MPCC File No. 2008-042

IN THE MATTER OF a public interest hearing before the Military Police Complaints Commission, pursuant to section 250.38 of the *National Defence Act*, R.S.C. 1985, c. N-5

FINAL SUBMISSIONS OF THE COMPLAINANTS AMNESTY INTERNATIONAL CANADA AND B.C. CIVIL LIBERITES ASSOCIATION

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All that is necessary for the triumph of evil is that good men do nothing.

I. Introduction

1. At their heart, these submissions concern the global imperative to respect and uphold fundamental human rights. Torture is the ultimate denial of human rights. The international community has agreed that torture in never acceptable. Torture is prohibited under all circumstances and there can never be situation where the use of torture can be justified.

2. In conflicts across the globe, governments and armed groups routinely commit terrible abuses of human rights, including this extreme of cruelty. And yet, even in war there are rules that all sides are legally bound to obey. Governments must never engage in torture or be complicit in torture. Governments must prevent the perpetration of torture and must never deliver individuals to situations in which they would be at risk of torture. The failure to abide by these expectations is not only a violation of law; it is a moral abdication of our most fundamental human values.

3. Police play a critical role in ensuring that ongoing violations of this fundamental human right are stopped and that future violations are deterred. Police are the thin blue line; by upholding the rule of law, they ensure that order prevails over chaos. By investigating crimes, police officers protect individuals who are at risk, including victims of human rights abuses, promoting stability and the general welfare of society. When police fail in this duty, the system fails to correct itself and heads on an ever widening spiral toward more frequent and more intense abuse.

4. Amnesty International Canada and the B.C. Civil Liberties Association ("Amnesty/BCCLA" or "Complainants") filed the complaint that is the basis of these hearings on June 12, 2008 (the "Complaint") with the Military Police Complaint Commission.[12] The Complaint alleges the Military Police ("MP") failed to investigate "crimes or potential crimes committed by senior officers"[3] who may have been aware that former CF detainees were likely tortured by Afghan authorities. The Complaint specifically states that members of the National Investigation Service in Kandahar and the Task Force Provost Marshal "have been aware that former Canadian Forces detainees were likely tortured by Afghan authorities, yet they failed to investigate whether any members of the CF should be charged for their role in facilitating these crimes."[4]

5. The time period set out for the Complaint is May 3, 2007 to June 12, 2008. The subjects of the Complaint are the CF Provost Marshal, the Commanding Officer of the NIS, the Task Force Provost Marshals in Afghanistan and the Commanders of the NIS detachment in Afghanistan ("Subjects") during the relevant time frame.

6. In September 2008, this Commission determined that it had jurisdiction over the Complaint.[5] Finding that there was a threat to public confidence in the Military Police stemming

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[1] Amnesty /BCCLA, *Letter from Amnesty International Canada and the B.C. Civil Liberties Association to Mr. Peter Tinsley Chair of the Military Police Complaints Commission Re: Update of detainee complaint MPCC-2007-006 and Commencement of New Complaint* (June 12, 2008) (the "Complaint") [Exhibit P-2; MWB Vol. 4, Tab 7]. This was the second complaint filed by Amnesty/BCCLA. On February 21, 2007, Amnesty/BCCLA submitted a complaint to this Commission alleging that members of the Canadian Forces military police transferred detainees to Afghan authorities, or allowed them to be transferred, notwithstanding evidence that the detainees could be tortured (the "February 2007 Complaint"). In February, 2007 the Commission initiated a public interest investigation into the complaint. In March 2008 the Commission determined to hold public interest hearings. In April, 2008, before those hearings could begin, the Attorney General of Canada commenced an application in Federal Court seeking to prohibit the Commission from proceeding with hearings and the investigation into the February 2007 Complaint on jurisdictional grounds. The Court determined that the custody of detainees by members of the Military Police is not a "policing duty or function" over which the Commission has jurisdiction, essentially on the grounds that it is an aspect of "military operations" performed by military police acting under orders from the commander of the theatre of operations.

[2] Throughout this public interest hearing, the Complainants have enormously benefitted from the generosity of *pro bono* counsel and the work performed by articled students and interns. We wish to acknowledge the contributions of Khalid Elgazzar, Jennifer Godwin, Greg McMullen, Sébastien Jodoin, Tiisetso Russell, Safia Lakhani, Ian Kennedy, Shannon Lindal and Nathan Crompton.

[3] *Id*. at 3.

[4] *Id*. at 4.

[5] Military Police Complaints Commission, *Decision pursuant to section 250.38 of the National Defence Act in respect of a conduct complaint submitted by Amnesty International Canada and the British Columbia Civil Liberties Association on June 12, 2008*, MPCC 2008-024 and MPCC 2008-042 (September 30, 2008).

from the allegations and a significant level of public concern, the Commission exercised its jurisdiction to commence a public interest investigation and hearing into the Complaint in accordance with s. 250.38(3) of the *National Defence Act*.[6] The Commission determined that the Complaint fell under s. 2(1)(b) of the *Conduct Regulations* as relating to the "conduct of an investigation", and also under the closely associated concept of the "enforcement of laws" found at s. 2(1)(g). The public interest hearings to investigate the Complaint commenced on May 25, 2009.

7. The legal framework for this Complaint is the assertion that MPs have a duty to investigate criminal and service offences committed by members of the Canadian Forces. When officers order a detainee to be transferred to the custody of Afghan authorities, despite knowledge that the Afghan authorities are predisposed to torture these persons, a number of possible criminal and service offences warrant investigation.[7]

8. By way of example, a Commander's decision to transfer detainees to a risk of torture could constitute a variety of criminal and service offences. Commanders are required to abide by the law of armed conflict and to treat detainees according to the standards articulated in the Third Geneva Convention (Geneva Convention Relative to the Treatment of Prisoners of War). Failure to abide by these standards could constitute service offences under the *National Defence Act*.

9. Further, a Commander who transferred to a risk of torture could also potentially be liable under the *Crimes Against Humanity and War Crimes Act*. A Commander could potentially be liable for criminal negligence under the *Criminal Code*, which, by virtue of section 130(1) of the *National Defence Act*, has extraterritorial reach over members of the Canadian military. In summary, a Commander's decision to transfer detainees to Afghan authorities where there was risk that those transfers would result in torture would be a grave transgression of the international and domestic law standards which CF commanders are obliged to observe.

10. These submissions are divided into four parts. First, we set out the background facts for the submission by describing the Afghanistan deployment and the role of the Military Police. Next, we discuss the legal standards governing (1) the conditions under which Canadian Forces

[6] *National Defence Act*, R.S.C. 1985, c. N-5 ("*National Defence Act*"), at s. 250.18(1).
[7] Complaint at 4.

are prohibited from transferring detainees to Afghan authorities and (2) the duty of Military Police to investigate crime in a competent, diligent and impartial manner. The third section discusses the Subjects' deficient investigations and failures to investigate. Finally, we set out our recommendations for ensuring that investigations concerning grave transgressions of the international and domestic law standards which occur during military operations are conducted properly in the future.

11. It will be our submission that all the Subjects had sufficient information to suspect that individuals were being transferred by the Canadian Forces to a serious risk of torture. The Subjects should have known that such conduct could give rise to criminal and service offences. Yet even in the face of compelling and credible reports of torture and clear military directives that underscored the need for MP diligence in this area, not one of the Subjects investigated the legality of the transfers in a competent or impartial manner; most of the Subjects did not investigate the matter at all. These failures were a gross breach of the professional standards by which society expects Military Police to conduct themselves.

II. Background Facts

A. Canadian Forces Mission in Afghanistan

12. The events leading to Canada's military involvement in Afghanistan began in the aftermath of the events of September 11, 2001. The United States of America responded to this attack by invading Afghanistan, which was hosting Al Qaida training camps. This U.S. campaign was named Operation Enduring Freedom ("OEF"), and was initiated on the basis of the right of states to individual and collective self-defence.[8]

13. The Canadian government informed the United Nations on October 24, 2001 that it would be joining the U.S. in deploying military forces to Afghanistan in the exercise of its inherent right of self-defence. After the Taliban government was defeated in December 2001, the U.N. Security Council authorized the creation of the International Security Assistance Force ("ISAF") to provide security and support to the newly established interim Afghan governing authority.[9] From 2001 to the present, the CF has been continually deployed in Afghanistan, from time to time under the authority of OEF or ISAF, and often both.

14. The present operation in Kandahar province commenced in December 2005. A large contingent of CF troops moved to Kandahar with the objective of engaging in counterinsurgency combat operations. Today, the majority of the CF in Afghanistan remain part of the ISAF mission and are located in Kandahar province, based at Kandahar Airfield ("KAF"). Canada retains operational command over CF personnel.[10]

B. Canadian Forces' Detention of Individuals in Afghanistan

15. As part of Canada's military operations in Afghanistan, Canadian Forces have captured and detained individuals in that country since January 2002. Until December 2005, CF detainees were transferred to the custody of the United States of America. On December 18, 2005, the Chief of the Defence Staff, Gen. Rick Hillier, signed an arrangement with the Afghan Ministry

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[8] *Amnesty International and B.C. Civil Liberties Association v. Chief of the Defence Staff*, 2008 FC 336 ("*AI v. CDS*"), at paras. 22-25 [Exhibit P-5, Vol. 5, Tab 43].
[9] *Id.* at paras. 24-31.
[10] *Id.* at paras. 31, 32-33 and 38.

of Defence for the transfer of detainees to Afghan authorities (the "2005 Detainee Agreement").[11]

16. The 2005 Detainee Agreement prescribes procedures "in the event of a transfer … to the custody of any detention facility operated by … Afghanistan". In broader Technical Arrangements between Canada and Afghanistan dealing with the status of forces and other issues, the handling and treatment of individuals detained by Canada is also addressed:

> Detainees would be afforded the same treatment as Prisoners of War. Detainees would be transferred to Afghan authorities in a manner consistent with international law and subject to negotiated assurances regarding their treatment and transfer.[12]

17. The JTF-A Commanders in Kandahar issued standing orders to provide a framework or protocol for detainee capture, detention, transfer and release. The CF Theatre Standing Order regarding "Detention of Afghan Nationals and Other Persons" ("TSO 321A" or "TSO") went through several iterations, though the main provisions remained substantively the same.[13] The TSO states that the CF may detain any person on a "reasonable belief" (defined as "neither mere speculation nor absolute certainty") that he or she is adverse in interest. This includes "persons who are themselves not taking a direct part in hostilities, but who are reasonably believed to be providing support in respect of acts harmful to the CF / Coalition Forces".[14]

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[11] Arrangement for the Transfer of Detainees Between the Canadian Forces and the Islamic Republic of Afghanistan (December 18, 2005) ("2005 Detainee Agreement") [Exhibit P-4, Tab 5; MWB, Vol. 2, Tab 23].

[12] Technical Arrangements Between the Government of Canada and the Government of the Islamic Republic of Afghanistan (December 18, 2005) ("Technical Arrangements"), at para. 12 [Exhibit P-4, Tab 4; MWB, Vol. 2, Tab 25]; 2005 Detainee Agreement at para. 1.

[13] The MPCC created a brief report outlining the evolution of the TSO 321A for these hearings. Military Police Complaints Commission, Afghanistan Public Interest Hearings, *Summary – Theatre Standing Order (TSO) 321A* (May 4, 2009) ("MPCC TSO Summary") [MPCC Doc. D-85-001].

[14] Joint Task Force Afghanistan (JTF-AFG), Theatre Standing Order (TSO) 321A, *Detention of Afghan Nationals and Other Persons* (March 19, 2007) ("March 2007 TSO 321A"), at paras. 13, 19-20 [Exhibit P-4, Tab 11; MWB, Vol. 1, Tab 16]. *See also* Joint Task Force Afghanistan (JTF-AFG), Theatre Standing Order (TSO) 321, *Detention of Afghan Nationals and Other Persons* (May 27, 2007) ("May 2007 TSO 321") [Exhibit P-4, Tab 13; MWB, Vol. 2, Tab 2]; Joint Task Force Afghanistan (JTF-AFG), Theatre Standing Order (TSO) 321, *Detention of Afghan Nationals and Other Persons* (June 2008) ("June 2008 TSO 321") [Exhibit P-41, Tab 23; MWB, Vol. 5, Tab 16].

18. CF detainees are held in CF detention facilities at Kandahar Airfield ("KAF"), the CF base for operations in Kandahar province. CF policy is to transfer or release detainees within 96 hours, although the CF has the ability to hold detainees for longer periods.[15]

19. The TSO speaks to the standards required for the treatment and transfer of detainees. It states that "all detainees will be treated to the standard required for prisoners of war (PW) as indicated in the Third Geneva Convention; as this is the highest standard required under international law." Detainees "must at all times be protected; particularly against acts of violence or intimidation", and are to be transferred to Afghan authorities "in a manner consistent with international law [in accordance with] negotiated assurances regarding their treatment and transfer". [16]

20. According to the TSO, the JTF-A Commander has the sole authority to determine whether a detainee "shall be retained in custody, transferred to ANSF [i.e. Afghan National Security Forces] or released." The JTF-A Commander receives advice on these issues from senior military officers in theatre, which usually include the Deputy Commander, the Legal Advisor, the JTF-A Provost Marshal ("TFPM") and the designated detainee officer.[17] The JTF-A Commanders testifying before this Commission indicated that the CEFCOM Commander and the Chief of the Defence Staff may withdraw the JTF-A Commander's authority to transfer detainees.

21. The TSO provides for a TFA "Detainee Liaison Officer", later simply called a "Detainee Officer". That senior officer, designated by the JTF-A Commander, acts as the liaison with Afghan authorities, including the NDS and the AIHRC. Although the position exists in all versions of the TSO, it was never staffed until May 2007. The duties were previously executed by the TFPM.[18]

22. The JTF-A Commanders all testified that they could not order detainee transfers unless they were satisfied that there was no substantial risk that the individual would be tortured or

[15] *Id.* at para. 32.
[16] *Id.* at paras. 3 and 12.
[17] *Id.* at para. 32.
[18] MPCC TSO Summary at ss. 6.1, 11.1 and 11.2 .

abused by Afghan authorities. The TSO does not state this standard specifically, although it is implicit in the reference to transfers being made in accordance with international law.[19]

23. From December 2005 until 2007, no specific policy document existed that provided further guidance to JTF-A Commanders for making transfer decisions. A draft Tasking Order by the Chief of the Defence Staff was prepared in December 2006, but it remained under revision and subject to approval by higher Canadian authorities. Although never promulgated, the document states that the Canadian Government's "strong commitment" to international human rights and international humanitarian law demanded a "proactive approach" to any allegations of mistreatment of persons after transfer from CF to Afghan custody.[20]

24. On May 3, 2007, the Governments of Canada and Afghanistan signed a further arrangement concerning the transfer of detainees ("May 2007 Detainee Agreement"). The new arrangement states that it supplements but does not replace the original December 2005 Detainee Agreement. The most significant addition was the provision allowing Government of Canada officials to have "full and unrestricted access" to facilities where Canadian-transferred detainees are held. Visiting Canadian officials are authorized to have private interviews with detainees, without Afghan authorities present. Other important additions include the requirement that Canada must be informed about the release of any detainee, the initiation of proceedings, or any allegations of mistreatment.[21]

25. Although Afghanistan is a party to the *Convention Against Torture*, and therefore has binding international obligations with respect to the humane treatment of persons in detention, it was deemed important that the May 2007 Detainee Agreement include the following:

> The Afghan authorities will be responsible for treating such individuals in accordance with Afghanistan's international obligations including prohibiting

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[19] March 2007 TSO 321A at para. 12.

[20] CDS Tasking Order – Direction to Commanders Following Transfer of Detainees From the Canadian Forces to the Afghan Authorities (December 2006) ("Draft CDS Tasking Order") at paras. 2 and 3(a)(1) [Exhibit P- 71,Coll. X, Tab 25]. *See also* CEFCOM HQ Transmittal Sheet for further information on the fate of the unreleased CDS Tasking Order [Exhibit P-71, Coll. X, Tab 23].

[21] Arrangement for the Transfer of Detainees Between the Government of Canada and the Government of the Islamic Republic of Afghanistan (May 3, 2007) ("May 2007 Detainee Agreement"), at paras. 1, 3, 8-10 [Exhibit P-4, Tab 5; MWB, Vol. 2, Tab 23].

> torture and cruel, inhuman or degrading treatment, protection against torture and using only such force as is reasonable to guard against escape.[22]

26. On June 18, 2007, CEFCOM Commander Lt. Gen. Michel Gauthier provided incoming JTF-A Commander Brig. Gen. Guy Laroche with the most detailed guidance yet regarding his responsibilities towards detainees transferred to Afghan authorities. After referring to TSO 321A and the fact that a new monitoring and inspection regime was established, the CEFCOM Commander provided the following direction and caution:

> The chain of command bears the potential liability should we become aware of torture or mistreatment following the transfer of detainees to Afghan authorities. It is for this reason that I am particularly concerned about the chain of command obligation to satisfy itself that the follow up of transferred detainees is sufficiently robust. I expect a proactive engagement with DFAIT at all levels, but particularly at your level, to ensure the monitoring occurs and reporting and analysis is provided. *The monitoring, reporting and analysis must be sufficient to enable command decisions regarding the continuation of transfers.*[23]

27. CEFCOM Commander Lt. Gen. Gauthier provided more detailed directions in a policy issued September 12, 2007. Entitled "Amplifying Guidance On Detainees", the document states that the CEFCOM Commander or CDS may intervene and assume responsibility for transfer decisions. It also articulates in writing, for the first time, the standard to be applied in assessing the risk of torture, and the information that should be considered. The Amplifying Guidance states:

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

[22] *Id.* at para. 4.
[23] Commander CEFCOM Directive to Commander Joint Task Force – Afghanistan, (June 18, 2007) ("CEFCOM Commander Directive"), at paras. 23-24 [Exhibit P-76, Coll. Z, Vol. 1, Tab 20].

> from Afghanistan's own investigations into existing allegations of mistreatment, and updates or reports from the Afghan Independent Human Rights Commission.[24]

28. Until very recently, the CF had steadfastly refused to provide any information regarding the number of detainees transferred to Afghanistan authorities. However, the CF suddenly changed its position on this issue on September 22, 2010. Crown counsel furnished the Commission with this information on an annualized basis, indicating that 96 detainees were transferred to Afghan authorities in 2007 and 21 in 2008.[25] The CF publicly confirmed that 129 detainees were transferred to Afghan authorities in 2006.[26]

C. Role of Military Police in the Canadian Forces

29. Military Police support CF missions by providing policing and operational support. Military Police possess a dual responsibility: they are police officers and soldiers. One of their primary functions is to assist military commanders in enforcing discipline of Canadian Forces members. Historically, Military Police have also been tasked with coordinating tasks related to persons held in custody (including military detainees and prisoners of war).[27]

30. The focus of these hearings concerns the conduct of Military Police members with respect to the performance of their policing duties. In fulfilling their policing functions, Military Police are entrusted with independently investigating suspected crimes that are committed by individuals subject to the *Code of Service Discipline* or that are alleged to occur on Department of National Defence (DND) premises. Even during military operations outside of Canada, military police officers are entrusted with upholding the rule of law and maintaining the public's confidence in the integrity and legal accountability of our armed forces.

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[24] Amplifying Guidance On Detainees Re Chain of Command Obligations With Respect to Post-Transfer Follow Up (September 12, 2007) ("Amplifying Guidance"), at paras. 2 and 6 [Exhibit P-76, Vol. 1, Tab 46; Coll. Z, Vol. 1, Tab 46] .

[25] Military Police Complaints Commission, Afghanistan Public Interest Hearings, Transcript of Proceedings, Vol. 21 (September 27, 2010) at 3:8-14.

[26] Government of Canada, *Backgrounder – Canadian Forces Release Statistics on Detainees* (September 2010), *available at* http://www.afghanistan.gc.ca/canada-afghanistan/news-nouvelles/2010/2010_09_22b.aspx?lang=eng.

[27] For example, in Afghanistan, the Military Police are tasked with taking responsibility for the care and custody of detainees after capture. These detention operations, however, are not considered "policing functions," and therefore fall outside of this Commission's oversight jurisdiction.

31. Military Police personnel are "specially appointed persons" under section 156 of the *National Defence Act*. A central role of the Military Police is to maintain law and order within the Canadian Forces including the enforcement of the criminal law and the *Code of Service Discipline*, as set out in Part III of the *National Defence Act*. Pursuant to section 156 of the *National Defence Act*, they have the power to arrest, investigate, and use force in certain circumstances. Military Police personnel are also "peace officers" under section 2 of the *Criminal Code*.[28]

32. MPs receive specialized training. After completing the first stage of training pertinent to all CF members, MP candidates attend basic MP training where they learn the basics of Canadian civilian and military law, investigative techniques, and acquire skills necessary to perform daily Military Police functions. Part of that core MP training includes comprehensive training in the Geneva Conventions.[29]

33. The structure of the Military Police branch and its relationship to the operational chain of command is complex. As a starting point, it is important to understand the distinction between a technical chain and the chain of command. This Commission, in a previous ruling, set out the nature of the technical chain:

> In the CF, a technical chain is a hierarchical network of military personnel, distinct from and parallel to the chain of command, assigned to a given military occupation which requires specialized training, and which has been formally authorized to provide for guidance and accountability related to the field of specialization. The Minister of National Defence has authorized a technical chain for MPs in the CF.[30]

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[28] *Criminal Code*, R.S.C. 1985, C-46. Section 2 defines peace officers to include officers and non-commissioned members of the Canadian Forces appointed for purposes of section 156 of the *National Defence Act*.

[29] Military Police Complaints Commission, Afghanistan Public Interest Hearings, Transcript of Proceedings, Vol. 2 (May 26, 2009) ("Beaudry Tr."), at 163:10-15.

[30] Military Police Complaints Commission, *Final Report Following a Public Investigation Pursuant to 250.38 of the National Defence Act of a Complaint Submitted by Dr. Amir Attaran Concerning the Conduct of the Task Force Afghanistan Military Police (Roto 1) at Kandahar Air Field in Kandahar, Afghanistan*, MPCC 2007-003 (April 23, 2009) ("Attaran Report"), at para. 101.

34. The CFPM is the highest ranking Military Police member; his role is roughly similar to a civilian Chief of Police.[31] The CFPM has a duty to provide technical guidance and support direction all MPs. He also has command and control over the CFNIS.[32]

35. The CFPM retains the technical control of policing services; therefore, he is responsible for issuing the technical directives on the conduct of policing duties and functions.[33] The technical directives set out the standards by which MPs are to deliver policing duties and the services.[34]

36. The technical chain is designed to bolster MP's professionalism in the exercise of their policing duties and to afford MPs with investigative independence from the chain of command.[35] Although the CFPM's technical direction does not constitute or have the same legal force as an order,[36] on matters concerning MPs policing duties, which includes law enforcement and investigative duties, the CFPM's technical direction is authoritative.[37] The CFPM can enforce his technical authority with his power to revoke an MP's credentials which are necessary to maintain an MP's peace officer status and the powers of arrest under the *National Defence Act*, section 156.[38] The CFPM's technical direction with respect to matters requiring investigative action by MPs should be considered binding on all MPs, unless in conflict with valid orders from the chain of command.[39]

37. An important way in which the CFPM issues technical direction on policing matters is via the *Military Police Polices and Technical Procedures* (the "MP Manual"). The MP Manual sets out the CFPM's general expectations and guidance on policing duties and functions. All MP units have access to this document.[40] In particular, the MP Manual provides detailed guidance on the duty and authority to conduct investigations. The Manual is discussed in greater depth, *infra*, at paragraphs 139 to 141.

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[31] Beaudry Tr. at 149:19-150:1.
[32] *Id*. at 148:1-10.
[33] *Id.* at 147:2-6.
[34] *Id*. at 147:9-12.
[35] Attaran Report at para. 113.
[36] *Id.* at para. 102.
[37] For a full discussion of the technical chain of command as it pertains to the CFPM and his authority concerning policing matters, see the Attaran Report at paras. 103-115.
[38] *Id*. at para. 112.
[39] *Id.* at para. 115.
[40] Beaudry Tr. at 197:22.

38. The professional direction provided by the CFPM in the MP Manual is complemented and enhanced by the mission-specific technical directives issued by the CFPM. During the relevant time periods of this complaint, the CFPM issued three technical directives.[41] Although there were several technical directives, the language of the directives concerning investigatory duties remained largely unchanged. The March 2006 directive for Roto 3 contained the following provisions relevant to the issue of investigations:

> 9. *General*. […] The authority for MP to conduct investigations is derived from the NDA and the Criminal Code of Canada, not from the operational chain of command. It is critical that commanders understand the authority of the MP to conduct independent investigations. […]
> […]
> 11. *Specific guidance*. While deployed on multi-national operations, the appropriate component of Canadian MP (MP or CFNIS) shall investigate allegations or instances of the following occurrences (attributed to Canadian Forces personnel), in addition to the normal investigations required IAW Ref B:
> [...]
> 11.C. Allegations of violations of the law of armed conflict or international law.
> […]
> 14. *Detainees*. […] The TFPM is responsible for:
> 14.A. The provision of advice on prisoner handling and transfer policy and procedures.
> […]
> 14.F(1). Ensure investigation of the following types of incidents is conducted by appropriate CF investigative organization (i.e. CFNIS):
> […]
> 14.F.(1)(B): Allegations of crimes committed by CF members against detainees.
> 14.F.(1)(C): Allegations of violations by CF members of the law of armed conflict or international law.
> […]

39. The directive emphasizes the authority of MPs to conduct investigations independent of the chain of command. It offers specific direction to MPs to investigate allegations into violations of the law of armed conflict and international law. It also underscores the TFPM's

[41] NDHQ CFPM Ottawa, *Military Police Technical Directive (Op Archer)* (March 15, 2006) ("Roto 3 Tech Directive") [Exhibit P-24, Coll. C, Vol. 1, Tab 2; MWB Vol. 1, Tab 3]; NDHQ CFPM Ottawa, *Military Police Technical Directive (Op Archer Roto 4)* (July 15, 2007) ("Roto 4 Tech Directive") [Exhibit P-25, Coll. D, Tab 22; MWB Vol. 3, Tab 20]; NDHQ CFPM Ottawa, *Military Police Technical Directive (Op Athena Roto 5)* (March 5, 2008) ("Roto 5 Tech Directive") [Exhibit P-25, Coll. D, Tab 21; MWB Vol. 3, Tab 19].

responsibility for ensuring that the CFNIS conducted investigations into violations of the law of armed conflict and international law as it pertained to detainees.[42]

a) Task Force Provost Marshal

40. The TFPM is the senior Military Police member in charge of the Military Police resources deployed in Afghanistan.[43] Among other duties, the Task Force Provost Marshal commands a company of MPs responsible for handling detainees and managing the KAF detention facility. The TFPM also maintains a relationship with local Afghan authorities and arranges for the transfer of detainees when the Commander makes a transfer decision. The TFPM is formally part of the JTF-A Commander's advisory team on the disposition of detainees.[44]

41. The TFPM reports to the Task Force Commander and has many responsibilities, including command over detention operations. In that role, the TFPM is necessarily exposed to matters and information involving detainee handling and transfers. While detention operations are not "policing duties" *per se,* the TFPM always remains a police officer and has a duty to enforce the law, including violations of the law of armed conflict and international law.

42. The CFPM has a duty to provide technical guidance to the TFPM, but he does not have a command relationship with the TFPM deployed in Afghanistan; the TFPM is under the command and control of the Task Force Commander.

b) National Investigative Service

43. The NIS is a specially formed unit of MP members mandated with the investigation of serious and sensitive offences. The NIS is similar to the Major Crimes unit of a municipal or provincial police force. The CFPM has a command relationship with the Commander of the NIS and all members of the NIS. He also controls the kit and resources of the NIS.[45]

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[42] Military Police Complaints Commission, Afghanistan Public Interest Hearings, Transcript of Proceedings, Vol. 27 (November 15, 2010) ("Hudson Tr."), at 55:8-18.
[43] Beaudry Tr. at 166:9-12.
[44] *See* paragraph 20, *supra.*
[45] Beaudry Tr. at 147:13-22.

44. Members of the NIS are trained to conduct complex investigations to a high standard. They are taught more advanced investigative techniques than are taught in the MP basic training course.[46] By design, the NIS is completely independent of the operational chain of command so that its investigations will contain no taint or perception of influence. Even when deployed in theatre, the NIS remains under the command of the Commander of the NIS, and by extension, the CFPM, to ensure the independence of investigation.[47]

D. Human Rights Record in Afghanistan

45. There is considerable evidence in the public domain about the pervasive nature of torture in Afghanistan. The United Nations, the U.S. government, and the Afghan Independent Human Rights Commission all concur that detainees are routinely tortured and otherwise abused in Afghan custody, and have so stated in publicly-available materials.

46. In March 2006, the U.N. High Commissioner for Human Rights, Louise Arbour, described torture in NDS custody as "common":

> The NSD [sic], 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. Multiple security institutions managed by the NSD, the Ministry of the Interior and the Ministry of Defence, function in an uncoordinated manner, and lack central control. *Complaints of serious human rights violations committed by representatives of these institutions, including arbitrary arrest, illegal detention and torture, are common*. ...[48]

47. The U.N. Secretary-General submitted two reports in 2007 to the U.N. General Assembly regarding the work of the United Nations Assistance Mission in Afghanistan ("UNAMA"). Both reports expressed the U.N.'s concern about torture and ill treatment in Afghan custody. Notably, the Secretary-General highlighted the fact that UNAMA continued to "receive and verify" complaints about torture in custody. These findings led the U.N. to

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[46] *Id*. at 180:19-23.
[47] *Id*. at 182:16-19.
[48] Commission on Human Rights, *Report of the High Commissioner for Human Rights on the situation of human rights in Afghanistan and on the achievement of technical assistance in the field of human rights*, UN ESCOR, 62d Sess., UN Doc. E/CN.4/2006/108 (March 3, 2006) at para. 68 (emphasis added) [Exhibit P-6, Vol. 2, Tab 8].

emphasize that the Government of Afghanistan needs to investigate allegations of torture by authorities, "in particular by the National Directorate of Security".[49]

48. The U.S. State Department has repeatedly reported on "torture and abuse" in Afghan custody, and described some techniques in use such as "pulling out fingernails and toenails, burning with hot oil, beatings, sexual humiliation, and sodomy." The U.S. State Department has also found that security forces are responsible for extrajudicial killings.[50]

49. The Afghan Independent Human Rights Commission ("AIHRC") is a branch of the Afghan government, established under Article 58 of the Afghan Constitution to monitor "the observation of human rights in Afghanistan". For its 2004-2005 Annual Report, the AIHRC aggregated data on the number of complaints of torture and extra-judicial killing, and reported:

> Torture continues to take place as a routine part of ANP [i.e. Afghan National Police] procedures and appears to be closely linked to illegal detention centers and illegal detention, particularly at the investigation stage in order to extort confessions from detainees. Torture was found to be especially prevalent in Paktia and Kandahar provinces, linked to the high numbers of illegal detainees. High numbers of complaints of torture were received from all regional offices in the past year.[51]

50. Canada's Department of Foreign Affairs and International Trade ("DFAIT") has long been aware of the perniciousness of torture in Afghanistan. DFAIT conducts annual reviews of the human rights situation in Afghanistan. For several years, these reports have affirmed the consensus that torture and other serious human rights abuses are prevalent.

51. In the DFAIT report for 2006, released in January 2007, the Department concluded, "Extrajudicial executions, disappearances, torture and detention without trial are *all*

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[49] Report of the U.N. Secretary-General, *The situation in Afghanistan and its implications for international peace and security*, UN GAOR, 61st Sess., A/61/799-S/2007/152 (March 15, 2007) at para. 41 [Exhibit P-9, Vol. 5, Tab 40]; Report of the U.N. Secretary-General, *The situation in Afghanistan and its implications for international peace and security*, UN GAOR, 62d Sess., A/62/345-S/2007/555 (September 21, 2007) at paras. 45 and 84 [Exhibit P-9, Vol. 5, Tab 41].

[50] *See, e.g.*, U.S. Department of State, *2006 Human Rights Report: Afghanistan* (March 6, 2007) at 1-4 [Exhibit P-5, Vol. 1, Tab 9]; U.S. Department of State, *2007 Human Rights Report: Afghanistan* (March 11, 2008) at 1-3 [Exhibit P-5, Vol. 1, Tab 10].

[51] Afghan Independent Human Rights Commission, *2004-2005 Annual Report*, at Section 4.7 [Exhibit P-5, Vol. 1, Tab 14].

too common."[52] The 2006 report elaborated that "military, intelligence and police forces" have all been accused of torture and extrajudicial killing of suspects in detention. Similar to the U.N. Secretary-General and High Commissioner for Human Rights, DFAIT singled out the National Directorate of Security as an agency of particular concern for practising torture.[53]

52. Previous annual DFAIT reports on Afghanistan have described human rights violations such as torture and killing as "*widespread*" and "*visible and flagrant*". In the 2003 report, DFAIT provided details on the nature of torture perpetrated by Afghan authorities:

> Common methods of torture included beating with an electric cable or metal bar, electric shocks, sleep deprivation and hanging detainees by their arms or upside down for several days. Juveniles were also reported to have been beaten and tortured.[54]

E. Torture and Abuse of Canadian Forces Detainees

53. There is no evidence before this Commission about the Canadian Forces' state of knowledge of the prevalence of torture in Afghanistan in December 2005, when the 2005 Detainee Agreement was signed. General Rick Hillier, who personally signed the Agreement, did not testify. However, CF officers testifying before this Commission recognized generally that Canada was deployed in Afghanistan to improve the human rights situation in that country. Some also testified that they had read the various international reports on human rights abuses in Afghanistan. From these facts, it can be inferred that the CF senior leadership, including Commanders of Task Force Afghanistan, were aware that torture was practised by the NDS and other Afghan authorities.

54. Canadian diplomat Richard Colvin provided evidence to this Commission indicating that there were red flags concerning treatment of CF-transferred detainees in 2006. Mr. Colvin was posted to Afghanistan in April 2006 until October 2007. From April to June 2006, he was the

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[52] DFAIT, *Afghanistan – 2006: Good Governance, Democratic Development and Human Rights* (January 2007) ("2006 DFAIT HR Report"), at para. 1 [Exhibit P-74, Coll. Y, Vol. 5, Tab 15].
[53] *Id.* at paras. 14-15 and 17.
[54] DFAIT, *Afghanistan, Human Rights, Democratic Development, and Good Governance: 2003 Annual Report*, at paras. 13 and 18 [Exhibit P-5, Vol. 1, Tab 2]. *See also* DFAIT, *2002 Annual Report: Human Rights, Democratic Development, and Good Governance, Afghanistan*, at para. 10 [Exhibit P-5, Vol. 1, Tab 1]; and DFAIT, *Afghanistan – 2004: Good Governance, Democratic Development and Human Rights*, at para. 2 [Exhibit P-5, Vol. 1, Tab 3].

acting DFAIT representative in Kandahar. According to Mr. Colvin, he received information in May 2006 from "very credible" sources that CF-transferred detainees were being abused in Afghan custody. As Mr. Colvin told the Commission, "the information was conveyed that there was mistreatment of detainees, not just a risk, but the fact of mistreatment."[55]

55. Mr. Colvin produced several emails to the Commission which show that he communicated that CF-transferred detainees were at risk of being abused. In May 2006, Mr. Colvin widely distributed an email report that he says raised concerns about the mistreatment of detainees post-transfer. The primary issues raised in the email was a complaint by the ICRC that the CF was not providing timely information about detainee transfers. However, the email also noted that the ICRC suggested "a lot can happen in two months."[56] Mr. Colvin expanded on these issues in a second email report in early June 2006, where he added a whole section on "Treatment of detainees by Afghan authorities." Mr. Colvin noted that his source was speaking "in code" with "roundabout answers." The source spoke about "unsatisfactory conditions", and stressed that Canada's responsibility for detainees did not cease because they had been handed over to Afghan authorities.[57]

56. Mr. Colvin testified that while it is true his email report was written in the "code" of his source, he nonetheless believed that recipients would have fully understood what it meant. He said that, in the context of Afghanistan, it would have been clear that concerns about treatment would not have meant inadequate food or bedding.[58] Mr. Colvin testified that Major Erik Leibert of the CF understood and agreed with his concerns, as he was consulted on the report.[59] Major Leibert was not called as a witness in this proceeding.

57. As referenced in paragraph 23, *supra*, a draft "CDS Tasking Order" concerning follow-up on detainees post-transfer was considered in December 2006. The draft Tasking Order stated that "[t]his direction is issued despite the fact that allegations of mistreatment of such detainees have not been supported by specific facts and remain substantiated." It is unknown what

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[55] Military Police Complaints Commission, Afghanistan Public Interest Hearings, Transcript of Proceedings, Vol. 13 (April 13, 2010) ("Colvin Tr."), at 25:15; 32:12-15.
[56] Email from KANDH-C4 (KANDH-0029) (May 26, 2006) [Exhibit P-26, Coll. E, Tab 1; MWB, Vol. 3, Tab 10].
[57] Email from KANDH-C4 (KANDH-0032) (June 2, 2006), at paras. 20-24 [Exhibit P-26, Coll. E, Tab 43; MWB, Vol. 3, Tab 15].
[58] Colvin Tr. at 61-62; 63-64.
[59] *Id.* at 24:1-15.

"allegations of mistreatment" Gen. Hillier was referencing here. The Tasking Order urged a "proactive approach in exercising due diligence to ensure the rights of persons detained by the CF are protected while in CF custody and following transfer to Afghan authorities."[60] This draft document was exchanged among numerous people in CEFCOM and NDHQ, but was never issued because it was "on hold pending consultations with OGDs (Other Government Departments)." On a briefing note related to the draft CDS Tasking Order, there is also a hand-written notation about "MP context" and the remark, "We need to be very careful with this document – let's talk later."[61]

58. On February 21, 2007, Amnesty International Canada and the B.C. Civil Liberties Association submitted their first complaint to the Commission (the "February 2007 Complaint"). The Complainants asserted that the CF was not taking into account publicly available and credible reports that Afghan authorities such as the NDS and ANP were routinely inflicting torture in detention. The Complainants relied chiefly on the reports by the United Nations, AIHRC and U.S. State Department referred to above. It was alleged that the Military Police were particularly implicated in the transfer process because they were responsible for the physical custody and transfer of CF detainees. [62] As the Complainants noted, "All the reports are found on public websites, such that due diligence would cause the Military Police to be aware of them."[63]

59. While the Complainants did not have information specifically about CF-transferred detainees at that time, they emphasized that the absence of any kind of post-transfer monitoring system meant that detainees could be tortured without Canada being aware.[64] "Public confidence in the CF would be very much more severely affected if it was found that a person transferred by the Military Police to GoA were tortured," the Complainants wrote. "We believe this is possible; indeed it becomes more likely with time."[65]

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[60] Draft CDS Tasking Order, *supra* note 20, at paras. 1 and 3(b).
[61] CEFCOM HQ Transmittal Sheet, *supra* note 20, at 20 of 29 (handwritten notation), and attached Briefing Note to DOS/CDS (February 2007), at 23 of 29 (handwritten notation on "MP context").
[62] February 2007 Complaint at 3-5.
[63] *Id.* at 4.
[64] *Id.* at 6-7.
[65] *Id.* at 7.

60. Approximately at the same time as the February 2007 Complaint was filed, the Complainants launched an application in the Federal Court of Canada for an injunction prohibiting detainee transfers on the grounds that transfers to risk of torture violated the detainees' rights under the *Charter of Rights and Freedoms.*

61. A few weeks later, on March 9, 2007, officials from DND, CF, DFAIT and other government departments held a meeting in Ottawa to discuss issues concerning the transfer of detainees to Afghan authorities, including the Court challenge by the Complainants. There were approximately 12 to15 people present, including Richard Colvin and Gabrielle Duschner, the Policy Advisor to CEFCOM Commander Lt. Gen. Michel Gauthier. Both Mr. Colvin and Ms. Duschner testified that Mr. Colvin told the group, "The NDS tortures people, that is what they do, and if we don't want detainees tortured, we shouldn't give them to the NDS."[66]

62. Ms. Duschner testified that she took notes of the meeting, but chose not to record Mr. Colvin's comments, aside from the notation, "NDS torture, do we know for certain?"[67] Mr. Colvin testified that the CEFCOM representative conspicuously "put down her pen" while he was talking about the NDS and torture.[68] Ms. Duschner indicated that it appeared that Mr. Colvin's comments were merely "a matter of opinion", and therefore she did not take them seriously enough to write more. She did not recall if she reported Mr. Colvin's concerns to Lt. Gen. Gauthier. [69]

63. Denying the risk that CF-transferred detainees would be tortured became considerably more difficult following the publication of a front-page newspaper story on April 23, 2007 by *The Globe and Mail* ("Graeme Smith Article"). Reporter Graeme Smith had carried out his own investigation into the treatment of individual CF-transferred detainees in Afghan custody. Mr. Smith tracked down 30 individuals who had been transferred by the CF and eventually released

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[66] Colvin Tr. at 97:2-7; and Military Police Complaints Commission, Afghanistan Public Interest Hearings, Transcript of Proceedings, Vol. 15 (June 14, 2010) ("Duschner Tr."), at 75:22-76:1.
[67] Duschner Tr. at 74:16-75:5; 76:2-14.
[68] Colvin Tr. at 97:8-12. Mr. Colvin testified that he believed it was Mieka Bos from CEFCOM who put down her pen. *Id.* at 97:13-15. However, Ms. Duschner confirmed that it was actually she who did so. Duschner Tr. at 76:2-7. This is perhaps explained by the fact that Ms. Duschner and Mr. Colvin only met once, and there were no introductions at the roundtable meeting. *Id.* at 78:1-3; 148:9-14.
[69] Duschner Tr. at 76:20-78:25.

by Afghan authorities. Mr. Smith's story, complete with photographs and names, provided riveting details of abuse:

> 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.[70]

64. Immediately following this newspaper story, Canadian officials took some steps to find out more information. Meetings were held with the AIHRC to ask about comments in the story emanating from that body. DFAIT was advised by the AIHRC that it was often being denied access to detainees in NDS custody, including CF-transferred detainees. Reportedly, Afghan President Hamid Karzai had intervened, but the access problems nonetheless continued. This information was a concern to Canadian officials because the AIHRC was seen as a means of monitoring the treatment of CF-transferred detainees. This report was transmitted to CEFCOM on April 24, 2007.[71]

65. In response to the Graeme Smith Article and other media coverage of the torture issue around the same date, individuals at CEFCOM investigated whether any of the men Mr. Smith interviewed who reported being tortured had in fact been in the custody of the CF prior to being transferred, and whether their allegations were true. A document entitled, "Fact Check on Detainee Related Coverage 23-27 Apr 07," prepared by Mike Carter, a civilian employed at

[70] G. Smith, "From Canadian custody into cruel hands", *The Globe and Mail* (April 23, 2007) ("Graeme Smith Article") [Exhibit P-8, Vol. 4, Tab 1; MWB, Vol. 3, Tab 5].

[71] Email from DFAIT KABUL C4 to Scott Proudfoot (April 23, 2007), forwarded to CEFCOM NDHQ [Exhibit P-76, Coll. Z, Vol. 2, Tab 8].

CEFCOM headquarters, set out the allegations reported in the media, followed by comments concerning their veracity.[72]

66. For example, the Graeme Smith Article reported that Mahmad Gul, a 33 year-old farmer, had his teeth knocked out by an Afghan interrogator. He claimed that Canadians visited him between beatings, heard his screams, and urged him to provide his Afghan captors with intelligence. The CEFCOM document is highly redacted, but what little is unredacted indicates that CEFCOM verified that CF units were operating in the surrounding area during the relevant time period of Mr. Gul's incarceration. It further indicated that the CEFCOM Commander requested that the NIS investigate the alleged incident. The document also indicates that CEFCOM verified that the man identified as "Sherin" in the Graeme Smith Article, who reported being taken to NDS headquarters and being beaten with bundles of electric cables, was verified as having been in CF custody.

67. Lt. Col. Garrick, Commander of the NIS, testified that CEFCOM never shared the "Fact Check" with him or any of his NIS investigators.[73] He testified that the NIS investigation into whether the CF transferred Mr. Gul to torture was ultimately conducted under the auspices of GO 2008-6920.[74] That investigation is discussed in detail *infra* at paragraphs 277 to 278; for present purposes we merely highlight that the NIS investigator for GO 2008-6920 took no other investigative step other than to read the Graeme Smith Article and close the file on July 10, 2008, well over a year after the article was published. Lt. Col. Garrick further testified that no further investigations into the reports of torture in the article were ever conducted.

68. In light of the Graeme Smith Article and problems faced by the AIHRC, it was decided that Canadian officials should visit NDS detention facilities to confirm that access was indeed possible. A visit by DFAIT and Correctional Service of Canada ("CSC") officials was arranged for April 25, 2007. The officials reported that they were surprised when two detainees complained about torture. One detainee said he had been "kicked and beaten while blindfolded" and that NDS interrogators "stepped on his belly." Another detainee said he had been beaten and

[72] Mike Carter, *Fact Check on Detainee Related Coverage 23-27 Apr 07* (undated) [Exhibit P-71, Coll. X, Tab 10].
[73] Military Police Complaints Commission, Afghanistan Public Interest Hearings, Transcript of Proceedings, Vol. 33 (November 29, 2010) ("Garrick Tr. Vol. 1"), at 85:16-86:1.
[74] *Id*. at 133:4-134:7.

subjected to electric shocks. He also said he was bound by his feet and hands and made to stand for ten days.[75]

69. Brig. Gen. Tim Grant was the JTF-A Commander at the time. He informed this Commission that all of these events contributed to a decision in the last week of April 2007 to suspend detainee transfers. Brig. Gen. Grant gave evidence that CEFCOM Commander Lt. Gen. Gauthier gave this direction and that transfer decisions were "effectively taken out of [his] hands and put in General Gauthier's hands."[76]

70. The Complainants reacted to the Graeme Smith Article by bringing an urgent motion to the Federal Court for an injunction prohibiting transfers. (It was not publicly known that the CF had already suspended transfers until it was disclosed in the course of these MPCC proceedings.) The motion was scheduled to be argued May 3, 2007, but the Governments of Canada and Afghanistan signed the May 2007 Detainee Agreement that same day and the document was revealed in the courtroom. Since the new agreement allowed for regular monitoring by Canadian officials, the motion was adjourned indefinitely.

71. The CF resumed the transfer of prisoners on or about May 19, 2007, once the protocol for NDS site visits was established.[77] DFAIT was tasked with carrying out visits to CF-transferred detainees in Afghan custody. Brig. Gen. Grant had expressed his opinion at the time that appropriate monitoring would involve a minimum of three visits to each detainee. His advice on the appropriate level of monitoring was not followed, however, and it was decided in Ottawa that even a single visit to every detainee was unnecessary.[78]

72. On June 4, 2007, DFAIT and CSC officials and the PRT Legal Advisor Lt. Cmdr. Gina Connor visited Saraposa prison in Kandahar to carry out the first detainee interviews. According to the "C4" report of the visit, one detainee divulged that he had been "beaten with electrical

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[75] Email from KANDH-KAF-C4 to Kerry Buck (KANDH0026) (April 25, 2007) and attached "NDS SITE VISIT" report at 2 of 7, 5 of 7, and 6 of 7 [Exhibit P-71, Coll. X, Tab 2].

[76] Military Police Complaints Commission, Afghanistan Public Interest Hearings, Transcript of Proceedings, Vol. 20 (September 22, 2007) ("Grant Tr."), at 64:3-6. *See also id.* at 70:15-71:2.

[77] *See* Email from Lt. Gen. Michel Gauthier to Brig. Gen. Tim Grant (May 19, 2007) [Exhibit P-76, Coll. Z, Vol. 1, Tab 42] and Grant Tr. at 181:14-182:5.

[78] Grant Tr. at 74:16-75:4; 76:9-23; 179:6-180:4.

cables while blindfolded" while he was held at the NDS facility. [79] (Detainees are initially transferred to the NDS for "investigation" before being handed over to Saraposa, a prison operated by the Afghan Ministry of Justice.)

73. The following day, other DFAIT officials visited an NDS detention facility in Kabul. The DFAIT officials heard disturbing claims of torture, which they summarized as follows:

> Of the four detainees we interviewed, three said they had been whipped with cables, shocked with electricity and/or otherwise "hurt" while in NDS custody in Kandahar. This period of alleged abuse lasted from between two and seven days, and was carried out in both****** and Kandahar city. One of the detainees still had visible scars on his body, one seemed traumatized.[80]

74. The DFAIT report documented additional claims of torture, including forced standing and pulling out of toenails. One detainee informed the monitoring team that he saw other detainees having their fingers cut and burned with a lighter. [81]

75. Lt. Gen. Gauthier testified that transfers were suspended a second time as a result of these DFAIT reports.[82] Since DFAIT monitoring had commenced, nearly half of the detainees interviewed had made complaints of torture and abuse.[83] The AIHRC and ICRC were informed of the allegations, and the Afghan authorities were asked to investigate. The Afghan investigations were hampered by the fact that none of the detainees wanted their names divulged. But importantly, DFAIT officials were also concerned about "how we ensure a meaningful investigation (given that it is likely the NDS will be investigating themselves)."[84] There is no evidence that concern was ever addressed.

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[79] Email from KANDH-C4R (KANDH-0039) (June 5, 2007) at para. 5 [Exhibit P-76, Coll. Y, Vol. 3, Tab 60; MWB, Vol. 2, Tab 49].

[80] Email from KABUL C4 (KBGR-0291) (June 6, 2007) at para. 3 [Exhibit P-26, Coll. E, Tab 33; Exhibit P-70, Tab 12] It was later determined that one of these detainees claiming abuse was not transferred by the CF.

[81] *Id.* at 4-5 of 6. Richard Colvin was one of the DFAIT officials present at this visit. He confirmed that the report indicated that one of the men was missing his toenails, which the detainee monitoring team believed to be a result of torture. Colvin Tr. at 177:12-178:14.

[82] Military Police Complaints Commission, Afghanistan Public Interest Hearings, Transcript of Proceedings, Vol. 23 (October 5, 2010) ("Gauthier Tr. Vol. 1"), at 139:17-140:20.

[83] *See* Visits Summary Since May 3, 2007, at 2 of 2 ("Visit Summary Table") [Exhibit P-74, Coll. Y, Vol. 3, Tab 46]. The first four visits show a total of eight interviews and three allegations. As noted by the asterisk, a further allegation of abuse was excluded as the individual was not a CF-transferred detainee. It is unclear why DFAIT regarded torture of other prisoners in the same facility as irrelevant to the risk of torture.

[84] Email from KABUL-C4R, to Kerry Buck (KANDH-0043) (June 6, 2007) at para. 4 [Exhibit P-74, Coll. Y, Vol. 2, Tab 15, at 4 of 7; Exhibit P-70, Tab 11, at 1 of 3].

76. On June 22, 2007, Lt. Gen. Gauthier informed Brig. Gen. Grant that he was authorized to resume transfers again. The Chief of Defence Staff, Gen. Hillier, had also conveyed that he was "satisfied that the conditions for transfer have been met." Nonetheless, Lt. Gen. Gauthier cautioned Brig. Gen. Grant that he should "proactively" evaluate the monitoring and follow-up by DFAIT to ensure "the risk of abuse after transfer remains low."[85]

77. Brig. Gen. Guy Laroche assumed command of Task Force Afghanistan from Brig. Gen. Grant on August 1, 2007.[86] Brig. Gen. Laroche testified that he was aware that there had been certain allegations of abuse received by DFAIT, but he did not see the specific C4 reports from DFAIT.[87] He acknowledged receiving the CEFCOM Commander Directive dated June 18, 2007 and the Amplifying Guidance dated September 12, 2007, regarding CF responsibilities for post-transfer follow-up, discussed at paragraphs 26 to 27, *supra*.

78. In August 2007, DFAIT and NDHQ learned that the AIHRC was continuing to report difficulties in accessing detainees in NDS custody. In early August, it was reported that on several occasions, the AIHRC would arrive at the detention facility with a transfer notification record from DFAIT but the NDS would deny that the detainees were ever received into custody.[88] Later that month, the AIHRC reported that access was completely refused on some occasions.[89] These problems persisted despite the specific terms of the May 2007 Detainee Agreement and the fact that Brig. Gen. Grant had personally brokered a deal between the local heads of the AIHRC and the NDS to resolve such issues.[90]

79. In the first two months of Brig. Gen. Laroche's command, DFAIT carried out only two monitoring visits.[91] On the second of those visits, DFAIT officials attended the Kandahar NDS facility on September 11, 2007, where two detainees were interviewed. Before the monitoring

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[85] Email from Lt. Gen. Michel Gauthier to Brig. Gen. Tim Grant (June 22, 2007) [Exhibit P-76, Coll. Z, Vol. 3, Tab 9]; and Gauthier Tr. Vol. 1 at 140:14-141:15.

[86] Military Police Complaints Commission, Afghanistan Public Interest Hearings, Transcript of Proceedings, Vol. 13 (May 11, 2010) ("Laroche Tr. Vol. 1") at 3:22-24.

[87] *Id.* at 137:2-138:11; 147:5-13.

[88] Email from KABUL C4 to KANDH-PRT-DIR (August 2, 2007) [Exhibit P-74, Coll. Y, Vol. 4, Tab 18].

[89] Email from KANDH-C4 to KABUL-KAF-HOM (August 21, 2007) at para. 2 [Exhibit P-74, Coll. Y, Vol. 4, Tab 13].

[90] Email from KANDH-C4 to Scott Proudfoot (April 26, 2007) [Exhibit P-76, Coll. Z, Vol. 2, Tab 11].

[91] According to the Visit Summary Table, *supra* note 83, there was only one visit in July 2007 and no visits in August 2007. While the specific date of the first recorded visit in September 2007 is redacted, the facility identified is NDS Kandahar. We believe this shows that the first September 2007 visit on the table is the one described in the DFAIT site visit report known as KANDH-0074, *infra* note 92.

team had asked any questions of the first detainee, he suddenly announced that he had not been beaten. The second detainee did complain of abuse, alleging he had been punched in the mouth and hit on the buttocks and upper thigh.[92]

80. Despite this report of abuse, the next DFAIT visit did not occur until more than ten days later, on September 23, 2007. On a visit to Sarposa prison, a detainee described being beaten badly with a power cable or wire on his side and buttocks. He also said that during NDS interrogation he was forced to stay awake for three to four days with his hands raised above his head.[93]

81. Brig. Gen. Laroche and his chain of command, however, did not deem it necessary to suspend transfers following the abuse allegations received on September 11 and 23, 2007.

82. On October 29, 2007, an article by Michèle Ouimet was published in *La Presse* ("Ouimet Article"). Like Graeme Smith before her, Ms. Ouimet interviewed individuals who had been transferred by Canada to the NDS. The men claimed they had been abused, describing methods of torture such as sleep deprivation, electric shocks, pulled out fingernails, beatings with electrical cables and bricks, and being suspended by their arms. According to the article, Canadian officials refused to speak to the reporter.[94]

83. Brig. Gen. Laroche went on a short leave in early November 2007. As a result of national security objections, this Commission heard no evidence about how many transfer decisions were made during that time period. By that time, there had been only one more DFAIT monitoring visit since the two allegations of abuse in September.[95] Brig. Gen. Laroche and his deputy commander Col. Christian Juneau agreed to prepare a memo for CEFCOM Commander Lt. Gen. Gauthier, highlighting the JTF-A Commander's concerns about the post-transfer monitoring regime. According to the memo, Brig. Gen. Laroche had become concerned about the frequency of DFAIT monitoring visits and the lack of any additional information from any

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[92] Email from KANDH-C4R to David Mulroney (KANDH-0074) (September 11, 2007) at 3 of 4 [Exhibit P-76, Coll. Y, Vol. 4, Tab 21; Exhibit P-70, Tab 13; MWB, Vol. 2, Tab 49].
[93] Email from KANDH-PRT-C4 to KANDH-KAF (KANDH-0082) (September 23, 2007) at 3 of 3 [Exhibit P-76, Coll. Y, Vol. 4, Tab 22; Exhibit P-70, Tab 14; MWB, Vol. 2, Tab 49].
[94] M. Ouimet, "C'est vous, Canadiens qui êtes responsables de la torture…" *La Presse* (October 29, 2007) ("Ouimet Article") [Exhibit P-70, Tab 6].
[95] Visit Summary Table, *supra* note 83.

other source. Among other issues, he had not received a periodic assessment from DFAIT, nor had he received any information on the outcome of Afghan investigations into previous allegations of abuse. The recent Ouimet Article with new allegations of detainee abuse was also noted. The memo did not remark on whether AIHRC access issues had been resolved. The memo stated that transfers were continuing but may have to be suspended until "the monitoring and reporting situation improves." The memo described the "light" for permitting transfers to continue as "amber", "not red but not green either."[96]

84. It is unsurprising that Brig. Gen. Laroche was concerned about this complete lack of information. The Amplifying Guidance he received on September 12, 2007 emphasized that he and the chain of command had "*an obligation* to satisfy itself that all relevant information regarding the treatment of detainees while in Afghan custody is actively sought and considered", and specifically cited DFAIT monitoring reports, periodic assessments and updates on Afghan investigations as relevant sources of information.[97] Brig. Gen. Laroche had continued to make transfer decisions for several weeks in the absence of any such information, other than the September DFAIT reports that contained abuse allegations.

85. On November 5, 2007, DFAIT officials Nicholas Gosselin and John Davison visited the NDS facility in Kandahar. Only one detainee was interviewed. The DFAIT officials made the following disturbing report about what they learned during the course of that interview:

> When asked about his interrogation the detainee came forward with an allegation of abuse. He indicated that he has been interrogated on 2 occasions by a group of 4 individuals. He could not positively identify the individuals but provided a general description of two of them. He indicated that he could not recall the first interrogation in any detail as he was allegedly knocked unconscious early on. He alleged that during the second interrogation, 2 individuals held him to the ground with his shawl while the other 2 were 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

[96] Email from Lt. Col. Stéphane Dubois to Brig. Gen. André Deschamps (November 5, 2007) attaching memo "Points to Pass on to the Comd CEFCOM" [Exhibit P-53, Coll. U, Tab 3].
[97] Amplifying Guidance, *supra* note 24, at para. 2.

> 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.[98]

86. Witnesses testifying before this Commission agreed that in all likelihood this man had been tortured.[99] It was confirmed during the hearing that Brig. Gen. Laroche made the decision to transfer him to NDS custody.[100] The DFAIT report led to an immediate suspension of transfers by the acting JTF-A Commander, Col. Juneau. A summary of DFAIT visits showed that, by November 5, 2007, six of 24 detainees interviewed – a full 25% – had complained of being abused by the NDS. From the time of the second suspension of transfers in June 2007 to November 5, 2007, only five DFAIT visits were conducted over a four month period. Of those five visits, three resulted in allegations of abuse, including the one reported on November 5, 2007.[101]

87. Canada informed the Government of Afghanistan about this most recent allegation of abuse. As a result, a single official was removed from NDS Kandahar. It was suggested that the NDS official was being criminally investigated, but it does not appear that the man was ever charged.

88. DFAIT continued to carry out visits following the suspension and several more allegations of abuse came to light. On November 7, 2007, two detainees were interviewed at NDS Kandahar. Both alleged they had been abused, including being beaten with an electrical cable and being forced to stand for an extended period of time. One said he was threatened with execution if he did not co-operate with the interrogation.[102] On November 10, 2007, and November 11, 2007, no detainees indicated they had been mistreated, but two individuals reported that other detainees had been abused with wires and sticks during interrogation by the NDS.[103] On November 27, 2007, two more detainees alleged abuse by the NDS. One detainee

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[98] Email from KANDH-PRT-C4 to KANDH-PRT-DIR (KANDH0123) (November 5, 2007) [Exhibit P-69, Coll. W, Tab 1; MWB, Vol. 2, Tab 49].

[99] Military Police Complaints Commission, Afghanistan Public Interest Hearings, Transcript of Proceedings, Vol. 22 (Oct. 4, 2010) ("Laroche Tr. Vol. 3"), at 81:15-82:9; 135:3-7; Gauthier Tr. at 139:17-140:20; Military Police Complaints Commission, Afghanistan Public Interest Hearings, Transcript of Proceedings, Vol. 34 (December 1, 2010) ("Moore Tr. Vol. 1"), at 252:6-20.

[100] Commander's Review, signed by Brig. Gen. Laroche [Exhibit P-80].

[101] *See* Visit Summary Table, *supra* note 83.

[102] Email from KANDH-PRT-C4 (KANDH0125) (November 7, 2007) at 3 of 3 [Exhibit P-69, Coll. W, Tab 4].

[103] Email from KANDH-PRT-C4 (KANDH0127) (November 10, 2007) at 3 of 3 [Exhibit P-69, Coll. W, Tab 2]; Email from KANDH-PRT-C4 (KANDH0128) (November 11, 2007) at 3 of 4 [Exhibit P-69, Coll. W, Tab 3].

said he had been slapped during interrogation, but another made a far more serious claim, stating he "was beaten several times with a cable and was told he would be killed or sexually assaulted."[104]

89. The Federal Court challenge by Amnesty International and the B.C. Civil Liberties Association was argued during this suspension in January 2008. The Federal Court reviewed much of the evidence discussed above, and described it as "very troubling", adding that it "creates real and serious concerns as to the efficacy of the safeguards that have been put in place thus far to protect detainees transferred into the custody of Afghan prison officials".[105] The Court observed that the numerous allegations of abuse had indicia of credibility,[106] and expressed reservations about the reliability and independence of investigations conducted by Afghan authorities into the abuse allegations.[107] The Court did not issue an injunction because transfers were already suspended, but expressed the view that it was unknown whether transfers could ever resume given the circumstances. Implying that previous transfers may have violated the "substantial risk" standard, the Court added:

> As a result of these concerns, the Canadian Forces will undoubtedly have to give very careful consideration as to whether it is indeed *possible* to resume such transfers in the future *without exposing detainees to a substantial risk of torture.*
>
> Careful consideration will also have to be given as to what, *if any*, safeguards can be put into place that will be sufficient to ensure that any detainees transferred by Canadian Forces personnel into the hands of Afghan authorities are not thereby exposed to a substantial risk of torture.[108]

90. The CF authorized the resumption of transfers to Afghan authorities on or about February 27, 2008, approximately three weeks after the Federal Court's judgment. The JTF-A Commanders appearing before this Commission testified that enhanced safeguards were put in place, including human rights training for the NDS and increased frequency of DFAIT visits. As well, a single NDS officer associated with the November 5 allegation had been removed from NDS Kandahar. However, the detainee interviewed on November 5, 2007, alleged that four NDS officers were involved in his cruel beating. There was no indication that the remaining three

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[104] Email from KANDH-PRT-C4 (KANDH0138) (November 27, 2007) at 2-3 of 4 [Exhibit P-69, Coll. W, Tab 8].
[105] *AI v. CDS*, 2008 FC 162 at para. 111.
[106] *Id.* at paras .86-87.
[107] *Id.* at paras. 92-93.
[108] *Id*. at 112-113 (emphasis added).

torturers had been removed from the institution. And while document disclosures to this Commission suggest that DFAIT visits to Afghan detention facilities were more frequent in 2008[109], there was still no requirement that every single detainee be visited post-transfer, as was originally recommended by Brig. Gen. Grant and others.[110] Indeed, on some occasions, no interviews were conducted at all, and cursory physical examinations were deemed sufficient.[111]

91. The Federal Court issued a second ruling on March 12, 2008, dismissing the Complainants' constitutional challenge on the grounds that the *Charter of Rights and Freedoms* could not be applied extraterritorially to protect the human rights of detainees in CF custody. The Court allowed that this was a "troubling" conclusion in light of the serious concerns raised about the safety of detainees, but offered the following observations:

> [343] *Before concluding, it must be noted that the finding that the Charter does not apply does not leave detainees in a legal "no-man's land," with no legal rights or protections.* The detainees have the rights conferred on them by the Afghan Constitution. In addition, whatever their limitations may be, the detainees also have the rights conferred on them by international law, and, in particular, by international humanitarian law.
>
> [344] It must also be observed that members of the Canadian Forces cannot act with impunity with respect to the detainees in their custody. *Not only can Canadian military personnel face disciplinary sanctions and criminal prosecution under Canadian law should their actions in Afghanistan violate international humanitarian law standards, in addition, they could potentially face sanctions or prosecutions under international law.*
>
> [345] Indeed, serious violations of the human rights of detainees could ultimately result in proceedings before the International Criminal Court, pursuant to the *Rome Statute of the International Criminal Court*, A/CONF. 183/9, 17 July 1998.[112]

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[109] *See* Exhibit P-69, Coll. W, "Site Visit Reports".

[110] Draft Interim Plan (April 30, 2007) [Exhibit P-76, Coll. Z, Vol. 1, Tab 19]. In fact, this plan prescribed three visits to *each* detainee in Afghan custody.

[111] *See, e.g.*, Email from KANDH-PRT-C4R (KANDH0061) (March 5, 2008) at para. 5 ("During our visit, we visually assessed the condition of all Canadian-transferred detainees currently held at the facility. A cursory examination of their condition revealed nothing out of the ordinary."); Email from KAND-PRT-C4R (KPRT0078) (March 25, 2008) at para. 5 ("KPRT DFAIT/Gosselin conducted a tour of the old and new detention facilities and visually assessed the condition of all Canadian-transferred detainees currently held at the facility.").

[112] *AI v. CDS*, 2008 FC 336 at paras. 343-345; *see also id.* at paras 339-340.

92. The Complainants submitted their second complaint to the MPCC on June 12, 2008 (the "Complaint").[113] Relying upon the DFAIT reports disclosed in the Federal Court case, the human rights groups contended that the Military Police failed in their duty to investigate whether those abused detainees were transferred unlawfully.

[113] *Supra* note 1.

III. The Legal Framework Governing the Conduct of MPs in Afghanistan

A. Prohibitions against Transfers to Risk of Torture

93. The standards governing the conditions under which Canadian Forces may transfer detainees to Afghan authorities are derived from international humanitarian law[114], international human rights law, and the military's own rules and policies. We discuss each of these in turn, below.

a) International Humanitarian Law

94. While the conflict in Afghanistan is of a non-international character, the detainee transfer agreements between Canada and Afghanistan[115] and CF policy[116] nonetheless contemplate that detainees captured by Canadian Forces in Afghanistan are to be treated as prisoners of war ("POWs") in accordance with the requirements set forth in the Third Geneva Convention (Geneva Convention Relative to the Treatment of Prisoners of War[117]) ("GPW").[118]

95. Article 12 of the GPW sets out the conditions which must be met before POWs can be transferred to another State. One of these conditions is that the transferring power – in this case, Canada – must satisfy itself of the willingness and of the ability of the transferee power – in this case, Afghanistan – to apply the GPW. [119] The GPW, in turn, prohibits torture and ill treatment of detainees.[120]

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[114] *See* Marco Sassòli, *International law issues raised by the complaint made by Amnesty International Canada and the British Columbia Civil Liberties Association before the Military Police Complaints Commission concerning the transfer, by Canadian forces, of Afghan detainees to Afghan authorities* ("Sassòli Report"), at 7 [Exhibit P-64].

[115] 2005 Detainee Agreement; May 2007 Detainee Agreement.

[116] *See, e.g.*, Office of the Judge Advocate General, *Code of Conduct for CF Personnel*, B-GG-005-027/AF-023 ("CF Code of Conduct") at 2-9 (stating that all detainees, regardless of status be treated in accordance with the standard set by GPW) [Exhibit P-23, Coll. B, Vol. 1, Tab 7]; *see also supra* note 14 and accompanying text.

[117] Geneva Convention Relative to the Treatment of Prisoners of War, 6 U.S.T. 3316, 75 U.N.T.S. 135 (Aug. 12, 1949) ("GPW").

[118] *See also* Sassòli Report at 12-14 (setting out analysis for the applicability of GPW with respect to CF transfers of detainees in Afghanistan); Craig Forcese, *Research Report: Assessment of Complainants' Legal Claims* (March 2010) ("Forcese Report"), at 49 (same) [Exhibit P-65].

[119] Art. 12 of the GPW states:

> Prisoners of war are in the hands of the enemy Power, but not of the individuals or military units who have captured them. Irrespective of the individual responsibilities that may exist, the Detaining Power is responsible for the treatment given them.
>
> Prisoners of war may only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such

96. In determining whether the transferee power is willing and able to apply the GPW, the International Committee of the Red Cross has indicated that "[t]he Power wishing to transfer prisoners can only satisfy itself of the ability of the receiving Power to accept the prisoners through prior investigation."[121]

97. It is clear from the evidence of Professors Marco Sassòli and Craig Forcese, the international law experts testifying before this Commission, that Afghanistan's bare undertaking to not torture or to abide by the two transfer agreements is insufficient to satisfy this requirement of Article 12. International human rights bodies have repeatedly rejected assurances to not engage in torture as conclusive evidence that no risk of torture or abuse exists, and instead, "have requested that the transferring State evaluate whether these assurances correspond to reality."[122] While the international law experts acknowledged that assurances, coupled with an adequately robust monitoring regime, may be sufficient in discharging Canada's duties as required by Article 12, they nonetheless agreed that where, as here, the monitoring regime found that abuse was taking place, little weight should be given to the transferee's assurances.[123] Indeed, "once findings of violations arose, […] whatever virtue the assurance had prior to that date is much abased."[124]

98. Further guidance as to the appropriate standard for transferring detainees can also be found in Common Article 3, so-called because it is common among all four Geneva Conventions. Common Article 3 addresses the treatment of all persons detained in armed conflict and "explicitly enshrines the prohibition of violence and threat to life against persons not taking

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> transferee Power to apply the Convention. When prisoners of war are transferred under such circumstances, responsibility for the application of the Convention rests on the Power accepting them while they are in its custody.
>
> Nevertheless if that Power fails to carry out the provisions of the Convention in any important respect, the Power by whom the prisoners of war were transferred shall, upon being notified by the Protecting Power, take effective measures to correct the situation or shall request the return of the prisoners of war. Such requests must be complied with.

GPW, *supra* note 117.

[120] *Id.* at Arts. 3, 17 and 130.

[121] J.S. Pictet (ed.), Commentary, III, Geneva Convention Relative to the Treatment of Prisoners of War, ICRC, Geneva (1960), at 136 (emphasis added), *cited in* Sassòli Report at 14.

[122] Sassòli Report at 14, 34; *see also* Complainants' Written Submissions on the Standard of Conduct, filed with the MPCC on March 24, 2010 ("March 2010 Submissions"), at paras. 57-62 for further discussion on the inadequacy of diplomatic assurances where, as here, the receiving country has a documented record of human rights abuses.

[123] Military Police Complaints Commission, Afghanistan Public Interest Hearings, Transcript of Proceedings, Vol. 12 (May 6, 2010) ("Sassòli and Forcese Tr."), at 82:2-19.

[124] *Id.* at 82:19-21.

part in hostilities."[125] According to Professor Sassòli, implicit in Common Article 3 is the requirement that detainees not be transferred to a situation where there is a substantive risk that a person would be subject to torture or abuse.[126]

99. Similarly, Professor Forcese gave the opinion that Common Article 3, read in conjunction with Common Article 1 of the Geneva Conventions, can also be construed as establishing implicit transfer standards. In his report, Professor Forcese quotes the Legal Advisor to the International Committee of the Red Cross as stating the following:

> Article 3 common to the four Geneva Conventions absolutely prohibits torture, cruel treatment or outrages upon personal dignity, in particular humiliating and degrading treatment. Taken together with Article 1 common to the four Geneva Conventions, this implies an obligation of states not only to respect these prohibitions, but also to ensure respect for them. Among others, parties to a conflict have a responsibility not to encourage or in any way contribute to violations of common Article 3. A transfer to a situation where there is a substantive risk that a person will be subjected to such treatment would amount to a violation of those obligations.[127]

b) International Human Rights Law

100. The absolute prohibition against torture is clear and well-established in international law.[128] As Professor Sassòli notes in his report, this prohibition "does not only contain a negative obligation for States but also a positive one to secure individuals from prohibited treatment."[129] Thus, the right to be free from torture "requires not only that States refrain from torture but also take steps of due diligence to avoid a threat to an individual of torture from third parties."[130]

101. In the context of detainee handling in Afghanistan, this means that Canada has two primary obligations: to ensure that detainees are not subjected to torture or cruel, inhuman or degrading treatment while in the custody of the Canadian Forces, and to ensure that detainees are not transferred to Afghan authorities if there are substantial grounds for believing that such transfers would place them at risk of being subjected to torture or other cruel, inhuman or

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[125] Sassòli Report at 14.
[126] *Id.*
[127] Forcese Report at 21 (internal citations omitted).
[128] The legal framework setting out this universal prohibition is set out in paragraphs 33 through 38 of the March 2010 Submissions. *See also* Sassòli and Forcese Tr. at 58:25-59:17.
[129] Sassòli Report at 29 (internal citations omitted).
[130] *Id.* at 34.

degrading treatment.[131] This prohibition against transfer to risk of torture and abuse is also known as the principle of *non-refoulement*, which is codified in Article 3 of the Convention Against Torture[132]:

> 1. No State Party shall expel, return ("*refouler*") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
>
> 2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

102. The U.N. Committee Against Torture has affirmed that the protections under the Convention extend to detainees held by military forces in a foreign territory. The Committee considered this same armed conflict in Afghanistan and found that Denmark violated its *non-refoulement* obligation when it transferred detainees to the jurisdiction of another state. Having so found, the Committee stated:

> The Committee recalls its constant view (CAT/C/CR/33/3. Paras. 4b, 4d, 5e and 5f and CAT/C/USA/CO/2m paras. 20 and 21) that article 3 of the Convention and its obligation of *non-refoulement* applies to a State party's military forces, wherever situated, where they exercise effective control over an individual. This remains so even if the State party's forces are subject to operational command of another State. Accordingly, the transfer of a detainee from its custody to the authority of another State is impermissible when the transferring state was or should have been aware of a real risk of torture.[133]

This view was affirmed by the testimony of the international law experts.[134]

103. The obligation of *non-refoulement* is regarded as so significant by the international community that it is widely accepted as a principle of customary international law, thus binding on all States irrespective of the ratification of any of the relevant treaties.[135] Moreover, the

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[131] *Id.* at 35.
[132] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA Res. 39/46, annex, 39 U.N. GOAR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1989), *entered into force* June 26, 1987 ("CAT").
[133] U.N. Committee Against Torture, *Consideration of Reports Submitted by State Parties under Article 19 of the Convention, Conclusions and recommendations on the fifth periodic report of Denmark* (16/06/2007, CAT/C/DNK/CO/5) at para. 13 [Exhibit P-66]; *see generally id.* at paras. 12-13.
[134] Sassòli and Forcese Tr. at 94:15-96:14.
[135] *See* Manfred Nowak, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN GAOR, 13th Sess., A/HRC/13/39/Add.5 (2010) at para. 238.

prohibition against *refoulement* is absolute, a *jus cogens* norm of international law from which no State can derogate.[136] As Professor Forcese testified, breaches of the principle of *non-refoulement* are considered violations of the anti-torture principle.[137] Consistent with the views of the U.N. Committee Against Torture, he also testified that the transfer of detainees by Canadian Forces to Afghan authorities would be subject to the principle of *non-refoulement*.[138]

c) Canadian Forces Rules and Policies

104. The Law of Armed Conflict Joint Doctrine Manual ("LOAC Manual")[139] sets out certain fundamental legal principles guiding all military activity. Chief among these principles is the importance of adhering to international obligations, even during armed conflict. The absolute prohibition against torture and mistreatment, as embodied in the Geneva Conventions and Convention Against Torture, is made explicit throughout the LOAC Manual.[140]

105. Military doctrine is clear that transfers of detainees to foreign custody must be done in accordance with the law of armed conflict.[141] The requirements set forth in GPW's Article 12 are reiterated in military doctrine manuals.[142] TSOs make explicit reference to the protections of the GPW.[143] Military commanders at the most senior levels were aware of this obligation, as demonstrated by a directive issued by CEFCOM Commander Lt. Gen. Michel Gauthier, to JTF-A Commander Brig. Gen. Laroche in June 2007, which stated, *inter alia*, "The chain of

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[136] *See* March 2010 Submissions at paras. 39-43; Sassòli and Forcese Tr. at 88:10-90:7. *See also* U.N. High Commissioner for Refugees, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol* (January 26, 2007) at para. 21: "The prohibition of torture is also part of customary international law, which has attained the rank of a peremptory norm of international law, or *jus cogens.* It includes, as a fundamental and inherent component, the prohibition of refoulement to a risk of torture, and thus imposes an absolute ban on any form of forcible return to a danger of torture which is binding on all States, including those which have not become party to the relevant instruments."

[137] Sassòli and Forcese Tr. at 89:8-12.

[138] *Id.* at 95:1-25.

[139] Minister of National Defence, *Joint Doctrine Manual: Law of Armed Conflict*, B-GJ-005-104/FP-021 (2001) ("LOAC Manual").

[140] *See, e.g., id.* at paras. 110, 112, 114, 203, 1003, 1013, 1016, 1610, 1708, 1713.

[141] *See* Forcese Report at 14-16 (setting out the various CF mandates directing that all detainees be accorded the protections of GPW).

[142] *See* Minister of National Defence, *Joint Doctrine Manual: Prisoner of War Handling Detainees and Interrogation & Tactical Questioning in International Operations*, B-GJ-005-110/FP-020 (2004) ("Detainee Doctrine Manual"), at 1A-1, 3H-1 [Exhibit P-24, Coll. C, Vol. 6, Tab 8]; Minister of National Defence, *Military Police*, B-GL-362-001/FP-001 (2000) ("Chief of Land Staff MP Manual"), at Ch. 5, para. 8 and 42; Annex H, para. 2c [Exhibit P-3, Vol. 1, Tab 1].

[143] Sassòli and Forcese Tr. at 139:13-140:9.

command bears the potential liability should we become aware of torture or mistreatment following the transfer of detainees to Afghan authorities." [144]

106. Accordingly, pursuant to principles articulated under international law and adopted by the Canadian Forces, it is clear that the Canadian military cannot transfer individuals to the jurisdiction of a foreign power if it is established that there are substantial grounds for believing that these individuals may be subjected to torture in the receiving state. As we have detailed in previous submissions to this Commission, the threshold for establishing "substantial grounds" is a low one; rather than repeating the argument here, we respectfully refer the Commission to paragraphs 50 through 64 of our March 2010 Submission.

d) Substantial Grounds for Believing that a Transferee Faces Risk of Torture

107. The Complainants' position for what constitutes "substantial grounds" is supported by the evidence of the international law experts. "Substantial grounds" may be established by presenting generalized evidence showing that members of a particular class of persons are subjected to torture and mistreatment. Professor Sassòli informed this Commission that with respect to threat of torture, it is sufficient to show that the transferee "may simply belong to a category of people who, according to the information, are sometimes tortured."[145] Such generalized information can come from human rights reports, such as those discussed in paragraphs 46 to 52, *supra.* Indeed, according to Professor Forcese, Article 3 of the CAT requires states to scrutinize such "authoritative documents" to determine whether there are substantial grounds to believe that there is a risk of torture upon transfer.[146] The onus is on the transferring state to satisfy itself that transfers are permissible. This understanding of the international standard is made clear in Lt. Gen. Gauthier's directive, discussed in paragraph 105, *supra*, where he places the burden on Brig. Gen. Laroche to determine whether transfers satisfy international law requirements.

108. Risk of torture cannot be vitiated simply because a state offers assurances of compliance with the anti-torture prohibition.[147] Indeed, the Federal Court has found that assurances are

[144] *See* Commander CEFCOM Directive, *supra* note 23, at para. 24.
[145] Sassòli and Forcese Tr. at 45:8-12.
[146] *Id.* at 99:5-8.
[147] *Id.* at 97:5-100:3.

inappropriate where there is an "overall pattern" of human rights violations, such as the systematic practice of torture.[148] Nor is the mere promise of post-transfer monitoring meaningful in considering the risk of torture, particularly where human rights monitors are denied access to the facilities, or monitoring visits result in reports that torture and abuse have taken place.[149] The U.N. Special Rapporteur on Torture once viewed monitoring as mitigating the risk of torture only where it is "prompt, regular and includes private interviews." More recently, however, the Special Rapporteur and the U.N. High Commissioner for Human Rights have both rejected monitoring as ineffective in both safeguarding against torture and as a mechanism of accountability.[150]

109. Future risk of torture or abuse can only be determined by examining historical evidence of torture and abuse. As Professor Sassòli observed: "Obviously you can never – you can never have evidence for a future fact. So you will never have evidence that someone will become tortured, but that other people in the same situation were tortured."[151]

110. The record is replete with evidence that detainees were at risk of post-transfer torture during the relevant time period. In addition to reports from the United Nations, the AIHRC, the U.S. State Department, and the Canadian government, there were newspaper accounts detailing specific instances of abuse and, most seriously, compelling, first-hand reports from post-transfer monitoring visits that documented allegations of torture and abuse. On the other hand, there has been no evidence presented to this Commission contradicting these consistent reports of systematic abuse and torture carried out by the NDS in Afghan prisons. None of the government witnesses have been able to testify, for example, that they have ever seen an NDS report outlining the results of its investigations into allegations of torture at its facilities. Nor has the government ever produced any such reports to this Commission. In light of this paucity of evidence, we submit that it would have been simply unreasonable for Canada or any of its agents to assume – or to conclude – that conditions in NDS facilities would be any safer than these many and various reports have indicated.

B. The Duty of Military Police to Investigate Crime

[148] *Lai v. Canada (Minister of Immigration)*, 2007 FC 361 ("*Lai*") at paras. 136-138.
[149] *See* Sassòli and Forcese Tr. at 148:17-149:8; 179:21-180:9.
[150] *See* U.N. reports discussed in *Lai*, 2007 FC 361 at paras. 140-141.
[151] Sassòli and Forcese Tr. at 101:13-17.

111. The duties and powers of Military Police officers are subject to the common law that applies to constables, police and peace officers. Those common law powers and duties are overlaid and amended by statutes and policies governing MPs. We will, first, discuss the foundational common law principles which govern police officers. In that regard, Canadian law is clear that police officers have a duty to investigate crime in a diligent, competent and impartial manner. Although police have discretion in deciding whether or not to investigate crime, this discretion must be exercised honestly, transparently and reasonably in the circumstances of the particular case. Second, we then discuss the ways in which statutes and policies amend the common law police powers. Specifically, the specialized role and jurisdiction of the Military Police within the Canadian Forces places a greater onus on MPs to investigate and report alleged crimes, including breaches of the *Criminal Code* and *Code of Service Discipline*.

a) Police Have a Duty to Investigate Crime

112. Canadian common law makes it clear that police have an affirmative duty to investigate crime in a responsible and competent manner. This principle is non-contentious, and has frequently been commented upon by the courts. For example, in *R. v. Beaudry*, 2007 SCC 5, Madame Justice Charron, writing for the majority, stated:

> [35] There is no question that police officers have a duty to enforce the law and investigate crimes. The principle that the police have a duty to enforce the criminal law is well established at common law: *R. v. Commissioner of Police of the Metropolis*, [1968] 1 All E.R. 763 (Eng. C.A.), *per* Lord Denning M.R., at p. 769; *Hill v. Chief Constable of West Yorkshire*, [1988] 2 All E.R. 238 (U.K. H.L.), *per* Lord Keith of Kinkel; P. Ceyssens, *Legal Aspects of Policing* (loose-leaf), at pp. 2-22 *et seq.*

113. Madame Justice Charron cited with approval to the comments of Lord Denning in *R. v. Commissioner of Police of the Metropolis*[152], where he stated "I hold it to be the duty of the Commissioner of Police, as it is of every chief constable, to enforce the law of the land."

114. The principle that police have a duty to investigate crime in a reasonable and competent manner was also expressed by the Court in *Hill v. Hamilton-Wentworth (Regional Municipality) Police Services Board*, 2007 SCC 41. The Court held that police officers owe a duty of care in

[152] *R. v. Commissioner of Police of the Metropolis*, (sub nom. *Blackburn, Ex parte)*, [1968] 1 All E.R. 763, (Eng. C.A.) at 769.

negligence to suspects being investigated. Chief Justice McLaughlin, writing for the majority, stated:

> [1] *The police must investigate crime. That is their duty.*
>
> […]
>
> [41] … the argument that a duty to take reasonable care toward suspects conflicts with an overarching duty to investigate crime is tenuous. *The officer's duty to the public is not to investigate in an unconstrained manner. It is a duty to investigate in accordance with the law.* That law includes many elements. It includes the restrictions imposed by the *Charter* and the *Criminal Code*, R.S.C. 1985, c. C-46. Equally, it may include tort law. The duty of investigation in accordance with the law does not conflict with the presumed duty to take reasonable care toward the suspect. Indeed, the suspect is a member of the public. As such, *the suspect shares the public's interest in diligent investigation in accordance with the law.*
>
> [44] *"…effective and responsible investigation of crime is one of the basic duties of the state, which cannot be abdicated."*[153]

115. For Military Police officers, the duty to investigate suspected crimes exists not only at common law, but by virtue of the technical directives, discussed at paragraphs 142 to 145, *infra.*

b) Police Decisions Not to Investigate Crime Must be Reasonable

116. Earlier in these proceedings, this Commission made a preliminary ruling that the subjects of this hearing will be judged against the standard of care set out in *Hill*, *supra*, of a "reasonable police officer in all the circumstances."[154] In their submissions to the Commission, all the parties agreed that the appropriate standard of care was one of a "reasonable police officer in all the circumstances."

117. *Hill* is the leading case on the standard of care applying to police work from the investigation of a potential crime to the decision whether or not to lay charges. The Court

[153] *Hill v. Hamilton-Wentworth (Regional Municipality) Police Services Board*, 2007 SCC 41 ("*Hill"*) at paras. 1, 41, 44 (emphasis added, internal citation omitted). Though writing in dissent, Madame Justice Charron agreed with the Chief Justice that the police have a duty to investigate crime. *Id.* at para. 115 ("Police officers have multiple duties. There is no question that one of them is the duty to investigate crime."); para. 116 ("There is no dispute that a police officer owes an overarching duty to the public to investigate crime."); para. 138 ("… society undoubtedly relies on police officers to perform their public duty to investigate crime and apprehend criminals in a competent, non-negligent manner …").

[154] Military Police Complaints Commission, Afghanistan Public Interest Hearing, *Ruling on the Motion of Standard of Conduct* (April 1, 2010) at para. 27 (citing *Hill* at para. 68).

explained in detail at paragraphs 67 to 73 the substance of the standard. Chief Justice McLaughlin, writing for the majority, stated that the standard "covers all aspects investigatory police work."[155] Thus, the decision to not investigate a potential crime will be judged by the same standard.

118. The standard of the reasonable officer in like circumstances is informed by the principle that in cases of professional negligence where the defendant has special skills and experience, the defendant must "live up to the standards possessed by persons of reasonable skill and experience in that calling."[156] Chief Justice McLaughlin explained that police professional standards "require police to act professionally and carefully, not just to avoid gross negligence."[157]

119. Chief Justice McLaughlin emphasized the standard is a high one, in keeping with society's expectation that police will fulfill their duties and wield their considerable powers to the public's benefit. Police are entrusted with preserving the peace, preventing crime and the protection of life and property; when police fail in those duties the public rightly expects that they will be held accountable. Chief Justice McLaughlin wrote:

> [71] Police conduct has the capacity to seriously affect individuals by subjecting them to the full coercive power of the state and impacting on their repute and standing in the community. It follows that police officers should perform their duties reasonably. *It has thus been recognized that police work demands that society (including the courts) impose and enforce high standards on police conduct*. This supports a reasonableness standard, judged in the context of a similarly situated officer. *A more lenient standard is inconsistent with the standards that society and the law rightfully demand of police in the performance of their crucially important work.*[158]

120. Finally, the Court clarified that police are not required to make optimal decisions and that a number of choices may be open to a police officer investigating a crime.[159] Nonetheless,

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[155] *Hill* at para. 68.
[156] *Id.* at para. 69.
[157] *Id.* at para. 70.
[158] *Id.* at para. 71 (emphasis added, internal citation omitted).
[159] *Id.* at para. 73.

although a police officer "may make minor errors or errors in judgment which cause unfortunate results," a police officer making an "unreasonable mistake" will breach the standard of care.[160]

c) Police Have a Power and Duty to Investigate all Possible Leads

121. At common law, the police are granted broad powers to preserve the peace, prevent crime and protect life and property. At the initial stages of a criminal investigation, the common law grants police the duty and broad license to investigate and question witnesses and suspects.[161] The statutory powers of arrest and search found in ss.487 and 495 of the *Criminal Code* require that police have reasonable and probable grounds to believe that a crime has been committed. This can be contrasted with the pre-charge stage of a criminal investigation, where the police duty is to pursue all possible leads in a diligent manner.

122. At the pre-charge stage of a criminal investigation, police have broad duties and powers. The state of the law was well summed up by the Honourable G. Arthur Martin, Q.C., in his authoritative *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions* ("Martin Report"):[162]

> The police, as criminal investigators, are duty bound to focus on objectively exploring leads that will ultimately provide reasonable and probable grounds for charging a person as the perpetrator of the criminal act in question. The emphasis, of course, is on assembling evidence, assessing it dispassionately, and making responsible charge decisions based on that assessment.

123. Justice Martin's observations are well-supported by the caselaw, which repeatedly emphasizes that police officers have a right and a duty to investigate, even in situations where they may not necessarily believe that a criminal offence has been committed or have in mind that a particular person is the perpetrator. In *Hill*, Chief Justice McLaughlin stated:

> It is reasonable for a police officer to investigate in the absence of overwhelming evidence — indeed evidence usually becomes overwhelming only by the process

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[160] *Id*.

[161] *See Hill*; *R. v. S. (R.J.)*, [1995] 1 S.C.R. 451; *R. v. Grafe* (1987), 60 C.R. (3d) 242, 36 C.C.C. (3d) 267; *R. v. Moran* (1987), 21 O.A.C. 257, 36 C.C.C. (3d) 225 (C.A.); *R. v. Grant*, 2009 SCC 32. *See also* Michael Code, "Crown Counsel's Responsibilities When Advising the Police at the Pre-Charge Stage" (1998), 40 Crim. L.Q. 326.

[162] Ontario Ministry of the Attorney General, *Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution Discussions* (generally referred to as the "Martin Report", as the committee in question was chaired by the Honourable G. Arthur Martin, Q.C.), (Toronto: Queen's Printer, 1993) at 117, quoted in "Crown Counsel's Responsibilities When Advising the Police at the Pre-Charge Stage," *ibid*. at 332-333.

> of investigation. Police officers can investigate on whatever basis and in whatever circumstances they choose, provided they act reasonably.[163]

124. Similarly, in *R. v. S. (R.J.)*, Madame Justice L'Heureux-Dubé stated:

> Much of investigation, however, relies upon hunches, instinct, the following up on anonymous or unsubstantiated tips and, more generally, the style and thoroughness of the investigator. Sometimes, the investigation advances by pure chance. [164]

125. And in *R. v. Grafe*, Krever J.A. discussed "the right of a police officer to ask questions even […] when he or she has no belief that an offence has been committed." [165] In *R. v. Moran*, Mr. Justice Martin stated:

> … it is important to bear in mind that a police officer when endeavouring to discover whether or by whom an offence has been committed, is entitled to question any person, whether suspected or not, from whom he thinks useful information can be obtained.[166]

126. The authorities make clear that it is only at the end of an investigation that a police officer must determine if reasonable and probable grounds exist to believe that an offence has been committed and that a particular person is the perpetrator. At the beginning of an investigation, evidence is often in an undeveloped state; reasonable investigators pursue multiple leads, follow their hunches and keep an open mind.[167] The common law has evolved to protect the investigative function, and imposes no barriers to police officers' ability to question individuals and to begin assembling evidence.

d) Limits of Police Discretion to Refuse to Investigate Potential Offences

127. In formulating the standard of care applicable to police investigations, it is necessary to consider the discretion that is inherent in police work. The discretionary nature of police work and the independence of police is well-established. The leading case in Canada on the

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[163] *Hill* at para. 58.
[164] *R. v. S. (R.J.)*, [1995] 1 S.C.R. 451 at para. 258.
[165] *R. v. Grafe*, (1987), 60 C.R. (3d) 242, 36 C.C.C. (3d) 267 at para. 9. This passage from *Grafe* was recently cited with approval by the Supreme Court of Canada in *R. v. Grant*, 2009 SCC 32 at para. 37.
[166] *R. v. Moran*, (1987), 21 O.A.C. 257, 36 C.C.C. (3d) 225 (C.A.) at para. 81.
[167] Indeed, as CFPM Capt. (N) Moore informed this Commission: "I think it's fair to say there are situations that you come across that you're not ready yet to say there's an offence associated with this, but it prompts you to start asking more questions." Moore Tr. Vol. 1, *supra* note 99, at 84:18-22.

independence of police in investigating crime is *R. v. Campbell*, [1999] 1 S.C.R. 565, in which the Court made clear that police independence is crucial for insulating the police from outside interference, and works to ensure that the law is in fact and appearance applied equally to all individuals and institutions. The Court found that in exercising authority to investigate crimes, a police officer "is not the servant of anyone, save the law itself."[168]

128. The independence of police, however, does not give officers a license to ignore crime or conduct inadequate investigations. Police exercise professional discretion, but they are not permitted to exercise their discretion unreasonably. In *Beaudry*, the Supreme Court recognized that police officers have discretion to decide whether (or not) to conduct an investigation, but it also emphasized that the "discretion is not absolute", and "far from having *carte blanche*, police officers must justify their decisions rationally."[169]

129. In *Beaudry*, the Court held that a police officer's decision not to engage judicial processes, such as by not conducting a more thorough investigation, or by not arresting a suspect, required subjective and objective justification. The Court stated:

> [38] The required justification is essentially twofold. First, the exercise of the discretion must be justified subjectively, that is, *the discretion must have been exercised honestly and transparently, and on the basis of valid and reasonable grounds*. Thus, a decision based on favouritism, or on cultural, social or racial stereotypes, cannot constitute a proper exercise of police discretion. However, *the officer's sincere belief that he properly exercised his discretion is not sufficient to justify his decision*.
>
> [39] Hence, *the exercise of police discretion must also be justified on the basis of objective factors.* I agree with Doyon J.A. that in determining whether a decision resulting from an exercise of police discretion is proper, it is important to consider the material circumstances in which the discretion was exercised. …[170]

130. Accordingly, in order to establish subjective justification, it must be shown that the officer sincerely believed that he or she has properly exercised the discretion. However, the exercise of discretion must also be objectively reasonable in the circumstances of the particular case.

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[168] *R. v. Campbell*, [1999] 1 S.C.R. 565 at para. 33 (quoting *R. v. Commissioner of Police of the Metropolis*, [1968] 1 All E.R. 763 at 769).
[169] *Beaudry*, 2007 SCC 5 at para. 37.
[170] *Id.* at paras. 38-39 (emphasis added, internal citation omitted).

131. In determining whether the exercise of discretion was objectively reasonable, it is necessary to consider the seriousness of the potentially illegal conduct and whether the discretion was exercised in the public interest. Thus, the more serious the offence, the less discretion a police officer has to decide not to conduct an investigation or to decline to arrest a suspect, and the greater the onus on the officer to rationalize the decision. The Court stated:

> [40] First, it is self-evident that the material circumstances are an important factor in the assessment of a police officer's decision: the discretion will certainly not be exercised in the same way in a case of shoplifting by a teenager as one involving a robbery. In the first case, the interests of justice may very well be served if the officer gives the young offender a stern warning and alerts his or her parents. However, this does not mean that the police have no discretion left when the degree of seriousness reaches a certain level. In the case of a robbery, or an even more serious offence, the discretion can be exercised to decide not to arrest a suspect or not to pursue an investigation. However, *the justification offered must be proportionate to the seriousness of the conduct and it must be clear that the discretion was exercised in the public interest. Thus, while some exercises of discretion are almost routine and are clearly justified, others are truly exceptional and will require that the police officer explain his or her decision in greater detail.*[171]

e) International Law Informs the Reasonableness Standard Under Canadian Law

132. International law and policy inform the nature and extent of the duty of police officers to investigate crimes and the limits on police discretion.

133. International human rights conventions to which Canada is a party, customary international human rights law, and international human rights policies reinforce the importance of the duty to investigate serious human rights violations. As we have previously argued, international law is clear that states have an obligation to investigate human rights violations, and the obligation to investigate human rights violations is strongest in cases involving the most serious human rights abuses, such as torture or cruel, inhuman or degrading treatment.[172] International human rights law and policy provide strong support for the principle that a police officer's decision to decline to investigate allegations involving breaches of the universal prohibition against torture or the law of armed conflict will not be deemed reasonable if there

[171] *Id.* at para. 40.
[172] These international law obligations were canvassed at length in the Complainants' March 2010 Submissions at paras. 21-31 and 72-73.

was no compelling justification for the decision and the decision was not exercised in the public interest.

f) Military Police Rules and Policies Mandate that Military Police Investigate Crime

134. Military Police are an essential part of the military justice system. Military Police have the status of common law peace officers; however, their common law powers are amended by the duties and limitations imposed on them by virtue of their special status in the military justice system. The specialized mandate and jurisdiction of the Military Police within the Canadian Forces places a greater onus on MPs to investigate and report alleged crimes.

135. As discussed in paragraphs 30 to 31, *supra*, the Military Police are a critical oversight mechanism of the Canadian Forces, ensuring that no member of the military, including commanders themselves, will be above the law. Military Police are entrusted with independently investigating suspected crimes that are committed by individuals subject to the *Code of Service Discipline* or that are alleged to occur on Department of National Defence premises. Thus, even during military operations outside of Canada, military police officers are entrusted with upholding the rule of law and maintaining the public's confidence in the integrity and legal accountability of our armed forces.

136. Given the specialized role and jurisdiction of the Military Police within the CF, there is a great onus on Military Police to investigate and report potential offences. As such, in the context of their law enforcement role, Military Police in the Canadian Forces are expected to exercise the duties and responsibilities, including the same independence of judgment, as their civilian counterparts.

137. Arguably, the NIS onus to investigate is particularly acute. As previously discussed, the NIS is a specially formed unit of MP members mandated with the investigation of serious and sensitive offences which reports directly to the Commander of the NIS. Members of the NIS are trained to conduct complex investigations to a high standard. By design, the NIS is completely independent of the operational chain of command so that its investigations will contain no taint or perception of influence. Thus, given the mandate of the NIS to investigate only the most serious crimes, the specialized training given to its members, and the organizational emphasis on

maintaining the highest degree of integrity, NIS members are held to a particularly high standard of professionalism.

138. By virtue of military policy, Military Police have a duty to investigate criminal offences and violations the *Code of Service Discipline*. The source of this duty is primarily found in the documents which contain technical guidance from the CFPM. As previously discussed, the CFPM provides technical guidance and direction on MP-specific tasks, such as law enforcement and investigations.

139. As discussed at paragraph 37, an important way in which the CFPM issues technical direction on policing matters is via the *Military Police Polices and Technical Procedures* (the "MP Manual").[173] In particular, the MP Manual provides detailed guidance on the duty and authority to conduct investigations. It emphasizes that "all investigations must be thorough, complete and accurate."[174] The MP Manual sets out the ethical principles governing all MP investigations:

> 6. **Ethical Principles**. MP investigations shall be conducted IAW accepted CF military policies and procedures, with particular attention to the following:
>
> a. Military Police shall not accord immunities or undue advantages to any person notwithstanding their rank or position;
>
> b. Investigations and other law enforcement activities must be conducted in such a manner, within the law, that facilitates and supports the Commander's legitimate mission, and reinforces military values;
>
> c. MP shall not attempt to dissuade a complainant from pursuing a complaint, nor will the MP display skepticism about the allegations. MP may attempt to reconcile inconsistencies in a complainant's statement(s) of present, however, failure to do so may not prevent the complaint from being pursued; and
>
> d. MP shall investigate complaints without bias or prejudice to any particular individual. Identification of suspects shall be based on objective evidence and reasonable grounds.

140. The MP Manual makes it clear that MPs are empowered to independently initiate the investigation of any criminal or service offence:

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[173] CFPM, *Security Orders for the Canadian Forces*, A-SJ-100-004/AG-000 (February 2000) ("MP Manual") [Exhibit P-3, Tab 3]. The MP Manual is commonly referred to as the "zero zero four." For a discussion of relevance and force of the document, *see* Beaudry Tr., *supra* note 29, at 196:21-197:21.

[174] MP Manual at Ch. 6, para. 4.

8. **Initiating an Investigation**. An MP investigation may be initiated whenever:
   a. an MP observes the commission of any criminal or service offence;
   b. an MP is in receipt of a complaint originating from any other person in which a criminal or service offence is alleged;
   c. at the request of a Commander/Commanding Officer;
   d. MP learns of an incident through an informant (i.e. local police, a witness, a confidential informant, an anonymous tip, etc.);
   e. MP are tasked directly by DPM Police or DPM NIS; and
   f. an authority in the MP technical Chain so directs.

The section expresses the CFPM's expectation and direction that MPs will independently exercise their powers as police officers, remaining vigilant and on the lookout for potential offences, notwithstanding whether or not a formal complaint is made.

141. The MP Manual provides that Military Police are expected to investigate all potential crimes and allegations appropriately and expeditiously. The only limitation to this general duty is if the allegations are frivolous, vexatious in nature, or made in bad faith.[175]

142. The professional direction provided by the CFPM in the MP Manual is complemented and enhanced by the mission-specific technical directives issued by the CFPM. The relevant language of these technical directives is set out at paragraph 38, *supra*.

143. The language of the technical directive states that all MPs "*shall* investigate allegations or instances of […] violations of the laws of armed conflict or international law."[176] While the aim of the direction could not be to force full investigations to be launched in a mechanical fashion without regards to the facts of a particular incident, the direction clearly intended to emphasize that the MPs were expected, when confronted with a possible violation of armed conflict or international law, to turn their minds to the need for further investigation.[177]

144. The Directive also emphasizes that that the TFPM shall ensure investigation of allegations of "crimes committed by CF members against detainees." Thus, the directive highlighted the need for the proper treatment of detainees. This Commission had previously had the opportunity to discuss the technical directive for the mission in Afghanistan, observing that

[175] *Id.* at Ch. 6, Annex A, para, 10 (emphasis added).
[176] Roto 3 Tech Directive, *supra* note 41 (emphasis added).
[177] Our interpretation of the directive is guided by comments made by Commissioner Peter Tinsley in the Attaran Report, *supra* note 30.

"the MP Technical Directive clearly intended a more proactive posture for MPs in the highly sensitive area of detainee treatment."[178]

145. The directive was binding on all MPs, unless it conflicted with valid orders from the chain of command (and there is no evidence before this Commission that the directives did conflict with any orders.) The failure to obey regulations, instructions or orders constitutes a service offence under the *National Defence Act*. A failure to comply with the directive is itself an offence.

146. Thus, in addressing the reasonableness of an MP's exercise of discretion, emphasis must be placed on the CFPM's clear direction to take a proactive investigative approach in the highly sensitive area of violations of the laws of armed conflict or international law. The directives from the CFPM as they pertain to policing duties of Military Police are not merely evidence of MP policy or usual procedures; they are binding directions that have the force of law and alter the scope of police discretion that is founded in the common law.[179]

147. An MP who is familiar with such a directive and who has pledged he will perform his duties with integrity cannot be unaware of how serious his command considers these types of offences to be. In short, evidence of the existence of the directives, and the presumption that all MPs are aware of them, is persuasive evidence of the standard of conduct expected of a reasonable MP. Simply put, a reasonable Military Police officer is expected to follow binding military directives. A failure to abide by a technical directive is strong evidence that an officer did not act reasonably.

148. Furthermore, as previously discussed, one of the factors that must be considered in determining whether a Military Police officer's exercise of discretion was reasonable is the seriousness of the potential offence and whether the discretion was exercised in the public interest. Here, factors which would weigh in favor of finding the exercise of discretion was not reasonable are that (1) that potential offences are extremely serious and (2) there is a strong public interest to be served by preventing, deterring and prosecuting these offences. Previously

[178] Attaran Report at para. 95.
[179] *See R. v. Beaudry* at paras. 44-46 for a discussion of how the nature and scope of police discretion at common law is circumscribed by directives that have the force of law.

this Commission discussed the strong public interest to be served in ensuring proper detainee handling by conducting thorough investigations:

> There is a general imperative of ensuring compliance with Canada's international legal obligations in the humane treatment of prisoners of war and other military detainees, both for their own sake and for the sake of Canada's international reputation, and also to try to encourage reciprocal behaviour on the part of the enemy. Also, in the context of the Afghan mission, one should also consider the particular objectives on the part of ISAF and Canada assisting and mentoring Afghan officials in professionalizing their law enforcement and security institutions in areas such as respect for human rights. Moreover, the success and ultimate value of military operations can themselves be compromised by perceptions of detainee mistreatment, and especially if there is any suggestion of the same being condoned by foreign military forces, such as the CF, who operate in Afghanistan at the invitation of the host nation.[180]

149. In conclusion, it is clear from the MP Manual and the technical directives that Military Police are mandated to investigate crime in a responsible and competent manner and are not given a license to ignore crime or conduct inadequate investigations. They may exercise a limited amount of professional discretion, but they are not permitted to exercise their discretion inappropriately. In particular, the technical directives mandated that Military Police would take a proactive investigative approach in the highly sensitive area of violations of the laws of armed conflict or international law.

C. Transfers to Risk of Torture Requires MP Investigation

150. As discussed previously, MPs have a right and duty to investigate even in situations where they may not necessarily believe that an offence has been committed. The law poses no barriers to an MP's ability to question individuals and assemble evidence at the pre-charge stage of an investigation. Nonetheless, there can be no doubt that a Commander's decision to transfer to a risk of torture could have constituted a criminal or service offence.

151. MPs are required to investigate criminal conduct. And as Rule 11 of the CF Code of Conduct states: "[d]isobedience of the law of armed conflict is a crime."[181] Further, the

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[180] Attaran Report at para. 127.

[181] CF Code of Conduct, *supra* note 116, at 3-1. It is worth noting that the technical directives governing the conduct of MPs in theatre make clear that potential violations of international law should be investigated. In this respect, it is irrelevant whether the international law requirements take the form of State obligations or carry with them the potential for personal liability. The directive places no limitation on the type of international law which must be investigated; any and all breaches are of equal concern.

requirements to treat detainees according to the standards articulated in GPW, and to ensure that they are not transferred to risk of torture and abuse, are set forth in regulations, instructions, or directives – some of which have the force of orders. Failure to obey such regulations, instructions or orders constitutes a service offence under the *National Defence Act*. Potential offences include violations of section 83 (disobedience of lawful command), section 124 (negligent performance of a military duty), and sections 129(2)(b) and (c) (prejudicing good order and discipline).[182]

152. In his expert report to the Commission, Professor Forcese also outlined potential criminal liability under the *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24, ("*War Crimes Act*") and the *Criminal Code*.[183] As detailed by Professor Forcese, potential offences under sections 6, 7, and 8 of the *War Crimes Act* include the commission of a war crime, aiding and abetting a war crime, and breach of responsibility by a military commander.[184] And according to Professor Forcese, transfers to risk of torture may also give rise to liability under the *Criminal Code*, which, by virtue of section 130(1) of the *National Defence Act*, has extraterritorial reach over members of the Canadian military. In particular, it was his opinion that criminal negligence, as set out in section 219 of the *Criminal Code*, would be a potential offence.[185] With respect to criminal negligence, Professor Forcese notes:

> A sustained pattern of transferring detainees to Afghan authorities where there was substantial risk that those transfers would result in torture could amount to the marked and substantial departure from the norms applicable to [a] reasonable CF commander; it would very seriously transgress the international law standards that Canada pledges to observe and which CF commanders are obliged to observe.[186]

D. Means of Knowing

153. The language of "means of knowing", as it has been applied in these proceedings before this Commission, is derived from the September 16, 2009 Order of the Federal Court in *Canada (A.G.) v. Amnesty International Canada, et al.*, 2009 FC 918, which states, in relevant part:

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[182] *See also* Forcese Report at 48-50.
[183] *Id.* at 54-56.
[184] *Id.* at 35-39; 41-43; 45; 54-55.
[185] *Id.* at 50-53; 55.
[186] *Id.* at 55.

> It is hereby declared that the Military Police Complaints Commission may only investigate what the Military Police subjects of the complaint knew, or had the means of knowing. Otherwise the Commission would be acting beyond its jurisdiction.

This is the only reference to "means of knowing" in the decision. The Court did not draw upon or cite any jurisprudence on this issue, and did not otherwise provide any guidance on the meaning of this phrase or what information could be regarded as within the means of knowing of Military Police members.

154. In the Complainants' submission, the question is "inherently factual and contextual," as the Commission indicated in its previous ruling.[187]

155. Ultimately, the question of "means of knowing" is one of fact, not law.[188] As detailed below, each of the subjects was aware or should have been aware of concerns that the NDS tortured detainees in its custody. Furthermore, it is reasonable to expect that each of the subjects, by virtue of his duties, would keep himself informed of publicly available information about activities taking place within the theatre of operations. The standard is simply whether the individual could have learned about the information through proper inquiries.

156. Each of the subjects, by virtue of his station and rank, had available to him or could have obtained information about post-transfer treatment of detainees. Each of the subjects occupied an informational environment – whether as the advisor to the Task Force Commander, the senior NIS investigator in theatre, or simply as senior members of the MP – where they were aware that reports of post-transfer torture existed. Basic curiosity would have compelled a reasonable police officer to seek more information, if he was carrying out his mandate as discussed above. Basic inquiries arising out of a simple awareness of one's surroundings and mission – as would be expected of trained police officers – would have led the subjects to evidence concerning the legality of past or ongoing orders to transfer.

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[187] Military Police Complaint Commission, In the Matter of the Afghanistan Public Interest Hearings before the Military Police Complaints Commission, pursuant to subsection 250.38(1) of the National Defence Act, *Ruling on the Second Motion Re Means of Knowing*, MPCC File No. 2008-042 (November 3, 2010) at para. 2.

[188] Throughout these proceedings, the subjects have attempted to establish the "means of knowing" as a legal standard, despite citing no authority setting out a legal definition of "means of knowing" in any of their submissions on the subject. Nor have we, in our research, been able to discover a legal standard for "means of knowing".

IV. Subjects Failed to Investigate or Conducted Deficient Investigations

A. Testimony of the Subjects during Evidentiary Hearings

a) Task Force Provost Marshals

157. The role of Task Force Provost Marshal has two primary – and interrelated – responsibilities. The first is serving as the commanding officer for the MP company. The second is providing MP-related advice to the JTF-A Commander, particularly with respect to issues concerning prisoner and detainee handling.[189] In significant part, the responsibilities and duties at issue in this inquiry arise from the TFPM's role as commanders of the MP detachment. The TFPM's informational environment, however, is shaped in part by virtue of his position as advisor to the JTF-A Commander.

i. Major Bernie Hudson

158. Major Bernie Hudson has been a military police officer for 18 years.[190] He served as the JTF-A TFPM during Roto 3, from early February 2007 to mid-August 2007, under Brig. Gen. Grant and Brig. Gen. Laroche.[191] In addition to his duties as the TFPM, Major Hudson also served as the Provost Marshal for the coalition forces at Kandahar Airfield.[192]

159. Major Hudson was generally aware that there were allegations of post-transfer torture and abuse of detainees by the NDS.[193] During his pre-deployment training, Major Hudson reviewed a human rights report from the U.S. State Department, outlining the use of torture in Afghan prisons.[194] He was aware that there was a "historical" concern of detainee torture and abuse by Afghan authorities.[195]

160. Major Hudson continued to be made aware of the risk of post-transfer abuse during his tenure as TFPM. For example, he was generally aware of the February 2007 Complaint because

[189] Hudson Tr., *supra* note 42, at 5:12-16; 8:3-7.
[190] *Id.* at 2:2-5.
[191] *Id.* at 4:13-22.
[192] *Id.* at 5:12-16.
[193] *Id.* at 246:8-24.
[194] *Id.* at 26:4-23.
[195] *Id.* at 27:2-8.

he was tasked with finding documents requested by the MPCC.[196] The February 2007 Complaint makes reference to human rights reports from the AIHRC, UNHCHR, and the U.S. Department of State, all documenting torture in Afghan prisons. He was also aware that there was a proceeding in Federal Court seeking to halt detainee transfers; it was a subject he discussed "at length" because an injunction, if granted, would directly affect detainee operations.[197] He was aware of news accounts of detainee torture, such as the April 2007 articles in *The Globe and Mail*. Major Hudson was generally aware of news reports of detainee abuse, in part because he helped identify whether detainees alleging abuse were in fact transferred by the CF.[198] He was aware that DFAIT monitoring visits yielded allegations of abuse. Shortly after the publication of the Graeme Smith Article, Major Hudson received a copy of a DFAIT site visit report documenting allegations of torture by the NDS.[199] After returning from leave in June 2007, he also learned that another DFAIT monitoring visit had yielded reports of torture.[200]

161. Major Hudson testified that there were concerns among the MPs in Afghanistan about potential liability stemming from their role in detainee transfers.[201] His troops recognized that there were reports that transferred detainees were being tortured by Afghan authorities. To assuage these concerns, Major Hudson held an "open town hall type" meeting with his troops.[202]

162. During Major Hudson's tenure, the JTF-A Commander convened a detainee committee to provide him with advice concerning the decision to transfer. According to Major Hudson, however, there was limited discussion concerning post-transfer risk of torture at these meetings. It was not until the publication of the Graeme Smith Article that discussions concerning transfer decisions explicitly touched on post-transfer treatment.[203] When the article was published, transfers were temporarily suspended. However, after receiving assurances from DFAIT that it would be conducting post-transfer monitoring visits, post-transfer risk assessments were again de-emphasized as being a part of the transfer decision-making process.[204] Ultimately, Major

[196] *Id.* at 18:25-19:12.
[197] *Id.* at 20:13-17.
[198] Hudson Tr. at 232:15-233:5.
[199] *See supra* note 75.
[200] Hudson Tr. at 135:15-22.
[201] *Id.* at 113:15-115:9.
[202] *Id.* at 114:10-19.
[203] *Id.* at 74:6-19.
[204] *Id.* at 81:11-82:1.

Hudson saw the decision to transfer primarily one that focused on whether the detainee was a belligerent, and not on whether it was safe to transfer him.[205]

163. In order to document the JTF-A Commander's decisions to transfer, Major Hudson helped create a transfer decision matrix, which recorded the advice provided to the Commander when he made his decision to transfer, hold or release detainees.[206] Unlike later versions of the transfer decision matrix, the one developed by Major Hudson did not contain any specific space for assessing post-transfer risk of torture and abuse.[207]

164. Major Hudson was aware that Canadian Forces had responsibility for ensuring that detainees were not transferred to risk of torture. He testified:

> My knowledge at the time, it was very clear in my mind that according to the Geneva Conventions, we are responsible for detainees post transfer. That's basic training for military police officers. That's part of the laws of armed conflict and that sort of stuff … [A]ccording to the Geneva Conventions, the original capturing power is ultimately responsible for prisoners of war post transfer. If they transfer them to a third state, they are still responsible. If that third state abuses them in some way, they are supposed to reassert custody of them or fix that in some other way.[208]

165. Major Hudson understood that if a CF member breached the laws of armed conflict or international law, then the MP should investigate because it would be a crime committed by a Canadian person under the MP's jurisdiction.[209] He also understood that as TFPM, he needed to ensure that an investigation into such offences is initiated if there is a report of such conduct, or if he somehow learns of such conduct.[210]

166. Nonetheless, despite his admitted awareness of reports and articles documenting torture of detainees, a general understanding that there were ongoing allegations of detainee abuse by the NDS, and his own MP detachment's concerns about personal liability for breaches of international law, Major Hudson made no efforts to inquire or investigate into whether past and

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[205] *Id.* at 220:12-25.
[206] *Id.* at 70:7-71:14.
[207] *Id.* at 77:22-23.
[208] *Id.* at 24:7-22.
[209] *Id.* at 57:6-11.
[210] *Id.* at 58:7-12.

ongoing orders to transfer detainees were legal.[211] Moreover, he never sought any advice from the technical chain of command about whether ongoing transfers in the midst of allegations of torture required some sort of investigation.[212]

ii. Major Michel Zybala

167. Major Michel Zybala has been a military police officer since 1989.[213] He served as JTF-A TFPM during Roto 4, from August 15, 2007 to March 2008, under Brig. Gen. Laroche.[214] He performed his pre-deployment tactical reconnaissance in Afghanistan from April 6 to 16, 2007.

168. Major Zybala testified that he was aware of the concerns and risks associated with transferring detainees to Afghan prisons, even prior to his arrival in Afghanistan.[215] Prior to his deployment, he conducted his own research on human rights conditions in Afghan prisons. He read the Graeme Smith Article, and was aware of the allegations contained therein.[216] He visited the AIHRC's website and reviewed their reports, and learned that AIHRC documented ongoing torture of detainees in Afghan prisons.[217] He recalls reading the February 2007 Complaint on either Amnesty International Canada or the BC Civil Liberties Association's website, prior to his deployment.[218] He had been informed by Major Hudson that there had been one suspension of transfers during Roto 3,[219] but claims that he was not informed that the suspension was undertaken because there were reports of post-transfer torture and abuse.[220]

169. Major Zybala testified that he had no access to DFAIT site visit reports while in Afghanistan, and was never informed by DFAIT colleagues about any allegations of post-transfer torture and abuse of detainees.[221] He testified that with the exception of the November 5, 2007 site visit, he only learned of the allegations of abuse documented in DFAIT site visit

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[211] *Id.* at 145:8-25.
[212] *Id.* at 271:19-273:3.
[213] Military Police Complaints Commission, Afghanistan Public Interest Hearings, Transcript of Proceedings, Vol. 28 (Nov. 17, 2010) ("Zybala Tr."), at 2:14-16.
[214] *Id.* at 4:3-15; 5:12-14.
[215] *Id.* at 118:14-18.
[216] *Id.* at 19:11-24.
[217] *Id.* at 23:15-24:17; 117:17-22; 134:10-11.
[218] *Id.* at 133:16-134:2.
[219] As discussed at paragraphs 69 and 75, *supra*, there were actually two suspensions of transfers during Roto 3, the first in April 2007 and the second in June 2007.
[220] Zybala Tr. at 143:16-143:13.
[221] *Id.* at 30:5-16; 56:18-25; 57:15-58:9.

reports after leaving Afghanistan, when he reviewed redacted copies of the reports on the BCCLA's website.[222]

170. Major Zybala first learned of the allegations in the November 5, 2007 report[223] on November 6, 2007, during a meeting held by Col. Juneau.[224] Following this report, detainee transfers to NDS were suspended; it was Major Zybala's understanding that the suspension was instituted because the November 5, 2007 report constituted a credible allegation of mistreatment.[225] Major Zybala acknowledged that the individual interviewed for the report was "in all likelihood" tortured.[226]

171. Prior to his deployment, Major Zybala was aware that there were proceedings brought by the Complainants involving allegations of detainee abuse progressing in the Federal Court.[227] He was sufficiently curious about these proceedings so as continue visiting the BCCLA's website while in theatre, reading about new developments and viewing some of the primary source documents posted there. He acknowledged that he was "sufficiently curious about the issue" to perform his own inquiries.[228] After his return from Afghanistan, Major Zybala continued to follow the Federal Court case through updates on the BCCLA's website. He also read the Federal Court's judgments in the case.[229]

172. According to Major Zybala, the JTF-A Commander's detainee committee had been disbanded during his tenure, and advice regarding detainee transfers was provided to Brig. Gen. Laroche in writing.[230] Nonetheless, the MPs retained custody and control over the database, and Major Zybala continued to have personal access to detainee information, despite the creation of the position of "detainee officer" during Roto 3.[231]

173. Concerned about his role in transfers in light of the February 2007 Complaint and the Federal Court proceeding, Major Zybala sought to educate himself on the requirements of

[222] *Id.* at 60:14-61:6.
[223] KANDH0123, *supra* note 98.
[224] Zybala Tr. at 92:15-20.
[225] *Id.* at 95:23-96:6.
[226] *Id.* at 182:24-183:3.
[227] *Id.* at 26:20-25.
[228] *Id.* at 136:25-137:6.
[229] *Id.* at 191:14-192:9.
[230] *Id.* at 128:4-129:12.
[231] *Id.* at 237:3-15.

international law with respect to detainee transfers.[232] He believed that under international law, there is a "residual liability" ("responsabilité résiduelle") residing with the transferring power, which he understood to mean that Canada is not permitted to transfer a detainee if it is believed that there is a substantial risk of torture.[233] He also stated that the Convention Against Torture prohibits transfer to substantial risk of torture.[234]

174. Major Zybala agreed that if he was aware of a violation of international law, he had a duty to ask the NIS to investigate, or to refer the file to NIS.[235] If he had a personal concern about the liability of the JTF-A Commander, he would refer it to the NIS, because chain of command approval was necessary to approve charges in investigations conducted by non-NIS MPs.[236]

175. Prior to his deployment, Major Zybala undertook to research issues relating to Afghanistan's human rights record and international legal obligations with respect to transferring detainees. He testified that such curiosity and prudence was part of being a military police officer.[237] He also indicated that he undertook this research because there was a "reasonable apprehension" ("appréhension raisonable") that there may be questions about his own liability.[238] Yet despite his curiosity about his own potential liability, his awareness of allegations of detainee abuse, and general understanding of international legal obligations, Major Zybala never assessed the possibility that the JTF-A Commander may have acted illegally in ordering the transfer of detainees. Major Zybala never requested that NIS undertake an inquiry or investigation into historical or ongoing detainee transfers. He never assessed whether Brig. Gen. Laroche may have acted illegally in ordering the transfer of the individual interviewed for the November 5, 2007 report.[239]

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[232] *Id.* at 27:23-28:10.
[233] *Id.* at 21:1-8.
[234] *Id.* at 105:9-12.
[235] *Id.* at 102:12-19.
[236] *Id.* at 158:21-159:8.
[237] *Id.* at 118:19-24.
[238] *Id.* at 230:20-231:4.
[239] *Id.* at 183:8-13.

iii. Major Ron Gribble

176. Major Ron Gribble has been a military police officer since 1994.[240] He served as JTF-A TFPM during Roto 5, from February 26, 2008 through September 2008,[241] serving under Brig. Gen. Laroche and Brig. Gen. Denis Thompson.[242] He performed his tactical reconnaissance in Afghanistan in November 2007.

177. Unlike his predecessor TFPMs, Major Gribble testified that he had minimal awareness that there were concerns about post-transfer torture or abuse of detainees. He testified that he did not receive any background documents during his pre-deployment training that pertained to the human rights situation in Afghanistan.[243] While in theatre, he claimed to have heard no discussion of potential post-transfer abuse,[244] despite the fact that he started his rotation when transfers were just being resumed after the November 2007 suspension. In his conversations with the two DFAIT Political Advisors stationed at KAF, he never discussed concerns about post-transfer abuse.[245] He testified that he had no knowledge of the contents of DFAIT site visit reports;[246] in fact, during his rotation, he was not even aware that DFAIT produced site visit reports.[247] Despite having been interviewed by both MPCC investigators and the RCMP regarding the February 2007 Complaint, Major Gribble denied that he was aware of the substance of the Complaint.[248]

178. Nonetheless, he does admit that he was "generally aware" that there were allegations of detainee abuse in Afghan prisons.[249] He was also aware that detainee transfers were suspended in November 2007, as he was in theatre for his tactical reconnaissance, and that he understood the

[240] Military Police Complaints Commission, Afghanistan Public Interest Hearings, Transcript of Proceedings, Vol. 32 (November 24, 2010) ("Gribble Tr."), at 2:16-17.
[241] *Id.* at 5:6-9.
[242] *Id.* at 26:8-14.
[243] *Id.* at 44:11-16.
[244] *Id.* at 50:3-11.
[245] *Id.* at 90:25-91:4.
[246] *Id.* at 34:3-8; 48:14-19.
[247] *Id.* at 102:1-3.
[248] *Id.* at 36:3-13; 77:7-15; 117:7-2.
[249] *Id.* at 94:6-16.

transfers were suspended because there were reports of post-transfer abuse.[250] Around November 2007, he also accessed an online version of the Graeme Smith Article.[251]

179. On examination from Commission Counsel, Major Gribble initially testified that he was not familiar with the legal test for transferring detainees to a foreign power,[252] notwithstanding the fact that training on the law of armed conflict was part of his pre-deployment "detainee package."[253] He refused to articulate his understanding of the JTF-A Commander's legal obligations when ordering a detainee transfer, and instead stated:

> Their obligations are covered quite clearly under international law and Canadian law. … And I was very confident that they understood their responsibilities and they were acting accordingly. They had a host of advisers and people doing different things for them, a lot more knowledge and in-depth knowledge than I had. So I was satisfied that they were operating within those parameters.[254]

He later acknowledged under cross-examination that he understood that transfers to substantial risk of torture would be impermissible and such an order to transfer would constitute a violation of the law of armed conflict.[255] He further agreed that such an order should be investigated.[256]

180. Major Gribble testified that a complaint to this Commission – such as the February 2007 Complaint – could form the basis for a MP investigation, and that he believed it would be necessary to inquire into the allegations contained in the complaint.[257]

181. Nonetheless, Major Gribble never turned his mind to whether illegal transfers took place during previous rotations, stating: "The previous rotation was not my responsibility."[258] According to Major Gribble, he did not need to inquire into the legality of the transfer orders, or to consider whether the transfers had been ordered "in good faith" because he assumed that the JTF-A Commander had other advisors.[259] Moreover, Major Gribble believed that it would have been "inappropriate" for him to investigate potential misconduct by the JTF-A Commander: "It

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[250] *Id.* at 41:7-42:1.
[251] *Id.* at 40:1-13.
[252] *Id.* at 57:9-14.
[253] *Id.* at 160:7-17; *see also id.* at 84:6-19.
[254] *Id.* at 61:15-25.
[255] *Id.* at 92:6-13.
[256] *Id.* at 94:1-4.
[257] *Id.* at 81:10-17; 133:11-23.
[258] *Id.* at 53:9-17.
[259] *Id.* at 79:9-16.

would be inappropriate for me to investigate a man that I am under his chain of command. That's why we have the NIS there."[260]

b) National Investigation Service

182. The role of the NIS is to investigate serious or sensitive service and criminal offences. The NIS performs a function similar to that of a major crimes unit of the RCMP or large municipal police agency. Members of the NIS receive advanced investigative training and are trained to conduct investigations in a deployed theatre of operations. Independent of the normal military chain of command, they receive direction and report directly to the Commander of the CFNIS.

i. Lieutenant Colonel (Ret'd) William Garrick

183. Lieutenant Colonel William Garrick joined the Canadian Forces in 1981 as a military police officer. He was posted to the National Investigation Service (NIS) as an Operations Officer upon its creation in 1997. He was promoted to Lieutenant Colonel in 2006 and appointed as the Commanding Officer of the NIS.[261] He retired from the Canadian Forces in the summer of 2008, relinquishing his command of the NIS on June 12, 2008.[262] As the Commanding Officer of NIS, Lt. Col. Garrick reported directly to the CFPM and was responsible for overseeing all serious and/or sensitive criminal investigations by the CF Military Police. The NIS is vested with independence from the normal CF chain of command.[263]

184. The NIS was the branch responsible for investigating allegations related to harm to detainees.[264] Lt. Col. Garrick testified that issues concerning detainees were his top priority and occupied 75% of his time.[265] He understood that the CF had an obligation to be satisfied that detainees would not be abused post-transfer, an issue of which he became acutely aware when

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[260] *Id.* at 74:24-65:1.
[261] Garrick Tr. Vol. 1, *supra* note 73 at 7:5-8:20.
[262] *Id.* at 8:18-25.
[263] *Id.* at 14:12-16:5; 24:3-16.
[264] *Id.* at 16:6-23.
[265] *Id.* at 18:14-19:4.

the Complainants filed their first complaint with the MPCC in February 2007.[266] Lt. Col. Garrick was aware of the international reports concerning the prevalence of torture in Afghanistan and had read the *Globe and Mail* stories by Graeme Smith.[267]

185. Lt. Col. Garrick testified that he was aware that Canadian officials were monitoring detainees in Afghan custody.[268] Although he did not specifically ask his NIS officers to seek out this information, he believed it was appropriate for the MPs to occasionally inquire into detainee treatment post-transfer. Lt. Col. Garrick indicated this kind of inquisitiveness was part of their job, stating, "I expected they would look outside their general parameters when they're doing their business."[269]

186. According to Lt. Col. Garrick, he did not have to look into the DFAIT monitoring visits himself. He said there was "no reason" to follow up on these reports, although he later acknowledged that the information would have been "useful" to his investigators.[270]

187. Lt. Col. Garrick discussed the February 2007 Complaint with the CFPM Capt. (N) Steven Moore. It was decided that an outside police force should investigate given that the allegations were directed partly against the CFPM. The Royal Canadian Mounted Police ("RCMP") was approached and asked to look into the allegations. Supt. Wayne Rideout and Supt. Wade Blizzard were the senior RCMP officers tasked with the investigation.[271]

188. The RCMP started its investigation on March 13, 2007 and submitted a final report three months later. In its report, the RCMP stated that the CF request for an investigation "surrounds detainee handling and the transfer of detainees by Canadian Forces personnel" and "the torture and abuse of detainees, post handover."[272] The RCMP conducted numerous interviews to understand the scope of the CFPM's role in detainee transfers, and to a certain extent, the

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[266] *Id.* at 33:21-34:4; and Military Police Complaints Commission, Afghanistan Public Interest Hearings, Transcript of Proceedings, Vol. 34 (November 30, 2010) ("Garrick Tr. Vol. 2"), at 4:15-6:13. He understood that transferring despite a risk of torture would be a crime. *Id.* at 109:8-15.
[267] Garrick Tr. Vol. 1 at 43:4-25; 51:8-13.
[268] *Id.* at 30:7-19; 48:8-19.
[269] *Id.* at 31:6-8.
[270] *Id.* at 48:15-19; 72:21-73:4.
[271] RCMP, *The Canadian Forces Provost Marshal – Canadian Forces Detainees in Afghanistan* (June 29, 2007) ("Rideout/Blizzard Report"), at 1 of 20 [Exhibit P-81].
[272] *Id.*

concerns about abuse of detainees by Afghan authorities. In considering the information they deemed important to examine, the RCMP investigators stated:

> Finally, it was felt by investigators that the existence of any knowledge, information or intelligence of actual detainee abuse, post handover, known by the Military Police, or indeed DND would be *significant*.[273]

189. The RCMP investigators elaborated that they were looking for any kind of information about post handover abuse "known by, or ought to have been known by the CFPM."[274] After numerous interviews with Military Police officers and other senior DND personnel posted in CEFCOM or Afghanistan, the RCMP reported that no information or evidence was received by these officials "with respect to any knowledge of post handover abuse."[275]

190. The RCMP investigators submitted their report at the end of June 2007, concluding that there was no evidence of an offence, in part based on their understanding that there was no "knowledge, information or intelligence" indicating post-transfer torture and abuse by Afghan authorities.[276]

191. Unfortunately, the RCMP investigators concluded their investigation in the absence of critical information: namely, the graphic first-hand accounts of torture heard by DFAIT officials in Kabul and Kandahar only a few weeks earlier. From the RCMP report, it appears that all of their interviews were carried out before the DFAIT visits elicited the disturbing allegations on June 4 and 5, 2007. It is not known why this information was not shared with the RCMP before they submitted their report.

192. Lt. Col. Garrick met with the RCMP investigators after he read their conclusions. He was not in a position to share the DFAIT reports or the fact that transfers had been suspended in June 2007 because he did not have this information. However, this does not explain why Lt. Col. Garrick did not take further action once he learned about the allegations contained in the DFAIT

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[273] *Id.* at 2 of 20 (emphasis added).
[274] *Id.* at 16 of 20.
[275] *Id.* at 18 of 20. At another point, the RCMP investigators described what they were looking for as "any information or intelligence *to suggest* abuse or torture was occurring post handover." *Id.* at 16 of 20 (emphasis added).
[276] *Id.* at 20 of 20.

reports.[277] Supt. Rideout and Supt. Blizzard were experienced criminal investigators. They indicated that "knowledge, information or intelligence" suggesting post handover abuse would be "significant" for any such investigation.

193. Clearly, Lt. Col. Garrick's views about the significance of the DFAIT reports were at variance with the senior RCMP officers. Lt. Col. Garrick testified that he was "comfortable" with the situation because the RCMP report provided some assurances and he understood a process was in place with "checks and balances" and "triggers." He also said there were other ongoing MP investigations considering the same issues.[278]

194. It is true that a small number of other MP investigations connected to post-transfer abuse were initiated in 2007. The investigations were later brought together under one umbrella and referred to as "Operation Centipede," a "CFNIS investigative project which was created to address numerous allegations that CF personnel had illegally or improperly carried out their duties in the handling of Afghan detainees." As the Commanding Officer of the NIS, Lt. Col. Garrick had overall responsibility for these investigations. They included, variously, the following allegations:[279]

- a detainee was executed by Afghan authorities post handover and tossed in a ditch (GO-6912);[280]
- a soldier reported witnessing a detainee being beaten in the head by Afghan soldiers (GO-6913);[281]
- a detainee transferred to an Afghan authority was subsequently taken behind a building and executed (GO-6917); [282]
- CF personnel witnessed a detainee being abused post handover (GO-6918);[283]

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[277] Lt. Col. Garrick never read the DFAIT reports until he testified in these proceedings. However, he did read the Federal Court judgment of February 7, 2008, which described those reports in detail. *See* Garrick Tr. Vol. 1 at 60:15-61:8.

[278] Garrick Tr. Vol. 1 at 49:6-23.

[279] A single case summary of all the Operation Centipede investigations can be found at Exhibit P-27, Coll. F, Vol. 5, Tab 12; NWD Vol. 1, Tab 11.

[280] Case Summary (GO-08-6912) (Initiated in summer 2007, concluded in April 2008) [Exhibit P-27, Coll. F, Vol. 5, Tab 20; NWD Vol. 1, Tab 15].

[281] Case Summary (GO-08-6913)(Initiated on March 2007 and concluded July 2008)[Exhibit P-27, Coll. F, Vol. 5, Tab 26]. This investigation was initially investigated under GO-5564: See Case Summary (GO-07-5564) (Initiated on March 2007 and concluded July 2008) [Exhibit P-27, Coll. F, Vol. 1, Tab 2].

[282] Case Summary (GO-08-6917) (Initiated in July 2007 and concluded in August 2008) [Exhibit P-27, Coll. F, Vol. 5, Tab 29; NWD Vol. 1, Tab 20].

[283] Case Summary (GO-08-6918) [Exhibit P-27, Coll. F, Vol. 6, Tab 2; NWD, Vol. 1, Tab 21].

- a CF captain alluded in an email that Afghan authorities abused detainees in their custody (GO-6919); [284]
- *The Globe and Mail* reported post-transfer abuse by Afghan authorities, and suggested CF personnel may have been aware (GO-6920[285] and GO-6921[286]);
- an instructor providing MP training lecture alleged that Afghan authorities abused detainees (GO-23231);[287] and
- a survey of CF personnel reported, among other things, that a certain percentage of CF respondents reported witnessing abuse against detainees (GO-3134).

195. Initial discussions about Operation Centipede began in the fall of 2007, but most of the Operation Centipede investigations were not concluded until 2008 and 2009. Lt. Col. Garrick testified that he faced significant resource issues and investigations were prioritized as necessary. However, this evidence is troubling given the weight that Lt. Col. Garrick appeared to place on the investigations in other contexts. In his testimony, Lt. Col. Garrick said repeatedly that one of the main reasons why he did not look into the subsequent allegations of detainee abuse was the fact that the Operation Centipede investigations were underway. In particular, he testified that he believed the *Globe and Mail* investigations would look into those issues.[288] The Complainants submit that this explanation is wholly insufficient.

ii. Chief Warrant Officer Barry Watson

196. Chief Warrant Officer Barry Watson served as the Afghanistan NIS detachment commander during Roto 3 and was stationed in Afghanistan from January 31, 2007 through August 8, 2007. He served under Brig. Gen. Grant and Brig. Gen. Laroche. During this rotation, Major Bernie Hudson was the JTF-A TFPM.

197. CWO Watson claimed to have extremely limited knowledge about allegations of post-transfer torture and abuse of detainees. He was not aware of the fact or substance of the February

[284] Case Summary (GO-08-6919) (Initiated in May 2007, concluded in March 2009) [Exhibit P-27, Coll. F, Vol. 6, Tab 9; NWD, Vol. 1, Tab 23].
[285] Case Summary (GO-08-6920) (Initiated in April 2007, concluded in November 2008) [Exhibit P-27, Coll. F, Vol. 6, Tab 24; NWD Vol. 2, Tab 5].
[286] Case Summary (GO-08-6921) (Initiated in April 2007, concluded in November 2008) [Exhibit P-27, Coll. F, Vol. 6, Tab 27; NWD Vol. 2, Tab 7].
[287] Case Summary (GO-08-23231) (Initiated in August 2008, concluded December 2008) [Exhibit P-27, Coll. F, Vol. 6, Tab 28; NWD, Vol. 2, Tab 8].
[288] *See* Garrick Tr. Vol. 1 at 153:14-154:1, and Garrick Tr. Vol. 2 at 106:16-107:16.

2007 Complaint.[289] In particular, he claimed that while he was in Afghanistan he was not aware that there were allegations that MPs could potentially be held liable for *Criminal Code* or service offences for complicity in post-transfer abuse.[290] He was not aware that there was a proceeding in Federal Court seeking to halt detainee transfers.[291] He was unaware of news accounts of detainee torture, such as the April 2007 articles in *The Globe and Mail*.[292] He was entirely unaware of human rights reports from the AIHRC, UNHCHR, Amnesty International and the U.S. Department of State.[293] CWO Watson was aware that "somebody" was visiting detainees after they were transferred to ensure that the detainees were "being treated fairly and properly", but he did not know it was DFAIT, or that DFAIT prepared reports based on those visits.[294]

198. CWO Watson testified that before he was deployed, TFPM Major Hudson briefed him, along with the upper levels of the MP chain of command, on the importance of ensuring the proper treatment of detainees while they were in CF custody. Major Hudson advised that improper treatment of detainees could "bring down his command" and "cause serious ripples in the government."[295] CWO Watson testified that no one in the CF ever briefed him about potential for post-transfer risk of abuse[296] and he did not receive a refresher course on the law related to detainee handling or the law of armed conflict before he was deployed.[297]

199. CWO Watson testified that he was aware while he was in Afghanistan that Canadian Forces had "residual responsibility" for ensuring that detainees were treated humanely post-transfer,[298] but that he did not turn his mind to that legal issue or whether the JTF-A Commander's orders to transfer were legal while he was in Afghanistan.[299] He testified that he

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[289] Military Police Complaints Commission, Afghanistan Public Interest Hearings, Transcript of Proceedings, Vol. 30 (November 22, 2010) ("Watson Tr."), at 10:17-11:10.
[290] *Id*. at 13:6-12.
[291] *Id*. at 13:23-14:3.
[292] *Id*. at 14:11-15:16.
[293] *Id*. at 15:17-17:13.
[294] *Id.* at 67:18-68:13
[295] *Id*. at 18:22-19:12.
[296] *Id*. at 19:13-16.
[297] *Id.* at 71:16-72:5; 148:25-149:13.
[298] *Id*. at 71:2-15; *see also id.* at 93:8-13.
[299] *Id. at* 43:12-22; 95:2-3; 56:22-25; 60:1-10; 70:12-16.

was not briefed on the CF's legal obligations post-transfer by the NIS or the CFPM, and he was not instructed on how the Geneva Conventions apply in the context of post-transfer abuse.[300]

200. CWO Watson was aware that transfers were suspended in May during his rotation, but claimed he "had no idea" why the Commander made that decision. He testified: "… I could only assume and I did at the time that something caused the Task Force Commander to halt the transfer of detainees. What particulars, I don't know."[301] Despite frequent contact with other MPs, he did not ask any MPs about why the transfers stopped and claimed to have only had "some very vague and general conversation amongst other MPs" about the issue.[302]

201. CWO Watson admitted that while he was in Afghanistan he heard "very vague rumours of incidents regarding the handling of detainees post-transfer"[303] but that he could not recall the details of those rumours.[304] When he was cross-examined about whether the rumours concerned the post-transfer *abuse* of prisoners, CWO Watson denied that he had heard rumours of abuse, repeating that he only heard "very vague rumours that I can't even recall what the rumours were or who I heard them from."[305] It was only after CWO Watson was directed to a transcript of his interview with MPCC investigators on January 15, 2008,[306] in which he stated he heard rumours about abuse, that he admitted the fact.[307] CWO Watson also claimed to have no memory of how the rumours of abuse were conveyed to him.[308]CWO Watson's was aware of reports of post-transfer abuse from the beginning of his rotation.[309]

202. In order to initiate an investigation, CWO Watson testified that an MP needed to have a "reasonable suspicion."[310] If someone had laid a complaint with him or ordered him to investigate the legality of the JTF-A Commander's transfer orders, CWO Watson stated that he

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[300] *Id.* at 148:4-151:7.
[301] *Id.* at 52:18-22.
[302] *Id.* at 75:1-3.
[303] *Id. at* 19:19-22.
[304] *Id.* at 51:3-14.
[305] *Id.* at 99:3-11.
[306] Military Police Complaints Commission, Interview of WO Barry Watson (January 15, 2008) at 13:18 [Exhibit P-36].
[307] Watson Tr. at 99:3-103:5.
[308] *Id.* at 110:13-112:8.
[309] *Id.* at 102:17-105:5.
[310] *Id*. at 75:20-76:2.

would "have had no choice but to investigate" but no one ever ordered him to do so.[311] When asked by Commission Counsel if he had a "duty of curiosity" to question individuals or gather preliminary evidence, CWO Watson replied that he did not have time due to his heavy workload to be curious about things.[312] CWO Watson stated: "I was not proactive in my role as the NIS detachment commander in Afghanistan as it related to policing."[313] He explained that due to his workload, he relied on the TFPM and the TFPM's personnel to alert him of incidents that required NIS investigation.[314]

203. He testified that he never considered launching an investigation based in the rumours he heard.[315] He stated "they didn't cause anything to tweak in my head that I should be asking questions, maybe not even launching an investigation. It didn't tweak in my mind to even ask a question of my chain of command, "Should we be looking into this?"[316]

204. CWO Watson testified that even if he had read the Graeme Smith Article or even if he had been presented with the facts that were alleged in it, he would not have initiated an investigation. He elaborated that he only would have investigated if the article had made a specific complaint against the JTF-A Commander.[317] CWO Watson argued that because the article failed to identify a specific person who was violating the law, an investigation would not have been justified.[318] He stated: "This article is more relating to the treatment of detainees post-transfer, which I don't have jurisdiction to investigate."[319]

[311] *Id*. at 77:11-25.
[312] *Id*. at 76:6-18.
[313] *Id*. at 32:21-33:5.
[314] *Id*. at 32:10-17.
[315] *Id*. at 38:22-39:5.
[316] *Id.* at 173:9-17.
[317] *Id*. at 137:21-141:21.
[318] Watson Tr. at 140:21-141:8.
[319] *Id.* at 140:9-11.

iii. Master Warrant Officer Jean-Yves Girard

205. Master Warrant Officer Jean-Yves Girard served as the Afghanistan NIS detachment commander during Roto 4. He was stationed in Afghanistan from July 31, 2007 until the beginning of March 2008.[320]

206. He received training on the Geneva Conventions at the beginning of his career in the early 1980s or the end of the 1970s,[321] but he never received further training on the Geneva Conventions.[322] No one in the CF briefed him about the human rights situation in Afghanistan or post-transfer risk of abuse before or during his deployment.[323]

207. While he was in Afghanistan, MWO Girard was not aware of the February 2007 Complaint.[324] In particular, he was not aware that there were allegations that MPs were transferring detainees to risk of torture.[325] He was unaware of news accounts of detainee torture, such as the Graeme Smith Article and the Ouimet Article.[326] He was not aware that there was a proceeding in Federal Court seeking to halt detainee transfers.[327] He was unaware of human rights reports from the AIHRC, UNHCHR, Amnesty International and the U.S. Department of State.[328] MWO Girard was not aware that Canada was conducting post-transfer site visits.[329]

208. He was not aware before he arrived in Afghanistan that the transfers were stopped for certain periods of time.[330] He also claimed that he did not know that transfers were suspended during his rotation, from November 2007 through February 2007.[331] He was on vacation when the transfers were initially suspended; he claimed that when he returned to theatre, he noticed that detainees were remaining longer in the detainee compound – which was located directly next

[320] Military Police Complaints Commission, Afghanistan Public Interest Hearings, Transcript of Proceedings, Vol. 31 (November 23, 2010) ("Girard Tr."), at 4:2-10.
[321] *Id.* at 29:14-20.
[322] *Id.* at 29:22-24; 42:6-9.
[323] *Id.* at 36:11-37:6. *See also* 95:11-23; 143:14-24; 144:5-9.
[324] *Id.* at 35:5-22.
[325] *Id.* at 36:5-9.
[326] *Id.* at 38:10-21; 73:6-19; 74:23-75:4.
[327] *Id.* at 40:9-14.
[328] *Id.* at 39:5-24.
[329] *Id.* at 57:8-21.
[330] *Id.* at 58:6-10.
[331] *Id.* at 75:10-18; 77:14-19.

to the NIS detachment's offices – but he did not know why that was[332] and he did not ask anyone about it.[333] He stated that the MPs at the detainee compound "confirmed that there were more of them [detainees] there, but why that was, I don't know. There were rumours that it was because the detainees were comfortable there, had three meals a day and didn't want to leave. That's all I know."[334]

209. MWO Girard claimed to be ignorant about the facts pertaining to detainee handling, going so far as to state that he did not know whether or not the Canadian Forces transferred detainees to Afghan authorities or some other foreign power.[335]

210. Like CWO Watson, MWO Girard heard rumours that detainees were at risk of post-transfer torture or mistreatment.[336] However, MWO Girard could not remember if he heard those rumours when he was in theatre or when he returned to Canada.[337] The rumours he heard were that detainees were being tortured after they were transferred,[338] but he could not recall further details about the rumours.[339] MWO Girard testified that MPs in theatre did not discuss the rumours.[340]

211. Unlike the other NIS Subjects, MWO Girard testified that he could not remember if he received a copy of the technical directive that was in force during his rotation.[341] Nonetheless, MWO Girard testified that it was his understanding while he was in theatre there was a mandatory obligation to conduct an investigation when there were allegations of violation of international law or allegations of mistreatment of detainees.[342] In contrast to CWO Watson, MWO Girard testified that he did not rely on the TFPM to bring to his attention allegations of violation of international law or complaints concerning the mistreatment of detainees.[343] When

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[332] *Id.* at 76:3-8.
[333] *Id.* at 76:9-11.
[334] *Id.* at 76:20-77:2 ("... les policiers militaires, ils disaient qu'il y en avait plus. Mais, il y en avait plus, pourquoi, je ne le sais. La rumeur circulait que c'est parce qu'ils étaient bien là et ils avaient trois repas par jour et ils ne voulaient pas quitter. C'est tout ce que je sais.")
[335] *Id.* at 45:17-24; 55:20-51:1; 124:22-125:2.
[336] *Id.* at 47:24-48:3.
[337] *Id.* at 48:4-10.
[338] *Id.* at 49:11-13.
[339] *Id.* at 49:3-10.
[340] *Id.* at 50:20-51:1.
[341] *Id.* at 13:8-14:21; 16:15-25; 80:22-81:4.
[342] *Id.* at 21:20-22:10; 23:17-25.
[343] *Id.* at 23:17-24:16.

questioned by Commission Counsel if it was his duty to be proactive, he stated, "Absolutely, the NIS is totally independent from the chain of command."[344] He was emphatic that he "never" ("jamais") relied on the TFPM to bring charges to attention in any investigation.[345]

212. He testified that if he had been aware of allegations he would have asked questions and investigated.[346] He testified that never conducted an investigation into the legality of transfers because it never occurred to him, and furthermore, he was busy with other investigations.[347] He testified that it would have been his duty to investigate allegations that Canadians were somehow involved in post-transfer abuse.[348] Generally speaking, if he had a reasonable suspicion that a crime had been committed, he would launch an investigation.[349]

213. MWO Girard testified that he understood that detainees were to be treated in accordance with the Geneva Conventions,[350] but he never considered while he was in Afghanistan whether Canada had ongoing obligations after detainees were transferred to Afghan custody.[351]

iv. Major John Kirschner

214. Major Kirschner served as the Afghanistan NIS detachment commander during Roto 5 and was stationed in Afghanistan from February through October 2008. He served under Brig. Gen. Laroche and Brig. Gen. Thompson.[352] During this rotation, Major Gribble was the JTF-A TFPM. He had daily contact with Major Gribble while he was in theatre.[353]

215. During his pre-deployment training, Major Kirschner was not briefed about the human rights situation in Afghanistan or the post-transfer risk of abuse.[354] Major Kirschner was not aware of the February 2007 Complaint while he was in theatre.[355] He did not read the April 2007

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[344] *Id.* at 24:17-24 ("Absolument, le SNE est complètement indépendant de la chaîne de commandement.")
[345] *Id.* at 25:5-9.
[346] *Id.* at 93:11-14.
[347] *Id.* at 91:11-17.
[348] *Id.* at 98:5-17.
[349] *Id.* at 120:5-8.
[350] *Id.* at 31:1-6
[351] *Id.* at 31:1-15; 61:22-62:9; 119:18-24.
[352] Military Police Complaints Commission, Afghanistan Public Interest Hearings, Transcript of Proceedings, Vol. 29 (November 19, 2010) ("Kirschner Tr."), at 6:20-7:5.
[353] *Id.* at 7:6-15.
[354] *Id.* at 44:8-15; 37:6-13.
[355] *Id.* at 12:21-13:1.

articles in *The Globe and Mail*,[356] but he read or heard other media reports about detainee mistreatment treatment by Afghan authorities post-transfer.[357] At the hearing, he could not recall who authored, published or transmitted those media reports.[358] He was not aware that there was a proceeding in Federal Court seeking to halt detainee transfers.[359] He was not aware of human rights reports from the AIHRC, UNHCHR, Amnesty International and the U.S. Department of State.[360]

216. Major Kirschner testified to having a far greater familiarity with Canada's post-transfer monitoring process than either MWO Girard or CWO Watson. Major Kirschner was aware that Canada had an agreement in place with Afghanistan for visitation rights to their detention facilities. When he arrived in theatre, he understood that DFAIT was conducting site visits in order to interview prisoners who had been transferred from Canadian custody.[361] He was aware that at least one of the DFAIT site visits uncovered an allegation of torture.[362] Without being directly told, common sense led him to conclude that DFAIT was preparing reports based on the site visits.[363] However, he never sought to obtain copies of the reports.[364] He never asked anyone at DFAIT questions about the reports.[365]

217. Shortly after arriving in Afghanistan Major Kirschner became aware that a suspension of transfers was in effect.[366] He learned that the transfers were suspended after implements of torture were discovered in an interrogation room during a monitoring visit.[367] He testified that he was not aware of any previous suspensions and that he was not aware of any further suspensions occurring during his rotation.[368] He learned that the transfers were resumed after an agreement with Afghanistan was amended to allow DFAIT more access for site visits.[369]

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[356] *Id.* at 41:23-42:8; 86:3-4.
[357] *Id.* at 86:5-87:11; 97:11-20.
[358] *Id.* at 86:5-20.
[359] *Id.* at 49:16-25.
[360] *Id.* at 43:13-44:7.
[361] *Id.* at 72:4-9; 81:9-14.
[362] *Id.* at 82:18-21.
[363] *Id.* at 81:15-25.
[364] *Id.* at 43:13-44:7; 60:18-23.
[365] *Id.* at 84:10-25.
[366] *Id.* at 36:19-37:1.
[367] *Id.* at 55:3-13.
[368] *Id.* at 52:16-53:8.
[369] *Id.* at 55:14-22.

218. Again, in stark contrast to CWO Watson and MWO Girard, Major Kirschner testified that he was aware of general and specific allegations of post-transfer torture and mistreatment. The following exchange occurred between Major Kirschner and Counsel for the Commission, Mr. McGarvey:

> Q. … To what extent was the detainee issue even in your mind or a significant issue when you were deployed?
> A. *I would suggest it was omnipresent. I was certainly aware of the fact that complaints were put forward, particularly through the media.* Having said that, and again to refer back to my discussion concerning my dispatch of investigators to the NDS facility, it was something that I was very cognizant of. [370]

219. He was also aware of specific allegations of post-transfer torture. He testified:

> I was aware that there was an observation of a chair with instruments of torture, I believe, under the chair. To my knowledge, that is what prompted the suspension of the transfers.[371]

220. Major Kirschner testified that around March 2008, he deployed investigators to an Afghan prison to collect evidence for an investigation into complaints he had received about MPs who purportedly mistreated detainees in their custody.[372] He instructed the investigators to interview the detainees about the allegations; he also instructed the investigators to physically inspect the detainees for signs of abuse unrelated to the complaint and to ask them how they were being treated under Afghan custody.[373] It was his personal initiative to instruct his investigators ask about Afghan treatment of the detainees, and had nothing to do with the investigation at hand.[374] He testified that he requested the questioning due to his "appreciation for the global sensitivities concerning the treatment of Afghan detainees that had been transferred from the Canadian Forces."[375]

221. Major Kirschner exhibited a tenuous grasp of the CF's international and domestic law obligations as they pertained to detainee post transfer abuse. On one hand, Major Kirschner testified during a leading direct examination by Commission Counsel that if detainees were

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[370] *Id.* at 38:22-39:6 (emphasis added).
[371] *Id.* at 55:9-13.
[372] *Id.* at 24:2-18; 64:22-23.
[373] *Id.* at 24:2-18.
[374] *Id.* at 98:13-24.
[375] *Id.* at 62:3-6.

knowingly transferred to a risk of torture, he would be required to investigate pursuant to the technical directive.[376] Later however, Major Kirschner gave an unsatisfactory answer to a question about his understanding of the law at issue. For example, the following exchange occurred during cross-examination by counsel for the Complainants:

> Q. It was also your understanding, I would assume, that according to the Geneva Conventions, the capturing power is responsible for ensuring humane treatment of detainees after they are transferred.
> A. After they are transferred? I am not aware of that, no.
> Q. That wasn't your understanding.
> A. No, not really. […][377]

222. Major Kirschner expressed a satisfactory understanding of the law at only one point in his testimony – and that was in response to a leading question asked by Mr. Wallace during his second examination of the witness.[378] Unfortunately, it is not possible to say with certainty what Major Kirschner understood to be the state of the law. However, one is left with the troubling impression that Major Kirschner did not have a correct understanding of the JTF-A Commander's legal obligations.

223. Major Kirschner did not investigate the legality of the Commander's transfer orders and the matter of post-transfer torture. He did not collect any evidence; he did not interview any witnesses. Major Kirschner offered several reasons for his failure to investigate. First, Major Kirschner testified that he was extremely busy and had a limited ability to be curious about such matters.[379] Second, Major Kirschner testified that only the Afghans had jurisdiction to investigate incidents that occurred outside Canadian custody.[380] He stated: "That was not a part of my job to conduct investigations of any abuse suffered by a detainee under Afghan custody."[381]

224. Finally, Major Kirschner testified that he had confidence in the JTF-A Commander and trusted his judgment.[382] On this latter point he stated:

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[376] *Id.* at 31:21-32:11.
[377] *Id.* at 71:10-23.
[378] *Id.* at 122:11-18.
[379] *See for example*, *id.* at 58:16-59:6.
[380] *Id.* at 93:17-22.
[381] *Id.* at 94:6-8.
[382] *Id.* at 62:17-63:8; 55:23-56:11.

> …When I arrived in theatre, of course the moratorium was in effect which suggested to me that the process was working and certainly that the commander was exercising due diligence in ensuring that he was protecting those persons that earlier fell under his responsibility.[383]

c) Canadian Forces Provost Marshal

i. Captain (Navy) (Ret'd) Steven Moore

225. Captain (Navy) (Ret'd) Steven Moore joined the Canadian Forces in 1983. He served as CF Provost Marshal from June 15, 2005 to approximately June 15, 2009.[384] He retired from the Canadian Forces in August 2009.[385] As the CFPM, Capt. (N) Moore was the most senior member of the Military Police, and had the "last word" on policing issues in the Canadian Forces."[386]

226. Capt. (N) Moore was aware of allegations of detainee torture, and acknowledged that he had concerns about the treatment of detainees post-transfer.[387] He testified that concerns about post-transfer treatment of detainees "crystallized" by the time he received the February 2007 Complaint.[388] Prior to that time, he had simply assumed that the Government of Canada had "done their due diligence" in determining that detainees could safely be transferred to the NDS.[389] Nonetheless, when he reviewed the specific allegations of post-transfer torture and abuse detailed in the February 2007 Complaint, he assumed that the Government of Canada was aware of this information and had already taken it into account when developing its detainee transfer policy.[390]

227. According to Capt. (N) Moore, when he received the February 2007 Complaint, he ordered Lt. Col. Garrick to report it to the NIS and to request an investigation into the allegations. He also tasked Lt. Col. Garrick with reviewing the NIS investigations ongoing at that time to determine if there was any evidence that the JTF-A Commander had committed an offence by ordering the detainee transfers. He also instructed Lt. Col. Garrick to raise these

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[383] *Id.* at 36:12-18.
[384] Moore Tr. Vol. 1, *supra* note 99, at 4:12-25.
[385] *Id.* at 5:7-13.
[386] *Id.* at 11:6-8.
[387] *Id.* at 133:13-134:11.
[388] *Id.* at 206:9-18.
[389] *Id.* at 206:25-207:16.
[390] *Id.* at 210:22-211:13.

issues with NIS investigators, and ask if they were aware of any information that would suggest an investigation into the transfer orders would be necessary.[391] Capt. (N) Moore assumed responsibility for discussing his concerns with the TFPMs and the JTF-A Commanders, and to determine if they believed there were issues requiring investigation.[392] Capt. (N) Moore testified that he was informed that there were no concerns or issues requiring investigation.[393] According to Capt. (N) Moore, he spoke with the TFPMs personally.[394]

228. Even so, Capt. (N) Moore continued to be concerned about detainee transfers,[395] and followed media reports on detainee issues.[396] Nonetheless, he simply assumed that all parties involved in the detainee transfer process – from the Government of Canada which formulated the transfer policy, to DFAIT which was responsible for monitoring, to the JTF-A Commander who made the transfer order – had performed the necessary due diligence and were firmly satisfied that they were not transferring to risk of torture: "… the assumption off the bat was that they had done their due diligence and that policy was legal."[397]

229. He also expected soldiers to report potentially illegal transfers to the Military Police.[398] He informed this Commission that:

> … I find it incredulous if somebody is out there that honestly thinks this Commander knew that detainee was going to be tortured, transferred him anyway and hasn't reported it to the police, I'd be amazed."[399]

On the other hand, he also informed the Commission that very often, CF members do not think to call the Military Police, even when they suspect criminal conduct. He testified:

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[391] *Id.* at 134:24-135:13; 212:4-24.
[392] *Id.* at 135:14-18.
[393] *Id.* at 212:25-213:3.
[394] Military Police Complaints Commission, Afghanistan Public Interest Hearings, Transcript of Proceedings, Vol. 36 (December 2, 2010) ("Moore Tr. Vol. 2"), at 94:16-19. This testimony is directly contradicted by the evidence of each of the TFPMs. *See* Hudson Tr. at 9:12-10:18 (testifying that he never spoke to the CFPM while in theatre, and never about detainee issues); Zybala Tr. at 194:15-23 (testifying that he never spoke to the CFPM about detainee issues); and Gribble Tr. at 111:24-112:21 (testifying that he never spoke with the CFPM prior to deployment, and that he cannot recall any conversations with the CFPM concerning post-transfer abuse).
[395] *Id.* at 136:6-137:8.
[396] *Id.* at 217:24-218:3.
[397] *Id.* at 231:5-20.
[398] *Id.* at 231:21-232:19.
[399] *Id.* at 232:15-19.

> … these men and women are very competent, professional people and they're taught that you need to look after your people and you need to handle what the issues are and if there's a problem, then you investigate it and find out what it is and deal with it. But very often, when that problem translates into a criminal offence, the light doesn't always come on right away that you need to call the police and what your action is is stepping aside and reporting it to the police. They will take action, but sometimes they will miss that step of calling the police.[400]

230. Capt. (N) Moore ordered no other investigations into the legality of detainee transfer orders, even after learning about the allegations in the Graeme Smith Article or the fact that detainee transfers had been suspended in November 2007. He made no attempt to access the DFAIT site visit reports documenting detainee torture and abuse;[401] he did not undertake any additional inquiries.[402] As he explained to this Commission:

> As I felt that with the amount of people and senior people, lawyers and that that were involved in the process, I felt that somebody inside the process, if they felt there were negligence or an offence, then they would have stuck up their hand and they would have reported it to us.[403]

B. Subjects Had Sufficient Information Concerning the Risk of Torture

231. The majority of the subjects here testified to actual knowledge that there were reports of post-transfer detainee torture and abuse. That understanding alone should have caused a reasonable police officer to undertake preliminary inquiries into the legality of past or ongoing orders to transfer.

232. As detailed in Part II, *supra*, there was significant information publicly available concerning the risk of torture faced by detainees in Afghan prisons. To the extent that the subjects testified that they had limited or no awareness of reports of detainee torture by the NDS, we submit that such testimony should be given little weight. As a threshold matter, given the prevailing concerns within the Canadian government, at CEFCOM, among various Canadian agencies, and at KAF itself concerning, first, the ongoing Federal Court litigation and then various Boards of Inquiry and MPCC investigations into issues relating to detainee handling, it is

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[400] *Id.* at 122:2-13.
[401] *Id.* at 249:2-7.
[402] *Id.* at 255:24-256:10.
[403] *Id.* at 249:10-16; *see also id.* at 256:11-25.

simply non-credible that there was no discussion or awareness of post-transfer abuse among the CF in theatre.

233. Moreover, given the senior positions occupied by each of the subjects, and the mission-critical nature of the entire detainee handling process, we submit that it would have been unreasonable for the subjects to not pay close attention to reports suggesting that CF conduct may have potentially violated international law. It is reasonable to expect that each of the subjects, by virtue of his duties, would keep himself reasonably informed of publicly available information about activities taking place within the theatre of operations.

234. The subjects could have obtained additional information pertaining to the risk of torture by virtue of their powers and training as police officers. Each of the subjects, by virtue of their police training and experience could reasonably be expected in the course of an investigation to: identify and pursue relevant issues; identify, preserve, collect and examine physical evidence as necessary; secure and review relevant documentation, including obtaining warrants as necessary; identify, segregate and interview witnesses; and, objectively analyze the material they gathered based solely on the facts. These basic principles of investigation are well-accepted and commonsensical, yet none of the subjects engaged in these investigative steps. Any one of these steps would have led the subjects to evidence concerning past or ongoing transfers to the risk or torture.

C. Subjects Failed to Understand the Law and Potential Offences

235. Military Police, by virtue of their police training and their specialized training in detainee handling, are expected to have knowledge of the legal principles governing the conditions under which Canadian Forces may transfer detainees to foreign powers. MPs are expected to have an understanding of international humanitarian law, international human rights law, and the military's own rules and policies. It is reasonable to expect that each of the subjects would know enough law to verify compliance with the law or gather evidence concerning possible breaches of the law. Simply put, it is impossible for a Military Police officer to enforce the rule of law if he has no idea what the law is.

236. Each of the subjects testified to varying understandings of Canada's responsibilities with respect to post-transfer treatment of detainees. There is compelling evidence before this Commission that many of the subjects had a wholly deficient understanding of the potential legal issues concerning the post-transfer treatment of detainees.

237. Major Hudson, Major Zybala, Major Gribble, L. Col. Garrick and Capt. (N) Moore each generally understood that it would be a violation of international law to issue an order to transfer a detainee where there were grounds for believing that the detainee would be transferred to substantial risk of torture.[404] This articulation appears to be derived from the *non-refoulement* obligation as set out in Article 3 of the Convention Against Torture, discussed at paragraph 101, *supra*.[405]

238. This formulation does not encompass the totality of the international law obligations that ought to be considered by the CF, however. For example, it does not reflect the requirements of GPW's Article 12, even though it is clear that the CF considers its conduct bound by the Geneva Conventions, and its treatment of detainees by GPW, in particular.[406] GPW's Article 12, as discussed at paragraph 95, *supra*, prohibits transfer of detainees to a foreign power that is unable or unwilling to provide all of the protections of GPW. None of these witnesses testified to even turning their minds to the issue of whether, in light of ongoing reports of detainee torture and abuse, Afghanistan was capable of respecting GPW.

239. There is unsettling evidence before this Commission that the NIS detachment commanders did not appreciate that it was a violation of law to transfer individuals to Afghan custody if there was a risk of torture. CWO Watson testified that he did not have jurisdiction to investigate issues related to the post-transfer treatment of detainees, assuming that the only potential offence was the act of torture itself, and not the order to transfer. Major Kirschner offered conflicting legal testimony about the CF's legal obligations post-transfer, stating at one point that he was unaware that a capturing power is responsible for ensuring the humane treatment of detainees after they are transferred. MWO Girard testified that he never considered whether Canada had ongoing human rights obligations after detainees were transferred.

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[404] *See* paras. 164, 173, and 179 *supra*; Moore Tr. Vol. 1 at 64:15-23.
[405] Forcese Report at 26-27.
[406] This was specifically remarked upon by Professor Forcese in his testimony before this Commission. *See* Sassòli and Forcese Tr. at 138:25-139:17.

240. Ultimately, it is our submission that the Commander of NIS, Lt. Col. Garrick, and the CFPM, Capt. (N) Moore, failed to adequately train MPs on the potential legal issues they would encounter in theatre concerning the humane treatment of detainees and the CF's post-transfer obligations. It would appear that the members of the NIS were the most woefully unprepared; subsequently, even when they were presented with evidence that detainees faced a risk of torture, they did not even turn their minds to whether the transfers were illegal.

241. All the NIS subjects testified that neither Lt. Col. Garrick nor Capt. (N) Moore briefed them on reports of risk of post-transfer abuse. Nor did they receive refresher courses on legal principles governing the conditions under which Canadian Forces may transfer detainees to foreign authorities, such as a substantive review of the Geneva Conventions or the military's own rules and policies. This is significant because the NIS subjects testified that their training was sorely out of date. For example, MWO Girard testified that he received training in the Geneva Conventions at the beginning of his career – in approximately the early 1980s.

242. Although Capt. (N) Moore claims that he instructed Lt. Col. Garrick to discuss with NIS investigators whether there was evidence that any of the JTF-A Commanders had committed an offence by ordering the detainee transfers, all the NIS investigators denied that Lt. Col. Garrick had discussions with them even about the issue post-transfer risks and obligations, let alone whether potential offences had occurred. In summary, Capt. (N) Moore and Lt. Col. Garrick's failure to train and educate the MPs under their command about the potential legal issues in theatre concerning the post-transfer treatment of detainees was a failure of leadership.

D. Evidence of Subjects' Failured to Investigate

243. Despite their awareness of ongoing reports of post-transfer torture of detainees, neither the subject TFPMs nor NIS detachment commanders made any inquiries into the legality of any transfer orders. The investigative steps taken by Lt. Col. Garrick and Capt. (N) Moore were cursory at best, and given the fundamental human rights at issue and the mission-critical circumstances, their actions were completely inadequate.

a) Task Force Provost Marshals

i. Major Bernie Hudson

244. Major Hudson agreed that the following excerpt from an army doctrine manual accurately set out MP duties:

> Customary police procedures continue to apply throughout the spectrum of conflict. Notwithstanding the chaos of war or the primitive installations and equipment available in operations other than war, the Canadian Forces military police standard policies and standard procedures must be adhered to as closely as possible.[407]

245. He also understood that with respect to discretion to start an investigation, a peace officer's level of discretion is inversely proportional to the seriousness of the offence.[408] He acknowledged that the allegations in the Graeme Smith Article and the April 25, 2007 DFAIT site visit report[409] constituted a "pattern of activity", and that there were grounds to look into those allegations. However, he believed that DFAIT had responsibility for investigating reports of torture, and until DFAIT could confirm the truth of those reports, he did not have to determine whether the legality of the transfer orders.[410] While it is our position that the report of post-transfer torture alone should have triggered a duty to investigate, it bears noting that there is nothing in evidence to show that Major Hudson attempted to discover whether these reports were ultimately "substantiated" or not.

246. Moreover, he testified that in the case at issue, he would require "clear evidence" that the JTF-A Commander intended to transfer to risk of torture before launching an investigation.[411] Upon further questioning, Major Hudson changed his testimony, stating that he would ultimately have to "formulate a belief or at least a reasonable suspicion" that the Commander intended to transfer to risk of torture,[412] though we would suggest that his initial response is revealing.

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[407] Hudson Tr. at 263:8-21; excerpt from Chief of Land Staff MP Manual, *supra* note 142.
[408] Hudson Tr. at 175:16-19.
[409] *See supra note* 75 and accompanying text.
[410] Hudson Tr. at 159:15-160:8.
[411] *Id.* at 176:8-17.
[412] *Id.* at 176:18-177:15.

247. In any event, Major Hudson never formulated such a belief or suspicion. Based on untested assumptions and sheer faith and trust, Major Hudson never contemplated the propriety of the transfer orders, despite his own personal knowledge that there were reports of post-transfer torture. According to Major Hudson: "Implicitly I trust the Government of Canada and I trust the other federal departments that are part of this whole-of-government construct are actually all doing their jobs until proven otherwise."[413] He believed that if it was necessary to stop transfers, then there would have been direction from DFAIT or CEFCOM. Given that there was no such direction, his conclusion was that transfers were appropriate.[414]

248. The renegotiation of the transfer arrangement in May 2007, along with the revised DFAIT Standard Operating Procedures (SOPs) accompanying the implementation of the new arrangement, also gave Major Hudson comfort that there was no substantial risk of post-transfer torture and abuse.[415] According to Major Hudson, an important aspect in ensuring that detainees were not transferred to risk of torture was the knowledge that post-transfer treatment was being monitored, not necessarily by the CF, but by other responsible agencies such as DFAIT.[416] While it was his understanding that DFAIT would be sharing their reports regarding post-transfer monitoring with the CF,[417] he never saw the actual reports himself, and did not even know to whom they were sent.[418] He never asked to see the DFAIT reports.[419] He simply trusted that they were of adequate quality and accuracy.[420] He gave no evidence suggesting he made any inquiries into what DFAIT actually did. He gave no evidence suggesting that he had any personal knowledge as to the investigations DFAIT undertook.

249. Major Hudson testified that he had little reason to suspect that the JTF-A Commander was issuing orders to transfer in contravention of international law because the Commander had shown willingness to suspend transfers in the past, such as in April 2007.[421] According to Major Hudson: "… I was relying on the fact that my commander had a positive pattern of activity, he

[413] *Id.* at 115:19-23.
[414] *Id.* at 165:7-166:9; 235:12-21.
[415] *Id.* at 110:5-111:6; 116:10-117-4.
[416] *Id.* at 106:6-17.
[417] *Id.* at 127:2-18.
[418] *Id.* at 127:19-128:18.
[419] *Id.* at 179:20-22.
[420] *Id.* at 211:22-212:15.
[421] *Id.* at 109:17-24; 152:2-153:11.

has done the right thing in the past."[422] He also suggested that the Commander had no "motive" to violate international law[423].

250. Moreover, Major Hudson did not believe that the JTF-A Commander was transferring to risk of torture because he himself did not have any knowledge that there was torture.[424] He acknowledged that the Commander was privy to more information than he was, but appeared to simply assume that such information would necessarily reinforce the correctness of the Commander's position.[425]

251. In short, Major Hudson simply trusted his commander to make correct decisions.[426] However, there is no evidence that he made any inquiries whatsoever to support his assumptions that DFAIT was conducting adequate investigations, or that the JTF-A Commander had adequate information. There is no evidence that he had any knowledge of DFAIT's activities or of the Commander's access to information. His assumptions of best efforts and good faith conduct are not based on any actual knowledge, but simple faith.[427] Illustrative of this failure to learn even the most basic facts relating to the transfers is his inability to state with any certainty that he even knew who ordered the transfer of a detainee alleging post-transfer torture and abuse in June 2007 – despite the fact that this detainee was almost certainly transferred during Major Hudson's tenure as TFPM.[428]

252. Neither Major Hudson nor any MPs under his command investigated or made any inquiries into the legality of any orders to transfer detainees to Afghan custody.[429] Nor did he make any recommendations to the NIS to investigate the legality of the transfers.[430] He asked no questions to determine if there was a pattern of activity – such as continued transfers in light of ongoing reports of post-transfer torture – which might suggest misconduct. He asked no questions to determine whether allegations of abuse were "substantiated"; rather, he assumed that if they were "substantiated," he would be informed.

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[422] *Id.* at 169:15-17.
[423] *Id.* at 177:16-178:10.
[424] *Id.* at 160: 24-161:6.
[425] *Id.* at 236:1-5.
[426] *Id.* at 150:24-151:4.
[427] *See, e.g., id.* at 174:17-175:1.
[428] *Id.* at 215:16-216:9.
[429] *Id.* at 145:8-25.
[430] *Id.* at 149:3-6.

253. In this case, Major Hudson's approach to policing started off with the strong presumption that there was no misconduct, as evidenced by this testimony concerning the seriousness of the June 5, 2007 reports of torture: "Obviously, DFAIT did not believe that it was that serious or they would have put out that, and obviously the Commander did not believe that it was that serious or he would have stopped transfers."[431]

254. Given Major Hudson's awareness of both historical and ongoing reports of detainee torture by the Afghans, his failure to make even the most basic inquiries into the legality of the transfer orders is objectively unreasonable. As outlined at paragraph 38, *supra*, the TFPM has specific direction from the CFPM via the technical directive to "ensure" that investigations involving "allegations of violations by CF members of the law of armed conflict or international law" is conducted by the appropriate branch of the Military Police. Given the seriousness of the allegations at issue, Major Hudson's discretion to investigate is narrow, and his reliance on untested assumptions cannot be considered reasonable.

ii. Major Michel Zybala

255. According to Major Zybala, he never turned his mind to the necessity of conducting an investigation into the legality of transfer orders because he was aware of no information that would lead him to suspect that detainees were being transferred to risk of torture.

256. Though he was aware of human rights reports documenting systemic abuse in Afghan prisons, he dismissed their utility in determining whether there were substantial grounds for believing that a detainee would be subjected to post-transfer abuse, arguing that the risk of torture must be assessed prospectively, not retrospectively: "it's the future that determines the risk, not the past."[432] This understanding of risk assessment is deeply flawed. Under Major Zybala's formulation, past reports of torture and abuse would never be relevant in determining risk of torture, yet as Professor Sassòli observed, future risk of torture or abuse can only be determined by examining historical evidence of torture and abuse.[433]

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[431] *Id.* at 270:22-25.
[432] Zybala Tr. at 131:18-23; 190:8-191:5 ("C'est le futur qui détermine le risque, et non le passé.").
[433] *See* paragraph 109, *supra.*

257. Likewise, he believed that unless they were "substantiated", reports by detainees stating that they had been abused by the NDS did not carry much weight in determining whether other detainees faced risk of torture. While he did not state so explicitly, his position appeared to follow that of Major Hudson's: that is, until the "truth" of the allegations could be proven, he was not obliged to consider the legality of the transfer order.

258. For Major Zybala, even if he had known of additional evidence documenting reports of detainee abuse, he would not have necessarily been inclined to undertake inquiries into the propriety of past and current transfer orders. For example, when asked whether he felt he needed the information reported in the site visit reports while he was in theatre, Major Zybala stated that such information was not necessary for him, suggesting that such reports only indicated misconduct by the Afghans and did not necessarily trigger suspicion of misconduct by members of the CF,[434] despite the fact that a report of post-transfer torture necessarily raises the question of whether the order to transfer was itself properly made. Moreover, he understood DFAIT to be charged with investigating such allegations, in any event.[435]

259. Similarly, according to Major Zybala, statistics showing the high incidences of detainees claiming post-transfer abuse did not go to show that the JTF-A Commander had acted inappropriately. For him, these were simply unsupported allegations; the Commander would have needed, for example, charges against a member of the NDS or results from an NDS investigation to show that there should be cause for concern about potential for torture.[436] This level of "proof", however, appears unreasonably high, given a peace officer's broad power and duties of investigation into situations where they may not even have a reasonable belief that an offence has been committed.[437]

260. Like Major Hudson before him, Major Zybala was "confident" that the JTF-A Commander was making correct decisions with respect to transfers,[438] notwithstanding the fact that he never sought to determine how Brig. Gen. Laroche was making transfer decisions, or to learn what information the Commander was able to access. While he was not aware of the two

[434] Zybala Tr. at 163:13-164:2.
[435] *Id.* at 89:18-90:6.
[436] *Id.* at 186:16-187:10.
[437] *See* paragraphs 121 to 126, *supra.*
[438] Zybala Tr. at 201:10-14.

allegations of torture documented by DFAIT in September 2007, he believed that the Commander "presumably" would have been aware of them.[439] He believed it was a "reasonable assumption" ("assumation raisonnable") that the results of the DFAIT monitoring visits would have been considered by the Commander in making his transfer decisions,[440] though he gave no evidence showing that he knew this for a fact. And indeed, Major Zybala testified that he did not know that the Commander, in fact, was *not* receiving quarterly assessment reports from DFAIT prior to the November 5, 2007 site visit report, as he had expected.[441] Major Zybala's confidence was premised on mere assumption and never tested.

261. As discussed in paragraphs 168 to 175, *supra*, Major Zybala demonstrated curiosity and concern about the practice of transferring CF-captured detainees to the NDS. He was sufficiently concerned about his own potential liability that he conducted factual and legal research prior to his deployment. He was sufficiently concerned to seek additional information from the BCCLA's website while he was in theatre. He was sufficiently concerned to continue gathering additional information after the end of his tour. He was aware of the fact that there were reports of post-transfer torture. He was aware of the general legal obligations governing CF conduct with respect to detainee transfers.

262. But Major Zybala's concern seemed strictly focused on his own potential liability arising from illegal transfers; none of this concern played a role in how he carried out his policing duties as the commander of the Military Police in Afghanistan. This concern did not extend to potential liability that could attach to the JTF-A Commander, who was responsible for making the transfer decision. There is no evidence that either Major Zybala or any MPs under his command investigated or made any inquiries into the legality of any orders to transfer detainees to Afghan custody. Nor is there any evidence that he made recommendations to the NIS to investigate the legality of the transfers. He also gave no evidence showing that while he was in theatre, he was aware that any NIS investigations[442] – or any investigations of any sort, for that matter – were taking place. As with Major Hudson before him, Major Zybala's failure to make basic inquiries into the legality of the transfer orders is objectively unreasonable.

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[439] *Id.* at 184:14-20.
[440] *Id.* at 200:6-12.
[441] *Id.* at 176:12-177:4.
[442] To the extent he was aware of NIS investigations made in the press about detainee abuse, for example, he learned of these investigations after his return from Afghanistan. (Zybala Tr. at 103:18-24)

iii. Major Ron Gribble

263. As Major Gribble informed this Commission, if he had received a complaint that transfer orders were made with the knowledge that detainees would be at risk of post-transfer torture or abuse, he would be obliged to ensure that the complaint was investigated.[443] He would also be obliged to refer such a complaint to the NIS.[444] And while it would not always be the case that a full investigation would be launched, the MPs would still be obliged to make some inquiry into such allegations or incidents.[445] Yet while he was aware that such a complaint existed – in the form of the February 2007 Complaint to this Commission – he did not fulfill any of these obligations to ensure a proper investigation.

264. And while Major Gribble testified that he believed that they "opened a GO on every single"[446] report or allegation of post-transfer torture, this recollection has not been supported by the Government of Canada's disclosures to this Commission.

265. According to Major Gribble, general allegations, such as those contained in newspaper articles or the February 2007 Complaint, could form the basis of an investigation.[447] He read the Graeme Smith Article prior to his deployment. He was twice interviewed in connection with the February 2007 Complaint. Yet he undertook no inquiries.

266. The document disclosures provided to this Commission do not contain any reports of post-transfer torture of detainees issued during Roto 5.[448] Nonetheless, Major Gribble still had the opportunity to investigate the legality of transfer orders issued during previous rotations,

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[443] Gribble Tr. at 24:3-11.
[444] *Id.* at 25:18-22.
[445] *Id.* at 128:23-25.
[446] *Id.* at 129:1.
[447] *Id.* at 81:10-17.
[448] It is perhaps worth noting, however, that the absence of such documentation should not be taken to mean that detainee torture and abuse by Afghan authorities was necessarily abated in any way. The U.S. State Department's most recent Human Rights Report on Afghanistan repeated its finding from previous years that Afghanistan's "human rights record remained poor" and that human rights problems included torture, poor prison conditions and official impunity. It notes that there were reports of torture of detainees, and methods of torture and abuse included, *inter alia*, flogging by cable, electric shock, beating by stick, sexual humiliation; and rape. It also cites an AIHRC report stating that "torture was commonplace among the majority of law enforcement institutions." U.S. Department of State, *2009 Human Rights Report: Afghanistan* (March 11, 2010), online: http://www.state.gov/g/drl/rls/hrrpt/2009/sca/136084.htm.

especially in light of his awareness that transfers had been suspended following allegations of torture.

267. The fact that potentially illegal conduct took place during a prior rotation was no bar to his launching an investigation.[449] But as Major Gribble informed this Commission:

> The previous rotation was not my responsibility. I had plenty of work to keep me busy on the ground. I wasn't looking at – I actually was carrying some files from the previous roto, so I had plenty of work. So to look at something that was past post, no.[450]

Given the seriousness of the issues at stake – violation of the law of armed conflict and the universal prohibition against torture – "being busy" is no excuse for failing to make basic inquiries.

268. Major Gribble did not attempt to rely on the fact that other investigations may have been underway to excuse his own failure to investigate, nor could he. Major Gribble testified that did not know whether *any* investigations into detainee transfers had ever been launched, nor was he aware of Operation Centipede.[451]

269. And like his predecessor TFPMs, Major Gribble assumed – as a threshold matter – that the transfer orders were legal, without making any actual attempts to verify his assumptions. The following exchange between Major Gribble and Commission Counsel is illustrative:

> Q: I guess the question was: How do you know, if you didn't investigate, what was in [the Commander's] mind in November 2007 or earlier than November 2007? How do you know he was doing it in good faith and didn't have knowledge of the potential risk?
>
> A: *I don't know about it. That is the whole point.* He has his advisers. He has political advisers. He has a representative of the Government of Canada who is responsible to go in and follow-up with the people that have been transferred, so I am positive that he had all the information that he was doing his assessment and that he is doing it in good faith, and I had no reason not to believe that.[452]

[449] Gribble Tr. at 79:17-24.
[450] *Id.* at 53:12-17.
[451] *Id.* at 54:2-24.
[452] *Id.* at 79:2-16 (emphasis added).

But Major Gribble never once sought to discover what sort of information the JTF-A Commander had at his disposal, or what information he relied on in making the decision to transfer.[453] He was not aware of what reporting – if any – DFAIT provided to the Commander.[454] In truth, he did not know, and did not care to know.

270. Major Gribble never sought advice along the technical chain of command as to whether past orders to transfer required an investigation, nor did he ever express any concern up the technical chain, either.[455] He gave no evidence that he or any MP under his command ever investigated or inquired into the legality of past orders to transfer. He never asked NIS to investigate or inquire into whether past orders to transfer detainees were unlawful.[456] Given that Major Gribble was aware of reports of post-transfer torture and that transfers had to be halted entirely due to concerns over NDS treatment of CF-transferred detainees, his failure to investigate was also objectively unreasonable.

b) National Investigation Service

i. Lt. Col. (Ret'd) William H. Garrick

271. Lt. Col. Garrick admitted that he read the Federal Court judgment of February 7, 2008, which described the DFAIT reports in detail. Lt. Col. Garrick also acknowledged that the abuse allegations in the DFAIT reports should have triggered some further inquiry or investigation. However, it was his position that, as Commanding Officer of the NIS, he fulfilled his duty to investigate because the Operation Centipede and Operation Camel Spider investigations were ongoing and would look into those issues. The Complainants submit that this explanation is wholly insufficient.

272. Lt. Col. Garrick acknowledged that he was given the Federal Court judgment because his investigators were looking into the detainee transfer issue.[457] Yet he conceded that he never gave the judgment to the investigators or spoke to them about its "obviously" troubling findings. He suggests that, if he had stayed on, he would have brought the Federal Court judgment to the

[453] *Id.* at 89:22-24.
[454] *Id.* at 102:1-3.
[455] *Id.* at 105:7-21.
[456] *Id.* at 105:22-106:6.
[457] Garrick Tr. Vol. 2 at 21:4-22.

attention of his investigators. [458] This is not a tenable excuse, given that the ruling was released in February 2008 and he retired over four months later.

273. Most seriously, Lt. Col. Garrick clearly understood that the reports of abuse described by the Federal Court "raise concerns, obviously." Yet he took almost no action while the relevant NIS investigations languished. Police are supposed to exercise their discretion with respect to investigative decisions based in part on the seriousness of the offence. Torture is not only a serious offence, it was possible that unlawful transfers were ongoing. A reasonable officer in Lt. Col. Garrick's position would have been proactive in investigating these inherently serious issues.

274. Lt. Col. Garrick was taken through the DFAIT report of November 5, 2007. He agreed that the individual was likely tortured, and therefore the JTF-A Commander had made a transfer decision that resulted in a detainee being tortured. When asked whether these facts should have triggered an investigation as to the legality of the transfer decision, he said:

> It should have and probably, you know, may have, you know, if it would have come through the other investigations, six or seven other investigations we had going on at that time into detainee issues.[459]

275. In other words, Lt. Col. Garrick agreed that that the DFAIT reports "should have" led to further investigation. But those critical documents, which were the type of information that the RCMP said would have been "significant" for such an investigation, were never sought out by Lt. Col. Garrick or the NIS detachment commanders who were under his command. Had the MPs sought those documents, they would have discovered that transfers continued despite the troubling pattern of abuse allegations reported by DFAIT in 2007.[460]

276. As the Commander of the NIS, Lt. Col. Garrick was ultimately responsible for all the Operation Centipede investigations. Not one of the Operation Centipede investigations was conducted in a responsible or competent manner. The investigations were plagued by

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[458] *Id.* at 30:1-22.
[459] *Id.* at 130: 15-19.
[460] Lt. Col. Garrick was shown the Visit Summary Table, *supra* note 83, which indicated 25% of detainees interviewed by November 5, 2007 claimed that they had been tortured or abused. He agreed that this kind of information would have led to further inquiry and investigation (Garrick Tr. Vol. 2 at 130:24-131:13), but it was never obtained in the first place because no MP cared – or dared – to ask.

extraordinary delay and utterly failed to collect relevant documentary and testimonial evidence. For example, the investigators in charge of GO 08-6912 and GO 08-6913 never took any investigative steps to determine if the detainees in question had ever been in CF custody. On the basis of untested evidence, they concluded that they were not CF detainees and closed the files. By way of another example, GO 08-23231 concerned an allegation made by a CF member that Afghans abuse detainees. Warrant Officer London reported that a detainee was abused post-transfer; he told investigators that a Master Corporal who witnessed the abuse firsthand had told him about the incident. Once again, the allegation was dismissed as a fabrication. No attempt was made to locate or interview the Master Corporal, despite the fact that the investigators had been provided with his rank and knew the base he was located at and the date he returned from theatre.

277. In those rare instances where investigators collected evidence, if there was conflicting evidence, investigators reconciled the conflict by concluding that the allegations were unsubstantiated; but those conclusions were not based on objective facts. The most troubling of all the investigations were those into the *Globe and Mail* reports of post-handover abuse by Afghan authorities (GO-6920 and GO-6921). As previously discussed, those articles contained compelling and disturbing first-hand reports of torture suffered by CF-transferred detainees. Before the files were closed, the only investigative steps the investigators took were to read the articles at issue. The detainees' allegations were simply dismissed as "hearsay;" no attempts were made to contact the detainees who had been interviewed or to speak with the *Globe and Mail* reporter. The investigators evinced a complete misapprehension of the law, concluding that because the detainees were abused by Afghans, the CFNIS did not have jurisdiction to investigate.

278. Lt. Col. Garrick conceded that the *Globe and Mail* investigations were concluded in error, with no actual investigation and based on a misapprehension of the relevant issues.[461] He presumed to deflect responsibility for these conclusions on the ground he was retired at the time. But this fails to recognize the fact that there was almost no activity on the investigations for a significant period of time, a delay for which he was responsible. Further, he evidently failed to provide appropriate guidance to his investigators regarding this legally complex and sensitive

[461] Garrick Tr. Vol. 2 at 75:12-17.

issue. Indeed, those investigators may have interpreted his lack of interest as a signal that not much was expected or required. Lt. Col. Garrick failed to properly investigate information that suggested transfer decisions may have been made despite a substantial risk of torture.

ii. CWO Barry Watson

279. There were many problems with CWO Watson's testimony and we find that it was unsatisfactory in many respects. At times, it was implausible and was contradicted by other evidence. For example, CWO Watson repeatedly emphasized that only heard "vague rumours" of "incidents" regarding the handling of detainees post-transfer. It was only when he was confronted with a transcript of an interview he gave to MPCC investigators two years earlier that he admitted the rumours were not simply about "incidents" – the rumours concerned the abuse and torture of detainees. Thus, CWO Watson's claim that he could not remember any details of the rumours was difficult to credit. CWO Watson also claimed that he did not know why transfers were suspended during his rotation in May 2007. In our view, this assertion must be assessed with the scrutiny. In our respectful submission, CWO Watson's testimony on these issues was a product of his determination to hold to his story, rather than an honest review of the events that transpired and a reflection upon his duties as a Military Police officer.

280. Once CWO Watson heard rumours that detainees were being tortured post-transfer, CWO Watson had a duty to make further inquiries, yet he did not ask any questions, interview any witnesses or collect any evidence. CWO Watson's primary justification for not investigating the rumours was ignorance; he testified that the rumours he heard were so vague that they did not raise any suspicions in his mind, and would not raise suspicions in the mind of reasonable police officer. CWO Watson's failure to take any investigative steps clearly contradicted the unmistakable expectation of the national MP technical chain as reflected in the technical directive. His failure also flew in the face of the briefings he received pre-deployment from the chain of command about the need to ensure proper treatment of detainees and to avoid being left vulnerable to allegations of abuse.

281. His second justification for not investigating was that he did not have the resources or the mandate to proactively investigate potential crimes. Yet, NIS officers are mandated to investigate serious and sensitive matters. They are the only CF agency that is specially trained and equipped

to conduct police duties in a deployed theatre of operations.[462] His testimony that he did not have the mandate to be proactive was contradicted by the testimony of his superiors in the chain of command and other NIS subjects. There can be no doubt that it is onerous to conduct investigations in theatre and that there were difficult time and resource demands placed upon NIS investigators. However, the clear expectation of NIS officers is that they will conduct investigations to the same level as any municipal or provincial police service, even in theatre. Furthermore, given the fact that CWO Watson never requested additional resources so that he could investigate the reports of torture, his justification suggests an after the fact rationalization rather than an honest justification.

282. Even if CWO Watson had greater time and resources, it seems he would not have had any inclination to investigate in any event. For example, CWO Watson testified that even if he had read the Graeme Smith Article, its reports of torture would not have caused him to investigate because it was not within his jurisdiction to undertake any response.[463]

283. Much of CWO Watson's testimony strongly suggested that CWO Watson did not understand that transferring detainees to a risk of torture would be a violation of law. CWO Watson admitted that it did not even occur to him that he should be asking questions or launching an investigation.[464]

iii. MWO Jean-Yves Girard

284. There were also many problems with MWO Girard's testimony and we urge the Commission to weigh his testimony with scrutiny. By way of example, MWO Girard claimed that he was unaware that transfers were suspended during his rotation for a period of almost three months from November 2007 through February 2008. This testimony is difficult to credit, given the fact that his offices were located directly next to the detainee compound, where he noticed that detainees were remaining longer than usual, and he had ample opportunities to interact with MPs and CF members who would have known that the reasons for the suspension. Furthermore, his immediate successor, Major Kirschner, testified that he was fully aware of the suspension and understood that the moratorium was in place due to concerns about torture.

[462] Canadian Forces Provost Marshal, *Annual Report Fiscal Year 2006*-2007, at 5 [Exhibit P-3, Tab 7].
[463] Watson Tr. at 137:21-141:21 (emphasis added).
[464] *Id.* at 173:9-17.

285. In addition, MWO Girard testified that he heard rumours that detainees suffered torture and abuse post-transfer, but he could not recall if he heard those rumours while he was in theatre. He claimed he could not remember the content of the rumours, who he heard the rumours from, or when and where he heard the rumours. Furthermore, MWO Girard claimed to be almost entirely ignorant about the detainee transfer process, going so far as to state that he did not know whether or not detainees were transferred to Afghan authorities or to some other foreign power. It was only after a lengthy cross-examination on this issue that MWO Girard finally admitted that he "presumed that they were transferred to the Afghan side."[465] His professed ignorance on this subject damaged his credibility.

286. As discussed above, the law is clear that if the facts are such as would raise suspicions in the mind of a reasonably competent police officer, a duty to investigate will arise. MWO Girard, by virtue of his station and rank, had available to him information about post-transfer treatment of detainees. It is reasonable to expect that by virtue of his duties as the commander of the Afghanistan detachment responsible for major investigations into serious and sensitive matters that he would keep himself informed of publicly available information about activities taking place within the theatre of operations. Thus, even if MWO Girard's state of knowledge was as limited as he professed, MWO Girard fell below the standard one would expect of a reasonably competent NIS officer. He did not take any investigative steps; in fact, he admitted that he never even considered whether the Canadian Forces had ongoing obligations after detainees were transferred to Afghan officials. MWO Girard never turned his mind to the propriety of the transfer orders.

iv. Major John Kirschner

287. Of the three NIS detachment commander subjects, Major Kirschner provided the most credible testimony. While it will be our submission that Major Kirschner failed to investigate when it was his duty to do so, we nonetheless found his testimony to be sincere and straightforward.

288. Unlike CWO Watson and MWO Girard, Major Kirschner readily admitted that he was aware of both general and specific allegations of post-transfer torture and mistreatment. He

[465] Girard Tr. at 125:19-20 ("... j'assumait qu'ils étaient transférés sur le côté afghan.").

became aware of the suspension of transfers shortly after he arrived in theatre, and he knew that transfers were suspended after a detainee was interviewed by DFAIT and directed them to the implement he claimed to have been tortured with. He stated that the issue of detainee abuse was "omnipresent" and was something he was well aware of throughout his rotation. Major Kirschner's testimony on these points was credible. Accordingly, where the evidence of CWO Watson and MWO Girard diverges from that of Major Kirschner, we suggest the Commission prefer the evidence of Major Kirschner. Based on Major Kirschner's testimony, it appears highly likely that senior MPs in theatre in the relevant period had general as well as specific knowledge of allegations that the Canadian Forces were transferring detainees to a risk of torture.

289. Even in the face of disturbing information about post-transfer abuse, Major Kirschner did not take adequate investigative steps to determine if detainees were being transferred to a risk of torture. Major Kirschner was the only NIS detachment commander who attempted to gather any evidence. As discussed, his sole investigative step was to direct his investigators during an unrelated prison interview in an Afghan prison facility to physically inspect several detainees for abuse and ask of they were being well-treated. That he undertook this investigation at his own initiative underscores his concern about the allegations of detainee mistreatment. However, Major Kirschner's investigative steps were not thorough, substantial or complete. Like many of the other subject witnesses, Major Kirschner expressed confidence that the JTF-A Commander was exercising due diligence, yet he never sought to determine how the Commander was making transfer decisions or to learn what information the Commander was able to access. He was aware that DFAIT was conducting prison visits, but he did not seek to obtain copies of those reports.

290. It would seem that Major Kirschner's primary impediment to discharging his duties was his tenuous grasp of the CF's legal obligations. As we discussed above, Major Kirschner offered conflicting testimony about the CF's legal obligations post-transfer, leaving one with the troubling impression that he did not understand that transferring detainees to a risk of torture could give rise to criminal or service offences.

c) Canadian Forces Provost Marshal

i. Captain (Navy) (Ret'd) Steven Moore

291. As detailed in paragraph 227, *supra*, Capt. (N) Moore tasked Lt. Col. Garrick with heading up an investigation into the allegations in the February 2007 Complaint, though he assumed responsibility for contacting the TFPMs and JTF-A Commanders to discuss concerns about the legality of transfers. And while he testified that he spoke to the TFPMs personally and was informed that there were no issues requiring investigation[466], each of the TFPMs testified that they never spoke with the CFPM about issues concerning post-transfer torture.[467] If the TFPM's recollections are to be credited, it would tend to suggest that the MP investigation into the February 2007 Complaint was cursory, at best, notwithstanding the RCMP-led investigation into the narrow question of the CFPM's liability with respect to transfers undertaken by MPs under his *technical* command. With respect to the substantive allegations of the Complaint – that detainees were being transferred to risk of torture in violation of international law – there seemed to be almost no inquiry undertaken by the Military Police.

292. According to Capt. (N) Moore, learning that a detainee had been, in all likelihood, tortured or abused post-transfer should trigger at least a preliminary inquiry by a Military Police officer.[468] He also agreed that if there were allegations that a detainee had been subjected to post-transfer abuse, the specific decision authorizing the transfer of the particular detainee claiming abuse should have been subject to review.[469] And yet, none of the allegations of detainee abuse being documented throughout 2007 resulted in any review of the actual transfer order itself. And there is no evidence before this Commission suggesting that there was any sort of MP inquiry conducted following the allegations of torture leading to the November 2007 suspension of transfers, despite the fact that the detainee interviewed for the November 5, 2007 DFAIT report was very likely tortured by the NDS.

293. Capt. (N) Moore is the most senior member of the Military Police. He has the ability to marshal all of the resources of the MP, if necessary. He was aware of reports of NDS torture, and testified to his own concern. Yet this concern amounted to a narrow, cursory investigation, and when further reports of post-transfer torture and abuse emerged, he declined to devote any resources for further inquiry. In so doing, he failed to take necessary steps to ensure that

[466] Moore Tr. Vol. 1 at 212:25-213:3; Moore Tr. Vol. 2 at 94:16-19.
[467] *See* Hudson Tr. at 9:12-10:18; Zybala Tr. at 194:15-23; and Gribble Tr. at 111:24-112:21.
[468] Moore Tr. Vol. 1 at 244:15-20.
[469] *Id.* at 233:19-234:14.

Canadian commanders were fulfilling their legal obligations, and to ensure that those carrying out the Commander's orders to transfer – members of the Military Police – were not placed in a position where they may be liable for violations of international and domestic law.

E. Subjects' Failure to Investigate Was a Breach of Canadian Forces Guidelines and Domestic Law

294. Under Canadian law and MP directives and guidelines, Military Police are charged with a duty to investigate criminal and service offences. If the facts are such as would raise suspicions in the mind of a reasonably competent police officer, a duty to investigate will arise. It is impermissible for an MP to leave a crime uninvestigated when an MP has grounds to initiate an investigation, particularly where the alleged offence is a violation of the universal prohibition of torture.

295. A Military Police officer's conduct during the course of an investigation should be measured against the standard of how a reasonable officer in like circumstances would have acted. The law does not demand a perfect investigation. It requires only that police conducting an investigation act reasonably.

296. The subjects had sufficient information to suspect that detainees were being transferred to a risk of torture and should have know that such transfers could give rise to criminal and service offences. There was significant information publicly available concerning the risk of torture faced by detainees in Afghan prisons, and there can be no doubt that there was discussion and awareness of post-transfer abuse among the CF in theatre. To the extent that the subjects testified that they had limited or no awareness of reports of detainee torture by the NDS, such self-serving testimony should be given little weight. Moreover, given the senior positions occupied by each of the subjects, and the critical nature of the entire detainee handling process, it would have been unreasonable for the subjects to not pay close attention to reports suggesting that CF conduct may have potentially violated international law. The apparent interests in the chain of command on this issue should have underscored the need for MP diligence in this area.

297. Even in the face of compelling and credible reports of torture and clear military directives that underscored the need for MP diligence in this area, not one of the subjects investigated the

legality of the transfers in a diligent, competent or impartial manner. Neither the subject TFPMs nor NIS detachment commanders made any inquiries into the legality of any transfer order. In fact, not one of the TFPMs or NIS detachment commanders even turned their mind to the issue. Furthermore, there were troubling problems with the reliability of some of the NIS subjects' evidence. In key respects, the evidence of CWO Watson and MWO Girard was unsatisfactory.

298. Disturbingly, the subject TFPMs and NIS detachment commanders testified that a number of irrelevant and inappropriate factors weighed in their decisions not to make preliminary inquires or launch an investigation into the legality of the transfer order. Some of the subjects, for example, testified that to start an investigation, they would have to have some suspicion that the JTF-A Commander knowingly transferred detainees to risk of torture. These subjects essentially argued that they needed to know the *mens rea* of the Commander – an essential element of proof – before they could even make basic inquiries. This not only is a mistaken formulation of the *mens rea* element of many of the potential offences, it is also too high of an investigative threshold. As discussed at paragraphs 121 to 126, *supra*, the common law imposes no barriers to an MP's ability to question individuals and begin to assemble evidence. It is only at the end of an investigation that a police officer must determine if reasonable and probable grounds exist to believe that an offence has been committed and a particular person is the perpetrator.

299. Another irrelevant consideration expressed by the subjects was their faith and trust in their commanders. Many of the subjects defended their actions on the basis that they were "comfortable" with the JTF-A Commander's conduct. It is commonplace that police officers are expected to weigh a decision whether to investigate in an evidence-based, explicable and objective manner. There were objective facts available to the subjects which gave rise to the simple duty to ask questions, gather information and make preliminary inquiries. The TFPMs and NIS commanders never even bothered to discover what information the JTF-A Commander was relying on, whether DFAIT was providing adequate information to him, or whether the Afghans were reliable partners. A blind faith in a commander is simply not an acceptable justification for failing to take investigative steps.

300. Finally, many of the subjects claimed they lacked the time or resources to conduct investigations into reports of post-transfer torture and abuse. To begin with, many of these same subjects testified that they never turned their mind to the issue, which would indicate that resources did not in fact play a significant role in their failure to investigate. Yet even if this justification is given little weight, it is relevant to note that the subjects are trained to conduct policing duties in the theatre of operations and are expected to maintain basic standards of policing even during times of war. Furthermore, Major Hudson's testimony on the issue of resources was instructive:

> Resource issues, I have found that historically, you may not have all kinds of resources at your disposal, but as soon as you raise a big enough complaint and you need to investigate something, resources get freed up. That has been my experience.
>
> I have seen this in a number of theatres. I have seen us fly teams in from Canada into theatres. You saw this, it has happened – it happened in Somalia, it happened in umpteen other theatres. Something serious happens, there is not enough guys on the ground, guess what. We just open up the big government wallet and we start firing things and we beg forgiveness later. And generally no one comes after us for spending too much money to investigate a serious offence. So no, resources would not factor into my thinking at all.[470]

It seems clear that had any of the subjects prioritized an investigation into the legality of the transfers, resources would have been forthcoming.

301. The investigative steps taken by Lt. Col. Garrick and Capt. (N) Moore were cursory at best, and given the fundamental human rights at issue and the mission-critical circumstances, their actions were completely inadequate.

302. Lt. Col. Garrick had considerable awareness of ongoing reports of post-transfer torture of detainees, yet he allowed the relevant NIS investigations to languish. Lt. Col. Garrick had direct command over his investigators, and was ultimately responsible for all the Operation Centipede investigations, yet he failed to ensure that the investigations were conducted in a competent or responsible manner. The investigations were plagued by extraordinary delay and utterly failed to collect relevant documentary and testimonial evidence. In those rare instances where investigators collected any evidence at all, if there was conflicting evidence, investigators

[470] Hudson Tr. at 180:23-181:14.

reconciled the conflict by concluding that the allegations were unsubstantiated; but those conclusions were not objective or evidence-based. As previously discussed, given the specialized mandate of the NIS to investigate only the most serious crimes, the specialized training given to its members, and the organizational emphasis on maintaining the highest degree of investigational integrity, the NIS onus to investigate is acute. By any measure, the conduct of the investigations under Lt. Col. Garrick's command neglected the duty to investigate crime in a reasonable and competent manner, and breached the standard of care expected of Military Police.

303. Lt. Col. Garrick conceded that the critical *Globe and Mail* investigations were concluded in error, with no actual investigation and based on a misapprehension of the relevant issues. He presumed to deflect responsibility for these conclusions on the ground he was retired at the time, but this testimony should be rejected as inadequate. The simple fact is that during his command, there was virtually no activity on the investigations for a significant period of time, a problem for which he was ultimately responsible.

304. The evidence suggests that of all the subjects, Capt. (N) Moore had the most developed understanding of the detainee issue at the relevant time periods, yet his failure of leadership was the most pronounced. He readily admitted that he had concerns about the treatment of detainees post-transfer and he testified that he ordered Lt. Col. Garrick to determine whether there was any evidence that the JTF-A Commander had committed an offence by ordering the detainee transfers. As the Canadian Forces Provost Marshal, he had the ultimate power and authority to ensure that a thorough investigation into the legality of the transfer orders was conducted, yet he failed to do. His concern about the issue culminated in a narrow, cursory investigation, and when further reports of post-transfer torture and abuse emerged, he declined to devote any resources for further inquiry. Capt. (N) Moore had more than enough evidence to conclude that an investigation was necessary and mandatory. The facts that were at Capt. (N) Moore's disposal demanded competent investigation, and he alone had the power to marshal all of the resources of the MP, if necessary.

305. It cannot be emphasized enough that one of the most glaring of Lt. Col. Garrick and Capt. (N) Moore's professional omissions was the failure to adequately train the MPs under their direct and technical command. The legal training of the NIS commanders appeared to be severely

lacking, and they all testified that they were never briefed by Lt. Col. Garrick nor by Capt. (N) Moore about reports of post-transfer risk of abuse. Further, although Capt. (N) Moore testified that he spoke to the TFPMs personally and was informed that there were no detainee issues requiring investigation, each of the TFPMs testified that they never spoke with the CFPM about issues concerning post-transfer torture. Capt. (N) Moore presented no evidence other than his own testimony on this issue. Lt. Col. Garrick and Capt. (N) Moore's failure to train and educate the MPs under their command about the potential legal issues in theatre concerning the post-transfer treatment of detainees was a failure of leadership.

306. In summary, the conduct of all the subjects of this complaint fell below the standard of reasonableness. Society rightly imposes high standards on Military Police conduct; the subjects' failure to investigate was, by any measure, a marked departure from the professional standards of reasonableness. The subjects' decision not to investigate the transfer orders was not simply an "error in judgment" – it was an abdication of the officers' professional responsibilities.

V. Conclusion

307. Investigations are essential to justice. For the Canadian Forces, investigations are vital to support operational efficiency, enforce discipline, and maintain respect for the principles, values and laws of the country that the Forces defend and represent. When the Canadian Forces operate abroad, investigations are also necessary to ensure respect for the laws of armed conflict. Functioning democracies require that their armed forces be accountable and act in accordance with the rule of law at all times, wherever they are deployed.

308. The Canadian Forces Military Police represent the rule of law within the Canadian military. They are soldiers, but they are also police officers responsible for upholding the law and investigating crime. The Military Police play a central accountability function within the CF because often the military operates in circumstances that make other forms of oversight very difficult. Further, as the Somalia affair demonstrated, the rigid nature of the military chain of command, while so important for operational efficiency, can often stifle appropriate scrutiny of questionable conduct. For these reasons, the Military Police play a special role in the Canadian Forces because their independence and investigatory powers enable them to perform this critical accountability function.

309. The Military Police technical directives for Task Force Afghanistan emphasized this special responsibility by requiring MPs to carry out investigations in certain circumstances. According to the technical directives, violations of international law and mistreatment of detainees were two issues that demanded this high priority from the CF Military Police. As the MPCC observed, the MP technical directive set a "robust and proactive threshold" for investigating such matters.[471]

310. In the present case, the Complainants submit that the allegations of post-transfer abuse and torture of CF detainees should have led to a mandatory investigation by the responsible CF Military Police officers. The Military Police Subjects knew or ought to have known about the compelling DFAIT reports detailing abuse. Many of those reports indicated detainees had visible marks and presented as traumatized. In one case the implements of torture were actually found in the interrogation room. Most of the CF witnesses agreed that, in all likelihood, the detainee had

[471] Attaran Report at para. 122.

been tortured. Knowledge that the CF handed over a detainee to the custody of torturers should have led to an automatic investigation of whether the transfer violated international law or was otherwise the result of criminal negligence.

311. Capt. (N) Steven Moore, the Canadian Forces Provost Marshal at the relevant time, testified that he did not ask more direct questions about the DFAIT reports, or seek to obtain them, because it "would have been seen as an intrusion and I would have been pushed off."[472] Yet Capt. (N) Moore also readily conceded that he had ongoing concerns about the issue of post-transfer abuse.[473] Capt. (N) Moore's deference in these circumstances and his reluctance to be intrusive, was an abdication of his duty to uphold the law, and a denial of the special independent role that the CF Military Police must play in the military system.

312. Did these Military Police subjects breach the standard of a reasonable military police officer? The answer is clearly yes. It is the duty of any police officer to be inquisitive and, if necessary, intrusive. That is the nature of a police investigator. Yet these MPs repeatedly demonstrated an unwillingness to ask the uncomfortable questions of their chain of command when it was their duty to do so.

313. The honour and integrity of the CF are damaged when the CF Military Police fail to carry out their special independent role to investigate questionable conduct, including and in particular potential violations of international law. Their failure to investigate in these circumstances has left the Canadian public asking questions about the propriety of CF conduct, and whether there is a problem with resistance to oversight. For those in the lower ranks of the CF, who are no doubt aware of this controversy, there are likely questions about whether the CF Military Police has the same willingness to investigate senior CF commanders as they do the rank and file.

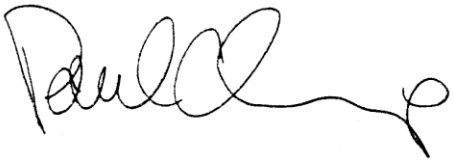
314. Public confidence in the CF Military Police and the CF must be restored. The Complainants submit that the Commission should uphold this Complaint against the subjects and recommend further institutional checks and balances to protect, promote and enhance the independence of the Military Police. The testimony of Capt. (N) Moore and the report by RCMP Inspector Gfellner raise troubling questions about the perception of the Military Police in CF

[472] Moore Tr. Vol. 1 at 195:11-196:9.
[473] *Id.* at 134:21-137:8.

military culture, particularly within the chain of command. This is an urgent issue that must be addressed.

315. Finally, the Complainants submit that the MPCC should recommend that the current CFPM direct an investigation, without delay, of the transfer decisions made by the CF during the relevant period. Preferably, the CFPM should request that the Royal Canadian Mounted Police should lead the investigation with the assistance of the NIS. Allegations that Canada and the Canadian Forces may have been complicit in torture are inherently serious. An investigation is necessary to restore public confidence, enhance accountability, and demonstrate that Canada is a country that respects international law and does not condone torture in any circumstances.

ALL OF WHICH IS RESPECTFULLY SUBMITTED ON THIS 26TH DAY OF JANUARY 2011



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PAUL CHAMP

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CARMEN K. CHEUNG

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GRACE PASTINE