

FEDERAL COURT

B E T W E E N:

**AMNESTY INTERNATIONAL CANADA and
BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION**

Applicants

-and-

**CHIEF OF THE DEFENCE STAFF
FOR THE CANADIAN FORCES,
MINISTER OF NATIONAL DEFENCE,
and ATTORNEY GENERAL OF CANADA**

Respondents

APPLICATION UNDER SECTIONS 18 and 18.1 OF THE *FEDERAL COURTS ACT*

AFFIDAVIT OF MICHAEL BYERS

I, **Michael Byers**, of the City of Vancouver, in the Province of British Columbia, **make oath and state as follows:**

1. I am a tenured full professor at the University of British Columbia, where I also serve as the academic director of the Liu Institute of Global Issues and hold a Tier 1 Canada Research Chair in Global Politics and International Law. Until 2004, I was a tenured full professor at Duke University School of Law. From 1996-1999, I was a Fellow of Jesus College, Oxford University. In addition to my doctorates from Oxford University and Cambridge University, I also have degrees in both civil law and common law.

2. As a scholar, my particular field of study is the international law governing military force. I have written about this subject in several peer-

reviewed international journals, as well as a book entitled *War Law: Understanding International Law and Armed Conflict*, initially published in Britain (Atlantic Books, March 2005) and since published in Canada, Germany and the United States. A copy of my curriculum vitae, which explains in further detail my qualifications and publications, is attached hereto as **Exhibit "A"**.

3. I have reviewed a document entitled *Arrangement for the Transfer of Detainees between the Canadian Forces and the Ministry of Defence of the Islamic Republic of Afghanistan*, signed on December 18, 2005 by the Chief of the Defence Staff of the Canadian Forces, General R.J. Hillier, and the Minister of Defence of the Islamic Republic of Afghanistan (hereinafter "the Canada-Afghanistan Arrangement" or "the Arrangement"). It is in my capacity as an expert in international law generally, and the law of armed conflict in particular, that I make this affidavit and provide my expert opinion on international law issues concerning this agreement between Canada and Afghanistan.

THE ARRANGEMENT IS AN INTERNATIONAL TREATY

4. The Canada-Afghanistan Arrangement "establishes procedures in the event of a transfer" of any detainee from Canadian to Afghan custody. It commits Canada and Afghanistan to treat detainees "in accordance with the standards set out in the Third Geneva Convention" and stipulates that the International Committee of the Red Cross "will have a right to visit detainees at any time while they are in custody, whether held by the Canadian Forces or by Afghanistan."

5. The Arrangement states that Canada and Afghanistan "will be responsible for maintaining accurate written records accounting for all detainees that have passed through their custody" and that "[c]opies of all

records relating to the detainees will be transferred to any subsequent Accepting Power should the detainee be subsequently transferred." This last sentence explicitly envisages that some detainees will be transferred onwards to the custody of third countries.

6. The Department of National Defence has stated that the Canada-Afghanistan Arrangement is not a legally binding treaty. However, according to Article 2 of the 1969 Vienna Convention on the Law of Treaties, a "treaty" is "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation." The fact that the document is entitled an "Arrangement" does not detract from its legal status as a treaty. As the Oxford Dictionary of Law notes, treaties "can also be known as conventions, pacts, protocols, final acts, arrangements, and general acts". In international law, it is the Vienna Convention, and not the title, that is dispositive of the issue.

7. Consequently, the Canada-Afghanistan Arrangement is a treaty that creates binding obligations under international law.

THE ARRANGEMENT DOES NOT PROVIDE ADEQUATE PROTECTIONS AGAINST VIOLATIONS OF THE 1949 GENEVA CONVENTIONS

8. The Geneva Conventions are four international treaties that seek to limit the barbarity of war. These treaties protect people who do not take part in the fighting (civilians, medics, aid workers) and those who can no longer fight (wounded or sick soldiers and prisoners of war).

9. The first two Geneva Conventions contain rules for protecting wounded or sick armed forces on land or at sea. The Third Geneva Convention deals with rules governing the treatment of prisoners of war. The Fourth Geneva

Convention concerns the protection of civilians in a time of war. These treaties all had forerunners prior to World War II, but they were revised together in 1949 and are known as the 1949 Geneva Conventions. Two additional protocols to the Geneva Conventions were also agreed to in 1977. The 1949 Geneva Conventions have been ratified or acceded to by 194 states and enjoy universal acceptance.

10. Canada is a party to the 1949 Geneva Conventions and the additional protocols. Parliament has passed the *Geneva Conventions Act*, R.S. 1984, c. G-3, incorporating the provisions of these treaties into domestic law.

11. Common Article 3 is a keystone provision that is found in all four of the 1949 Geneva Conventions. Common Article 3 applies to non-international (i.e. internal) conflicts of precisely the kind that now exists in Afghanistan.

12. The central purpose of Common Article 3 is that:

"Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms, including members of armed forces who have laid down their arms and those placed ' hors de combat ' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely..."

13. Common Article 3, by virtue of the underlined word, applies to persons detained by Canadian Forces in Afghanistan. It prohibits, *inter alia*, "cruel treatment and torture" and "outrages upon personal dignity, in particular, humiliating and degrading treatment", and those prohibitions "are and shall remain absolutely prohibited at any time and in any place whatsoever."

14. The absolute, territorially-unlimited and time-unlimited character of Common Article 3 imposes obligations on Canada that would be violated if a

detaïnee transferred to Afghanistan was tortured or otherwise mistreated in the custody of either Afghanistan or a third country.

15. This conclusion is buttressed by Article 16 of the UN International Law Commission's Articles on State Responsibility—which have been adopted by the UN General Assembly and are universally regarded as codifying customary international law. Article 16 reads:

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

- (a) That State does so with knowledge of the circumstances of the internationally wrongful act; and*
- (b) The act would be internationally wrongful if committed by that State.*

16. Canada, by transferring detainees to Afghanistan in circumstances where there is objective knowledge they might be tortured, or might be transferred onwards to face torture or other mistreatment at the hands of a third country, risks violating Common Article 3 of the Geneva Conventions. The Arrangement fails to guard against this possibility.

THE ARRANGEMENT DOES NOT PROVIDE ADEQUATE PROTECTIONS AGAINST VIOLATIONS OF THE 1976 INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

17. The *International Covenant on Civil and Political Rights* (ICCPR) is an international treaty that seeks to protect and promote the most basic and fundamental civil and political rights and freedoms. Based on the Universal Declaration of Human Rights, the ICCPR was created in 1966 and entered into force in 1976. There are currently 160 states that have ratified or acceded to the treaty, including Canada, Afghanistan and the United States.

18. Article 7 of the ICCPR states, “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” It is my opinion that Canada violates this Article by transferring detainees to Afghanistan in circumstances where it is objectively known and reasonably inferred that they might be tortured or abused by Afghan authorities, who have a pattern of such conduct.

19. The same would be true, *mutatis mutandis*, for onward transfer to a third country where the same is objectively known about their authorities. Again, this conclusion is supported by Article 16 of the UN International Law Commission’s Articles on State Responsibility—which have been adopted by the UN General Assembly and are universally regarded as codifying customary international law. Article 16 reads:

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

- (a) That State does so with knowledge of the circumstances of the internationally wrongful act; and*
- (b) The act would be internationally wrongful if committed by that State.*

20. Canada is not in any way relieved of its obligations under the ICCPR because its military forces are operating in a foreign country. Article 2 of the ICCPR provides that its protections extend to individuals within a State Party’s territory and those “subject to its jurisdiction”. The UN Human Rights Committee, which publishes its interpretations of ICCPR provisions in the form of “General Comments”, has said the following in its General Comment Number 31:

States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means

that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party...This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained...

THE ARRANGEMENT DOES NOT PROVIDE ADEQUATE PROTECTIONS AGAINST VIOLATIONS OF THE 1984 TORTURE CONVENTION

21. While the ICCPR contains a provision prohibiting torture, many countries believed that more comprehensive and detailed obligations were necessary because torture was such a grave crime and offense to human dignity. In particular, it was felt that states should have a legal duty to prevent torture whenever possible. Negotiations for a new treaty were successful and, in 1987, the *United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment* was created. It is usually referred to as the Convention Against Torture, or simply the Torture Convention.

22. The Convention Against Torture bans torture in all circumstances. The Convention defines torture, requires states to take effective legal and other measures to prevent torture, and declares that there is never justification for torture, including state of emergency, external threats, or orders from a superior officer or authority.

23. One of the protections in the Convention is an obligation not to return an individual to the risk of torture. Article 3 of the UN Torture Convention reads:

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.

24. By returning detainees to Afghanistan authorities in circumstances where there are substantial grounds to believe the person is in danger of torture, Canada is in violation of the Convention Against Torture.

25. The UN Committee Against Torture is authorized to provide interpretive comments regarding the Convention Against Torture. In General Comment Number 1, it has indicated that the term "another state" in Article 3 encompasses any additional country (or countries) to which a prisoner might subsequently be transferred. For this reason, Canada's obligation extends to ensuring that any detainee is protected against torture, not just when transferred to the custody of Afghanistan, but also if transferred onwards into the custody of a third country. The Arrangement, by failing to guard against this possibility, does not adequately guard against violations of Canada's legal obligations.

THE ROLE OF THE ICRC AND THE LIKELIHOOD IT WOULD REPORT MISTREATMENT OR TORTURE TO CANADA

26. The International Committee of the Red Cross (ICRC) is a Swiss organization established in 1863 with the goal of alleviating the suffering of wounded soldiers in war. The organization was responsible for initiating the first Geneva Convention and today it is assigned certain tasks by the contracting states under all four Geneva Conventions as well as other humanitarian treaties. In its primary role, the ICRC works in conflict zones around the world, gaining access to those who need protection or help.

27. The ICRC is governed by principles of confidentiality and neutrality. Even the most repressive regimes are willing to grant the ICRC access to victims of war and conflict because those regimes know that the ICRC will not disclose to others what it has seen. It is for this reason that the ICRC's policy of discretion is so effective in gaining access to sensitive locations in war conditions.

28. In the case of detainees, for example, if ICRC delegates find evidence of abuse, they keep their findings confidential and raise the matter with the detaining authority. The ICRC will normally encourage an improvement of detention conditions. ICRC's view is that, while confidential reporting may not necessarily result in immediate improvements to the situation, continuing access is better than secret detention.

29. The ICRC's policy of discretion is even more important for a non-international armed conflict such as the situation in Afghanistan. For international conflicts, states that are parties to the 1949 Geneva Conventions are obliged by law to allow the ICRC access to prisoners of war or civilian detainees. (See Article 126 of the Third Geneva Convention regarding the Treatment of Prisoners of War and Article 143 of the Fourth Geneva Convention regarding the Protection of Civilian Persons in Time of War.) The same obligation does not apply to internal conflicts. In those cases, the ICRC must negotiate agreements with the state or states involved, and such agreements are usually subject to termination. States will only entertain such arrangements if they are confident that the ICRC will keep confidential the information it gathers.

30. In short, the ICRC does not have a legal right of access to detainees in Afghanistan, so it depends on negotiating access on an ongoing basis. When it gets access, if it gets such access and finds detainee abuse, then it would normally raise the matter with the detaining authority, which would be Afghanistan or possibly a third country in cases of onward transfer. It is

highly unlikely that the ICRC would raise the matter with Canada. As such, the ICRC simply cannot fulfill the kind of watchdog or reporting function that the Government of Canada seems to be expecting in the Afghan conflict.

SWORN BEFORE ME at Vancouver,)
British Columbia, this ____ day of)
February, 2007.)
)
)
_____)
A Commissioner for Taking Affidavits)
in the Province of British Columbia

Michael Byers

MICHAEL BYERS

ADDRESS:

Liu Institute for Global Issues
University of British Columbia
6476 N.W. Marine Drive
Vancouver, British Columbia, V6T 1Z2, Canada
Tel. +1 604-822-3049
E-mail: michael.byers@ubc.ca
Website: www.ligi.ubc.ca

This is Exhibit "A" referred to
in the Affidavit of Michael Byers
sworn before me, this _____ day
of _____, 2007

A Commissioner

EDUCATION:

- 1996 D.Phil. Oxford University (Jesus College) (by incorporation)
- 1996 Ph.D. Cambridge University (Queens' College)
- 1992 B.C.L. McGill University, Droit civil du Quebec
- 1992 LL.B. McGill University, English Canadian Common Law
- 1988 B.A. (honours) University of Saskatchewan, Political Studies & English Literature

PROFESSIONAL EXPERIENCE:

July 2004 –

Canada Research Chair (Tier 1) in Global Politics and International Law
Department of Political Science & Liu Institute for Global Issues
University of British Columbia

July-August 2005

Visiting Professor, Faculty of Law, University of Cape Town, South Africa

April 2004

Visiting Professor, Buchmann Faculty of Law, University of Tel Aviv, Israel

2003-2004

Professor of Law (with tenure), Duke University School of Law
Director, Center for Canadian Studies, Duke University
Co-director, JD/LLM Program in International & Comparative Law

Nov-Dec 2003

Commerzbank Visiting Professor, Buccrius Law School, Hamburg, Germany

1999-2003

Associate Professor, Duke University School of Law
Director, JD/LLM Program in International & Comparative Law