Court File No. T-324-07

FEDERAL COURT

BETWEEN:

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

RESPONDENTS' FACTUM RE: DETERMINATION OF TWO QUESTIONS, PURSUANT TO RULE 107 OF THE *FEDERAL COURTS RULES*, REGARDING THE APPLICATION OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS.*

PART I – OVERVIEW & FACTS

A. Overview

1. Torture is abhorrent; it is recognized by the community of nations as a serious violation of human rights. Torture can never be tolerated. The prohibition against torture has the status *of jus cogens;* it is a peremptory and non-derogable norm of international law. This rule is also contained in International Humanitarian Law ("IHL") which governs Canadian conduct during the armed conflict in Afghanistan.

2. The question before the Court under Rule 107 is whether, as a matter of law, the *Canadian Charter of Rights and Freedoms* (the "*Charter*") applies to the detention of non-Canadians captured by the Canadian Forces (CF) in Afghanistan in the context of armed conflict and their subsequent transfer to Afghan authorities. This preliminary

question of law arises against a backdrop of allegations brought by the applicants that such transfers result in serious human rights violations.

3. The legal issue of the application of the *Charter* in the context of armed conflict on foreign territory must be resolved before the Court can address the substance of the allegations and the Court should not conflate these two separate issues.

4. The Supreme Court of Canada's recent and binding analysis in *R. v. Hape* fully and completely forecloses the application of the *Charter* in the context of this case. In that case the entire Court recognized extra-territorial application of the *Charter* would be extremely rare. The Supreme Court held that the *Charter* could apply outside of the territory of Canada upon the sovereign territory of another State only with the consent of that State. Canada has no jurisdiction to enforce Canadian law, including the *Charter*, on the territory of another country absent consent. The mandate of the CF in Afghanistan does not include Afghan consent for the operation of Canadian law over non-Canadians captured and detained by CF pending transfer to Afghan authorities or release.

5. While the facts in *Hape* arose in the context of an investigation by Canadian police officers in a foreign State in co-operation with its police officials, the principles underlying the Court's analysis of the application of the *Charter* abroad are universal, rational and give rise to predictable results. The Supreme Court's framework for analysis of s.32(1) of the *Charter* applies to all contexts, including the context of military operations on foreign territory.

6. The Supreme Court recognized in *Hape* that the principles of international law have a role to play and can assist Canadian courts with respect to interpreting the scope of the extraterritorial application of the *Charter*. In the context of CF participation in military operations in Afghanistan, general international law principles discussed by the Supreme Court in *Hape* as well as those principles governing armed conflict and the laws and facts specific to this particular armed conflict support the conclusion that the *Charter* has no application in this case.

7. All international law analysis of extra-territorial effect has one fundamental characteristic: a State's domestic law has no application extraterritorially except in exceptional circumstances. In the context of military operations and absent consent, extraterritorial effect of domestic law to the activities of military forces is limited to situations in which the State is an occupying power or has equivalent effective control over particular foreign territory.

8. Finally, the Court should not read the statements of the majority in *Hape* as suggesting that even if the *Charter* has no application in a given context; its application can somehow be triggered by the establishment of a serious violation of human rights. This would be a misconstruction of the statements of Justice LeBel and one that does not accord with logic or fundamental legal principles.

B. Facts

i) Bases for Canadian Forces Presence in Afghanistan

9. Canada is a party to a non-international[1] armed conflict taking place in the sovereign state of Afghanistan in the context of which it captures non-Canadian detainees and transfers them to Afghan governmental authorities.

10. At the present time, and since December 2001, the CF's mandate has been to mount security-related operations in Afghanistan under the United Nations-sanctioned NATO-led forces and with the consent of the Government of Afghanistan. The objective of the CF and its allies is to help create the conditions for longer-term reconstruction and development laid out in the *Afghanistan Compact*[2] (the "*Compact*").

11. Canada is a major participant in the *Compact,* which is a five year commitment on the part of the Government of Afghanistan and the international community. The

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[1] For the purpose of this litigation Canada accepts the Applicants' characterization of the conflict as non-international as opposed to international.

[2] Affidavit of Col. Stephen P Noonan ("Noonan Affidavit") at par 14, Affidavit of Colleen Swords ("Swords Affidavit") at par 9 & Ex. "F", Motion Record of the Respondents to the Main Application [hereinafter the "Crown's Record"] at Tabs 26, 25 & 25(F).

Compact commits the international community (more than 60 countries as well as international organizations including UN agencies), along with the Government of Afghanistan, to achieve progress in three critical and interrelated areas of activity: security; governance, including the rule of law, human rights and tackling corruption; and economic and social development[3]. However, consistent with the fact that Afghanistan is a sovereign state; the international community's role is expressly stated to be one of support only.

12. CF operations include: establishing the level of security necessary to promote development and an environment conducive to the improvement of Afghan life; assisting local law enforcement authorities; training the Afghan military; participating in the stabilization and reconstruction activities of provincial reconstruction teams; and, conducting air and ground combat operations as and when required[4].

13. In a series of resolutions commencing in 1998 the Security Council noted the threat to international peace and security posed by the support for international terrorism, including through the role of the then-Taliban regime in Afghanistan[5]. In Resolution 1746 of March 23, 2007, the Security Council reiterated "its concern about the security situation in Afghanistan, in particular the increased violent and terrorist activities by the Taliban, Al-Qaida, illegally armed groups and those involved in the narcotics trade, and the links between terrorism activities and illicit drugs, resulting in threats to the local population..."[6]

14. Since the fall of the Taliban in December 2001, the international community has been helping to rebuild Afghanistan's infrastructure, institutions, government, and security forces as security sector reform remains paramount to consolidating Afghanistan's transition. Canada works within the multinational context, including

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[3] Swords Affidavit, par 9 & 11-12 & Ex. "H", Crown's Motion Record at Tabs 25 & 25(H).
[4] Swords Affidavit, par 9, Crown's Motion Record Tab 25.
[5] See Resolutions 1189 (1998); 1193 (1998); 1214 (1998); and 1267 (1999). Crown's Motion Record at Tabs 1 - 4.
[6] Swords Affidavit, par 10, Crown's Motion Record, Tab 25.

working in support of efforts in Afghanistan at NATO, in the G8 and in concert with the United Nations Assistance Mission in Afghanistan (UNAMA)[7].

15. Canada's military engagement in Afghanistan rests upon three distinct but interrelated legal bases: individual and collective self-defence, Security Council Resolutions and consent from the sovereign state of Afghanistan[8].

i) Individual and collective self–defence

16. The right of self-defence is recognized in Article 51 of the United Nations Charter[9]. In response to the tragic events of 11 September, 2001, in which Canadian lives were also lost, the Security Council issued Security Council Resolutions 1368 and 1373 which "recognized" and "reaffirmed" the inherent right of individual and collective self-defence. Article 5 of the North Atlantic Treaty, to which Canada is a party, recognizes that an armed attack against one or more members of the Alliance in Europe or North America shall be considered an attack against them all. NATO Secretary General Lord Robertson announced that it had been determined that the attacks on the World Trade Center had been directed from abroad and they were regarded, therefore, as an action covered by Article 5 of the Washington Treaty[10].

17. On 24 October, 2001, Canada informed the Security Council by letter that it would be deploying military forces into Afghanistan "in exercise of the inherent right of individual and collective self defence, in accordance with Article 51 of the UN Charter.[11] Military operations in Afghanistan relying initially on the right of self-defence are conducted as part of Operation Enduring Freedom ("OEF"). With the emergence of the

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[7] Swords Affidavit, par 6, Crown's Motion Record at Tab 25.
[8] Swords Affidavit, par 11-12 & Ex. "H", Crown's Motion Record at Tabs 25 & 25(H).
[9] 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."
[10] Swords Affidavit, par 20, Crown's Motion Record at Tab 25.
[11] Swords Affidavit, par 21 & Ex. " L", Crown's Motion Record at Tabs 25 & 25(L).

Afghan Government as a coalition partner OEF now also relies upon the collective right of self defence as well as consent.

18. It is important to note that international legal authority for OEF is not derived directly from UNSCR 1368 as the applicants may assert. Rather, its international legal authority was derived from the right of self-defence under general international law, which, in turn, was recognized by the UNSCR 1368.

19. That resolution does not in itself provide a legal justification for military action in the way that the UNSCRs now mandate action by ISAF. For example, the previous mandate related to self-defence in relation to the former Taliban led government of Afghanistan whereas the more recent UNSCRs relate to assistance, including force protection- which includes again the right to self defence, within the context of assisting the later established and now recognized sovereign government of Afghanistan. This right of self-defence only 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 1776 (2007) in affording a legal authority for the use of force by ISAF forces when they are attacked or threatened with attack.

ii) United Nations Mandate – International Security Assistance Force (ISAF)

20. The vast majority of CF 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 Chapter VII of the UN *Charter*.

21. 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 1776 (2007)[12].

22. The United Nations Security Council Resolutions (UNSCRs) authorize the use of force in accordance with Chapter VII of the United Nations Charter. On December 20, 2001, in Resolution 1386, the Security Council called for the establishment of an International Security Assistance Force (ISAF) to assist the Afghan Interim authority in the maintenance of security in Kabul and its surrounding areas. Successive Security Council resolutions have extended the authority for the mandate, most recently in Resolution 1776 (2007). The Security Council has determined that the situation in Afghanistan constitutes a threat to international peace and security. Further all Member States participating in the ISAF have been authorized to take all necessary measures to fulfil its mandate, thereby authorizing the use of all necessary force by the ISAF military forces to carry out their mission[13].

23. 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, par. 3; UNSCR 1776 par. 2) to accomplish this task.

24. UNSCR 1776 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 UN 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"[14].

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[12] See Key UNSCRs relevant to UN/ISAF Involvement in Afghanistan, Crown's Motion Record at Tabs 16-24.

[13] Swords Affidavit, par 22, Crown's Motion Record at Tab 25.

25. It follows that CF 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 discussed above.

26. The mandate contained in UNSCRs 1386, 1510, and 1776 does not apply to those CF which are present in Afghanistan outside the framework of ISAF, in particular those CF which are deployed as part of OEF – a 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 1776 (2007), preamble, and UNSCR 1746 (2007) par. 25).

iii) Consent of the State of Afghanistan

27. In addition to UN Security Council resolutions, the engagement of Canada and its allies in Afghanistan is based on the consent of the legitimate, internationally recognized and democratically elected Government of Afghanistan. The *Compact* concluded on February 1, 2006 by Afghanistan and the international community provides[15]:

> 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.
>
> 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

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[14] UN Charter, Article 25.
[15] Swords Affidavit par 23 & Exs. "O", "P", Crowns Motion Record at Tabs 25, 25(O) & 25(P).

> Afghanistan, including through Provincial Reconstruction Teams (PRTs), and will continue to promote stability and support security sector reforms in its areas of operation. **Full respect for Afghanistan's sovereignty and strengthening dialogue and cooperation between Afghanistan and its neighbors constitute an essential guarantee of stability in Afghanistan and the region. The international community will support concrete confidence-building measures to this end."** (Emphasis added)

28. The *Compact* was expressly endorsed by the Security Council 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, par. 6, see also UNSCR 1776(2007)).

29. In addition, the "Technical Arrangements"[16] between the Government of Canada and the Government of the Islamic Republic of Afghanistan" of 18 December 2005 and the two Arrangements on the Transfer of Detainees of 18 December 2005 and 3 May 2007, though not legally binding instruments, are a clear manifestation of the consent of Afghanistan to the operation of CF on its territory for the purposes recognized therein.

iv) Canada's Role within the ISAF Coalition

30. The vast majority of the CF personnel in Afghanistan form part of a UN-mandated multinational force called the International Security Assistance Force (ISAF). Canada is one of at least 37 nations contributing to ISAF. The North Atlantic Treaty Organization (NATO) – of which Canada is a founding member -- leads ISAF[17].

31. Canada retains operational command over CF personnel within ISAF. NATO, not Canada, has operational control over these forces. The Canadian Commander of Joint Task Force-Afghanistan reports both to the Commander of ISAF through Commander Regional Command South and nationally to the Commander of the Canadian Forces, Expeditionary Forces Command ("CEFCOM")[18].

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[16] Swords Affidavit at pars 25-28 & Ex "Q" & Affidavit of Scott Proudfoot, Ex. "A", Crown's Motion Record at Tabs 25, 25(Q) & 28.
[17] Noonan Affidavit, pars 13 & 18, Crown's Record at Tab 26.
[18] Noonan Affidavit, pars 21 & 23, Crown's Record at Tab 26.

v) Context of CF Temporary Detention of Non-Canadians

32. Canada does not operate a prison or other detention facility in Afghanistan and has no capacity to do so[19]. The CF's operates a "transfer facility"[20]. Persons are captured and detained because they pose a threat[21].

33. Detentions on the NATO base are intended to be, and generally are, temporary[22]. Each detention is reviewed, generally, every 24 hours for the purpose of ascertaining whether or not the detainee poses an ongoing military threat to ISAF operations or to Afghans. The policy of both the CF and ISAF is to decide whether or not to transfer and to transfer, as much as possible, within 96 hours[23].

34. The transfer facility, and in fact any other like it, cannot be used as a long-term detention facility. Permanent facilities are operated in different ways, their infrastructure is different and they require personnel with skills and training different from that of military personnel at a temporary detention and transfer facility[24].

35. The CF does not unilaterally control any part of Afghanistan; it is not an occupying power. Importantly, the Canadian transfer facility is not located within a Canadian Military Base. Members of the CF and several other ISAF countries participating in security and infrastructure operations in Afghanistan share different areas of this base[25].

36. The Government of Canada has no legal authority to run a prison in Afghanistan; it has neither the mandate nor a bilateral agreement with the government of Afghanistan to establish and run a long-term detention facility in Afghanistan. The CF has not been

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[19] Affidavit of Brigadier General Joseph Paul Andre Deschamps ("Deschamps Affidavit), par 17 & Noonan Affidavit at pars 36, 37, 88-90 & Ex. "H", Crown's Record at Tabs 27, 26 & 26(H).
[20] Noonan Affidavit at par 80. Crown's Record at Tab 26.
[21] Deschamps affidavit, pars 8-11 & Affidavit of Yavar Hameed, Ex "T" [Theatre Standing Order ("TS0") 321A] & Noonan Affidavit, par 47, Crown's Record at Tabs 27, 36 & 26.
[22] Deschamps Affidavit, par 17; Noonan Affidavit at par 36 & Ex. " H", Crown's Record at Tabs 27, 26 & 26(H).
[23] Deschamps Affidavit pars 8-11, Affidavit of Yavar Hameed Affidavit Ex "T", Noonan Affidavit at par 36, 37, 38 45, 47 & Ex. "H", Crown's Record at Tabs 27, 36, 26 & 26(H).
[24] Noonan Affidavit, pars 82-86, Crown's Record at Tab 26.

authorized to detain for the long term by either the government of Canada or ISAF commanders who have operational control over CF forces[26].

PART II – POINTS IN ISSUE

37. The questions to be determined on this motion, as agreed to by the parties and as Ordered by this Honourable Court, are:

1. Does the *Canadian Charter of Rights and Freedoms* apply during the armed conflict in Afghanistan to the detention of non-Canadians by the CF or their transfer to Afghan authorities to be dealt with by those authorities; and

2. If the answer to the above question is "NO" then would the *Charter* nonetheless apply if the Applicants were ultimately able to establish that the transfer of the detainees in question would expose them to a substantial risk of torture?

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[25] Noonan Affidavit, pars 18-23 & 77 – 79, Crown's Record at Tab 26.
[26] Noonan Affidavit, par 77, Crown's Record at Tab 26.

PART III – ARGUMENT

A. Law Regarding Extra-Territorial Enforcement Jurisdiction

38. The applicants assert that Canadian law, as opposed to the accepted and broad protection afforded by international law, supplants the laws of the sovereign State of Afghanistan simply by the presence of the CF. This is an astounding proposition.

39. The Supreme Court of Canada's June 2007 decision in *R.* v. *Hape* stands for the general proposition that the *Charter* cannot be applied extraterritorially without host state consent[27]:

> Canadian law cannot be enforced in another state's territory without that state's consent. Since extraterritorial enforcement is not possible, and **enforcement is necessary for the *Charter* to apply, extraterritorial application of the *Charter* is impossible.**
> (Emphasis added.)

40. Furthermore, *Hape* makes it clear that the inquiry into the extra-territorial application of the *Charter* "begins and ends with s.32(1) of the *Charter*." The wording of s. 32(1) defines *to whom* the *Charter* applies as well as the circumstances the *Charter* applies to those actors. The fact that a state actor is involved is not in itself sufficient to ground *Charter* application. Two threshold questions must be asked in order to determine whether the *Charter* applies[28]:

i) Is the actor an official or other agent of the government purporting to exercise statutory authority or a public function?

ii) Even if the actor is *prima facie* a state actor, are the impugned acts within the authority of the Parliament of Canada (or Provincial Legislatures)?

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[27] *R.* v. *Hape*, [2007] S.C.J. No. 26 at par 85, see also pars 69 & 106.
[28] *R. v. Hape*, [2007] S.C.J. No. 26, pars 94 & 103 (cite)

41. *Charter* analysis is purposive and contextual. In *Hape* the Court stated that international law informs the interpretation of the *Charter*, including the question of its extra-territorial application. The international law authorizing the activities of the CF in Afghanistan forms a key factual basis to this application and inform the analysis of the application of the *Charter* in the case at bar.

42. 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 International Court of Justice in the *Case of the SS Lotus (France v. Turkey)* in 1927[29] 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".[30] This is consistent with the principle of *jus cogens*, set out in Article 2(7) of the United Nations Charter (the "UN Charter"), which prohibits intervention "in matters which are essentially within the domestic jurisdiction of any state".

43. A finding of the application of the Canadian *Charter* to CF engaged in security operations on foreign territory will have ramifications for Canada's participation in Afghanistan. Such a finding will send a message to the international community generally and to Afghanistan specifically that a Canadian military presence on their territory includes not only Canadian personnel and equipment but also the application of the Canadian legal regime.

B. No *Charter* Application.

i) No Canadian Authority

44. The challenged transfer activities of the CF in Afghanistan cannot be said to be "within the authority of Parliament" as that phrase in s.32(1) of the *Charter* has been interpreted by the Supreme Court in *Hape*. The detention and transfer of detainees by CF

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[29] *Case of the SS Lotus (France v. Turkey)*, PCIJ Reports, Series A, No. 10, 1927, p. 18.
[30] *Case of the SS Lotus (France v. Turkey)*, PCIJ Reports, Series A, No. 10, 1927, p. 18.

in Afghanistan takes place pursuant to Afghan and international law, including the UN Charter and applicable UNSCRs and IHL to which the *Charter* does not apply.[31] The application of the *Charter* to CF detention and transfer activities pursuant to Afghan and international law as challenged in this case would be an impermissible exercise of Canadian jurisdiction as understood under international law and would be an impermissible interference into the sphere of Afghan sovereignty.

45. This issue is separate and distinct from the point that CF detention and transfer activities in Afghanistan are authorized by the government of Canada. This domestic authorization is necessary for CF detention and transfer activities to take place, but because such activities take place beyond the borders of Canada it is not sufficient: Canada must have international law authority for such activities. This authority is contained in the three interrelated international legal bases for Canada's operations in Afghanistan: UNSCRs[32], host state consent, and exercise of collective self-defence.

46. Canada's operations in Afghanistan, which draw their authority from these three international law bases, are governed by international law, most importantly the *lex specialis* of IHL applicable in times of armed conflict, whereas international human rights law is *lex generalis.* In the circumstances it is neither appropriate, nor necessary, for the *Charter* to apply.

47. Afghanistan has a functioning government that has the support of the international community as evidenced by the *Compact* and UNSCRs. Enforcement of the Canadian *Charter* within Afghanistan in the context of Canadian detention operations there is impermissible for the same reasons that the *Charter* cannot be enforced in the Turks and Caicos in the context of an RCMP investigation in that country.

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[31] The *Charter* does not apply to foreign laws: *Spencer v. The Queen*, [1985] 2 S.C.R. 278; *Canada v. Schmidt*, [1987] 1 S.C.R. 500.

[32] It bears repeating in this context that the relevant UNSCRs not only authorize Canadian operations in Afghanistan, they also oblige Canada to conduct military operations in accordance with that authorization: Article 25 of the UN Charter

48. The Supreme Court of Canada clearly recognized the absurdity of attempting to impose a particular country's laws on a multi-national, international effort[33]:

> The investigation and policing of such criminal activities requires cooperation between states. In a cooperative investigation, Canada cannot simply walk away when another country insists on following its own investigation and enforcement procedures rather than ours. That would fall short not only of Canada's commitment to other states and the international community to provide assistance in combating transnational crime, but also of Canada's obligation to Canadians to ensure that crimes having a connection with Canada are investigated and prosecuted. As McLachlin J. wrote in *Harrer*, at para. 55:
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> > It is not reasonable to expect [police forces abroad] to comply with details of Canadian law. To insist on conformity to Canadian law would be to insist on external application of the *Charter* in preference to the local law. It would render prosecution of offences with international aspects difficult if not impossible. And it would undermine the ethic of reciprocity which underlies international efforts to control trans-border crime…

49. The applicants assert that Canada possesses the jurisdiction to grant *Charter* rights to persons otherwise under the sovereign territorial jurisdiction of Afghanistan simply by virtue of the fact that the CF, as opposed to other ISAF or Afghan forces, have engaged and temporarily detained these persons. This surprising proposition is unsupported in both domestic and international law[34].

50. The issue of whether activity that takes place outside Canada is "within the authority of Parliament," as those words are used in s. 32(1) of the *Charter*, must be considered within the relevant international law framework[35]:

> Where the question of application [of the *Charter*] involves issues of extraterritoriality, and thereby necessarily implicates interstate relations, the tools that assist in the interpretation exercise include Canada's obligations under international law and the principle of the comity of nations.

51. Central to the issue of extraterritorial application of the *Charter* is the fundamental concept that all states are sovereign and equal. Sovereign equality is the

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[33] *R. v. Hape*, [2007] S.C. J. No. 26 at pars 88, 97 & 98 (quote).
[34] See in a similar vein the dicta of Bingham LJ. in *Al Skeini et al. v. Secretary of State for Defence et al.*, [2007] UKHL 26 at par 24.

"linchpin of the whole body of international legal standards," and "the fundamental premise upon which all international relations rest". The principles of sovereign equality, territorial integrity and non-interference in the internal affairs of a state are central to the conduct of international relations and fundamental principles international law. As a matter of international and Canadian law, Canada is obliged to refrain from interfering with other states. A key manner in which Canada would interfere in the internal affairs of another state is by applying the *Charter* in its territory without that state's consent[36]:

> Were *Charter* standards to be applied in another state's territory without its consent, there would by that very fact always be interference with the other state's sovereignty.

52. As the Court also noted in *Hape*, the most contentious claims for jurisdiction arise when one state attempts to enforce its jurisdiction within another. "The fact that a state has exercised extraterritorial prescriptive jurisdiction by enacting legislation in respect of a foreign event is necessary, but not in itself sufficient, to justify the state's exercise of enforcement jurisdiction outside its borders". Attempts to enforce the *Charter* in another country, so as to give *Charter* rights to those falling under the jurisdiction of that foreign state, must necessarily impinge upon that country's sovereignty as well as its prescriptive and enforcement jurisdiction.[37]

53. The applicants seek an order that would apply the *Charter* to the detention and transfer of detainees by the CF in Afghanistan. This would be inconsistent with Afghan sovereignty, IHL and relevant UN Security Council Resolutions authorizing ISAF operations. As the Supreme Court of Canada indicated in *Hape*, whenever possible, the court should "ensure consistency between its interpretation of the *Charter*, on the one hand and Canada's international obligations and the relevant principles of international law, on the other".[38]

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[35] *R. v. Hape*, [2007] S.C. J. No. 26, pars 33, 34, 39.
[36] *R. v. Hape*, [2007] S.C.J. No. 26, pars 40, 41, 43, 44, 45, 47, 48, 50, 68, 69, 84, 113.
[37] *R. v. Hape*, [2007] S.C.J. No. 26, pars 63-64 & 85.
[38] *R. v. Hape*, [2006] S.C. J. No. 26, par 55.

ii) No Afghan Consent to Grant *Charter* rights to Non-Canadians in Afghanistan

54. The Court in *Hape* suggests in *obiter* that activity that is not "within the authority of Parliament" might otherwise be governed by the *Charter* in one circumstance: consent of the host State. There are still no allegations in the Amended Notice of Application in the case at bar that the sovereign Republic of Afghanistan has consented to the application of the Canadian jurisdiction, the application of Canadian laws, including the *Charter* on its territory. The Afghan government has consented only to the application of Canadian criminal and disciplinary jurisdiction in Afghanistan to "Canadian Personnel" as that term is defined in the Technical Arrangements between Canada and Afghanistan[39]. In fact paragraph 7(1)(b) expressly excludes Afghan nationals from the definition of "Canadian Personnel" over whom Canadian criminal and disciplinary jurisdiction could be extended.

55. The *Compact* makes it clear that, rather than having Afghanistan cede its jurisdiction to states operating within its borders, the international community wishes to support Afghan sovereignty over its entire territory and ensure respect for that sovereignty even within the context of military operations there as well as other activities including through capacity-building and strengthening of the necessary governance institutions and the Afghan legal system

56. The *Compact* is a key document which outlines the nature and ambit of the involvement of Canada and indeed the international community in Afghanistan. The CF is engaged in Afghanistan with the consent of the Government of Afghanistan as reflected in the *Compact* as well as the "Technical Arrangements" entered into between Canada and Afghanistan. In particular, the *Compact* provides consent for ISAF operations based upon a fundamental recognition and respect for Afghan sovereignty[40]:

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[39] See the Technical Arrangements between Canada and Afghanistan, December 18, 2005, Crown's Record at Tabs 34 & 26.

[40] Swords Affidavit Ex. "F" (The *Compact* at 2 & 3 and see more generally at 1-5) Crown's Motion Record at Tab 25(F). Note: This has been supported by UN Security Council Resolution s 1659 (2006), 1707(2006) and 1746 (2007).

> **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.
> ***
> **Governance, Rule of Law and Human Rights**
> The **Afghan Government** and the international community reaffirm their commitment to the protection **and promotion of rights provided for in the Afghan constitution** and under international law…
> (Emphasis added)

57. Nothing in the *Compact* suggests that Afghanistan has consented to the application of Canadian or any other foreign law in Afghanistan. Rather, Canada and other members of the international community have pledged to respect and support the sovereignty of Afghanistan. Members of the CF are in Afghanistan to provide assistance and to play a supportive role in order to strengthen and bolster the sovereignty of Afghanistan. To hold that Canadian law, including the *Charter,* is consensually operable in this context is contrary to the fundamental basis of the *Compact*, and UNSCRs.[41]

58. Any assertion of Canadian enforcement jurisdiction in Afghanistan over non-Canadians without the consent of the sovereign state of Afghanistan would violate the international legal obligations imposed upon Canada by the relevant UNSCRs which are legally binding pursuant to Article 25 of the UN Charter as well as the UN Charter prohibition against non-interference with matters essentially within the domestic jurisdiction of Afghanistan. As previously noted, in *Hape* the SCC held that international law informs the court on the scope of application of the *Charter*. Furthermore, the Court should "ensure consistency between its interpretation of the *Charter*, on the one hand and Canada's international obligations and the relevant principles of international law, on the other".[42]

59. Canada's acceptance and respect for the sovereign authority of the Government of Afghanistan has been repeatedly expressed.[43]

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[41] Swords Affidavit Ex. "F" (the *Compact*), Crown's Motion Record at Tab 25(F).
[42] *R. v. Hape*, [2006] S.C. J. at par 55.
[43] See for example: Testimony of Ms. Colleen Swords, Assistant Deputy Minister, International Security Branch and Political Direct, Department of Foreign Affairs and International Trade House Standing

60. Canada and Afghanistan have agreed to the application of a limited range of Canadian laws in Afghanistan. The Technical Arrangements provide for the application of Canadian rather than Afghan law to any questions of a criminal or disciplinary matter involving those falling within the definition of "Canadian Personnel". They reflect a standard practise of allowing State deploying military personnel on the territory of another state to discipline them according to its own laws.[44]

61. The record shows that agreements in place allow for the exercise of Canadian jurisdiction (application of Canadian criminal and disciplinary law and authority) only over the conduct of Canadian personnel who are part of the Canadian government's actions in support of the Afghan government and Afghan sovereignty. These agreements reflect modern military practice concerning the status of forces on foreign territory and are consistent with the general approach of respect for Afghan sovereignty.

iii) No Effective Control Over Territory to Enforce Canadian Law

62. The recent judgment in *Hape* completely forecloses the possibility of *Charter* application to CF detention and transfer activities in Afghanistan. In addition, a close reading of relevant decisions of the International Court of Justice, decisions of the European Court of Human Rights, decisions of the UK House of Lords and views expressed by the UN Human Rights Committee lead to the conclusion that the current state of international law on the issue of the extraterritorial application of a State's international human rights obligations does not support a different result for the application of the *Charter* in this case than that in *Hape*[45].

Committee on National Defence before the Standing Committee on Defence, Transcript of Proceedings Before the House Standing Committee on Defence, December 11, 2005 at 10-11, Affidavit of Alex Neve, Ex." E", Crown's Motion Record at Tab 37.

[44] Affidavit of Yavar Hameed, Exs. "L" & "M." (Canada-Afghanistan, Technical Arrangements dated December 18, 2005), Crown's Motion Record at Tabs 34 & 35.

[45] *Banković v. Belgium*, (2001) 11 BHRC 435, par. 67. Also see: *Al-Skeini* 's discussion of Bankovic.

63. The European Court of Human Rights decision in the *Bankovic* case notes that extraterritorial application of jurisdiction is exceptional[46]:

> ... the case-law of the Court demonstrates that its recognition of the exercise of extra-territorial jurisdiction by a Contracting State is exceptional: it has done so when the respondent State, through the effective control of the relevant territory and its inhabitants abroad, as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory exercises all or some of the public powers normally to be exercised by that Government.

64. Canada is not an occupying power in Afghanistan[47]. The CF controls neither the military nor civilian administration of any part of the territory of that country. In fact, the CF is one of several NATO forces operating in concert on the territory of Afghanistan as part of a UN Security Council mandated security assistance force – International Security Assistance Force (ISAF). The mere use of military force is not sufficient to establish effective control of territory necessary to allow for the enforcement of the foreign State's laws[48]. A State cannot ensure respect for human rights if it is not effectively in control of the territory[49].

65. Moreover, CF detentions and transfers do not fall within any of the other exceptions noted above in *Bankovic*[50]. CF activities have not displaced the jurisdiction of the Afghan government over any part of Afghan territory. More importantly Canada does not control the military or civilian administration of any part of the territory of that country.

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[46] *Banković v. Belgium*, (2001) 11 BHRC 435 (2001) par . 71 (see also par 67). See also *Al Skeini* et al. per Brown LJ. at par 129.

[47] See in contrast: *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, (Advisory Opinion) I.J.C, Reports 2004, p. 126.

[48] *Banković v. Belgium*, (2001) 11 BHRC 435 at par 62. See also *Al Skeini et al. v. Secretary of State for Defence et al.*, [2007] UKHL 26, par Bingham LJ. at par 29.

[49] See *Al Skeini et al. v. Secretary of State for Defence et al.*, [2007] UKHL 26, per Brown LJ. at pars 76-84 (see in particular par 79). See also *A Case Concerning Armed Activities on the Territory of the Congo* (*Democratic Republic of Congo v. Uganda*), I.J.C. Reports 2005, General List No. 116.

[50] The facts in the case at bar are clearly and easily distinguishable from those in *Al Skeini et al. v. Secretary of State for Defence et al.*, [2007] UKHL 26. That case considered extra-territorial application of the ECHR. The U.K. Government conceded that the ECHR applied extra-territorially. Some of the Court discussed, in *obiter* in relation to plaintiff # 6 (Mousa), that the application of the ECHR could be justified on the basis of the exceptions laid down in *Bankovic;* ie., an embassies-type exception and related directly to the fact that British forces not only "arrested" Mousa they controlled him and were also the ones who grossly mistreated and eventually beat him to death within their long-term detention Prison in Basra. Unlike Al-Skeini, where the U.K. had the control and consent to operate a Prison Canada ha neither the

66. As a matter of law and policy, the recognition of extraterritorial jurisdiction in circumstances where the State in question has no legislative or other authority over individuals on the territory is unrealistic and unworkable. An intervening State's military forces cannot be expected to enforce their own laws on others as if those persons where within that State's domestic control. The reason for the effective control test being equated with occupation is that the occupying force must possess the capacity to exercise public authority and the consequent power to enforce laws[51]. This effective control exception reinforces the concepts underlying the ratio in the *Hape* case because either through consent or effective control the capacity to enforce jurisdiction is required for extra-territorial application of laws.

67. Enforcement of law without consent or effective control of territory is completely unworkable as demonstrated in this case; eg., in Afghanistan there would be a patch-work of various national laws norms applied within various regions of a sovereign Afghanistan. For example, Dutch law would apply to detainees taken by Netherlands forces; Danish law to detainees taken by the Danes; and so on. The result would be a hodgepodge of different foreign legal systems, imposed within the territory of a state whose sovereignty the international community has committed itself to uphold, and applicable on a purely random-chance basis. IHL provides not only full protections but also the necessary coherence and legal certainty.

C. Seriousness of Allegations Cannot Be Conflated with the Analysis of *Charter* Jurisdiction under s. 32(1)

68. There is neither a rationally consistent nor legal basis to support the proposition that the *Charter* could be engaged where it is not otherwise applicable simply because the

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legal authority nor control to operate any similar facility. Indeed to do so would be to trench upon Afghan Sovereignty and run counter the ISAF mission and the UNSCRs.

[51] See *Al-Skeini, supra* at par 129.

effect of the impugned actions changes. It is improper to conflate the issue of whether the *Charter* applies with whether a fundamental right has been violated[52].

69. The proposition that the *Charter* can be applied where it otherwise has no application when it is established that serious violations of human rights have occurred offers no consistent or predicable measure of *Charter* applicability. To base *Charter* applicability on the nature of the violation/impugned effect rather whether there is authorization for its application is to put the cart before the horse. The effect of such a finding, without the prior basis of Charter applicability, must surely be a legal nullity. This sort of approach is inconsistent with fundamental tenets of our legal system which require (i) a consistent legally predicable set of rules, and (ii) even more importantly, express intent on the part of Parliament to apply and enforce domestic laws, including the *Charter*, in other states[53].

70. Certain *obiter* comments in *R. v. Hape*, earlier advanced by the applicants' as a caveat on the universal and predicable rule that the domestic law cannot apply extra-territorially without consent, do not go so far as to suggest that breaches of fundamental human rights alone can justify the application of the *Charter*. Statements made by Justice LeBel for the majority and by Binnie J., in a separate concurring judgement still contemplate the application of the *Charter* to individuals whose *Charter* rights are engaged in a court process in Canada. As noted by Justice LeBel:[54]

> It is no more helpful to suggest that some third option other than the law of the host state or the full application of *Charter* standards might govern foreign investigations. Where would the standards to be applied come from? How would Canadian officials know what is required of them at the outset of an investigation? **The only reasonable approach is to apply the law of the state in which the activities occur, subject to the *Charter*'s fair trial safeguards and to the limits on comity that may** prevent Canadian officers from participating in activities that, though authorized by the laws of another state, would cause Canada to be in violation of its international obligations in respect of human rights (emphasis added)

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[52] See *Banković v. Belgium*, (2001) 11 BHRC 435 at par 75.
[53] *Al Skeini et al. v. Secretary of State for Defence et al.*, [2007] UKHL 26 at pars 24-26.
[54] *R. v. Hape* per LeBel J at par 90.

71. This quote also makes reference to the limits of comity (the international principle favouring State co-operation). Justice LeBel placed great emphasis on the importance of comity but was also careful to recognize its limits. He clearly was signalling that the value of cooperation with foreign officials on their territory could not be used as a means of justifying the participation of Canadian officials in activities with foreign officials that would be in violation of Canada's international human rights obligations. Justice LeBel's references to the limits of comity do not negate the discussion of the relevance of the sovereignty principle and comity to the interpretation of s.32(1) of the *Charter*, addressed earlier in this factum.

72. Both Justice LeBel for the majority and Binnie J. suggest only that the *Charter* could apply and *Charter* relief is granted where *Charter* rights are engaged or will be engaged in Canada. That is, the effect of the actions of Canadian officials in a foreign State on the rights of individuals in Canada, for example the rights to a fair trial in Canada could be regulated by Canadian courts through the remedial power of s.24(1). As Lebel J. states[55]:

> Moreover, there is an argument that comity cannot be invoked to allow Canadian authorities to participate in activities that violate Canada's international obligations. As a general rule, Canadian officers can participate in investigations abroad, but must do so under the laws of the foreign state. The permissive rule that allows Canadian officers to participate even when there is no obligation to do so derive from the principle of comity; the rule that foreign law governs derives from the principles of sovereign equality and non-intervention. **But the principle of comity may give way where the participation of Canadian officers in investigative activities sanctioned by foreign law would place Canada in violation of its international obligations in respect of human rights. In such circumstances, the permissive rule might no longer apply and Canadian officers might be prohibited from participating. I would leave open the possibility that, in a future case, participation by Canadian officers in activities in another country that would violate Canada's international human rights obligations might justify a remedy under s. 24(1) of the *Charter* because of the impact of those activities on *Charter* rights in Canada.**
>
> ***
>
> If the court is not satisfied that the foreign state consented to the enforcement of Canadian law in its territory, it must turn to the final stage of the inquiry and consider how to ensure the fairness of a trial held in Canada. **What is in issue at this stage is no longer whether the actions of state agents outside Canada were consistent with the *Charter*, but whether they affect the fairness of a trial inside Canada.** (Emphasis added)

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[55] *R. v. Hape* per LeBel J., at pars 101 & 107. See also the *dicta* of Binnie J. at pars 186-187.

73. The applicants are not entitled to a s. 24(1) of the *Charter* remedy. This is yet another reason why, even if the *obiter* in *Hape* could apply, it could not apply to these applicants in this case. This is because an individual or organization that alleges violations of the rights of other individuals cannot obtain a s. 24(1) remedy on their behalf[56].

D. Law Applicable to CF Detainees In Afghanistan

74. Although the *Charter* does not apply to CF's detention of individuals in Afghanistan their detention is, nevertheless governed by law. Consequently they have rights and are protected by law. Furthermore the CF personnel are directly accountable under law for the protection and care of each detainee.

i) Legal Authority for Detention

75. In the case of CF operating as part of ISAF a mandate to detain persons who pose a threat to the achievement of the objectives of ISAF is based in IHL as well as the authorization by the UNSC to ISAF to "take all necessary measures" to restore stability and security in Afghanistan.

76. That, in the context of a UNSCR mandating a multinational force to restore security in a territory, such language impliedly authorizes 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* and *Saramati*.[57]

77. The authorization of the Security Council, as a basis for detention by Canadian ISAF personnel, is reinforced by three other considerations. First, there is the consent of the Government of Afghanistan allowing for the presence and assistance of foreign military and other officials in their territory. In addition to the more general expression

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[56] *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295 at pars 37-38(39). See also: *R. v. Borowski*, [1989] 1 S.C.R. 342 at pars 53- 54 & *Canadian Bar Association v. British Columbia*, [2006] B.C.J. No. 2015 at pars 50-54 and Hogg, *Constitutional Law of Canada* - Loose Leaf, Vol. 2 (5 Ed). Thompson/Carswell: Toronto, 2007)., (40-3) Also see 40-27 to 40-28.

of consent to the operation of the foreign military forces contained in the *Compact* and earlier instruments, the Technical Arrangements between the two Governments[58] expressly refer to "the detention of persons" as one of the tasks which may be undertaken by CF. Moreover, there is the Arrangement of December 2005 and the May 2007 supplement, both of which are premised on the basis that CF will detain people or there would be no need to provide for transfers to the Afghan authorities.

78. 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 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.

79. As a consequence of the existence of the ongoing armed conflict in Afghanistan, CF has the power to capture and detain those suspected of being the enemy. This power to detain is recognized under IHL. While IHL is not, for the most part, couched in terms of the powers of armed forces, nevertheless, the existence in IHL of rules for the protection of prisoners presupposes a power to take and detain prisoners within the confines of those rules. An example may be found in the decision of the English House of Lords in *R (Al-Jedda) v. Secretary of State for Defence in* which the House of Lords accepted that a power of detention was implicit in customary IHL[59].

80. The detention of the enemy in accordance with IHL (a) during an armed conflict, (b) pursuant to the consent of the host state, and (c) under UNSCR authorization, is not arbitrary.

ii) Rights of persons detained in the context of armed conflict

81. Persons who are detained within the context of an ongoing armed conflict are not detained within the context of criminal law in times of peace. Importantly, they do have

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[57] *Behrami v. France* (App. No. 71412/01) and *Saramati v. France, Germany and Norway* (App. No. 78166/01), (Decision, par. 124.) See also *Al-Jedda* at par 39.
[58] Affidavit of Yavar Hameed, Ex. "L" (Technical Arrangements at par 11), Crown's Record at Tab 34.

rights and protections and these rights and protections are principally defined by international law. In the current situation there are two relevant bodies of international law: IHL and human rights law. Since it is a situation of armed conflict, IHL is applicable as *lex specialis*, and human rights law as *lex generalis*.[60]

82. A state's international human rights obligations, to the extent that they have extraterritorial effect, are not displaced at such times. However, the relevant human rights principles "can only be decided by reference to the law applicable in armed conflict,"[61] the *lex specialis* of IHL:

> Critically, in the event of an apparent inconsistency in the content of the two strands of law, the more specific provisions will prevail: in relation to targeting in the conduct of hostilities, for example, human rights law will refer to more specific provisions (the *lex specialis*) of humanitarian law. In such circumstances it is not that human rights law ceases to apply, but that it must be interpreted in light of the detailed rules of IHL. As such, the protection from arbitrary deprivation of life and arbitrary detention are non-derogable human rights that continue to apply in armed conflict; but targeting or detention is not arbitrary, and the rights are not violated, where permitted under IHL.[62]

83. Additionally, where an individual detained in the context of armed conflict is charged with criminal offences, Common Article 3 and Article 75 of Protocol I Additional to the Geneva Conventions apply, either directly or as a matter of customary international law, to guarantee a number of due process rights. The fundamental protections against torture and criminal due process rights under international humanitarian law are virtually identical to the norms found in international human rights law, the *lex generalis,* both in terms of content and with respect to the context in which they apply. Absent criminal or disciplinary charges nothing in IHL requires a detaining

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[59] *R (Al-Jedda) v. Secretary of State for Defence* [2007] UKHL 58.

[60] The International Court of Justice, in its *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, [2004] I.C.J. Rep. 136 at par 106, framed the "relationship" between IHL and IHRL in times of armed conflict through reference to "three possible situations:""some rights may be exclusively matters of" IHL, "others may be exclusively matters of" international,"yet others may be matters of both these branches of international law." See also *Legality of the Threat or Use of Nuclear Weapons*, [1996] I.C.J. Rep. in which the ICJ addressed the issue of whether the ICCPR's "right to life" applied directly during an armed conflict. The ICJ said, at par 25: "in principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities."

[61] *Nuclear Weapons* at para 24.

[62] Helen Duffy, *The 'War on Terror' and the Framework of International Law* (Cambridge: University Press, 2005) at 300 (footnotes omitted.)

Power to provide individuals detained in the course of armed conflict access to counsel: Common Article 3 and the customary international law reflected in article 75 of API. Individual detained by the CF are not charged with criminal offences prior to their transfer to Afghan authorities.

84. The complex relationship of the various international legal sources - *jus cogens*, UN law (UN SCRs and Charter Articles 25 and 103), IHL and IHRL - does not have to be fully considered for the purposes of this litigation as the focus is on the prohibition against torture and against transfer to a real risk of torture. These prohibitions exist in international law as *jus cogens* and in the standards of IHL, the *lex specialis*

iii) No Legal Vacuum

85. Non-availability of the *Charter* as a legal tool does not deprive individuals of legal rights and protections. As addressed earlier in this argument, various norms of international law protect fundamental human rights of individuals detained by CF in Afghanistan, including the right to humane treatment and protection from transfer to inhumane treatment. Not only do these rights exist independently of the *Charter,* they have been in existence for decades or more before the promulgation of the *Charter* in 1982.

86. To suggest, as the is the clear implication from the underlying application, that only the *Charter* can provide the fullest and best protection to Afghans or others is an affront to important and widely accepted international norms as well as the principles of sovereignty and comity among and between nations. It is neither correct in law nor in fact to suggest that Canada corners the market on the recognition and enforcement of human rights, or that Canadian law trumps all other legal regimes merely because of the physical presence of a Canadian expeditionary force.

87. In addition, CF officials are not insulated from the application of Canadian domestic laws[63] under which they can face disciplinary sanctions and criminal prosecution should their actions violate international humanitarian law standards requiring humane treatment of detainees. Such laws could include:

i) Criminal proceedings pursuant to s. 269.1 of the *Criminal Code*, R.S.C. c. C-46[64];

ii) related criminal proceedings such as assault, aggravated assault, sexual assault, conspiracy or aiding and abetting under other provisions of the *Criminal Code;*

iii) proceedings in respect of offences established by ss. 4-7 of the *Crimes Against Humanity and War Crimes Act*, S.C. 2000 c. 24; and

iv) Court Martial proceedings pursuant to the provisions of the *Military Code of Service Discipline* as set out under Part III of the *National Defence Act*, R.S.C. 1985 c. N-5.

88. Moreover, CF officials could face sanctions and prosecutions under international law. Serious violations of human rights can result in proceedings before the International Criminal Court (subject to initial deference to effective domestic laws relating to the same subject) pursuant to the Rome Statute.[65]

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[63] See: *Al Skeini et al. v. Secretary of State for Defence et al.*, [2007] UKHL 26 at par 26 where Lord Bingham noted that lack of application of the UK Human Rights Act (and the ECHR) to activities of the British Forces in Iraq or elsewhere did not mean that members of the British Forces can act with impunity outside Britain. Several of the Law Lords noted that the application of the ECHR was only one means of response to alleged breaches of fundamental human rights and furthermore that allegations of human rights abuses by BF were triable and punishable under various provisions of British and international law

[64] *(see* s. 130 of the National Defence Act, which incorporates all other federal Statutes into the Code of Service Discipline applicable to all members of the CF deployed on operations outside of Canada);

[65] *Rome Statute of the International Criminal Court.* Note also that the actions of CF officials can be subject to comment and criticism by a number of United Nations bodies, including the UN Human Rights Council and special mechanisms under its mandate such as the Special Rapporteur on Torture.

PART IV – RELIEF SOUGHT

89. The respondents respectfully request an Order:

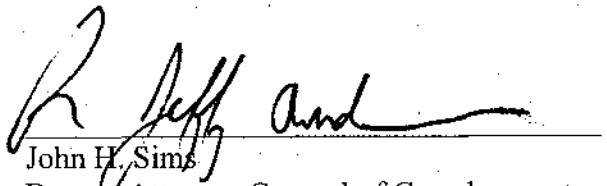
i) answering both of the questions to be determined in this matter in the negative and declaring the *Charter* does not apply in any circumstances in this case;

ii) dismissing the underlying application for judicial review in its entirety; and

iii) requiring the applicants to pay the Respondents Costs in these proceedings.

All of which is respectfully submitted,

Dated: January 18, 2008.



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PART V. AUTHORITES

A) Legislation

Canadian Charter of Rights and Freedoms, Schedule "B" to the *Canada Act 1982 (U.K.), 1982, c. 11*
Criminal Code, R.S.C. c. C-46
National Defence Act, R.S.C. 1985 c. N-5.
Crimes Against Humanity and War Crimes Act, S.C. 2000 c. 24
Rome Statute of International Criminal Court
Charter of the United Nations

B) Jurisprudence & Academic Writing

R. v. *Hape*, [2007] S.C.J. No. 26.
Case of the SS Lotus (France v. Turkey), PCIJ Reports, Series A, No. 10, 1927, p. 18
Spencer v. The Queen, [1985] 2 S.C.R. 278
Canada v. Schmidt, [1987] 1 S.C.R. 500
Al Skeini et al. v. Secretary of State for Defence et al., [2007] UKHL 26.
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R. v. Borowski, [1989] 1 S.C.R. 342
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Hogg, *Constitutional Law of Canada* - Loose Leaf, Vol. 2 (5 Ed). Thompson/Carswell: Toronto, 2007). , *(40-3) Also see 40-27 to 40-28*
R (Al-Jedda) v. Secretary of State for Defence, [2007] UKHL 58.
R. v. Brown, [1995] C.M.A.J. No. 1 (SCC Application for leave to appeal dismissed)
Bhraemi v. France (App. No. 71412/01) (EC HR Grand Chamber) & *Saramati v. France, Germany & Norway*, (App No. 78166/01) (EC HR Grand Chamber)