

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-international¹ 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

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 development³. 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 required⁴.

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 Afghanistan⁵. 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

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 Afghanistan⁸.

i) Individual and collective self-defence

16. The right of self-defence is recognized in Article 51 of the United Nations Charter⁹. 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 Treaty¹⁰.

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

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 mission¹³.

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.

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 provides¹⁵:

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

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 ISAF¹⁷.

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.

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 so¹⁹. The CF's operates a "transfer facility"²⁰. Persons are captured and detained because they pose a threat²¹.

33. Detentions on the NATO base are intended to be, and generally are, temporary²². 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 hours²³.

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 facility²⁴.

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 base²⁵.

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

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 ("TSO") 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 forces²⁶.

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?

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 consent²⁷:

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* applies²⁸:

- 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)?

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 1927²⁹ 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

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: UNSCRs³², 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.

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 effort³³:

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:

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 law³⁴.

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 framework³⁵:

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

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 consent³⁶:

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

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 Afghanistan³⁹. 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 sovereignty⁴⁰:

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 Resolutions 1659 (2006), 1707(2006) and 1746 (2007).