INTERNATIONAL LAW FRAMEWORK FOR THE TREATMENT OF PERSONS DETAINED IN AFGHANISTAN BY CANADIAN FORCES

REPORT

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I. Introduction

1. I have been asked by the First Respondent, the Chief of the Defence Staff, to prepare this Report to address certain issues of international law which have been raised in these proceedings and, in particular, in the affidavits of Mr Hameed, Mr Neve and Professor Michael Byers.

2. I should say at the outset that I believe that those affidavits are based upon a number of serious misconceptions regarding the international law applicable to Canadian military operations in Afghanistan. While some of the statements which they make – in particular that the prohibition of torture in international law is absolute and has the status of a rule of *jus cogens* (i.e. a rule recognized by the international community of States as a whole as one from which no derogation is permitted) – are unquestionably correct, both deponents misunderstand the way in which that principle falls to be applied in the context of the operations in Afghanistan and its place within the wider framework of the international law applicable to those operations.

3. While I have set out below the details of my disagreement with Professor Byers, Mr Neve and Mr Hameed, it is perhaps useful to summarise the main features of that disagreement here. In my opinion, they misunderstand –

   (a) the legal basis for Canada to conduct military operations in Afghanistan and, in particular, the significance of the UNSC resolutions authorizing military operations;

   (b) which rules of international law, and, in particular, international humanitarian law ("IHL") are applicable to those operations;

(c) the significance of the fact that any detention of persons by Canadian forces, and any transfer of such persons to the Afghan authorities, occurs entirely within the territory of the State of Afghanistan; and

(d) the nature and effectiveness of the steps taken by Canada to comply with its international obligations.

4. In consequence, Mr Hameed and Mr Neve appear to conclude that if Canada is to comply with its international law obligations while still exercising a power of detention, it must establish its own prison in Afghanistan and allow those held there access to Canadian counsel to advise them of their legal rights (though without specifying under what law – international, Canadian or Afghan – those rights are said to arise). In my opinion international law [1] contains no requirement on Canada to act in the manner he suggests. Moreover, to confine Canada's participation in a UN peace operation in the way that they suggest would be inconsistent with the principles of international law governing such operations.

5. This Report is set out as follows. Part II considers the international legal basis for Canadian military operations in Afghanistan, including the power of detention. Part III examines certain consequences which flow from the decisions taken by the United Nations Security Council ("UNSC") with regard to Afghanistan. Part IV then turns to the international law relating to the standards of treatment of persons detained in the operations in Afghanistan. Finally, Part V addresses the application of those standards in practice.

II. The Legal Basis for Canadian Military Operations in Afghanistan

6. The starting point for any analysis of the international legal basis for Canadian operations in Afghanistan has to be the principle, laid down by the

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[1] I am not qualified to comment on the application of Canadian or Afghan domestic law and nothing in this Report should be taken as an attempt to do so.

International Court of Justice in the *Case of the SS Lotus (France v. Turkey)* in 1927 that "the first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State".[2] Bound up with this principle – and with the rules of international law relating to the use of force – is the principle that no State may deploy armed forces on the territory of another unless it can rely on one of the justifications for such deployment which is recognized by international law.

7. Mr Neve, Professor Byers and Mr Hameed do not directly address the principles set out in the preceding paragraph. They are, however, clearly established in international law and are incompatible with the premise, which appears to underlie much of their testimony, that the situation of a person detained by Canadian forces in Afghanistan can in some way be equated to that of a prisoner held by Canadian authorities in Canada in terms of the legal regime regarding access to counsel and transfer to the authorities of another State.

A. The Overall Legal Basis for Operations

8. In my opinion, the legal basis for Canadian forces' operations in Afghanistan rests on three separate elements, namely a mandate from the UNSC, the consent of the Government of Afghanistan and the international law right of individual and collective self-defence. The significance of these three elements varies, however, depending on which aspect of Canadian operations is under consideration.

9. Most Canadian forces in Afghanistan are deployed as part of the International Security and Assistance Force ("ISAF"). ISAF is a multinational force under NATO command which has been deployed to assist the Government of Afghanistan to restore peace and security in Afghanistan. It is not a "blue beret" force but it has been authorized by the UNSC under its powers in

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2 PCIJ Reports, Series A, No. 10, 1927, p. 18.

Chapter VII of the UN Charter. ISAF's original mandate was set out in UNSCR 1386 (2001) but this has been renewed and broadened in important respects in a number of subsequent resolutions, noticeably UNSCR 1510 (2003) which extended the mandate so that ISAF was authorized to operate outside Kabul. ISAF currently operates under the mandate conferred by UNSCR 1707 (2006). The principal resolutions are attached as Annex 1 to this Report.

10. The principal features of the ISAF UNSCRs of relevance here are (i) that the UNSC expressly considered that the responsibility for maintaining security and law and order in Afghanistan rested with the Government of Afghanistan established after the overthrow of the Taliban and expressly recognized as the legitimate government by the UNSC; (ii) ISAF was given a mandate to assist the Afghan Government in that task; and (iii) ISAF was empowered to "take all necessary measures" (UNSCR 1386, para. 3; UNSCR 1707 para. 2) to accomplish this task.

11. UNSCR 1707 and its predecessors were adopted under Chapter VII of the Charter of the United Nations. As such, they are legally binding on all States Members of the United Nations, including Canada and Afghanistan, by virtue of Article 25 of the Charter, which provides that "the Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter". It follows that Canadian forces operating as part of ISAF are authorized to do so by the mandate conferred by the UNSC. That provides a legal basis for the presence and operations of those forces. As such, it would be sufficient in and of itself. That mandate is, however, reinforced by the principles of consent and self-defence which are considered below.

12. The mandate contained in UNSCRs 1386, 1510 and 1707 does not apply to those Canadian forces which are present in Afghanistan outside the framework of ISAF, in particular those Canadian forces which are deployed as part of Operation Enduring Freedom ("OEF"), a US-led multinational

operation which is distinct from ISAF. The legal basis for their operations is provided by consent and self-defence. Nevertheless, it should be noted that the UNSC has expressly stated its support for the activities of OEF (see, e.g., UNSCR 1707, preamble, and UNSCR 1746 (2007) para. 25).

13. Taking first the consent of the Government of Afghanistan to Canadian operations on its territory, that consent has been manifested in a number of different instruments. The Afghanistan Compact, concluded on 1 February 2006 by the Islamic Republic of Afghanistan and the international community (Annex 2 to this Report), provides that –

> "Genuine security remains a fundamental prerequisite for achieving stability and development in Afghanistan. Security cannot be provided by military means alone. It requires good governance, justice and the rule of law, reinforced by reconstruction and development. With the support of the international community, the Afghan Government will consolidate peace by disbanding all illegal armed groups. The Afghan Government and the international community will create a secure environment by strengthening Afghan institutions to meet the security needs of the country in a fiscally sustainable manner.
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> To that end, the NATO-led International Security Assistance Force (ISAF), the US-led Operation Enduring Freedom (OEF) and partner nations involved in security sector reform will continue to provide strong support to the Afghan Government in establishing and sustaining security and stability in Afghanistan, subject to participating states' national approval procedures. They will continue to strengthen and develop the capacity of the national security forces to ensure that they become fully functional. All OEF counter-terrorism operations will be conducted in close coordination with the Afghan Government and ISAF. ISAF will continue to expand its presence throughout Afghanistan, including through Provincial Reconstruction Teams (PRTs), and will continue to promote stability and support security sector reforms in its areas of operation.
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> Full respect for Afghanistan's sovereignty and strengthening dialogue and cooperation between Afghanistan and its neighbours constitute an essential guarantee of stability in Afghanistan and the region. The international community will support concrete confidence-building measures to this end."

14. The Compact was expressly endorsed by the UNSC in UNSCR 1659 and UNSCR 1707 (2006), which described it as providing "the framework for the partnership between the Afghan Government and the international community" (Preamble, para. 6).

15. In addition, the "Technical Arrangements between the Government of Canada and the Government of the Islamic Republic of Afghanistan" of 18 December 2005 (Hameed, Exhibit L) and the two Arrangements on the Transfer of Detainees of 18 December 2005 (Hameed, Exhibit Y) and 3 May 2007 (attached as Annex 8 to this report), though not (as explained in paragraphs 73-74, below) legally binding instruments, are a clear manifestation of the consent of Afghanistan to the operation of Canadian forces on its territory for the purposes recognized therein.

16. Finally, there is the right of self-defence under international law. Article 51 of the United Nations Charter provides in relevant part that –

> "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."

It was this right which was the basis for the original Canadian deployment to Afghanistan in 2001, following the armed attack upon the United States on 11 September 2001 and the threat of further attacks. That the right of self-defence was triggered by those attacks was recognized by the UNSC in UNSCR 1368 (2001).[3] Canada and a number of other States invoked the right of collective self-defence in respect of those attacks upon the United States.

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[3] The statement, at paragraph 7 of Mr Hameed's affidavit, that "international legal authority for OEF is found in United Nations Security Council resolution 1368" is inaccurate. The international legal authority for OEF was derived from the right of self-defence under general international law, the application of which was recognized by the UNSC in resolution 1368. The resolution does not in itself provide a legal justification for military action in the way that the UNSCRs which mandate action by ISAF (discussed above) afford a legal justification for military action by ISAF forces.

17. The right of self-defence continues to be a part of the legal basis for OEF operations and is relevant to ISAF in that it serves to reinforce the mandate provided by UNSCR 1707 (2006) in affording a legal authority for the use of force by ISAF forces when they are attacked or threatened with attack.

B. The Legal Basis for Detention by Canadian Forces in Afghanistan

18. In the case of Canadian forces operating as part of ISAF a mandate to detain persons who pose a threat to the achievement of the objectives of ISAF is contained in the authorization by the UNSC to ISAF to "take all necessary measures". That (or very similar) language has been employed by the UNSC when it wished to authorize the use of force and it was plainly intended to carry such a connotation in Afghanistan. It would be wholly illogical for the authorization to extend to the use of lethal force against persons but not to include their detention.

19. That such language in the context of a UNSCR mandating a multinational force to restore security in a territory impliedly authorized the detention of individuals was recently accepted by the Grand Chamber of the European Court of Human Rights in its decision of 31 May 2007 in the two cases of *Behrami v. France* (App. No. 71412/01) and *Saramati v. France, Germany and Norway* (App. No. 78166/01). The two cases concerned events in Kosovo following the deployment there of KFOR, a multinational force led by NATO and authorized by UNSCR 1244 (1999)[4] to "use all necessary means" to fulfil its responsibilities. The case of *Saramati* concerned an applicant detained by KFOR who alleged that his detention violated his rights under Article 5 (freedom from arbitrary deprivation of liberty) of the European Convention on Human Rights ("ECHR"). Although UNSCR 1244 and its Annex do not expressly refer to detention, the Grand Chamber

[4] UNSCR 1244 (1999) is attached as Annex 3 to this Report.

concluded [5] that "KFOR's mandate included issuing detention orders" (Decision, para. 124).

20. While the KFOR mandate is not identical to that of ISAF (primarily because KFOR is charged with working alongside a United Nations civil administration entrusted with the governance of Kosovo, while ISAF assists the Afghan Government), the differences do not bear on this issue. Both forces have a mandate to assist a civil administration in restoring security and both are authorized to take the action necessary to achieve that goal. If the detention of persons who threaten its achievement is authorized in the case of KFOR, the same logic applies to ISAF.

21. Decisions of the European Court are, of course, of no more than persuasive authority elsewhere. Nevertheless, this decision is, in my opinion, highly persuasive both because it is the first instance of a human rights court examining this issue and because its reasoning is extensive and its conclusion convincing. It is also noticeable that the case was referred to a Grand Chamber at the admissibility stage. Article 30 of the European Convention (as amended) provides for such a reference on the basis that the case "raises a serious question affecting the interpretation of the Convention". This provision has seldom been invoked at the admissibility phase.

22. The authorization of the Security Council is reinforced, as a basis for detention by Canadian ISAF personnel, by three other considerations. First, there is the consent of the Government of Afghanistan. In addition to the more general expression of consent to the operation of the foreign military forces contained in the Afghanistan Compact and earlier instruments, the Technical Arrangements between the two Governments (Hameed, Annex L) expressly refer (at para. 11) to "the detention of persons" as one of the tasks which may be undertaken by Canadian forces. Moreover, there is the Arrangement of December 2005 and the May 2007 supplement, both of

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[5] The decision was reached by a majority but the size of the majority was not disclosed. That is the standard practice in respect of admissibility decisions.

which are premised on the basis that Canadian forces will detain people or there would be no need to provide for transfers to the Afghan authorities.

23. Secondly, the right of self-defence, described above, includes the right of Canada to engage in the defence of its forces in Afghanistan. That right plainly extends to the use of force in the face of attacks and – for the same logical reasons as have been set out above in connection with the United Nations mandate – must also include the right to take the lesser step of making an attacker prisoner.

24. Lastly, a power to take and detain prisoners is part of the IHL applicable to any armed conflict (though, as explained below, there are different rules relating to international and non-international conflicts). That conclusion may not be apparent at first sight, as IHL is not, for the most part, couched in terms of powers for the armed forces. Nevertheless, the existence in IHL of rules for the protection of prisoners presupposes a power to take and detain prisoners so long as that is done within the confines of those rules. An example may be found in the decision of the English Court of Appeal in *R (Al-Jedda) v. Secretary of State for Defence* [2006] EWCA Civ 327; [2006] 3 WLR 954, in which the Court of Appeal accepted (in the context of detention of a terrorist suspect by British troops serving in the Multi-National Force in Iraq) that a power of detention was implicit in customary IHL (see para. 46 of the Judgment).[6]

25. In the case of Canadian forces operating outside ISAF, it would be these three considerations which confer any power of detention as the ISAF mandate would not apply.

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[6] The judgment of the Court of Appeal is under appeal to the House of Lords which will hear argument on 28-30 October 2007.

III. The Broader Legal Significance of the UNSCRs

26. While I have considered the specific implications of the UNSCRs with regard to the ISAF mandate in the preceding Part of this Opinion, there are two other, more general, implications which need to be considered.

A. The Significance of the Behrami *and* Saramati *Decision*

27. The first concerns the significance of the decision of the Grand Chamber in the *Behrami* and *Saramati* case (above). The Grand Chamber there concluded that the actions of a national contingent which forms part of a United Nations authorized (but not a "blue beret") force are in principle attributable to the United Nations with the consequence that they do not engage the international human rights law obligations of the State which has supplied that contingent (see, in particular, paragraphs 128-141 and 146-149). The Grand Chamber considered that the UNSC had delegated part of its powers of maintaining international peace and security to KFOR. In that context it noted that this delegation was prior and explicit, that the relevant UNSCR (UNSCR 1244 (1999)) put sufficiently defined limits on the delegation of power by fixing the mandate with adequate precision as to objectives and the roles and responsibilities of those concerned, and that the leadership of KFOR was required to report to the Security Council. The Grand Chamber considered the fact that UNSCR 1244 would remain in force indefinitely unless the UNSC took a positive decision to repeal it (something which could be blocked by a veto from any one of the permanent members of the UNSC) but did not deem this to preclude the conclusion that the UNSC exercised sufficient control over the operation to make the acts of KFOR attributable to the United Nations.

28. The same considerations are applicable to ISAF. The mandate is prior and explicit. It is sufficiently detailed as to the objectives and the role and responsibilities of ISAF and the other parties. That the UNSCRs do not descend into detail is not significant as "the broad nature of certain provisions … could not be eliminated altogether given the constituent nature of such an

instrument whose role was to fix broad objectives and goals and not to describe or interfere with the detail of operational implementation and choices" (*Behrami and Saramati*, para. 134). ISAF has a reporting requirement similar to that for KFOR (see para. 5 of UNSCR 1707). Indeed, the UNSC exercises a greater degree of control in respect of ISAF than it does vis-à-vis KFOR, because the ISAF mandate is not indefinite but has to be renewed annually. Both ISAF and KFOR are multinational forces led by NATO.

29. The most significant difference (to which I have already referred) is that there is no United Nations civil administration governing Afghanistan, the way that UNMIK has responsibility for civil administration in Kosovo under UNSCR 1244. In my opinion, however, that makes no difference to the issues under consideration here. The fact that in Kosovo the UNSC chose to establish a civil administration of its own, whereas in Afghanistan it has decided to support an elected Afghan Government (and has established a United Nations mission, the United Nations Assistance Mission in Afghanistan ("UNAMA"), established by UNSCR 1471 (2003) and currently governed by UNSCR 1746 (2007), to work alongside that Government) logically makes no difference to the issue of United Nations responsibility for the acts of the military force which the UNSC has established and mandated to restore security in the territory concerned. It is noticeable that nothing in the *Behrami and Saramati* decision suggests that the Grand Chamber considered the existence of the United Nations civil administration was decisive.

30. The conclusion which the Grand Chamber drew in respect of whether the acts of KFOR engaged the international law obligations of the contributor countries under the Convention was that –

> "Since operations established by UNSC Resolutions under Chapter VII of the UN Charter are fundamental to the mission of the UN to secure international peace and security and since they rely for their effectiveness on support from member states, the Convention cannot be interpreted in a manner which would subject the acts and omissions of Contracting Parties which are covered by UNSC Resolutions and

> occur prior to or in the course of such missions, to the scrutiny of the Court. To do so would be to interfere with the fulfilment of the UN's key mission in this field including, as argued by certain parties, with the effective conduct of its operations. It would also be tantamount to imposing conditions on the implementation of a UNSC Resolution which were not provided for in the text of the Resolution itself." (Decision, para. 149)

31. In my opinion, the same considerations apply here. If the decision in *Behrami and Saramati* is followed, then the act of detaining (and transferring to Afghan custody) a person held by ISAF forces (including the Canadian contingent) is an act attributable to the United Nations. Accordingly, that person is not within the separate jurisdiction of Canada and Canada's obligations under the international human rights treaties (such as the International Covenant on Civil and Political Rights, 1966, "ICCPR") which depend upon a person being within the territory or jurisdiction of Canada would not be applicable as the detainee would be in Afghan territory and within United Nations and/or Afghan, rather than Canadian, jurisdiction while detained by ISAF.

32. I understand that the United Nations Human Rights Committee's General Comment No. 31 (UN Doc. HRI/GEN/1/Rev.7, p. 192) might be taken to adopt a contrary position but the passage in the General Comment dealing with peacekeeping operations (the final sentence of para. 10) is not fully reasoned and was not arrived at after hearing argument, whereas the *Behrami and Saramati* Decision is binding on the parties and was reached only after hearing arguments which are exhaustively discussed in the Decision. In my opinion, the Decision in *Behrami and Saramati* is a more persuasive authority than the single sentence in General Comment No. 31.

33. Moreover, and quite separately, it is important to bear in mind that the role of ISAF is expressly stated in the UNSCRs to be to assist the Government of Afghanistan in restoring security (while the UNSCRs describe the task of restoring security as being primarily that of Afghanistan itself). In those circumstances, the transfer, after a reasonable period of time, of persons

captured by ISAF forces in Afghanistan to the Afghan Government is entirely in accordance with the mandate and, indeed, a natural fulfilment of it. In addition, the fact that the UNSC has expressly declared support for the Afghan Government and is itself directly involved in working with that Government (for example through UNAMA; see above) is relevant to the question of what reliance can be placed upon assurances given by that Government with regard to transferred prisoners. The Government of Afghanistan is not free from international scrutiny, nor is the scrutiny to which it may be subjected by Canada the only safeguard against ill-treatment of a transferred prisoner. In such circumstances, to interpret human rights obligations of one State as precluding the transfer of detainees taken prisoner in Afghanistan and held there to the Government of Afghanistan would be to frustrate the achievement of the objectives of the resolutions establishing ISAF and defining its mandate.

B. *Article 103 of the United Nations Charter*

34. The second general consideration is that Article 103 of the United Nations Charter provides that obligations arising under the Charter prevail over the obligations of States under other international agreements. As the ICJ has held, this priority extends to the obligation to comply with UNSCRs (see the 1992 decision in the *Lockerbie* case).[7] That priority has recently been recognized as extending to human rights treaties both by the English Court of Appeal (in *Al-Jedda*, above) and the Court of First Instance of the European Communities (see the decisions in *Kadi v. Council of the European Union (Case T-315/01)* Official Journal C/281/17, 12 November 2005, (2006) 45 ILM 77, and *Yusuf v. Council of the European Union (Case T-306/01)*, Official Journal C/281/17, 12 November 2005).[8] These authorities have been

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[7] *Case concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom) (Provisional Measures)*, ICJ Reports, 1992, p. 3 at para. 39.

[8] Both decisions are currently under appeal to the Court of Justice of the European Communities. There will be a hearing on 2 October 2007.

referred to without any form of disapproval by the Grand Chamber in *Behrami and Saramati*, though they are all under appeal.

35. It is said by Mr Hameed and Mr Neve (see, in particular, paragraph 25 of the First Affidavit of Mr Neve, pages 25, 26 and 30 of Exhibit E to that Affidavit, and pages 4-5 of the letter of 7 June 2007 from Mr Neve to the Minister of National Defence) that Canada's obligations under human rights treaties require it to maintain a separate prison in Afghanistan (or to remove detained persons to Canada) and to allow access to legal counsel on a basis similar to that for prisoners in Canada. In my opinion, such an obligation (if it existed at all, which I do not believe that it does) would be overridden by the obligation of Canada, now that it has taken up the authorization conferred by the UNSC on ISAF by contributing troops to ISAF, to comply with the UNSCRs governing ISAF.

IV. The Status of, and Standards applicable to, Persons Detained by Canadian Forces in Afghanistan

36. The first and most important body of law regarding the standards applicable to persons detained by Canadian forces is IHL. IHL distinguishes between international and non-international conflicts with the latter being subject to a more limited body of rules than the former. In the case of Canadian operations in Afghanistan, the relevant treaties for an international conflict would be the four Geneva Conventions of 1949 and for a non-international conflict common Article 3 of those Conventions. The Additional Protocols to the Conventions, adopted in 1977, are binding on Canada but would not apply to operations in Afghanistan as Afghanistan is not a party. Additional Protocol I is applicable to an international conflict only if there are States on both sides of that conflict which are party to the Protocol (which was not the case with the original fighting in Afghanistan). In the case of a non-international conflict, Additional Protocol II is applicable only to a conflict within the territory of a party to the Protocol.

37. It follows that if the conflict currently taking place in Afghanistan is an international conflict (ie one between States parties to the 1949 Conventions) the relevant IHL would be the four 1949 Conventions, together with the relevant customary international law and any specialist treaties (eg on weaponry) to which the relevant States are parties. If the conflict is to be characterised as non-international, then the applicable IHL is common Article 3 of the Geneva Conventions and the customary international law principles identified by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor v. Tadic* (1995) 105 ILR 419 at pp. 504-20 (paragraphs 96-127 of the Judgment).

38. I notice that the Applicants' expert on international law, Professor Byers, considers that the current conflict in Afghanistan is properly characterised as non-international and hence as governed by common Article 3 and the customary IHL of non-international conflicts (Byers affidavit, para. 11) and I have therefore proceeded on that basis so as to avoid complex questions of international law which are not in issue in these proceedings.

39. An important consequence is that the persons detained by Canadian forces, whether or not acting within the ambit of ISAF, are not prisoners of war ("POWs"). There is no concept of POW in a non-international conflict and the criminal law of the State concerned will continue to apply to acts such as the bearing of arms or the infliction of violence (see, e.g., the Canadian Forces, *Law of Armed Conflict Manual*, Annex 4 to this Report, para. 1706).

40. For the sake of completeness, however, I would observe that even if the conflict is characterised as an international conflict, a person captured would be entitled to prisoner of war status only if he or she met the very strict requirements of Art 4A of the Third Geneva Convention. In my opinion, it is unlikely that the Taliban and Al-Qaeda fighters in Afghanistan would meet that test, as it appears that they do not wear any form of "fixed distinctive sign" such as would distinguish them from the civilian population as required by Art. 4A. Nor do they meet the condition of conducting their operations in

accordance with the laws and customs of war. In practice, therefore, none of those detained by Canadian forces in Afghanistan would have the status of POW under IHL whether the conflict is characterised as international or non-international. It follows that Mr Hameed's comparison with the Canadian practice regarding POWs in World War Two is inapposite.

41. I note that both the 2005 Arrangement and the Canadian doctrine regarding prisoners require that the standards of treatment required by the Third Convention should be applied to all persons taken prisoner during combat. Nevertheless, in my opinion Mr Hameed is wrong when he describes this as meaning that the Canadian forces are to "afford all the rights and privileges attached to that status" to anyone whom they capture[9]. Treating a prisoner in accordance with the standards in the POW Convention is not at all the same thing as according him the status of POW. Thus those provisions of the Third Convention which are dependent upon status are not rendered applicable either by the Agreement or the Canadian doctrine.

42. Instead, I read the doctrine and the Arrangement as providing that the standards of humanitarian treatment in the POW Convention (generally agreed to be the highest in IHL) shall be applied but not that those detained shall be accorded the status of POWs to which they are plainly not entitled under international law.

43. It follows that the principal yardstick for the treatment of detainees is to be found in Article 3, common to all four Geneva Conventions, which provides that --

> "In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party shall be bound to apply, as a minimum, the following provisions:

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[9] Hameed Affidavit, para. 25. The passage which he quotes from the Detainee Doctrine Manual does not support his conclusion, nor do the relevant provisions of the CF LOAC Manual; see, in particular, para. 1702.2, Annex 4 to this Report.

> (1) Persons taking no active part in hostilities, 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, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
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> To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons.
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> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
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> (b) taking of hostages;
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> (c) outrages upon personal dignity, in particular, humiliating and degrading treatment;
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> (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are re4cognized as indispensable by civilized peoples.
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> (2) The wounded and sick shall be collected and cared for.
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> An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.
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> The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.
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> The application of the preceding provisions shall not affect the status of the Parties to the conflict."

44. That provision is supplemented by the policy which Canada has voluntarily chosen to adopt of applying the principles and spirit of the full Geneva Conventions (see, e.g., *Law of Armed Conflict Manual*, para. 1702.2, Annex 4 to this Report), including the standards of treatment for POWs, as explained above.

45. In addition to IHL, it is necessary to have regard to international human rights treaties. The International Court of Justice has rejected the suggestion that such agreements are not applicable in time of war or armed conflict (see, e.g., the Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reps., 1996, p. 226 at p. 240, para. 25; the Advisory Opinion on the

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Reps. 2004, p. 136 at pp. 177-178, paras. 105-106, and the decision in the *Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda*, decision of 19 December 2005, (2006) 45 ILM 271). Moreover, the House of Lords has recently held that the European Convention was applicable to a person detained by British forces in Iraq in a detention centre controlled by those forces during the occupation of Iraq.[10] It does not, however, follow from that that every human rights treaty to which Canada is party applies to its detention of prisoners taken in Afghanistan during the conflict there in the same way as it would to a prisoner held in Canada outside the context of an armed conflict.

46. First, in the case of the Canadian contingent in ISAF, the decision of the Grand Chamber of the European Court of Human Rights in *Behrami and Saramati*, discussed above, suggests that Canada's obligations under its human rights treaties are not engaged.

47. Secondly, not all of the provisions of all human rights treaties apply extraterritorially. For example, while some of the provisions of the Convention against Torture, 1984, are intended to have universal application (e.g. Article 4), others are more limited in their scope. Thus, Article 2(1) provides that "each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture *in any territory under its jurisdiction*" (emphasis added). Quite apart from the *Behrami and Saramati* point, considered above, I do not believe that it could seriously be asserted that any part of the territory of Afghanistan is currently within the jurisdiction of Canada. Canadian forces are in Afghanistan in order to assist the Government of Afghanistan. They are not themselves exercising legislative, judicial or even administrative functions there. The European Court of

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[10] *R. (Al-Skeini) v. Secretary of State for Defence* [2007] 3 WLR 33, paras. 107 and 132 (Lord Brown).

Human Rights has made clear, in a unanimous judgment of the Grand Chamber in *Bankovic v. Belgium and Others*, (2001) 123 ILR 94, that the concept of "jurisdiction" is central to the scope of the European Convention on Human Rights with the consequence that the Convention is not rendered applicable to an individual simply because that individual is affected by acts attributable to a State Party to the Convention. In my opinion, the same logic applies to other human rights provisions, including Article 2(1) of the Convention against Torture, 1984 ("CAT").

48. Thirdly, even where a human rights treaty may be applicable to the way in which a State treats persons outside its territory, the fact that those persons are present on the territory of another State cannot be overlooked. In such circumstances, the obligations of the first State under the human rights treaty have to take account of its obligations to respect the territorial sovereignty of the second State.

49. That issue was recently considered by the English Court of Appeal in *R(B) v. Secretary of State for Foreign and Commonwealth Affairs* [2005] QB 643. That case concerned the application of the European Convention on Human Rights to two boys who had taken refuge in the British Consulate in Melbourne. The Court of Appeal proceeded on the basis (without actually deciding the point) that while the boys were inside the Consulate they were within the jurisdiction of the United Kingdom and the Convention was applicable to them. The Court, however, rejected the argument that the United Kingdom authorities were barred by the Convention from handing the boys over to the Australian authorities. Counsel for the boys had relied on the decisions in *Soering v. United Kingdom,* 98 ILR 270, and *Chahal v. United Kingdom,* 108 ILR 385, which decided that a State was precluded by Article 3 of the Convention from extraditing or deporting a person from its own territory to that of a State in which there was a real risk that the person

concerned would be tortured.[11] He argued that there was a risk of torture if the boys were returned to the detention centre from which they had escaped.

50. The Court of Appeal noted that in *Bankovic* the European Court of Human Rights had insisted that the Convention had to be interpreted and applied in the context of international law as a whole. The Court of Appeal went on to say that –

> "In a case such as *Soering* the contracting state commits no breach of international law by permitting an individual to remain within its territorial jurisdiction rather than removing him to another state. The same is not necessarily true where a state permits an individual to remain within the shelter of consular premises rather than requiring him to leave. It does not seem to us that the Convention can require states to give refuge to fugitives within consular premises if to do so would violate international law. So to hold would be in fundamental conflict with the importance that the Grand Chamber attached in *Bankovic's* case 11 BHRC 435 to principles of international law. Furthermore, there must be an implication that obligations under a Convention are to be interpreted, in so far as possible, in a manner that accords with international law." (para. 84)

51. The Court concluded that, since international law normally required consular officials to surrender a fugitive to the authorities of the receiving State, the Convention could not normally require them to do otherwise. It added that –

> "We have concluded that, if the *Soering* approach is to be applied to diplomatic asylum, the duty to provide refuge can only arise under the Convention where this is compatible with public international law. Where a fugitive is facing the risk of death or injury as the result of lawless disorder, no breach of international law will be occasioned by affording him refuge. Where, however, the receiving state requests that the fugitive be handed over the situation is very different. The basic principle is that the authorities of the receiving state can require surrender of a fugitive in respect of whom they wish to exercise the authority that arises from their territorial jurisdiction: see article 55 of the 1963 Vienna Convention on Consular Relations. Where such a request is made the Convention cannot normally require the

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[11] This same principle has been recognized in the views of the United Nations Human Rights Committee, e.g, in *Kindler v. Canada,* 98 ILR 426, and *Ng v. Canada,* 98 ILR 479, and by the Supreme Court of Canada in its judgment in *Suresh v. Canada (Minister of Citizenship)*, (2002) 208 DLR (4th) 1.

> diplomatic authorities of the sending state to permit the fugitive to remain within the diplomatic premises in defiance of the receiving state. Should it be clear, however, that the receiving state intends to subject the fugitive to treatment so harsh as to constitute a crime against humanity, international law must surely permit the officials of the sending state to do all that is reasonably possible, including allowing the fugitive to take refuge in the diplomatic premises, in order to protect him against such treatment. In such circumstances the Convention may well impose a duty on a contracting state to afford diplomatic asylum." (para. 88) [12]

52. The factual setting is, of course, different from that of the present case but the important point, for present purposes, is that the Court of Appeal considered that the *Soering* doctrine could not simply be transposed from the situation where a State has a person in detention on its own territory and is contemplating the transfer of that person to another State to the situation where a State has custody of a person on the territory of another State and is contemplating the transfer of that person to the authorities of that other State. The affidavits of Professor Byers, Mr Neve and Mr Hameed, by contrast, proceed on the basis that there is no material difference between the two cases.

53. Finally, the International Court has made clear (in the cases cited at paragraph 45, above) that where a human rights treaty applies in time of armed conflict, its application will frequently be limited by the provisions of IHL.

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[12] The Court considered that whether a lesser level of threatened harm would entitle a State to give diplomatic asylum was an unsettled question (para. 89).

V. The Application of these Standards in Practice

54. I now turn to examine the implications of the standards set out in the previous section for the detention and transfer of persons by Canadian forces in Afghanistan.

A. Detention

55. I have already set out my reasons for thinking that the detention, at least for a short period, of persons captured by Canadian forces in Afghanistan is lawful under international law. Once that is established, there is then a clear duty of humane treatment under both IHL and human rights law, although whether (in the case of ISAF) compliance with those standards is the responsibility of the United Nations (as decided in *Behrami and Saramati*) or the individual troop contributing nation is another matter. It is not, in any event, suggested that Canadian forces are not treating those whom they detain in accordance with the humanitarian standards required. Nevertheless, I have read the passages in the Canadian *Law of Armed Conflict Manual* (Annex 4 to this Report), Chapter 1 of the Canadian Forces' *Code of* Conduct (Annex 5 to this Report), and the Rules distributed to the Canadian Forces serving in ISAF (Annex 6 to this Report), as well as the documents at Exhibit T to the affidavit of Mr Hameed and in my opinion, if the standards laid down there are in fact applied by Canadian forces in Afghanistan, there is no doubt that the Canadian forces have met any international law requirements concerning humane treatment which could plausibly be said to be applicable to them.

56. Mr Hameed and Mr Neve appear, however, to contend that –

(1) Canada has a duty to allow anyone detained in Afghanistan by its forces access to Canadian counsel;

(2) Canada may in certain circumstances have an obligation to maintain a long-term detention facility under its own control in Afghanistan;

(3) Canada may in certain circumstances have a duty to remove persons detained by its forces to custody in Canada; and

(4) Canada may in certain circumstances have a duty to try such persons in Canadian courts.

57. In my opinion, there is no international law requirement for Canada to do anything of the kind.

58. Nothing in IHL -- including both common Article 3 of the Geneva Conventions and the principles regarding the humane treatment of POWs requires Canada to allow persons whom it detains in the course of armed conflict in another State access to counsel. Such persons are held not as criminal suspects but under powers conferred by the ISAF mandate, the law of armed conflict/IHL, the right of self-defence and the consent of the State of Afghanistan, as set out above. IHL has never conferred a right of access to counsel upon persons detained in those circumstances. Nor, indeed, does it do so upon POWs. In my opinion, Article 9 of the ICCPR cannot be read as overriding the principles of IHL in this regard. Article 9 is concerned with two matters:- protection from arbitrary deprivation of liberty, but detention in accordance with a United Nations mandate and the applicable IHL is not arbitrary;[13] and the protection of the rights of criminal suspects, but the detainees in issue are not criminal suspects.

59. Nor, in my opinion, is Canada required to construct and operate its own prison in Afghanistan or to transfer those it has detained to Canada. Again there is nothing in IHL or any applicable human rights treaty which requires such action. As I have already explained, the fact that Canada detained POWs in Canada itself during the Second World War (and other conflicts) is immaterial. The persons detained in the present case are not POWs, for the reasons I have given, and even if they were, there would be no obligation to hold them in Canada as opposed to Afghanistan.

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[13] See the decision of the English Court of Appeal in *R (Al-Jedda) v. Secretary of State for Defence* [2006] 3 WLR 954.

60. Lastly, so far as prosecution is concerned, to the extent that the persons detained might be considered as having committed criminal offences, those would be offences under the law of Afghanistan. In the case of a non-international armed conflict, the State in which that conflict takes place remains free to treat those who take up arms against the lawful authorities as criminals under its own law. That is the situation to which the Canadian Forces *Law of Armed Conflict Manual* [14] is referring when it says that "a governmental authority [engaged in such a conflict] is still entitled to treat its opponents in accordance with its national legislation (i.e. as traitors or common criminals)". Canadian jurisdiction (under international law) would be limited to cases of persons accused of war crimes, torture or crimes against humanity.

61. Moreover, in my opinion it is not simply that Canada has no obligation to behave in the way suggested by Mr Hameed, it probably has no right to do so as a matter of international law. Under general international law, it is unlawful for one State to exercise governmental authority on the territory of another State (see para. 6, above citing the decision of the Permanent Court of International Justice in the *Lotus* case). That general principle is subject to only limited exceptions. In the present case, the presence of Canadian forces is lawful under the terms of the ISAF mandate and in accordance with the consent given by the Afghan Government and the principle of self-defence. The exercise by Canada of a limited degree of governmental authority on Afghan territory is, accordingly, rendered lawful. However, the emphasis has to be on the word "limited". Canada is empowered to exercise governmental authority on Afghan territory only for the purpose of, and to the extent necessary for, the achievement of the goals of the ISAF mandate and the objectives permitted by the right of self-defence and the consent of the Afghan Government. The ISAF mandate confers power only to assist the Government of Afghanistan and neither that mandate nor the other elements

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[14] Annex 4 to this Report.

on which Canadian military presence in Afghanistan rests entitle Canada to run its own prisons in Afghanistan as though they were in Ottawa, to insist upon access to Afghanistan for Canadian private lawyers, to conduct trials of Afghan nationals or to remove such nationals from the territory of Afghanistan against their will or that of their Government. To do so would be incompatible with the territorial sovereignty (and possibly with the law) of Afghanistan [15]

62. It would also be incompatible with the good faith application of the ISAF mandate. For a State which has contributed troops to a UNSC mandated operation designed to assist the Government of Afghanistan to restore security to insist upon the measures suggested by Mr Hameed would be to step completely outside the goal of assisting the Government of Afghanistan and embark instead upon something more like the establishment of an old-fashioned regime of capitulations. If each troop contributing nation were to do the same, each applying its own notion of what, for example, constituted the requisite access to counsel, the result would be to make effective international action impossible. As the European Court of Human Rights Grand Chamber put it in *Behrami and Saramati*, to impose conditions of this kind on the implementation of UNSC resolutions mandating a multinational force would be to interfere with the fulfilment of the UN's key mission in this field and to interfere with the effective conduct of its operations.[16]

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15 In that context I should note my disagreement with Mr Hameed when he says, at para. 20 of his affidavit, that "Canada and Afghanistan have agreed that Canadian personnel operating in Afghanistan are, under all circumstances, immune from Afghan law". That is not what the Agreement regarding the Status of Personnel in Afghanistan (Hameed, Exhibit M) provides. What Mr Hameed refers to as an "Agreement" is in fact a set of "Technical Arrangements" (Hameed Exhibit L), to which the provisions on Status of Personnel are an annex; like the Arrangements on transfer of detainees, these instruments are not intended to be legally binding – see paragraphs 72-73, below. The Technical Arrangements and the Annex on Status of Personnel do not treat Canadian personnel as "immune from Afghan *law*"; they are rather a standard status of forces agreement (though in a non-binding form) which gives immunity to visiting personnel from local *jurisdiction*. They do not alter the duty of respect which Canada and its forces owe, while in Afghanistan, to Afghan sovereignty and Afghan law.

16 See paragraph 149 of the Decision, quoted in paragraph 30, above, of this Report.

B. Transfer

63. Turning to the issue of the transfer of detainees to the Afghanistan authorities, Professor Byers maintains that –

> "Canada, by transferring detainees to Afghanistan in circumstances where there is objective knowledge that 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 [of December 2005] fails to guard against this possibility." (Byers, para. 16)

Like Mr Neve and Mr Hameed, Professor Byers also maintains that in these circumstances Canada would be in breach of Article 7 of the ICCPR and Article 3 of the CAT. For several reasons, I do not share their view.

64. At the outset, I do not agree that all of the provisions relied on by Professor Byers and Mr Hameed impose obligations of the kind and extent suggested. Common Article 3 of the Geneva Conventions does not contain the equivalent of a "*Soering* principle". Neither its text, nor the practice of States in its application, suggests that the prohibitions it contains were intended to include prohibitions on transfer to other States, let alone a doctrine as restrictive as the "*Soering* principle". On the contrary, the fact that there are express restrictions placed upon the transfer in international conflicts of protected persons held under the Third Geneva Convention (POWs) and the Fourth Convention (civilian detainees) suggest that no such restrictions were considered to be implicit in the other provisions of the Conventions.[17] The specific provisions limiting the transfer of protected persons are not applicable to common Article 3 conflicts.

65. I note that Professor Byers does not directly assert that there is a "*Soering* principle" implicit in common Article 3. Instead, he relies upon Article 16 of the International Law Commission ("ILC") Articles on State Responsibility (quoted at para. 15 of his affidavit) as the basis for an argument that if Canada

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[17] See, e.g., GCIII Art. 12 and GCIV Art. 45.

were to transfer a detainee to Afghanistan and that detainee were later to be tortured, Canada might be responsible for, in effect, aiding and abetting the unlawful act by Afghanistan. That argument is, with respect, misconceived. The official ILC Commentary to Article 16 makes clear that responsibility can be established on the basis of aiding and abetting only when three conditions are satisfied –

> "Article 16 limits the scope of responsibility for aid and assistance in three ways. First, the relevant State organ or agency providing assistance must be aware of the circumstances making the conduct of the assisted State internationally wrongful; secondly, the aid or assistance must be given with a view to facilitating the commission of that act and must actually do so; and thirdly, the completed act must be such that it would have been wrongful had it been committed by the assisting State itself."

It then elaborates on the second requirement as follows:-

> "The second requirement ... limits the application of Article 16 to those cases where the aid or assistance is clearly linked to the subsequent wrongful conduct. A State is not responsible for aid or assistance under Article 16 unless the relevant State organ intended, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct and the internationally wrongful conduct is actually committed by the aided or assisted State. There is no requirement that the aid or assistance should have been essential to the performance of the internationally wrongful act; it is sufficient if it contributed significantly to that act."[18]

66. It is, in my opinion, unarguable to suggest that, in transferring a detainee to the Afghan authorities in circumstances where press reports about the treatment of prisoners *in general* are said to give rise to a risk that, to use Professor Byers' words, the detainee "*might* be tortured or *might* be transferred onwards to face torture or other mistreatment at the hands of a

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[18] Crawford, *The ILC Articles on State Responsibility* (2002), p. 149, paras. (3) and (5). The relevant parts of the Commentary are reproduced for ease of reference as Annex 7 to this Report. Article 16 of the ILC Articles was taken as stating a rule of customary international law by the International Court of Justice in its recent decision in the *Genocide Case (Bosnia and Herzegovina v. Serbia and Montenegro)*, 26 February 2007, (2007) 46 ILM 185 at para. 420.

third country" (Byers, para. 16, emphasis added) Canada has the knowledge and intention required by the ILC as the basis for liability under Article 16 of the ILC Articles on State Responsibility.

67. As for Article 3 of the CAT, I do not agree that it is applicable at all to the actions of Canadian forces in Afghanistan. Article 3(1) provides that –

> "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."

Professor Byers assumes that this provision applies to Canadian forces in Afghanistan but that assumption cannot be reconciled with the text of the provision. The transfer to the Afghan authorities by Canada of a person detained by Canadian forces *in Afghanistan* would not involve expulsion or extradition (each of which terms assumes that the person concerned is sent across an international frontier). The term "return" is potentially less restricted but the addition of the explanatory word "*refouler*" makes clear that it is also conceived as involving a transfer across an international frontier. The term "*refouler*" is a term of art from the international law of refugees, where it is clearly limited to the transfer of a refugee to his State of nationality (or a third State in which he is at risk of persecution) from the territory of another State.

68. Consequently, the only provision relied on by Professor Byers which I agree might be applicable is Article 7 of the ICCPR. That provision has been interpreted by the United Nations Human Rights Committee (following the lead of the European Court in cases like *Soering*) as impliedly including a duty not to send someone to a State where there is a real risk that they will be tortured.[19] Nevertheless, there are several reasons why I do not believe that there is an arguable case that Canada is in breach of that provision.

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[19] See, in particular, *Kindler v. Canada*, 98 ILR 426, and *Ng v. Canada*, 98 ILR 479.

69. First, Professor Byers, Mr Neve and Mr Hameed do not consider the effect of the UNSC mandate and whether the actions of Canadian forces forming part of ISAF are attributable to the United Nations under the principles laid down in *Behrami and Saramati*. This issue has already been addressed above.

70. Secondly, and quite apart from that first objection, their approach ignores the fact that, for the reasons given above, the starting point of any inquiry has to be that Canadian forces are operating on the territory of another State and have only limited powers thereon. The situation is quite different from that of cases like *Soering* or the equivalent ICCPR decisions (eg *Kindler v. Canada; Ng v. Canada*) in which the issue is whether a State may transfer to another State a person who is currently on the territory of the first State and whom it has no legal obligation to transfer. In the circumstances of Afghanistan, both the United Nations mandate and the general principles of respect for the sovereignty of the host State suggest that transfer of prisoners should be the norm and that the ordinary "*Soering* principle" cannot be applied without very substantial qualification.

71. Thirdly, even if the "*Soering* principle" were to be applied, the test suggested by Professor Byers is not the test which has been applied under the ICCPR or other human rights agreements. The standard which has been applied in all the relevant authorities is whether there are *substantial grounds* for believing that there is *a real risk* that *this particular person* will be subjected to torture (or transferred to a third State where he would be so treated).[20] Professor Byers, Mr Neve and Mr Hameed are inviting the Court to go well beyond that test:-

(a) They invite the Court to proceed on the basis not of information relating to specific detainees but of press reports concerning conditions in Afghan prisons in general. That is precisely the approach rejected by a Grand Chamber of the European Court of Human Rights in *Mamatkulov and*

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[20] See, e.g., the decision of the House of Lords in *R. v. Secretary of State*, ex parte *Yogathas* [2003] 1 AC 920, which contains a useful synthesis of the authorities.

Askarov v. *Turkey* (Judgment of 6 February 2005, paras. 72-73), where the Court held that generalised reports were not sufficient to sustain the specific allegations made by the applicants unless corroborated by other evidence.

(b) They invite the Court to substitute for the test of "substantial grounds of belief that there is a real risk" a test which Professor Byers sums up in paragraph 16 of his affidavit as one that "the detainee "*might* be tortured or *might* be transferred onwards to face torture or other mistreatment at the hands of a third country" (emphasis added). That is an altogether different, lower and unsupported standard.

72. Lastly, Professor Byers, Mr Neve and Mr Hameed fail, in my opinion, to attach sufficient weight to the safeguards contained in the Arrangements concluded between Canada and Afghanistan on 18 December 2005 and then supplemented by a further set of Arrangements on 3 May 2007.[21]

73. Contrary to what is said by Professor Byers, I do not believe that these Arrangements are treaties as they were never intended to be legally binding as a matter of international law. Article 2 of the Vienna Convention on the Law of Treaties 1969 (which is generally accepted as the definitive statement of the international law on treaties) defines a treaty as "an international agreement concluded between States in written form and governed by international law ... whatever its particular designation". The International Law Commission Commentary on Article 2 makes clear that the phrase "governed by international law" was intended to include the requirement (familiar in the common law of contract) that there should be an intent to create legal relations.[22] If there is no such intent, then the resulting instrument will not be a treaty and will not be legally binding.

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[21] The latter Arrangements were concluded after their affidavits were filed and could not, therefore, have been taken into account.

[22] The Commentary appears at Watts, *The International Law Commission 1949-1998*, vol. II (1999), p. 623, para (6).

74. As Mr Aust explains in his monograph on the law of treaties, whether or not there is such an intention must be gathered from the terms of the instrument itself and the circumstances of its conclusion.[23] In this respect, the deliberate choice of an informal title ("Arrangements"), like the use of "Memorandum of Understanding" (which in the usage of the United Kingdom and other Commonwealth States, for example, always connotes an intention *not* to create legal relations [24]) and the employment of non-mandatory language ("will" rather than "shall") point clearly to the Arrangements being non-binding instruments.

75. While the Arrangements are not legally binding instruments, they are nonetheless important in providing assurances that:-

(a) Afghanistan will treat detainees in accordance with the same high standards which Canada has voluntarily assumed (namely, the humanitarian standards of the Third Convention which go well beyond a prohibition of torture) (2005 Arrangements, paragraphs 3, 5 and 8);

(b) No detainee who is transferred will be subjected to the death penalty (2005 Arrangements, paragraph 9);

(c) No detainee transferred by Canada will be transferred to a third State without Canada's prior written agreement (2007 Arrangements, paragraph 5);

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23 Aust, *Modern Treaty Law and Practice* (2000), p. 17.

24 Aust, above, pp. 17-18 and 26-30. Mr Hameed, at paragraph 105 of his affidavit contrasts the Canadian Arrangements of December 2005 with what he describes as the "treaties" concluded by the United Kingdom and the Netherlands (Hameed Exhibits JJ and KK). The United Kingdom agreement with Afghanistan is a Memorandum of Understanding. For the reasons given by Mr Aust, that term is never used in United Kingdom practice for a treaty. In my opinion, the United Kingdom's Memorandum of Understanding is not legally binding and is no more a treaty than the Arrangements concluded by Canada. I believe that the same is true of the Dutch instrument.

(d) The Afghan authorities will investigate any allegations of abuse and report on the investigation to Canada (2007 Arrangements, paragraph 10);

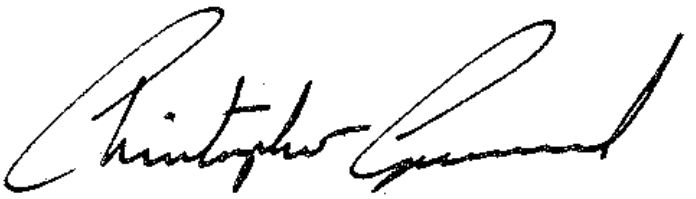
(e) The Government of Afghanistan will ensure that all prison authorities are aware of the provisions of the Arrangements (2007 Arrangements, paragraph 12)

76. These are assurances to which any international human rights tribunal would give considerable weight in a *Soering* case. They are particularly significant where, as here, the case is one of transfer within the territory of a host State whose territorial sovereignty has to be respected and with whom Canada has a duty of co-operation, and with which the UNSC has established a special working relationship.

77. In addition, they are reinforced by provision for monitoring by the Afghan Independent Human Rights Commission ("AIHRC") and the International Committee of the Red Cross ("ICRC"). Professor Byers is quite dismissive of the likely effectiveness of the ICRC and does not discuss the AIHRC at all. I do not share his conclusions. While it is true that the ICRC has a strict policy of confidentiality in relation to its visits to prisoners (of all kinds) that has not made it ineffective. It has a special provision under the Geneva Conventions and is a highly respected body. The issue is not whether it will communicate its findings to Canada but rather whether its access to transferred detainees provides a real assurance that they will not be ill-treated. The AIHRC is a NGO the role of which has received special recognition from the UNSC in UNSCR 1536 (2004), paragraph 10, which provides for UNAMA to work with it.

78. In my opinion, the safeguards afforded by these Arrangements are some of the most extensive ever concluded and, together with the other considerations set out above, make clear that Canada is not in breach of any of its

international legal obligations in transferring detainees to the Afghan authorities in accordance with their terms.



Christopher Greenwood, CMG, QC

14 August 2007