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CANADIAN FORCES COLLEGE / COLLÈGE DES FORCES CANADIENNES
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MASTER DEFENSE STUDIES

**TO TRANSFER OR NOT TO TRANSFER, THAT IS THE QUESTION
(REGARDING DETAINEES - A CANADIAN PERSPECTIVE)**

By / par : Major Manon Plante
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ABSTRACT

The aim of this paper is to amplify the implications relating to the handling and processing of detainees and how the decision to transfer or not detainees affects everyone and the mission.

Hence, **the thesis of this paper advances that the right decision to transfer or not detainees, as part of the overall handling and processing of detainees, is one of the crucial enablers in a mission.** The decision must be taken very judiciously and sensibly in order to obtain the desired mission effects. More so, transferring detainees to a HN that would not have the capacity to handle and process detainees would have significant adverse impacts on the mission, the HN itself and on soldiers alike. However, the decision not to transfer detainees when a state would actually have the capacity to embrace the handling and processing of detainees, could be as equally devastating. The bottom line is that the decision of transferring detainees is at the heart of the handling and processing of detainees. The right decision will set the conditions for success on the battlefield, on the home front and within the government but also within the HN and the international community.

In fact, the importance of making the right decision has a very real, essential and fundamental human dimension that must be considered and embraced. Indeed, the

decision can not solely be based on political and legal imperatives, and convenient motives. The decision to transfer or not detainees is very much an ethical dilemma where cultures, values, self, national and international expectations and interests, and political and legal realities are harmonized. To overlook the human dimension of the decision to transfer detainees could be mission suicide.

In the end, *to transfer or not to transfer detainees is the question* that must be wisely answered – the people and mission depend on it. Indeed tactical brilliance can not make up for strategic miscalculations.

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INTRODUCTION

I understood that such was the case and I therefore did not pursue the matter further at that time, and I did not phone the Prime Minister to inform him of the taking of detainees, since there was no diversion from government policy or the rules of engagement. *The apprehension, Mr. Chairman, of alleged terrorists is the normal and expected outcome of this type of operation that they were sent to Afghanistan for in the first place* [added emphasis].¹

Early in February of 2002, Honorable Art Eggleton, then Minister of National Defense (MND), was accused of making misleading statements in the House of Commons regarding his knowledge on the detention of prisoners by Canadian Forces (CF) troops in Afghanistan.² The problem was that Mr Eggleton did not inform then Prime Minister (PM), Right Honorable Jean Chretien, about this fact and upon being interviewed “[the PM] was asked about detainees by the media, which he referred to that situation as being *hypothetical*.”³ Of course, this miscommunication caused much embarrassment to the government and while trying to explain himself in the House, Mr

¹Report 50 - Question of privilege concerning the charge against the Minister of National Defence of making misleading statements in the House, (Presented to the House on March 22, 2002), paragraph 22; Available from the House of Commons Webpage, Archives.
<http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=1032102&Language=E&Mode=1&Parl=37&Ses=1&File=9>; Internet; accessed 24 March 2009.

²Report 55 – Question of privilege..., paragraph 01.

³*Ibid.*, paragraph 27.

Eggleton made things worst by providing contradictory statements. Subsequently, the matter was “examined” by a committee. In due course, Mr Eggleton was cleared of any wrongdoing as it became clear that he did not intent to mislead the house - he had simply made a mistake.⁴

While this event seems benign, the context in which it took place raises its significance. In fact it occurred during the timeframe where the United States (US) were first being accused of mistreating prisoners in its “War against Terrorism.”⁵ In effect, some photos were published around the world showing “kneeling captives at Guantanamo Bay, manacled, goggled and wearing bright orange [] jumpsuits.”⁶ These photos outraged the international community, raising the controversy on how to handle and threat detainees. This was the beginning of the debate regarding the status and treatment of detainees in the “war against Terrorism” that is still much debated today.

Given these circumstances (the US alleged mistreatment of prisoners and first instance of CF troops with detainees), it then becomes obvious that Mr Eggleton did not clearly understand the CF Rules of Engagement (ROE) otherwise he would have advised the PM immediately – there were some very sensitive issues at play. On the other hand, the PM clearly understood at least one of the implications vis-à-vis CF detainee ROE: the

⁴*Ibid.*, paragraphs 39-41.

⁵John Ibbitson, "Prison Camps faces rights challenge," *Globe and Mail*, 22 January 2002, 1. <http://www.theglobeandmail.com>; Internet; accessed 24 March 2009.

⁶Barbara Amiel, "Female guards - now that's punishment," *National Post*, 29 January 2002, 1. <http://proquest.umi.com/pqdweb?RQT=301&UserId=IPAuto&Passwd=IPAuto&JSEnabled=1&cfc=1>; Internet; accessed 24 March 2009.

handing over of detainees to the US could negatively affect the reputation of the Government of Canada. Although his choice of word regarding the detainee situation during the interview should have been “forthcoming,” he astutely chose “hypothetical” possibly to avoid being associated with the on-going US detainee controversy at the time. But once the Canadian public learned the fact that CF troops had already handed over detainees to the US authorities, the controversy regarding the handling of detainees escalated rapidly and became a strong and intense Canadian issue. It was the beginning of the Canadian debate regarding detainees which, not surprisingly, is also still on-going today.

The significance of the MND event highlights important factors regarding detainees. First the handling of detainees has strong international and political implications because the manner in which it is effected speaks to a nation’s sovereignty, integrity, rightness and morality. Former MP John Godfrey succinctly summarized the matter:

Nations express their sovereignty internationally in three ways: by their independent assessment of the facts of a situation, a condition we might describe as “intellectual sovereignty”; through their self-interest; and finally and most crucially, through the projection abroad of their fundamental values, as given expression by their constitutions and laws. The current ambiguity surrounding the treatment of prisoners taken [] threatens all three aspects of Canadian sovereignty.⁷

⁷John Godfrey, "Prisoners of conscience?" *The Globe and Mail*, 22 January 2002, A-15. <http://proquest.umi.com/pqdweb?RQT=301&UserId=IPAuto&Passwd=IPAuto&JSEnabled=1&cfc=1>; Internet; accessed 4 March 2009.

Second, the handling of detainees is of great concern to Canadians because Canadian missions overseas are one of the means by which Canadians can extend, export and inject their values in the world. It is very important that it is done right because it speaks to the nature of being a Canadian. In fact, aside from the major and prominent concern of CF casualties in any CF Mission abroad, the handling and processing of detainees is one of the most controversial issues that has retained the attention of the Canadian Government, population and media.⁸ Sadly, in truth, issues surrounding detainees such as the Abu Ghraib prison incidents, the Guantanamo Bay detention center, Canadian detainee Omar Khadr and Capt Semrau's alleged actions in Afghanistan capture the attention of the international community where the death of Canadian soldiers casualties do not.

Hence, the detainee issues are as politically charged as they are controversial and emotional not only for the Canadian population but also for the international community. But there are more than just strategic political and public impacts. There are also tactical impacts, directly affecting soldiers on the battlefield, the Local Nationals (LN), and the tactical mission's integrity and progress, The latter could even undermined the Host Nation's (HN) credibility and sincerity. Given *les enjeux* relating to detainees, Canada must effect its policy regarding detainee very efficiently yet intelligently, sensibly and responsibly.

⁸CBC News – In Depth Afghanistan, "The controversy over detainees," CBC News webpage – Background. <http://www.cbc.ca/news/background/afghanistan/detainees.html>; Internet; accessed 22 May 2009.

The aim of this thesis is to amplify the implications relating to the handling and processing of detainees and how the decision to transfer or not detainees affects everyone and the mission: the soldiers on the ground, the Prime Minister of Canada, a Canadian citizen in Winnipeg, an Afghan in Kabul. Nations, including Canada, will likely be called to participate in future stability and security operations that will most likely deal with fragile and failed states where the handling of detainees will be a reality and prove to be challenging and problematic. It is therefore imperative to do learn from present experience and prepare for future expeditionary operational commitments.

Hence, the thesis of this paper is that the right decision to transfer or not detainees, as part of the overall handling and processing of detainees, is one of the crucial enablers in a mission. Indeed, the decision must be taken very judiciously and sensibly in order to obtain the desired mission effects. More so, transferring detainees to a HN that would not have the capacity to handle and process detainees would have significant adverse impacts on the mission, the Host Nation (HN) itself and on soldiers alike. However, the decision not to transfer detainees when a state would actually have the capacity to embrace the handling and processing of detainees, could be as equally devastating. The bottom line is that the decision of transferring detainees is at the heart of the handling and processing of detainees. The right decision will set the conditions for success on the battlefield, on the home front and within the government but also within the HN and the international community.

This paper has five chapters. The first chapter provides the background surrounding the phenomena of detainees in the 21st century while the second chapter will offer some theory and challenges relating to the handing and processing of detainees. The third chapter, the heart of the paper, presents some anecdotal and ethical perspectives of the on-going handing and processing of detainees in Afghanistan. The fourth chapter gives an analysis of the previous chapters, recapitulates shortfalls, gaps, and key impacts and proposes recommendations to address the latter. The last chapter, Chapter 5, summarizes why it is important to make the right decision regarding transfers of detainees and how the decision process can be improved based on a summary of key recommendations. The conclusion refocuses on the main arguments supporting that the transfer of detainees is one of the key and crucial enablers in peace support operations.

CHAPTER 1: AND THERE WERE DETAINEES

THE DETAINEE PHENOMENA

Before the turn 21st century the word detainee was just that, a word. Its definition did not raise any real issue and was, for most part, not necessarily part of the military or the international community lexicon. However, since the beginning of the US operations and the establishment of the International Security Assistance Force (ISAF) in Afghanistan, the Iraq invasion and most recently, the epidemic occurrence of piracy off the Horn of Africa, the word detainee has received unprecedented public attention.⁹ The word detainee has become the term to refer to individuals captured outside international armed conflicts or as frequently referred to, captured non-state actors.¹⁰

Indeed, the international community has become acutely aware of detainees because of the complex legal and moral controversies that surround them. In fact, there is no official and internationally recognized definition for detainees and their treatment varies from a nation to another. As such, the Law Of Armed Conflict (LOAC) does not specifically define non-state actors, armed civilians or "dissident armed forces or other

⁹ Statistics on Proquest Academic Research website: as an example, prior to 2001, there were 6,694 references on detainees; post 2001, there were 26,851 references on detainees. The search was done by the author of this paper on 22 May 2009.

¹⁰ Examples of non-state actors are: al-Qaeda, Yemeni Islamic Jihad Somali National Front (SNF) and Tamil Tigers being and/or armed civilians. They readily use available weapons, (or make shift weapons such as Improvised Explosive Devices), employ tactics influenced by their culture (such as suicide bombers, the use human shields, insurgents blending with the local populace) and capitalize on the will of individual to pick up arms to support their ideologies and interests. O'Neil, p3 and Peacebuild Forum Website

organized armed groups."¹¹ Further, the LOAC does not define the word detainee either.¹² This shortcoming regarding detainees is causing controversy because it is unclear what specific rights and treatment they should be entitled to. But why is there no definition? Dr Kretzmer provides some insight:

The reasons for this lacuna [no definition] are well known. States were, and still are, unwilling to grant the status of combatants to insurgents and other non-state actors who take part in non-international conflicts, as doing so would not only afford them an element of legitimacy, but would mean that they enjoy the two 'privileges' of combatants – immunity from criminal liability for fighting, and prisoner-of-war status when apprehended.¹³

Indeed, the LOAC clearly defines state actors or armed forces as combatants and if captured, they will be entitled to Prisoner of War (PW) status. PW status provides significant protections and guarantees including that PW "must be released and repatriated without delay at the end of hostilities."¹⁴

¹¹Canada, Department of National Defence, B-GG-005-027/AF-021 *The Law Of Armed Conflict at the Operational and Tactical Level* (Ottawa: DND Canada, 2001), Canada, Department of National..., 3-1.

¹²Chris Madsen, *Military law and operations* (Aurora, Ontario: Canada Law Book, 2008), 8-12.

¹³ David Kretzmer, "Targeted killing of suspected terrorists: Extra-judicial executions or legitimate means of defence?" *European Journal of International Law* 16, no 2 (April 2005): 195.

Professor David Kretzmer, LL.B, LL.M (Jerusalem), Dr. Jur. (York University, Canada). During a long academic career Professor Kretzmer has taught contract law, constitutional law, administrative law, international human rights and international humanitarian law. Recent articles have been published in the *American Journal of International Law*, the *European Journal of International Law*, the *German Yearbook of International Law* and the *European Constitutional Law Review*. Besides his academic work, Professor Kretzmer has been active in NGO activities. He was a founding member of the Association for Civil Rights in Israel and is a member of the executive board of B'Tselem, the Israeli Information Centre for Human Rights in the Occupied Territories (page 197).

¹⁴Canada, Department of National Defence, B-GG-005-027/AF-021 *The Law Of Armed Conflict at the Operational and Tactical Level* (Ottawa: DND Canada, 2001), 3-1.

Meanwhile, the international community continues to associate detainees with controversy, arrangements, convenience, abuse, mistreatment, torture, Human Rights (HR) violations, illegal and unlawful non-combatants, pirates, interrogations, shame, child soldiers, women, injustice, military tribunals, criminal law, ...etc. The word detainee has become an emotional word and as a result, its meaning and definition are actively debated, closely scrutinized and analyzed.

This chapter presents three detainee definition examples (the US, UK and Canada) to accentuate the similarities regarding the treatment to be afforded to detainees. It follows by emphasizing how the phenomena of detainees and associated challenges, resulting from internal armed conflicts, are and will persist at being a reality of the overseas missions and engagements for the international community. The chapter concludes with the fact that Canada, as an international player, will continue to participate in such operations and face the detainee issue.

DEFINING DETAINEES

The international community has yet to reconcile and harmonize legality and morality, politics and national interests, values and culture regarding detainees before a definition could be adopted or proposed. The latter are the reasons why the word detainee raises such feeling of uneasiness because consensus regarding the status of detainees has yet to be reached. Nonetheless, because detainees are a contemporary military reality for many nations, there exist numerous national definitions for detainees.

For example, in the US, the term detainee refers "to any person captured or otherwise detained by an armed force."¹⁵ The US goes further by specifying that

other detainees or persons in the custody of the U.S. Armed Forces who have not been classified as an EPW [Enemy Prisoner of War] (article 4, GPW [Geneva Convention Relative to the Treatment of Prisoners of War]), RP [Retained Personnel] (article 33, GPW), or CI [Civilian internee] (article 78, GC [Geneva Convention relative to the protection of Civilian persons in time of War]), shall be treated as EPWs until a legal status is ascertained by competent authority.¹⁶

Similarly, the Minister of Defence for the United Kingdom (UK), in its publication *Joint Doctrine Publication – Detainee (2006)*, states:

[d]etainees are a category of prisoner who can only be held during operations other than International Armed Conflict... Detainees should be handed over to the appropriate local authorities at the earliest opportunity, provided that there is no reason to believe they will suffer abuses of their human rights... Detainees must be treated humanely at all times... [and on transfers]... detainees must only be transferred to a state that is a party if the detaining state has satisfied itself that the receiving state is willing and able to apply the GCs.¹⁷

¹⁵Military Police - Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, Army Regulation 190-8, OPNAVINST 3461.6, AFJI 31-304, MCO 3461.1. Headquarters Departments of the Army, the Navy, the Air Force, and the Marine Corps Washington, DC, 1 October 1997. http://www.apd.army.mil/pdf/files/r190_8.pdf; Internet accessed 24 May 2009, 33.

¹⁶Military Police - Enemy Prisoners of War, Retained Personnel..., 33.

¹⁷Minister of Defence United Kingdom, *Joint Doctrine Publication – Detainees*. http://www.mod.uk/NR/rdonlyres/92D44066-04ED-46A6-8010-A4716446C659/0/20071218_jdp1_10_3_U_DCDCIMAPPS.pdf; Internet accessed 24 May 2009, 1-1,1-2 and 1-5.

Finally, DND, in its publication *Prisoner of War Handling Detainees and Interrogations & Tactical Questioning in International Operations*, provides the following direction on detained persons and detainees:

Persons detained or captured as a result of operations outside international armed conflict will be subject to local and national law and, so long as there is reason to believe that their human rights will be respected, should be handed over to the appropriate authority at the earliest opportunity. ...If there exists any uncertainty as to status, then persons detained shall be accorded the same rights as PW [prisoners of war] until such time as their status is clarified and/or they are turned over to civilian authorities. Detained persons must be treated humanely and in accordance with the basic standards for the treatment of PW...Detainees are associated with the entire spectrum of conflict...Persons who are caught and detained by CF personnel are detained persons, and all those not entitled to Prisoners of War (PW) status are detainees...Personnel captured by, or those who surrender to, CF forces as a result of an operational engagement, especially during any CF pre-emptive action, will become detainees.¹⁸

The definitions or statements are fairly similar on the surface but national legal experts would argue that they are legally quite different. While it is not the aim of the paper to discuss the legal ramifications of non-state actors, there are three evident common threads in all-mentioned definitions of detainees: first, they refer to persons captured outside international armed conflict; second, detainees should be subjected to local and national law¹⁹; and third, they all have provisions for ensuring that detainees receive humane treatment, that their human rights (HR) are respected and that the essence of the Geneva Conventions regarding PW is applied to them. Basically, despite the legal

¹⁸B-GJ-005-11-/FP-200, Prisoner of War Handling, Detainees and Interrogation & Tactical Questioning in International Operations, dated 01 August 2004, <http://www.cfd-cdf.forces.gc.ca/sites/page-eng.asp?page=3486>; Internet; accessed 28 February 2009, 1-7 and 1B-1.

¹⁹The US do not stipulate local authorities in the aforementioned definition.

arguments going back and forth regarding detainees, the world community has reached the same conclusions and is demanding nations to comply with a fair and humane treatment of detainees.²⁰

DETAINEES: PRESENT AND FUTURE OPERATIONS

The latter is an important to recognize and understand because the present phenomenon of detainees is not ephemeral. In fact detainees will continue to be a factual component of future foreseeable operations, and more precisely, of internal armed conflicts. In the post cold war era, there "has been the renewed focus on fragile and failing states"²¹ and the same can be said of internal conflicts (non-international armed conflicts).²² In reality, this is a classic case of the "chicken and the egg" dilemma. Are internal conflicts causing a state to fail or is it the failure of the government ability to sovereign that cause the internal conflicts to emerge which in turn will cause a state to fail? Actually both perspectives, depending on root circumstances, are plausible. What is certain however, is that whenever one is present, the other is or will be present as well.²³

²⁰As seen at footnote 9, the incredible number of articles (26,851) based on detainees and their rights and treatment is concrete trend of the pressure the international community is placing on nations regarding the handling and processing of detainees.

²¹Center for International Governance Innovation, Global and Human Security, <http://www.cigionline.org/community.igloo>; Internet accessed 21 March 2009.

²² James Cockayne and David M. Malone, "The Ralph Bunche centennial: Peace operations then and now." *Global Governance* 11, no. 3 (July-September 2005); <http://proquest.umi.com/pqdweb?RQT=301&UserId=IPAuto&Passwd=IPAuto&JSEnabled=1&cfc=1>; Internet; accessed 18 March 2009.

²³Monika Francois and Inder Sud, "Promoting Stability and Development in Fragile and Failed States," *Development Policy Review* 24, no.2 (2006): 142.

While it could be argued that in the past the international approach was not to intervene in internal conflicts²⁴, the international community has changed its posture regarding internal conflicts. Fragile and failed states, with their inherent corruption, dictatorship, absence of rules of law (governance), ethnic and/or religion divisions, economy shortfalls, pose an undeniable threat to the global international security and it can not be ignored.²⁵ They are incubators for extremist groups, "instability, mass migration and murder...as well as reservoirs and exporters of terror. The existence of these kinds of countries, and the instability that they harbour, not only threatens the lives and live hoods of their own peoples but endangers world peace."²⁶ As such, fragile and

<http://proquest.umi.com/pqdweb?RQT=301&UserId=IPAuto&Passwd=IPAuto&JSEnabled=1&cfc=1>; Internet; accessed 04 March 2009.

²⁴"Nothing in this protocol shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the government by all legitimate means, to maintain or re-establish law and order in the state or to defend the national unity and territorial integrity of the State."

Canada, Department of National Defence, *Collection of documents on the Law Of Armed Conflict*, Edited by the Directorate of Law Training (Ottawa: DND Canada, 2005), 166.

²⁵ Monika Francois and Inder Sud, "Promoting ...", 141. And

Daniel Thürer, "An Internal Challenge – Partnerships in Fixing Failed States," *Harvard International Review* 29, (4) (Winter 2008): 42. Harvard Education website. <http://hir.harvard.edu/index.php?page=article&id=1706>; Internet; accessed 20 May 2009.

²⁶ Robert Rotberg, "Failed states in a World of Terror," *Foreign Affairs*, 81, no.4 (July/August 2002): 127. <http://proquest.umi.com>; Internet accessed 20 March 2009. And,

"September 11 taught us that "failed states" are not just wellsprings of vast human suffering, they are also breeding grounds for extremist movements and safe havens for anti-Western terrorists. Dealing with failed states - Afghanistan, Bosnia, Rwanda, Congo, Somalia, and now Iraq - requires a multinational response."

Stephen Walt, "The Imbalance of Power." *Harvard Magazine, Forum*, (March-April 2004). Harvard Magazine website. <http://harvardmagazine.com/2004/03/the-imbalance-of-power.html>; Internet; accessed 26 May 2009.

failed states are considered "one of the main threats to the international and regional security."²⁷

Canada has clearly recognized these threats and their effects in the future.

Canada's International Policy Statement – A Role of Pride and Influence in the World – Defence,²⁸ states:

Whether in Somalia, Afghanistan, Haiti or Sudan, the past 15 years have confronted us with the concept and consequences of failed and failing states[,] ...this problem will remain with us into the future. Failed and failing states pose a dual challenge for Canada. In the first instance, the suffering that these situations create is an affront to Canadian values. Beyond this, they also plant the seeds of threat to regional and global security. They generate refugee flows that threaten the stability of their neighbours, and create new political problems for their regions. More ominously, the impotence of their governing structures makes them potential breeding ground or safe havens for terrorism and organized crime.²⁹

Furthermore, Canada has not only recognized the threats, it has also understood that it must be an active participant in confronting and resolving them.³⁰ So, Canada, just as one of the many nations in the international community, is prepared to continue to get

²⁷Stefan Mair, "A New Approach – The Need to Focus on Failing states," *Harvard International Review* 29, no. 4 (Winter 2008): 52. <http://hir.harvard.edu/index.php?page=article&id=1708>; Internet; accessed 20 May 2009.

²⁸Department of Foreign Affairs and International Trade, *Canada's International Policy Statement – A Role of Pride and Influence in the World : Defence* (Ottawa: Canada Communication Group, 2005).

²⁹ Department of Foreign Affairs and ..., 5.

³⁰ "Today's international security environment t poses complex challenges, whether in the form of failed and failing states, global terrorism, the spread of weapons of mass destruction or ongoing regional tensions. Canada, working in close partnership with friends and allies, must do its part to confront them. To this end, the Government will pursue an integrated strategy that draws on Canada's diplomatic, development and defence resources. This includes a central role for the Canadian Forces."

Ibid., 6.

involve in internal conflicts. This trend also directly relates to the changes in UN peacekeeping operations of the 21st century "[t]he narrowly defined, lightly armed, strictly neutral operations have become complex, multidisciplinary state-building operations."³¹ Indeed the end of the Cold war has "largely freed the Council [Security Council] to engage in peacekeeping in places and forms that would have been unthinkable during the Cold War – including internal conflicts."³² Hence, the UN has been willing and able "to intervene more often in essentially internal conflicts and complex humanitarian situations."³³ Another key change is the readiness of the UN to invoke Chapter VII in its resolutions: since the 1st Gulf War (1990), UN Resolutions hinging on Chapter VII have increased by 37%.³⁴ The latter is particularly crucial because it allows actions "by air, sea, or land forces as may be necessary to maintain or restore international peace and security."³⁵ Consequently, by allowing the use of force, there will be captives.

³¹Cockayne and Malone, "The Ralph Bunche . . . , 1.

³²*Ibid.*, 4.

³³*Ibid.*, 4-5.

³⁴Calculations were executed by the author of this paper based on statistic emanating from an inventory of resolutions compiled by Department of Peace and Conflict Research in 2003 and UN Resolution research Website.

Patrik Johansson, "UN Security Council Chapter VII resolutions, 1946-2002. An Inventory." Uppsala: Department of Peace and Conflict Research 2003; http://www.pcr.uu.se/publications/UCDP_pub/Chapter%20VII%20Resolutions_050921.pdf; Internet; accessed 21 February 2009. And,

UN Security Council: Resolutions, Presidential Statements, Meeting Records and Security Council Press Releases; Research Document Webpage, <http://www.un.org/Depts/dhl/resguide/scact.htm>; Internet; accessed 15 February 2009.

³⁵ United Nations Peacekeeping Operations, Background note: 31 December 2008; <http://www.un.org/Depts/dpko/dpko/bnote.htm>; Internet; accessed 21 February 2009.

Detainees are and will continue to be part of military operations in the foreseeable future. Canada, as an active player on the world arena, has and will continue to be a willing participant in dealing with the emergence of failed and fragile states and the treat they pose. This signifies as well that Canada will continue to deal with detainees and their inherent controversial handling and processing.

SUMMARY

In summary, the emergence of failed and fragile states poses an undeniable threat to the global international security and it is in the best interest of the international community to confront and address these threats. Hence, most 21st century operations will likely involve security assistance forces (as it is the case in Afghanistan) in resolving internal conflicts. Consequently, the phenomena of detainees and their handling and processing challenges are and will be a reality of the overseas missions and engagements. Canada, as a key and willing international player, will continue to participate in such operations and face the detainee issue, especially relating to their treatment

But what has been learned and practiced so far regarding the handling and processing of detainees? How have the strategic and tactical levels been dealing with this relatively new battlefield reality? Specifically for Canada, how has the transferring of detainees been effected given that there must be a reasonable belief that the HR and the essence of the GC are being applied by the receiving party to detainees? The next

Chapter explores the existing and recommended practices relating to the handling and processing of detainees.

CHAPTER 2: DEFINING THE HANDLING AND PROCESSING OF DETAINEES

It seems rather intuitive to say that the handling and processing of prisoners or captives do not begin at the time of capture. But it is vital to emphasize that there are crucial steps regarding the handling and processing of prisoners or captives that need to be considered and resolved well in advance of the deployment and capturing any personnel because they will set the conditions to increase the odds of success for such activities. This is key not only from national and military perspectives but also from an international one: in the 21st century, a nation is judged by its transparency, accountability and responsibility of its actions.³⁶

This Chapter is divided in four sections and aims at providing a baseline of the requirements and challenges associated with the handling and processing of detainees especially when the decision is to transfer the detainees to another party. The first section provides an understanding of the three initial key decisions (the type of conflict, status to be afforded to prisoners and choice of post-capture options which are either release or detention) that are required by the government of Canada regarding prisoners prior to any missions or operations. The second section concentrates on the status of detainee, highlighting the challenges and dilemmas associated with post capture options. The third

³⁶ "The standards a nation sets for the treatment of those whom it makes PW should be a benchmark of that nation's culture and humanity, on display for all to see. It is the requirement to establish a benchmark, which dictates the need for clear doctrine and, where necessary, instructions governing the treatment of PW." B-GJ-005-11-/FP-200, Prisoner of War..., 1-1.

section focuses on the post capture option of “detention” by a detaining power, which in simpler terms implies the transfer of detainees to another party. The section specifically speaks to what should be done at the strategic level, such as the evaluation of the capacity and capability of a detaining power to effect detention and the preparation of assurances. Section four, the last section, advances a tactical or soldier perspective resulting from the decision to transfer detainees, to include requirements, implications, challenges and dilemmas.

SECTION I - PRISONERS AND CAPTIVES, GENERAL

Of the many decisions that the government of Canada must make prior to troops being actively engaged in a mission, the decision regarding how captured personnel will be handled and processed must be answered. There are three key initial decisions that are integral to the handling and processing of captured personnel: first, the type of mission must be clearly identified, second the status to be afforded to captives must be resolved, and third, the decision on what will happen with captives post-capture must be deliberated.³⁷

³⁷There is no specific theory or planning guidance that amalgamate the key decisions at a strategic level regarding capture personnel. The author of this paper, in reviewing various publications such as *Canadian Military Doctrine, Use of Force for CF Operations, and Prisoner of War Handling Detainees and Interrogation & Tactical Questioning In International Operations*, has analyzed and compiled the most crucial steps and decisions required at the strategic level in order to provide the necessary direction and guidance in military operations.

B-GJ-005-11-/FP-200, Prisoner of War..., Chapters 1-2.

B-GJ-005-000/FP-001, Canadian Forces Joint Publication – 01 Canadian Military Doctrine, December 2008.

B-GJ-005-501/FP-001, Canadian Forces Joint Publication – 5.1 Use of Force for CF Operations, August 2008.

The government of Canada must qualify the type of conflict (international, non-international, internal), operations/mission (assistance, observer) the military will be engaged with. These decisions should be clear, publicly and widely understood not only by DND but also by all government agencies. Indeed, as discussed in Chapter 1, Canadian expeditionary operations are likely to be in failed or fragile states and will be based on "an integrated strategy that draws on Canada's diplomatic, development and defence resources [a comprehensive approach type engagement]."³⁸ Hence it is critical for all relevant government agencies to easily and objectively identify the responsibilities and expected outcomes of their organizations in any given mission.³⁹

Having qualified the type of conflict and mission it would be involved with, the government of Canada would then be in the position to establish the status of the captured personnel as part of the operations. According to Canadian military doctrine, captured personnel are either Prisoner of War (PW) or detainees.⁴⁰ The next key logical decision relates to what happens to the captives post-capture. There are two options: captives may be detained or released based on the type of mission, and based on International, political and legal imperatives. Although detention may seem like the most logical option, there are situations where legal and ethical constraints will render the option of detention not-feasible.⁴¹ But, for most situations, detention should be the

³⁸Department of Foreign Affairs and ..., 6.

³⁹Agencies such as DFAIT, CIDA, CSC, RCMP.

⁴⁰Department of National Defence, Prisoner of War..., 1-7 and 1B-1.

preferred option. Indeed, there are strong and rational incentives in taking and detaining prisoners, despite the administration burden they may bring. As per Canadian doctrine, reducing the enemy's numerical strength, fighting capacity and morale as well as trying to gain information or intelligence from prisoners are the fundamental purposes of taking prisoners.⁴² Of course, the taking and detaining of prisoners are also done for "reason of man's humanity."⁴³

Therefore, when the decision for post-capture action is to detain prisoners, it ensues that a detention process complete with arrangements must be made. Canada has then two further options: it may decide to hold the prisoners itself or it may transfer them to a receiving Power.⁴⁴ Given that Canada (DND) does not have an innate capacity⁴⁵ of holding prisoners (for long period), Canada would most likely be inclined on relying on a coalition/ alliance organization or partner to detain the prisoners.⁴⁶ In doing so though,

⁴¹There are situations where there will be no taking or detaining of prisoners such as it often the case in pure Peacekeeping and Military Observer type missions. Also for compelling international and legal reasons there may be the taking of prisoners, however these individuals would be subsequently released. This is the present situation with the apprehension of pirates off the Sea of Eden where once they are searched and disarmed, pirates are released.

Todd Pitmand and Katharine Houreld (The Associated Press), "NATO can't arrest pirates – Frees 20 hostages off Somalia," *The Edmonton Sun*, 19 April 2009: 46.

⁴²Department of National Defence, Prisoner of War..., 1-1.

⁴³*Ibid.*, 1-1.

⁴⁴A Detaining power can be a Host Nation, a coalition partner or an allied. *Ibid.*, 1A-1.

⁴⁵This is not to say that DND could not detain prisoners for a long period. If the decision was for Canada to detain prisoners, it would have to build that capacity. However, DND has the doctrine available to do so. The Joint Doctrine Manual, Prisoner of War Handling Detainees and Interrogation & Tactical Questioning In International Operations, provide specifics guidelines from the building to the management of detention establishments. *Ibid.*, Chapter 3.

⁴⁶*Ibid.*, 1A-1.

there is one important caveat regarding the transferring of prisoners: "[i]t is a Canadian Forces policy that all captured persons or detainees be treated to the standard required for PWs, as this is the highest standard required under International Humanitarian Law."⁴⁷ As a result of this policy, Canada has the "residual responsibility"⁴⁸ to ensure that transferred captives are receiving such treatment. If the receiving power is not complying with the standards and is not capable of correcting the situation, "Canada has a duty to correct the problem, or to take the [prisoners] back into Canadian custody."⁴⁹ Hence, although not specified in *Department of National Defence, Prisoner of War Handling Detainees and Interrogation & Tactical Questioning In International Operations* manual, the latter implies that a monitoring system regarding the treatment of prisoners must be in place in order to enact that residual responsibility.⁵⁰

In sum, once the government has decided to support a mission, there are three major decisions it must take: it must specify the type of mission, the status of captives, and decide how the captives will be handled post-capture (release or detention). In the case where Canada has elected to detain prisoners, Canada must also decide it will detain the prisoners itself or rely on a partner, allied or the Host Nation. Although these decisions appear straight forward, their execution is far from being simple. In fact, when the status of captives qualify as detainee, the handling and processing of captives take a

⁴⁷ *Ibid.*, I and 1B-2

⁴⁸ *Ibid.*, 3H-1.

⁴⁹ *Ibid.*, For PW see 3H-1 and for detainees see 1B-2.

⁵⁰ The manual does not address the monitoring of detainees. *Ibid.*

new dimension and are a great deal more complex and demanding.⁵¹ The next section will highlight the challenges and dilemmas associated with the status of detainee and their post-capture options.

SECTION II – TRANSFERRING DETAINEES

The taking, handling and processing of captives in armed conflicts have always been a troubled affair.⁵² But the specific handling and processing of detainees are reaching new heights in the international public eye today. Globalization, numerous HR watch groups in addition to the International Committee of the Red Cross (ICRC) and UN HR branch allow for more public awareness and concerns regarding the treatment of these detainees. Also, the emergence of failed and fragile states and the threat they pose to the international peace and security, coupled with the relatively recent willingness of the international community to intervene in internal armed conflicts are contributing causes to this increased public scrutiny regarding detainees. Hence for Canada, like many other nations, the handling and processing of detainees are proving challenging, difficult and politically charged. As a result, the three decisions aforementioned (type of conflict, status of captives and post-capture action) must be done very wisely, carefully and transparently because not only do they affect the strategic level, these decisions do have

⁵¹*Ibid.*, 3H-1.

⁵²"Throughout the history of warfare, the capture and treatment of prisoners has been an emotive subject." *Ibid.*, 1-1.

great complex implications at the tactical level as well.

As briefly discussed in Chapter 1, the decision regarding the status to be afforded to captives is sensitive. While PW status is relatively straight forward as LOAC provides the necessarily guidance and rules, this is not the case with detainees. Hence, once Canada has ruled that captives, as part of a specific mission, will be detainees⁵³, Canada must then also establish and coordinate the guidance and rules regarding the administration of those detainees (in concert with its coalition partners as applicable). Accordingly, as described in the previous section, Canada will have to make provisions specifically for ensuring that detainees receive humane treatment, that their HR are respected and that the essence of the GC regarding PW is applied to them.

Evidently, how detainees would be handled post-capture (release or detention) is also one of the most delicate decisions Canada would have to make in supporting a mission abroad. It is not the purview of this paper to analyze how the choice is made from a legal point of view. Rather the impacts of the resulting choice are examined to demonstrate that the implications range from the strategic to the tactical level, nationally and internationally. Hence, post-capture, Canada has two options: release or hold detainees (in Canadian custody or transfer detainees).

- **RELEASE OF DETAINEES.** As briefly discussed already, this option may appear irrational to some. However, it is sometimes the only viable or feasible

⁵³As opposed to PW.

option for legal and ethical reasons. A case in point is the current Canadian government policy regarding pirates off the Horn of Africa. As such, once the pirates have been apprehended, they are searched, disarmed and subsequently released. The reason why they are released is that Canada (as part of the NATO mission) does not have the jurisdiction and authorities to hold the detainees. Also, the pirates who are primarily from Somalia, can not be turned over the local authorities because Somalia, a failed state, has no functioning governance and rule of law.⁵⁴ Finally, as seen in Chapter 1, Canada has the responsibility to ensure that the HR of detainees are respected. Given the situation in Somalia, it would be highly unlikely that it would occur. Therefore, in certain circumstances as it is case with the pirates, the release of detainees is the only feasible option.

- HOLDING DETAINEES.
 - Canadian Custody. Although a viable solution, holding detainees in Canadian custody is not a readily available option because the CF does not have the infrastructure and personnel to hold detainees in the long term. Hence, if Canada, for different reasons, was to estimate that the best option is to detain personnel, it would have to build up a new organization. It is not an impossible venture but it would require time

⁵⁴ Stefan Mair, "A New Approach – The Need to Focus on Failing states," *Harvard International Review* 29, no. 4 (Winter 2008): 54-55. <http://hir.harvard.edu/index.php?page=article&id=1708>; Internet; accessed 20 May 2009.

and deliberate planning because detaining personnel has never been done by Canada (other than PW during the World War II). This option will be discussed further in the fifth chapter of this paper.

- Transfer of detainees. While this option of holding detainees by transferring them to a another party may appear as most logical, especially given that there is no detention capacity within DND (from a long term perspective), Canada retains the responsibility to monitor and ensure that the receiving party is treating the detainees humanely and is respecting the detainees' HR. Ashley Deeks argued in her paper *Avoiding Transfers to Torture*, that if a government wishes to transfer detainees it should be done with assurances.⁵⁵ In fact, "assurances are becoming the norm"⁵⁶ as they "reflect a commitment by a receiving state that it will treat an individual in a particular way."⁵⁷

⁵⁵ Ashley S Deeks, "Avoiding transfer to torture - Council Special Reports," *Council on Foreign Relations* no. 35 (June 2008); http://www.cfr.org/content/publications/attachments/Assurances_CSR35.pdf; Internet; accessed 10 April 2009.

Ashley Deeks is an International Affairs Fellow, Council on Foreign Relations and Visiting Fellow, Center for Strategic and International Studies (on leave from the Office of the Legal Adviser, US Department of State).

⁵⁶ Assurances are becoming the norm. For example, the Australian Defence Force (ADF) had assurances arrangement with the United Kingdom for its mission in Iraq, where the ADF has assurances with the Netherlands in Afghanistan (as part of ISAF partner in the Oruzgan province). The Netherlands in turn has arrangements with the government of Afghanistan, very similar to what Canada has with the Detainee Transfer Agreement.

Office of the Minister for Defence Australia, Letter to Dr. Kristine Klugman, President of Civil Liberties Australia, 25 February 2009. http://www.cla.asn.au/Article/090225MOD_Detainees.pdf; Internet accessed 24 May 2009.

⁵⁷ Deeks, *Avoiding transfer to...*, 9.

Basically, when the government of Canada qualifies the status of captives as detainees and that subsequently the post-capture option is to detain by transferring them to another party, the government of Canada must secure specific arrangements for the handling and processing of the detainees to ensure that the receiving party is treating the detainees humanely and is respecting the detainees' HR. The establishment of assurances becomes then crucial to the successful handling and processing of detainees. The next section provides the details on the preparation of assurances.

SECTION III – STRATEGIC PREPARATION OF ASSURANCES

Assurances reflect a commitment by a receiving state that it will treat a detainee in accordance with the rules and directions of the releasing state (transferring party). But before such assurances can be coordinated, an overall assessment of the receiving state must be conducted to evaluate the capacity, reliability and feasibilities of a possible arrangement. Hence for Canada, the Privy Council Office (PCO) and Department of Foreign Affairs and International Trade (DFAIT) along with specialized other departments such as Correctional Service Canada (CSC) and Royal Canadian Mounted Police (RCMP), should be engaged at the earliest stages in assessing the receiving state capacity to effect assurances.⁵⁸

⁵⁸PCO is coordinating the Canadian Comprehensive Approach in Afghanistan.

ASSESSMENT AND EVALUATIONS. Assessments and evaluations would most likely be done in concert with other nations, coalitions, groups, and/or organizations. They are as crucial as they are challenging to do:

- The evaluations must be carried out without alienating the receiving state;
- An evaluation of the detention system capacity must be done (adequate number of trained personnel and infrastructure for minimum standards of living);
- An assessment of the capacity and maturity of the receiving state judicial system must be performed and rated throughout the state (confirm uniformity or irregularity within the state);
- An appraisal of the overall competency of the judicial system, from beginning to end (fair trials, fair sentencing and enforcement of the sentence) must be quantified according to HR and International Law norms and standards but also may include Canadian caveats. In fact, Canadians often expect to have Canadian standards embraced by other nations; and

- An assessment and selection of a monitoring authority must be achieved.⁵⁹

Evidently such evaluations are very difficult to synthesize and rationalize. But in the end, the ultimate decision to transfer detainees is a balance of qualifying and quantifying information, probabilities, and willingness of the transferring and receiving states to do the right things to ensure that the detainees are treated adequately and fairly. This decision is highly strategic and political and can be just as controversial, if not more, as the decisions to participate in a conflict, to allow for collateral damage, or to accept the fact that there will be Canadian casualties as part of a given mission. Therefore, once the decision is reached to transfer detainees, the evaluations and assessments of the receiving party capacity and capability to detain personnel are critical because the success or the failures of the detaining power could reflect on Canada, affecting positively or negatively its international reputation.

PREPARATION OF ASSURANCES. Just as the ROEs are the means by which Canada relays its intent to the CF tactical level, assurances extend Canada's strategic and political intent regarding those detainees. While these assurances may take various forms (diplomatic note, letters, MOU), they are difficult to negotiate because they are highly sensitive. Moreover, "[m]ost assurances are crafted as political commitments that are not legally binding, although some assurances reaffirm the receiving state's legally binding obligations under human rights treaties."⁶⁰ As such, if a government seeks assurances

⁵⁹Deeks, *Avoiding transfer to...*, 9-10.

from a receiving state, it conveys that there is a possibility, however small or large, that the mistreatment of detainees may take place. For that reason, the agreement should be executed at the highest level of government possible and therefore, may be difficult to execute and obtain. For example, Canada never thought of, or chose not to seek assurances from the US in the first years of the campaign in Afghanistan probably because the possibilities of detainee abuses were estimated as small. However, as the allegations erupted of abuse at Guantanamo Bay in early of 2002, Canada quickly started to negotiate with the US to ensure that the detainees, transferred by the CF to US authorities, were going to be treated humanely and their HR would be respected.⁶¹

Assurances must contain a number of articles: it must provide definitions of terms, clear expectation regarding the treatment of detainees, possibly including where the detainees should be held, and very importantly, they should provide for monitoring mechanisms through detention, prosecution, trial, sentencing and the serving of the sentence, as applicable. In fact, the assurances should provide for the monitoring of detainees from beginning to end. The latter is key because not only would it serve as the backbone and “watchdog” of the assurances, it would also provide vital references and information on whether or not the articles within the assurances are being carried out as laid out. Without monitoring, assurances are really nothing more than a piece of paper.⁶²

⁶⁰*Ibid.*, 9.

⁶¹Hugh Winsor, "For Canada, prisoner status should matter," *The Globe and Mail*, 4 February 2002. And, Shawn McCarthy and Jeff Sallot, "Liberal fears fail to change troops' orders on captives," *The Globe and Mail*, 6 February 2002.

Hence, if Canada wishes to transfer detainees to an ally, HN or a third party, Canada must then first assess the capacity of the receiving party and subsequently arrange for assurances. It is understood that negotiating with an ally will be very different from negotiating with a fragile state, being either on the verge of being a failed state or just recovering from being one. Nonetheless, the assessments must be carried out and assurances developed and implemented – this is what is expected of nations in the 21st centuries. The next and final section of this Chapter provides a tactical or soldier’s perspective of having to deal with the requirements, challenges and dilemmas associated with the transfer of detainees.

SECTION IV - A TACTICAL PERSPECTIVE

The decision to release or hold/transfer detainees is a strategic decision however, it has, not surprisingly, tremendous implications for the personnel on the ground, at the tactical level. In fact, the manners soldiers will implement detainees ROEs on the battlefield create the initial conditions for the successful handling of detainees. Detainee handling will be examined by studying the challenges in three different settings: on the battlefield, off the battlefield and post battlefield.

ON THE BATTLEFIELD. The “on the battlefield” setting refers to individuals being captured on the battlefield itself. It is also the location of first interactions between

⁶²Deeks, *Avoiding transfer to...*, 9.

soldiers and detainees. Although the circumstances of the capture may differ (kinetic or non kinetic such as at check points, patrols, combat engagement situations, criminal activities, etc), the initial handling of the detainees will not be different. Actions such as disarming, searching and guarding of the individuals will take place.⁶³ However, with the status of detainees, one more activity must take place: the gathering of evidence.⁶⁴

Although this type of activity is not new to the battlefield space, this activity has been more an exception than a rule in the past, as evidence have been gathered in cases of war crime activities. Hence, the capture of personnel has become much more complex for the soldiers on the ground than is used to be. Ultimately, the soldiers are responsible to ensure that the collection of evidence is carried out appropriately in order to set the conditions for a proper processing of these individuals. Unmistakably, this step is crucial and the failing of it has direct impact not only at the tactical level but also at the strategic level. After all it is not only in the soldiers' best interest to do so, but for all, HN and contributing nations alike, who wish to see the resolution of a conflict. If the gathering of evidence is not done adequately, it may mean that the soldiers may face the same individuals on the battlefield - the impacts can be easily assessed: possibly more soldier casualties.

In order for soldiers to perform the vital step of gathering evidence adequately, there are two crucial dimensions that must be fulfilled. First, the soldiers must be trained

⁶³Department of National Defence, Prisoner of War..., 3-1 and 3A-1.

⁶⁴Army Lessons Learned Centre, Lessons Synopsis report 08-014 – Administration of Detainees in the Battlefield, 24 November 2008. Accessed from email sent by Director of Army Engineers, 28 January 2009.

to effectively perform the duties of gathering of evidence as part of the processing of detainees. Gathering evidence is not routine work for soldiers although it is highly likely to become so given the nature of future conflicts where detainees, vice PW, are likely to be collected on the battlefield. Soldiers should receive specialized training to do so and the responsibilities and duties of transferring this information must be clearly laid out in the chain of command. Although it should be based on International Laws, the gathering of evidence should also be in synch with the prosecuting authorities' demands and specifications. It is easy to assess that this gathering of evidence resembles police work. In all simplicity, it is. In fact, some have argued that it should be left to the police to do. The article *it's All About The Policing Stupid*⁶⁵ mentioned that the UN should continue to increase its police force because the requirements of the 21st Century battlefield resemble indeed police work. But until this is achieved, it will be the responsibility of the soldiers. Hence, Canadian soldiers should be trained specifically to perform the gathering of evidence that is tailored to the prosecuting authorities' demands and specifications.

The second aspect speaks to the trust and confidence the soldiers must have in the handling and processing of detainees coupled with strong and clear direction from the chain of command. Killing, capturing and the surrendering of the enemy result from the actions of soldiers. If these actions can not be projected beyond the battlefield, why then have the soldiers on the battlefield in the first place? Evidently, soldiers must see the handling and processing of detainees as effective and fair in order to perform their duties

⁶⁵"It's All About The Policing Stupid," Strategy Page, Peacekeeping;
<http://www.strategypage.com/htm/htun/articles/20081129.aspx>; Internet; accessed 15 March 2009.

adequately. In the context of gathering evidence, if soldiers do not have confidence in the system, then they would question the need to collect evidence, estimating that the exercise is futile. It would jeopardize the first crucial step in the processing of prisoners. From a soldiers' perspective, if the process is not working, there are repercussions. The detainee boomerang effect may take place. Facing the same opponents over and over again would not be acceptable, especially if a comrade's life or his own is a risk each time, or civilians life for that matter. As such, soldiers would question their utility in the whole process. Moreover, soldiers may feel that since justice can not be rendered, then taking justice into their own hands become an acceptable alternative (rather than seeing comrades or civilians die): *dead detainees do not return to the battlefield*.⁶⁶ And it could go as far as revenge as well. The impacts of such tactical actions could cause dramatic strategic impacts such as the fueling insurgent recruitment, but worst the HN and contributing nations could loose credibility with the local population and international community. The essence of winning hearts and minds, a vital aspect in the restoring Governance, security and development into failed and fragile states, could be jeopardized.⁶⁷

Soldiers may also face moral and ethical dilemmas with respect to detainees on the battlefield. If the soldiers know that the handling and processing of detainees leave

⁶⁶"If soldiers lose the conviction that their daily work is making an important contribution to a larger, positive mission, they can become alienated and detached from their surroundings." Paul Bartone, "Lessons of Abu Ghraib: Understanding and Preventing Prisoner Abuse in Military Operations," November 2005. Center for Technology and National Security Policy National- Defense University. Defense Horizons webpage. http://www.ndu.edu/ctnsp/defense_horizons.htm; Internet: accessed 31 May 2009.

⁶⁷Greg Mills, "10 Counterinsurgency commandments from Afghanistan," Spero News – International Peace and Security website; <http://speroforum.com/site/srticle.asp?idarticle=9024>; Internet: accessed 15 March 2009.

room to mistreatment, torture and/or unfair prosecution, how would they react when the detainees are child soldiers, circumstantial soldiers (fathers having to earn a living for example), or individuals who are at the wrong place at the wrong time? Should some of these personnel be simply released? What could be the impacts of doing so? These would be morally and ethically challenging decisions to make because assessing the outcomes of letting someone go or not, are almost impossible to predict. But, this type of decision is expected of soldiers. In accordance with Joint Doctrine Manual “Prisoner of War, Handling detainees and Interrogation and Tactical Questioning in International Operations,” the senior soldier on the battlefield has the authority (and in accordance with mission specific Rules of Engagement) to detain or release captives.⁶⁸ Additionally, when the local authorities may not be viable or dependable, which would be most likely be the case in operations occurring in fragile and failed state, this type of decision is extremely challenging to make.⁶⁹

It becomes clear that soldiers should not have to face this type of dilemma and doubts on the battlefield. Consequently, the handling and processing of detainees must be in synch with soldiers’ ethics and morality. This is not to be taken lightly given the fact that DND is engaged in ensuring that its members “will consistently perform their duties to the highest ethical standards,”⁷⁰ through the robust promotion of its Department Ethics Program. The choice of the words “consistently” and “highest” has obviously been done

⁶⁸Department of National Defence, Prisoner of War..., 1B-1.

⁶⁹*Ibid.*

⁷⁰Defence Ethics Programs, National Defence and Canadian Forces Website; <http://www.ethique.forces.gc.ca/dep-ped/index-eng.asp>; Internet accessed 01 May 2009.

very deliberately and leaves no room for interpretation: the conduct of CF members must be exemplary at any given time, be it in an office setting or on operations. Therefore, if DND demands this behavior of its soldiers then it must, in return, provide the soldiers with an environment, rules and directions that will set the conditions for them to be capable of applying such ethical and moral conduct and judgment. It is than expected that DND, in concert with the government of Canada, must ensure that a fair and effectual detainee handing and processing practice is in place for the well being of its soldiers and setting them up for success. If it is not the case, the soldiers will end up in untenable situations which may affect them adversely, such as Post Traumatic Stress Disorder (PTSD) or pushing them to do extremely actions.

History is replete with examples where the lack of clear and firm direction and/or confidence in the system for the handling of detainees, results in disastrous events. The Boer war, 1899-1902, was an irregular warfare where the Boers commandos were difficult to discern from the local populace, used tactics of hit and run and strike when least expected. There was no clear direction but rather mixed messages regarding the handling of prisoners.⁷¹ Lieutenant (Lt) Morant or known as “Breaker Morant”, an

⁷¹There was allegation that the message from higher Army HQ was to take no prisoners. If it was not the case, it was nonetheless a perception that many troops had. Another perception was that since the Boers Commandos were not following Customary Military law, that was sufficient justification to execute them (Canadian troops). Also, Boer Commandos frequently took uniforms and equipment from dead or captured Imperial soldiers. This led to a situation where the British military authorities declared that any Boers caught wearing articles of British uniforms would be shot.

Australian officer of the Bushveldt Carbineers (BVC), killed “a few”⁷² Boer Commandos in a reprisal of the cruel death of Capt Hunt, his Officer Commanding (OC) and best friend (Capt Hunt was reportedly wounded, captured, tortured and mutilated to death by Boers Commandos). Lt Morant was obviously revengeful but the lack of clear direction regarding prisoners was also a definite factor, amongst many others, for this disillusioned soldier that played in those executions. If he knew that the Boer commandos would be properly dealt with, his approach may have been different.⁷³

But another interesting aspect of this example, is how the effect of these actions had on the soldiers who participated in or knew of the executions:

Sir, many of us are Australians who have fought through nearly the whole war... We cannot return home with the stigma of these crimes attached to our names. Therefore we humbly pray that a full and exhaustive inquiry may be made by impartial Imperial officers in order that the truth may be elicited and justice done.⁷⁴

The above extract is taken from a memorandum prepared by fifteen Non Commissioned Officers and troopers of the BVC. It is obvious that these individuals had a moral dilemma with the events that took place and felt so compelled by them that they had to do

South Australian History, "Breaker Morant, Hero, scapegoat or Rogue?" South Australian History website; <http://www.southaustralianhistory.com.au/breakermorant.htm> Internet; accessed 29 April 2009.

⁷² It is unclear from the research and available evidence how many were killed - but a minimum of three Boers were executed. South Australian History, *Breaker Morant, Hero...*

⁷³ Canadian Forces College, JCSP (DL) Case Study – Ethical considerations in Operations other than war - Breaker Morant.

⁷⁴ Canadian Forces College, JCSP (DL) Case Study – Ethical..., B-8/11.

something. The memorandum was submitted to the officer to whom their Commanding Officer (CO) was reporting to, a pretty bold move by these NCOs and troopers given that it was in 1902.⁷⁵ But this action is a perfect example that soldiers know the difference between what is ethically and legally right and wrong.

The massacre of My Lai (Vietnam 1968) is another example where ambiguous prisoners handling direction went awry. The mission was communicated by superiors officers as “[t]his is what you've been waiting for -- search and destroy -- and you've got it.”⁷⁶ This lax direction coupled with the fact that the US troops moving into that area were agitated and angry because many of their brothers in arms had been maimed or killed in this heavily mined area the week before, was a recipe for disaster. It resulted in the execution not only many enemies but also the massacre of many civilians. Just as with the Breaker Morant case, the lack of clear and solid direction was a key contributing factor in the unfortunate events.⁷⁷

Most recently the events in Somalia are an example where mixed messages regarding the handling of detainees were propagated and it resulted in the death a young Somali. But in the long term, it led to the disbandment of the Airborne Regiment (rightly

⁷⁵*Ibid.*

⁷⁶PBS, American Experience, "The My Lai Massacre." American Experience – Vietnam Online; http://www.pbs.org/wgbh/amex/vietnam/trenches/my_lai.html; Internet; accessed 29 April 2009.

⁷⁷PBS, American Experience, "The My Lai...."

or wrongly), and stained Canada's military reputation. The action of a few individuals had grave strategic impacts.⁷⁸

In summary, on the battlefield, soldiers are key and crucial to the handling and processing of prisoners by gathering evidence. But in order for the collection of evidence to be done adequately, the soldiers must not only be trained and prepared for those duties, they must have trust and confidence in the whole process of detainees. The chain of command must also be clear in its directions regarding detainees handling. It is in the best interest of all, detainees, soldiers and strategic *enjeux*.

OFF THE BATTLEFIELD. The "off the battlefield" setting refers to the processing of detainees once they have been removed from the battlefield and are waiting to be transferred to a permanent detention facility. Most likely, in this transition period, detainees will be further screened at a rear (more permanent) military location where an interview will take place. The two most important components of this interview will be to gather information/intelligence (records and analysis of) and to decide, with the evidence at hand, whether or not a detainee should be released or transferred to a permanent facility to await prosecution. Given the present expeditionary mission organization, these decisions would be taken by military personnel.⁷⁹ For the military personnel performing these duties, they will have the similar issues that the military

⁷⁸ DeMont, John and Luke Fisher. "Somalia Inquiry's Damning Report." The Canadian Encyclopedia - Historica Foundation of Canada. <http://www.thecanadianencyclopedia.com/PrinterFriendly.cfm?Params=M1ARTM0011348>; Internet; accesses 29 April 2009.

⁷⁹Department of National Defence, Prisoner of War..., 1B-1.

personnel on the battlefield had to face: should this detainee be transferred or not, is he or she a child soldier, circumstance soldier? A hard-core criminal? Again these are very moral and ethical decisions based only on evidence at hand as no trial will have taken place at that time. There can be no doubt in the capacity in the handling and processing of detainee of the permanent detaining party for the soldiers to perform their duties. Hence, just as it was the case on the battlefield, military personnel are key to the handling and processing of detainees and must have trust and confidence that the system is effective and fair.

POST-BATTLEFIELD. The final setting to be examined is the “post-battlefield” setting. It refers to the processing of detainees once they are in the custody of the permanent detaining authority. At this level, soldiers are no longer involved but from a Canadian Comprehensive Approach (CA), members of DFAIT, RCMP and/or CSC should be engaged, at least in the monitoring of the detaining authority. In fact, once a detainee is transferred, he should be told why he is being held, what he is accused of and be made aware of the evidence against him. He should also be entitled to counseling to prepare his defence. The detainee then awaits his day in court and subsequent sentencing and serving of, as required. This is the minimum required by the International Law Standards.⁸⁰ The CA team should monitor all those requirements. Just as it was for the

⁸⁰Human Rights First, "Arbitrary Justice: Trials of Bagram and Guantanamo Detainees in Afghanistan," April 2008. Report obtained on the Human Rights First Website; <http://www.humanrightsfirst.info/pdf/USLS-080409-arbitrary-justice-report.pdf>; Internet; accessed 8 March 2009, i-iv. And,

Helena Pejic, "Procedural principles and safeguards for internment/administrative detention in armed conflict and other situations of violence," Accessed through the International Commission of the Red Cross

soldiers, members of the DFAIT, RCMP and or CSC must also have confidence in the system. In fact, most likely, these members may be direct witnesses to the very handling and processing of detainees by the receiving party. If the handling and processing of detainees is not adequate, they could also be subjected to enormous ethical and moral dilemmas.

In the end, it does not matter in observing the requirements of on, off or post battlefield settings, there must be an effectual and fair handling and processing of detainees for the tactical players, soldiers and members of DFAIT, RCMP, CSC to perform their duties adequately. If the process is solid and fair, the tactical level will be set for success in processing the detainees; and if the tactical level is effective than the processing of detainees is that much more robust and valuable.

SUMMARY

This Chapter outlined the baseline requirements and challenges associated with the handling and processing of detainees arising from the decision to transfer detainees to another party. Section I illustrated that once the government of Canada elects to support a mission, there are three major decisions it must take: it must specify the type of mission, stipulate the status of captives, and decide how the captives will be handled post-capture (release or detention). In the case where Canada decides to detain prisoners,

Canada must also specify whether it will detain the prisoners itself or rely on a partner, allied or the Host Nation. Section II specifically focused on the status of captives as detainees and their detention by transferring them to detaining power. It was illustrated that in the later case, the government of Canada must secure specific arrangements for the handling and processing of the detainees to ensure that the receiving party is treating the detainees humanely and is respecting detainees' HR. Section III further detailed key requirements such as the assessment and evaluation of receiving party and the arrangement of assurances by the GOC prior to the transferring of detainees. Finally, Section IV offered a tactical perspective of the requirements, challenges and dilemmas on, off or post battlefield settings. It illustrated that there must be an effectual and fair handling and processing of detainees by the detaining power for the tactical players such as soldiers and members of DFAIT, RCMP, and CSC to perform their duties adequately and without undue stress.

The next Chapter will compare the baseline requirements raised in this present Chapter regarding the intricacies of transferring of detainees (evaluations, assurances, handling and processing, dilemmas) against the on-going operations in Afghanistan.

CHAPTER 3: DETAINEE CASE STUDY – AFGHANISTAN

Although the irregular warfare that is experienced in Afghanistan is not a first for the CF, the dealing with detainees is. Hence the aim of this Chapter is to examine and highlight some the experiences, possible challenges and dilemmas encountered in Afghanistan as part of ISAF in dealing with the transfer, handling and processing of detainees. The Chapter is structured similarly to Chapter 2 and has three main sections. Section I provides some background relating to the present Canadian mission in Afghanistan. Section II focuses on the Strategic preparation of the DTA which also includes a review of the evaluations and assessments of the detaining power, the Afghan authorities. Finally, Section III concentrates on the tactical perspective and illustrates some of the unique challenges and dilemmas the tactical level is facing.

SECTION I - BACKGROUND.

At the outset of the mission in Afghanistan in late 2001/ early 2002, there was an agreement with the US that personnel captured by CF soldiers would be ultimately transferred to US authorities. Although official documents could not be found, it is believed of this author that one of the reasons why the Government of Canada decided to deal with the US is because the Afghan detaining and judicial systems were not reliable, adequate and needed further development and maturity. However, once the allegation of mistreatment of detainees by American authorities arose in early winter 2002, the Canadian government had rethink its approach and secure some “assurances” from the

US that the detainees would be treated properly, adhering to HR principles. Then the scandal of Abu Ghraib came to light in 2004 and the Government of Canada decided to change its strategy. In early 2005, the Government of Canada signed a Detainee Transferred Agreement (DTA) with the newly elected Afghan Government. This agreement came under fire by the Canadian media because the Afghan authorities were too accused of abusing detainees.⁸¹

At first, the Government of Canada stated that it relied on the ICRC to ensure that no abuse was taking place. But realizing that the ICRC would not tell Canada if such action would take place, the Government of Canada modified the DTA (2007) to include that the monitoring of the DTA would be achieved through the Afghanistan Independent Human Rights Commission (AIHRC), a newly formed organization. It is important to note that the CF stopped transferring detainees in early 2007 for a few weeks because of mounting accusations that abuses were taking place. Once, the Government of Canada felt reassured that no abuses were taking place under the Afghan authorities, the CF resumed the transfer of detainees to Afghan authorities.⁸²

⁸¹ Paul Webster, "Canadian soldiers and doctors face torture allegations," *The Lancet* 369, (9571) (April-May 2007): 1419. And,

John Godfrey, "Prisoners of conscience?" *The Globe and Mail*, 22 January 2002; <http://proquest.umi.com/pqdweb?RQT=301&UserId=IPAuto&Passwd=IPAuto&JSEnabled=1&cfc=1>; Internet; accessed 24 March 2009. And,

CBC News – In Depth Afghanistan, "The controversy over detainees," CBC News webpage – Background. <http://www.cbc.ca/news/background/afghanistan/detainees.html>; Internet; accessed 22 May 2009.

⁸²Greame Smith, "From Canadian custody into cruel hands," *Globe and Mail*, 23 April 2007. <http://www.theglobeandmail.com/servlet/story/>; Internet; accessed 9 May 2009. And,

Of late, there are two public and controversial events regarding detainees that has retained the attention of the Canadian population. The first one is legal case by British Columbia Civil Liberties Association (BCCLA) and Amnesty International Canada (the applicants) against the CDS-DND and the Attorney General of Canada. The applicants argue that the present arrangements (DTA) "do not provide adequate substantive or procedural safeguards"⁸³ to protect detainees against a substantial risk of torture.⁸⁴ The case was brought before the Federal Court, the Federal Court of Appeal and the Supreme Court but none of these courts supported the case.⁸⁵ The next step for the applicants is unknown at this time.

The second event involves the Military Police Complaint Commission (MPCC) which has launched a public inquiry into Canada's handling and processing of detainees in Afghanistan. There are three main complaints. The first complaint alleges that CF Military Police personnel failed to investigate possible abuse of detainees by CF member.

Tim Naumetz, "Ombudsman kept lid on transfer of detainees in Afghanistan - release of files could've harmed relations with other countries," *The Ottawa Citizen*, 28 May 2008. And,

"Investigation into alleged detainee abuse concluded," *Marketwire*, 3 October 2008.

⁸³Federal Court, "Amnesty International Canada v. Canada (Attorney General) – Decision," Docket: T-324-07, Citation: 2008FC 336, <http://decisions.fct-cf.gc.ca/cgi-bin/>; Internet; assessed 11 March 2009: [7]-[10].

⁸⁴The legal case also asked that the Canadian Charter of rights and Freedoms be applied to detainees, that no transfer (to any one) until adequate substantive or procedural safeguards are in place and, inquiries into the status of detainees previously transferred to Afghan authority.⁸⁴ Federal Court, *Amnesty International...*, [7]-[10].

⁸⁵The Supreme Court just provided its decision on May 2009 and rejected the appeal. Janice Tibbetts, "Supreme court rejects charter protection for Afghan detainees," *National Post*, 21 May 2009; <http://www.nationalpost.com/story-printer.html?id=1616100>; Internet; accessed 22 May 2009.

This complaint has been already investigated and no evidence was found that such actions took place.⁸⁶ The second and third complaints allege that possible transfers of detainees to Afghan authorities were effected despite the fact that CF personnel were aware that torture by Afghan authorities was possibly taking place.⁸⁷ The commission is to begin its investigation at the end of May 2009.⁸⁸ It will be a very interesting inquiry to follow to hear what CF soldiers may have to say under oath.⁸⁹ No one can predict the results and outcomes of this inquiry.⁹⁰ However, as Philip Zimbardo emphasizes in his book focused on Abu Ghraib incidents, *The Lucifer Effect – Understanding How Good People Turn Evil*⁹¹, the human psyche is difficult to comprehend:

What is significant to me is the number of people who knew of the abuses, witnessed them, even participated in them in various ways and did nothing to prevent, stop, or report them. They provided "social proof" to the MPs [Military Police] that it was acceptable to continue doing whatever they wanted to do... we see the evil of inaction facilitating the evil of action⁹².

⁸⁶Military Police Complaints Commission., Chairperson's Final Report – MPCC 2007-003 Concerning the Afghan Detainee complaint by Dr. Attaran -Public Interest Investigation: 1 and 14. 23 April 2009. <http://www.mpcc-cppm.gc.ca/300/300-eng.aspx>; Internet; accessed 28 April 2009.

⁸⁷CANFORGEN 017/09 CDS 002/09 231603ZKAN 09 – Military Police Complaints Commission (MPCC) Public Interest Hearings – Afghanistan Detainee Complaints; <http://www.vcds.forces.gc.ca>; Internet accessed 28 February 2009.

⁸⁸Paul Koring, "Inquiry into Afghan detainee transfers gets green light," *Globe and Mail*, 26 March 2009; <http://www.theglobeandmail.com>; Internet; accessed 9 May 2009.

⁸⁹Anonymous, "Gov't halts probe into military handling of Afghan detainees; decision to protect reputation of soldiers." *Edmonton Journal*, 5 February 5, 2009; <http://proquest.umi.com/>; Internet; accessed 18 February 2009.

⁹⁰Anonymous, "Gov't halts probe...", 1.

⁹¹ Philip Zimbardo, *The Lucifer Effect – Understanding How Good People Turn Evil* (New York: Random House Trade Paperbacks, 2008).

⁹²Zimbardo, *The Lucifer Effect – Understanding...*, 396.

SECTION II - STRATEGIC PREPARATION OF ASSURANCES

As seen in the previous Chapter 2, when the transfer of detainees is considered, it should be done through the use of assurances. But before assurances can be negotiated, there must be first an *overall* evaluation of the capacity of the “contemplated” detaining authority from many angles: what is the HR track record, their Detention capacity (staff and physical infrastructure) and the capacity of the judicial system. Originally (2001), Canada did not seek or chose not to seek assurances from the US regarding the handling of detainees. However, once the US allegations of abuses came about in early 2002, Canada did pursue this route but it is unknown if there was ever a document created or not.⁹³ But as mentioned in the background section, the events at Abu Ghraib pressed Canada to find an alternative party to dealing with its detainees in Afghanistan. It is a rather interesting exercise to piece together the factors and reasons that led the government of Canada to decide that handing over the detainees to Afghan authorities was a viable and reasonable option.

⁹³This information has been compiled through newspaper articles. There is no available document to show that there was in fact an assurance agreement between Canada and the US, other than Canada was actively pursuing one (article G&M). Most probably, the fact that the US do not make “assurances or agreements” public, is a contributing factor to the non-availability of this information. Hence it is not possible to say with certainty that such document was ever created. ⁹³Deeks, *Avoiding transfer to...*, 1. And, Godfrey, *Prisoners of conscience...*

EVALUATION OF THE CAPACITY OF THE AFGHAN AUTHORITIES TO DETAIN PERSONNEL

HR TRACK RECORD. In the case of Afghanistan, it is assumed that the overall evaluation of the capacity of the Afghan authorities to detain personnel was initially done by specialized and experienced personnel on behalf of the government of Canada. Unfortunately, the results of these assessments are classified.⁹⁴ However, according to the AIHRC Annual report for the year of 2008 “the findings of the monitoring indicates that despite progresses, human rights violations occurs particularly in prisons, detention centers, child correctional centers as well as orphanages and schools.”⁹⁵ More specifically:

In December [2008], the M&IU [Monitoring and Investigation Unit] evaluated the situation of human rights in country’s prisons and detentions centers during 2008. The result of the evaluation indicated that, despite progresses made in area of HR promotion by the AIHRC promotions units, a lot of HR violations still occur in prisons and detention centers. Tortures, lack of defence lawyer, illegal arrest and captivity, and abuse of Afghanistan’s legal procedures still exists.⁹⁶

⁹⁴From past personal experience and discussions with various military personnel who were privy to such documents, the author of this thesis can attest that documents regarding the detainees are classified and closely guarded.

⁹⁵Afghanistan Independent Human Rights Commission, "Annual Report 1 January to 31 December 2008," page 8; http://www.aihrc.org.af/index_eng.htm; Internet; accessed 8 March 2009.

⁹⁶Afghanistan Independent Human Rights Commission, *Annual Report 2008...*, 8.

If this was the situation in December of 2008, one can not help but wonder what were the HR conditions in such establishments four years ago, when the decision to transfer detainees to Afghanistan was taken. In fact, since its establishment in 2002, the AIHRC has been stating that prisons, detentions centers and justice system need to be improved and have been sources of HR violations, abuse and mistreatment.⁹⁷ Based on the above information, it most certainly indicates that there still exist real challenges with the Afghan detention system. Moreover, Canada can not simply dismiss such information as it trusts AIHRC as one of its main monitoring agencies.⁹⁸

CAPACITY OF THE DETENTION SYSTEM. The physical state of prisons should also be a good indicator of the capacity of the Afghan authority to handle and process detainees. Although prisons such as Sarpoza (kandahar) and Pol Charki (Kabul)

⁹⁷"The fragile security situation is due to intangible reforms in the Security Sector, the slow pace of reform within government and weak outcomes of the DDR [Disarmament, Demobilizations and Reintegration] program to which only lip service is being paid by powerful figures. The AIHRC believes that expanded reform of the justice sector would substantially improve security, as the current piece-meal reform is insufficient. The lack of security is undermining attempts to improve human rights and human security, and is fuelling child trafficking, land grabbing, torture by police and extra-judicial killings." Afghanistan Independent Human Rights Commission, "Annual Report 2005," Words from the Chair, I; http://www.aihrc.org.af/index_eng.htm; Internet; accessed 8 March 2009. And

"Major obstacles throughout 2006 consisted in the absence of Rule of Law, the presence of a culture of impunity and the abuse of power by government officials, along with a weak judicial system, slow process of legal cases, and the lack of reforms within the Government to improve the judicial and social system. In addition, the incidence of torture on detained or imprisoned persons was still occurring throughout the past year, although cases of torture have declined. Furthermore, the Government failed in practice to take rapid action on the promotion of human rights, and more specifically, on the transitional justice system." Afghanistan Independent Human Rights Commission, "Annual Report 2006," 53; http://www.aihrc.org.af/index_eng.htm; Internet; accessed 8 March 2009.

⁹⁸Arrangement for the transfer of detainees between the Government of Canada and the Government of the Islamic Republic of Afghanistan - Supplement. 03 May 2007, paras 2, 6, 8 & 10; <http://www.afghanistan.gc.ca/canada-afghanistan/documents/>; Internet, accessed 18 February 2009.

are “medieval [with] many areas [that] are very archaic,”⁹⁹ they are considered as some of the best prisons in Afghanistan, meeting or exceeding Afghan standards. In fact both prisons have been receiving special funding from Canada and the US for upgrades and improvements. While these prisons would not meet Canadian standards, they do meet the Afghan Prison Reform Restructure requirements (internationally acceptable).¹⁰⁰

However, it is important to emphasize that these prisons are not representative of the rest of the prisons across Afghanistan: most prisons are below standards and are overcrowded. And one of the contributing factors to this overcrowding rests with the slow progress of the judicial system reform.¹⁰¹ Hence, the transfers of detainees can only add pressure to the detention centers and judicial system. Moreover, the fact that “detainees” prisons meet minimum standards¹⁰² where most Afghan prisons do not, it has and possibly has already had the grave potential to create a sentiment of inequality in the eyes of Afghans. This does not create an environment to win the hearts and minds of the Afghans, especially when one consider that HR are violated elsewhere in most other Afghan detention facilities, that there are not enough prisons for women (whom are often

⁹⁹Gail Latouche, Email correspondence between Gail Latouche and Manon Plante, date 16 March 2009.

Mrs Gail Latouche is a CSC employee on assignment in Afghanistan, "helping to train and mentor local staff and administrators, provide advice on improving the country's correctional infrastructure, equipment, prison facilities and general living conditions." Government of Canada – Afghanistan. "Working in Afghanistan: CSC employees help bring security and stability to a war-torn region." <http://www.afghanistan.gc.ca/canad-afghanistan/stories-reportages/>; Internet; accessed 9 May 2009.

¹⁰⁰*Ibid.*

¹⁰¹*Ibid.* This will be discussed further in the paper.

¹⁰²In order to respect the DTA basic requirements, modifications had to be done ahead of other prisons.

imprisoned with their children because the children have no where to go) and for “criminal” children who are often kept in adult prisons and subjected to abuse.¹⁰³

Disturbingly detainees may be perceived as receiving a better treatment than the rest of the Afghan prisoners (from being treated better to being process through the judicial system more rapidly). And according to the AIHRC, many Afghans, especially women and children, are being incarcerated wrongly and illegally. In sum, the decision to transfer detainees to Afghan prisons appears to be premature and not in synch with the rest of the Afghan detention and legal reforms.¹⁰⁴ Moreover, since there is no thorough monitoring (Canadian or Afghan), these effects can not be measured, good or bad.

STATUS OF THE AFGHAN JUDICIAL SYSTEM. In 2004, Afghanistan was ranked 173 out of 178 countries on the UN Human development Index. This extremely low ranking is a good indication that Afghanistan has a long way to go before being an independent and self sufficient nation. Not surprisingly, the judicial system in Afghanistan is one of the areas that need specific attention. This was recognized as part of the Afghanistan Development Framework through the establishment of the Afghanistan Compact early in 2006.¹⁰⁵ Specifically, the Compact acknowledged “three

¹⁰³Gail Latouche, Email correspondence... And, Afghanistan Independent Human Rights Commission, UNICEF, "Justice for Children – The situation of children in conflict with the law in Afghanistan," 24-25. [http://www.reliefweb.int/rw/RWFiles2008.nsf/FilesByRWDocUnidFilename/EGUA-7FXRGP-full_report.pdf/\\$File/full_report.pdf](http://www.reliefweb.int/rw/RWFiles2008.nsf/FilesByRWDocUnidFilename/EGUA-7FXRGP-full_report.pdf/$File/full_report.pdf); Internet; accessed 24 March 2009.

¹⁰⁴Afghanistan Compact, London 31 January – 1 February 2006, 3, 4 & 8. <http://www.google.ca/search?hl=en&q=Afghanistan+Compact&btnG=Search&meta=>; Internet; accessed 05 May 2009.

¹⁰⁵Afghanistan Compact, London 31 January – 1 February...1.

critical and interdependent pillars of activity for the five years from the adoption of this Compact: 1. Security; 2 Governance, Rule of Law and Human Rights; and 3. Economic and Social Development.”¹⁰⁶ Further it specifies in its pillar of Governance, Rule of Law and Human Rights, that priority must be given “to the coordinated establishment in each province of functional institutions – including civil administration, police, prisons and judiciary.”¹⁰⁷ Further the Compact specifies that:

[t]he aim [of reforming the justice system] will be to ensure equal, fair and transparent access to justice for all based upon written codes with fair trials and enforceable verdicts. Measure will include: completing legislative reforms for the public as well as the private sector; building the capacity of judicial institutions and personnel; promoting human rights and legal awareness; and rehabilitating judicial infrastructure.¹⁰⁸

Hence, the Afghanistan Compact confirms that a judicial reform is required with timelines which began in 2006 and with expected achievements by end of 2010.¹⁰⁹

However, although there are plans for improvement, the status of the judicial system is

¹⁰⁶*Ibid.*, 2.

¹⁰⁷*Ibid.*, 3.

¹⁰⁸*Ibid.*

¹⁰⁹ *Ibid.*, 8. According to the document, timelines regarding the Rule of Law are as follows: “By end-2010, the legal framework required under the constitution, including civil, criminal and commercial law, will be put in place, distributed to all judicial and legislative institutions and made available to the public. By end-2010, functioning institutions of justice will be fully operational in each province of Afghanistan, and the average time to resolve contract disputes will be reduced as much as possible. A review and reform of oversight procedures relating to corruption, lack of due process and miscarriage of justice will be initiated by end-2006 and fully implemented by end-2010; by end-2010, reforms will strengthen the professionalism, credibility and integrity of key institutions of the justice system (the Ministry of Justice, the Judiciary, the Attorney-General’s office, the Ministry of Interior and the National Directorate of Security). By end-2010, justice infrastructure will be rehabilitated; and prisons will have separate facilities for women and juveniles.

bleak. The AIHRC stated in its 2008 report “ [a]dditionally, lack of professional staff in judiciary agencies is one of the most important causes of human rights violations in the country.”¹¹⁰ The report goes on to specify “[c]ulture of impunity, low capacity in the judiciary and law enforcement agencies and reluctance by some official of the agencies in the center and provinces continued to remain other main challenges ahead of human rights protection and promotion in the country.”¹¹¹

Also, based on a report from “Human Rights First” produced in April 2008, the criminal justice system of Afghanistan falls short of meeting the International fair trial standards. According to the report,

Afghans transferred from US Custody [from Guantanamo Bay Prison to Afghan National Detention Facility (ANDF) or locally know as Block D, Pul-i-Charkhi] are being charged and tried under Afghan law based on allegations, but little else, provided by the United States...The detainees are being charged under Afghan law for crimes ranging from treason and destruction of government property to threatening the security of Afghanistan. Trials last between 30 minutes to an hour and defendants have been sentenced to terms of imprisonment ranging from 3 to 20 years...Since the trial began in October 2007, sixty-five persons have been convicted in violation of fair trial standards based on allegations and evidence provided by the United States and supplemented by the Afghans. Seventeen have been acquitted.¹¹²

¹¹⁰Afghanistan Independent Human Rights Commission, *Annual Report 2008...*, 32.

¹¹¹Afghanistan Independent Human Rights Commission, *Annual Report 2008...*, 9.

¹¹²*Human Rights First* conducted research for this report in January-February 2008 in Kabul, Afghanistan, and follow-up research from New York. Human Rights First interviewed family members of Guantanamo returnees, a Block D defendant, defense lawyers, Afghan government officials, including prosecutors and judges, and officials from the US embassy in Kabul. *Human Rights First* also observed two trials and examined court documents.

Human Rights First, "Arbitrary Justice: Trials of Bagram and Guantanamo Detainees in Afghanistan," April 2008, Report obtained on the Human Rights First Website, ii-iii.

Although the report “applaud[s] the Afghan government’s decision to use its regular criminal justice system as the mechanism for adjudicating the guilt or innocence of these detainees,”¹¹³ the fact remain that justice appears not be applied properly, putting in question the convictions or releases of detainees.

Moreover, Katherine McCullough, Professor of Law at the Georgetown University Law Center, argues that Afghanistan has a long route ahead because of its trouble past and ethnicity.¹¹⁴ She brilliantly points out that “credibility of the state system and overcoming of the people’s historical mistrust of the state legal system”¹¹⁵ are a must for the Afghans to eventually have faith and confidence in the State court system. Further she states:

Afghan legal professionals must address the historically-rooted by still persistent problems of underqualification, corruption, and outside interference in the judicial process. These weaknesses cannot be addressed through short-term solutions alone, but will require significant long-term ideological change.¹¹⁶

<http://www.humanrightsfirst.info/pdf/USLS-080409-arbitrary-justice-report.pdf>; Internet; accessed 8 March 2009.

¹¹³Human Rights First, *Arbitrary Justice: Trials...*,

¹¹⁴Katherine McCullough, "Out with the old and in with the new: The long struggle for judicial reform in Afghanistan," *The Georgetown Journal of Legal Ethics* 19, no. 3 (Summer 2006): 822.

¹¹⁵McCullough, *Out with...*, 822.

¹¹⁶*Ibid.*

Hence, there is no doubt that the capacity of the Afghanistan judicial system is neither adequate nor mature. Another aspect directly relating to the Afghan justice system is correlated in the UNICEF *Justice for Children: the situation of children in conflict with the law in Afghanistan*.¹¹⁷ The document avers that although the justice system has somehow improved much more work is required.¹¹⁸

This is particularly relevant given the fact that Afghanistan has the youngest population in the world, with 45% of its population below the age of fourteen years old with a male or female age median of 17.6 years old. Also, as one of the poorest countries in the world, it adds to the vulnerability of children of being exposed to criminal endeavors and lures. It specifically states:

...children in detention face various rights violations – including maltreatment, lack of access to education and health services. Also, lack of due process in juvenile justice system appears to be a serious concern. A punitive and retributive approach to juvenile justice seems to be still predominant in Afghanistan. We strongly advocate for measure to prevent and reduce detention or imprisonment of children and prevention programmes... we need to invest more to prevent children coming into conflict with the law than just to assist children already in detention...The study highlighted serious concerns for the protection and rehabilitation rights of juveniles within the present criminal system...Children who are most vulnerable and at risk [are] those in police facilities and those treated as adults by the justice system.¹¹⁹

Adding the child component in handling and processing of detainees is a troublesome

¹¹⁷AIHRC, UNICEF, *Justice for....*

¹¹⁸ *Ibid.*,24-25.

¹¹⁹AIHRC, UNICEF, *Justice for...*, 3.

prospect, but it is real.

EVALUATION OF THE JUDICIAL SYSTEM. As discussed earlier in Chapter 2, ensuring the handling and processing of detainees are fair and effectual from capture, detention, and prosecution to sentencing is vital strategically and tactically. In effect, the “transferring” of detainees is one of the many steps in the handling and processing of detainees. The prosecution and the sentencing of the detainees must also be considered to ensure the successful handling and processing of detainees. The DTA does not address these requirements. What were the factors considered and resulting conclusions regarding the Canadian assessment of the capacity of the Afghan legal system? How reliable and effective is the Afghan judicial system? Some may argue that legally, it is not the responsibility of Canada because doing so would be construed as interfering with the internal affairs of another country.

However, isn't it in Canada's best interest, the mission best interest, especially for the soldiers and the locals in the line of fire, that the entire handling and processing of detainees be working and effective? To simply illustrate the latter, would a police force be effective if there would be no judicial system to support it? The answer goes without saying. But, from its perspective, Canada argues that the DTA is working.¹²⁰ However, since Canada has specified through the DTA that detainees would be detained in certain

¹²⁰Government of Canada – Privy Council Office, Evergreen Document (unclassified), 26 May 2008: 29.

prisons only¹²¹, did the Afghan authorities under staff other detention centers in order to meet their obligations? Is the adage “robbing Peter to pay Paul” in effect? In fact, do the detainees transferred by NATO forces tax the Afghan legal system that much more? It is important to point out that the Afghan Government and the NATO forces have signed an agreement requiring that all detainees captured by NATO forces be turned over to Afghan authorities in 2007.¹²² Based on all the facts so far, one is left to wonder what kind of assessment was done for this decision to take place. Surely, given allegations of tortures of detainees (US, Canada, UK), the Afghan government took this step to show its citizens that it was taking the protection of all its citizens seriously. Meanwhile, as already discussed, the government of Afghanistan has not been capable of doing so thus far.

Hence, legally it was the option to take but was it ethically? But as it was commented by a senior military officer “transferring detainees to Afghanistan is by far *not* the best solution however, it is the only one we have. The alternatives, such as holding the detainees ourselves or having a NATO holding cell would be too problematic. I just can not phantom how many problems that would generate and

¹²¹“In order to facilitate ongoing access and capacity building projects by the Government of Canada, the Afghan Government will hold detainees transferred by Canadian Forces in a limited number of facilities.”

Arrangement for the transfer of detainees between the Government of Canada and the Government of the Islamic Republic of Afghanistan - Supplement. 03 May 2007, paras 7; <http://www.afghanistan.gc.ca/canada-afghanistan/documents/>; Internet, accessed 18 February 2009.

¹²²Afghanistan Independent Human Rights Commission, *Annual Report 2008...*, 33.

entail.”¹²³ Nevertheless, in its Evergreen Document (April 2008), the Government of Canada is optimistic about its decision “[w]e are confident in the professionalism of our armed forces and we are confident that our Taliban prisoner policy is working.”¹²⁴ Considering the number of players in making the DTA successful, it is ironic that DND has been singled out as the one department ultimately responsible to do so.

In fact, the DTA appears to be working but at what cost? This is a difficult assessment to make at this time. But one thing is certain, the Afghans are not satisfied with the present Afghan judicial system which is a source mistrust. They question the capability of the Afghan Government to do so as their basic needs are not met and many injustices are occurring everyday.¹²⁵ Because there is no thorough monitoring system in place, it is unclear how the transfer of detainees to Afghan authorities is impacting on the Afghan Judicial system.

Based on the Afghan HR track record and its primitive prison capacity, how the Government of Canada came to the conclusion that the Afghan authorities had the capacity to detain personnel is perplexing.¹²⁶ The decision strongly indicates that there

¹²³This was a private conversation and as the officer has not authorized the release of these comments, the anonymity of the officer will be respected.

¹²⁴Government of Canada – Privy Council Office, Evergreen Document (unclassified), 26 May 2008: 29.

¹²⁵ The following reports are replete with accounts by Afghans of injustice, unsatisfactory treatment and response and mistrust in the system:
Human Rights First, *Arbitrary Justice: Trials...* And
Afghanistan Independent Human Rights Commission, *Annual Report 2008...* And
AIHRC, UNICEF, *Justice for...*, 3. And
McCullough, *Out with...*

were other factors at play. Specifically, the transfer of detainees to the US was no longer acceptable and had too many political and legal implications. Moreover, since Canada does not have a long term detention capacity, its participation in Afghanistan mission could have been jeopardized if an alternate solution would not be found. Finally, there is no doubt that by entrusting the government of Afghanistan with the processing of detainees, it conveyed a powerful message that the Government of Canada had confidence in the newly Afghan administration.¹²⁷ In the end, the decision was likely based on political motives rather than an objective assessment or evaluation of the real situation. The fact that Canada had to stop transferring detainees in 2007 and reworked the DTA, further reinforces that assumption.

PREPARATION OF THE DTA (CANADA-AFGHANISTAN ASSURANCES)

MONITORING AGENCY. In preparing assurances, a monitoring party or agency must also be selected. The competency and abilities of the Government of Canada to do so came under scrutiny during the Afghanistan mission as initially it specified that the ICRC could perform the monitoring duties for Canada. It is evident that the Government of Canada did not comprehend and grasp all issues surrounding detainees especially regarding the monitoring aspect of the transfer of detainees. Back in 2002, John Godfrey

¹²⁶Canada, through the DTA, is demanding that specific standards be met by afghan authorities – afghan authorities would argue that they have capacity to detain personnel which is true. Based on their values, culture, and detention and judicial systems they are detaining and processing personnel however, it is not to the required international standards from HR and law perspectives. Human Rights First, *Arbitrary Justice: Trials...*, ii-iii.

¹²⁷Afghanistan Compact, London 31 January – 1 February...1.

stated that relying on the International Committee of the Red Cross (ICRC) to raise the flag is futile. In fact, the ICRC would not share any of their findings with the international community but only with the involved authorities. On one hand, this approach makes sense because otherwise no nations would let the ICRC be involved, observe or do any monitoring in their country. In fact, no nation would want to expose their dirty laundry internationally before they could have a chance to correct the situation. On the other hand, it means that the ICRC could not be relied upon to provide the monitoring Canada was seeking. So knowing this, why did the Government of Canada in 2005, when the DTA was drafted, specify that the monitoring of the detainees would be done by the ICRC? The latter points out to an obvious lack of experience and comprehension regarding detainee transfer implications. The situation was somewhat resolved by engaging the Afghanistan Independent Human Right Commission (AIHRC) to provide the monitoring which, to a certain degree is proving effective.¹²⁸ But this raises the question, what are the capacities of the Canadian government to evaluate and select a monitoring party? How would the monitoring be achieved in failed or fragile states where perhaps there would be no special HR commission such as the AIHRC? How would Canada ensure that detainees are treated properly, from a HR or a judicial point of view? There appears to be no clear answer to those questions at this time. Afghanistan may have been the first case in dealing with detainees but surely will not be the last.

¹²⁸Government of Canada – Privy Council...29-30.

PREPARATION OF THE DTA. The DTA, a written document, is the assurance that Canada sought with the Afghanistan for the transfer of detainees. As the information regarding the formulation and preparation of the DTA is classified, it is unknown who specifically was involved in the direct drafting of the agreement. But looking at the original DTA, it was signed between the Chief of Defence Staff General Rick Hillier and the Ministry of Defence of the Islamic Republic of Afghanistan. It appears that it was mostly considered a simple security related transaction although, as it was explained in Chapter 2, assurances are much more than that. Although there are some experts in DND that could assist with the preparation of such complex and strategic agreement, there are no specifically dedicated personnel whose employment focuses solely on such documents. And the same applies for the assessment of the Afghan authorities capacity with respect with HR, detention, judicial system, etc. Therefore, why was DND the signatory and how was this DTA prepared? But, within two years of the DTA implementation, there were allegations of abuse by Afghan authorities, and subsequently, the Government of Canada reviewed the DTA and negotiated an “enhanced DTA.”¹²⁹ It included a more robust clause on monitoring requirements which involved more than just the Department of National Defence. It involved “Canadian Government personnel, including representatives of the Canadian Embassy in Kabul and others empowered to represent the Government of Canada.”¹³⁰

¹²⁹Arrangement for the transfer of detainees between the Government of Canada and the Government of the Islamic Republic of Afghanistan - Supplement. 03 May 2007, paras 2, 6, 8 & 10; <http://www.afghanistan.gc.ca/canada-afghanistan/documents/>; Internet, accessed 18 February 2009.

¹³⁰ “Representatives of the Afghanistan Independent Human Rights Commission (AIHRC), and Canadian Government personnel, including representatives of the Canadian Embassy in Kabul and others empowered to represent the Government of Canada will have full and unrestricted access to any persons transferred by the Canadian Forces to Afghan authorities while such persons are in custody. In addition to

Fortunately, the strategic importance of the DTA was somewhat better understood when it was reviewed in 2007. In fact, the “enhanced” agreement was signed between Mr Arif Lalani, Ambassador of Canada in Afghanistan and the Minister of Defence. However, as Deeks mentioned, these assurances should be signed at the highest level possible – which was still not done in this case, or was it? In fact since assurances are not binding, the weight of the assurances rest in the commitment and reputation of the signatories and their respective nation to respect the agreement. Hence the signature of President Karzai would have a lot more implications than the signature of his Defence Minister. The same can be said on the Canadian side. But then again at what level of government should the signatories be? But there is one aspect that the DTA does not address: the capacity of the Afghan judicial system and its authorities.

In the end, interacting with a reforming embryonic Afghan State Justice system is assessed as an extremely complex and sensitive venture that must be done very deliberately, understanding the possible dangers of doing so: overloading (387 detainees in 2008 alone)¹³¹, creating an imbalance regarding prisons and prosecution standards across the country, preferential treatment vis-à-vis HRs (detainees HR are protected whereas local HR may not), etc. One thing is certain, the transfer of detainees to the

the International Committee of the Red Cross (ICRC), relevant human rights institutions with the UN system will be allowed access to visit such persons.”

Arrangement for the transfer of detainees between the Government of Canada and the Government of the Islamic Republic of... para 2.

¹³¹Afghanistan Independent Human Rights Commission, *Annual Report 2008...*, 33. British, Canada Denmark, Norway and Netherlands.

Afghan authorities is a lot more than just the act itself, the transfer of detainees implies so much more for all, soldiers and local nationals alike. It would be interesting to see how soldiers would react if they were presented with a realistic (not convenient) evaluation of the existing state of the Afghan judicial system. Perhaps, quite possible, some already know. How would (do) soldiers handle the full spectrum of implications regarding the transfer of detainees which include adults, males, females, young and child soldiers? Morally and ethical, this is not an environment in which CF, RCMP and CSC personnel should find themselves in. Further, for CF members, is this environment in synch with the Department of National Defence Ethics Program teachings and standards? These questions lead well into the next tactical level analysis of the Afghanistan Case study.

SECTION III - THE TACTICAL PERSPECTIVE

As already mentioned, the soldier has the first interaction with a detainee and actions such as neutralizing, searching and disarming of the individuals will take place. In Afghanistan, the doctrine is applied. However, given that captives in Afghanistan are regarded as detainees, two key activities must take place: first, the CF must collect evidence in order to create a pool of information that will be at the center of the prosecution of detainees by Afghan authorities; Second, based on a review of the evidence and interviews, detainees will be (or not) transferred. The latter two activities weave through the various settings of the battlefields, creating unique situations and challenging dilemmas.

ON THE BATTLEFIELD. The CF soldiers have been capturing and transferring detainees in Afghanistan since the beginning of the mission 2002. The soldiers have also been collecting evidence that should serve in the prosecution of the detainees. However, in accordance with the Army Lessons Learned Centre (ALLC) and its latest report on the Administration of Detainees in the Battlefield of Afghanistan, the CF doctrine “does not detail specific responsibilities and procedures for detainee handling and processing at the sub-unit/ unit level.”¹³² It is also recognized that there is a lacuna regarding the evidence gathering: what the CF members are gathering as evidence may not be lined up with what the Host Nation specific needs to process and ultimately prosecute detainees. The ALLC document states:

[t]he successful prosecution of detainees by HN authorities requires that sufficient evidence, in accordance with HN judicial requirements, accompany the detainee through the process (i.e. grounds to capture, witness statements, hard evidence, etc). It is crucial that accompanying documentation is complete and that the integrity of evidence is maintained.¹³³

Hence, it appears that requirements regarding the gathering of evidence may not well be understood, and as a result, it may mean that the soldiers are not provided the rights tools and not trained adequately to effect those duties. And since there is no data available regarding the results of the prosecution of transferred detainees by the CF, it is not

¹³² Army Lessons Learned Centre, Lessons Synopsis report 08-014 – Administration of Detainees in the Battlefield, 24 November 2008, Accessed from email sent by Director of Army Engineers, 28 January 2009, 1.

¹³³ Army Lessons Learned Centre, *Lessons report...*, 1-2.

possible to ascertain that the CF personnel are effective in their collection of evidence.¹³⁴ It is disconcerting to think that CF may have not been gathering the right evidence to support the HN, especially considering that the judicial system has already enough challenges of its own. In fact, on one hand, the CF personnel by not gathering the right and/or enough evidence for an alleged insurgent or terrorist may prevent prosecution and hence, this individual may be released and further caused destruction on the battlefield or in civilian centres. On the other hand, this lack on evidence may play against the detainee himself, and lead to lengthy jail term, or unwarranted prosecution. In the end, all parties may lose in this “lax” exchange of information: CF personnel, allied troops, Afghans and detainees but most importantly, the Host Nation itself and its people.

Despite some possible challenges regarding the gathering of evidence in Afghanistan, soldiers are still effecting the first steps relating to the handling and processing of the detainees on the battlefield. But how do soldiers on the mission in Afghanistan feel regarding the entire process? Do they have trust and confidence in it? Unfortunately, there are no official surveys or reports that provide such assessment at this time.¹³⁵ However, there is definitely a soldier’s perception of “catch and release” from the HN regarding detainees as unconfirmed reports by soldiers returning from

¹³⁴Information is most probably classified and/or unavailable. Once a detainee enters the judicial system (prosecution), Canada loose tract of these individuals.

¹³⁵It would be a fascinating research to examine what is the perception of the soldiers on the ground vice the reality, i.e. statistically comparing what happens to detainees once transfers occur. It is important to note that the Afghan judicial system has not have able to maintain such records but is planning to do so.

Afghanistan have said that they have been witnessed to the “catch and release” practice, i.e. seeing the same individuals on the battlefields over and over again.¹³⁶ Given the aforementioned state of the Afghan judicial system, it is quite in the realms of possibilities.

One of the most public examples regarding “catch and release” relates to the individual who allegedly was part of the killing of Department of Foreign Affairs and International Trade (DFAIT) Diplomat, Mr Glyn Berry. The suspect, Pir Mohammed, was first arrested in January 2006, in connection with the suicide bombing of Mr Berry, but was released shortly thereafter. Mohammed was re-arrested in January 2007 and was subsequently released again in March 2007. Although he has always claimed that he was innocent, it is believed that because he was a prominent tribal chief and ally of the Afghan Government, he got the preferred treatment. To many, this was a classic case of catch and release.¹³⁷ But, whether or not this “catch or release” practice is occurring, if the perception is there, it is then as good as if it is true and consequently, it is far plausible that CF soldiers may indeed not trust and have confidence in the Afghan detainee handling and processing in part because it is felt that the Afghan judicial system

¹³⁶This unofficial information has been gathered by the author of this thesis through direct conversations and undirected i.e. related by colleagues who had been told first hand as well (the latter would qualify as hearsay). The individuals, for privacy reasons, have declined that their names be used.

¹³⁷Afghan News 03/27/2007 – Bulletin #1647; Compiled by the Embassy of Afghanistan in Canada; www.afghanemb-canada.net. http://www.afghanemb-canada.net/en/news_bulletin/2007/march/27/index.php; Internet; accessed 6 May 2009. And, Radio Canada International, News headlines, 20 January 2007, <http://www.rcinet.ca/rci/en/news/2007/01/20070120.shtml>; Internet; accessed 6 May 2006.

is not effective. As already discussed in Chapter 2, this possible lack of trust and confidence has the potential of causing second and third order effects on the battlefield, such triggering the extreme behaviours or causing undue operational and emotional stress unto soldiers.

The case of Captain (Capt) Robert Semrau may turn out to be possibly an example of lack of trust or confidence in the handling and processing of detainees. Capt Semrau, as part of an Operational Mentor and Liaison Team (OMLT), is accused of having killed an unarmed and severely injured detainee insurgent in October of 2008, after the group he was with, “[composed of] Afghan Soldiers, Canadian mentors and Afghan police, [was] ambushed by Taliban insurgents.”¹³⁸ It is important to point out that the role of an OMLT is “to mentor and advise Afghan National Army (ANA) personnel to develop the collective and individual skills required to achieve and maintain peace and stability in Afghanistan.”¹³⁹ The OMLT also provides the liaising with ISAF in order to “ensure[] that the ANA receives the resources and information it needs to conduct joint operations with ISAF task forces.”¹⁴⁰ Hence, the ANA was in charge and the transfer of Taliban insurgent detainees to a detention center (through NDS) was ultimately their responsibility. With the information at hand, it appears that a mercy killing took place.¹⁴¹

¹³⁸ Richard J Brennan, "The Case Against Capt Semrau," The Star.com, 7 January 2009. <http://www.thestar.com/SpecialSections/article/562812>; Internet; accessed 6 May 2006.

¹³⁹ Department of National Defence, Operational Mentor and Liaison Teams Background; Canadian Expeditionary Forces Command webpage; <http://www.cefcom.forces.gc.ca/pa-ap/ops/fs-fr/omlt-eng.asp>; Internet; accessed 6 May 2009.

¹⁴⁰ *Ibid.*

¹⁴¹ This is a pure speculation by the author of this paper.

But why would Capt Semrau take it upon himself to do so? Did Capt Semrau estimate that the injured detainee would unjustifiably further suffer if the ANA handled him? Did Capt Semrau, noting that the ANA would just leave him to die, rationalized that it was not acceptable? The latter questions do not aim at judging or criticizing Capt Semrau's actions. Rather, the aim is to highlight the essence of plausible and hypothetical moral questions. The answers to these questions will hopefully be found in the upcoming the military tribunal. However, there seems to be one undeniable fact: Capt Semrau appeared to have faced a moral dilemma regarding the severely injured insurgent which arose as a result of his experiences regarding the handling and processing of the detainees.

In fact, his experiences may expose the human dimension of the Canadian and Afghan relationship. As such the Afghan values and culture are a source of moral and ethical dilemmas for Western soldiers. Through the transfer of detainees to Afghan authorities, soldiers are intrinsically connected to these values and culture because as expected, Afghan values and culture are reflected in their handling and processing of detainees. In effect, despite the pushing of a Justice Reform by the government of Afghanistan, "90% of Afghans rely on [Afghan] customary law due to a lack of 'trust and confidence' in the nation's formal judicial institutions' physical absence and low capacity...this reliance will take considerable time to reverse."¹⁴² Effected through elders

¹⁴² Amy Senier, "Rebuilding the Judicial Sector in Afghanistan: The Role of Customary Law," January 2006; http://fletcher.tufts.edu/al_nakhlah/archives/spring2006/senier.pdf; Internet; accessed 7 May 2009.

and Imams tribunals, the Afghan customary law is based on mediation and arbitration panels with core principles of apology, forgiveness and restorative justice.¹⁴³ Juvenile justice is somewhat different and is predominantly punitive and retributive.¹⁴⁴ Therefore, even though the catch and release of detainees by Afghan authorities may seem illogical from a western soldier perspective (prosecution and sentencing are the expectation), catch and release may actually be the Afghan way to deal with the problem. Moreover, in the aforementioned case, perhaps it was acceptable from an ANA perspective that the severely injured insurgent be left to die.¹⁴⁵ However, it would likely not be acceptable for a Canadian soldier because it contravenes Canadian values, culture and ethical principles. Another a propos example is that ANA soldiers may see a fourteen year-old detainee insurgent simply as “another detainee” where for a Canadian soldier, the fourteen year old is a child soldier and should be handled and treated accordingly. Hence, it is evident that there are marked differences in national values and culture. These differences may result in an incompatibility and a disconnect between the western and Afghan expectations regarding the handling and processing of detainees. Not surprisingly, these differences engender moral and ethical dilemmas on the part of CF soldiers and results in a source of operational stress.

Another important source of operational stress regards the fact that the senior soldier on the battlefield has the delegated authority (in accordance with established

¹⁴³ Senior, *Rebuilding the Judicial...*, 2.

¹⁴⁴ AIHRC, UNICEF, *Justice for Children...*,4-5.

¹⁴⁵The author is not implying that it is the case, but implies that it is a possibility.

Rules of Engagement) to take or free captives.¹⁴⁶ Although making this type of decision is not new as this has occurred in the past regarding PW, it is a somewhat more challenging in an Afghanistan context. Just as much the decision (to release or detain) can be straight forward with some captives such as known hard core insurgents, it can be just the opposite with cases such as, child soldiers, circumstantial soldiers, and wrong-place/ wrong-time personnel. For the Canadian soldier who will make this decision, there is no doubt that the perception of the fairness and effectiveness of the Afghan handling and processing of detainees play in the decision process of keeping or releasing a captive. Given that CF personnel have not been trained to assess and make such decisions, one can only assume the stresses, both internal and external, the individual is exposed to. Making the wrong decision regarding the release or the detention of a captive carries serious implications, tactically or strategically.

But a vital and contentious question is at the heart of the handling and processing of detainees: do Canadian soldiers know if mistreatment of detainees takes place or not once the detainees are transferred? Surely, soldiers are aware that this is a possibility given the fact that the transfer of detainees was stopped in 2007 for those very reasons. Also there has been a multitude of reports promulgated by the media and various agencies such as AIHRC, that mistreatment is taking place. How is this playing in the moral and ethical plane of the soldiers? In 2007 the Globe and Mail carried an investigation where it had face-to-face interviews with 30 ex-detainees. The results of this investigation were so compelling that the BCCLA and Amnesty International Canada

¹⁴⁶B-GJ-005-11-/FP-200, Prisoner of War..., B-1, 1B-4.

took DND to court in an effort to stop the transferring of detainees by the CF. Hence, how would the soldier who protected the head of an Afghan detainee by placing his hand over his head react if he knew that later that same day, the detainee was tortured and beaten beyond recognition? The ex-detainee, a certain Mr Noori, wondered “why the Canadian had bothered to protect his head during the ride.”¹⁴⁷ Mr Noori reportedly added: “Did he know? ...Do the Canadians know what happens to us?”¹⁴⁸

The MCPP investigation which is scheduled to begin on 25 May 2009, may reveal or not, disturbing facts. Will the MPCC reveal if the DTA is effective or not? According to the *Globe and Mail*, Mr Paul Cham, the Ottawa lawyer for amnesty International advanced:

‘They [Government officials] don’t want any of the Canadian Forces officers, or military police, or Department of Foreign Affairs officials, getting on a stand where there’s television cameras and newspaper reporters to say what they’ve seen done and heard in Afghanistan with respect of the detainees,’ said Champ. “if you hear a lot of those people speak under oath, you’re going to be hearing a very different story than what is publicly presented by the Harper government.”¹⁴⁹

Also, according to the *Globe and Mail*, Justice lawyer Alain Prefontaine said: “the government of Canada seeks to prevent irreparable harm to the reputation of our soldiers recently returned from Afghanistan, risk to national security ...and the potentially

¹⁴⁷Greame Smith, "From Canadian custody into cruel hands," *Globe and Mail*, 23 April 2007; <http://www.theglobeandmail.com/servlet/story/>; Internet; accessed 9 May 2009.

¹⁴⁸*Ibid.*

¹⁴⁹Mike Blanchfield, "Feds block inquiry into transfer of Afghan prisoners," *CanWest News*, 4 February 2009.

needless expenditure of time, effort and resources.”¹⁵⁰ The bottom line is that soldiers expectations regarding the handling and processing of detainees is that justice, not an ill treatment of detainees, is carried out. What would be the effects on soldiers if reports or facts confirm that of the detainees they were transferring to Afghan authorities, many, possibly including child soldiers, were submitted to torture?

Hence, controversially, it is estimated that the compounded effects resulting from a lack of trust and confidence in the handling and processing of detainee is possibly one of the key contributing factors causing operational stress injuries, including PTSD, to returning soldiers from Afghanistan. The latest figures indicate that up to 28% of Afghanistan mission veterans have symptoms that suggest one or more mental health problems with 6% to 10% of those personnel will be diagnosed with PTSD.¹⁵¹ While repetitive deployments, constant IED threat, and loss of or injuries to a comrade have been publicly acknowledged as key factors, it is unlikely that a lack of trust and confidence in the handling and processing of detainee by Afghan authorities will be publicly identified as such, for obvious reasons.¹⁵² However, in examining the many causes that lead to operational stress injuries, sustained operational stress and mental

¹⁵⁰ *Ibid.*

¹⁵¹ CBC news webpage: Post-traumatic stress disorder surges among Canadian veterans; <http://www.cbc.ca/health/story/2008/02/29/ptad-report.html>; Internet; accessed 7 May 2009.

¹⁵² Peter Worthington, "PTSD in Afghanistan," Toronto Sun website, 1 May 2009; http://www.torontosun.com/news/columnists/peter_worthington/2009/05/01/9310996-sun.html; Internet; accessed 8 May 2008.

fatigue are identified.¹⁵³ Surely enough, facing perpetual ethical dilemmas, perceiving that one is not making of difference on the battlefield, making high risk decisions regarding captives and operating in a significantly different values and culture environment corroborate to operational stress and mental fatigue. Hence, the lack of trust and confidence in the handling and processing of detainees is considered a viable contributing factor to operational stress injuries, leading possibly to PTSD in certain cases.

In summary, on the battlefields of Afghanistan, the gathering of evidence is taking place but it appears that not only it has not been coordinated appropriately with the HN judicial requirements, it may required specific collaboration with the HN given that the HN gives favour Afghan Customary Law. There is a lack of trust and confidence on the part of the soldiers in the handling and processing of detainees by the HN. This in turn transpires into a source of operational stress, impacting soldier's behaviours both physically and mentally and may, ultimately lead to operational stress injuries and PTSD.

OFF OF THE BATTLEFIELD. Many sentiments and effects experienced by the soldiers on the battlefield are also experienced by personnel off the battlefield. Following the initial screening of detainees on the battlefield, detainees are then moved, as

¹⁵³ Department of National Defence. Post traumatic Stress Disorder - Backgrounder <http://www.forces.gc.ca/site/news-nouvelles/view-news-afficher-nouvelles-eng.asp?id=1514>; Internet; accessed 8 May 2009.

expediently as possible,¹⁵⁴ off the battlefield to a temporary Canadian Holding Facility located at the Kandahar Airfield (KAF). Subsequently, two main activities regarding the detainees take place: a thorough interview and evaluations of the detainees will be conducted; and the decision regarding the transfer of the detainees will be effected by Commander JTF Afg. However, Commander JTF Afg has also another key responsibility regarding detainees: in the advent of mistreatment allegations regarding the detainees by Afghan authorities, the commander has the authority to stop all detainee transfers to Afghan authorities.

Interviews are not interrogations and although they may result in providing intelligence on insurgent activities, the main objective of interviews, as already discussed, is to further screen and gather information about the detainees themselves. The importance of these steps are emphasized in the following example. After the capture of three individuals during an ISAF operation in April 2006, no interviews and no recording of evidence took place. Basically the aforementioned steps were not carried out. Subsequently, these three individuals were transferred to the ANP, without the appropriate information regarding the circumstances of their apprehension. Given this lack of information, the ANP released the detainees, “rendering for naught the risks taken in their capture by other Canadian Forces members.” Moreover, one of these released detainees was eventually killed in action against coalition forces, validating the fact that

¹⁵⁴ Military Police Complaints Commission, Chairperson's Final Report – MPCC 2007-003 Concerning the Afghan Detainee complaint by Dr. Attaran -Public Interest Investigation, 23 April 2009: 53; <http://www.mpcc-cppm.gc.ca/300/300-eng.aspx>; Internet; accessed 28 April 2009.

he was indeed an active insurgent.¹⁵⁵ Hence, it is evident that interview information coupled with the evidence at hand are key at evaluating detainees' "circumstances" and making recommendations regarding their release, holding or transfer. But of course, just as it is expected, the military personnel who are making those recommendations face comparable emotional stress and ethical dilemmas then those of the senior soldier, who on the battlefield, has first the delegated authority to make the decision of detaining or freeing captives.

Second, the senior military officer of the Canadian Afghan mission, Commander JTF Afg, makes the final decision, based on the recommendations of his staff, regarding the transfers or release of detainees.¹⁵⁶ Commander JTF Afg must also first notify the Government of Canada "prior to the initiation of the proceedings involving persons transferred by the Canadian Forces and prior to the release of the detainee."¹⁵⁷ It is important to note that this is not a measure of control but rather an information requirement, given the sensitivity surrounding detainees. In fact, in its Evergreen Report, the GOC specifically emphasizes that "[d]ecisions on the transfer of detainees are made by the Canadian Forces Commander on a case-by-case basis, in accordance with international law and consistent with arrangements with the Government of Afghanistan."¹⁵⁸ Evidently, the responsibility of making the right decision regarding a

¹⁵⁵*Ibid.*, 11-14,55-56.

¹⁵⁶Arrangement for the transfer of detainees between the Government of Canada and the Government of the Islamic Republic of... para 2. Government of Canada – Privy Council...,32.

¹⁵⁷*Ibid.*, para 3.

¹⁵⁸Government of Canada – Privy Council...,29.

detainee squarely rests on the shoulders of the CF. It carries plenty of “political” implications which affect soldiers at the tactical level. The expression “strategic Corporal” takes a new dimension, adding a twist to the DND ethical principle that soldiers “will consistently perform their duties to the highest ethical standards.”¹⁵⁹

But there is one more politically charged responsibility that the CF (Commander JTF Afg) must effect: as part of the DTA, the CF must stop the transfer of detainees to Afghan authorities if allegations of mistreatment are received.¹⁶⁰ The incongruity of this provision is that to be effected, mistreatment must possibly have taken place. Moreover, to recognize that mistreatment has occurred, one must have a clear understanding of what is mistreatment.¹⁶¹ While the DTA does not provide a definition of mistreatment, it describes how the Afghan authorities are expected to treat detainees:

The Afghan authorities will be responsible for treating such individuals in accordance with Afghanistan’s international human rights obligations including prohibiting torture and cruel, inhuman or degrading treatment, protections against torture and using only such force as is reasonable to guard against escape.¹⁶²

¹⁵⁹Defence Ethics Programs, National Defence and Canadian Forces Website. <http://www.ethique.forces.gc.ca/dep-ped/index-eng.asp>; Internet accessed 01 May 2009.

¹⁶⁰Arrangement for the transfer of detainees between the Government of Canada and the Government of the Islamic Republic of... para 3.

¹⁶¹ Unfortunately, there is not clear definition of mistreatment in the DTA.

¹⁶²Arrangement for the transfer of detainees between the Government of Canada and the Government of the Islamic Republic of... para 4.

Hence, based on the latter, the mistreatment of detainees involves the violation of one or more of IHR (International Human Rights).¹⁶³ However, it appears that only torture, inhuman or degrading treatments have been recognized as mistreatment.¹⁶⁴

Consequently, it suggests that the DTA is neither clear enough nor providing the guidance it should to the strategic, operational and tactical levels. As a result, how do CF, CSC, and RCMP personnel recognize that detainee mistreatment is occurring? While it is relatively easy to recognize torture as mistreatment, it is more difficult to assess, for example, that a lack of Rule of Law may also be mistreatment, especially if it means that detainees are not being subjected to fair prosecution and sentencing processes. And, given the maturity of the Afghan judicial system, it is most likely occurring. Why is the CF still transferring detainees And how about if that detainee is a young offender or Child soldier? Would it be different?

In summary, the off battlefield activities are the last direct interactions the CF will have with the Canadian portion of handling and processing detainees. As such, detainees will be subjected to a final interview and the staff will draft recommendations for the release, holding or transfer of detainees. Based on that, Commander JTF Afg will make the final decision regarding the detainees which will then be subsequently

¹⁶³IHR are commonly thought of as human rights include civil and political rights (right to life and liberty, freedom of expression, and equality before the law); and social, cultural and economic rights (including the right to participate in culture, the right to food, the right to work, and the right to education).

Human Rights. http://en.wikipedia.org/wiki/Human_rights#Humanitarian_Law; Internet; accessed 9 May 2009.

¹⁶⁴Only Amnesty International has recognized that not observing the Rule of law regarding the transfer of detainees is mistreatment of detainees. Also, the transfer of Canadian captured detainees to Afghanistan was stopped once in Nov of 2007 based on allegation of abuse and/or torture.

implemented. Commander JTF Afg has also the responsibility of stopping the transfer of detainees to Afghan Authorities if allegations of mistreatment vis-à-vis detainees arise. While the post battlefield activities relating to the detainees seem straight forward, they are a source of operational stress. Evidently the soldiers must resolve numerous ethical challenges which may have significant impacts not only on their fellow soldiers but also for the detainees themselves and the local population.

POST BATTLEFIELD. In the post battlefield setting, the major activity that is taking place is the physical coordination and transfer of the detainees from Canadian Forces authorities to Afghan authorities. The process is fairly straight forward and begins when a detainee is ready to be transferred i.e. all interviews, identification and evidentiary procedures have been completed and assembled by the CF. The detainees are then collected by the Afghan National Police (ANP) and brought to a provincial detention center, either National Directorate Security (NDS) Kandahar or Kabul. Once the detainees are at a NDS or subsequently moved a prison (Sarpoza in Kandahar or Pol Charki in Kabul), the Afghan authorities have the obligation to notify DFAIT of the location of the detainees. In turn, DFAIT will advise CSC personnel.¹⁶⁵

¹⁶⁵As per DTA, the transfer of detainees is effected through a limited number of facilities to permit the Government of Canada to access to such facilities, monitor Canadian transferred detainees and to implement Canadian capacity building projects. And Gail Latouche email.

Arrangement for the transfer of detainees between the Government of Canada and the Government of the Islamic Republic of... para 4. And,

Gail Latouche, *Email correspondence...*

This notification is an important step because DFAIT and CSC have the right to interview detainees and hence, these personnel can ensure that “[detainees’] rights are being met, i.e. sustenance, [and that there are] no signs of torture etc.”¹⁶⁶ In effect, DFAIT and CSC play a crucial role in ensuring that the DTA is adhered to and that no mistreatment is occurring once the detainees are in Afghan hands.¹⁶⁷ Given this key role and in light of the discussion in the previous section, it would be that much more important to examine DFAIT and CSC understanding of the word mistreatment and its implications. There is no doubt that these personnel are also facing ethical dilemmas. Further, this process of monitoring comes to an end once the detainees enter the judicial system. Hence, at this juncture, it is quite possible that detainees’ rights may no longer be observed such as the rights to representation and fair prosecution and sentencing since, as already discussed, the status of the judicial system in Afghanistan is precarious and in development. Yet, aside from reports from Justice First or AIHRC, the Government of Canada no longer knows what is becoming of the detainees. Most importantly, the Government of Canada does not know if the collected evidence were relevant or effective in the prosecution a detainee (if it took place at all) or if a detainees is serving a sentence or has been released. Ultimately, Canada is not in a position to assess if the judicial system is supporting and congruent with security operations which are, too often, at the expense of soldiers. More obvious than ever, the handling and processing of detainees is much more than just collecting a detainee on the battlefield and handing them over to the Afghan authorities.

¹⁶⁶Gail Latouche, *Email correspondence...*

¹⁶⁷*Ibid.*

In the end, the post-battlefield activities, ensure that the coordination of detainees is properly done with the Afghan authorities and that it confirms with the intent of the DTA. However, once the detainees enter the Afghan Justice system, the government of Canada loses sight of those detainees and hence, of how effective is the handling and processing process of detainees.

Afghanistan is the first instance where the CF and the Government of Canada must deal with detainees and their implications both at the tactical and the strategic levels. Be at the strategic or at the tactical level, there are a number of unanswered questions, dilemmas, gaps, etc. Hence what are the obvious gaps and the lessons that must be retained thus far from the mission in Afghanistan? The next chapter analyses and distills those.

CHAPTER 4: ANALYSIS OF THE CASE STUDY

In this Chapter, the Afghanistan case study (previous Chapter) is analyzed using the theory advanced in Chapter 2. As well, recommendations are proposed with an aim to improve the decision process and the resulting handling and processing of detainees, as applicable. It is important to point out that these recommendations will be integrated in the "how to improve" section of Chapter 5 .

SECTION I - STRATEGIC PREPARATION OF ASSURANCES

At the strategic level, there are two major activities that must be undertaken when detainees will be a reality of a mission. In order to setting the right conditions regarding for the successful transfer of detainees. The first activity is to evaluate and assess the contemplated receiving state with respect to its overall capacity in handling and processing of detainees. The importance of thorough assessments and evaluations can not be understated. The second activity is the drafting, preparation and negotiation of assurances. Assurances translate the strategic intent of a nation to another. They also provide the basic guidance and directive for the handling and processing of detainees at the tactical level.

ASSESSMENTS AND EVALUATIONS

THEORY. As seen in Chapter 2, the assessment of the contemplated receiving state is to include the evaluation of the capacity of its detention system, and the uniformity, maturity, competency and capacity of its judicial system. These assessments and evaluations provide vital information that is essential to the formulation of a decision to transfer or not detainees and their handling and processing. The assessments and evaluations of monitoring agencies or organizations should be also undertaken at this stage to ensure that a monitoring process will be available, feasible and achievable.

CASE STUDY. In 2005, it is unclear (classified information) what were the factors that contributed to the decision to transfer detainees to Afghan authorities. In fact, it is doubtful that the decision was based on evaluations and assessment of the capacity of the Afghan authorities to detain personnel. Given the “then” and “today’s” detention system capacity (professional and physical infrastructure), their track records in abilities and capabilities to respect HR, and condition of the Afghan judicial system specifically in capacity, maturity and competency, it is difficult to comprehend how the Government of Canada could arrive to this conclusion. Moreover, at the time of the negotiations, the Afghan National Special Forces (ANSF) were at an embryonic state (mentoring began in 2006 for the Afghan National Army or ANA, and in 2007 for the Afghan National Police or ANP) and it would have been premature to rely on them. Indeed, the case study research provided many red flags and indications that the Afghan Government was not, and possibly is still not, in a position to negotiate an agreement with Canada (or with

NATO for that matter in 2007) regarding the handling and processing of detainees. Yet the decision was made. Hence, the decision to transfer detainees to Afghanistan was possibly based on political motives rather than the realities of the overall assessment of capacity of the Afghan authorities to do so. The decision may have been legal but it appears that it may not have been the right ethical choice.

GAPS/SHORTFALLS. As stated above, the main shortfall appears to be that the decision to transfer detainees to the Afghan authorities was possibly based on political motives (limited resources, no Canadian long-term detention capacity, amongst other things) rather than the realities of the overall assessment of capacity of the Afghan authorities to do so. As well, the assessments and evaluations of the Afghan government capacities to handle and process detainees were possibly not thoroughly or adequately analyzed, hence yielding to the wrong recommendations and implications. In addition, given that initially the Government of Canada relied on ICRC to do the monitoring of detainees on its behalf, it implies that monitoring requirements were overlooked and/or misunderstood.

IMPACTS. The impacts of not considering, analyzing and/or thoroughly performing assessments and evaluations have already been felt: the CF had to stop transferring detainees to the Afghan authorities¹⁶⁸ because of allegations of mistreatment

¹⁶⁸ The author of this thesis strongly believe that one of the main reasons the decision to switch the transfer of detainees from the US to the Afghan authorities was directly a result of the mounting allegations and controversies surrounding the US handling of detainees from 2002 forward. Not surprisingly, publicly acknowledging these reasons would have strong political ramifications and hence, no official (or unclassified) documents are available.

and torture which in the end, proved to have taken place; DND has been taken to the Federal Court and the Federal Court of Appeal by BCLL; and an MPCC is to hold a public inquiry to investigate the handling and processing of detainees at the end of May 2009. Other key probable impacts are the overloading of the detention and Judicial systems, the creation of an imbalance regarding prisons and prosecution standards across the country, and perceived preferential treatment vis-à-vis insurgents vice local criminals (detainees HRs are protected whereas local HR may not, women and children being a case in point). The latter impacts do not create an environment conducive to win the hearts and minds of the Afghans, an aspect which is deemed crucial in the fight against an insurgency.¹⁶⁹ Moreover, CF soldiers, RCMP, CSC personnel and Afghans alike are the ones who experience first hand the impact of the decision to hand over the detainees to the Afghan authorities. Indeed, CF soldiers, RCMP, CSC personnel are placed in an environment where they face unnecessary moral and ethical dilemmas because of the aforementioned conditions. Personnel should no have to live through these dilemmas - the human dimension of the decision can not be overlooked for convenience and political imperatives.¹⁷⁰

RECOMMENDATIONS. The process of evaluating the capacity of a receiving state to detain or not personnel must be done thoroughly and transparently, considering not only political and legal factors, but also ethical and moral factors. In fact, the decision to transfer detainees must not only make sense politically and legally, it must also make

¹⁶⁹ Ref...

¹⁷⁰ This is the assessment of the author of this paper.

sense ethically and morally. In fact, as the ultimate test, the capacity of a receiving state to detain or not personnel should be commensurate to the values and expectations of the Canadian people and its soldiers. This human dimension is crucial. Historian Colin S. Gray astutely stated in his book “Another Bloody Century” that one of the five themes that will influence future warfare “is the overwhelming significance of the human element: people matter most...Many analysts and officials do not want to be told that military prowess and strategic effectiveness is more a matter of will and skill than of machines and numbers.”¹⁷¹ Indeed, politics is one of the main drivers, but it is not the only – people are too.¹⁷² Moreover, tactical brilliance can not make up for strategic miscalculations.

ASSURANCES

THEORY. Assurances should be negotiated and signed at the highest governmental level possible. This is to ensure that an influential and important governmental figure has committed to the responsibilities identified in the assurances and understands the possible repercussions if those responsibilities are not met or respected. In the end, the responsibilities rest with the head of the Government. To have these intended effects, the assurances must then provide clear definitions of terms, unambiguous expectation regarding the treatment of detainees, possibly including where

¹⁷¹ Colin S Gray, *Another Bloody Century – Future Warfare*. (London, Great Britain: Weidenfeld & Nicolson, 2005): 376.

¹⁷² *Ibid.*, 24-25.

the detainees should be held, and they should provide for monitoring mechanisms of detainees from beginning to end.

CASE STUDY. The original DTA was signed between the Canadian Forces Chief of Defence Staff and the Ministry of Defence of the Islamic Republic of Afghanistan. The subsequent enhanced DTA saw only one signature change and it was on the Canadian side. The responsibility of the DTA signature agreement was assigned to the Ambassador of Canada in Afghanistan (Mr. Lalani), a more appropriate political figure than the CDS. The enhanced DTA enforced the monitoring process of detainees however, the monitoring covers only the detainees until they enter the Afghan judicial system after which time, Canada has not visibility or knowledge of what occur to these detainees.

GAPS/SHORTFALLS. Although on the Canadian side, the signature requirement of the DTA was elevated to the Ambassador of Canada in Afghanistan, there was no change on the Afghan side – it is still the responsibility of the Ministry of Defence of the Islamic Republic of Afghanistan. Although the latter is obviously an important governmental figure, this level of government still does not carry the weight it should because the DTA has ramifications and requirements that sit clearly outside the influence of the Ministry of Defence, such as the detention and judicial systems.¹⁷³ The

¹⁷³ Ministry of Justice is responsible, amongst other departments, for the General Department for prisons and detention center, General Department of Juvenile and Ra, and General Department of Legal Aid. President Karzai's cabinet consists of 25 ministers and one senior minister.

DTA also falls short of identifying a robust monitoring system for the detainees. Moreover, it is unknown if the gathering of information and evidence by Canadians are relevant or not to the Afghan authorities. In sum, there is no thorough monitoring process in place that will validate the handling and processing of detainees.

IMPACTS. Just as it was the case with "assessments and evaluations", CF soldiers, RCMP, CSC personnel and Afghans alike are the ones who experience first hand the impact of the assurances as laid out because they are the ones implementing the DTA. CF soldiers, RCMP, CSC personnel are placed in an environment where they face unnecessary moral and ethical dilemmas because of the aforementioned conditions. Yet again, this is considered an unacceptable situation given that DND demands of its soldiers to "...consistently perform their duties to the highest ethical standards"¹⁷⁴ yet the soldiers, have to operate in a culture where values significantly differ from the West. This atmosphere does not foster the highest ethical performance and place unnecessarily stress on the personnel.¹⁷⁵ Moreover, given questionable condition of the Afghan detention, judicial and police institutions, the DTA is not laid out to induce a climate to win the hearts and minds of the LN. Finally, without a thorough monitoring system, it is unknown if the detainee process is effective, fair and ethically acceptable. Hence the soldiers on the ground, the local nationals, Canadian population, and the international community for that matter, can not be appraised and reassured of the effects and outcomes, regarding the handling and processing of detainees.

¹⁷⁴Defence Ethics Programs, National Defence and Canadian Forces Website. <http://www.ethique.forces.gc.ca/dep-ped/index-eng.asp>; Internet accessed 01 May 2009.

¹⁷⁵ This is the assessment of the author of this paper.

RECOMMENDATIONS. Albeit difficult to achieve in certain situations, the negotiation of assurances must be done at the highest governmental level possible. It is a strong way to induce a sense of responsibility to the receiving governmental party. If this can not be secured, it should send some signals that the government is not ready or capable to fully assume required assurances responsibilities. The assurances must detail intended effects, complete with clear definitions of terms, unambiguous expectations regarding the treatment of detainees, possibly including where the detainees should be held, and identifying monitoring mechanisms of detainees from beginning to end. Finally, the monitoring of detainees must be clearly identified and described to cover the handling and processing of detainees from beginning to end, as this has the potential to gain the support of all involved.

SECTION II - TACTICAL PERSPECTIVE

At the tactical level, three different environment settings were identified: on, off and post the battlefield environments.

ON THE BATTLEFIELD

THEORY. The soldiers are the first ones to interact with detainees. They are key and crucial to the handling and processing of prisoners by gathering evidence. But in order for the collection of evidence to be done adequately, the soldiers must not only be

trained and prepared for those duties, they must have trust and confidence in the whole process of detainees. The chain of command must also be clear in its directions regarding detainees handling. It is in the best interest of all, detainees, soldiers and strategic enjeux.

CASE STUDY. On the battlefields of Afghanistan, the gathering of evidence is taking place but it appears that not only it has not been coordinated appropriately with the HN judicial requirements, it may required specific collaboration with the HN given that the HN relies not only on International law but also relies strongly on Afghan Customary Law. There appears to be a lack of trust and confidence on the part of the CF soldiers in the handling and processing of detainees by the HN. This in turn could transpire into a source of operational stress, impacting soldier's behaviours both physically and mentally and may, ultimately lead to operational stress injuries and PTSD.

GAPS/SHORTFALLS. The accuracy and relevancy of the gathering of evidence by Canadian soldiers are unknown. As well, because the handing and processing of detainees can not be validated (no thorough monitoring process), it is difficult for the soldiers to have trust and confidence in the handling and processing of detainees. As for the Canadian public, the HN and the international community, given the public uproar regarding detainees, there is a lack of trust and confidence in the process.

IMPACTS. The unknown effectiveness of the HN handling and processing of the detainees, coupled with the fact that detainees' HR might be violated once transferred, has the great potential to transpire into a source of operational stress, impacting soldier's

behaviours both physically and mentally and may, ultimately lead to operational stress injuries and PTSD.

RECOMMENDATIONS. It is important to reiterate that soldiers are the first ones to interact with detainees – often at the peril of their lives. Hence the processing and handling of detainees must be robust, efficient, fair and ethical – it must be supportive of soldiers’ actions on the battlefield. The transfer of detainees to a HN must be done with the full understanding of what this may translate to soldiers on the ground, not only physically but mentally as well.

OFF THE BATTLEFIELD

THEORY. Once they have been removed from the battlefield, detainees undergo further interviews and wait to be transferred to a permanent detention facility. Following a review of the evidence at hand, a tactical decision will be taken regarding the release or transfer of detainee to another party. Given the present expeditionary mission organization, these decisions would be taken by military personnel.

CASE STUDY. Off battlefield activities are the last direct interactions the CF will have with the Canadian portion of handling and processing detainees. As such, detainees will be subjected to a final interview and the staff will draft tactical recommendations for the release, holding or transfer of detainees. Based on that, Commander JTF Afg will make the final decision regarding the detainees which will then be subsequently

implemented. Commander JTF Afg has also the responsibility of stopping the transfer of detainees to Afghan Authorities if allegations of mistreatment vis-à-vis detainees arise. While the off battlefield activities relating to the detainees seem straight forward, they are a source of operational stress. Evidently the soldiers must resolve numerous ethical challenges which may have significant impacts not only on their fellow soldiers but also for the detainees themselves and the local population.

GAPS/SHORTFALLS. While most detainees will be transferred based on the NATO/Afghanistan detainee agreement, Commander JTF Afg retains the authority to release or not to transfer detainees. Of course the latter actions must be fully justified and documented. Although Commander JTF Afg and his staff have received some training that focus on the mechanics of the transfers, they have not been trained specifically to interpret and thus make such crucial decisions based on the evidence and information at hand.

IMPACTS. Just as with the on the battlefield activities, it is a source of operational stress, impacting soldier's behaviours both physically and mentally and may, ultimately lead to operational stress injuries and PTSD.

RECOMMENDATIONS. If the handling and the processing of detainees is set in such a way that it is working, that it is effective, fair and ethical, there would be no issues for the Commander of a JTF and his staff, thus removing possibly a source for moral dilemma. Although this should be the expectation, it is also recognized that it may be

difficult to achieve. Hence a solid and realistic DTA, which can be easily comprehended by soldiers, is a must. Also, the aforementioned off the battlefield activities should be supported by specialized personnel (RCMP, CSC) to further promote a robust and healthier handling and processing of detainees. Finally, the ultimate decision to stop transferring the detainees to the HN based on realistic allegations of abuse or mistreatment should rest with a higher Canadian governmental figure. It would have two effects: first remove the responsibility from the JTF Afg and staff (only execution) and second, would emphasize the important at the Governmental level.

POST BATTLEFIELD

THEORY. The post-battlefield activities focus on ensuring that the coordination of detainee transfers and their monitoring, from beginning to end, is properly effected.

CASE STUDY. The coordination of detainees is being effected through DFAIT, CSC and CF personnel. However, once the detainees enter the Afghan justice system, the government of Canada loses sight of those detainees.

GAPS/SHORTFALLS. The obvious shortfall of not having a thorough monitoring of the handling and processing of detainees is a reoccurring and debilitating gap: Canada has yet to confirm if the handling and processing of detainee is effective, fair or ethical. Thus Canada does not know if the DTA is achieving its aim because it can not

be validated.

IMPACTS. The validation of the handling and processing of detainees is yet to be confirmed as affective. Thus it can not instill trust and confidence in the handling and processing of detainees to soldiers, detainees, Afghans, Canadians and ultimately the international community. It becomes a source for ethical dilemmas and ensuing additional, though unnecessary, operational stress.

RECOMMENDATIONS. The essence of assurances, complete with a strong monitoring mechanism, is to set the conditions for an effective, fair and ethical handling and processing of detainees. Not only must assurances be validated, they must also be improved and amended as situations evolve in theatre. Without monitoring this can not occur. If the effectiveness of assurances can not be measured or observed, then the purpose of negotiating assurances is almost futile and becomes solely a political exercise to cover its reputation.

SECTION III - THE THESIS LINK

In this Chapter, the compilation of shortfalls and impacts, arising from the Afghan case study at the strategic and tactical levels, either influenced or resulted from the decision to transfer detainees. The compilation also revealed strong and reoccurring impacts or themes resulting from (rightly or wrongly) deciding to transfer detainees: the undermining of the efforts of winning the heart and minds of the Afghans; the

undermining of the support of soldiers, Canadian population, HN people and international community because of the doubt surrounding the effectiveness, fairness and ethical process of detainees; and the creation of an environment at the tactical level that may not be conducive to ethical behaviors resulting in a source of unnecessary ethical dilemma and operational stress.

These impacts, given their tactical and strategic significance, have had or have the potential to positively or negatively affect a mission. Indeed it is imperative to recognize that their positive or negative outcomes hinge on an ethical, robust, transparent and effective handling and processing of detainees. This may only take place if the right decision is taken in the first place. Hence the bottom line is very clear: the transfer of detainees, being the first step in the handling and processing of detainees, can empower a mission or it can seriously jeopardize or negate all of the mission's effects including the soldiers' efforts and sacrifices – thus, it is obvious that with so much power and influence on the outcomes of a mission, the transfer of detainees, as part of the overall handling and processing of detainees, truly qualify as a mission enabler.¹⁷⁶ Hence, making the right decision to transfer or not detainees to HN (or others) is a key enabler in the execution of a mission and as such, will assist in setting the right conditions to support the mission.

¹⁷⁶Enabler: the ability to empower, influence positive development and growth, facilitate.

CHAPTER 5: TO TRANSFER OR NOT TO TRANSFER THAT IS THE QUESTION

Hence, as one of the key enablers in expeditionary operations, the decision to transfer or not detainees, as part of their overall handling and processing, must be taken very judiciously and sensibly in order to obtain the desired mission effects. Indeed, transferring detainees to a HN that would not have the capacity to handle and process detainees would have significant adverse impacts on the HN and on soldiers alike. However, the decision not to transfer detainees when a state would actually have the capacity to embrace the handling and processing of detainees, could be equally as devastating.

Thus, the more astute, experienced and competent the Government of Canada becomes in assessing and analyzing a HN capacity (or any other party contemplated as the receiving power) to handle and process detainees, the greater are the chances that the right decision regarding the transfer of detainees is taken. So why is making the right decision so important?

WHY IT IS IMPORTANT

There are numerous reasons why the decision to transfer or not detainees is important and this paper has highlighted some of the most compelling ones. Hence the

following is a summary of some of the reasons why it is important to make the right decision regarding the transfer of detainees.

- Must be realistic (qualitative and quantitative), public, transparent evaluations and assessments of a nation, party or organization ability to effect the handling and processing of detainees;
- To win the hearts and minds of the people in conflict situations such as in failed and fragile states. As they already face injustice and immorality, it is important that the handling and processing of detainees does not add more injustice and immorality;
- To empower the promoting the Rule of Law and good governance through the fair and ethical handling of detainees regardless of whom is the detaining power; this can only be achieved if the right decision regarding the transfer of detainees is made from the onset of a mission;
- To have the support of the international community, including the home front and HN people, by promoting accountability, transparency and responsibility vis-à-vis HR through ethical, fair and effective handling and processing of detainees and;

- To provide the soldiers with an environment that will be conducive to performing their duties and where they will not be submitted to unnecessary ethical dilemmas and operational stress. Soldiers must have trust and confidence in the handling and processing of detainees. Waging war offers already enough ethical challenges of its own; and most importantly,
- To ensure that the most vulnerable, child soldiers, children, youths and women alike do not suffer and face the consequences of second and third order effects resulting from taking the wrong decision regarding the handling and processing of detainees.

Hence, aside from positively enabling a mission, the importance of making the right decision regarding the transfer of detainees has a very real, essential and fundamental human dimension that must be considered and embraced. Indeed, there are not only legal and political imperatives that must be considered when making the decision to transfer or not detainees. There are ethical and moral obligations must be as well. To do otherwise could be mission suicide.

HOW TO IMPROVE

In Chapter 5, a number of recommendations were proposed with the aim of improving the steps regarding the detainees. Indeed, there are numerous factors and conditions that must be considered in order to assist in taking the right decision and also

in projecting it out. To further improve the decision process and subsequent handling and processing of detainees, the following emphasis and additional guidance is proposed¹⁷⁷:

EVALUATIONS/ASSESSMENTS. They provide the fundamental information in the decision-making regarding the transfer or not of detainees:

- Must be realistic (qualitative and quantitative), public, transparent evaluations and assessments of a nation, party or organization ability to effect the handling and processing of detainees;
- Must review and appraise the maturity, capability and capacity of the receiving power's agencies, systems and organizations (detention, Armed forces, police forces, legal system, capacity to observe and follow fundamental HR) that will be involved in the handling and processing of detainees *from beginning to end*;
- Must assess the overall national impacts (second and third order effects on the detention and legal systems) of adding detainees to a nation, party or organization;

¹⁷⁷ In addition to the theory in Chapter 2.

- Must review and appraise the capacities and capabilities of those various parties, agencies and organizations that will form *a thorough monitoring process* of the handling and processing of detainees, *from beginning to end*.

ASSURANCES. The drafting and negotiating of robust assurances will set the conditions to foster ethical, fair and effective handling and processing of detainees:

- Must clearly spell out the Authorities, Accountabilities and Responsibilities (AAR) regarding the entire handling and processing of detainees including those AAR of the monitoring party;
- Must include and describe a *thorough* monitoring process of the handling and processing of detainees that is feasible and achievable. The monitoring process must measure the performance and effectiveness of the handling and processing of detainees – in other words it must validate the adequacy and effectiveness of assurances;
- Must be negotiated at the highest level to impose commitment and transparency; and
- Must have clear articles: definitions, expectations, outcomes, consequences.

PREPARATION AND ALTERNATIVE OPTIONS. Being prepared and having alternative options in advance of having to make the decision to transfer or not detainees, would increase the odds of making the right choice for the right reasons:

- Detention capacity. Canada does not have a readily available deployable long-term detention capacity. Contingency planning for building such a capacity should be done. Specifically, DND Military Police, CSC and the RCMP supported possibly by the private sector, should devise a detention capacity plan, including resource requirements, management, and administration. This could possibly alleviate the inevitable decision of transferring detainee to a potentially nation because of not having a detention capacity;
- Coalition detention capacity. In the same essence, a coalition detention capacity could be planned as well;¹⁷⁸ and
- Canadian Assessment Team. The involvement of experts and specialized personnel (DFAIT, DND, CSC, RCMP, CIDA, etc) is required to assess and evaluate a receiving power's capacity and capability of handling and processing detainees. As such, the critical components of an assessment team

¹⁷⁸"In view of the detention problems that ISAF member states are having in Afghanistan, the European States and Canada should consider establishing a detention facility in Afghanistan run by ISAF for ISAF detainees." Deeks, *Avoiding transfer to ...*, 39.

should be identified in advance and known by the various agencies in order to address shortfalls and gaps. That does not mean that specific personnel must be identified, rather specific requirements, expertise and specialties must be identified. Hence the more comprehensive and specialized the assessment team is, the more robust and reliable evaluations and assessments should be.

TACTICAL LEVEL. At the tactical level, a thorough awareness of the handling and processing of detainees coupled with detainee-focused training is indispensable and critical:

- Soldiers must receive specific training to handle and process detainees, from the gathering of evidence to the preparation of files for the transfer (or not) of detainees (Military Police focused);
- The tactical level must be provided with the adequate resources to effect their part in the handling and processing of detainees such as specialists for the assessment of releasing or transferring detainees and the execution of interviews;
- The tactical level must receive updates (as part of the monitoring process) on the efficiency of the handling and processing of detainees in order to inform the soldiers and build trust and confidence in the detainee process. In fact, this information should be made available to the public, HN and home front as

well to provide transparency and accountability to the controversial handling and processing of detainees; and

- Make soldiers particularly aware of the possibilities that they will face ethical dilemmas and how to handle and address them. Canadian values and the HN values may differ significantly and may influence how a HN would deal with detainees first hand. Soldiers must be prepared to deal with these realities.

Given the importance of making the right decision regarding the transfer of detainees, it is essential that the steps required to make that decision and to carry it out are revised regularly and improved. This is how the thinking process and steps leading to a fair, effective and ethical handling and processing of detainees will be refined and gain a higher level of fidelity and reliability.

This last Chapter summarized the many reasons as to why it is important to make the right decision regarding the transfer of detainees and not surprisingly, most evoke a human dimension. This Chapter also provided a number recommendations, emphasis and additional guidance to further improve the decision process and subsequent handling and processing of detainees.

CONCLUSION

It would be idyllic if there was an extensive, perfect and foolproof checklist that would yield to a guaranteed and unquestionably right decision to transfer or not detainees to a nation, coalition partner or organization. Unfortunately, no such list exists. However, as discussed in this paper, there are a number of steps, factors and conditions that should be followed to ensure that all key aspects of the decision are considered. In turn, the odds will be increased that the right decision will be elected. But in the end, it is the art of balancing the qualification and quantification of legal, political and ethical imperatives that should drive the election of the right decision to transfer of not detainees.

Also discussed in this paper was the importance of choosing the right course of action regarding the transfer of detainees because the decision itself has very real and tangible human dimension impacts: winning the hearts and minds of the HN; promoting the rule of law and good governance, securing the support at home and from the international community; creating a tactical environment conducive to ethical behaviors with no added ethical dilemma or operational stress; and, ensuring that the most vulnerable, child soldiers, children, youths and women alike do not suffer and face the consequences of second and third order resulting from the wrong decision. Not surprisingly, the decision drives positive or negative outcomes.

But as this paper has demonstrated, it is paramount to recognize that these impacts, given their tactical and strategic human dimension significance, have had or have the potential to positively or negatively affect a mission. Indeed positive or negative outcomes hinge on an ethical, robust, transparent and effective handling and processing of detainees. Hence, the bottom line is very clear: the transfer of detainees, being the first step in the handling and processing of detainees, can empower a mission or it can seriously jeopardize or negate its effects including the soldiers' efforts and sacrifices – thus, it is obvious that with so much power and influence on the outcomes of a mission, the transfer of detainees, as part of the overall handling and processing of detainees, truly qualify as a mission enabler. Hence, as the thesis of this paper advanced, indeed **the right decision to transfer or not detainees, as part of the overall handling and processing of detainees, is one of the crucial enablers of a mission.**

The aim of this thesis was to amplify the implications relating to the handling and processing of detainees and how the decision to transfer or not detainees affects everyone, including the mission. In fact, the importance of making the right decision has a very real, essential and fundamental human dimension that must be considered and embraced. Indeed, the decision can not solely be based on political and legal imperatives, and convenient motives. In fact, the decision to transfer or not detainees is very much an ethical dilemma where cultures, values, self, national and international expectations and interests, and political and legal realities are harmonized. To overlook the human dimension of the decision to transfer detainees could be mission suicide.

In the end, *to transfer or not to transfer detainees is the question* that must be wisely answered – the people and mission depend on it. Indeed tactical brilliance can not make up for strategic miscalculations.

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