

# Torture of Afghan Detainees

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

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### LONGER EXECUTIVE SUMMARY<sup>1</sup>

THIS REPORT DISCUSSES Canada's shortcomings and violations of international law relating to its transfer of hundreds of Afghan 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 the first of two Transfer Arrangements 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 UN High Commissioner for Human Rights, UN Secretary General reports to the UN Security Council, 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. The content of these reports is discussed in more detail in **Section 2.2** of this report.

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 torture and other 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. These arrangements, in addition to Canada's standard practices for handling detainees, are further discussed in **Section 3** of the report.

Both arrangements contained diplomatic assurances against torture, which have been shown to be ineffective and unreliable in states with consistent patterns of human rights

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<sup>1</sup> This longer Executive Summary was prepared after the printing of the full report, which contains a shorter version.

abuses, such as Afghanistan. They 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 (as was the case for a period of time after Canada began monitoring places of detention in Kandahar), if detaining authorities can hide detainees from monitors, or in circumstances where detainees may be reluctant to speak about their abuse for fear of retaliation. The ineffectiveness of diplomatic assurances is discussed in **Section 6** of the report.

Under the new arrangement, Canada lost track of at least 50 detainees transferred in 2006 or 2007, and continued to find disturbing incidents of torture (described in more detail in **Section 4.4** of this report) after the new arrangement was signed. These incidents included detainees being beaten with electric cables, rubber hoses or sticks; being given electric shocks; being forced to stand for long periods of time with their hands raised above their heads; being punched or slapped; and being threatened with execution or sexual assault. The government occasionally suspended transfers for various reasons, including these 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 (*jus cogens*) that can never be suspended under any circumstances, including in situations of armed conflict. They also violated the Convention Against Torture, Article 3 of 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. Canada's international legal obligations in relation to Afghan detainees are discussed in **Section 6** of the report.

There have been three major attempts at transparency and accountability on this issue to date. These efforts, which were either narrow in scope or were stymied by the government, are discussed in more detail in **Section 5** of the report. 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 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 subject to cruel and unusual punishment, respectively. The applicants also

sought an immediate injunction against detainee transfers until the case for judicial review was resolved.

The Federal Court dismissed the applicant's motion for an injunction against transfers, since there was a suspension of transfers in effect at the time. However, Justice Anne Mactavish noted that the evidence of abuse presented by the applicants called into question the effectiveness of the government's efforts to ensure detainees were not abused. In another ruling, the Federal Court found 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. However, the Court found in the same ruling, this did not mean CF could act with impunity, and that they could face disciplinary sanctions and criminal prosecution either under Canadian or international law, should their actions in Afghanistan violate international law. This ruling was unanimously upheld on appeal to the Federal Court of Appeal, and the Supreme Court refused to grant leave to consider a further appeal.

The second process was an investigation by the Military Police Complaints Commission (MPCC), a quasi-judicial administrative tribunal established by the House of Commons to oversee the actions of Canadian Military Police. The MPCC originally sought to investigate the allegations that CF Military Police transferred detainees, or allowed them to be transferred, notwithstanding evidence of substantial risks of torture. However, the Commission was ultimately confined to an examination of whether Military Police officers failed to investigate transfer orders made by Task Force Commanders in Kandahar, after the government successfully narrowed the scope of the investigation. The Commission determined in their Final Report that the eight officers could not be found responsible in this regard, since information from DFAIT, Canadian Expeditionary Force Command (CEFCOM), and Joint Task Force-Afghanistan (JTF-A) about detainees, including their abuse, did not reach Military Police. The Final Report also noted the narrow scope of the investigation, and observed that it is for other bodies to examine the appropriateness of the entirety of Canada's detainee transfer policies.

The third process consisted of an attempted 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, pursuant to two adopted 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. As a result, the Committee reported a

motion to the House of Commons that a serious breach of privilege had occurred, members' rights had been violated, a witness of the committee had been intimidated, and that the government had obstructed and interfered with the Committee's work by refusing to produce requested documents.

Pursuant to this motion, the House of Commons passed on December 10, 2009 an order demanding the release of original and uncensored documents to Members of Parliament. On December 30, 2009, and without having released the requested documents, Parliament was prorogued at the request of Prime Minister Stephen Harper, which prevented the Special Committee from continuing its study. After Parliament reopened in March 2010, the government tabled thousands of heavily censored documents.

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.

Consequently, Prime Minister Stephen Harper, and the Leaders of the Liberal Party and the Bloc Québécois, signed a Memorandum of Understanding (MOU) establishing an *Ad Hoc* Committee of Parliamentarians external to the House of Commons, consisting of one MP from each participating party, as well as a Panel of Arbiters, both of whom had access in confidence to the uncensored documents listed in the House's Order. Even though the *ad hoc* committee and the Panel of Arbiters had only completed the review of an "initial set of documents", the government advised them that the MOU that established the committee and the Panel would not be renewed. The government then proceeded to release 362 documents, many of them heavily censored, including documents that had been previously released during the course of litigation and the MPCC's investigation.

The release of these documents, however, came 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.

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.

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*. (See Section 7.2 at pages 73-4 of the report for the full set of recommendations.)