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BC Civil Liberties Association

AMNESTY INTERNATIONAL

The Honourable Peter MacKay
Minister of National Defence
National Defence Headquarters
Major-General George R. Pearkes Building
Ottawa, ON K1A 0K2

October 11, 2011

Dear Minister MacKay:

While the combat role of the Canadian Forces in Kandahar province has come to an end, Canada's responsibilities under international law towards transferred prisoners have not. We were disturbed to read the report released yesterday by UNAMA outlining serious findings of abuse and torture against prisoners transferred by NATO to Afghan authorities.

UNAMA concludes that "almost half (125 or 46 per cent) of the 273 conflict-related detainees interviewed who had been held by the National Directorate of Security (NDS) experienced torture, as defined under international law, and 41 (35 per cent) of the 117 detainees held by the Afghan National Police (ANP) experienced treatment that constituted torture or other forms of cruel, inhuman or degrading treatment." Given the widespread nature of these reports, it is likely that some of the prisoners alleging abuse were transferred by the Canadian Forces. It is imperative for Canada to confirm the actions it plans to take in response to the serious issues raised by UNAMA. We urge the government to take the following steps.

First, Canada must immediately take action to confirm the physical condition of every individual transferred by the Canadian Forces to Afghan authorities. From our involvement in proceedings before the Military Police Complaints Commission, we learned that Canadian diplomats did not adopt a systematic approach to visiting prisoners transferred to Afghan custody. In that regard, the visits were largely random and there was no guarantee that every single individual would be visited and interviewed.

As you may know, the British military instituted a monitoring regime that involves multiple visits to every prisoner transferred. Canadian Brigadier General Tim Grant, commander of Task Force Afghanistan in 2007, initially recommended that every CF-transferred prisoner should be visited by Canada at least three times. Unfortunately,

Brig Gen Grant's advice on the appropriate level of monitoring was not followed, and it was decided in Ottawa that even a single visit to every detainee was unnecessary.[1] In 2010, the England High Court of Justice ordered the British military to continue its rigorous monitoring regime, holding that regular private interviews with each detainee were necessary to meet the minimum requirements under international human rights law.[2] At a bare minimum, Canada should meet this same standard.

Second, Canada should confirm and clarify its ongoing responsibility to ensure transferred prisoners are not tortured. Canada has insisted that Afghan detainees will be treated in accordance with the standards applicable to prisoners of war under the *Geneva Conventions*. Under Article 12 of the *Third Geneva Convention*, a transferring power must take "effective measures" where it is believed the detaining power is not meeting its obligations of humane treatment, which may include demanding the return of the transferred prisoner.

Furthermore, to the extent that Canada relies on diplomatic assurances and monitoring to satisfy itself under Article 3 of the *Convention Against Torture* that there is an insufficient risk of torture upon transfer, Canada incurs an ongoing legal obligation to take appropriate steps to meaningfully and effectively address any allegations of torture that may arise. In light of the foregoing, please confirm what steps Canada intends to take to ensure that prisoners will not be abused in the future, and how long monitoring arrangements will remain in place.

Third, Canada must ensure that independent and competent investigations of these allegations are carried out, with charges and prosecution where appropriate. Unfortunately, there is no evidence that Afghanistan has properly investigated past allegations of abuse. Indeed, both the England High Court of Justice and the Federal Court of Canada have held that Afghan investigations into abuse allegations were "clearly inadequate" and were not meaningful or independent.[3]

We would appreciate learning what efforts the government has made to get details of the results of all past investigations of abuse and how Canada will assure itself that the current allegations documented by UNAMA will be appropriately investigated. (In that regard, we note that the Afghanistan National Directorate of Security has previously refused any advice or assistance from Canada in conducting these investigations – a troubling position in all of the circumstances.)

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[1] Military Police Complaints Commission, Afghanistan Public Interest Hearings, Transcript of Proceedings, Vol. 20 (September 22, 2007) at 74:16-75:4; 76:9-23; 179:6-180:4.
[2] *Evans v. Secretary of State for Defence*, [2010] EWHC 1445 (Admin) at para. 320.
[3] See *Evans, supra*, para. 309(ii); and *Amnesty International and BCCLA v. Chief of Defence Staff*, 2008 FC 162, at paras. 92-94.

Fourth and finally, we repeat the call we made in our letter of 24 November 2009 to Prime Minister Harper, urging the government to institute a full public inquiry into the handling of detainees in Afghanistan. The problems and challenges encountered by the Canadian Forces with respect to detainee transfers in Afghanistan may well arise in future deployments. The report and recommendations by a commission of inquiry will no doubt be invaluable to future military practice. The partial and aborted review of documents by a small group of Parliamentarians cannot be a substitute for a public inquiry.

We would welcome an opportunity to meet with you or your officials to discuss these recommendations further.

Sincerely,

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