the four Geneva Conventions, Article 75 of Additional Protocol I and Article 4 of Additional Protocol II. Under the Third Geneva Convention, "prisoners of war may only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention."[266]

Canada has implemented the Geneva Conventions into domestic legislation by passing the *Geneva Conventions Act* in 1985. Article 3, in conjunction with Article 147 of this Act, makes it a crime in Canada to commit a "grave breach" of the Geneva Conventions.[267]

When an armed conflict breaks out, the ICRC, which monitors compliance with the Geneva Conventions and calls on State parties to respect their provisions, customarily directly but confidentially communicates a '*rappel du droit*' (reminder of the law) with parties to the conflict. This serves to establish the ICRC's qualification of the conflict as international or non-international, as well as to remind parties to the conflict of their legal obli-

gations under international humanitarian law, including their obligations vis-à-vis detainees. In its 2006 Annual Report, for example, the ICRC states it "collected allegations of violations of IHL with respect to people not or no longer taking part in the hostilities, reminded all parties of their obligations under the applicable rules of IHL and, wherever necessary, made confidential representations to the parties concerned regarding specific cases brought to its attention."[268]

Since the conflict in Afghanistan was classified a non-international armed conflict for the time period from when Canada began transferring detainees to Afghanistan until the end of Canadian combat operations in 2011, only Article 3 common to all Geneva Conventions ('Common Article 3') and Additional Protocol II to the GCs apply.

Common Article 3 prohibits parties to conflict from engaging in the following acts against non-combatants, including persons in detention: "(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples."[269] Although it does not specifically mention the transfer of detainees, Common Article 3 applies "in all circumstances" and "at any time and in any place whatsoever," which covers the transfer of detainees.[270] The International Court of Justice has called Common Article 3 a "minimum yardstick" for conduct in all armed conflicts because it contains "elementary considerations of humanity."[271]

Additional Protocol II of the Geneva Conventions reaffirms the obligations for humane treatment in non-international armed conflicts, including obligations vis-à-vis those who are detained. Article 5(4) provides that "[i]f it is decided to release persons deprived of their liberty, *necessary measures to ensure their safety* shall be taken by those so deciding" (emphasis added).[272] The ICRC's *Commentary* on Article 5(4) establishes that this concerns both the decision prior to transfer, and the detainee's safety following transfer.[273] Canada's *Law of Armed Conflict Manual* (2001) states in its chapter on non-international armed conflicts: "When persons who have been detained or interned are released, the detaining authority is obliged to take such steps as are necessary to ensure their safety."[274]

In addition to Common Article 3 and Additional Protocol II of the Geneva Conventions, there are also rules applicable to armed conflicts that are

considered to be binding under customary international law, and exist independently of international treaty law.[275] These rules emanate from longstanding practices by States, military manuals, agreements such as the Lieber Code and The Hague Conventions that were antecedent to the Geneva Conventions, jurisprudence and legal precedents, and other authoritative sources. For the purposes of this report, customary international humanitarian law also fills lacunae in IHL treaty provisions relating to the handling of detainees.

The ICRC, which believes these rules are an accurate assessment of the current state of customary international humanitarian law, compiled them in a study of 161 rules that was published by Cambridge University Press in 2005. These rules include the prohibition of torture and other cruel and inhuman treatment (Rule 90), that persons deprived of liberty be held in premises that safeguard their health and hygiene (Rule 121), that detaining powers continue to have responsibility for a detainee's safety upon release (Rule 128), that serious violations of international humanitarian law constitute war crimes (Rule 156), and that States must investigate war crimes and prosecute individuals who may be found to be criminally liable for the commission of prohibited acts under international humanitarian law (Rule 158). All of these binding customary rules apply to Canada's handling of Afghan detainees in Kandahar.

6.4 Individual Criminal Responsibility

International criminal law emphasizes the notion of individual criminal responsibility, no matter how high up a hierarchy of power. Torture, and cruel and degrading treatment constitute war crimes in non-international armed conflicts under the Rome Statute of the International Criminal Court, the Statute of the International Criminal Tribunal for Rwanda, and the Statute of the Special Court for Sierra Leone.

The drafters of the Rome Statute did not want to develop a new body of law, but rather to reinforce the Law of Armed Conflict. For this reason, the Rome Statute includes a wide range of provisions from IHL. Article 8 of the Rome Statute codifies customary IHL into its jurisdiction.

Article 7(2)(e) of the Rome Statute defines the crime of torture under the ICC's jurisdiction,[276] and Article 8(2)(a)(ii) lists torture and inhuman treatment among the grave breaches of the Geneva Conventions which are punishable under the Statute as war crimes. The ICC's Preparatory Commission

has found that the only difference between inhuman treatment and torture is the purposive element in the crime of torture.[277]

Under Article 8 of the Rome Statute, the ICC also has the power to prosecute acts of torture committed in a non-international armed conflict and "against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause."

The *Crimes Against Humanity and War Crimes Act* (henceforth "War Crimes Act") a statute of the Parliament of Canada, was promulgated in 2000 to codify Canada's international obligations as a State Party to the Rome Statute in domestic criminal law. By doing so, Canada became the first country in the world to implement its Rome Statute obligations in its domestic law. The Act provides that as required by the Rome Statute, war crimes, among other international crimes, are indictable offences in Canada, as per sections 6 and 8 of the Act. JTF-A Commanders and other officials who transferred or contributed to transferring detainees to substantial risks of torture could be held liable under the *War Crimes Act*, as well as under the *Canadian Criminal Code*, which applies extraterritorially to members of the Canadian Forces.

The International Criminal Tribunal for the former Yugoslavia (ICTY) offers authoritative jurisprudence in the field of international criminal law. Article 7(1) of the ICTY Statute stipulates that any person who "planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime."[278] Articles 2 to 5 include the prohibition of torture, grave breaches of the Geneva Conventions, and other violations of the laws or customs of war.

In December 1998, the Trial Chamber of the ICTY interpreted this as follows: "to be guilty of torture as an aider or abettor, the accused must assist in some way which has a substantial effect on the perpetration of the crime and with knowledge that torture is taking place."[279] As such, the Chamber found that the *actus reus*, or criminal act, of aiding and abetting in international criminal law requires practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime.[280]

The ICTY Trial Chamber further found that if a person who participates in the process of torture also partakes in the purpose behind the torture, he or she may be found to be a co-perpetrator of torture. If he or she does not share the intent or purpose of torture, but still assists in some way with the knowledge that torture is being practised, then he or she may be found

to be guilty of aiding and abetting the perpetration of the crime of torture. Given the volume of information about the abuse of detainees in NDS custody in Kandahar, it would be difficult to find that officials, including Ministers of the Crown, did not have the knowledge that torture was taking place in NDS detention facilities. Therefore, they could be found to be liable for aiding and abetting the crime of torture.

In addition to potentially being criminally liable for aiding and abetting torture, it is important to remember that under the UNCAT, States also have an obligation to make criminal any activity that "constitutes complicity or participation in torture,"[281] and must prevent torture and other ill treatment "with the consent or acquiescence of a public official or other person acting in an official capacity."[282]

In this regard, while the UNCAT addresses States' obligations, those have a direct bearing on individual criminal responsibility. As mentioned earlier, this was acknowledged in directives sent by CEFCOM Commander General Michel Gauthier on September 12, 2007 to individuals under his command on the subject of legal liability for transfer decisions,[283] as well as in the Federal Court judgment of March 12, 2008, which found that Canadian military personnel could face disciplinary sanctions and criminal prosecution under Canadian or international law.[284]

In addition to individual liability under international law, and as argued by Amnesty International and the BCCLA in their complaint before the MPCC, liability also exists under the following Canadian laws, among others: Sections 269.1, 265 and 219 of the *Criminal Code*, which define the offences of torture (in Canada and abroad), assault, and criminal negligence, respectively; Sections 21 to 23 which broaden liability to those who aid or abet the commission of offences; and Section 130(1) of the *National Defence Act*, which stipulates that liability exists for offences committed outside of Canada.

Finally, Canada's own Law of Armed Conflict (LOAC) manual states that if a subordinate commits a breach of the LOAC, this does not absolve superiors from individual responsibility. The latter are guilty of a criminal offence if they knew that a subordinate was in violation of the LOAC, and did not take all feasible steps to prevent the continuation of such a violation.[285]

As stated at the beginning of Section 6, given limited available information due to the government's lack of transparency, it cannot be determined if any particular individual in government during the period of concern can be held personally liable for decisions or actions he or she may have taken. It is important to note, however, that government practices relating to Afghan detainees occurred based on decisions by particular individuals to de-

velop a legal framework, design policies and practices, and order their implementation. In light of many concerning cases of serious human rights violations against Afghan detainees, individuals such as JTF-A Commanders, DFAIT and DND officials, and Ministers of the Crown could be found to be held criminally liable for violations of Canadian criminal law, some of which is based on international law.

7. Conclusion and Recommendations

"In any constitutional climate, the administration of justice thrives on exposure to light — and withers under a cloud of secrecy."[286]

IN THE PAST, the Government of Canada was at the forefront of many efforts that set important norms and precedents in the promotion and protection of international human rights. These include the concept of human security in the United Nations, the Responsibility to Protect (R2P), the Rome Statute of the International Criminal Court, the Ottawa Anti-Personnel Mine Ban Convention, and UN Security Council debates on the Protection of Civilians in Armed Conflict. On the issue of Afghan detainees, there has been a clear departure by the Government of Canada from any such efforts, in spirit as well as in substance.

Despite an abundance of information about torture and other abuse in Afghan places of detention, Canada entered into an arrangement with the Government of Afghanistan to transfer detainees to their custody. When difficulties with monitoring, delays in notifying the ICRC, and reports of substandard conditions and abuse in detention facilities arose, Canada entered into another arrangement that continued to allow for the transfer of detainees, but also allowed Canadian personnel to monitor their conditions after transfer. Under the new arrangement, Canada lost track of many detainees

transferred in 2006 and 2007, continued to find incidents of torture after the new arrangement was signed, occasionally suspended transfers for various reasons, including allegations of abuse, but then resumed transfers. The government's conduct in this regard has been haphazard and unprincipled, in addition to being in violation of international law, as shown in this report.

When there were attempts at transparency or accountability, the government resisted. Whether before the Federal Court of Canada, the Military Police Complaints Commission or the House of Commons Special Committee on the Canadian Mission in Afghanistan, the government refused to release relevant information, citing operational security reasons. When the House of Commons issued an Order for the government to release uncensored documents to Members of Parliament, the government refused to comply. The compromise that the government ultimately devised was the creation of an *ad hoc* committee to review documents before they could be released. What ensued, however, was that the government, once it was re-elected with a majority, ended the review before the *ad hoc* committee could complete its work, and the outcome was the release of 362 documents, many of them heavily censored. Additionally, the government did not reappoint the Special Committee on the Canadian Mission in Afghanistan, effectively blocking the latter from continuing its investigation into laws, regulations and procedures governing the transfer of Afghan detainees.

7.1 Importance of a Public Inquiry

In view of all of the evidence and findings set out in this report, the Government of Canada should launch a public Commission of Inquiry into Canada's policies and practices in relation to the transfer of detainees to Afghan authorities between December 18, 2005 and December 31, 2011, pursuant to the provisions of the *Inquiries Act*.[287] This Inquiry should be thorough, open to the public, expeditious and fair.[288]

The government does not have to look far for a precedent for such an inquiry. The Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, led by Justice Dennis O'Connor, released its findings in 2006.[289] The mandate for this important precedent consisted of two parts: a Factual Inquiry that investigated and reported on the actions of Canadian officials, and a Policy Review that made recommendations for an independent review mechanism for the activities of the Royal Canadian Mounted Po-

lice with respect to national security matters.[290] A future public inquiry into the handling of Afghan detainees could follow this mandate's basic structure.

There was also a judicial Internal Inquiry into the Actions of Canadian Officials in Relation to Abdullah Almalki, Ahmad Abou-Elmaati and Muayyed Nureddin, led by former Supreme Court Justice Frank Iacobucci, the findings of which were made public in 2008.[291] The mandate for this inquiry, however, was narrower in scope than that of the Maher Arar Inquiry, although both pertained to actions of Canadian officials relating to crimes of torture.

The work of a Commission of Inquiry on Afghan detainees would serve to authoritatively investigate and report fully on the actions of Canadian officials, including Ministers of the Crown, in relation to this issue, make assessments of why these actions were carried out and undertake a policy review of these actions. The latter would include the development of a legal framework that attempted to justify these actions, the design of policies and practices, and orders and instructions, whether implicit or explicit, to implement them. Based on this policy review, the Commission would issue recommendations to ensure that Canadian officials never engage in practices that violate the universal prohibition of torture again. While the inquiry would not make determinations on criminal liability and guilt, it would have the power to make findings of misconduct against individuals or organizations in government.

The government should thus appoint an independent Commissioner who shall have in his or her Terms of Reference the power to

- Summon witnesses and compel them to give evidence under oath or affirmation;
- Have full access to original, uncensored documents in all government departments and agencies that had a role in Canada's handling of Afghan detainees. This includes, but is not limited to, the Department of Foreign Affairs and International Trade (now the Department of Foreign Affairs, Trade and Development), the Department of National Defence and the Canadian Forces, Correctional Service Canada, the Privy Council Office, and the Canadian Security Intelligence Service;
- Report on the facts associated with Canada's approach to the issue of Afghan detainees throughout Canada's mission in Afghanistan, as well as make assessments of those facts;

- Make authoritative findings of misconduct against officials and government departments, including violations of Canadian and international law, and undertake a policy review of Canada's approach to the handling of the issue of Afghan detainees, which would include making recommendations on policies that ought to be in place to prevent such practices from ever reoccurring.

If significant evidence cannot be made public due to national security confidentiality (NSC) concerns during the course of the inquiry, and specifically if section 38 of the *Canada Evidence Act* is invoked by the government, as was the case in the Maher Arar Inquiry, the Commissioner may take evidence through *in camera* hearings, and subsequently make public summaries and recommendations based on this evidence. However, it should be noted that the reason most often cited by the government for non-compliance with orders to disclose documents was that of operational security in relation to Canada's military mission in Afghanistan, a circumstance that now no longer applies.

Many government departments and agencies played a role in this issue, and there are a large number of relevant documents, many of which have never been released, whether in censored or uncensored forms. In view of these two factors, a Commission of Inquiry into the matter is the only effective process that would satisfy the public's right to know the actions of the Government of Canada in relation to this issue, and the public's right to be assured that Canada is in full compliance with its obligations under international law in relation to the prohibition of torture. If the government does not launch a public Commission of Inquiry, the UN Human Rights Council may establish by resolution an International Commission of Inquiry into the matter.

7.2 Recommendations

The Government of Canada should thus take the following actions:

- Launch a comprehensive, independent and impartial judicial Commission of Inquiry that would investigate the practices of Canadian officials, including Ministers of the Crown and other senior officials, relating to Afghan detainees, and make policy recommendations to ensure relevant illegal practices never reoccur;

- Develop clear policies that would prevent the Government of Canada from relying on diplomatic assurances against torture under any circumstances in the future, including situations of armed conflict or extradition;
- Reaffirm Canada's commitment to the prohibition of torture and other abuse by immediately signing and ratifying the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, which establishes a system of regular visits to places of detention.

Appendix A

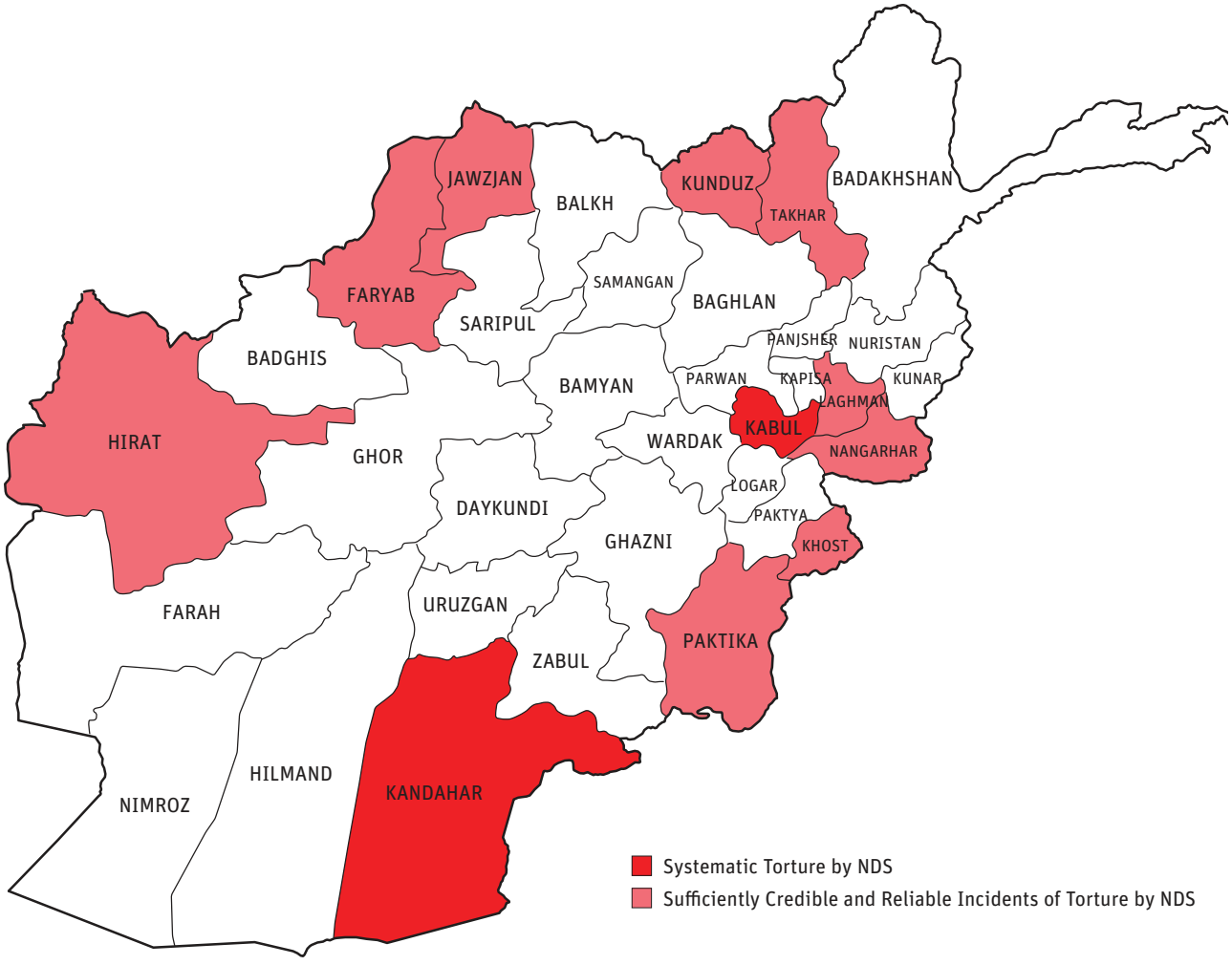
Acronyms

ANP Afghan National Police
ANSF Afghan National Security Forces
ATIP Access to Information & Privacy (Canada)
BCCLA British Columbia Civil Liberties Association
CEFCOM Canadian Expeditionary Force Command
CF Canadian Forces
CSC Correctional Service Canada
DFAIT Department of Foreign Affairs and International Trade (Canada) — currently Department of Foreign Affairs, Trade and Development
DND Department of National Defence (Canada)
ICRC International Committee of the Red Cross
IHL International Humanitarian Law
ISAF International Security Assistance Force
JTF-A Joint Task Force-Afghanistan
KAF Kandahar Airfield
MP Military Police (Canada)
MPCC Military Police Complaints Commission (Canada)
NDS National Directorate of Security (Afghanistan)
PRT Provincial Reconstruction Team
SCC Supreme Court of Canada
TSO Theatre Standing Order
UNCAT United Nations Convention Against Torture

Appendix B

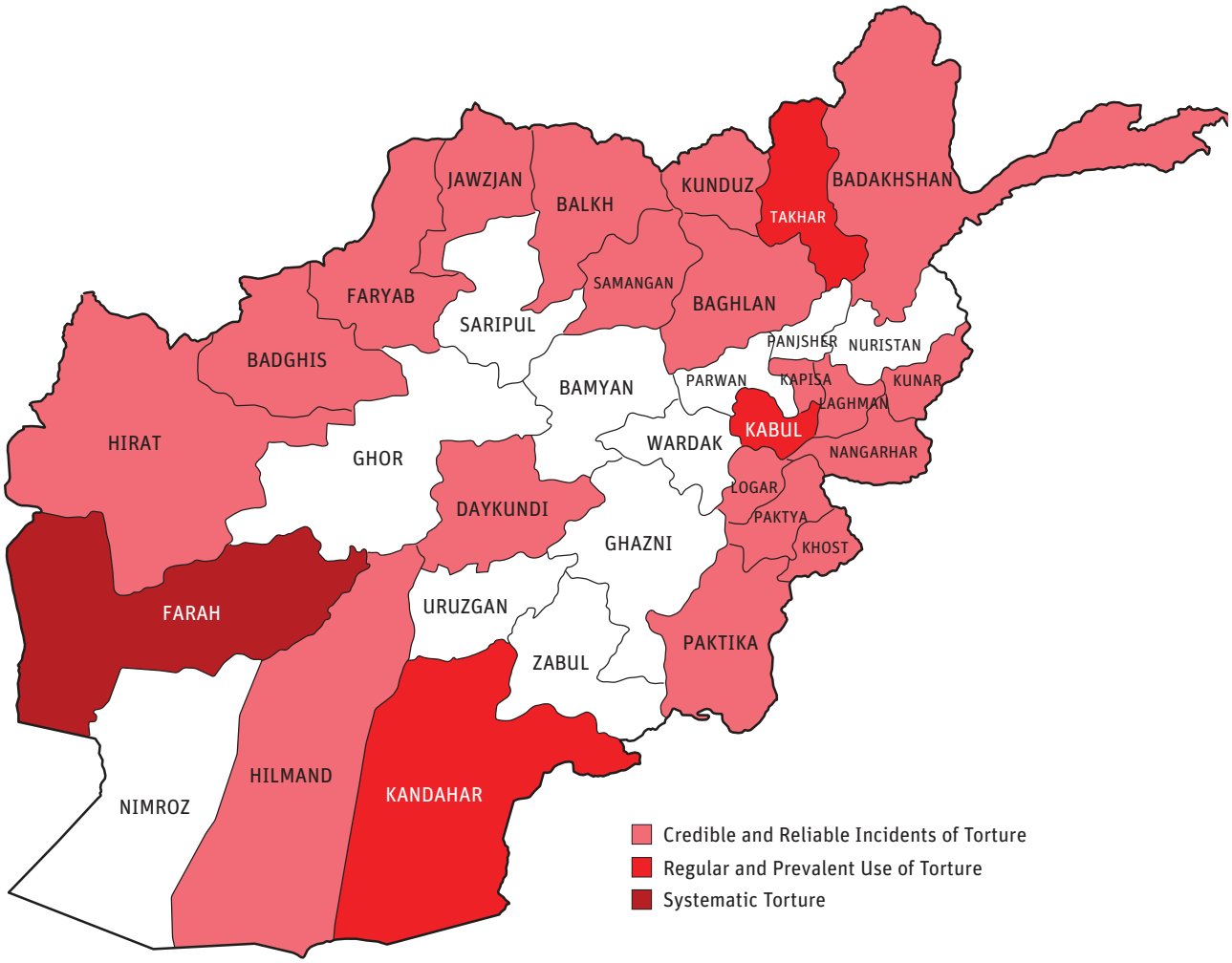
Maps of Torture in NDS Custody

FIGURE 1 Systematic Torture and Sufficiently Credible and Reliable Incidents of Torture by NDS



Source Adapted from the United Nations Assistance Mission in Afghanistan (January 2013)

FIGURE 2 Sufficiently Credible and Reliable Incidents in NDS Custody



Source Adapted from the United Nations Assistance Mission in Afghanistan (January 2015)

Appendix C

THE FOLLOWING IS a non-exhaustive selection of internal reports sent to Government of Canada officials on the torture and ill treatment of Afghan detainees. The government released these documents on June 22, 2011.

TABLE 3 Annotated List of Reports on Afghan Detainees Addressed to Government of Canada Officials

Year	Date	Code	Title or subject	Content and excerpts
2006	May 26	KANDH-0029	"Detainees: ICRC concerns over notification by Canadian forces"	A PRT report which warned of serious problems with notification to ICRC: long delays, inadequate information, with the result that some detainees were lost track of and could not be monitored.
	June 2	KANDH-0032	"Kandahar prison and Afghan detainees"	A PRT report about conditions at Sarpoza Prison in Kandahar, as well as dvetainee treatment generally. The report stated: "main concern in Kandahar is not the prison itself but overall treatment of detainees, including those transferred to Afghan custody by Canadian forces."
	Sept.19	KBGR-0118	"Afghanistan: ISAF detainee concerns"	An embassy report that noted ISAF concerns that CF refused to provide them with information about Canadian detainees, including whether any had been captured, since ISAF was obliged to send detainee numbers to Brussels. The report also noted a "highly credible source" stating that Canada still had legal obligations towards detainees post-transfers, and that Canadian officials needed to monitor detainees directly.
	Sept. 28	KBGR-0121	"Afghanistan: ISAF detainee concerns - update"	An embassy report which contained more complaints from ISAF about Canada's detainee practices, and which urged Canada to inform the ICRC more promptly about detainee transfers.
	Dec. 4	KBGR-0160	"Afghanistan: Detainee issues"	An embassy report which noted concern from allies that detainees may "vanish from sight" after being transferred to Afghan custody, as well as the risk that they "are tortured."
	Dec. 2006 or Jan. 2007		Annual human rights report for 2006 submitted by the embassy	The embassy's annual human rights report for Afghanistan. It noted that torture is rife in Afghanistan prisons, as well as extrajudicial executions and disappearances.

Year	Date	Code	Title or subject	Content and excerpts
2007	Early March		Inter-agency meeting with 12–15 officials in Ottawa, including some from CEFCOM	According to Richard Colvin's written evidence to the House Special Committee on the Canadian Mission in Afghanistan, he stated: "The NDS tortures people, that's what they do, and if we don't want our detainees tortured, we shouldn't give them to the NDS."
	Apr. 25	KANDH0026	"Visit to NDS detention facility"	One detainee said he was kicked and beaten while blindfolded, and that NDS interrogators "stepped on his belly." Another said he was beaten, subjected to electric shocks, and bound by his feet and hands and made to stand for ten days.
	May or June		Report sent to Ottawa	Report alluded to "sources" (who were not detainees) who had information that suggested all detainees transferred by Canada to the NDS were likely tortured, according to Richard Colvin, in written evidence to the House of Commons Special Committee on the Canadian Mission in Afghanistan.
	May 7	KANDH0031	AIHRC access to NDS detention facilities	A report stating that AIHRC had five failed attempts of accessing Kandahar NDS facilities in 2007.
	June	KBGR0291	"Visit to NDS detention facility in Kabul"	The Canadian Embassy visited the central NDS detention facility June 5–6. Four detainees were interviewed and three said that they had been whipped with cables, shocked with electricity and/or otherwise "hurt" while in NDS custody in Kandahar. One detainee said that while in custody of an unnamed detention facility, an unnamed individual came to speak to him and others detained. He, and others, told the ISAF visitors that three fellow detainees had their "fingers cut and burned with a lighter" while in NDS detention. While in Kandahar he was hit on his feet with a cable or "big wire" and forced to stand for two days.
	June 7	KANDH0042	"June 7: Periodic Follow-up visit to NDS"	Interview with detainees that had been detained by the Canadian forces and were transferred to NDS on June 7. None of the detainees knew of their charges. One detainee had been held in solitary confinement since arriving at the NDS, as well as kept in shackles and wearing sight deprivation goggles.
	Nov. 7	KANDH0125	"Detainees: Periodic Follow-up Visit to NDS on November 2007"	One detainee said he was struck twice on the hip with an electric cable while being interrogated by NDS officials. Another said he was suffering from headaches and was not given access to a doctor or medication. While interrogated, he was forced to stand up for extended periods of time and slapped in the face 5 or 6 times.
	Nov. 27	KANDH0138	"Detainees: Periodic Follow-up visit to Sarpoza prison on November [redacted] 2007"	One detainee said he was slapped once or twice during interrogations. Another said the NDS beat him with electric cables on several occasions, interrogated him 15 times, and told him he would be killed or sexually assaulted. A third detainee said he was verbally abused.
2008	Jan. 28	KPRT0019	"Detainees: Periodic Follow-up Visit to Sarpoza Prison, January 2008"	One detainee repeated claims he had made in 2007 that he was physically abused twice while being interrogated by the NDS.
	Mar. 31	KPRT-0083	"Periodic Follow-up Visit to NDS Kandahar on March [redacted], 2008"	A detainee claimed he was hung from the ceiling and beaten by Afghan National Police officers.

Notes

1 For a visual representation of the prevalence of torture in Kandahar compared to other Afghan provinces, see Appendix B. Although these maps are from 2013 and 2014, which is outside the temporal scope of Canada's military mission, the patterns they indicate are only the continuation of persistent patterns of the use of torture, stretching back to a time before Canada engaged militarily in Afghanistan.

2 Mr. Richard Colvin was DFAIT Political Director at the Provincial Reconstruction Team (PRT) in Kandahar (April-June 2006) and subsequently head of the political section and *de facto* Deputy Head of Mission (August 2006-October 2007) at the Canadian embassy in Kabul.

3 Parliament, House of Commons, Special Committee on the Canadian Mission in Afghanistan, *Evidence by Richard Colvin*, 40th Parl, 2nd Sess, No 15 (November 18, 2009).

4 The status of the conflict as a non-international armed conflict (NIAC) means that only Article 3 common to the four Geneva Conventions, Additional Protocol II and customary international humanitarian law apply, as further discussed in the Section 6 on the Law of Armed Conflict.

5 The London Conference on Afghanistan, *The Afghanistan Compact* (January 31-February 1, 2006). Retrieved from: http://www.nato.int/isaf/docu/epub/pdf/afghanistan_compact.pdf.

6 UN Security Council, *Security Council Resolution 1659 (2006): The situation in Afghanistan* (February 15, 2006), S/RES/1659 (2006).

7 Richard Colvin, *Affidavit to the Military Police Complaints Commission* (October 5, 2009), Washington, District of Columbia.

8 Parliament, House of Commons, Special Committee on the Canadian Mission in Afghanistan, *Evidence by David Mulroney*, 40th Parl, 2nd Sess, No 17 (November 26, 2009).

9 Canadian military involvement in Afghanistan formally ends (March 12, 2014), *CBC News*. Retrieved from: http://www.cbc.ca/news/world/canadian-military-involvement-in-afghanistan-formally-ends-1.2569162.

10 The National Directorate of Security (NDS) is Afghanistan's domestic intelligence agency, and is the government entity that received the highest number of detainees captured by NATO forces.

In a meeting between NATO officials and Amnesty International representatives on October 8, 2007 in Brussels, NATO officials revealed that NATO and ISAF states were advised that the NDS was the best long-term option for receiving transferred detainees. See Amnesty International, *Afghanistan, Detainees Transferred to Torture: ISAF Complicity?* (November 13, 2007), p.13. Retrieved from: https://www.amnesty.ie/reports/afghanistan-detainees-transferred-torture-isaf-complicity.

11 Afghanistan Independent Human Rights Commission, *Annual Report 2003–04*, p. 18. Retrieved from: http://www.aihrc.org.af/home/annual_report/526.

12 Afghanistan Independent Human Rights Commission, *Annual Report 2005,* p. 40. Retrieved from: http://www.aihrc.org.af/home/annual_report/527.

13 Afghanistan Independent Human Rights Commission, *Annual Report 2006*, p. 53. Retrieved from: http://www.aihrc.org.af/home/annual_report/528.

14 Afghanistan Independent Human Rights Commission, *Annual Report 2008*, p. 32. Retrieved from: http://www.aihrc.org.af/home/annual_report/531.

15 Graeme Smith (2013), The Dogs Are Eating Them Now: Our War in Afghanistan. (Ottawa: Knopf Canada).

16 Afghanistan Independent Human Rights Commission, *Causes of Torture in Law Enforcement Institutions* (April 2009). Retrieved from: http://www.aihrc.org.af/english/Eng_pages/Researches_eng/Research_cause_of_Torture_2009_April.pdf.

17 Afghanistan Independent Human Rights Commission, *Torture, Transfers, and Denial of Due Process: The Treatment of Conflict-Related Detainees in Afghanistan* (October 2011), p. 10.

18 Ibid, p. 13.

19 UN Commission on Human Rights, *Report of the High Commissioner for Human Rights on the Situation of Human Rights in Afghanistan and on the Achievements of Technical Assistance in the Field of Human Rights* (March 3, 2006), E/CN.4/2006/108. 68.

20 UN Security Council, *Report of the Secretary-General on the Situation in Afghanistan and Its Implications for International Peace and Security*, A/61/799S/2007/152 (March 15, 2007), at para. 41; UN General Assembly, *Report of the U.N. Secretary-General on the Situation in Afghanistan and Its Implications for International Peace and Security*, UN GAOR, 62d Sess, A/62/345-S/2007/555 (September 21, 2007), at paras. 45 and 84.

21 UN Security Council, *Report of the Secretary-General on the Situation in Afghanistan and Its Implications for International Peace and Security*, A/61/799S/2007/152 (March 15, 2007), at para. 41.

22 UN Assistance Mission in Afghanistan, *Treatment of Conflict-Related Detainees in Afghan Custody* (October 2011). Retrieved from: http://www.refworld.org/docid/4e93ecb22.html.

23 Ibid, p. 23.

24 Alissa J. Rubin, After a Reassessment, NATO Resumes Sending Detainees to Afghanistan Jails (February 15, 2012), *New York Times*. Retrieved from: http://www.nytimes.com/2012/02/16/world/asia/nato-resumes-transferring-detainees-to-afghan-prisons.html.

25 UN Assistance Mission in Afghanistan, *Treatment of Conflict-Related Detainees in Afghan Custody: One Year On* (January 2013). Retrieved from: http://www.refworld.org/docid/50ffe6852.html.

26 UN Assistance Mission in Afghanistan, *Update on the Treatment of Conflict-Related Detainees in Afghan Custody: Accountability and Implementation of Presidential Decree 129* (February 2015). Retrieved from: http://www.ohchr.org/Documents/Countries/AF/UNAMA_OHCHR_Detention_Report_Feb2015.pdf.

27 Human Rights Watch, *"All Our Hopes Are Crushed": Violence and Repression in Western Afghanistan* (October 2002); Human Rights Watch, *"Enduring Freedom": Abuses by U.S. Forces in Afghanistan* (March 7, 2004); Human Rights Watch, *"Killing You Is Very Easy Thing for Us": Human Rights Abuses in Southeast Afghanistan* (July 28, 2003).

28 Parliament, House of Commons, Special Committee on the Canadian Mission in Afghanistan, *Evidence by Andrea Prasow*, 40th Parl, 3rd Sess, No 8 (May 5, 2010).

29 Ibid.

30 Human Rights Watch, *Afghanistan: Letter to NATO Secretary General Regarding Summit in Latvia* (November 27, 2006).

31 Supra note 28.

32 Andrew Prasow, *Transfers to Afghan Custody Violate Canada's International Legal Obligations* (May 5, 2010). Retrieved from: https://www.hrw.org/news/2010/05/05/transfers-afghan-custody-violate-canadas-international-legal-obligations#_ftn2.

33 U.S. Department of State, *2005 Human Rights Report: Afghanistan* (March 8, 2006).

34 Ibid.

35 U.S. Department of State, *2006 Human Rights Report: Afghanistan* (March 6, 2007).

36 U.S. Department of State, *2009 Human Rights Report: Afghanistan* (March 11, 2010).

37 Department of Foreign Affairs and International Trade, *Afghanistan: Human Rights, Democratic Development, and Good Governance: 2003 Annual Report*, at paras. 13 and 18.

38 Department of Foreign Affairs and International Trade, *Afghanistan—2006: Good Governance, Democratic Development and Human Rights* (January 2007); Department of Foreign Affairs and International Trade, *Afghanistan—2004: Good Governance, Democratic Development and Human Rights*.

39 Paul Koring, What Ottawa doesn't want you to know (April 25, 2007), *Globe and Mail*. Retrieved from: http://www.theglobeandmail.com/news/national/what-ottawa-doesnt-want-you-to-know/article4094537/.

40 Department of Foreign Affairs and International Trade, *Afghanistan Human Rights Report 2007–08* (December 30, 2008), p. 8.

41 Amnesty International Canada and the BC Civil Liberties Association, *Final Submissions of the Complainants to the Military Police Complaints Commission* (January 26, 2011), at para. 61.

42 *R (on the application of Evans) v. Secretary of State for Defence*, [2010] EWHC 1445 (Admin), United Kingdom: High Court (England and Wales), June 25, 2010.

43 Military Police Complaints Commission, *Commission's Final Report—MPCC 2008-042—Concerning a complaint by Amnesty International Canada and British Columbia Civil Liberties Association in June 2008* (Ottawa: June 27, 2012), section 12.2.1.

44 *Arrangement for the Transfer of Detainees Between the Canadian Forces and the Ministry of Defence of the Islamic Republic of Afghanistan*, Canada and Afghanistan (entered into force December 18, 2005). Retrieved from: https://www.unodc.org/tldb/showDocument.do?documentUid=7954&cmd=add&node=docs&country=&pageNum=122.

45 Former Liberal government approved controversial Afghan detainee deal, records show (May 3, 2007) *CanWest News Service*. Retrieved from: http://www.canada.com/story.html?id=7a52d344-7f0e-487c-bd7b-1000ebf3fb7c.

46 Ibid. It is important to note that the category of persons "Prisoners of War" exists only in international armed conflicts, according to the Third Geneva Convention. During the period of concern (2005–11), the armed conflict in Afghanistan was of a non-international character. Hence, legally speaking, persons captured by CF were not considered to be Prisoners of War.

47 Parliament, House of Commons, Special Committee on the Canadian Mission in Afghanistan, *Evidence by the Honourable William Graham*, 40th Parl, 3rd Sess, No 9 (May 12, 2010).

48 Supra note 44.

49 The 2005 Transfer Arrangement also states that such written records would be available for inspection by the ICRC, and that copies of such records would be shared with the Accepting Power, i.e. Afghan authorities.

50 Parliament, House of Commons, Special Committee on the Canadian Mission in Afghanistan, *Evidence by David Sproule*, 40th Parl, 3rd Sess, No 6 (April 21, 2010).

51 Ibid.

52 Article 58 of the Afghan Constitution of 2004, which stipulates the AIHRC "shall refer human rights violations of individuals to legal authorities and assist them in defense of their rights." The AIHRC also derives its jurisdiction from the *Law on the Structure, Duties and Mandate of the AIHRC*, which the Afghan government passed in 2005. See *The Constitution of the Islamic Republic of Afghanistan*. Retrieved from: www.afghanembassy.com.pl/afg/images/pliki/TheConstitution.pdf.

53 Email from KANDH-KAF-C4R to Douglas Scott Proudfoot (March 15, 2007).

54 Supra note 7.

55 Supra note 7. Canadian Expeditionary Force Command (CEFCOM), headed by Major-General Michel Gauthier, was established on February 1, 2006 to oversee the international operations of Canadian Forces in Afghanistan.

56 Joint Task Force-Afghanistan (JTF-A), based at Kandahar Airfield (KAF), had overall responsibility for the management of detainees.

57 Graeme Smith, From Canadian custody into cruel hands (April 23, 2007), *Globe and Mail*. Retrieved from: http://www.theglobeandmail.com/news/world/from-canadian-custody-into-cruel-hands/article585956/?page=all.

58 Mr. Colvin further testified that by April 2007, Afghanistan Task Force Director David Mulroney sent written messages to the embassy "to the effect that we should be quiet and do what we were told," and DFAIT Assistant Deputy Minister Colleen Swords left a phone message suggesting their concerns should be conveyed by telephone instead of on paper. *See* supra note 3.

59 These designated facilities were the NDS detention facility in Kandahar, Kandahar Central Prison (Sarpoza), NDS detention facility No. 17 in Kabul, and Pul-e-Charki prison, also in Kabul, according to Federal Court judgment in *Amnesty International Canada and BC Liberties Association v. Chief of the Defence Staff* (F.C.), 2008 FC 336, [2008] 4 F.C.R. 546.

60 Supra note 43, section 8.1.

61 Military Police Complaints Commission, Afghanistan Public Interest Hearings, *Transcript of Proceedings*, Volume 5 (April 13, 2010), p. 110–115.

62 A document released by the government, titled *Visit Numbers Since May 3, 2007*, lists participating agencies in detention site visits. It is unclear which department produced this document, or on what date, because the document is redacted.

63 Richard Colvin, *Supplementary Written Evidence to the House of Commons Special Committee on the Canadian Mission in Afghanistan* (December 19, 2009). Retrieved from: http://www.ctvnews.ca/full-text-of-richard-colvin-s-letter-1.465338.

64 There were subsequent versions of this standing order on March 1, 2006 and on March 19, 2007, but much of their content remained the same as the original standing order. Department of National Defence and the Canadian Armed Forces, JTF-Afgh Theatre Standing Order (TSO) 321A, *Detention of Afghan Nationals and Other Persons* (March 19, 2007). See Department of National Defence, *Canadian Forces Operations in Afghanistan 2006—Board of Inquiry into In-theatre Handling of Detainees* (February 6, 2009); Amnesty International Canada and BC Civil Liberties Association, *Final Submissions of the Complainants to the Military Police Complaints Commission* (January 26, 2011), at para. 17.

65 Supra note 41, at para. 21.

66 Joint Task Force-Afghanistan, *Theatre Standing Order 321: Detention of Afghan Nationals and Other Persons* (May 27, 2007).

67 The Joint Task Force-Afghanistan Policy Advisor, upon receiving information about a detainee, would then inform the Political Director of the Kandahar Provincial Reconstruction Team, the Canadian embassy in Kabul, and DFAIT. The latter would in turn notify both the ICRC and the AIHRC.

68 Supra note 40, at para. 20.

69 Supra note 66.

70 Parliament, House of Commons, Special Committee on the Canadian Mission in Afghanistan, *Evidence by Gen. David Fraser*, 40th Parl, 2nd Sess, No 16 (November 25, 2009).

71 If release or transfer were delayed beyond 96 hours for any reason, the JTF-Afgh Commander would seek an extension of detention from the CEFCOM Commander.

72 Murray Brewster & Jim Bronskill, Canadian spies interrogated Afghan prisoners, insiders reveal (March 7, 2010), *Globe and Mail*. Retrieved from: http://www.theglobeandmail.com/news/politics/canadian-spies-interrogated-afghan-prisoners-insiders-reveal/article1461459/.

73 Parliament, House of Commons, Special Committee on the Canadian Mission in Afghanistan, *Evidence by Mr. Michel Couloumbe*, 40th Parl, 3rd Sess, No 8 (May 5, 2010).

74 Murray Brewster & Jim Bronskill, Canadian spies interrogated Afghan prisoners, insiders reveal (March 7, 2010), *Globe and Mail*.

75 Senate Intelligence Review Committee, *CSIS's Role in Interviewing Afghan Detainees* (July 4, 2011), p. 7. Retrieved from: http://www.sirc-csars.gc.ca/pdfs/criad_20110704-eng.pdf.

76 Parliament, House of Commons, Special Committee on the Canadian Mission in Afghanistan, *Evidence by Kenneth W. Watkin*, 40th Parl, 2nd Sess, No 14 (November 4, 2009).

77 Supra note 41.

78 Department of Foreign Affairs and International Trade, Post-Transfer Follow-up Measures for Detainees Transferred by the Canadian Forces in Afghanistan (June 20, 2007).

79 Supra note 3.

80 Alan Freeman and Jeff Esau, Hillier muzzles military over detainees (July 9, 2007), *Globe and Mail*. Retrieved from: http://www.theglobeandmail.com/news/national/hillier-muzzles-military-over-detainees/article962702/.

81 Ibid.

82 Supra note 61, p. 130.

83 Supra note 43, s. 12.2.

84 Supra note 61, p. 134.

85 Email from Cory Anderson DFA-FTAG-C5 (August 2007).

86 Supra note 61, p. 134.

87 House of Commons, Special Committee on the Canadian Mission in Afghanistan, *Evidence by Mr. Arif Lalani*, 40th Parl, 3rd Sess, No 6 (April 21, 2010).

88 Supra note 61, p. 131–2.

89 Email from KANDH-KAF-C4R to KANDH-C4R, *RE: KANDH-0055 NDS Prison Visit for July [redacted]* (July 16, 2007); Email from Cyril Borlé-DFA-FTAG-C5 to KANDH-PRT-C4R, *reconciliation complete* (November 17, 2007).

90 A Foreign Affairs spokesman stated in April 2007 that Canada had not received any such notifications, and a regional head for the AIHRC, on a later occasion, stated the organization could not follow up on the fates or conditions of detention for Canadian-transferred detainees. See supra note 42, section 7.2.

91 Supra note 3.

92 Graeme Smith, Watchdog: 'We can't monitor these people' (April 24, 2007), *Globe and Mail*. Retrieved from: http://www.theglobeandmail.com/news/world/watchdog-we-cant-monitor-these-people/article4094542/.

93 Murray Brewster, PM, ministers at odds on Afghan detainees (April 27 2007), *Canadian Press*. Retrieved from: http://www.thestar.com/news/2007/04/26/pm_ministers_at_odds_on_afghan_detainees.html.

94 Canadian officials heard torture allegations: Day (April 30, 2007), *CBC News*. Retrieved from: http://www.cbc.ca/news/canada/canadian-officials-heard-torture-allegations-day-1.684190.

95 Paul Koring, Red Cross contradicts Ottawa on detainees (March 8, 2007), *Globe and Mail*. Retrieved from: http://www.theglobeandmail.com/news/national/red-cross-contradicts-ottawa-on-detainees/article20394095/.

96 Alain Aeschlimann (2005). Protection of detainees: action of ICRC behind bars, *International Review of the Red Cross 87* (857).

97 Canadian Expeditionary Force Command (CEFCOM), headed by Major General Michel Gauthier, was established on February 1, 2006 to oversee the international operations of the CF in Afghanistan. Task Force Afghanistan, the Canadian military deployment to Afghanistan (which included Canadian Military Police), therefore reported to CEFCOM. Major General Michel Gauthier, in turn, reported to the Chief of the Defence Staff, at the time General Rick Hillier.

98 Supra note 3.

99 Ibid.

100 Graeme Smith, Canada can't find 50 Afghan detainees (September 22 2007), *Globe and Mail*. Retrieved from: http://www.theglobeandmail.com/news/world/canada-cant-find-50-afghan-detainees/article585958/. In addition, an untitled and mostly redacted government document contains a table titled "Unaccounted For Detainees Transferred to ANP". Even though the table is mostly redacted, it is three pages long.

101 Supra note 61, p. 162–3.

102 Supra note 43, section 7.2.

103 Supra note 80.

104 Military Police Complaints Commission, Afghanistan Public Interest Investigation, *Complaint Letter Regarding Allegations of Failure of Military Police to Investigate Possible Incidents of Detainee Abuse by Canadian Forces in Afghanistan* (January 29, 2007).

105 Department of National Defence and the Canadian Armed Forces, *Board of Inquiry into Intheatre Handling of Detainees* (Feb. 19, 2010). Retrieved from: http://www.crs.forces.gc.ca/boice/rp/detainees/index-eng.aspx.

106 Parliament, House of Commons, Standing Committee on National Defence, *Evidence by General Walter Natynczyk*, 40th Parl, 2nd Sess, No 44 (December 8, 2009).

107 Gen. Natynczyk's press conference (December 9, 2009), *Globe and Mail*. Retrieved from: http://www.theglobeandmail.com/news/national/gen-natynczyks-press-conference/article1394802/; Department of National Defence, *News Release: Board of Inquiry to Examine Details of June 2006 Detainee Incident in Afghanistan* (January 28, 2010).

108 What's behind the black boxes? (December 11, 2009), *BCCLA National Security Blog*. Retrieved from: https://bcclanationalsecurity.wordpress.com/2009/12/11/black-boxes/.

109 Department of National Defence and the Canadian Armed Forces, *Board of Inquiry into 14 June 2006 Detainees Incident* (May 4 2010).

110 *Amnesty International Canada and British Columbia Civil Liberties Association v. Chief of the Defence Staff for the Canadian Forces, Minister of National Defence and Attorney General of Canada*, Cross-examination of Steven Noonan (May 2, 2007).

111 Graeme Smith, From Canadian custody into cruel hands (April 23, 2007), *Globe and Mail*. Retrieved from: http://www.theglobeandmail.com/news/world/from-canadian-custody-into-cruel-hands/article585956/?page=all.

112 Ibid.

113 Supra note 41, at para. 66.

114 «Les Canadiens nous ont dit de ne pas avoir peur, a poursuivi le prisonnier. Ils nous ont donné un document qui affirmait qu'il n'y avait plus de torture en Afghanistan. Les gens des services secrets l'ont déchiré et ils me l'ont jeté à la figure. Ils m'ont torturé pendant 20 jours.» *See* Michèle Ouimet, "C'est vous, Canadiens, qui êtes responsables de la torture…" (October 29, 2007), *La Presse*. Retrieved from: http://service.vigile.quebec/C-est-vous-Canadiens-qui-etes.

115 Parliament, House of Commons, Special Committee on the Canadian Mission in Afghanistan, *Evidence by Mr. Gavin Buchan*, 40th Parl, 3rd Sess, No 6 (April 28, 2010).

116 Email from KANDH-KAF-C4 to Kerry Buck (KANDH0026) (April 25, 2007); supra note 40, at para. 68.

117 Military Police Complaints Commission, Afghanistan Public Interest Hearings, *Transcript of Proceedings*, Vol. 20 (September 22, 2007).

118 Supra note 41, at para. 71.

119 Supra note 117.

120 Email from KANDH-C4R (KANDH-0039) (June 5, 2007); Office of the Minister of Foreign Affairs, *Information Memorandum for the Minister* (June 21, 2007).

121 Email from KABUL-GR-C4R (June 6, 2007); supra note 63.

122 Ibid.

123 Ibid.

124 Military Police Complaints Commission, Afghanistan Public Interest Hearings, *Transcript of Proceedings*, Vol. 23 (October 5, 2010).

125 Supra note 41, at para. 76.

126 Supra note 63.

127 Email from KANDH-C4R to David Mulroney (KANDH-0074) (September 11, 2007).

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