Court File Number: T-324-07

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 YAVAR HAMEED

I, **Yavar Hameed**, of the City of Ottawa, in the Province of Ontario, **make oath and state as follows:**

1. I am a lawyer and member in good standing of the Law Socicty of Upper Canada, in the firm of Hameed Farrokhzad LLP, whcre my practice emphasizes protection and advocacy of human rights and civil liberties in a variety of legal domains including: administrative law, immigration law, criminal law and general civil litigation. I am also a student of international affairs, and earned a Masters' degree in that subject from the Norman Paterson School of International Affairs at Carleton University.

2. As a lawyer and advocate for human rights, I have been deeply concerned about the erosion of basic civil liberties and fundamental human rights in the wake of the "war

on terror". I have therefore closely followed reports about the treatment of individuals detained in the course of this conflict. My concerns have primarily related to the denial of due process and allegations of abuse, inhumane treatment and torture. As a Canadian, I have naturally paid close attention to Canada's military deployment in Afghanistan, including and in particular the circumstances of individuals detained by Canadian Forces in that country.

3. I have inquired into and researched these issues and have offered to provide legal counsel to individuals detained by the Canadian Forces in Afghanistan. It is in this capacity that I have knowledge of the matters deposed to in this affidavit. Where my knowledge is based on information and belief, I have stated the basis of such information and belief.

4. For ease of reference, my affidavit is organized in these sections:

    (a) The Canadian Mission in Afghanistan;

    (b) Canadian Forces and Detainees in Afghanistan;

    (c) Risk That Detainees May Be Subject to Torture;

    (d) No Safeguards to Prevent Torture; and

    (e) Other Options.

THE CANADIAN MISSION IN AFGHANISTAN

5. Canada's largest foreign military commitment at present is in Afghanistan. Approximately 2,500 Canadian Forces personnel are currently deployed in that country. The source of this information is a backgrounder dated January 5, 2007, and issued by the Department of National Defence ("DND") on its website. A copy is attached hereto as **Exhibit "A"**.

6. Canadian Forces have been in Afghanistan since January 2002 at varying levels of deployment. On 17 May 2006, Parliament debated and passed a government motion to extend the mission of the Canadian Forces in Afghanistan until February 2009 (subject to further extension). In light of this motion, it is apparent that this military operation will continue for the foreseeable future. An excerpt from *Hansard* comprising the government's motion, the ensuing debate, and the Speaker's declaration that the motion was carried is attached hereto as **Exhibit "B".**

7. The events leading to Canada's military involvement in Afghanistan started in 2001. Following the terrorist attacks of September 11, 2001, the United States of America invaded Afghanistan and – with assistance from Canada and other countries – overthrew the Taliban government on the basis it was providing a safe haven to Al Qaeda training camps. This U.S. campaign, which continues to this day, is named Operation Enduring Freedom ("OEF"). International legal authority for OEF is found in United Nations Security Council Resolution 1368, which condemned the September 11th attacks and affirmed the right of states to individual and collective self-defence. My knowledge of these facts is based on several government documents. A copy of a document entitled "Canada – Making a Difference in Afghanistan – Background Information", dated September 2006 and obtained from the website of the Department of Foreign Affairs Canada, is attached hereto as **Exhibit "C"**. A copy of a DND Backgrounder dated January 7, 2004, obtained from the DND website, is attached hereto as **Exhibit "D"**. Copies of UN Security Council Resolution 1368, and related Resolution 1373, obtained from the UN website, are attached hereto as **Exhibit "E".**

8. In October 2001, the Canadian government established Operation Apollo to support OEF. In addition to warships and aircraft, Canadian Forces deployed nearly 1,000 soldiers to the Kandahar region in southern Afghanistan in February 2002 as part of

Operation Apollo. These soldiers regularly engaged in combat operations. See Exhibits "C" and "D" referred to above.

9. In August 2003, the Canadian Forces re-deployed a significant number of troops to Afghanistan under Operation Athena. The main objective of this contingent was to provide security in the capital city of Kabul as part of the International Security Assistance Force (ISAF). This time, the Canadian Forces served in Afghanistan under the express authority of the United Nations Security Council. By passage of Resolution 1386 in December 2001, the UN Security Council authorized the creation of the ISAF to assist the newly established interim Afghan governing authority. Subsequent Security Council Resolutions have prolonged ISAF to the current day. A brief history of ISAF, as found on ISAF's website, is attached as **Exhibit "F"**. Copies of UN Security Resolutions 1386, 1413, 1444, 1510, 1563, 1623, 1659 and 1707 are attached hereto as **Exhibit "G"**.

10. From August 2003 to November 2005, Canadian soldiers under Operation Athena were located primarily in and around Kabul, conducting foot patrols and surveillance missions as part of the ISAF. The Canadian Forces subsequently moved their base of operations to the Kandahar region of Afghanistan. In doing so, Canadian Forces became part of U.S.-led OEF again rather than the ISAF and the mission was called Operation Archer. The Canadian Forces in Operation Archer engaged in combat operations in the Kandahar region. See DFAIT document "Canada – Making a Difference in Afghanistan", referred to earlier as Exhibit "C".

11. On July 31, 2006, Canadian Forces in Kandahar were assigned from OEF leadership to the ISAF. Their day-to-day operations and fundamental responsibilities did not change. Today, nearly all the Canadian Forces in Afghanistan remain part of the ISAF mission and are located in Kandahar province. A copy of the Canadian Forces

Army News Backgrounder dated July 21, 2005, and obtained from the DND website, is attached hereto as **Exhibit "H"**.

12. Canadian Forces assigned to the ISAF mission are integrated into the ISAF chain of command. ISAF itself is now led by the North Atlantic Treaty Organization (NATO). NATO is a defence-oriented alliance of countries. Canada is a member of the North Atlantic Council, which is the supreme decision-making body of NATO.

13. It is a principle of NATO's functioning that the Council sets objectives, but individual members retain sovereignty for their actions. This is described in the current *NATO Handbook*:

> "Without depriving member countries of their right and duty to assume their sovereign responsibilities in the field of defence, the Alliance enables them through collective efforts to meet their essential national security objectives."

Excerpts of the *NATO Handbook*, published 2006, are attached as **Exhibit "I"** to my affidavit.

14. The *NATO Handbook* describes NATO's current objectives in Afghanistan as:

> "Specifically, NATO is seeking to assist the government of Afghanistan in maintaining security within its area of operations, to support the government in expanding its authority over the whole country, and to help provide a safe and secure environment conducive to free and fair elections, the spread of the rule of law, and the process of reconstruction."

15. Currently the government of Afghanistan depends entirely on ISAF's support in providing a secure environment in which the government can function. In order to assist the government to expand its authority over the whole country, starting in 2003, ISAF created Provincial Reconstruction Teams (PRTs), which provide support from soldiers in the ISAF chain of command as well as civilian personnel. The *NATO Handbook* states that the PRTs "primary role is to help the government of

Afghanistan extend its authority further afield and to facilitate the development of security in the regions".

16. Canada currently staffs and leads a PRT in Kandahar. According to documents on the Government of Canada and the DND websites, the Canadian PRT comprises a "330-person team [that] utilizes the expertise of diplomats, development experts, the police and military government officials". The PRT's staff is drawn from "Canadian Forces members, a civilian police contingent led by the RCMP, representatives of the Department of Foreign Affairs and International Trade and the Canadian International Development Agency". These documents as well as others disclosed by the DND under the *Access to Information Act* ("ATI") are attached hereto as **Exhibit "J"** to my affidavit.

17. According to the DND, the purpose of Canada's PRT is to "assist the Government of Afghanistan to extend its authority in the province of Kandahar, to facilitate the development of a stable, secure and self-sustaining environment for the Afghan people". As the Government of Canada writes, "Kandahar is arguably the Afghan province in greatest need for support and also the Province most targeted by insurgent activities".

18. Canada has also committed additional resources, outside of the ISAF mandate, in the form of a Strategic Advisory Team (SAT) of experienced leaders and strategic planners, who are based in Kabul to give high-level Canadian guidance to the Afghan government. The SAT is composed of Canadian Forces, Canadian civil servants, and others, who report directly to President Karzai's senior economic advisor and General Hillier, the Chief of the Defence Staff. The SAT does not have a specifically delegated area of responsibility, but operates at a very high level to mentor the Afghan government on nation-building. According to documents disclosed by DND under the ATI, the SAT advises "primarily in non-security related areas such as

governance and development", and is "an example of Canada's 'whole of government' commitment to supporting all aspects of Afghanistan's development". Copies of the DND documents, including the one containing these quotes, are attached as **Exhibit "K"** to my affidavit.

19. Canada's mission in Afghanistan is further outlined in an agreement signed with the Afghanistan government on December 18, 2005. Entitled "Technical Arrangements Between the Government of Canada and the Government of the Islamic Republic of Afghanistan", this agreement states that one of the primary operational objectives of the Canadian Forces in Afghanistan is to "[e]liminate Al Qaida, the Taliban, anti-coalition armed groups and any other insurgents threatening the security and stability of Afghanistan or international peace and security." A copy of this document is attached hereto as **Exhibit "L"**.

20. Canada and Afghanistan have agreed that Canadian personnel operating in Afghanistan are, under all circumstances, immune from Afghan law, arrest or detention. A copy of this agreement, entitled "Arrangement Regarding the Status of Personnel in Afghanistan", is attached hereto as **Exhibit "M"**. By this same agreement, Canadian personnel, vehicles, vessels and aircraft have complete and unimpeded freedom of movement throughout the territory and airspace of Afghanistan.

21. The CBC has quoted two Afghan government officials who believe that the Afghan government would be unsustainable without the military support of Canada and other countries. In the CBC News in Review educational module of March 2006, a copy of which was obtained from the CBC website and is attached hereto as **Exhibit "N"**, it is reported:

> "Their present structure will not stand," explains [Aghan Independent Human Rights Commission] Director Abdul Qadi Noorzai in Kandahar. "The current Afghan central authority is unable to maintain stability and human rights without the international prescence."
>
> "[The prescnce of] international military forces means it is not possible to fall back into civil war," argues Ramadan Bashar Dost, former minister of planning. "If international forces leave Afghanistan, there will be a war within 10 minutes."

CANADIAN FORCES AND DETAINEES IN AFGHANISTAN

22. The Canadian Forces have detained individuals in Afghanistan since the outset of their involvement in the country. Then Defence Minister Art Eggleton confirmed in an interview on January 29, 2002, that Joint Task Force 2 ("JTF2"), an elite CF unit, had already captured at least three to four individuals. A transcript of this interview was obtained from DND through an ATI request and is attached hereto as **Exhibit "O"**.

23. According to a DND document entitled "Campaign Against Terrorism Dctainee Transfer Log", which was obtained from DND under ATI, 40 unnamed detainees were transferred by the Canadian Forces to the custody of the U.S. or Afghanistan between January 20, 2002 and April 29, 2006. A copy of the Dctaincc Transfer Log is attached as **Exhibit "P"** to my affidavit.

Canadian Forces' doctrine, policy and practice

24. DND has developed an operating policy for the handling of prisoners of war and detainees. A final version of this policy was completed in 2004 and was obtained from the DND website. Attached as **Exhibit "Q"** to my affidavit is a copy of the DND Joint Doctrine Manual entitled *Prisoner of War Handling, Detainees,*

Interrogation & Tactical Questioning in International Operations, dated 21 August 2004 (hereinafter the "Detainee Doctrine Manual"). This manual furnishes the military doctrine and policies that apply to all persons who the Canadian Forces detain in the armed conflict in Afghanistan.

25. It is the policy of the Canadian Forces to treat all persons captured during armed conflict abroad, such as in Afghanistan, as prisoners of war ("PW"), and afford all the rights and privileges attached to that status. This policy applies even if the captured person does not satisfy the legal definition of a "prisoner of war" in the Geneva Conventions. As the Detainee Doctrine Manual states:

> "Under the Law of Armed Conflict, PW provisions only apply during an international armed conflict and only to parties to that conflict... It is Canadian Forces policy that all captured persons or detainees be treated to the standard required for PWs, as this is the highest standard required under International Humanitarian Law. In addition to having certain practical advantages, this policy also obviates the requirement to make immediate judgment on the status of the captured person." (quoted from Preface)
>
> "Accordingly, all detainees will be provided with the same standard of treatment and care afforded to PW" (quoted from page 4A-1)

26. The policy of Canadian Forces is that detainees should be treated humanely. The Detainee Doctrine Manual specifically prohibits certain practices, such as "outrages upon the personal dignity including humiliation and degradation", "any stress positions", or "sleep deprivation or manipulation", among others (page 4A-2). (It is significant to note that the United States routinely employs these techniques, which is described below at paragraph 57 of this affidavit.)

27. Canadian military doctrine requires that all detainees captured in theatre "shall be handed over into Military Police custody as soon as possible after capture." Canadian Military Police are stationed in Afghanistan and maintain a detention facility in Kandahar. The policies and procedures for Military Police detention operations are set out in *Military Police Doctrine*, DND file B-GL-362-001. (See Chapter 5,

paragraph 46 for quote.) According to this document, which was obtained from the DND website electronic library and excerpts attached hereto as **Exhibit "R"**, the Military Police have plans for detention facilities in the field and the "evacuation chain" contemplates transfer of prisoners to EPW ("enemy prisoners of war") camps in Canada. The Canadian Military Police also follow more detailed directives contained in a document entitled *Military Police – Tactical Aide Memoire*, DND file number B-GL-332-012. This document was obtained from the DND website electronic library and excerpts are attached hereto as **Exhibit "S"**.

28. Brigadier-General David Fraser, Commander of the Canadian Forces in Afghanistan in 2006, issued a Theatre Standing Order 321A ("TSO 321A") regarding "Detention of Afghan Nationals and Other Persons". A copy was divulged by DND pursuant to an ATI request and is attached hereto as **Exhibit "T"**. The TSO, with an effective date of February 18, 2006, establishes operating policy and procedures for the handling of detainees by Canadian Forces personnel in Afghanistan. Canadian Forces are directed to detain individuals who are suspected to be members of Al Qaeda, Taliban, or other anti-coalition armed groups, for eventual transfer to Afghan National Security Forces, which includes the Afghan National Army, the Afghan National Police, or the National Directorate of Security.

29. According to the TSO 321A, Canadian Forces search and interrogate detainees and take their fingerprints. The Commander of the Canadian Forces is directed to make a determination of whether to continue detention, transfer to Afghan forces, or release the detainee. This decision is to be made within 96 hours, although it may be delayed in certain circumstances. The information gathered about each detainee, including fingerprints and the "tactical questioning report", is forwarded to Afghan authorities upon transfer. Canadian Forces are required to keep records of the detention and transfer and must treat detainees humanely.

30. Internal DND documents disclosed through ATI requests confirm that the Canadian Forces interrogate detainees in Afghanistan. As some of these documents demonstrate, suspects are also subjected to testing for "GSR", or gun-smoke residue, in order to identify potential combatants. Copies of these documents are attached hereto as **Exhibit "U"**.

31. Other DND documents obtained through ATI requests also confirm that Canada is transferring the very large majority of detainees to the "ANP" (the Afghan National Police) or the "NDS" (the National Directorate of Security; sometimes also called "NSD"), while a few are transferred to the "PTS Program" (Program Takhim-e-Solh, or "Strengthening Peace"). The ANP and NDS are specifically cited in the TSO 321A referred to above in paragraph 28. The PTS Program is a government effort to reintegrate Taliban members into the community. Three Detainee Transfer Records, chosen as examples of transfer from Canadian custody to each of these three organizations, are attached as **Exhibit "V"** to my affidavit.

32. Canadian Forces and the DND have repeatedly stated that detainees in Afghanistan shall be treated in accordance with international and Canadian law, but have not specified which legal provisions apply. In one DND "Questions & Answers" briefing document, a copy of which was obtained through ATI and is attached hereto as **Exhibit "W"**, it is suggested that applicable Canadian law is "the National Defence Act, Geneva Conventions Act and relevant decisions from the courts."

33. Finally, I am unable to locate evidence that Canada has ever convened status determination tribunals for Afghan detainees to determine their legal rights under the Geneva Conventions. I do not believe these are being held.

Detainee Agreement and Canadian Forces' transfer of detainees to third parties

34. The Canadian Forces operating policy in Afghanistan is to transfer detainees to third parties for any detention that may last longer than a few days. Initially, Canadian Forces handed over detainees to the U.S. because, it was said, Canadian Forces were "neither manned, equipped, nor trained to handle the long term requirements of holding and controlling detainees." This information is found in a Briefing Note to the Chief of Defence Staff dated January 29, 2002 and entitled "Detainee Handling Procedures", a copy of which was obtained through ATI and is attached hereto as **Exhibit "X"**.

35. DND decided in 2005 that it would be advisable to start transferring detainees to Afghanistan authorities rather than the U.S. military. There being no NATO-wide agreement with the Government of Afghanistan concerning the transfer of detainees, Canada sought its own.

36. On December 18, 2005, 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, Abdul Raheem Wardak, signed a document entitled "Arrangement for the Transfer of Detainees Between the Canadian Forces and the Ministry of Defence of the Islamic Republic of Afghanistan" (hereinafter referred to as "Detainee Agreement".) A copy is attached hereto as **Exhibit "Y"**.

37. The Detainee Agreement did not necessarily stop the transfer of persons detained by the Canadian Forces into the custody of the U.S. The Agreement authorizes not only an initial transfer of a detainee from Canadian custody to Afghan custody, but also a further transfer of that same detainee from Afghan custody to unnamed third parties.

This possibility is implied in paragraph 7 of the Detainee Agreement, which details procedures "should the detainee be subsequently transferred" from Afghan custody to a third-party country. As the leading military power in the conflict, the U.S. is the most likely third country to whom detainees would be transferred by the Afghans.

38. Colonel Neil Anderson, Director of NATO Policy at DND headquarters in Ottawa, has confirmed that onward transfers from Afghanistan to the U.S. are allowed. Colonel Anderson answered as follows when interviewed by the CBC on the matter:

> *ANNA MARIA TREMONTI (CBC): And do you know if any of the detainees you would hand over to the Afghans could be handed over to the US soldiers after that point?*
>
> *COLONEL NEIL ANDERSON: Yes, that is a, we would term that a third party transfer. There is, international law provides for a transfer of detainees to third parties, but there are specific conditions. And the conditions are that the transferring party is satisfied that the third party is willing and able to treat detainees in accordance with the standards required.*

A transcript of Colonel Anderson's interview with the CBC that aired April 10, 2006, is attached as **Exhibit "Z"** to my affidavit.

39. The Detainee Agreement also allows that the Canadian Forces may transfer a detainee to another country directly, <u>without</u> ever transferring those detainees to Afghan custody. Colonel Anderson acknowledged the possibility of direct transfers in his interview with the CBC, and characterized these an "exception" to the usual policy of transferring detainees to Afghan custody:

> *"Questions come up: 'What if we captured Osama Bin Laden?' I'd say our full intent is to transfer detainees to the Afghan authorities, and I can't really speculate on what situations may cause an exception to the policy."*

40. Canadian Forces operations as recently as April 2006 (*i.e.* after the Detainee Agreement was signed) contemplated direct transfers of detainees to the United States authorities. This is shown in documents that DND disclosed pursuant to ATI. Among those documents are "Coalition Enemy Combatant Determination Reports"

which reveal that Canadian Forces have the option of "transferring the seized person to the US". Copies of these documents are already attached to my affidavit as part of Exhibit "S".

Canadian Forces Refuse Access to Independent Legal Counsel

41. On June 16, 2006, I wrote a letter to the Chief of the Defence Staff, General R.J. Hillier, and drew his attention to situations where detainees might have need of legal counsel. I cited that a detainee might require a lawyer to apply for *habeas corpus*, or a remedy under the *Canadian Charter of Rights and Freedoms*. A copy of my letter to General Hillier is attached as **Exhibit "AA"** to my affidavit.

42. In my letter to General Hillier, I made the following request:

> "In order that I might provide legal advice and representation for detainees while in Canadian custody, I request that the Department of National Defence provide me with timely notice when it detains any person in Afghanistan and that the department facilitate a reasonable opportunity for me to be retained by and take instructions from any detained person, ahead of that person being transferred to the authorities of Afghanistan or any other state."

43. General Hillier replied to me by letter dated July 17, 2006. General Hillier denied my request to make contact with and take instructions from detainees held in Canadian Forces' custody. As General Hillier wrote to me:

> "You have indicated that you are aware it is Canada's intent to transfer persons detained by the Canadian Forces in Afghanistan to the Afghan authorities. Under such circumstances, and contrary to an assertion made in your letter, there is no requirement to offer detained persons access to legal counsel prior to transferring to Afghan authorities...
>
> ...I cannot agree to provide you with access to and information on detainees that the Canadian Forces has transferred or will transfer to Afghan authorities."

A copy of General Hillier's reply is attached as **Exhibit "BB"** to my affidavit

44. There are reasons to believe that it would be possible to integrate lawyers into DND operations, as has been done for other professions. The DND program for "embedded" journalists allows that profession to be practiced alongside battle groups. DND has created extensive instructions and ground rules that allow up to 15 journalists to be embedded with its operations in Afghanistan at any one time. DND's scheme stipulates conduct that is acceptable and not acceptable for the journalists, and tries to reconcile that with the freedom of expression of the journalists. In DND's words, the embedding program has "the goal…to provide the Canadian public with as much accurate information as possible about CF operations". A copy f the Operation Athena Media Embed Program Instructions and related annexes, dated October 2006, is attached hereto as **Exhibit "CC"**. A recent DND backgrounder posted on the DND website February 21, 2007 describes the program as "extremely successful." A copy of this document is attached as **Exhibit "DD"**.

45. If DND agreed to make reasonable provision for me to be retained by and take instructions from detainees in Afghanistan, consistent with the basic requirements of the solicitor-client relationship, I remain interested to offer my services in that regard. I believe that other Canadian lawyers would similarly be willing to offer services.

RISK THAT DETAINEES MAY BE SUBJECT TO TORTURE

46. The absolute prohibition of torture is an essential human right recognized in a wide range of international treaties. The prevention of torture is not only an international obligation, it must be the paramount objective of any society that values human rights and the dignity of the human being.

47. I am seriously concerned that there is a substantial risk that detainees captured by Canadian Forces in Afghanistan may be subject to torture. This belief is based on

several credible reports of abuse and torture by Afghan and U.S. authorities, both of which are recipients of detainees taken by Canadian Forces. Notwithstanding these reports, current Canadian Forces' policy contemplates the transfer of detainees to these authorities. The following sections detail my concerns about this practice.

U.S. Record on Abuse and Torture in Detention

48. Starting in January 2002, Canadian Forces policy envisaged that "any detainee [taken by Canadian Forces] would be transferred to the United States as the coalition authority responsible for the long-term treatment and security of the detainees". This statement was made in a DND "Questions & Answers" briefing document, dated 30 January 2002, a copy of which was obtained pursuant to ATI and is attached as **Exhibit "EE"**.

49. Canadian Forces agreed to transfer detainees to the United States based on assurances that the U.S. would treat detainees humanely and in accordance with international law. In the same "Questions & Answers" document referred to above and dated 30 January 2002, the DND writes (at A24):

> "Canada and its coalition partners have specific obligations for the detention of all detainees under international law. Regardless of a detainee's status, international law provides minimum standards to ensure that they receive fair and humane treatment. The United States has assured Canada that the detainees in Guantanamo Bay are being treated humanely in accordance with the principles of the Geneva Conventions. Canada welcomes this commitment."

50. Canada's government acted in reliance on American assurances and transferred detainees to U.S. custody. Canada subsequently became concerned because of statements made by the U.S. that detainees would not have the right to status determination tribunals, as required by the Geneva Conventions. The Canadian government was also worried that the U.S. refused to confirm that it would provide updates on the location and status of detainees transferred from Canadian custody. This information is contained in a DND "Questions & Answers" document dated

January 31, 2002, and a Briefing Note to the COS (Chief of Staff) J3 (Operations Division), dated January 29, 2002, and entitled "Detainee Handling Procedures." The concerns also prompted a legal opinion from the Judge Advocate General dated February 14, 2002. All three documents were obtained from the DND through ATI and are attached hereto as **Exhibit "FF"**.

51. It was reported in the *Ottawa Citizen* newspaper that at least three detainees captured by Canadian Forces in 2002 ended up at Guantanamo Bay. Canadian officials reportedly became uneasy with U.S. methods and treatment at Guantanamo Bay and tried to find out what happened to these detainees. The U.S. reportedly refused to provide further details. A copy of this article, dated February 14, 2005, is attached hereto as **Exhibit "GG"**.

52. These concerns caused Canada's Minister of National Defence in 2005, the Honourable Bill Graham, to seek a cessation of such transfers. Mr. Graham sought to reach a detainee agreement with Afghanistan "to make sure that we didn't run into the problem with detainees that had come up before, about them being transferred to Guantanamo and places like that." This statement is reported in an article published in the *Globe and Mail* newspaper on March 30, 2006. A copy is attached hereto as **Exhibit "HH"**.

53. Defence Minister Graham's concerns were well founded. The following paragraphs relate a pattern of murder, torture and abuse suffered by detainees in U.S. custody over the past few years in Afghanistan, Iraq and Guantanamo Bay. These paragraphs also describe U.S. practices of secret and indefinite detention, otherwise called "enforced disappearance". Even U.S. officials themselves, such as the Federal Bureau of Investigation (FBI), have commented with alarm on the torture and other abuses that are now officially perpetrated upon terrorism suspects in U.S. custody. In

but one example, an FBI inspector reported the following observations from his time at Guantanamo Bay:

> On a couple of occassions [sic], I entered interview rooms to find a detainee chained hand and foot in a fetal position to the floor, with no chair, food or water. Most times they had urinated or defacated [sic] on themselves, and had been left there for 18, 24 hours or more. On one occassion [sic], the air conditioning had been turned down so far and the temperature was so cold in the room, that the barefooted detainee was shaking with cold. When I asked the MP's what was going on, I was told that the interrogators from the day prior had ordered this treatment, and the detainee was not to be moved. On another occasion [sic], the A/C had been turned off, making the temperature in the unventilated room probably well over 100 degrees. The detainee was almost unconscious on the floor, with a pile of hair next to him. He had apparently been literally pulling his own hair out throughout the night. On another occassion [sic], not only was the temperature unbearably hot, but extremely loud rap music was being played in the room, and had been since the day before, with the detainee chained hand and foot in the fetal position on the tile floor.

54. The above passage is from an internal FBI email, a copy of which was obtained under American freedom of information laws and can be found in a report by the American Civil Liberties Union (ACLU) to the United Nations Committee Against Torture. The ACLU's report, entitled *Enduring Abuse: Torture and Cruel Treatment by the United States at Home and Abroad* and dated April 2006, is attached hereto as **Exhibit "II"**. (See Annex B for several similar documents, including page 14 for the quoted email.) This report is one of many by human rights groups as well as international bodies which demonstrate that acts of torture in U.S. custody, as illustrated by the above passage, are not isolated incidents, but rather are related to systematic and high-level changes in the U.S. government and military which relaxed the prohibition on torture.

55. This shift in U.S. policy commenced in January and February 2002. Then White House counsel and current U.S. Attorney General Alberto Gonzales wrote in a memo to the U.S. President that the Geneva Conventions were "obsolete" and prevented harsh interrogation techniques necessary for this "new kind of war". President George Bush officially accepted this memo and decided on February 7, 2002, that the Geneva Conventions would not apply to prisoners in the Afghanistan conflict. He

also declared that detainees had no right to humane treatment, although they should be humanely treated only "to the extent appropriate and consistent with military necessity." (See ACLU report, Exhibit "HH", pages 19-20.)

56. In a memorandum dated August 1, 2002, the United States Department of Justice advised the White House on how the legal definition of "torture" could be narrowly interpreted so US interrogators could escape criminal liability. Commonly known as the "Torture Memo", the opinion also argued that the President could in any event override the prohibition against torture as a function of executive power and that cruel, inhuman and degrading treatment was already allowed under U.S. law. The Torture Memo has been published in its entirety by the *Washington Post* newspaper on its website, and a copy is attached as **Exhibit "JJ"** to my affidavit, and reads in part:

> "Physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death. For purely mental pain or suffering to amount to torture under Section 2340 [of title 18 of the United States Code], it must result in significant psychological harm or significant duration, e.g. lasting for months or even years. We conclude that the mental harm also must result from one of the predicate acts listed in the statute, namely: threats of imminent death; threats of infliction of the kind of pain that would amount to physical torture; infliction of such physical pain as a means of psychological torture; use of drugs or other procedures designed to deeply disrupt the senses, or fundamentally alter an individual's personality; or threatening to do any of these things to a third party..."
>
> "Because the acts inflicting torture are extreme, there is significant range of acts that though they might constitute cruel, inhuman, or degrading treatment or punishment fail to rise to the level of torture."

57. Following this memo, senior U.S. government officials issued several different versions of approved interrogation techniques. In a memorandum dated December 2, 2002, the U.S. Secretary of Defence Donald Rumsfeld authorized interrogation techniques at Guantanamo Bay such as hooding, stripping, sensory deprivation, isolation, stress positions, the use of dogs to inspire fear, sleep "adjustment", and dietary manipulation. Mr. Rumsfeld also decided that techniques such as exposure to

extremes in temperature and the use of dripping water "to induce the misperception of suffocation" could receive special approval. (Some of the destructive effects caused by these techniques were described by the FBI in paragraph 53 above.) Copies of Mr. Rumsfeld's memorandum, and the documents it references, are attached hereto as **Exhibit "KK"**. These copies were obtained from the online national security archive maintained by George Washington University.

58. The ACLU's 2006 report to the Committee Against Torture, referred to above at paragraph 53, found that the U.S. government's selective interpretation of torture was used to justify the development of such interrogation techniques, creating a permissive climate for torture and other abuses. The ACLU's findings were based on over 100,000 official government documents that the organization obtained by use of American freedom of information laws. These documents revealed widespread abuse, torture and death in U.S. custody.

59. Investigations by the United Nations have similarly concluded that practices in U.S. detention facilities in Afghanistan "fall under the internationally accepted definition of torture." Acting on allegations of torture committed by the U.S. and Afghan authorities, the United Nations Commission on Human Rights appointed an independent expert to investigate. The UN expert was denied access to U.S. detention facilities but heard accounts from victims, the Afghan Independent Human Rights Commission, and NGOs about conduct by U.S. forces which included "forced nudity, hooding and sensory deprivation, sleep and food deprivation, forced squatting and standing for long periods in stress positions, sexual abuse, beatings, torture, and use of force resulting in death." A copy of the UN expert's report, dated March 11, 2005, and entitled *Report of the Independent Expert on the Situation of Human Rights in Afghanistan*, is attached as **Exhibit "LL"** to my affidavit. (See paragraphs 44 and 46 of the report for the cited quotes.)

60. The United Nations Commission on Human Rights published another report in February 2006 entitled *Situation of Detainees at Guantanamo Bay*. The report details US policy on detainment and interrogation for detainees at Guantanamo Bay and other locations. According to the UN Commission on Human Rights, the United States' redefinition of torture is "of utmost concern". Further, the United States has employed "excessive violence in many cases during transportation" and "force-feeding of detainees", both of which the UN Commission believes "must be assessed as amounting to torture". A copy of the Commission's report is attached hereto as **Exhibit "MM"**. (See paragraph 88 of the report for the cited quotes.)

61. The International Committee of the Red Cross (ICRC) has also had occasion to investigate the use of certain interrogation techniques by the U.S. The *Washington Post* newspaper obtained a confidential February 2004 report by the ICRC entitled *Report of the International Committee of the Red Cross of the Treatment By the Coalition Forces of Prisoners of War and Other Protected Persons By the Geneva Conventions in Iraq During Arrest, Internment and Interrogation.* The report is published online by the *Washington Post* and a copy is attached hereto as **Exhibit "NN"**.

62. In the Executive Summary of the ICRC report cited above, the ICRC states that it found several violations of international humanitarian law in U.S. custody, such as "[b]rutality against protected persons upon capture and initial custody, sometimes causing death and serious injury" and "[e]xcessive and disproportionate use of force against persons deprived of their liberty resulting in death or injury during their period of internment". The ICRC also made the following findings:

    - "[M]ethods of physical and psychological coercion were used by the military intelligence in a systematic way to gain confessions and extract information or other forms of co-operation..." (See para. 26.)
    - "The ICRC medical delegate examined persons deprived of their liberty presenting signs of concentration difficulties, memory problems, verbal expression difficulties, incoherent speech, acute anxiety reactions, abnormal

behaviour and suicidal tendencies. These symptoms appeared to have been caused by the methods and duration of interrogation." (See para. 27.)

- "This ICRC report documents serious violations of International Humanitarian Law relating to the conditions of treatment of the persons deprived of their liberty held by the (Coalition Forces) in Iraq. In particular, it establishes that persons deprived of their liberty face the risk of being subjected to a process of physical and psychological coercion, in some cases tantamount to torture, in the early stages of the internment process." (See para. 59.)

63. The *New York Times* newspaper reported that the ICRC delivered a similar confidential report to the U.S. government in July 2004 in which the ICRC described the U.S. interrogation methods of detainees at the Guantanamo Bay facility as "tantamount to torture". A copy of this article, published November 30, 2004, is attached hereto as **Exhibit "OO"**.

64. As noted in the above paragraphs, the ACLU, the UN and the ICRC all found evidence of brutality against individuals, sometimes leading to death, while in U.S. custody. Human Rights First is a U.S.-based human rights organization (formerly known as the Lawyers Committee for Human Rights) that has conducted a detailed analysis of the nearly 100 known deaths in U.S. custody in Iraq and Afghanistan. According to its February 2006 report entitled *Command's Responsibility: Detainee Deaths in U.S. Custody in Iraq and Afghanistan*, at least 45 deaths occurring in U.S. custody were homicides, with several resulting directly from torture. Citing official autopsy and military investigation reports, Human Rights First revealed numerous deaths in custody caused by blunt force trauma, strangulation, suffocation, drowning, and gunshots to the back. A copy of this report is attached hereto as **Exhibit "PP"**.

65. Human Rights First examined the systemic failure to adequately investigate or prosecute deaths in U.S. custody. Its report revealed that "only 12 detainee deaths resulted in punishment of any kind for any individual." Human Rights First also cited examples of failure to report deaths, evidence being deliberately destroyed, and

soldiers being ordered to deny incidents and resist co-operation with criminal investigators.

66. The UN Committee Against Torture condemned the U.S. for these practices in its most recent report on the country. It stated, "The Committee is concerned by reliable reports of acts of torture or cruel, inhuman and degrading treatment or punishment committed by certain members of the State party's military or civilian personnel in Afghanistan and Iraq. It is also concerned that the investigations and prosecution of these cases, including some resulting in the death of detainees, have led to lenient sentences, including of an administrative nature or less than one year's imprisonment." This report by the UN Committee Against Torture, dated July 25, 2006, is attached hereto as **Exhibit "QQ"**. (See paragraph 26 of the report for quote.)

67. The above described evidence of U.S. practices relates only to known U.S. detention sites and known allegations of torture. However, there also exists an entirely different global network of secret prisons managed by the Central Intelligence Agency (CIA) about which little is known. This information was reported by the *Washington Post* newspaper on November 2, 2005, with these secret locations described as "black sites". Attached as **Exhibit "RR"** is the article from the *Washington Post.*

68. President George W. Bush confirmed the existence of CIA black sites in a public address on September 6, 2006. He said:

> "In addition to the terrorists held at Guantanamo, a small number of suspected terrorist leaders and operatives captured during the war have been held and questioned outside the United States, in a separate program operated by the Central Intelligence Agency… Many specifics of this program, including where these detainees have been held and the details of their confinement, cannot be divulged…"

A copy of President Bush's address is attached as **Exhibit "SS"** to my affidavit.

69. The whereabouts of the CIA's black sites and the persons detained in them are not known. The ICRC does not have access to inspect detainees held in black sites. It recently announced in a rare public statement that it "deplored the fact that the US authorities had not moved closer to granting the ICRC access to persons held in undisclosed locations." A copy of the ICRC press release dated May 12, 2006 is attached hereto as **Exhibit "TT"**.

70. Human Rights Watch is a non-governmental organization that is committed to investigating and reporting on human rights violations around the world. The group recently published a report on the CIA's detention program entitled *Ghost Prisoner: Two Years in Secret CIA Detention*. Dated February 2007, the report is attached hereto as **Exhibit "UU"**. Human Rights Watch indicates that in the last few years secret CIA prisons have been operated at various times in eight countries around the world, including Afghanistan. It is estimated that these detention sites have held at least 100 detainees. Human Rights Watch has collected the names of 38 people who were believed to have been held by the CIA and whose current whereabouts remain unknown. Human Rights Watch concludes that the U.S. has violated a host of fundamental human rights norms, including the prohibition against "enforced disappearance", which is defined in international legal instruments as:

> the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.

71. As Human Rights Watch notes, enforced disappearance not only violates the human rights of the "disappeared" person, "it inflicts severe mental pain and suffering on members of that person's family." (See page 39 of the report.) As such, the practice may constitute torture of the detainee as well as the detainee's family members.

72. The CIA black sites are also of serious concern because CIA personnel are using interrogation techniques that are even more extreme than the U.S. military. In the statement by President Bush on September 6, 2006, he said that "the CIA [uses] an alternative set of procedures" for interrogation. He has pointed to examples where these alternative procedures were used on persons who had "stopped talking" under normal interrogation. In the *Washington Post* article referred to earlier at paragraph 67, it was reported that these techniques include "waterboarding", a torture method by which the individual is strapped to a board and submerged in water until it feels like he or she is drowning.

73. The UN Committee Against Torture and Human Rights Watch, among others, have strongly condemned the United States for resorting to interrogation techniques such "waterboarding". Nevertheless, U.S. Vice President Dick Cheney has maintained that there is nothing wrong with the use of the technique. In a radio interview published online by the White House website on October 24, 2006, a transcript of which is attached hereto as **Exhibit "VV"**, Vice President Cheney agreed that "a dunk in the water" is acceptable "if it can save lives". He said, "It's a no-brainer for me, but for a while there, I was criticized as being the Vice President 'for torture.'"

74. In another deplorable practice, the U.S. continues to abduct individuals from locations around the world and transfer them, without any legal process whatsoever, to countries where they are likely to be tortured. This practice, called "extraordinary rendition", resulted in the torture of Canadian Maher Arar by Syrian authorities. It has been roundly condemned as illegal and a breach of basic human rights by the UN, the ICRC, Amnesty International, Human Rights Watch, and the ACLU, among others.

75. Yet Secretary of State Condoleeza Rice is unapologetic about this practice and has said, "Rendition is a vital tool in combatting international terrorism." She added that

the practice is used where "the ordinary processes of law" are "not a good option." The U.S. Secretary's statement was made at a press conference on December 5, 2005 and is published online by the U.S. Department of State. A copy is attached hereto as **Exhibit "WW"**.

76. Finally, the U.S. has also not provided a judicial path to trial, conviction and sentence, or acquittal and freedom for "enemy combatants". There are plans to try such persons before "Military Commissions", but when directly questioned on the matter, U.S. Department of Defense officials have admitted that even persons acquitted by a Military Commission could continue to be detained indefinitely. This emerged in a "Background Briefing of Military Commissions" conducted by U.S. officials in July 2003, which is attached as **Exhibit "XX"** to my affidavit, and which reads:

> *Q: So is it possible then that somebody could go through a commission, be found not guilty, and then have them say well, congratulations, you're not guilty but you're still an enemy combatant so back into wherever we're holding you?*
>
> *Senior Defense Official: As a legal matter, they're two completely different questions. They're not being held because of any criminal activity or any charges. They're being held because they're enemy combatants in an ongoing armed conflict.*

Afghanistan's Record on Torture and Abuse in Detention

77. The United Nations, the US State Department, Amnesty International and the Afghan Independent Human Rights Commission all concur that torture occurs in detention in Afghanistan.

78. The Afghan Independent Human Rights Commission (AIHRC) is a body that investigates human rights complaints in Afghanistan. The AIHRC began operating in

2002 and was given status by a Presidential Decree in June 2002. The existence and role of the AIHRC was later entrenched in the Afghan constitution of 2004 (see Article 58 thereof). AIHRC further derives its jurisdiction from the *Law on the Structure, Duties and Mandate of the AIHRC*, which the Afghan government passed in May 2005.

79. Canada acknowledges AIHRC's expertise and legitimacy. In particular, the Detainee Agreement expressly "recognize[s] the legitimate role of the Afghan Independent Human Rights Commission... in regard to the treatment of detainees."

80. According to the AIHRC, torture is a "routine" part of custody and interrogation by the Afghan National Police. Torture is used to extort confessions from detainees, and occurs in illegal detention centers. Further, torture is especially prevalent in Kandahar, which is precisely the location that Canadian Forces have detained and transferred persons to the Afghan National Police (see paragraph 31 of my affidavit). As the AIHRC wrote in its annual report of 2004-2005, which was contemporaneous with the signing of the Detainee Agreement:

> "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. The lack of prisoner access to legal services continues to be a major factor in incarceration."

A copy of the AIHRC annual report is attached as **Exhibit "YY"** to my affidavit.

81. Torture is an ongoing and persistent problem in Afghanistan. The previous AIHRC annual report (2003-2004) also stated that torture was a "routine part of police procedures" and the most recent one (2005-2006) finds that "torture continues to be used during prosecutions by the Afghan National Police."

82. Torture forms part of wider, systematic human rights violations in Afghanistan's prisons. Other problems include illegal detention, lack of medical care, and the unsegregated incarceration of men, women and children. AIHRC's annual reports have noted all these problems.

83. Prison conditions in Afghanistan were also condemned as "abhorrent" by the UN expert's report published March 11, 2005, and referred to earlier in this affidavit at paragraph 59. This same report also cites concerns about "the use of torture by various [Afghan] government intelligence entities, including those associated with the National Security Directorate, the Ministry of Defence and the Ministry of the Interior". (See page 6 of the report.)

84. The United Nations High Commissioner for Human Rights also notes that complaints of torture in Afghanistan are "common", and questions the ability of the state security apparatus to comply with international standards. The current UN High Commissioner, Louise Arbour, is a former Justice of the Supreme Court of Canada. As the Honourable Louise Arbour wrote in her March 2006 report:

> "The NSD [i.e. National Security Directorate], 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. Thorough, transparent and public investigations are absent and trials regularly occur without adhering to the due process rights enshrined in the Constitution. Serious concerns remain over the capacity and commitment of these security institutions to comply with international standards."

The NSD mentioned in this paragraph is one of the units of the Afghan government to which the Canadian Forces recently transferred detainees (see paragraph 31 of my affidavit). A copy of the report by the UN High Commissioner for Human Rights is attached as **Exhibit "ZZ"** of my affidavit.

85. Afghanistan's closest ally, the United States, concurs that there is credible evidence of torture in Afghan custody. Techniques of torture include physical mutilation and sexual abuse. As the US State Department reported on March 6, 2007:

> "...local authorities in Herat, Helmand, Badakhshan, and other locations continued to routinely torture and abuse detainees. Torture and abuse consisted of pulling out fingernails and toenails, burning with hot oil, sexual humiliation, and sodomy."

A copy of the US State Department Country Report on human rights practices in Afghanistan, dated March 6, 2007, is attached as **Exhibit "AAA"** of my affidavit.

86. Afghanistan's prison and detention conditions are substandard and far below the minimum Geneva Convention and international human rights standards. As the US State Department has described them in March 2007:

> "Prison conditions remained poor; prisons were decrepit, severely overcrowded, and unsanitary. Prisoners shared collective cells and were not sheltered adequately from severe winter conditions. Living conditions did not meet international standards. Some prisons held more than twice their capacity. In district prisons, shipping containers were frequently used when other structures were unavailable. Prisoners were reportedly beaten, tortured, and denied adequate food."

87. There is also evidence that Canadian Forces have encountered situations in which they could easily arrive at their own conclusions about the risk of torture by Afghan authorities.

88. Reporting in June 2006, a CTV Television news crew accompanied Canadian Forces operating in the Panjaway district of Kandahar, when the Forces detained a man. The detained man appears on camera but his personal details are unknown. Canadian Forces are seen on camera handcuffing the man and taking custody of him. A copy

of the CTV newscast on videodisc, and the accompanying text taken from CTV's website, are attached hereto as **Exhibit "BBB"**.

89. The Canadian Forces undertook to transfer the above-mentioned detainee to Afghan authorities. On doing so, Afghan officials informed the Canadian Forces that the detainee was a Taliban member, and that they planned to kill him summarily. The CTV Television crew recorded Canadian soldiers' radio conversation about the situation:

> *CANADIAN SOLDIER: "Roger. They want to execute him here. I'm, uh, obviously, I'm not for that..."*
>
> *"He's probably of low intelligence value. It's either we take him, or, or he gets executed. I need you to manage that, over."*

90. Canadian Forces retained the detainee due to the intent of the Afghan officials to carry out summary execution. Nevertheless, twenty-four hours later, the Canadian Forces transferred the detainee to Afghan officials anyway. CTV's report goes on to state that the prisoner's whereabouts and fate were unknown after he was transferred. The episode CTV recorded on camera appears not to be an isolated case, and CTV reported that they "know of at least one other instance where a detainee faced summary execution by the Afghans, and still Canadians had to turn him over".

91. There is a clear consistency to the UN, AIHRC, US State Department, and journalistic reports cited in this affidavit, all of which point to the torture or other abuse of detainees by Afghanistan. All these reports are freely available on the internet to anyone who seeks to be informed by them. Together, they underscore my belief that there is sufficient evidence for the Canadian Forces to be informed about the substantial risks—including torture and even summary execution—of transferring detainees to Afghan custody.

92. My concerns have been heightened by a recent article in the *Globe and Mail* newspaper. On March 2, 2007, it was reported that three detainees who were transferred from Canadian Forces to Afghan authorities had disappeared. Inquiries by the Canadian Forces into the whereabouts of the three transferred detainees have apparently so far been unsuccessful in locating them. The fate of these detainees, captured by Canadian Forces in April 2006 and transferred to the Afghan National Police, is currently unknown. A copy of this article is attached as **Exhibit "CCC"**.

NO SAFEGUARDS TO PREVENT TORTURE

93. Given the substantial risk that detainees taken by the Canadian Forces and transferred to Afghan custody will be tortured or otherwise abused, Canadian Forces must take effective steps to protect against this risk. The aspect of the Detainee Agreement most frequently cited by Canadian government officials as conferring such protection is the right of the ICRC to visit detainees after they are transferred to Afghan custody. However, and for the reasons that follow, I do not believe that ICRC visits are likely to be effective safeguards to pre-empt torture or other abuse.

94. The history and processes of the ICRC's work to visit detainees is explained in a March 2005 article authored by the head of the ICRC's Protection Division, Mr. Alain Aeschlimann, in the *International Review of the Red Cross*. A copy of Mr. Aeschlimann's article is attached as **Exhibit "DDD"** to my affidavit.

95. Mr. Aeschlimann notes three significant limitations of the ICRC's processes. The first limitation is that, in non-international armed conflicts (such as in Afghanistan) the parties to the conflict are <u>not</u> legally required by the Geneva Conventions to accept ICRC visits. As Mr. Aeschlimann writes:

> "In a non-international armed conflict there is no explicit treaty basis for the ICRC to have access to persons deprived of their liberty… Legally, the parties

concerned are thus under no obligation to accept ICRC visits to detainees in internal conflicts."

96. The second limitation is that ICRC visits are intermittent and, as such, ICRC is not able by its inspections to guarantee against torture and other abuses. Mr. Aeschlimann writes:

> "…the ICRC's intermittent presence in a place of detention cannot guarantee that the detainees' physical and moral integrity will be respected. Only the detaining authorities themselves can assume this responsibility."
>
> "Torture is usually carried out in secret, away from the public eye. It is therefore extremely rare for ICRC delegates to be direct witnesses of acts of torture or other forms of ill treatment, even when they have authorization to visit detainees during the interrogation period."

97. The third limitation is that the ICRC almost always treats as confidential the findings of its visits. Even a confirmed instance of torture or serious abuse would in most cases not cause the ICRC to break confidentiality. Mr. Aeschlimann writes that the ICRC will "make a public denunciation only when strict conditions are met", and that to do so "will benefit the detainees and not harm them".

98. ICRC's confidentiality practices are such that only the detaining authority itself receives ICRC reports as of right. Where an ICRC report concerns the treatment of detainees by another country such as Afghanistan or the United States, Canada does not receive that ICRC report as of right. Nor would Canada likely become privy to such an ICRC report on an exceptional basis, since the ICRC stipulates that its reports are confidential, "not intended for publication", and are for the detaining authorities only. The ICRC's confidentiality is an extremely serious matter, and the ICRC writes—using both bold and italicized text—on its website:

> **"*The reports written by the ICRC after each visit are given to the detaining authorities and are not intended for publication* - the point being that detention problems are best solved through constructive dialogue based on mutual confidence, rather than in the glare of publicity which inevitably carries the risk of politicizing the issues. This is why the ICRC will not**

comment publicly on such issues as possible problems concerning the transportation of prisoners or their conditions of detention."

The relevant page of the ICRC website containing the above excerpt is attached as **Exhibit "EEE"** of my affidavit.

OTHER OPTIONS

99. I am aware that various commentators, organizations and politicians have proposed that the Canadian Forces build and staff a proper, safe detention facility in Afghanistan, either alone or (preferably) jointly with their NATO allies. The advantage of a joint detention facility is that it could both serve to hold detainees in conditions consistent with their human rights, and could serve as a training ground for the Afghan authorities to develop capacity and expertise in techniques of humane detention and interrogation that comply with international human rights and humanitarian law.

100. Canada already possesses the fundamental plans and personnel programs to build and staff a detention facility. The Canadian Forces Doctrine Manual, and Canadian Military Police Doctrine Manual, referred to earlier at paragraphs 24, expressly contemplate building detention facilities abroad, complete with operating procedures and draft layouts. The RCMP has contributed staff to the Canadian PRT in Kandahar since August 2005, to "advise, mentor, monitor and train the local Afghan police," doing so "in compliance with international law and standards". Those quotes are found in the most recent RCMP International Peacekeeping Branch Review (which although dated 2004/2005, has not been superseded on the RCMP website in February 2007) an excerpt of which is attached hereto as **Exhibit "FFF".**

101. In a series of internal DND emails in October 2003, Canadian Forces officials discussed potential funding and plans for detention facilities in Afghanistan. For

reasons that are unclear, these plans were never carried out. A copy of this document, obtained through ATI, is attached hereto as **Exhibit "GGG"**.

102. The Canadian government has a history of interning detainees for long periods during war. In World War II, the Canadian government maintained prisoner of war camps in Canada for German and Italian soldiers. According to a CBC Archives web page on "Canada's Forgotten POW Camps", obtained from the CBC website and attached as **Exhibit "HHH"**, more than 37,000 foreign soldiers were detained in these camps.

103. While failing to build detention facilities to protect the human rights of detainees, the Canadian Forces have gone to effort and expense to build other kinds of facilities in Afghanistan. An example is the acquisition, transport and installation by the Canadian Forces of a fast food facility in Kandahar. Some documents related to this facility obtained from DND through ATI are attached hereto as **Exhibit "III"**.

104. A detention facility aside, Canada's Detainee Agreement does not provide the same level of protection that is found in other countries' agreements of a similar kind.

105. The Dutch and British governments have also entered into treaties with the Afghan government for the transfer of detainees. A copy of the British document is found on the UK Parliament's website and is attached as **Exhibit "JJJ"**. An English language version of the equivalent Dutch document is found on the website of the Dutch Ministry of Foreign Affairs (the Nederlands Ministerie van Buitenlandse Zaken) and is attached as **Exhibit "KKK".** Both are hereinafter referred to respectively as the "British Detainee Agreement" and the "Dutch Detainee Agreement".

106. The Canadian, British and Dutch presences in Afghanistan are functionally similar. For example, as of October 2006, the Dutch forces comprised about 2100 personnel—about the same number as the Canadian Forces (the British forces are more numerous). The Canadian, British and Dutch forces are under the same NATO led ISAF command in Afghanistan. The Canadian, British and Dutch forces also in combat operations, predominantly in southern Afghanistan. A document from NATO's website showing the commonality of the mission by all three countries is attached as **Exhibit "LLL"** to my affidavit.

107. The Canadian government has stated that it is not interested in revisiting and improving its Detainee Agreement. Minister of National Defence Gordon O'Connor, who had the Dutch Detainee Agreement pointed out to him in the House of Commons on April 5, 2006, said that that "we have no intention of redrafting the agreement". A copy of the Minister's statement is attached as **Exhibit "MMM"** to my affidavit.

108. I make this affidavit in support of an application for judicial relief from the Canadian Forces' practice of transferring detainees into the custody of Afghanistan or the United States.

SWORN BEFORE ME at Ottawa,)
Ontario, this 14 day of)
March, 2007.)
)
)
)
)
A Commissioner for Taking Affidavits)
in the Province of Ontario

Yavar Hameed