

# LETTER FROM OTTAWA: CANADA'S DETAINEE SCANDAL IN AFGHANISTAN BEFORE THE COURTS

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*In 2007, Canada's government became embroiled in an international scandal when journalists reported that 30 persons detained by the Canadian Forces and transferred to Afghan custody were tortured. Leaked government documents prove that Canadian diplomats were aware that persons in Afghan custody could be tortured, at the dates when the Canadian Forces authorized the detainee transfers to occur. A judicial review has been launched in the Federal Court alleging that the Canadian Forces are violating the constitution, specifically the Canadian Charter of Rights and Freedoms, in transferring detainees to known torturers. This paper discusses both the facts underpinning Canada's detainee scandal, and the Canadian jurisprudence which will be decisive as the matter heads to the courts for resolution.*

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*En 2007, le gouvernement du Canada s'est trouvé mêlé à un scandale international lorsque des journalistes ont annoncé que trente personnes détenues par les Forces canadiennes et ensuite mises en détention en Afghanistan avaient été torturées. Des documents gouvernementaux confidentiels qui ont été divulgués démontrent que les diplomates canadiens savaient que les personnes en détention en Afghanistan étaient exposées à un risque de torture au moment où les Forces canadiennes autorisaient le transfert de celles-ci. Une demande de contrôle judiciaire a été intentée auprès de la Cour fédérale selon laquelle les Forces canadiennes ont violé la Constitution, à savoir, la Charte des droits et libertés, en autorisant le transfert de personnes détenues à des tortionnaires connus. Le présent article examine les faits derrière le scandale canadien des personnes détenues et la jurisprudence canadienne qui jouera un rôle décisif dans l'affaire qui sera décidée par les tribunaux sous peu.*

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As I revised this paper for the final time in March 2008, about 2,500 Canadian troops were at war in Afghanistan.<sup>1</sup> Most are based in the

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<sup>1</sup> Canada, Department of National Defence, *Backgrounder: Canadian Forces Operations in Afghanistan*, BG-07.009 (15 May 2007) online: National Defence and the

notoriously troubled province of Kandahar, where their duties include seeking, engaging and destroying Taliban and al-Qaeda combatants. The mission is dangerous — it has killed over 80 Canadians and counting — but Canada has committed to it until December 2011, or possibly longer.

Prime Minister Stephen Harper knows and fears that the national mood is ambivalent about the military's new, more belligerent role. And the public rightly worries about the Prime Minister's intentions: in a candid moment, his Defence Minister let slip that the Afghan conflict could last another ten or fifteen years.<sup>2</sup> The Prime Minister knows that a war of that duration would garner no support, so he justifies the open-ended commitment by the argument that the Canadian Forces must remain "to stabilise Afghanistan so that vital humanitarian and development work can be undertaken."<sup>3</sup> That work includes striving to "build a justice system" and to "ensure that the rights of the Afghan people are protected."<sup>4</sup>

But do these statements accurately represent the situation in Afghanistan? George Orwell, in his famous novel *1984*, warned about the nostrums that delude nations. "War is peace" was the slogan of his fictional, totalitarian dystopia. Just as the Canadian Prime Minister projects an appealing element of optimism, there is also a chilling element of "war is peace" in the formulation that by waging war in Afghanistan, Canada provides the means to build an Afghan justice system and human rights culture. Whether the English novelist or the Canadian Prime Minister has the better of this argument matters very much.

In this paper, I search for evidence — tangible facts — of whether the Canadian Forces actually advance the human rights of the Afghan people. I do not make that search out of idle academic curiosity, and what really interests me, as a professor of international development and law, is that human rights may have a prognostic quality for Afghanistan's future. Some of the best international development scholarship, including Amartya Sen's *Development as Freedom*, or Paul Collier's *The Bottom Billion*, emphasizes that the poorest, most fragile states must consolidate human rights, or they are at superadded risk to relapse into war and not develop.<sup>5</sup> East Timor, Eritrea, and Haiti are examples of the "conflict trap" that international development scholars worry about.

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Canadian Forces <[http://www.forces.gc.ca/site/newsroom/view\\_news\\_e.asp?id=1703#athena](http://www.forces.gc.ca/site/newsroom/view_news_e.asp?id=1703#athena)> (accessed 4 July 2007) [DND 2007"Backgrounder"].

<sup>2</sup> Brian Laghi, "O'Connor Envisions Conflicts Lasting 15 Years" *The Globe and Mail* (16 April 2007) A1.

<sup>3</sup> *House of Commons Debates*, No. 025 (17 May 2006) at 1500 (Right Hon. Stephen Harper).

<sup>4</sup> *Ibid.*

<sup>5</sup> Amartya Sen is a Nobel laureate in economics, and Lamont University

Briefly, there are two possible futures. If the Canadian Forces uphold human rights, they instil the future expectation of Afghans that the monopoly of state force can be honourable — a useful belief that builds support for Afghanistan's fledgling democracy. If the Canadian Forces violate human rights, they reconfirm the past expectation of Afghans that the monopoly of state force is disgraceful — a damaging belief that has long made Afghanistan so ungovernable. Human rights are about trust in public institutions, and put this way, it takes no particular insight to understand how they are highly instrumental to Canada's grand project in Afghanistan.

Perhaps there is no better litmus test of Canada's human rights performance than the direct interaction the Canadian Forces have with Afghans whom they detain in military operations. The conduct in such an interaction is Canada's own and not that of a nebulous coalition, and the applicable rules are very well spelled out. If international law is obeyed, particularly the Geneva Conventions and the *Convention Against Torture*,<sup>6</sup> the safeguards for detainees are excellent. But even the leading military forces unwisely cut corners, as America found when it lost the moral high ground — an asset it has never recovered — over the torture of detainees at Guantanamo Bay and Abu Ghraib prisons. Is Canada sticking to the law and managing to avoid a similar pitfall?

I argue in this paper that Canada is failing scandalously. At the heart of the problem is the fact that, when the Canadian Forces detain a person, that detainee is normally transferred to the custody of Afghan security institutions that have a notorious record of torture and extrajudicial killing. Instead of looking on the apprehension of detainees as an *opportunity* to mentor their Afghan counterparts in detaining and interrogating persons safely and without torture, which would be a genuine contribution that

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Professor at Harvard University. Paul Collier is former director of the World Bank's Development Research Group, and Professor of Economics at Oxford University. In Canada their theories are not often discussed in the context of Afghanistan, which is unfortunate. See Amartya Sen, *Development as Freedom* (Oxford: Oxford University Press, 1999); Paul Collier, *The Bottom Billion: Why the Poorest Countries are Failing and What Can Be Done About It* (Oxford: Oxford University Press, 2007).

<sup>6</sup> *Geneva Convention Relative to the Treatment of Prisoners of War, with Annexes (I to V)*, 12 August 1949, 75 U.N.T.S. 135, C.T.S. 1965/20 (entered into force 21 October 1950, ratification by Canada 14 May 1965) [Third Geneva Convention]; *Geneva Convention Relative to the Protection of Civilian Persons in Times of War, with Annexes (I to III)*, 12 August 1949, 75 U.N.T.S. 287, C.T.S. 1965/20 (entered into force 21 October 1950, ratification by Canada 14 May 1965) [Fourth Geneva Convention]; *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, 1465 U.N.T.S. 85, C.T.S.1987/36 (entered into force 26 June 1987, ratification by Canada 24 June 1987) [*Convention Against Torture*].

Canada could make to developing Afghanistan's justice system, the Canadian Forces look on detainees as a *problem* to transfer and be rid of automatically. What little Canadian mentorship has been done is solely in grudging response to the revelations of torture, and is a collection of one-off efforts of questionable efficacy. When the Canadian Forces capture a detainee, little effort is made to differentiate the guilty or innocent, and both are transferred without due process. So indiscriminate is the approach of the Canadian Forces that they have transferred to the known torturers sixteen-year-old boys and a seventy-five-year-old man — hardly the fifth column of the Taliban and al-Qaeda insurgency, but more its wheelchair and roller-skate contingent. In all the transfers, no detainee has ever been given access to a lawyer, and all have been transferred to the torturers in secret. And ridiculous as it sounds, perhaps one even has reason to be *grateful* to hear of the cases of torture, because only months after Canadian diplomats wrote in a secret report that “extrajudicial killing ... is all too common,” the Canadian military confirmed that several transferred detainees went missing without a trace.

Succinctly put, on the matter of detainees, the performance of Canada's government and military is disgraceful. Decades of hard-won international credibility for Canada are imperilled by a detainee transfer policy which no government official, bureaucrat or military officer to date has had the courage to question openly.

This paper is organized in three parts. The first part describes the recent public scandal (updated to early 2008) over the Canadian Forces' treatment of detained persons. The second section discusses the Canadian jurisprudence pertaining to a judicial review now before the Federal Court of Canada, in which Amnesty International and the British Columbia Civil Liberties Association seek to prohibit the Canadian Forces from transferring detainees in the face of the current risk of torture. The final part discusses Canada's options, given the very high probability that the courts will strike down Canada's current detainee transfer scheme as unconstitutional.

### *1. The Canadian Forces and Detainees*

The Canadian Forces are deployed in Afghanistan under the auspices of the International Security Assistance Force (ISAF) of the North Atlantic Treaty Organization (NATO), which in turn is authorized by a number of United Nations Security Council resolutions dating from 2001.<sup>7</sup> Since that date, the Canadian Forces have reinvented the purpose of their deployment several times, at times exiting ISAF and joining the United States (US)-led

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<sup>7</sup> See DND 2007 “Backgrounder,” *supra* note 1.

Operation Enduring Freedom, and later rejoining ISAF. The most significant reorganization took place in November 2005, when the Canadian Forces moved their base from the relative calm of Kabul to the southern and dangerous province of Kandahar.

Kandahar and its neighbouring provinces have always been restive. As early as 2002, Canadian Forces saw combat there.<sup>8</sup> The combat picked up again in 2006, when Canadian Forces participated in offensives across the southern Afghanistan that have killed hundreds of combatants and civilians.<sup>9</sup> Canadian military units have arrested and detained many people encountered in the course of these offensives. The number of detainees is a state secret.

Various bilateral treaties with Afghanistan and military theatre standing orders govern how the Canadian Forces handle and transfer detainees to Afghan custody.<sup>10</sup> The first treaty, signed on December 18, 2005 for Canada by the Chief of Defence Staff, General Rick Hillier, was for months a state secret. The Department of National Defence (DND) refused many requests by journalists and this author for a copy of this detainee treaty, even though allied military forces operating in Afghanistan, such as the Dutch forces, disclosed and encouraged public debate on their similar detainee treaties. DND only released the treaty to the public after a Canadian newspaper, *The Globe and Mail*, published leaked excerpts of it.<sup>11</sup>

<sup>8</sup> According to the DND *Backgrounder: Canadian Forces Commitment in Afghanistan to Date*, BG-05.012 (16 May 2005) online source cited at *supra* note 1, “In February 2002, the [3rd Battalion Princess Patricia’s Canadian Light Infantry] Battle Group commanded by then Lieutenant-Colonel Pat Stogran deployed to Kandahar for a six-month tour of duty that included tasks ranging from airfield security to combat.”

<sup>9</sup> Graeme Smith, “Taliban Gaining in South, Report Says” *The Globe and Mail* (7 June 2006) A15.

<sup>10</sup> DND prefers not to call this particular agreement a “treaty” but insists that it be called an “arrangement.” Semantics aside, legal authority favours the interpretation that it is a treaty; see e.g. *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331, at art. 2 s. 1 (b), Can.T.S. 1980/37, which defines a treaty as “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation”; and see Elizabeth A. Martin, *A Dictionary of Law*, 3d ed. (Oxford: Oxford University Press, 1994) s.v. “treaty” (a treaty “can also be known as conventions, pacts, protocols, final acts, *arrangements*, and general acts”) [emphasis added]. Accordingly, the fact that Canada and Afghanistan signed the document and intended that it be followed exactly as the international law cited in its four corners — the document references for example the *Geneva Conventions* — makes the document a “treaty” according to these authoritative definitions, notwithstanding DND’s preference to call it a mere “arrangement.”

<sup>11</sup> Canada, Department of National Defence, *Arrangement for the Transfer of*

The detainee treaty is straightforward. When the Canadian Forces detain a person, their local commander may order the transfer of that person to the security forces of the Afghan government.<sup>12</sup> The timing of the transfer is within Canadian discretion, but normally follows within 96 hours of captivity, in accordance with a current NATO policy.<sup>13</sup> A medical examination always takes place, and detainees who are wounded or sick receive care before being transferred.<sup>14</sup> Both Canada and Afghanistan must keep accurate records of detainees, their identity and whereabouts, and open those records to the International Committee of the Red Cross and Red Crescent (ICRC).<sup>15</sup> If the ICRC wishes to visit a detainee, Canada and Afghanistan must allow it.<sup>16</sup> Above all, detainees must at all times be protected and treated humanely, in the manner appropriate to their status in the Third Geneva Convention, and on no account may the death penalty be carried out.<sup>17</sup>

Unfortunately, General Hillier, who is not a diplomat by training, failed to ensure that Canada's detainee treaty has any follow-up mechanisms *after* persons are transferred to Afghan custody — mechanisms which Canada's NATO allies insisted on. Britain for example, stipulated that its representatives shall have the right to inspect its detainees at any time after their transfer to Afghan officials, and the right to be informed if criminal charges are brought.<sup>18</sup> Canada left those rights on the table. Britain also reserved the right to veto third-party transfers — that is, the ability of Afghanistan to receive a detainee from British custody, and launder that person onward to a third country's custody. Canada's treaty deleted that veto power.

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*Detainees Between the Canadian Forces and the Ministry of Defence of the Islamic Republic of Afghanistan*, (18 December 2005) online: National Defence and the Canadian Forces <[http://www.dnd.ca/site/operations/archer/Afghanistan\\_Detainee\\_Arrangement\\_e.pdf](http://www.dnd.ca/site/operations/archer/Afghanistan_Detainee_Arrangement_e.pdf)>; a signed version of this document is available in the docket of the litigation discussed *infra*, note 53 [Transfer Agreement].

<sup>12</sup> *Ibid.* at para. 1; note the treaty does not apply automatically in the event of taking a detainee, but rather applies discretionarily, “in the event of a transfer” of a detainee. And see *Amnesty International Canada et al. v. Canada (Canadian Forces et al.)*, 2007 FC 1147, 161 A.C.W.S. (3d) 665 [Amnesty] (Evidence, Affidavit of Yavar Hameed Tab T at para. 32) [Hameed affidavit]. Further Theatre Standing Order 321A reads that “Comd TFA [Commander of Task Force Afghanistan] is the sole authority empowered to make the determination whether a temporarily detained persons shall be retained in custody, transferred to ANSF [Afghan National Security Forces] or released.”

<sup>13</sup> See Theatre Standing Order 321A, *ibid.*

<sup>14</sup> *Ibid.* at para. 6.

<sup>15</sup> *Ibid.* at para. 7.

<sup>16</sup> *Ibid.* at para. 3.

<sup>17</sup> *Ibid.* at para. 8, 10 and 13; Third Geneva Convention, *supra* note 6.

<sup>18</sup> U.K., Foreign Affairs, *Second Report: Visit to Guantánamo Bay* (Foreign Affairs Reports to the House of Commons, 23 April 2005), online: House of Commons

Canada's omission to follow up detainees was not accidental. Certainly it would have been possible for Canada to obtain terms equivalent to those obtained by Britain, which negotiated its treaty first.<sup>19</sup> That Canada failed to do so is reportedly the doing of General Hillier, who circumvented Canada's diplomatic corps as the treaty was being negotiated; he has subsequently said that he signed a "very good agreement" and that he has "no regrets" over doing so.<sup>20</sup> Such comments suggest that General Hillier intended to drive a wedge between the Canadian Forces and the human rights frameworks of other federal government departments. As General Hillier said to journalists, explaining why the Canadian Forces play by different rules:

We're not the public service of Canada, we're not just another department. We are the Canadian Forces, and our job is to be able to kill people.<sup>21</sup>

Having also described the enemy in Afghanistan as "detestable murderers and scumbags," it seems General Hillier was not fully alert to the human rights imperatives when he signed Canada's treaty, and that appears to be the root of many subsequent problems.<sup>22</sup>

Canada is flagrant in denying detainees their basic legal rights. Under theatre standing orders, the Canadian Forces may detain not only belligerent combatants — the enemy — but also persons "not taking a direct part in hostilities ... who are reasonably believed to be providing

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Foreign Affairs Committee <[http://www.parliament.uk/parliamentary\\_committees/foreign\\_affairs\\_committee.cfm](http://www.parliament.uk/parliamentary_committees/foreign_affairs_committee.cfm)>; see Appendix 3: Memorandum of Understanding Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Islamic Republic of Afghanistan Concerning Transfer by the United Kingdom Armed Forces to the Afghan Authorities of Persons Detained in Afghanistan.

<sup>19</sup> There was however an unusually long delay in signing the British treaty, so although its terms were finalized and it was ready for signature on April 23, 2005 (about eight months before Canada's) it actually did not get signed until September 30, 2006.

<sup>20</sup> See Paul Koring, Brian Laghi and Campbell Clark, "Hillier Pushed Flawed Detainee Plan" *The Globe and Mail* (2 May 2007) A1; Rosie Dimanno, "Hillier Has No Regrets as Furor Grows" *Toronto Star* 3 May 2007 A1; See also CBC News, "Hillier Visits Troops in Afghanistan" 12 March 2007, online: CBC News <<http://www.cbc.ca/world/story/2007/03/12/hillier-afghanistan.html>>; c.f. Dana Priest, "CIA Holds Terror Suspects in Secret Prisons" *The Washington Post* 2 November 2005. General Hillier should have exercised better oversight than he did; at the date that he signed Canada's treaty, it was public knowledge that the Central Intelligence Agency (CIA) interrogated detainees using torture (or "enhanced interrogation techniques," as American euphemize it) in secret prisons in Afghanistan and elsewhere.

<sup>21</sup> Daniel Leblanc, "JTF2 to Hunt al-Qaeda" *The Globe and Mail* (15 July 2005) A1.

<sup>22</sup> *Ibid.*

support” — in other words, the civilian populace.<sup>23</sup> Regardless of the offence, all detainees are held incommunicado, and on General Hillier’s orders, none are allowed lawyers.<sup>24</sup> Despite the explicit promise of the Canadian Forces that detainees will be treated “in accordance with the standards set out in the Third Geneva Convention,” the Forces never actually permit detainees to have the status determination hearings prescribed by that Convention.<sup>25</sup> Accordingly none is afforded any legal process whatsoever in which to plead innocence. None is even entitled to write their families, as the Geneva Conventions allow, and which would in any case reflect common decency. Everything about the detentions is secret, including the names of the detainees, where they were caught, why they were arrested, and even simply the number of detainees to date, which is probably in the dozens, or possibly hundreds.<sup>26</sup> Transparency on these facts, according to General Hillier, would threaten “operational security.”<sup>27</sup> Interestingly, the United States military routinely issues press releases when it arrests Afghan detainees, including even names and photos.<sup>28</sup> It somehow manages to reconcile security with transparency, which the Canadian Forces say they cannot.

There is a clear risk of torture posed when the Canadian Forces detain and transfer persons extrajudicially and secretly. To be clear, there is absolutely no evidence or allegation that the Canadian Forces torture — but there is a mountain of evidence that the Afghan security forces do. According to the Afghan Independent Human Rights Commission (AIHRC), which is a branch of Afghanistan’s own government, torture is “routine:”

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

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<sup>23</sup> See Theatre Standing Order 321A, *supra* note 12 at para. 13.

<sup>24</sup> See *Amnesty*, *supra* note 12, Hameed affidavit at para. 41-45; see *Amnesty*, *ibid.* (Evidence, Letter from General Hillier to Mr. Hameed at Tab BB).

<sup>25</sup> Paul Koring, “Canada to Hand Over Suspects to Kabul” *The Globe and Mail* (24 March 2006) A18; Article 3, Transfer Agreement, *supra* note 10; Third Geneva Convention, *supra* note 6.

<sup>26</sup> See *Amnesty*, *supra* note 12 (Evidence, Detainee Transfer Log (duplicate) at Tab P); the only known estimate of detainees is that 40 were taken and transferred between 2002 and mid-2006. The Canadian Forces released this fact under the *Access to Information Act*. However, since that disclosure, the Canadian Forces have refused to update the number.

<sup>27</sup> Alan Freeman and Jeff Esau, “Hillier Muzzles Military over Detainees” *The Globe and Mail* (9 July 2007) A1.

<sup>28</sup> See generally the website of the Combined Joint Task Force-82 of U.S. Operation Enduring Freedom. There are dozens of press releases concerning detentions on this website, such as this one dated 9 February 2008 in which names and photos appear, online: <<http://cjtf-a.com/index.php/Press-Releases/Detained-Taliban-insurgents-identified.html>>.

confessions from detainees. Forced confessions are clearly in violation of the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR).<sup>29</sup>

In its most recent annual report, published in 2006, the AIHRC wrote:

Torture continues to take place as a routine part of ANP [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.<sup>30</sup>

The AIHRC's observation could not be more relevant; Kandahar is where the Canadian Forces are deployed, and the Afghan National Police (ANP) has been a recipient of Canada's detainees.

The United Nations High Commissioner for Human Rights (UNHCHR), Louise Arbour, has reached a similar conclusion. In 2006, she noted "serious concerns" over reports of torture and similar abuses, which she says are "common." She implicates Afghanistan's National Directorate of Security (NDS), which is that country's secret police, and which currently receives Canada's detainees:

The [NDS is] responsible for both civil and military intelligence, operates in relative secrecy without adequate judicial oversight and there have been reports of prolonged detention without trial, extortion, torture, and systematic due process violations... Complaints of serious human rights violations committed by representatives of these institutions, including arbitrary arrest, illegal detention and torture, are common. Thorough, transparent and public investigations are absent and trials regularly occur without adhering to the due process rights enshrined in the Constitution. Serious concerns remain over the capacity and commitment of these security institutions to comply with international standards.<sup>31</sup>

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<sup>29</sup> AF, Afghanistan Independent Human Rights Commission [AIHRC], *Annual Report 2003-2004* (Kabul, Afghanistan, The Commission, 2004), online: Afghanistan Independent Human Rights Commission <<http://www.aihrc.org.af/AnnualRep.pdf>>.

<sup>30</sup> AF, Afghanistan Independent Human Rights Commission, *Annual Report 2004-2005* (Kabul, Afghanistan, The Commission, 2005), online: Afghanistan Independent Human Rights Commission <[http://www.aihrc.org.af/anl\\_rept\\_2005.pdf](http://www.aihrc.org.af/anl_rept_2005.pdf)>.

<sup>31</sup> Economic and Social Council 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*, UN OHCHR, 62nd Sess UN Doc. E/CN.4/2006/108 (2006).

These reports are not isolated, nor are they old snapshots of a bad situation which has markedly improved. In March 2008, the US State Department affirmed that torture continues, and cited Ms. Arbour and the UN Secretary-General again. Torture is so rampant that even its methods are known in detail:

Torture and abuse included pulling out fingernails and toenails, burning with hot oil, beatings, sexual humiliation, and sodomy. On March 15, the UN Secretary-General released a report noting that in a significant portion of cases ill-treatment and torture had been used to force confessions, and on September 21, released another report stating that the government must investigate allegations of torture of detainees by authorities, especially by the National Directorate of Security (NDS)

The NDS investigated criminal and national security cases and also functioned as part of the intelligence apparatus... UN High Commissioner for Human Rights Louise Arbour, speaking during a November visit to the country, noted her concern regarding transfer of prisoners taken during ISAF operations to the NDS, stating that it “is not a regular law enforcement body and operates on the basis of a secret decree.”...<sup>32</sup>

Anyone in the Canadian government equipped with a computer can download these and other credible reports, and gather that when the Canadian Forces transfer detainees to the NDS, they collaborate with a shady and dangerous organization — one which is “not a regular law enforcement body,” and which answers to a “secret decree” rather than the rule of law. *This* is what the Prime Minister means when he talks of Canadians building the Afghan justice system?

The Harper government has never admitted flaws with the detainee treaty, except under pressure from the press or the courts. Critics of the treaty asked that it be revisited, but as early as April 2006 the government refused to do so.<sup>33</sup> When pressed by opposition members of Parliament on the treaty’s shortcomings, Defence Minister Gordon O’Connor promised all was well. He said the ICRC would follow-up Canada’s transferred detainees. “If there is something wrong with [the detainees’] treatment,” O’Connor promised Parliament, “the Red Cross or Red Crescent would inform us and we would take action.”

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<sup>32</sup> U.S., US Department of State, *Country Reports on Human Rights Practices—2007: Afghanistan*. (Washington, D.C.: Bureau of Democracy, Human Rights, and Labor, 11 March 2008), online: U.S. Department of State <<http://www.state.gov/g/drl/rls/hrrpt/2007/100611.htm>>.

<sup>33</sup> Michael den Tandt, “Ottawa Stands Behind Handover Deal with Afghanistan” *The Globe and Mail* (3 April 2006) A10.

Although what O'Connor said sounded reassuring, it was not the truth, so the ICRC contradicted him. Speaking to a Canadian journalist in March 2007, the ICRC explained it was "not a party" to Canada's detainee treaty, and that it was "not monitoring the implementation of it."<sup>34</sup> In short, if the ICRC discovered torture in Afghan hands, it would not tell Canada.

The unravelling of Minister O'Connor's story should have been no surprise. It has long been the ICRC's policy following prison inspections to discuss the results with the detaining country, in this case Afghanistan, but never to tell others.<sup>35</sup> Yet astonishingly, the Canadian Forces were ignorant of this famous, century-old policy of confidentiality, and senior military officers and bureaucrats advised the Minister in writing that the ICRC would warn Canada if there were problems with detainees.<sup>36</sup> Such an egregious error recalls the sad observation of Canadian military historian, Professor Jack Granatstein: "The [Canadian Forces] has a remarkably ill-educated officer corps, surely one of the worst in the Western world."<sup>37</sup>

O'Connor apologized for misleading Parliament about the ICRC, but soon landed in deeper trouble. In March 2007, *The Globe and Mail* reported that three men the Canadian Forces detained and transferred to Afghan custody disappeared.<sup>38</sup> A month-long search by Canadian military investigators could not locate them, but proved that Afghan custody was an uncertain affair, in which the Afghans violated their treaty obligation to keep accurate records of the whereabouts of all detainees. Pressed to

<sup>34</sup> Paul Koring, "Red Cross Contradicts Ottawa on Detainees" *The Globe and Mail* (8 March 2007) A1.

<sup>35</sup> Alain Aeschlimann, "Protection of Detainees: ICRC Action Behind Bars" (2005) 87:857 *Int'l Rev. Red Cross* 83; see also Caroline Moorehead, "Crisis of Confidence" *Financial Times* (18 June 2005) 18; the ICRC's confidentiality policy is so robust that it famously (rather, infamously) told nobody except the Nazis about the atrocities at Auschwitz, so Canada was very unrealistic to imagine the ICRC would tell it about a small number of possibly tortured detainees in Afghanistan.

<sup>36</sup> Jeff Esau, "Top Military Officers Off Base on Detainee File" *The Globe and Mail* (22 March 2007) A6; like any government minister, O'Connor faces Question Period in Parliament with briefing notes prepared by civil servants. The notes he was given contained the wrong advice from senior officials that "if the ICRC advised [Canada] of some problems with transferred detainees, we would discuss the issue with the Government of Afghanistan." Thus the advisors assumed that the ICRC would advise Canada, notwithstanding its explicit policy to the contrary.

<sup>37</sup> Department of National Defence Canada, *For Efficient and Effective Military Forces* by J. L. Granatstein (25 March 1997) at Section H online: National Defence and the Canadian Forces <<http://www.dnd.ca/site/Minister/eng/Granatstein/gra2engsecintro.html#TOP>>.

<sup>38</sup> Paul Koring, "Canada Loses Track of Afghan Detainees" *The Globe and Mail* (2 March 2007) A1.

explain, O'Connor gave an interview on national television, in which he said Afghan prisons have "a revolving door system," where bribes and tribal influence can procure a detainee's freedom.<sup>39</sup>

Taking Mr. O'Connor at his word, not only were the Canadian Forces very unwise for transferring detainees to Afghan prisons in the face of torture, but if the detainees really were dangerous Taliban fighters, for a few dollars they could escape and resume killing Canadians again.

Although a reasonable strategy at this juncture would have been to abandon the detainee treaty and take control of Canada's detainees, the Canadian Forces declined to do this. Instead, a new agreement was hurriedly signed with the AIHRC — the same organization which had called torture in Afghan prisons "common" — to monitor transferred detainees.<sup>40</sup> To seal the deal, O'Connor paid a courtesy call on the AIHRC in Kandahar, and declared the detainee problem solved.

Well, not quite. The Minister's gesture suddenly thrust the AIHRC's earnest officials under the spotlight, where they confided to journalists that they really had no way of monitoring detainees. AIHRC staff were often refused entry at prisons, and had no money to implement a monitoring program.<sup>41</sup> The Canadian government claimed it was helping the AIHRC with a \$1 million donation, but reporters soon discovered that this was much exaggerated; Canada's annual pledge was closer to \$2,000 (and in arrears at that).<sup>42</sup> Once again, the Canadian Forces had erred; they had first tried to deflect their responsibility for detainees onto the ICRC (a mute watchdog), and were now rightly blamed for trying to foist their responsibility on the AIHRC (a starving watchdog).

Finally, in April 2007, a courageous journalist at *The Globe and Mail*, Graeme Smith, did what the Canadian Forces seemed unable to do; he went outside the wire to monitor detainees. In interviews with thirty men, nearly all gave credible evidence of being arrested by the Canadian

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<sup>39</sup> See Jane Taber, "O'Connor Unsure if Detainees are Missing" *The Globe and Mail* (5 March 2007) A1; O'Connor said on national television "Theoretically in Afghanistan nearly everyone is a member of a tribe and sometimes tribes get their people out of prison, either through influence or through paying fines... they get their people out of prison. So it's quite the revolving-door system in their prisons."

<sup>40</sup> See the exchange of letters between the Canadian Forces and the AIHRC, online <[http://www.dnd.ca/site/afghanistan/aihrc\\_response\\_e.asp](http://www.dnd.ca/site/afghanistan/aihrc_response_e.asp) and [http://www.dnd.ca/site/afghanistan/aihrc\\_letter\\_e.asp](http://www.dnd.ca/site/afghanistan/aihrc_letter_e.asp)>.

<sup>41</sup> Joe Friesen, "O'Connor Likely to Hear of Afghan Concerns at Meeting on Detainees" *The Globe and Mail* (14 March 2007) A18.

<sup>42</sup> Paul Koring, "CIDA Contradicts Ottawa on Funding Afghan Monitor" *The Globe and Mail* (23 March 2007) A1.

Forces.<sup>43</sup> The ex-detainees said the Canadian soldiers treated them well, but many also said that they were tortured in Afghan custody. Smith's report was succinct and brutal:

Most of those held by the NDS for an extended time said they were whipped with electrical cables, usually a bundle of wires about the length of an arm. Some said the whipping was so painful that they fell unconscious.

Interrogators also jammed cloth between the teeth of some detainees, who described hearing the sound of a hand-crank generator and feeling the hot flush of electricity coursing through their muscles, seizing them with spasms.

Another man said the police hung him by his ankles for eight days of beating. Still another said he panicked as interrogators put a plastic bag over his head and squeezed his windpipe.

Torturers also used cold as a weapon, according to detainees who complained of being stripped half-naked and forced to stand through winter nights when temperatures in Kandahar drop below freezing.

The men who survived these ordeals often seem like broken husks. They tell their stories with quiet voices and trembling hands. They can't sleep, they complain of chronic pain and they forget the simplest things, such as remembering to pull down their pants when they use the toilet.<sup>44</sup>

The Afghan officials interviewed by Smith seemed to believe that such torture occurred. As Colonel Shir Ali Saddiqui, the human rights ombudsman for the Kandahar police, explained to Smith, "...people need some torture, because without torture they will never say anything."<sup>45</sup> The AIHRC chief in Kandahar, Abdul Qadar Noorzai, was equally blunt: "The NDS is torturing detainees," he said, adding, "I've heard stories of blood on the walls. It's a terrifying place: dark, dirty, and bloody."<sup>46</sup>

Smith's report was the decisive moment after which a very serious risk of torture among Canada's detainees seemed undeniable. It says much about the judgment of Prime Minister Stephen Harper that he steadfastly continued to deny that the risk existed. Not only did he dismiss the news

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<sup>43</sup> Graeme Smith, "From Canadian Custody into Cruel Hands" *The Globe and Mail* (23 April 2007) A1.

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*

reports as “allegations of the Taliban,” but when questioned by Parliament, he declared, “To date we have no evidence that supports the allegations.”<sup>47</sup>

No evidence? Only one day later, the *Globe and Mail* dropped a bombshell, and produced the evidence to prove that the Prime Minister had not told the truth.

Under the headline, “What Ottawa Doesn’t Want You to Know,” another *Globe and Mail* journalist, Paul Koring, published leaked passages of a report from Canada’s Department of Foreign Affairs and International Trade (DFAIT).<sup>48</sup> Coincidentally, I had months earlier requested the same report using Canada’s *Access to Information Act*; DFAIT at first refused to answer my request, and then grudgingly gave me a very heavily censored version.<sup>49</sup> Koring then compared his leaked and my censored versions of the same report, which proved that what the Prime Minister said his government knew about torture, and what it actually knew about torture, were two radically different things:

~~Despite some positive developments, the overall human rights situation in Afghanistan deteriorated in 2006. Afghanistan still faces immense political, economic, social, and security challenges. These continue to inhibit progress in the field of human rights, democratic development and good governance. Extrajudicial executions, disappearances, torture and detention without trial are all too common.~~

The censored passages are clear evidence that the Canadian government understood that its detainees faced a substantial risk of torture or disappearance — or worse — in Afghan hands. In effect, they prove subjective Canadian knowledge of facts otherwise known objectively, through the UNHCHR, US State Department and AIHRC reports cited above. How the DFAIT censors wielded their black pen is very unsettling, because they covered up knowledge of specific abuses, and disclosed only a weak euphemism about “challenges” that Afghanistan faces. Much as it did in the Maher Arar case, DFAIT here exhibited the dark side of Canada’s culture of politeness, under which we claim to be in favour of open dialogue about problems, so long as the dialogue is controlled and the problems dare not speak their real name.

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<sup>47</sup> Debates of the House of Commons (Hansard), 24 April 2007; Daniel Leblanc, “Harper Stands by O’Connor as Furor Grows” *The Globe and Mail* (25 April 2007).

<sup>48</sup> *The Globe and Mail* (25 April 2007).

<sup>49</sup> Parliament was so outraged by Foreign Affairs’ illegal delay and censorship that its Ethics Committee abandoned all other business to hold numerous hearings on the interference with the report’s disclosure. The hearings took place on various dates in June 2007.

The legal consequences of this cavalier attitude to torture are now starting to be felt. Two renowned Canadian international law professors, Michael Byers and Bill Schabas, denounced the Canadian Forces' detainee transfer scheme to the prosecutor of the International Criminal Court (ICC).<sup>50</sup> Torture is a war crime, but as Professors Byers and Schabas note, under Article 25(3) of the *Rome Statute*<sup>51</sup> anyone who "aids, abets or otherwise assists" in torture also commits a war crime. That is, the torturer and the torturer's helper are both criminals in the eyes of international law. The two professors draw on that observation, in a letter that is as upsetting as it is soundly reasoned, to recommend that the ICC prosecutor investigate General Hillier and Minister O'Connor for war crimes. Even the Federal Court, in a recent judgment, warned that Canadian soldiers "could potentially face sanctions or prosecutions under international law," and that "serious violations of the human rights of detainees could ultimately result in proceedings before the International Criminal Court."<sup>52</sup>

There are also civil consequences. In February 2007, two Canadian non-government organizations (NGOs), Amnesty International Canada, and the British Columbia Civil Liberties Association, applied for judicial review and a mandatory order prohibiting the Canadian Forces from transferring detainees to any destination having a substantial risk of torture; this is the "Amnesty litigation," discussed at length in the next section.<sup>53</sup> This and other litigation remains *sub judice* at this writing, but already the government has filed documents in the Federal Court which shock the conscience. In one document, the Canadian officer responsible for visiting detainees transferred to the Afghans asks for work boots, because she was "walking through blood and fecal matter" on the floor of detention cells.<sup>54</sup> Another document indicates that the Canadian Forces are detaining improbable terrorists, including a seventy-five-year-old man, and several sixteen-year-old boys.<sup>55</sup> The Canadian Forces transferred the boys to Afghan custody, despite a warning by UN officials that the warden of the NDS prison in Kandahar had recently been prosecuted for the "rape

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<sup>50</sup> Letter from Professors Michael Byers and Bill Schabas to Mr. Luis Moreno-Ocampo, Prosecutor of the International Criminal Court, dated 25 April 2007 online: <<http://ceasefireinsider.files.wordpress.com/2007/05/byers-schabas-letter-to-icc-25-april-2007.pdf>> (accessed 22 March 2008).

<sup>51</sup> Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9.

<sup>52</sup> *Amnesty International Canada et al v. Canada (Canadian Forces et al)*, 2008 FC 336, at para. 345-6.

<sup>53</sup> *Amnesty*, *supra* note 12.

<sup>54</sup> See Paul Koring and Alan Freeman, "Afghan Torture: What Ottawa Knew" *The Globe and Mail* (16 November 2007) A1, quoting the relevant document.

<sup>55</sup> *Amnesty*, *supra* note 12 (Evidence, document EV.DRATI.0002.0137 (internal DFAIT email) of Exhibit A of the Affidavit of Debra Bullen); the detention of children and the elderly is noted in the internal DFAIT email.

or attempted rape of a juvenile prisoner.”<sup>56</sup> Worst of all, the documents prove that Canada is transferring detainees not to a justice system, but to a bare prison system without due process thereafter. As Canadian officials admit in internal correspondence, “Some detainees were languishing in custody for up to a year without charges being laid.”<sup>57</sup>

With evidence like this, it is not surprising that the federal government has been embarrassed by the Amnesty litigation. In May 2007, after a year of deflecting concerns or dismissing them as Taliban propaganda, the Attorney General of Canada appeared in the Federal Court only ten minutes before the hearing of an injunction against transferring detainees bearing a new addendum to the detainee treaty.<sup>58</sup> The addendum had been signed that very morning in Kabul and faxed back to Canada in a hurry. What the addendum adds is a new set of follow-up rights that equal, and even exceed, those in the British treaty.<sup>59</sup> *The Globe and Mail* called the addendum a “stunning shift.”<sup>60</sup>

But the new addendum does not change this underlying fact: the Canadian Forces are still transferring detainees to the custody of Afghan institutions such as the NDS, where a substantial risk of torture exists. The new detainee inspections have only reconfirmed that the cause for worry is real. Barely a month after signing the addendum, Canadian officials admitted to visiting at least six detainees who alleged torture, yet detainee transfers went on.<sup>61</sup>

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<sup>56</sup> *Amnesty, ibid.* (Evidence, document EV.DFAIT.0001.0131 of Exhibit A of the Affidavit of Debra Bullen); Canadian officials also noted that the Warden was acquitted by a military court, because “the judge did not see the testimony of juvenile criminals as credible and that it would be impossible for a drunken man in his 50’s to commit the act of rape.”

<sup>57</sup> *Amnesty, ibid.* (Evidence, document EV.DFAIT.0001.0021 of Exhibit A of the Affidavit of Debra Bullen).

<sup>58</sup> Canada, *Rebuilding Afghanistan, Arrangement for the Transfer of Detainees between the Government of Canada and the Government of the Islamic Republic of Afghanistan*, online: Government of Canada, Protecting Canadians, Rebuilding Afghanistan <[http://www.canada-afghanistan.gc.ca/cip-pic/afghanistan/pdf/agreement\\_detainees\\_030507.pdf](http://www.canada-afghanistan.gc.ca/cip-pic/afghanistan/pdf/agreement_detainees_030507.pdf)>.

<sup>59</sup> *Ibid.*; c.f. Transfer Agreement, *supra* note 11; the addendum does not replace, but supplements, the earlier agreement which remains in force.

<sup>60</sup> Paul Koring, “Deal Represents a Stunning Shift” *The Globe and Mail* (4 May 2007) A4.

<sup>61</sup> Murray Brewster, “Canadians Hear Six Claims of Torture from Afghans” *The Globe and Mail* (8 June 2007); Bruce Champion-Smith, “MacKay Admits 6 Afghan Abuse Allegations Exist” *Toronto Star* (9 June 2007) A17; Juliet O’Neill, “Afghan Torture Allegations Increase; Discrepancy Leads to Charge Tories Mised House” *Calgary Herald* (10 June 2007) A8.

The only time that the Canadian Forces stopped transfers, very briefly, was in November 2007, and that happened only because NDS officials were so cavalier (or cruel) that they permitted a Canadian inspector to interview a detainee *in the same room where they stored the torture implements*. The notes of the Canadian inspector on that visit make chilling reading:

When asked about his interrogation the detainee came forward with an allegation of abuse. He indicated that he has been interrogated on [censored] occasions by a group of [censored] individuals. He could not positively identify the individuals [censored]. He indicated that he could not recall the [censored] interrogation in any details as he was allegedly knocked unconscious early on. He alleged that during the [censored] interrogation, [censored] individuals held him to the ground [censored] while the other [censored] beating him with electrical wires and rubber hose. He indicated a spot on the ground in the room we were interviewing in as the place where he was held down. He then pointed to a chair and stated the implements he had been struck with were underneath it. Under the chair, we found a large piece of braided electrical wire as well as a rubber hose. He then showed us a bruise (approx. 4 inches long) on his back that could possibly be the result of a blow.<sup>62</sup>

Despite being introduced to the torture weapons, Canada still never intervened to protect this individual. The Canadian inspector who documented the case said he believed the injuries could be caused by the improvised whips he found – but he did not confiscate the whips from the NDS.<sup>63</sup> There is also no evidence that the Canadian Forces demanded Afghanistan to yield the tortured detainee back into its protection, as the Geneva Conventions allow Canada to do.<sup>64</sup> Nor did Canada ever bother to investigate the incident, and it left that instead to Afghanistan.<sup>65</sup> Eventually the NDS suspended an employee, and satisfied that the “bad apple” had been caught, the Canadian Forces resumed detainee transfers in February 2008.<sup>66</sup>

<sup>62</sup> *Amnesty*, *supra* note 12 (Evidence, email written by the Canadian inspector, Nicholas Gosselin, date censored but identifiable by “KANDH0123” in the subject line, Exhibit 2 of his cross-examination of 21 January 2008). This and similar inspection reports are found on the website of the BC Civil Liberties Association <<http://www.bccla.org/antiterrorissue/DFAIT%20Torture%20Reports.pdf>>.

<sup>63</sup> *Amnesty*, *ibid.* (Cross-Examination of Nicholas Gosselin, 21 January 2008) questions 351 and 364.

<sup>64</sup> Third Geneva Convention, Article 12, *supra* note 6.

<sup>65</sup> *Amnesty*, *supra* note 12 (Affidavit of Brigadier General Peter John Atkinson, sworn 5 March 2008) at para. 10 [Atkinson Affidavit].

<sup>66</sup> Atkinson Affidavit in *ibid.* at paras. 10, 20. One has to wonder about the “bad apple” theory; the same month that the Canadian Forces restarted transfers, the *Globe and Mail*, whose journalists have been unerring so far, reported that Canadian officials had amassed evidence that the Governor of Kandahar province *personally* tortured detainees.

The Federal Court also declined to intervene. During the few months that the Canadian Forces temporarily suspended transfers, Mactavish J. of that Court declined to grant a *quia timet* injunction to prevent the transfers restarting, on the basis that it was speculative when, or even if, transfers might resume.<sup>67</sup> A few weeks later, the transfers did resume. She then struck out the Amnesty litigation, because for a number of technical reasons, she was not persuaded that the *Canadian Charter of Rights and Freedoms* applied to the Canadian Forces when they act extraterritorially.<sup>68</sup> Thus even if the Canadian Forces knowingly transfer detainees to others who commit atrocities on them, the *Charter* won't impose any prior restraint on that crime.

At the same time that Mactavish J. declined to grant a legal remedy, she found that the evidence of atrocities was “very troubling, and creates real and serious concerns as to the efficacy of the safeguards that have been put in place thus far to protect detainees.”<sup>69</sup> Of the temporary halt in detainee transfers, she questioned “whether it is indeed possible to resume such transfers in the future without exposing detainees to a substantial risk of torture.”<sup>70</sup> She doubted “as to what, if any, safeguards can be put into place that will be sufficient.”<sup>71</sup>

In ignoring these judicial warnings and resuming detainee transfers with only minimally improved safeguards, Canada is in essence conducting a grand experiment, but without the usual degree of prudence a civilized nation shows human beings. This, of course, raises grave concerns, but so long as these events happen “over there,” the Federal Court decision places no constitutional limits on the complicity with torture or other atrocities that the Canadian Forces might engage in.

## *2. The Amnesty International – British Columbia Civil Liberties Association Judicial Review*

The supreme law of Canada is the constitution, which includes the

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The evidence was so worrisome that Canada briefed the Red Cross about it, in secret, of course; see Paul Koring, “Ottawa Kept Abuse Charges Against Ally Secret” *Globe and Mail* (1 February 2008).

<sup>67</sup> [2008] F.C.J. No. 198 (QL) *Amnesty International Canada et al v. Canada (Canadian Forces et al)*, 2008 FC 162 [*Amnesty Injunction*].

<sup>68</sup> *Amnesty International Canada et al v. Canada (Canadian Forces et al)*, 2008 FC 336 [2008] F.C.J. No. 356 (QL) [*Amnesty Charter*].

<sup>69</sup> *Amnesty Injunction*, *supra*, note 68 at para. 111.

<sup>70</sup> *Ibid.* at para. 112.

<sup>71</sup> *Ibid.* at para. 113.

*Canadian Charter of Rights and Freedoms*.<sup>72</sup> Not surprisingly, the *Charter's* protections overlap with those in the major human rights treaties, including the Geneva Conventions, the *Convention Against Torture* and so on.<sup>73</sup> It is of course prohibited by the *Charter* for the Canadian state to expose persons to risk of torture or extrajudicial killing; neither is consistent with the *Charter*.

The fundamental question which lies at the heart of the Amnesty litigation, is how far the *Charter* extends abroad and “follows the flag” when the Canadian Forces detain foreigners suspected (rightly or wrongly) of being terrorists or insurgents. This is not a question which has a settled answer under Canadian law, but the danger of not settling it cannot be doubted: look at the incalculable damage that America has done to its reputation by nullifying detainees’ rights in Guantanamo Bay, Bagram Airfield and the gulag of CIA “dark sites.” In our time, history teaches that our closest political and cultural ally distorted the rule of law to detain extrajudicially, to waterboard, to extraordinarily render—even to assassinate.<sup>74</sup> Excessive judicial deference to military and executive power has turned a nation that, in our lifetimes, was regarded as the global paragon of democratic virtue into one that the normally placid ICRC accuses of subjecting detainees to treatment that is “tantamount to torture.”<sup>75</sup> For the Canadian public to have the confidence that such errors will not be repeated by us, our courts cannot be so sanguine; they must set the constitutional limits that the American courts missed.

I find it helpful to approach the emotive and daunting question of detainees’ extraterritorial rights by breaking it down into four simpler pieces, each of which is un-emotive because it already enjoys firm common law support. The relevant sub-questions are (1) whether matters of national defence are justiciable under the *Charter*; (2) whether the *Charter* confers rights on foreign persons; (3) whether the *Charter* prevents atrocities such as torture being carried out on known or suspected terrorists; and (4) whether any of the foregoing answers are set aside

<sup>72</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 [*Charter*].

<sup>73</sup> Third Geneva Convention, *supra* note 6; Fourth Geneva Convention, *supra* note 6; *Convention Against Torture*, *supra* note 6.

<sup>74</sup> Tim Weiner, *Legacy of Ashes: The History of the CIA* (New York: Doubleday, 2007); Philippe Sands, *Lawless World: America and the Making and Breaking of Global Rules—From FDR's Atlantic Charter to George W. Bush's Illegal War* (New York: Viking, 2005); Kermit Roosevelt III, “Application of the Constitution to Guantanamo Bay” (2005) 153 U. Penn. L R 2017; George P. Fletcher, “Black Hole in Guantánamo Bay” (2004) 2 J. Int'l Crim. Justice 121;

<sup>75</sup> Neil A. Lewis, “Red Cross Finds Detainee Abuse in Guantánamo” *New York Times* (30 November 2004) A1.

because of considerations of extraterritoriality. The rest of this paper is dedicated to these four questions.

It is already decided that the *Charter* applies to Canada's powers to make international agreements for national defence. In the case of *Operation Dismantle v. the Queen*, peace groups litigated and sought to declare unconstitutional an arrangement that allowed the US to test cruise missiles in Canadian airspace.<sup>76</sup> The applicants contended that such testing would tend to increase the risk of nuclear conflict, and to violate the *Charter's* right to life. The government responded that international military affairs are matters of high diplomacy, and raised political issues that are non-justiciable under the *Charter*.

The Supreme Court of Canada reached a split decision. The applicants were unable to demonstrate that cruise missile testing increased the risk of nuclear war, but the government failed in its effort to exempt its conduct of national defence from the *Charter*. In taking jurisdiction, the Court rejected the government's argument firmly:

The question before us is not whether the government's defence policy is sound but whether or not it violates the appellants' rights under ... the Charter of Rights and Freedoms. This is a totally different question. I do not think there can be any doubt that this is a question for the courts... I do not think it is open to [the Court] to relinquish its jurisdiction either on the basis that the issue is inherently non-justiciable or that it raises a so-called "political question."<sup>77</sup>

*Operation Dismantle* is controlling precedent for the proposition that an infringement of the *Charter* is justiciable even if it concerns international defence arrangements.

It also is long decided that the *Charter* applies to foreign persons, like Afghans. The Supreme Court of Canada first dealt with the *Charter* rights of foreigners in *Singh v. Canada (Minister of Employment and Immigration)*.<sup>78</sup> In particular, the Court held in *Singh* that before a foreign refugee claimant could be deported, the *Charter* required that he or she be afforded an oral hearing. Later, in *Andrews v. Law Society of British*

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<sup>76</sup> [1985] 1 S.C.R. 441, 18 D.L.R. (4th) 481 [*Operation Dismantle* cited to S.C.R.].

<sup>77</sup> *Ibid.* at 472, *per* Wilson J.; see also *ibid.* at 459, *per* Dickson J. for the majority: "I agree in substance with Madame Justice Wilson's discussion of justiciability and her conclusion that the doctrine is founded upon a concern with the appropriate role of the courts as the forum for the resolution of different types of disputes. *I have no doubt that disputes of a political or foreign policy nature may be properly cognizable by the courts...*" [emphasis added].

<sup>78</sup> [1985] 1 S.C.R. 177, 17 D.L.R. (4th) 422.

*Columbia*, which dealt with the *Charter* rights of a foreign lawyer, the Court explained in general terms why discrimination based on nationality normally will be unconstitutional:

Relative to citizens, non-citizens are a group lacking in political power and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated. They are among “those groups in society to whose needs and wishes elected officials have no apparent interest in attending” ... While legislatures must inevitably draw distinctions among the governed, such distinctions should not bring about or reinforce the disadvantage of certain groups and individuals by denying them the rights freely accorded to others.<sup>79</sup>

The principles in *Singh* and *Andrews* inure to the advantage of Canada's Afghan detainees. *Singh* has as its ratio that foreigners, even those without a right of abode in Canada, are entitled to due process rights if their life, liberty or security of the person is implicated. *Andrews* reasons that where foreigners begin at a disadvantage, Canada should not entertain measures which have the effect of reinforcing their disadvantage. The *Singh* principle would suggest that the Canadian Forces act illegally when they transfer detainees without the procedural entitlement to a hearing or representation by a lawyer. The *Andrews* principle argues that where Afghans are already disadvantaged by their circumstances — and indeed, the reason the Canadian Forces were sent to Afghanistan is to *improve* those circumstances — it is totally wrong for the Forces to impose measures on detainees which build on existing disadvantages, as by transferring them to the Afghan NDS, who tortures. Thus whether detainees claim procedural or substantive remedies under the *Charter*, the fact they are foreigners is no basis to disentitle them.

The most important rights cited in the Amnesty litigation are those under section 7 of the *Charter*. This section is both on-point in describing the threat torture poses to persons, and is useful because the Supreme Court has held it confers both procedural and substantive rights and remedies.<sup>80</sup> Section 7 reads:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.<sup>81</sup>

<sup>79</sup> [1989] 1 S.C.R. 143 at 152, 56 D.L.R. (4th) 1 [*Andrews* cited to S.C.R.].

<sup>80</sup> *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, 24 D.L.R. (4th) 536.

<sup>81</sup> *Charter*, *supra* note 62, s.7.

Section 7 has been applied extensively to guard against attempts by Canadian officials to transfer a person to another country's control in the face of a substantial and serious risk to that person's well-being, by, for example, extradition of accused criminals, *refoulement* of refugees, or any analogous mode of transfer. In one case, Section 7 was interpreted as forbidding the extradition if a person charged with a capital offence to another country, if that country cannot give a reliable assurance that the death penalty will never be imposed.<sup>82</sup> This rule is not limited to death penalty cases, and as the Supreme Court has written, "There are ... situations where the punishment imposed following surrender — torture, for example — would be so outrageous to the values of the Canadian community that the surrender would be unacceptable."<sup>83</sup> Thus if a person would face a substantial risk of torture, section 7 is triggered.

The Supreme Court's presumption against transferring a detainee to face the substantial risk of torture is strong — so strong that even terrorists have this legal protection. In *Suresh v. Canada (Minister of Citizenship and Immigration)*, which was decided only months after the hijackings of September 11, 2001, the Supreme Court was called on to deport a refugee back to his homeland of Sri Lanka.<sup>84</sup> Suresh was living in Canada as a status refugee, when he got the attention of the Canadian Security Intelligence Service (CSIS) who believed that he was a "big fish" in a terrorist organization.<sup>85</sup> Based on CSIS findings, immigration authorities sought to have Suresh deported. He protested that Sri Lanka would torture him, and literally on the day of his return, he won an interlocutory injunction.<sup>86</sup>

On appeal, the Supreme Court of Canada quashed the deportation. Even if Suresh did belong to a terrorist organization operating on Canadian soil, the Court reasoned, he faced a substantial risk of torture and was entitled to procedural rights in the form of a proper hearing before deportation could proceed. In reaching this conclusion, the Court weighed evidence that Sri Lanka practices torture on its opponents against the evidence that harboring Suresh in Canada endangered national security. As a unanimous Court wrote of that balance:

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<sup>82</sup> *United States v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283, 195 D.L.R. (4th) 1.

<sup>83</sup> *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779 at 832, 84 D.L.R. (4th) 438, *per* La Forest J., concurring.

<sup>84</sup> 2002 SCC 1, [2002] 1 S.C.R. 3, 208 D.L.R. (4th) 1 [*Suresh* SCC cited to SCR].

<sup>85</sup> *Suresh v. Canada* (1998), 38 O.R. (3d) 267 (Ont. Ct.J (Gen. Div.)), at 271, 77 A.C.W.S. (3d) 163 [*Suresh* cited to O.R.].

<sup>86</sup> *Ibid.*

In Canada, the balance struck...must conform to the principles of fundamental justice under s. 7 of the Charter. It follows that insofar as the Immigration Act leaves open the possibility of deportation to torture, the Minister should generally decline to deport refugees where on the evidence there is a substantial risk of torture... [The] fundamental justice balance under s. 7 of the Charter generally precludes deportation to torture when applied on a case-by-case basis.<sup>87</sup>

*Suresh* is controlling precedent for the proposition that transferring a person — even a terrorist — to the custody of another state where there is a substantial risk of torture will generally violate the *Charter*, unless it is accompanied by measures to ensure procedural fairness, such as a hearing. Very importantly, the applicant need not lead evidence that he or she specifically will be tortured, as in most cases this will be impossible to prove without already exposing the person to the risk. The Supreme Court quashed *Suresh*'s deportation based on its finding that he would be at a substantial risk of torture if returned to Sri Lanka, and the only evidence the Court cites is an Amnesty International report, documenting other allegations or instances of torture upon foes of the government. In short, the Court steered clear of requiring *subjective* evidence that *Suresh* himself would be tortured, and the burden of proof is only to show generalized or *objective* evidence of a substantial risk of torture.

For Afghanistan, the objective evidence that a substantial risk of torture exists in detention is overwhelming. Recall the reports from the AIHRC, the UNHCR, the US State Department, and Canada's own DFAIT; all state that torture is common in Afghan detention facilities. The high credibility of those sources, and the striking consistency in their findings, far surpasses the single Amnesty International report that the Supreme Court accepted in the *Suresh* case. Doubtless Afghanistan has given Canada its diplomatic assurance that it will not torture detainees, but the meaning of so many reports is that it is a recidivist state whose assurance cannot be relied on. If Afghanistan could be trusted not to torture, then why has it so many times broken the *Convention Against Torture*, which, being international law, is arguably the solemnest diplomatic assurance of them all?<sup>88</sup>

In my opinion, the reasons of the Supreme Court in *Suresh* must apply to the situation of persons detained by Canadian Forces in Afghanistan.

<sup>87</sup> *Suresh SCC*, *supra* note 84 at 46-47.

<sup>88</sup> The Federal Court recently heard an extradition case in which China offered a diplomatic assurance not to torture a person whose return was sought from Canada. Wisely, de Montigny J. rejected that diplomatic assurance and the deportation. His reasons reviewed the many reports on torture in China, and noted that "there appears to be a growing consensus that diplomatic assurances should not be sought when the practice of torture is sufficiently systematic or widespread." He also explained:

The only possible distinction of importance is one of *situs*; Suresh was in Canadian custody in Toronto at the time of his proposed deportation, while the detainees are in Canadian custody in Kandahar when they are transferred. Should *situs* — and I am purposefully avoiding the loaded term “extraterritoriality” until later in this paper — actually matter?

To answer this question, it helps to take a purposive approach to the *Charter*. Probably the *Charter*'s most basic truth, encapsulated in s. 1, is that no individual's right exists in a vacuum, and the individual's right is always limited by Canadian society's interests. In both the *Suresh* case and the Amnesty litigation, a purposive approach justifies Canadian society detaining and transferring persons, where this makes society safer from terrorism.

Now, while that last sentence is surely uncontroversial, it has a possibly surprising corollary: the *situs* of Suresh in Canada supports *Charter* protection less, and not more, than the *situs* of the detainees in Afghanistan. Why? Recall that Suresh was a known, confirmed, definite member of a terrorist organization — a fact that was found by the lower courts — and until his arrest, this known terrorist lived and moved freely in Toronto. By comparison, Canada's detainees in Afghanistan are located some 11,000 kilometers away in Kandahar. Further, it is not even clear that the Afghan detainees are terrorists at all; certainly the Canadian Forces never give them a hearing at which their status is declared; to the contrary, the Federal Court has ruled that detainees as a category include “individuals who may have no active role in hostilities.”<sup>89</sup>

The only logical conclusion to draw from this comparison is that Canadian society's interests were *more* threatened by Suresh, being a known terrorist in Canada's most populous city, than by the Afghan detainees, being uncertain terrorists on the other side of the planet. It therefore stands to reason that if deporting Suresh to a substantial risk of torture without due process was unjustified under the *Charter*, *a fortiori* transferring detainees to a substantial risk of torture without due process must also be unjustified. The purposive approach of balancing individual

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The logic behind such a stand is easy to grasp. If a country is not prepared to respect a higher legal instrument that it has signed and ratified - in this case, the UN Convention Against Torture, why would it respect a lower-level instrument such as a diplomatic note, that is not binding in international law and not enforceable?

See *Lai v. Canada (Citizenship and Immigration)*, 2007 FC 361, (2007), 307 F.T.R. 1 at paras. 136-138.

<sup>89</sup> *Amnesty Charter*, *supra* 68 at para. 54. Doubtless some detainees in the category are highly dangerous, but because the Canadian Forces refuse to give them a hearing, there is no just process to single them out.

rights against Canadian society's interests therefore produces a surprising result, but one which has the virtue of reason and logic.

Viewed in this dispassionate way, the *Charter* must apply to detainee transfers in Afghanistan, or else *Suresh* is throwaway case law. War is not dispassionate, however, and tends to excite nationalism and xenophobia to an extraordinary degree. That is perhaps why the Canadian Forces are so reluctant to see the *Charter* applied to their enemies, and why a sizeable proportion of the Canadian public will never accept that detainees — who are described by the leader of the Forces as “detestable murderers and scumbags” — are entitled to *Charter* rights. Nevertheless, it would be an error to let such sentiments determine jurisprudence, and override the long-settled principle that an individual's *Charter* rights are limited by Canadian society's interests alone.

Based on fundamental *Charter* principles and section 7 jurisprudence, the Amnesty litigation should therefore succeed, and it is worthwhile at this juncture to review the reasons. First, the issues raised by Afghan detainees are justiciable under the principle in *Operation Dismantle*, even if they do implicate national defence. Second, the foreign nationality of the detainees is irrelevant, since *Singh* and *Andrews* extend both procedural and substantive *Charter* rights to foreigners. Third, the summary transfer of detainees to the custody of known torturers is unconstitutional, because *Suresh* says that where there is a substantial risk of torture, the *Charter* requires procedural and/or substantive fairness before any transfer may occur. It is immaterial in the analysis that the Afghan detainees are said to be “terrorists,” because assuming for the sake of argument that that is what they are, *Suresh* certainly was a terrorist and the Supreme Court held that he was entitled to *Charter* rights.

All these *Charter* principles and jurisprudence, it is conceded, might be attenuated by the fact that Canada is at war. It would be surprising if detaining a person in Calgary, say, gave rise to exactly the same *Charter* duties as detaining a person in Kandahar; and this flows from the fact that during war, society possesses additional and novel interests that must sometimes prevail over individuals' rights. But even if war attenuates one's *Charter* rights, it certainly does not logically follow that war generally extinguishes them. The text of the *Charter* is carefully worded, and is explicit in the few cases where war trumps a *Charter* right: s. 4(2) expressly allows Parliament to suspend voting rights in times of war, and s. 11(f) creates an exception to the right of trial by jury for courts martial. By the principle of *inclusio unius est exclusio alterius*, one has to assume that other *Charter* rights such as s. 7 continue undiminished, except to the extent that the state meets its usual burden under s. 1 to show that an

infringement of rights is demonstrably justified in a free and democratic society.<sup>90</sup>

To this point, my analysis shows that the Canadian government is unlikely to win the Amnesty litigation by appealing to any fundamental *Charter* principles. If it does not emphasize more technical arguments in its defence, it should lose. None of the possible technical arguments appear, however, to support the Canadian government's position either.

Probably the Canadian government's strongest technical argument is that the *Charter* does not apply when Canadian Forces actions take place outside Canada and within the sovereign territory of Afghanistan. The government has argued in the Federal Court that this is the case, but is it true that extraterritorial military action is outside the jurisdiction of the *Charter*?<sup>91</sup> To answer this question, it helps to break it down into two inquiries: (1) whether the *Charter* applies to the actions of the Canadian Forces; and (2) whether the *Charter* applies to those actions extraterritorially. The answer to both questions is yes – the *Charter* applies.

The Supreme Court first decided that the *Charter* binds the actions of the Canadian Forces in *R. v. Généreux*.<sup>92</sup> Corporal Généreux was charged with trafficking of drugs and desertion, offences for which he was tried and convicted by court martial. On appeal, Généreux argued that his trial was unfair, because the court martial system was controlled by the administrative branch of the military, and could not operate with the independence and impartiality that the *Charter* requires for criminal tribunals. The Court agreed, and ordered a new trial in which the *Charter* standards would be observed. In short, the Court applied the *Charter* to the actions of the Canadian Forces.

Some might try and distinguish *Généreux*, on the ground that although the *Charter* applies to criminal environments such as courts-martial, it does not apply to the Canadian Forces' administrative action. Yet in *Liebmann v. Canada (Minister of National Defence)*, the Federal Court of Appeal has held that the *Charter* applies to administrative action too.<sup>93</sup>

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<sup>90</sup> Section 1 is discussed at the conclusion of this paper.

<sup>91</sup> See *Amnesty*, *supra* note 12 (Factum of the Crown, interlocutory hearing, dated 3 May 2007 at para. 64); *Amnesty*, *ibid.* (Evidence, document EV.DRATI.0002.0137 (internal DFAIT email) of Exhibit A of the Affidavit of Debra Bullen).

<sup>92</sup> [1992] 1 S.C.R. 259, 88 D.L.R. (4th) 110.

<sup>93</sup> 2001 FCA 243, [2002] 1 F.C. 29, 273 N.R. 332 (F.C.A.) [*Liebmann* cited to F.C.].

Lieutenant Liebmann was an accomplished officer, whose superiors intended to deploy him to a prestigious post within a UN-sanctioned mission in the Persian Gulf. All was in order, until someone in Canadian Forces headquarters spotted a problem with Liebmann's papers; he was a Jew. Convinced that a Jewish officer would not be well-received in the Middle East, the Canadian Forces decided not to offer the post to him.

Liebmann sued the Canadian Forces on the basis that the *Charter* prohibits discrimination based on religion. He lost the *Charter* argument at trial, but won at the Federal Court of Appeal. The Court reasoned that since "the impugned decision was made under delegated statutory authority" the Canadian Forces had to comply with the *Charter*.<sup>94</sup>

*Liebmann* is authority that nearly *any* operational decision of the Canadian Forces is subject to the *Charter*, because nearly everything the Forces do is performed under statutory authority.<sup>95</sup> The officers who decided not to deploy Liebmann were acting under statute, and specifically, under powers in the *National Defence Act*.<sup>96</sup> That Act and its associated regulations empower the Chief of the Defence Staff to issue and to delegate:

... all orders and instructions to the Canadian Forces that are required to give effect to the decisions and to carry out the directions of the Government of Canada or the Minister [of National Defence].<sup>97</sup>

The statutory authority could not be broader — it covers literally "all orders and instructions" the military must carry out — and so following *Liebmann*, those orders and instructions are susceptible to judicial review on *Charter* grounds.

Thus at this writing, the *Charter* does apply to the Canadian Forces' actions, and this is such settled law as to be indisputable. All that remains

<sup>94</sup> *Ibid.* at 44.

<sup>95</sup> See e.g. *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, 59 D.L.R. (4th) 416; the statutory authority test is a long-established doctrine for deciding when the *Charter* will apply.

<sup>96</sup> R.S.C. 1985, c. N-5 [*National Defence Act*]; *Liebmann*, *supra* note 80 at 44.

<sup>97</sup> *National Defence Act*, *ibid.*, s.18(2); see also Canada, Department of National Defence, *Queen's Regulations and Orders for the Canadian Forces* online: National Defence QR&O <[http://www.admfincs.forces.gc.ca/qr\\_of/intro\\_e.asp](http://www.admfincs.forces.gc.ca/qr_of/intro_e.asp)> [QR&O]; note that the powers granted to the Chief of the Defence Staff by the *National Defence Act* are routinely delegated to lower ranks in accordance with the QR&O, which are highly detailed as to the mode of delegation. For example "the arrest or custody of persons" is delegated to the ranks of Military Police, in accordance with chapter 22.01(2)(d) of the QR&O.

to be considered is whether those actions gain some immunity from the *Charter*, merely by virtue of being conducted extraterritorially and beyond Canada's borders. Do *Charter* obligations, in other words, follow the military and the flag?

Before answering that, I have to digress briefly. The case law that I am about to cite to answer this question, particularly *R. v. Hape*, is not case law that I think enduring. To explain how the majority of the Supreme Court erred in *Hape* is too involved an exercise for this paper, but I have written on it elsewhere for advanced readers who are interested in extraterritorial human rights doctrine.<sup>98</sup> Briefly, the Court's majority reasoned in *Hape* that in extraterritoriality cases the *Charter's* reach must be interpreted in light of international law, which is a desirable result. Unfortunately the majority misunderstood international law, and cited international law authority selectively and sometimes even for flagrantly mistaken propositions. Because of these errors, the Court in *Hape* modified Canada's extraterritoriality doctrine in such a way that it bears no resemblance to analogous cases of the European Court of Human Rights, the International Court of Justice, and other meritorious tribunals.<sup>99</sup> When eventually the Court revisits *Hape*, as it has been asked to do in an appeal now pending, the judges of the Court may well resolve their disagreements and change the doctrine of the *Charter's* extraterritorial application markedly.<sup>100</sup>

For the purposes of this paper, however, I must take the law as it now is, and approach the question of the *Charter's* extraterritorial application at face value. Even if the doctrine in *Hape* is some day corrected to be more in line with the doctrine of other courts, it would still be true that the

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<sup>98</sup> Amir Attaran (2008), "Have Charter, Will Travel? Extraterritoriality and Canadian Constitutional Law after *R. v. Hape*," forthcoming in print.

<sup>99</sup> Briefly, all these other courts adopt a form of control test to deciding extraterritorial human rights questions. Such tests come in many flavours, but generally aim at this question: Does an organ of the state exercise *de facto* extraterritorial control over persons or over a territory? If the answer to that question is yes, then the court will take jurisdiction and apply its equivalent of the *Charter* to the situation. The control test is a corollary of the international law rules of state responsibility, which deem a country shall be responsible for the conduct of its state organs, such as the military, whenever they exercise *de facto* extraterritorial control over persons or an area. Although Bastarache J. of the Supreme Court has recommended using a control test when deciding the extraterritorial reach of the *Charter*, his idea has never taken hold, so that Canada now is totally outside the doctrinal mainstream on such cases. For more on the subject, see *ibid.*

<sup>100</sup> *Minister of Justice, et al. v. Omar Ahmed Khadr*, SCC docket 32147. This appeal was argued before the Court on 26 March 2008, with both the appellant and respondent arguing that certain parts of *Hape* were incorrect. Judgment is reserved at this writing.

transfer of detainees to the custody of known torturers is unconstitutional, just for different reasons.

That said, *R. v. Cook*<sup>101</sup> and *R. v. Hape*<sup>102</sup> are the two major Supreme Court decisions which deal with the application of the *Charter* to the extraterritorial actions of Canadian law enforcement officers. The cases reach opposite conclusions; the Court in *Cook* held that the *Charter* applied extraterritorially, but in *Hape*, it held that it did not. Nevertheless, when read together, the two cases leave almost no doubt that the *Charter* applies extraterritorially when the Canadian Forces detain Afghan persons.

*Hape* is the more recent decision, and the latest word from the Supreme Court on *Charter* extraterritoriality.<sup>103</sup> It arose when a Canadian was convicted for laundering money through his business in the Turks and Caicos Islands. The conviction rested on evidence that Turks and Caicos and Canadian police had acquired using unusual methods, by covertly breaking and entering into Hape's place of business, for example. The Canadian police engineered the espionage, even bringing in technicians to defeat the security systems and to pick the locks, but at all times they agreed the investigation was conducted on the authority of a single Turks and Caicos policeman, who promised to obtain lawful search warrants. Whether he did so was cast in doubt, because at the trial the prosecution failed to authenticate and enter the warrants into evidence. Hape sought to have his conviction overturned because the evidence against him was obtained in an apparently warrantless manner — an unlawful search and seizure, which violated his *Charter* rights.

The Court in *Hape* decided not to apply the *Charter* extraterritorially. The Court ruled that the Canadian police had to abide by the legal standards of the Turks and Caicos when operating cooperatively there; respect for the sovereign equality of the Turks and Caicos required it. The Court held that unless the Turks and Caicos consented, it would breach the comity of nations for Canada to impose its *Charter* standards on this cooperative, international policing action.

At first blush, the doctrine in *Hape* seems to go against the Amnesty litigation; it seems to argue that the *Charter* does not apply to the cooperative work of Canadian military police when they detain persons and transfer them to the Afghan authorities. But the following wording in *Hape*, and especially the passage I italicize, makes it certain that the *Charter* does apply in just those circumstances:

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<sup>101</sup> [1998] 2 S.C.R. 597, 164 D.L.R. (4th) 1 [*Cook* cited to S.C.R.].

<sup>102</sup> 2007 SCC 26, 280 D.L.R. (4th) 385 [*Hape* cited to D.L.R.].

<sup>103</sup> *Ibid.*

The principle of comity does not offer a rationale for condoning another state's breach of international law...

Mutuality of legal assistance stands on ... two pillars. Comity means that when one state looks to another for help in criminal matters, it must respect the way in which the other state chooses to provide the assistance within its borders. *That deference ends where clear violations of international law and fundamental human rights begin.*<sup>104</sup>

Later, the Court describes comity as a “permissive rule” that allows Canadian officers to participate in investigations abroad, under the laws of the foreign state. But the Court also qualifies the permissive rule as follows:

[T]here is an argument that comity cannot be invoked to allow Canadian authorities to participate in activities that violate Canada's international obligations... [T]he principle of comity may give way where the participation of Canadian officers in investigative activities sanctioned by foreign law would place Canada in violation of its international obligations in respect of human rights. In such circumstances, the permissive rule might no longer apply and Canadian officers might be prohibited from participating.<sup>105</sup>

*Hape* does not rescue the Canadian Forces from the Amnesty litigation; it may in fact make their position unwinnable. The warrantless search and seizure at issue in *Hape* did not violate Canada's international obligations in respect of human rights, but the transfer to torture at issue in the Amnesty litigation certainly does. In fact, the crime of torture is considered the highest possible violation of human rights, and its prohibition in international law is so serious that it is *jus cogens*.<sup>106</sup> Further, it must not be forgotten that torture is a crime in Afghanistan's law as well. *Hape* has as its *raison d'être* that Canada not apply the *Charter* when Canadian officers cooperate extraterritorially with the *lawful* actions of a foreign sovereign, and it would be a preposterous distortion to extend *Hape* so that Canada not apply the *Charter* when Canadian officers cooperate extraterritorially with *unlawful and criminal* actions of a foreign sovereign. Bastarache J's concurring judgment in *Hape* underscores this obvious point, when he writes that

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<sup>104</sup> *Ibid.* at 411[emphasis added].

<sup>105</sup> *Ibid.* at 434.

<sup>106</sup> For readers not familiar with the topic, *jus cogens* is the ultimate category of international law. Rules that are *jus cogens* are universal in the sense of being accepted by all states; are never susceptible to derogation; and are only able to be modified (though they never are) by a subsequent rule of *jus cogens* status. Examples of *jus cogens* are the prohibitions on genocide, crimes against humanity, slave trading, and of course torture. See Ian Brownlie, *Principles of Public International Law*, 5th ed. (Oxford: Oxford University Press, 1998) at 514-17.

“flagrant breaches of fundamental human rights, such as torture, would not be accepted even if authorized by local laws.”<sup>107</sup>

Succinctly put, *Hape* does limit the *Charter's* extraterritorial reach, but does not confer a license for Canadian officers to lend assistance to the crimes of other sovereign countries while escaping *Charter* scrutiny. Rather, *Hape* applies until the moment that Canadian officers brush up against a foreign sovereign's illegal conduct, whereupon as the majority of the Court writes, “The permissive rule might no longer apply and Canadian officers might be prohibited from participating.” Detaining Afghans therefore is permitted to the Canadian Forces, but transferring them in the face of a substantial risk of torture is not.

Remarkably, the Supreme Court in *Hape* has already anticipated how the *Charter* could apply to the Amnesty litigation. It did so in *obiter dicta*, at a date when the Amnesty litigation had been filed but never argued. As Binnie J. wrote in *Hape*:

Recently, claims have been launched in Canadian courts by human rights activists (including Amnesty International Canada and British Columbia Civil Liberties Association) against the federal government asking the courts to extend Charter protections (as well as international human rights and humanitarian law) to individuals detained by the Canadian Forces operating in Afghanistan... The allegation against the Minister of National Defence and the Attorney General of Canada (both civilian authorities) is that detainees were given into the custody of the security personnel of the government of Afghanistan without adequate safeguards (see Federal Court File Number T-324-07). We have no idea if there is any merit in any of these claims, but at some point we are likely to be called upon to address them... I mention these matters simply to illustrate the sort of issues that may eventually wind up before us and on which we can expect to hear extensive and scholarly argument in relation to the extraterritorial application of the Charter.<sup>108</sup>

This is interesting *obiter dicta*, because while Binnie J. does not prejudge the merits of the Amnesty litigation, he notes that the Supreme Court is “likely to be called upon” to address the issue of detainees' treatment someday. It therefore is surprising that months after such *obiter dicta*, the Attorney General of Canada brought a motion in the Federal Court at the case management stage to strike out the Amnesty litigation entirely. The Attorney General's notice of motion claimed the Amnesty litigation

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<sup>107</sup> *Ibid.* at 463.

<sup>108</sup> *Ibid.* at 465.

“should not be justiciable,” and “is so clearly improper as to be bereft of any possibility of success.”<sup>109</sup> The Attorney General lost that motion.<sup>110</sup>

Having dealt with why *Hape* does not preclude the application of the *Charter* when the Canadian Forces act extraterritorially to transfer detainees to a substantial risk of torture — the negative case, as it were — I now turn to the positive case, of why the *Charter* forbids that kind of extraterritorial wrongdoing.

The starting point in this analysis is the text of the *Charter* itself, which at s. 32(1)(a) reads that it applies “to the Parliament and government of Canada in respect of all matters within the authority of Parliament.” The detention and handling of foreign persons by the Canadian Forces is certainly such a matter. Indeed, Canada’s statute law already applies to the military overseas; the *National Defence Act* and the *Geneva Conventions Act* are the most relevant Parliamentary enactments (and recall the promise, which is not fulfilled, of the Canadian Forces to apply the standards of the Third Geneva Convention to the detainees).<sup>111</sup> There is also subordinate legislation, such as the *Prisoner-of-War Status Determination Regulations*, which set out a comprehensive scheme for foreign military detainees to assert their Geneva Convention rights before a tribunal (and recall that the Canadian Forces in Afghanistan are denying detainees the privilege of a hearing before that tribunal).<sup>112</sup> It would be deeply ironic if the extraterritorial handling of detainees by the Canadian Forces was a matter within Parliament’s authority by dint of these ordinary statutes and lowly regulations, but not “within the authority of Parliament” for the purposes of s. 32(1)(a) of the *Charter*. A proposition like that turns the supremacy of constitutional law on its head — and so, it has got to be wrong.

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<sup>109</sup> See *Amnesty*, *supra* note 12 (Respondents’ Notice of Motion to Strike, filed on 26 July 2007); this Notice of Motion to Strike forms part of a growing, disturbing trend in which the Attorney General of Canada attempts to strike claims on the grounds that they are frivolous and vexatious, almost as a matter of course. These motions are rarely successful, but the Attorney General seems to have adopted a shotgun mentality where if only occasionally a case is dismissed, or if only occasionally the plaintiff might withdraw because of costs or delay, then it is worthwhile. It is suggested that the Federal Court should take a much tougher line on this type of practice, perhaps by awarding special or exemplary costs.

<sup>110</sup> *Amnesty*, *ibid.*

<sup>111</sup> *National Defence Act*, *supra* note 97; *Geneva Conventions Act*, R.S.C. 1985, c. G-3.

<sup>112</sup> S.O.R./91-134.

One sees s. 32(1) applied to take the *Charter* extraterritorially in *R. v. Cook*, which was the leading case of its kind for a decade prior to *Hape*.<sup>113</sup> Since there is much confusion about whether *Cook* is still good law, its status must be addressed before proceeding.

In *Hape*, the members of the Court all expressed the opinion that the *Cook* decision had doctrinal weaknesses. The Court therefore questioned if *Cook* should be overruled. After a lively discussion kicked off by Binnie J., who objected strenuously to overruling *Cook* (he wrote separate, concurring reasons explaining why the Court should not do so), the majority of the *Hape* Court bowed, and their reasons do not talk of overruling *Cook* but merely decide to “rethink and refine” it.<sup>114</sup>

Since rethinking and refining a case falls short of overruling it, one must conclude that *Cook* remains good law, and it coexists with *Hape* despite some lingering contradictions between the two cases. *Cook* and *Hape* each stand for a different doctrine of how the *Charter* may apply extraterritorially. Succinctly put, where *Hape* hinges on *comity* and the *consent* by a foreign sovereign to the *Charter's* application, *Cook* hinges on the *control* exerted on one's person by Canadian officers bound by the *Charter*. These different terms — *comity* and *consent* in *Hape*, and *control* in *Cook* — represent two separate paths toward skinning the *Charter's* extraterritorial cat, and for now, some sets of facts will be better decided under one doctrine than the other. The next Supreme Court case on *Charter* extraterritoriality will probably have the difficult task of fitting the two cases together harmoniously, but that is another subject.

In *Cook*, the Supreme Court had to decide on the admissibility of evidence that Canadian officers gathered extraterritorially. Members of the

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<sup>113</sup> *Cook*, *supra* note 101.

<sup>114</sup> *Hape*, *supra* note 102; the judicial discussion unfolds like this: LeBel J., writing for the court's majority, expresses the view at 426 that “*Cook* is subject to a number of difficulties and criticisms, both practical and theoretical.” This leads Binnie J. in his concurring reasons to complain that LeBel J. “effectively overrules *Cook*...” (at 464), which he pointedly refuses to endorse because it would be a “premature pronouncement” (at 464) and because it would be unwise to “foreclose *Charter* options that are now open ... under the flexible principles enunciated in *Cook*” (at 468). LeBel J. then replies to Binnie J., and gives an assurance that overruling *Cook* is not his intention; and as LeBel J. explains at 431, his judgment intends merely to “rethink and refine ... the law when confronted by jurisprudence that has demonstrated practical and theoretical weaknesses.” Since obviously rethinking and refining the law amounts to less than overruling it, there can be no doubt that the possibility of overruling *Cook* was considered by the Justices, who decided to stop short of doing so. One can only conclude that despite their obvious incompatibilities, both *Cook* and *Hape* are good law for the moment, and that the Court will explain in a future case how it wishes to proceed.

Vancouver police force, acting in connection with a Canadian extradition request, traveled to the United States where they interrogated an American citizen in a New Orleans prison. During the interrogation, the Canadian police informed Cook of his right to counsel, but only in a confusing, misleading manner, and not in the manner that the *Charter* requires. He appealed, and sought to have the interrogation evidence excluded.

The *Cook* case presents fascinating parallels with the Amnesty litigation: Canadian officers (Vancouver police or Canadian military police) were physically present on the territory of another sovereign (the United States or Afghanistan) where they interacted with a detainee of that nationality (an American or an Afghan). Further, in both cases, it was an exercise of Canadian discretion which brought the person within the control of Canadian officers (either because a Canadian judge issued an extradition order, or because a Canadian soldier arrested the person). In these circumstances, the decision in *Cook* was that the *Charter* applies, and that this did not interfere with the host state's sovereignty. As the majority wrote:

The application of the Charter in this case does not violate the principle of state sovereignty by imposing Canadian criminal law standards on foreign officials and procedures. Our conclusion that the Charter applies in the present case must be understood within this narrow context, i.e., where no conflict occurs in the concurrent exercise of jurisdiction by Canada on the basis of nationality [of the officers] and by a foreign state on the basis of territoriality.<sup>115</sup>

The above passage describes perfectly the situation now prevailing with detainees in Afghanistan. Recall that when a Canadian soldier spots an Afghan of interest, the decision to detain him is the soldier's alone to make, in accordance with Canadian standing orders for detentions. The detainee is then normally brought back to Kandahar Air Field, where he is processed and booked into cells belonging to the Canadian Forces. A Canadian commander then exercises "sole discretion," as Mactavish J. of the Federal Court found, to decide whether to release the detainee, to remand him in custody, or to transfer him to the Afghan authorities.<sup>116</sup>

Nowhere in this process is Afghanistan's sovereignty engaged, except in the territorial sense. Absolutely every exercise of discretion which might attract the *Charter* occurs under pure Canadian control. Further, as Afghanistan's government has consented to the Canadian Forces arresting, detaining and having "sole discretion" whether to transfer Afghan citizens to the Afghan authorities, it cannot be said applying Canadian law, such as the *Charter*, to any of these steps offends Afghanistan's sovereignty.

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<sup>115</sup> *Cook*, *supra* note 101 at 629.

<sup>116</sup> *Amnesty Charter*, *supra* note 68 at para. 56.

Afghanistan knew perfectly well that it was ceding control to Canada over these matters, and it even signed a detainee treaty to do it.

On these facts it isn't necessary to find that either the control (*Cook*) or the comity and consent (*Hape*) doctrine is satisfied, because *both* are. Regardless of which of these analyses a court might favour, the *Charter* has got to apply.

### 3. *Canada's Duties, Canada's Alternatives*

So what should Canada do?

I recommend that Canada could be instituting development projects in the justice sector to prevent torture, rather than adopting an approach where Canada transfers detainees and feigns ignorance of the substantial risk of torture. Such a development-based scheme would infringe the *Charter* rights of detainees less, and would be more rationally connected with Canada's military objectives, which, as will be explained, is crucial to surviving scrutiny under section 1 of the *Charter*.

I believe the best option for Canada is *immediately* to acquire a prison in Afghanistan, which can be used both to hold detainees and to teach the Afghan police the proper methods of detaining and interrogating by humane methods, instead of by torture. Canada need not undertake this task alone, and it could invite its NATO allies to join in, for several of them also have the problem of what to do with the persons their military forces detain. Despite the Canadian presence, the prison should in all possible senses be an Afghan one; the prison warden should be Afghan, the buildings should be gifted to the Afghans, and the management should follow Afghan cultural practices. The sole thing that should not be Afghan is the prevailing standard of human rights, and that is best assured by "twinning" each Afghan prison guard with a Canadian or NATO counterpart at a one-to-one ratio. That counterpart would mentor the Afghan twin constantly, whenever he is working a shift. The mentors would teach their Afghan counterparts how to detain persons humanely, how to interrogate persons without unlawful coercion, how to handle interrogation evidence for both military intelligence and prosecutorial purposes, and how to manage the prison in all general senses.

Done in this way, the prison would be under constant Canadian or NATO supervision and therefore be safeguarded against torture, while also serving as a kind of training college in which important skills in human rights and prison management could be developed.

I believe it is only a tragic failure of imagination which has led Canada to overlook this positive alternative to its deplorable and discredited detainee transfer scheme. If Canada had a genuine commitment to rebuilding the impoverished and shattered Afghan state, Canada's government would turn the "problem" of detainees into a valuable opportunity to develop Afghanistan's police and judicial systems. What possible objection could the Canadian government have to a transformative military presence of this kind?<sup>117</sup>

One possible objection is that a joint prison such as I propose would be prohibitively costly or difficult, but that goes against historical experience. During World War Two, Canada transported about 40,000 German and Italian enemy combatants to camps in Alberta, Ontario and Quebec.<sup>118</sup> Those enemies were treated humanely. They were fed even as Canadians suffered under food rationing. They were even given democracy classes, so they could spread those ideas in their fascist homelands upon their release. When the war ended, they went home. Doubtless all of this cost money and was politically controversial, but Prime Minister Mackenzie King decided Canada should uphold the Geneva Conventions — so we did.

There is a fascinating comparison out of this history; if Canada could, the teeth of a world war, detain 40,000 Europeans on its own soil without sapping its prospects for victory, then how can it be seriously contended that Canada today cannot scrape together the means for a joint prison in Afghanistan to incarcerate perhaps forty detainees, just 0.1 percent as many?<sup>119</sup>

The heart-rending answer to this question appears to be race. Canada's failure to treat European and Afghan enemies with equal dignity and protection from abuse and torture indicates that Canada's military and foreign policy establishment is still dominated by an atavistic, Europhilic ethos, which is the wrong one for Canada's current reality as a multicultural country. Six decades ago, German prisoners of war were held in esteem as a worthy enemy, and Canadian leaders expended very scarce resources to protect them. Today the Afghans are held in contempt as an

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<sup>117</sup> Adam Roberts, "Transformative Military Occupation: Applying the Laws of War and Human Rights" (2006) 100 *Am. J. Int'l L.* 580.

<sup>118</sup> Martin F. Auger, *Prisoners of the Home Front: German POWs and "Enemy Aliens" in Southern Quebec, 1940 – 1946* (Vancouver: University of British Columbia Press, 2006).

<sup>119</sup> Recall that 40 is the most recent figure available for Canada's detainees; see note 26, *supra*. It is said that there are actually about 200 detainees at the end of 2007, but even if that were true it would not change the point I make.

unworthy enemy — “detestable murderers and scumbags,” in General Hillier’s words — and Canadian leaders expend resources fighting in the Federal Court to avoid protecting them.<sup>120</sup>

In its blindness to this double standard, Canada’s military forces risk violating not only Afghans’ human rights, but also their own self-interest. Recall Defence Minister O’Connor stating that Afghan prisons are “a revolving door” that can be exited by paying a bribe. If that is so, enemies the Canadian Forces transfer to the Afghan authorities can in short order be back on the battlefield, trying to kill Canadian soldiers again. Worse, enemy fighters who know that Canada’s practice is to transfer them to torturers will hardly trust to lay down their arms and surrender to Canadian soldiers, but will more likely fight to the death. In short, our bad policy predisposes the enemy to try and kill our soldiers! As was once written by a wise military historian, on the importance of treating detainees well:

If prisoners of war are treated in accordance with the Geneva Conventions they may find their living conditions superior to those offered by their own units. Coalition Forces during the Gulf War of 1990 found enemy soldiers were happy to be captured and to obtain the basic necessities of life after extended periods of poor living conditions. The end results were favourable to the allies in many ways: fewer casualties on both sides and the garnering of excellent public opinion. Mistreatment of prisoners of war is militarily unwise, illegal, inhumane and immoral.

The “wise military historian” who wrote this passage is actually the Canadian Forces.<sup>121</sup> It comes from their own training manual for military policemen.

There is a certain legal significance to this discussion. Under s. 1 of the *Charter*, and the familiar analysis in *R. v. Oakes*,<sup>122</sup> transferring detainees to a substantial risk of torture is such a dubious practice that it is not even rationally connected with Canada’s own military objectives. When the Canadian Forces themselves condemn detainee torture as “militarily unwise, illegal, inhumane and immoral,” how can the transfer of detainees in the face of a substantial risk of torture possibly be rationally connected to Canada’s legitimate military objectives? Further, under section 1 and the *Oakes* analysis, a measure that infringes *Charter* rights should do so as

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<sup>120</sup> Without endorsing General Hillier’s redneck language, it is difficult to see how the Nazis, who orchestrated genocide, were any less murderers and scumbags than the Taliban.

<sup>121</sup> Canada, Department of National Defence, *Military Police: Manual B-GL-362-001/FP-001* (Ottawa: Public Works and Government Services Canada, Publishing and Depository Services, 2000), at 95.

<sup>122</sup> [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200 [*Oakes*].

little as possible. Can it really be said that transferring detainees to the incorrigible torturers of the Afghan NDS infringes rights less than transferring them to a safely-run joint prison?

As there seems no way for the current detainee transfer scheme to meet either of these criteria under the law of section 1, it is bound to be struck down by the courts.

Canada's government must reevaluate its options. It can try despite vertiginous odds to defeat the Amnesty litigation on some technicality. It can continue to advance the distasteful, Guantanamoesque argument that the *Charter* does not apply extraterritorially to stop detainees being tortured Afghanistan. Neither evasion is likely to work, and Amnesty International and the British Columbia Civil Liberties Association will win their lawsuit almost surely. Or Canada's government can take a fresh look at the "problem" of detainees, and recognize it for what it is: a neglected opportunity to establish a first-rate prison for Afghanistan, and through patience and mentorship educate the Afghans toward a fuller respect for human rights of detained persons. Which option ultimately goes into the history books will speak profoundly for the type of country that Canada is.