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MASTER OF DEFENCE STUDIES

**CANADIAN FORCES AND THE RULE OF LAW: FAILURES OF THE
ARRANGEMENT FOR THE TRANSFER OF DETAINEES IN AFGHANISTAN**

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ABSTRACT

The Canadian Forces are currently deployed in Afghanistan as part of the NATO-led coalition International Stability Assistance Force (ISAF), and during the conduct of these operations, Canadian soldiers detain persons who pose a continuing threat to ISAF or to Afghan stability and security. These detainees are then transferred to Afghan detention facilities in accordance with the Arrangement for the Transfer of Detainees (DTA) signed in December 2005 between the Chief of the Defence Staff and the Afghan Minister of Defence. Critics allege that the DTA violates the rule of law by failing to ensure the care that Canadian Forces must take to make certain that detainees transferred by them are not subjected to the probability of torture, extrajudicial killing, or other serious human rights violations. Where Canadian Forces transfer detainees to authorities who have been shown routinely to commit such crimes, and where there is no inherent mechanism to protect the detainees, then the transfer of detainees under the DTA appears to offend the *Charter of Rights and Freedoms*, the law of armed conflict, and the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, or Punishment*. Consequently, it may implicate Canadian Forces members and commanders in the commission of offences not only under the *Rome Statute of the International Criminal Court*, but also the *Canadian Crimes Against Humanity and War Crimes Act*.

CANADIAN FORCES AND THE RULE OF LAW: FAILURES OF THE ARRANGEMENT FOR THE TRANSFER OF DETAINEES IN AFGHANISTAN

“Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law...”
- Preamble, Charter of Rights and Freedoms¹

INTRODUCTION

On 21 February 2007, Amnesty International Canada (AIC), together with the British Columbia Civil Liberties Association (BCCLA), applied to the Federal Court for judicial review of the Arrangement for the Transfer of Detainees (DTA) signed in December 2005 between the Canadian Forces’ Chief of the Defence Staff (CDS) and the Afghan Minister of Defence.² Canadian Forces are currently deployed in Afghanistan as part of the NATO-led coalition International Stability Assistance Force (ISAF), and during the conduct of these operations, Canadian soldiers detain persons who pose a continuing threat to ISAF or to Afghan stability and security.³ These detainees are then transferred to Afghan detention facilities in accordance with the DTA.

Since its inception, the DTA has sparked debate between human rights advocates and the government of Canada, in particular the Departments of National Defence (DND) and Foreign Affairs and International Trade (DFAIT). Human rights advocates assert

¹ Canadian Charter of Rights and Freedoms, online: <http://laws.justice.gc.ca/en/Charter/index.html>; Internet; accessed 23 March 2007.

² Federal Court of Canada, “Court Files,” Federal Court Docket Number T-324-07, S.18.1 Application for Judicial Review, http://cas-ncr-nter03.cas-satj.gc.ca/IndexingQueries/infp_moreInfo_e.php?T-324-07; Internet; accessed 13 March 2007.

³ National Defence and Canadian Forces, “Protecting Canadians Rebuilding Afghanistan,” <http://geo.international.gc.ca/cip-pic/afghanistan/menu-en.asp>; Internet; accessed 17 April 2007. The

that the DTA does not contain any provision or process that would allow Canada to continue to monitor detainees adequately once they have been transferred to Afghanistan prisons and thus afford the detainees with a degree of protection against the reported likelihood of torture, extrajudicial killing, or other abuses. Additionally, by contributing to the probability that detainees will be mistreated, it violates the Canadian *Charter of Rights and Freedoms* and international laws. They further contend that such human rights abuses constitute war crimes under international law, and consequently, there is a risk that Canadian Forces soldiers and commanders may be vulnerable to prosecution.⁴

Conversely, the government of Canada maintains that the DTA does conform to the requirements of international law and that, by transferring detainees to Afghan authorities, Canada is visibly supporting the government of Afghanistan in its need to continue to build capability in its judicial system and thus to assert sovereignty over its own affairs.⁵ As to the complaint that the DTA does not allow for monitoring of

mission of the Canadian Forces is tied in with that of the whole of government approach: security, governance and sustainable development.

⁴ The Senlis Council, "Canada In Kandahar: No Peace to Keep, June 2006," http://www.senliscouncil.net/modules/publications/013_publication; Internet; accessed 3 January 2007; Amir Attaran, "Re: Arrangement for the Transfer of Detainees between the Canadian Forces and the Ministry of Defence of the Islamic Republic of Afghanistan – Effect of the Canadian Charter of Rights and Freedoms, 7 April 2006;" available from http://www.ceasefire.ca/atf/cf/%7B0A14BA6C-BE4F-445B-8C13-51BED95A5CF3%7D/Attaran_7%20April%202006.pdf; Internet; accessed 3 January 2007; and Michael Byers, "Legal Opinion on the December 18, 2005 'Arrangement for the Transfer of Detainees between the Canadian Forces and the Ministry of Defence of the Islamic Republic of Afghanistan, 7 April 2006;" available from <http://www.ceasefire.ca/atf/cf/%7B0A14BA6C-BE4F-445B-8C13-51BED95A5CF3%7D/Michael%20Byers%20Opinion%20Canada-Afghanistan%20Arrangement%207%20April%202006.pdf>; Internet; accessed 3 January 2007. Those who have publicly spoken out against the DTA include The Senlis Council, Amnesty International Canada, the British Columbia Liberties Association, Amir Attaran (Faculty of Law, University of Ottawa), and Michael Byers (University of British Columbia; author of *War Law: Understanding International Law and Armed Conflict*). Attaran, Amnesty International Canada and the British Columbian Civil Liberties Association are of the opinion that the DTA violates the Charter. Byers (and the Senlis Council, based on Byers' opinion) is of the opinion that the DTA exposes Canadian soldiers and commanders to allegations of war crimes and failure of command responsibility.

⁵ National Defence and the Canadian Forces, "Arrangement for the Transfer of Detainees between the Canadian Forces and the Ministry of Defence of the Islamic Republic of Afghanistan," Paragraph 3,

transferred detainees, on 20 February 2007, the Canadian Forces and the Afghanistan Independent Human Rights Commission (AIHRC) together agreed that the Canadian Forces would advise the AIHRC whenever a detainee is transferred, and that the AIHRC would in turn advise the Canadian Forces should they discover that a detainee, initially transferred by Canadian Forces, has been mistreated.⁶ However, at the heart of this controversy are the recent reports of ongoing, serious human rights violations in the Afghan judicial and penal systems, reports sufficiently disturbing as to lend considerable weight to the criticisms levelled at the DTA.

These reports emanate from such credible agencies as the United States (US) State Department, the AIHRC, and the United Nations High Commissioner for Human Rights (UNHCHR), and all of them point to evidence of torture, extrajudicial killing, and other human rights abuses within Afghan detention facilities. The US State Department's annual reports on human rights in Afghanistan have contained essentially the same observation about the incidence of torture and extrajudicial killing by Afghanistan security and/or police forces since 2002: "The Government's human rights record remained poor....There were instances where local security forces and police committed extrajudicial killings, and officials used torture in prisons."⁷ Likewise, in both 2005 and

http://www.forces.gc.ca/site/operations/archer/agreement_e.asp; Internet; accessed 28 March 2007; and House of Commons, Standing Committee on National Defence, *Evidence*, Monday, December 11, 2006, at 1530 (Ms. Swords, Assistant Deputy Minister, International Security Branch and Political Director, Department of Foreign Affairs and International Trade); available from <http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?SourceId=188457>; Internet; accessed 3 January 2007.

⁶ National Defence and the Canadian Forces, "Letter to the AIHRC from the Commander of Joint Task Force Afghanistan," and "Response from the AIHRC to the Commander of Joint Task Force Afghanistan," http://www.forces.gc.ca/site/afghanistan/index_e.asp; Internet; accessed 23 March 2007.

⁷ US Department of State, "Country Reports on Human Rights Practices – Afghanistan – 2004," <http://www.state.gov/g/drl/rls/hrrpt/2004/41737.htm>; Internet; accessed 23 March 2007.

2006, similar wording was used to report the continuing problem: “There continued to be instances in which security and factional forces committed extrajudicial killings and torture. Human rights problems included: extrajudicial killings; torture; poor prison conditions.”⁸ What is striking about all these reports is that, five years after the 2001 Bonn Agreement and the establishment of the Judicial and Human Rights Commissions in Afghanistan, the State Department continues to find evidence of serious human rights violations within the Afghanistan judicial and penal systems.⁹ These concerns are echoed in the AIHRC and UNHCHR reports as well.

The AIHRC was initially established through the Bonn Agreement. As an oversight body, it was given responsibilities for “human rights monitoring, investigation of violations of human rights, and development of domestic human rights institutions;” in 2005 the AIHRC was recognized within the Afghanistan Constitution as a formal body.¹⁰ They have reported on human rights abuses and other issues since 2002. In their “2003 – 2004 Annual Report”, the AIHRC made the following observation on the incidence of human rights abuses in the judicial and penal systems: “Torture continues to take place as a routine part of police procedures. The AIHRC has found torture to occur particularly at

⁸ US Department of State, “Country Reports on Human Rights Practices – Afghanistan – 2006,” <http://www.state.gov/g/drl/rls/hrrpt/2006/78868.htm>; Internet; accessed 23 March 2007.

⁹ Afghanistan Government, “Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions,” <http://www.afghangovernment.com/AfghanAgreementBonn.htm>; Internet; accessed 23 March 2007. The Bonn Agreement provided for the establishment of a Judicial Commission (per Part I, Section (2)) and an Independent Human Rights Commission (per Part III, Section C, sub-section (6)).

¹⁰ *Ibid.*; and Afghanistan Independent Human Rights Commission, “Legal Status,” http://www.aihrc.org.af/legal_status.htm; Internet; accessed 23 March 2007.

the investigation stage in order to extort confessions from detainees.”¹¹ The following year, the AIHRC also found little change to report:

Torture continues to take place as a routine part of [Afghan National Police] procedures and appears to be closely linked to illegal detention centers and illegal detention, particularly at the investigation stage in order to extort confessions from detainees. Torture was found to be especially prevalent in Paktia and Kandahar provinces, linked to the high numbers of illegal detainees. High numbers of complaints of torture were received from all regional offices in the past year.¹²

Yet again in 2006, the AIHRC report indicates a continuing lack of significant progress:

“The incidence of torture on detained or imprisoned persons was still occurring throughout the past year, although cases of torture have declined.”¹³ Obviously, even though the AIHRC is a fairly new organization, with limited resources, their investigators’ findings are in line with those of the State Department and show the same continuing problem of abuses within the Afghanistan detention system.¹⁴ Predictably, the UNHCHR’s observations in this regard are exactly the same.

The office of the UNHCHR was established within the department of the United Nations Secretariat in 1993 and is responsible to promote and protect human rights for all

¹¹ Afghanistan Independent Human Rights Commission, “2003 – 2004 Annual Report,” Section 4.2, <http://www.aihrc.org.af/AnnualRep.pdf>; Internet; accessed 23 March 2007.

¹² Afghanistan Independent Human Rights Commission, “2004 – 2005 Annual Report,” Section 4.7, http://www.aihrc.org.af/annual_rept_2005.pdf; Internet; accessed 23 March 2007.

¹³ Afghanistan Independent Human Rights Commission, “2006 Annual Report,” Executive Summary, http://www.aihrc.org.af/rep_annual_2005_2006_eng.pdf; Internet; accessed 23 March 2007.

¹⁴ Paul Koring, “CIDA contradicts Ottawa on funding Afghan monitor,” *Globe and Mail*, 23 March 2007, <http://www.theglobeandmail.com/servlet/story/RTGAM.20070323.wxdetainee23/BNStory/National/home>; Internet; accessed 3 April 2007. The AIHRC reports that of the approx \$US7M funding pledged for 2006, as of January 2007, they had received only about half of that funding.

peoples.¹⁵ Two recent reports point to the same problem of human rights violations in the Afghanistan judicial and penal systems. First, their “Report on the Situation of Human Rights in Afghanistan,” dated January 2003, makes the following observation about the Afghanistan legal system: “Abuses of human rights continue to occur and remain outside the reach of Afghanistan’s Transitional Administration.”¹⁶ Certainly, by the end of 2002, the Transitional Administration, or interim government, was only a year old and little progress had been made by the Judicial Commission in ameliorating the conditions endemic in the prison and legal systems. However, in 2006, the “Report of the High Commissioner for Human Rights on the Situation of Human Rights in Afghanistan and on the Achievements of Technical Assistance in the Field of Human Rights” noted more specifically the continuing problem:

The NSD [National Security Directorate], responsible for both civil and military intelligence, operates in relative secrecy without adequate judicial oversight and there have been reports of prolonged detention without trial, extortion, torture, and systematic due process violations. Multiple security institutions managed by the NSD, the Ministry of the Interior and the Ministry of Defence, function in an uncoordinated manner, and lack central control. Complaints of serious human rights violations committed by representatives of these institutions, including arbitrary arrest, illegal detention and torture, are common....Serious concerns remain over the capacity and commitment of these security institutions to comply with international standards.¹⁷

¹⁵ Office of the United Nations High Commissioner for Human Rights, “About OHCHR – Mandate,” <http://www.ohchr.org/english/about/index.htm>; Internet; accessed 23 March 2007.

¹⁶ Office of the United Nations High Commissioner for Human Rights, “Report on the Situation of Human Rights in Afghanistan,” Submitted by Mr. Kamal Hossain (E/CN.4/2003/39), <http://www.ohchr.org/english/about/index.htm>; Internet; accessed 23 March 2007.

¹⁷ Office of the United Nations High Commissioner for Human Rights, “Report of the High Commissioner for Human Rights on the Situation of Human Rights in Afghanistan and on the Achievements of Technical Assistance in the Field of Human Rights,” (E/CN.4/2006/108), <http://www.ohchr.org/english/about/index.htm>; Internet; accessed 23 March 2007.

Particularly telling in this report is the direct link that it draws between Afghanistan security institutions, including specifically the Ministry of Defence, and evidence of serious human rights violations committed by members of those institutions on persons in their custody. That the UNHCHR, even in 2006, had serious concerns over ability of the Afghanistan government to comply with the internationally accepted standards of judicial proceedings against its own citizens, is disquieting to say the least when considering that Canadian Forces continue to transfer detainees into that system.

Taken together, these reports from the State Department, the AIHRC and the UNHCHR offer credible and damning evidence of the probability that a person held within an Afghan detention facility will likely face torture or similar abuses, or will be killed outright, particularly where that person is likely to be interrogated, as most detainees captured by Canadian Forces would be.¹⁸ In fact, this probability was confirmed as recently as 14 March 2007, when Abdul Qadar Noorzai, head of the AIHRC, acknowledged to Canadian reporters that “the abuse and torture of inmates is an ongoing problem in Afghan prisons.... Last year, the commission said that by its estimates, one in three prisoners handed over by Canadians were beaten in local jails.”¹⁹

¹⁸ House of Commons, Standing Committee on National Defence, *Evidence*, Monday, December 11, 2006, at 1550 (Mr. Rigby, Acting Assistant Deputy Minister (Policy), Department of National Defence); available from <http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?SourceId=188457>; Internet; accessed 3 January 2007. Mr. Rigby notes: “In accordance with Canadian Forces doctrine, designated, specially-trained Canadian military personnel may conduct initial questioning and screening of persons under our custody to obtain information of immediate tactical value.” Thus, persons captured during operations would in all likelihood be interrogated for information they might have bearing on the conduct of operations; as insurgents, it is likely that Afghan security forces would also be interested in questioning them.

¹⁹ Joe Friesen, “O’Connor likely to hear of Afghan concerns at meeting on detainees,” *Globe and Mail*, 14 March 2007, <http://proquest.umi.com/pqdweb?index=0&sid=2&srchmode=1&vinst=PROD&fmt=3&startpage=-1&clientid=1711&vname=PQD&RQT=309&did=1232239781&scaling=FULL&ts=1176477166&vtype=PQD&rqt=309&TS=1176477174&clientid=1711&cc=1&TS=1176477174>; Internet; accessed 15 March 2007.

With the weight of reported evidence over the past several years to support their allegations, it is no surprise that human rights advocates have been pressuring the government of Canada to rectify the provisions of the DTA.

In contrast, over the past year, both the Minister of National Defence and representatives from DND/DFAIT have explained to parliamentarians how the DTA follows the rule of international law and is in keeping with the government of Canada's stated aim to support the government of Afghanistan and particularly its judicial system further to the Bonn Agreement. The Standing Committee on National Defence (SCOND) has been keenly interested in understanding the provisions of the DTA. During his testimony before SCOND in December 2006, in response to a question as to the nature of the persons being captured by the Canadian Forces, Vincent Rigby, Acting Deputy Minister (Policy) in DND, described these persons as "insurgents" and "conducting insurgent operations in Afghanistan and against alliance forces."²⁰ Mr. Rigby's assessment seems to be in keeping with the Canadian Forces' advertised role in ISAF, which is to provide assistance to the Afghanistan National Security Forces in countering the threat from the Taliban and Al-Qaeda.²¹ During the same meeting, Colleen Swords, Assistant Deputy Minister (International Security Branch and Political Director) in DFAIT, further explained that detainees are transferred to Afghan detention facilities because the government of Canada is "fully supportive of efforts to strengthen Afghan

²⁰ House of Commons, Standing Committee on National Defence, Evidence, Monday, December 11, 2006, at 1600 (Mr. Rigby, Acting Assistant Deputy Minister (Policy), Department of National Defence); available from <http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?SourceId=188457>; Internet; accessed 3 January.

²¹ National Defence and Canadian Forces, "Canadian Forces in Afghanistan – Why are we there?" http://www.forces.gc.ca/site/afghanistan/why_e.asp; Internet; accessed 17 April 2007.

capacity and good governance.”²² In other words, by handing over to Afghan authorities detained “insurgents” who are in all likelihood Afghan citizens, the government of Canada, through the actions of the Canadian Forces, is attempting to assist the maturation of the Afghan government, and particularly the penal and judicial systems, by deferring to them the responsibility to deal with their own people.

At the same time, however, the DTA requires both the Canadian Forces and Afghan authorities to treat detainees according to the standards prescribed by the *Geneva Convention (III) Relative to the Treatment of Prisoners of War*. While the government of Canada does not consider persons captured by Canadian Forces to be Prisoners of War, by providing in the DTA that detainees are to be treated according to the standard provided by the Third Convention, the government is acknowledging the requirement for the Canadian Forces to follow the dictates of international humanitarian law in its actions in Afghanistan. Notably, though, by setting the Third Convention as the standard of treatment for detainees, the government has essentially side-stepped the issue of having to determine their actual legal status. Both within Canada and internationally, a determination that these persons are Prisoners of War, rather than just detainees, would confer a degree of legitimacy on their cause that is politically unacceptable at the moment, particularly in the US as it grapples with the fate of its own Taliban and Al-Qaeda detainees. It is far more palatable to set the standard of treatment as that for

²² House of Commons, Standing Committee on National Defence, Evidence, Monday, December 11, 2006, at 1530 (Ms. Swords, Assistant Deputy Minister, International Security Branch and Political Director, Department of Foreign Affairs and International Trade); available from <http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?SourceId=188457>; Internet; accessed 3 January 2007.

Prisoners of War and declare that this “obviates the need for status determination.”²³

While this may be the case, the government’s understanding of the entire issue was recently called into question by the Minister of National Defence’s apparent ignorance of the nature of the role of the International Committee of the Red Cross (ICRC) as described in the Third Convention.

Initially, on 24 April 2006, the Minister of National Defence assured the House of Commons that transferred detainees would not be ill-treated in Afghan prisons because of the work of the ICRC: “We also have within [the DTA] the agreement that the Red Cross will inspect the Afghan detention areas and will inspect the treatment of prisoners. The Red Cross has not come back to us to report any difficulty with any potential prisoners.”²⁴ The Minister referred to the DTA provision, in accordance with the requirements of the Third Convention, that the Canadian Forces shall notify the ICRC whenever a detainee is transferred. Conversely, those who truly understand the role of the ICRC would never expect that the government of Canada would have had any report from them with respect to the treatment of detainees.

In fact, the Minister was completely mistaken in his understanding of the role of the ICRC. The ICRC certainly must be notified, and while it may, at its own discretion, visit detainees initially captured by Canadian Forces and then transferred to Afghanistan

²³ House of Commons, Standing Committee on National Defence, Evidence, Monday, December 11, 2006, at 1535 (Ms. Swords, Assistant Deputy Minister, International Security Branch and Political Director, Department of Foreign Affairs and International Trade); available from <http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?SourceId=188457>; Internet; accessed 3 January 2007. Ms. Swords uses this phrase when she speaks about setting the Third Convention as the standard for treatment of detainees, “... which affords detainees with the highest treatment standard regardless of their status and obviates the need for status determination.”

²⁴ House of Commons, *Edited Hansard*, no. 28, Monday, April 24, 2006, at 1325 (Hon. Gordon O’Connor, Minister of National Defence, CPC); available from

detention facilities, its advisory role is limited strictly to informing only the Afghanistan government of any concerns it may have with respect to the treatment of detainees. The ICRC is not obligated to divulge this information to the Canadian government. Almost a year later, and indeed just two weeks after the AIC/BCCLA filed their application for judicial review, the Minister of National Defence apologized in the House of Commons and issued a statement revoking his earlier comments and acknowledging that the ICRC does not inform Canada of any knowledge they might have concerning the treatment of detainees. That the Minister of National Defence could have been so wrong in his understanding of a key issue surrounding the matter of the transfer of detainees, particularly in light of the considerable reported evidence of serious human rights violations in Afghanistan prisons, is indisputably irresponsible.

In an obvious effort to correct the situation, the February 2007 amendment to the DTA, formalized in a letter from the commander of Canadian Forces in Afghanistan to the head of the AIHRC, now makes the AIHRC nominally responsible to advise the Canadian Forces in the event that it discovers a transferred detainee who has been mistreated. While this measure appears to correct the misplaced reliance on the ICRC, it does not necessarily amend the DTA sufficiently to overcome the probability that detainees will be tortured, killed, or otherwise abused. The AIHRC is a relatively new organization with limited resources. Their capability to track specific detainees, particularly within a penal system that is insufficiently structured to cope with the large number of detainees and other prisoners, is questionable at best; Mr. Noorzai admitted this state of affairs, reportedly saying that “he doesn't have enough staff and funding to

<http://www2.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&Parl=39&Ses=1&DocId=2163898#Int-1506168>; Internet; accessed 3 January 2007.

carry out the task.”²⁵ Furthermore, this amendment comes more than a year after the DTA was initially devised; transferred detainees may already have been victimized.

Of note, the other nations involved in ISAF also transfer detainees to Afghan authorities. In particular, the Dutch arrangement reportedly provides for a more rigorous monitoring regime, comprising the right of full access to transferred detainees by representatives of the Dutch government, as well as by United Nations human rights institutions, including the United Nations Special Rapporteur on Torture. Additionally, their arrangement requires that the Dutch government be notified in the event that a detainee is transferred onwards, and in particular to a third country.²⁶ The Canadian DTA includes none of these more robust monitoring provisions.²⁷ DND and the Canadian Forces have obviously tried to overcome the deficiency in the monitoring aspect of the DTA, but it is doubtful whether the AIHRC will be sufficiently successful in actually preventing the detainees from being abused. Even with this change, the criticisms levelled at the DTA by the AIC and other human rights advocates appear to remain valid.

In the AIC news release announcing their application for judicial review, Alex Neve, Secretary-General of AIC, was succinct in his summary of the human rights

²⁵ cbc.ca, “Canada willing to assist group monitoring detainees: O’Connor,” *CBC News*, 14 March 2007, <http://www.cbc.ca/world/story/2007/03/14/oconnor-detainees.html#skip300x250>; Internet; accessed 23 March 2007; and Afghanistan News Center, “O’Connor meets with Afghan rights chief,” <http://www.afghanistannewscenter.com/news/2007/march/mar152007.html>; Internet; accessed 23 March 2007.

²⁶ Michael Byers, “Legal Opinion on the December 18, 2005 ‘Arrangement for the Transfer of Detainees between the Canadian Forces and the Ministry of Defence of the Islamic Republic of Afghanistan, 7 April 2006;” available from <http://www.ceasefire.ca/atf/cf/%7B0A14BA6C-BE4F-445B-8C13-51BED95A5CF3%7D/Michael%20Byers%20Opinion%20Canada-Afghanistan%20Arrangement%207%20April%202006.pdf>; Internet; accessed 3 January 2007. Byers refers to the provisions of the Dutch Memorandum concerning transfer of detainees. The Dutch Memorandum is not publicly available.

²⁷ No information was found to explain why the Canadian DTA did not follow the Dutch model.

perspective: “Canadian soldiers must never be part of a process that could lead to torture. The detainee agreement should mirror our domestic values and match our international commitments and not be a conduit to possible future human rights violations.”²⁸ This perspective is one that would undoubtedly be shared by all Canadians, who today demand a very high standard of conduct from their Canadian Forces, particularly following the criminal and widely-condemned, repugnant actions of a few Canadian soldiers in Somalia in 1993. Highly visible, Canadian Forces represent, literally, the government of Canada wherever they may be.²⁹ Human rights advocates assert, therefore, that the actions of the Canadian Forces must be governed by the supreme law of the country, namely the Constitution and in particular, *the Charter of Rights and Freedoms*.³⁰ Internal policies of the Canadian Forces have certainly been shaped by the Charter over the past twenty years, and it seems reasonable to expect that deployed operating procedures of the Canadian Forces should likewise be in keeping with Charter. Additionally, when the Canadian Forces deploy abroad on operations, there can be no question that the full

²⁸ Amnesty International Canada, “News Release: Detainees in Afghanistan must not face torture, say rights groups in a call for a judicial review,” http://www.amnesty.ca/resource_centre/news/view.php?load=arcview&article=3879&c=Resource+Centre+News; Internet; accessed 5 March 2007.

²⁹ *Constitution Act, 1867*, online: http://laws.justice.gc.ca/en/Const/c1867_e.html#executive; Internet; accessed 7 February 2007; and Governor General of Canada, “Representing the Crown in Canada,” http://www.gg.ca/gg/rr/01/index_e.asp; Internet; accessed 15 March 2007. Section 15 of the *Constitution Act, 1867* provides that command of the Canadian Forces is vested in the Queen, who is also the Head of State and the representative of the Crown in Canada’s Parliament.

³⁰ *R. v. Cook*, [1998] 2 S.C.R 597, online: <http://scc.lexum.umontreal.ca/en/1998/1998rcs2-597/1998rcs2-597.html>; Internet; accessed 3 January 2007. Per Justice Bastarache: “[The] status of a [Canadian] police officer as an officer of the state is not altered by crossing a jurisdictional border... [Police] officers are still representatives of their home government.” By analogy, it is reasonable to assume that military officers would likewise be considered “officers of the state” and “representatives of their home government.”

spectrum of applicable international humanitarian and human rights law comes to bear and must be followed by commanders and military members at all levels.

Critics allege that the DTA violates the law by failing to ensure the care that Canadian Forces must take to make certain that detainees transferred by them are not subjected to the probability of torture, extrajudicial killing, and other serious human rights violations. Where Canadian Forces transfer detainees to authorities who have been shown routinely to commit such crimes, and where there is no inherent mechanism to protect the detainees, then the transfer of detainees under the DTA may indeed offend both the *Charter of Rights and Freedoms* and relevant international humanitarian and human rights laws. Likewise, it may consequently implicate Canadian Forces members and commanders in the commission of offences not only under international statutes, but also the Canadian *Crimes Against Humanity and War Crimes Act*.

These are serious allegations, for they imply a failure of the Canadian Forces to follow the rule of law, and not just domestic law, but international law as well. Therefore, each allegation must be considered in respect of the relevant law, beginning with an examination of the Charter, first to determine whether it should be applied to the actions of Canadian Forces while deployed, and then to ascertain whether the DTA infringes detainees' rights, if indeed they can claim rights under the Charter. Likewise, the DTA must be held up against the dictates of the two branches of relevant international law: international humanitarian law, which applies to armed conflict, and international human rights law. Finally, it is important not only to consider whether the DTA violates the rule of law, but also to evaluate what, if any, consequences may be incurred as a result.

CHAPTER 1: CONTRAVENTION OF THE CHARTER OF RIGHTS AND FREEDOMS

On 7 April 2006, Professor Amir Attaran of the Faculty of Law at the University of Ottawa wrote a letter (unaddressed), which included an accompanying memo by Professor Michael Byers of the University of British Columbia, on the subject of the DTA. He stated his opinion that “the [DTA] fails to meet the minimum standards of the [Charter]...with respect to the care that Canadian Forces must take under Canada’s constitution to prevent detainees from being tortured after they are transferred to Afghanistan or another country.”³¹ The AIC and BCCLA have echoed this criticism and in February 2007, pushed the debate out of the realm of academic and social commentary to the formal, binding arena of the judicial system. Together they are now seeking from the Federal Court “a declaration that the [DTA] offends section 7 of the *Charter of Rights and Freedoms* because it does not adequately protect detainees from the likelihood of torture by Afghan authorities or other third countries.”³² This allegation is serious, and should the Court find it valid, the consequences to Canadian Forces operations in Afghanistan could be substantial.

Indeed the AIC and BCCLA are seeking, should the Court concur with their argument, a writ of prohibition “preventing Canadian Forces in Afghanistan from

³¹ Amir Attaran, “Re: Arrangement for the Transfer of Detainees...” and Michael Byers, “Legal Opinion...” These two opinions are available on the internet, but neither of them are addressed to any particular party. Attaran’s letter refers to Byers’ memo.

³² Amnesty International Canada, “Detainees in Afghanistan must not face torture, say rights groups in a call for a judicial review,” AMR 20/C04/2007, 21 February 2007, http://www.amnesty.ca/resource_centre/news/view.php?load=arcview&article=3879&c=Resource+Centre+News; Internet; accessed 23 March 2007.

transferring detainees to the Afghan authorities or to any other state that is likely to torture them, including the United States.” This prohibition would have a huge impact not only on the Canadian Forces in Afghanistan, who would require significantly more resources in order to hold the detainees, but also on the government of Canada, who would then face the same problem as the US in respect of Taliban and Al-Qaeda detainees currently languishing in legal limbo in US detention centres. It remains to be seen how DND and the Canadian Forces will respond to this AIC/BCCLA Charter challenge. They have missed the first 30 day court deadline to respond to the judicial review application, and are now requesting a three month extension. AIC and the BCCLA have indicated publicly that they will accede to that request only if the Canadian Forces ceases immediately to transfer detainees to Afghan detention facilities; barring a halt, the two groups have indicated that they will seek an injunction to ban the transfers.

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It certainly would appear that the consequences of the Charter challenge are already manifest. When the constitutionality of a policy is questioned before the courts, as is the case now of the DTA, the resulting impact of the court’s judgement can have ripple effects far beyond the policy, as many Charter cases over the past twenty-five years have demonstrated. For this reason, it is worthwhile to consider the validity of the allegation that the DTA offends section 7 of the Charter.

³³ Paul Koring, “Groups offer to extend detainee policy deadline,” *Globe and Mail*, 14 March 2007, <http://www.theglobeandmail.com/servlet/story/LAC.20070414.DETAINEE14/TPStory/?query=groups+offer+to+extend+detainee+policy+deadline>; Internet; accessed 17 April 2007.

Does the Charter of Rights and Freedoms Apply to the DTA?

Much has been written over the past twenty-five years about the importance of the Charter to Canadian social and political life. Initially designed to foster unity in a country constantly under threat of fracture, the role of the Charter has grown to encompass a broader scope. Radha Jhappan, in her essay “The Charter and the Courts,” neatly sums up the meaning of the Charter for most Canadians: “There is no question that the Charter of Rights has been embraced by the Canadian public....It has become a key symbol of national unity, an inviolate set of values that is now fundamental to Canadians’ understanding of what it means to be Canadian.”³⁴ While many Canadians identify at a personal level with the values expressed by the Charter, the provisions of the Charter have also significantly altered and shaped the character of our national institutions, including the Canadian Forces.

Over the past twenty years, the Canadian Forces have undergone many changes in order to reflect the rights and freedoms guaranteed by the Charter; among these were changes in the policies concerning the employment of women, sexual orientation, mandatory retirement ages, physical and medical employment standards, and the recognition of common-law relationships.³⁵ Indeed, most of the Canadian Forces’ internal policies have long been aligned with the intent of the Charter. The question now is whether policies with respect to their conduct during deployed operations should likewise be reflective of the values embodied in the Charter, and in this light, specifically

³⁴ Rhadda Jhappan, “The Charter and the Courts” in *Canadian Politics in the 1990s*, ed. Michael S. Whittington and Glen Williams, 4th ed, 335 – 359 (Toronto: Nelson Canada, 1995), 348.

³⁵ Department of National Defence, *Charter Task Force Final Report*, Vol 1, (September 1986) Part 1-Introduction, 1.

whether the DTA, as an order which effectively governs the conduct of the Canadian Forces in the transfer of detained persons captured during ISAF operations in Afghanistan, should be subject to the Charter.

The link between deployments of the Canadian Forces and the Charter is found in examining the various applicable statutes and the relevant case law in order to understand to whom the Charter is meant to apply and how the Canadian Forces are controlled, commanded, and deployed. If there is a nexus between deployments and the Charter, it will then remain to determine whether orders and instructions issued during deployments, which direct actions of the Canadian Forces, are included in the ambit of the Charter.

First of all, the Charter itself defines to whom it applies. Section 32(1)(a) provides that the Charter applies “to the Parliament and government of Canada in respect of all matters within the authority of Parliament.”³⁶ It does not expressly define what is meant by the term “government of Canada,” and therefore it is the legal experts and the courts who have had, over the years, to make these determinations. The standard explanation of the government of Canada usually refers to the three branches: executive, legislative, and judicial. However, it is not as clear where to draw the line around what and who are encompassed by these branches. A comprehensive definition of the expression “government of Canada” is found in the book *The Canadian Charter of Rights and Freedoms*:

At the federal level, the expression “government of Canada” refers...to the Crown in whom is vested responsibility for the good government of Canada. It also refers to all those who act in the name of the Sovereign or who exercise in her name or as her representative the executive power of

³⁶ *Canadian Charter of Rights and Freedoms*, online: <http://laws.justice.gc.ca/en/Charter/index.html>; Internet; accessed 23 March 2007.

the federal state. This includes the Cabinet, the Prime Minister and his ministers, civil servants, and representatives or agents of the government of Canada when exercising the powers of the Sovereign or acting in the name of the Crown. The various departments, offices, and administrative bodies established under the statutes of the Canadian Parliament are also included in this term.³⁷

The government of Canada comprises not only the Prime Minister and his Cabinet, but also the people who are employed in the federal public service across the various departments, agencies, and offices that have their genesis in a federal statute.

In this case, the Department of National Defence is established at Section 3 of the *National Defence Act* (NDA), which states expressly that DND is “a department of the government of Canada.”³⁸ The Department is headed by a Minister who is a member of the federal Cabinet, and who is answerable directly to the Prime Minister as well as the people of Canada on all matters of national defence, including the Canadian Forces. The Canadian Forces come under the authority of the Minister of National Defence per section 17 of the NDA: “The Canadian Forces shall consist of such units and other elements as are from time to time organized by or under the authority of the Minister.”³⁹ Furthermore, at section 18, the NDA provides for the appointment of one person who is responsible for the control and administration of the Canadian Forces:

(1) The Governor in Council may appoint an officer to be the Chief of the Defence Staff, who shall hold such rank as the Governor in Council may prescribe and who shall, subject to the regulations and under the direction of the Minister, be charged with the control and administration of the Canadian Forces.

³⁷ Gerald-A. Beaudoin and Ed Ratushny, eds., *The Canadian Charter of Rights and Freedoms*, 2nd ed. (Toronto: Carswell, 1989), 79.

³⁸ *National Defence Act* (R.S., 1985, c. N-5), online: http://laws.justice.gc.ca/en/showdoc/cs/N-5/bo-ga:s_1::bo-ga:s_2?page=2; Internet; accessed 23 March 2007.

³⁹ *Ibid.*

(2) Unless the Governor in Council otherwise directs, all orders and instructions to the Canadian Forces that are required to give effect to the decisions and to carry out the directions of the Government of Canada or the Minister shall be issued by or through the Chief of the Defence Staff.⁴⁰

The CDS is the most senior military officer in the Canadian Forces, and all other members of the Canadian Forces are subordinate to him or her. This person is solely and ultimately responsible for the control of all actions and operations conducted by the Canadian Forces, and for that he or she is accountable directly to the Governor in Council, and in actual fact, the Prime Minister. As an entity, the Canadian Forces are part of the Department of National Defence, a department constituted by a federal statute, and are thus part of the government of Canada as defined above.

Moreover, the Canadian Forces are an instrument of national power and as such are employed by the government of Canada in pursuit of the accomplishment of national and strategic goals. Hence, the Canadian Forces do not act except at the direction of government, a principle which was formalized during confederation and thus is found in the Constitution. The *Constitution Act, 1867* defines the federation and sets out the division of powers between the federal and provincial governments; it also addresses the command of the armed forces. Sections 15 and 91(7) taken together provide that “command of the armed forces...is vested in the Queen and exercised in her name by the federal Cabinet acting under the leadership of the Prime Minister.”⁴¹ The armed forces are defined in the NDA at section 14: “The Canadian Forces are the armed forces of Her

⁴⁰ *Ibid.*

⁴¹ Corinne McDonald, *International Deployment of Canadian Forces: Parliament's Role*, PRB 00-06E; available from <http://dsp-psd.pwgsc.gc.ca/Collection-R/LoPBdP/BP/prb0006-e.htm>; Internet; accessed 23 March 2007.

Majesty raised by Canada.”⁴² Thus, the authority to employ the services of the Canadian Forces is vested solely in the Prime Minister and the federal Cabinet, who together comprise the Governor in Council. Employment of the Canadian Forces is further defined at Section 31 of the NDA, which states, “The Governor in Council may place the Canadian Forces or any component, unit or other element thereof or any officer or non-commissioned member thereof on active service anywhere in or beyond Canada at any time when it appears advisable to do so.”⁴³ Active service is the term used to denote the employment of members of the Canadian Forces whenever they are deployed to conduct operations. Therefore, deployments of the Canadian Forces are the result of decisions taken by the federal Cabinet, and their actions must be related to the Cabinet’s national or strategic goals that are meant to be accomplished by that deployment.

Finally, the link between decisions of the federal Cabinet and the actions of the Canadian Forces is found within the NDA. Given that it is the federal Cabinet who directs the Canadian Forces to deploy on operations, therefore, in accordance with section 18(2) of the NDA (all orders to effect decisions of the government of Canada are to be given by the CDS), it follows that orders and instructions issued to the Canadian Forces by the CDS with respect to such deployments must be in accordance with the “directions of the government of Canada.” Indeed, this principle is enshrined in the Constitution that governs the employment of the Canadian Forces and leads to the obvious conclusion that the DTA, signed by the CDS personally, must comprise direction from the government of Canada.

⁴² *National Defence Act* (R.S., 1985, c. N-5), online: http://laws.justice.gc.ca/en/showdoc/cs/N-5/bo-ga:s_1:bo-ga:s_2?page=2; Internet; accessed 23 March 2007.

⁴³ *Ibid.*

The Charter says that it applies to the government of Canada in respect of all matters within the authority of Parliament. The Canadian Forces are part of the government of Canada, and are therefore subject to the Charter; this is why many of the Canadian Forces' internal policies were aligned with the Charter over a decade ago. The chain of command of the Canadian Forces flows directly from the Prime Minister to the CDS, and because the Prime Minister, with the federal Cabinet, makes all decisions to deploy the Canadian Forces, when they deploy, their actions and conduct, controlled by the CDS, are in fact actions on behalf of the government of Canada. Whatever Canadian Forces do abroad, they do in the name of the government of Canada. While the statutes show that the Canadian Forces are part of government, that their actions must be considered as government action, and that the Charter must apply to the Canadian Forces per se, it is case law that holds the answer as to whether the Charter must apply to *actions* of the Canadian Forces when they are deployed and thus to the transfer of detainees under the DTA.

Two Supreme Court cases offer a relevant perspective. In *Operation Dismantle Inc. v. The Queen (1985)*, among the earliest Charter cases, the appellants alleged that a decision made by the government of Canada to allow the United States to test cruise missiles in Canada violated their section 7 rights under the Charter. The appeal was dismissed. However, in the process of deciding the case, the court had to consider whether or not decisions of the federal Cabinet were subject to the Charter. The government's position was summarized by Justice Wilson:

The respondents submit that at common law the authority to make international agreements...is a matter which falls within the prerogative power of the Crown and that both at common law and by s. 15 of the

Constitution Act, 1867 the same is true of decisions relating to national defence. They further submit that...the Charter's application must, so far as the government is concerned, be restricted to the exercise of powers which derive directly from statute. It cannot, therefore, apply to an exercise of the royal prerogative.⁴⁴

The royal prerogative refers to the residual power of the Queen as described in section 91 of the *Constitution Act, 1867*: "To make laws for the peace, order and good government of Canada, in relation to all matters not coming within the classes of subjects by this act assigned exclusively to the legislatures of the provinces."⁴⁵ Essentially, the royal prerogative is the power of the federal Cabinet to make decisions in matters that are not expressly the purview of the provincial legislatures, and arguably, the federal legislature. A decision by the federal Cabinet to deploy the Canadian Forces is thus an expression of the royal prerogative. The government in *Operation Dismantle Inc.* asserted that decisions made by the federal Cabinet, which constituted an exercise of the royal prerogative, should not be subject to the Charter. The Supreme Court disagreed. Chief Justice Dickson delivered the majority judgement of the court:

Cabinet decisions fall under s. 32(1)(a) of the Charter and are therefore reviewable in the courts and subject to judicial scrutiny for compatibility with the Constitution. I have no doubt that the executive branch of the Canadian government is duty bound to act with the dictates of the Charter.⁴⁶

Additionally, Justice Wilson responded directly to the government's contention with respect to the royal prerogative:

⁴⁴ *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441 at paragraph 28, online: <http://scc.lexum.umontreal.ca/en/1985/1985rcs1-441/1985rcs1-441.html>; Internet; accessed 23 March 2007.

⁴⁵ *Constitution Act, 1867*, online: http://laws.justice.gc.ca/en/Const/c1867_e.html#executive; Internet; accessed 7 February 2007.

Since there is no reason in principle to distinguish between Cabinet decisions made pursuant to statutory authority and those made in the exercise of the royal prerogative, and since the former clearly fall within the ambit of the Charter, I conclude that the latter do so also.⁴⁷

Therefore, further to the determination made by the Supreme Court in *Operation Dismantle Inc.*, the decision to deploy the Canadian Forces to ISAF in Afghanistan is subject to the Charter; actually, it is not so much the decision as it is the effect of the decision which is subject to the Charter. Thus it would actually be the deployment itself which is subject to the Charter, and indeed, to judicial review. However, while *Operation Dismantle Inc.* suggests that the Charter will apply to deployments, from which a supposition could be drawn that therefore the Charter must also apply to the way in which the Canadian Forces conduct themselves during a deployment, it does not explicitly suggest this conclusion.

In this regard, a case which offers a further perspective is *R. v. Cook (1998)*. In *Cook*, the Supreme Court had to determine whether the actions of Canadian detectives in the United States should be subject to the Charter. At issue was whether members of a Canadian law enforcement agency had to follow the dictates of the Charter when they were conducting an investigation outside Canada. This situation is completely analogous to that of Canadian Forces when they are abroad on active service or deployment. Both involve the actions of Canadians who are conducting their duties as prescribed by Canadian law, but outside of Canada. In making its determination, the Court said:

The Charter applies to the actions of the Canadian detectives in the United States. First, since the interrogation was conducted by Canadian

⁴⁶ *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441 at paragraph 28, online: <http://scc.lexum.umontreal.ca/en/1985/1985rcs1-441/1985rcs1-441.html>; Internet; accessed 23 March 2007.

⁴⁷ *Ibid.*

detectives in accordance with their powers of investigation which are derived from Canadian law, the impugned action falls within the purview of s. 32(1). Second, applying the Charter to the Canadian detectives' actions in these circumstances does not result in an interference with the territorial jurisdiction of the foreign state.⁴⁸

In essence, what the Supreme Court has laid out in this determination is a test by which Charter applicability can be decided in cases where the material elements are similar to those in *Cook*.

The Court provides that the Charter will apply, first, if the actions of the Canadian agents derive from Canadian law, in other words if the actions constitute government action, and second, if by applying the Charter, there is no interference in the jurisdiction of the foreign state in which they are acting. It has already been determined that when the Canadian Forces deploy, they do so at the will of the government. Through the command exercised by the CDS pursuant to both the Constitution and the NDA, anything done by a member of the Canadian Forces while on active service is an action that derives its authority from Canadian law and from the federal Cabinet; in short, the actions of the Canadian Forces constitute government action. The second part of the test looks at specific actions. In the matter of the DTA, the transfer of detainees is a specific action that is carried out by members of the Canadian Forces. The transfer is governed by the DTA, which was signed personally by the CDS. If it was to be subject to the Charter, would it interfere with the territorial jurisdiction of the state of Afghanistan? As has already been noted, the transfer of detainees is in fact completely respectful and supportive of the sovereignty of Afghanistan and its jurisdiction over persons within its sovereign territory. Indeed this show of support by transferring detainees is the express

⁴⁸ *R. v. Cook*, [1998] 2 S.C.R. 597, online: <http://scc.lexum.umontreal.ca/en/1998/1998rcs2-597/1998rcs2-597.html>.

intent of the government of Canada, and therefore inherent in the mission of the Canadian Forces. On the face of it, requiring the DTA to conform to the Charter does not seem to violate the jurisdiction of the state of Afghanistan. Application of the test provided in *Cook*, therefore, leads to the conclusion that the Charter should apply to actions of the government of Canada abroad, and indeed, should apply to the DTA.

These two cases together offer a more complete perspective on whether the Charter should apply to actions of Canadian Forces during deployments outside of Canada, and specifically to the DTA which governs their specific actions when captured detainees are to be transferred to Afghan detention facilities. First, the Charter is shown to apply to the actual deployment itself via the decision made by the federal Cabinet, and second, it is shown to apply to their actions as government agents performing their lawfully assigned duties.

In summary, there is indeed a nexus between the Charter and the DTA. The Charter is meant to apply to government action, and by following the thread of command of the Canadian Forces from the Constitution through the NDA to the specific orders of the CDS contained within the DTA, the connection between the two is clearly established. The next stage in the analysis considers whether or not the DTA conforms to the exigencies of the relevant sections of the Charter.

How does the Charter apply to the DTA?

The AIC and BCCLA have pointed to section 7 of the Charter as the one that is offended by the DTA. Section 7 of the Charter provides: “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in

accordance with the principles of fundamental justice.”⁴⁹ Where the risk to detainees is torture, extrajudicial killing, or other human rights abuses, section 7 is obviously the relevant section of the Charter which must be considered. No other section is applicable, except for section 1 that serves as the delimiter for all of the provisions of the Charter and is always considered in any Charter analysis.

Charter analysis is by no means a straight-forward process. As a result, the Supreme Court devised a logical approach that respects the unique challenges of construing a constitutional document.⁵⁰ The authors of the book *The Canadian Charter of Rights and Freedoms* offer a succinct summary: “The Supreme Court has sanctioned a two-stage approach to Charter analysis: at stage one, the scope and content of the freedom is defined, and at stage two the section 1 standards concerning reasonable limits are applied.”⁵¹ For the first stage of the analysis, where it has already been determined that the transfer of detainees in accordance with the DTA constitutes government action, and where transfer has been shown to lead to the real probability that detainees will be tortured or otherwise abused, there are three aspects which must be shown in order to determine that the DTA offends section 7: that “everyone” includes the detainees; that there has been or could be a deprivation of the right to life, liberty and security of the person; and that the deprivation was not or would not be in accordance with the principles of fundamental justice. For the second stage, while the “principles of fundamental justice” form an inherent limit on section 7, it is also necessary to weigh

⁴⁹ *Canadian Charter of Rights and Freedoms*, online: <http://laws.justice.gc.ca/en/Charter/index.html>; Internet; accessed 23 March 2007.

⁵⁰ Beaudoin and Ratushny, *The Canadian Charter of Rights and Freedoms*, 22 – 23.

⁵¹ *Ibid.*, 28.

section 7 against section 1 which “guarantees the rights and freedoms set out in [the Charter] subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”⁵² Having considered the effect of section 7 on the matter of detainee transfer, one must then determine what are the demonstrably justified, reasonable limits on the section 7 rights per section 1.

Charter Section 7: Who is meant by “Everyone”?

The persons being detained by Canadian Forces in Afghanistan are almost certainly not Canadian, and therefore it is not obvious that their rights should in any way come under the protection or application of the Charter. However, two considerations would instead lead to the opposite conclusion. First, the word “everyone” is not restricted in any way by the Charter; there is no section that says that the Charter applies only to Canadian citizens. In fact, several sections of the Charter do apply only to citizens of Canada, and these sections use precise language: sections 3, 6(1), 6(2), and 23 all use the expression “citizen of Canada.” It would thus appear that the intent of the Charter was to limit only certain rights to people who are in fact Canadian citizens. Additionally, section 20 employs the expression “any member of the public in Canada,” which again appears to extend this particular right only to persons who are present within the physical boundaries of the territory that comprises the country of Canada. Other rights expressed in the Charter which employ the word “everyone,” therefore, must apply to “every person” as the per the normal definition of that word.⁵³ Logically, then, it would appear

⁵² *Canadian Charter of Rights and Freedoms*, online: <http://laws.justice.gc.ca/en/Charter/index.html>; Internet; accessed 23 March 2007.

⁵³ Canadian Oxford Dictionary, 2nd ed., s.v. “Everyone.”

that any person can have access to the Canadian Charter section 7 rights, or any other Charter right that employs the same language. The courts, however, have construed this aspect of the Charter more narrowly.

Previous decisions of the Supreme Court offer a more concrete determination of who is included in “everyone” in section 7. In *R.v.Cook (1998)* again, Justices L’Heureux-Dubé and McLachlin (dissenting) stated:

A person invoking a Charter right must first show that he or she held that right. Determining whether someone is granted a right by the Charter involves an analysis of the language of the provision at issue and of the purposes of the rights guarantees in the Canadian constitution.⁵⁴

Implicit here is the possibility for any person, regardless of nationality, to claim a right granted by the Charter, providing the intent and purpose of the rights guarantee being claimed can be linked logically to the claimant. This view is better explained by the majority decision of Chief Justice Lamer and Justices Cory, Iacobucci, Major and Binnie:

The application of the Charter here will not ultimately confer Charter rights on every person in the world who is in some respect implicated in the exercise of Canadian governmental authority abroad. The holding here marks an exception to the general rule in public international law of territorial limits upon a state’s exercise of jurisdiction, and arises on the basis of the very particular facts....The breach was very serious if not flagrant.... As well, the breach occurred when the accused was in custody and therefore particularly vulnerable.⁵⁵

What the Court is saying is that when there is a serious breach of a right guaranteed by the Charter for any person who is in some way affected by the exercise of Canadian government action, that person accrues Charter rights. In *Cook*, it was determined that Canadian detectives conducting an operation outside of Canada had to follow the dictates

⁵⁴ *R. v. Cook*, [1998] 2 S.C.R 597, online: <http://scc.lexum.umontreal.ca/en/1998/1998rcs2-597/1998rcs2-597.html>.

⁵⁵ *Ibid.*

of the Charter, and furthermore, that the person whom they were investigating had the right to be protected by the Charter:

It is reasonable both to expect the Canadian officers to comply with Charter standards and to permit the accused, who is being made to adhere to Canadian criminal law and procedure, to claim Canadian constitutional rights relating to the interrogation conducted by the Canadian officers abroad.⁵⁶

The Court explicitly linked the actions of the Canadian detective officers to the rights of the person they were investigating and determined that the Charter had to apply not only to the actions of the government officials, but also to the recipients of that action. This assertion is particularly germane to the transfer of detainees by Canadian Forces because the material elements of both cases are very similar: both involve government action that affects a person, or persons, belonging to another jurisdiction and not physically in Canada.

Another similar Charter case is *Suresh v. Canada (Minister of Citizenship and Immigration)* (2002), which offers the most compelling analogy to the case of a transferred detainee. In *Suresh*, the appellant, allegedly a member of the Liberation Tigers of Tamil Eelam, was to be deported from Canada to Sri Lanka where it was very likely that he would be subjected to torture. Mr. Suresh was not a Canadian citizen, but he was in Canada as a refugee claimant seeking landed immigrant status. In their judgement of his case, the Court made this determination: “Deportation to torture may deprive a refugee of the right to liberty, security and perhaps life protected by s. 7 of the Charter. Section 7 applies to torture inflicted abroad if there is a sufficient causal

⁵⁶ *R. v. Cook*, [1998] 2 S.C.R. 597, online: <http://scc.lexum.umontreal.ca/en/1998/1998rcs2-597/1998rcs2-597.html>.

connection with Canadian government acts.”⁵⁷ The Court determined that the Charter was applicable to Mr. Suresh, a non-Canadian, because if he was deported back to Sri Lanka by the Canadian government, it was likely that he would be tortured, and being tortured is very definitely an infringement of section 7 of the Charter. The similarity between Mr. Suresh’s circumstances and those of transferred detainees, where both face the likelihood of being tortured upon return to their home jurisdiction, is limited primarily in their physical location prior to being prior to being deported or transferred. It remains however, that a person in Afghanistan initially captured and detained by the Canadian Forces comes under the control of representatives, or agents, of the government of Canada. At the point of capture, the person no longer has control of his fate, and is completely vulnerable, thereby compounding the effect of the rights infringement, as noted by Chief Justice Lamer and other judges in the *Cook* case.

People who are not Canadian can claim section 7 Charter rights because section 7 does not itself limit its applicability as do some other sections and because the Supreme Court has determined that where a clear connection between the probable infringement of a Charter right due to an action by the government of Canada, the Charter applies to that person; he or she accrues Charter rights. From the two cases cited above, it is reasonable to conclude that persons detained by Canadian Forces in Afghanistan could be eligible to claim the section 7 right.

⁵⁷ *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, online: <http://scc.lexum.umontreal.ca/en/2002/2002scc1/2002scc1.html>.

Charter Section 7: Deprivation of the Right to Life, Liberty and Security of the Person

In order that the DTA be considered offensive to section 7 of the Charter, it must be shown that it leads to the deprivation of the right to life, liberty and security of the transferred detainees. The jurisprudence on section 7 is extensive and offers several perspectives informative to the analysis. In the many cases which have come before the Supreme Court, the phrase “right to life, liberty and security of the person” itself has been the subject of much debate as to whether it comprises three distinct rights or one single right to be taken as a whole. While there is not yet a definitive approach, the tendency has been to gravitate towards the former interpretation of three distinct rights: the right to life, the right to liberty and the right to security of the person.⁵⁸

The right to life is a fairly straightforward concept. In this case, the right to life can be construed as meaning the right not to be unlawfully deprived of life, which extrajudicial killing obviously infringes. The probability that a transferred detainee could be killed is inherent in the ongoing incidence of extrajudicial killing in Afghan detention facilities as noted earlier in the human rights agencies’ reports.

On the other hand, a detainee’s right to liberty is difficult to define. Obviously in being detained, his or her liberty is infringed. However, the detention is lawful if there are compelling reasons for the initial capture and ongoing restriction of liberty. The persons captured by the Canadian Forces are quite likely persons who pose a security risk to Afghanistan and to ISAF forces, and if so, it is reasonable to assume that their capture

⁵⁸ Beaudoin and Ratushny, *The Canadian Charter of Rights and Freedoms*, 335. The authors quote three cases wherein this determination to view section 7 as conferring three rights – the right to life, the right to liberty and the right to security of the person – was made: *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486; and *R. v. Morgentaler*, [1988] 1 S.C.R. 30.

is warranted.⁵⁹ Where their right to liberty may be infringed is post-transfer when their legal right to a fair trial by a competent authority is not certain according to the same human rights agencies' reports.

Lastly, the right to security of the person is actually the element which has borne the weight of section 7 challenges; undoubtedly, it is also the most salient element of the detainee transfer issue. Several interpretations of the concept of security of the person exist, but most germane is the one offered in the book *The Canadian Charter of Rights and Freedoms*, where the authors summarize the determination made in *Singh v. Minister of Employment and Immigration (1985)*: "The Supreme Court of Canada has held that section 7 is designed to protect not only against all forms of corporal punishment or physical suffering, but also against the threat of such punishment or suffering."⁶⁰

Torture, as noted in each of the human rights agencies' reports, would, without much stretch of the imagination, easily fit within the scope of "corporal punishment or physical suffering." Most interestingly, the court includes in the protection meant to be provided by section 7 not only the actual physical abuse, but also the threat of such abuse. Clearly, it is this latter point that is most applicable to the DTA and the manner whereby it may offend section 7: it is in fact the probability of being tortured, or killed, or otherwise physically abused that is the risk against which the DTA should protect and does not.

This risk of torture, and even death, is specifically named in the Supreme Court's judgement in *Suresh* as a consequence that would infringe section 7: "If...our analysis must take into account what may happen to the refugee in the destination country, we

⁵⁹ See note 19.

⁶⁰ *Ibid.*, 346.

surely cannot ignore the possibility of grievous consequences such as torture and death, if a risk of those consequences is established.”⁶¹ Where a person may be removed from Canadian jurisdiction to another jurisdiction, the court specifically refers to the credible establishment of the risk of serious human rights violations to that returned person as the relevant factor in confirming a section 7 infringement under those circumstances. In *Suresh*, as noted earlier, the risk of torture to Mr. Suresh upon return to Sri Lanka was deemed credible, and it was accordingly determined that his removal from Canadian jurisdiction to that of Sri Lanka would in fact infringe his section 7 right specifically to security of the person.

Again, *Suresh* is of particular relevance to the detainee issue because the material elements are very similar. The act of transferring detainees initially captured and held by Canadian Forces to Afghan detention facilities is effectively the same action as the act of deporting a refugee from Canada to Sri Lanka. In both cases, the individuals are held in Canadian custody and are being physically removed by agents of the government of Canada from Canadian jurisdiction to that of a state known to commit torture, and in Afghanistan’s case, other serious human rights violations. The Supreme Court’s determination in *Suresh* should therefore also be applicable: “We conclude that to deport a refugee to face a substantial risk of torture would generally violate s. 7 of the Charter.”⁶² Thus, the act of transferring detainees to Afghan detention facilities would in all likelihood be considered to violate section 7, because there is a credible and

⁶¹ *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, online: <http://scc.lexum.umontreal.ca/en/2002/2002scc1/2002scc1.html>.

⁶² *Ibid.*,

established risk of torture and other serious mistreatment extant in the jurisdiction to which they are being transferred.

As the document which governs the transfer of detainees, it stands to reason that the DTA must itself offend section 7 of the Charter. The Supreme Court's determination in *Singh v. Minister of Employment and Immigration (1985)*, validates this conclusion. In *Singh*, as in *Suresh*, the appellants were seeking refugee status in Canada and, having been refused by the Minister of Employment and Immigration, appealed on the basis that their section 7 rights were being violated. Their appeals were allowed and they were entitled to a new refugee hearing. A succinct summary of the Court's decision is found in the book *The Canadian Charter of Rights and Freedoms*: "Thus, where a decision by a Canadian authority exposes a person to an infringement of life, liberty or security, this will suffice to make section 7 applicable to that authority."⁶³ In the matter of the transfer of detainees, the decision to transfer rather than retain was taken much earlier in the ISAF mission and is expressed now in the DTA, which is de facto the Canadian authority by which transfers are undertaken.⁶⁴ As a result of that transfer, exposure to infringement of the right to life, liberty and security of the person is based on the evidence provided by the US State Department, the AIHRC and the UNHCHR reports which make the same observation that torture and extrajudicial killing continues to be perpetrated against

⁶³ Beaudoin and Ratushny, *The Canadian Charter of Rights and Freedoms*, 334. The authors cite *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177.

⁶⁴ Amnesty International Canada, "Open Letter to National Defense Minister, Gordon O'Connor," Posted 11 April 2006, http://www.amnesty.ca/archives/oconnor_open_letter_2006.php; Internet; accessed 3 January 2007. Amnesty International Canada notes in their open letter to the Minister of National Defence: "In a meeting with Minister Graham and Judge Advocate General on November 15, 2005, Amnesty International was told that it was the government's intention to conclude an agreement with the Afghan government such that detainees would be transferred into Afghan custody rather than to US forces." Canadian Forces in Afghanistan had previously transferred captured detainees to the US forces, but

persons held in Afghan detention facilities. Apparently, the DTA may cause a deprivation of the transferred detainees' established right to life, liberty and security of the person.

Charter Section 7: Principles of Fundamental Justice

The most interesting aspect of section 7 is that the authors of the Charter included in this section an inherent limit to the right to life, liberty and security of the person. By adding the qualifying statement, "...and the right not to be deprived thereof except in accordance with the principles of fundamental justice," society is thus given a way to infringe section 7 rights when it is necessary to do so in the interests of fundamental justice. Although a myriad of decisions illuminate some aspect of the intended meaning of this concept, no absolute definition is available in case law of the "principles of fundamental justice." That being said, the Honourable David C. Macdonald, in his book, *Legal Rights in the Canadian Charter of Rights and Freedoms*, suggests that Justice Lamer (as he was then) provided the best summary in *Reference re B.C. Motor Vehicle Act (1985)*:

The term "principles of fundamental justice" is not a right, but a qualifier of the right not to be deprived of life, liberty and security of the person; its function is to set the parameters of that right....Consequently, the principles of fundamental justice are to be found in the basic tenets and principles, not only of our judicial process, but also of the other components of our legal system.^{65 66}

when it became widely known that US forces inflicted torture upon detainees in their custody, Canada decided instead to transfer its detainees to Afghanistan, per the DTA.

⁶⁵ *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, online: <http://scc.lexum.umontreal.ca/en/1985/1985rcs2-486/1985rcs2-486.html>; Internet; accessed 23 March 2007.

⁶⁶ The Honourable David C. Macdonald, *Legal Rights in the Canadian Charter of Rights and Freedoms*, 2nd ed (Toronto: The Carswell Company Limited, 1989), 143.

The point Justice Lamer was making is that fundamental justice is not in and of itself a right accorded by this section; instead it serves to limit the rights to life, liberty and security of the person where it is required for fundamental justice to be served. In this way, for example, the right to liberty is permitted, indeed obliged, to be infringed when it is necessary to do so in order to meet the demands of justice: a convicted murderer's right to liberty is suspended in order that he or she be incarcerated for a period of time, the requirement for incarceration being an accepted principle of fundamental justice in Canada.

In this way, it is necessary to ascertain whether any principle of fundamental justice requires that detainees' rights to life, liberty and security of the person be deprived by the DTA. Over the years, the Supreme Court has considered deprivation of section 7 rights through the test of conscience. Three cases in particular seem relevant to the issue of detainee transfer: *Canada v. Schmidt* (1987), *Kindler v. Canada (Minister of Justice)* (1991), and *United States v. Burns* (2001). These cases all deal with extradition to another jurisdiction that has a different approach to the application of justice than does Canada. They are relevant to the issue of detainee transfer in that both extradition and transfer are a form of "surrender" where a non-Canadian in Canadian custody is to be handed over to another jurisdiction. In each case, the consequences to the transferee in the name of justice in the receiving jurisdiction are considered by the court to "shock the conscience." As such, they are held to be inconsistent with the principles of fundamental justice in Canada.

In 1987, Justice La Forest first suggested this test in delivering the judgement in *Schmidt*: “Situations...may well arise where the nature of the...penalties in a foreign country sufficiently shocks the conscience as to make a decision to surrender a fugitive...one that breaches the principles of fundamental justice enshrined in s. 7.”⁶⁷ Similarly, three years later in *Kindler*, Justices La Forest, L'Heureux-Dubé and Gonthier also employed the conscience test and referred to situations involving torture:

The unconditional surrender of the appellant seriously affects his right to liberty and security of the person. The issue is whether the surrender violates the principles of fundamental justice in the circumstances of this case. The values emanating from s. 12 play an important role in defining fundamental justice in this context. The Court has held that extradition must be refused if the circumstances facing the accused on surrender are such as to "shock the conscience". There are situations where the punishment imposed following surrender – torture, for example – would be so outrageous as to shock the conscience of Canadians.⁶⁸

Finally, in *Burns* in 2001, the court expressly declared: “An extradition that violates the principles of fundamental justice will always shock the conscience.”⁶⁹ In these three cases, by relying on conscience, a Canadian conscience informed by the Charter itself, the court tests section 7 violations against Canadian principles of fundamental justice. Where such violations are found to be shocking, whether at the extreme of torture, or more commonly at the level of trial procedure and fairness, the Court has determined that the deprivation is unlawful. The DTA has been found to lead to a probable consequence for transferred detainees that includes torture; as was so clearly described in *Kindler*

⁶⁷ *Canada v. Schmidt*, [1987] 1 S.C.R. 500, online: <http://scc.lexum.umontreal.ca/en/1987/1987rsc1-500/1987rsc1-500.html>; Internet; accessed 23 March 2007.

⁶⁸ *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779, online: <http://scc.lexum.umontreal.ca/en/1991/1991rsc2-779/1991rsc2-779.html>; Internet; accessed 23 March 2007.

⁶⁹ *United States v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283, online: <http://scc.lexum.umontreal.ca/en/2001/2001scc7/2001scc7.html>; Internet; accessed 23 March 2007.

above, torture is shocking to the Canadian conscience, and thus the deprivation of detainees' section 7 rights as a result of the DTA, per *Burns* above, violates the principles of fundamental justice.

Intuitively, it seems glaringly evident that there could never exist any requirement that would justify torture. Likewise, the death penalty, even arising from a fair trial by competent authority, never mind extrajudicial killing, has been determined to be too severe a penalty to pay in the service of justice in Canada. One year after *Burns* was heard, in *Suresh*, the Supreme Court moved beyond the test of conscience that it had previously relied upon to inform its evaluation of section 7 deprivation and in a categorical manner confirmed what subjectively seems so obvious:

Deportation to torture may deprive a refugee of the right to liberty, security and perhaps life protected by s. 7 of the Charter.... In determining whether this deprivation is in accordance with the principles of fundamental justice, Canada's interest in combating terrorism must be balanced against the refugee's interest in not being deported to torture. Canadian law and international norms reject deportation to torture. Canadian law views torture as inconsistent with fundamental justice. The Charter affirms Canada's opposition to government-sanctioned torture by proscribing cruel and unusual treatment or punishment in s. 12. Torture has as its end the denial of a person's humanity; this lies outside the legitimate domain of a criminal justice system. The prohibition of torture is also an emerging peremptory norm of international law which cannot be easily derogated from. The Canadian rejection of torture is reflected in the international conventions which Canada has ratified.⁷⁰

The vehemence with which the court rejected action that could lead to torture is unmistakable. Even the need to combat terrorism in our post-September 11th world is dismissed as a justification for torture. The court reiterated that torture, an inhuman practice, is anathema to both Canadian and international law, and therefore any action

⁷⁰ *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, online: <http://scc.lexum.umontreal.ca/en/2002/2002scc1/2002scc1.html>.

which results in torture, or the threat of torture, deprives a person of their section 7 rights to life, liberty and security of the person and there is no principle of fundamental justice that could ever rationalize such action. In this way, the DTA appears not only to deprive detainees of their section 7 rights, but there is nothing in the interests of fundamental justice that would permit such deprivation to stand under law. It is quite likely that Canadians, were they to understand that detainees transferred by the Canadian Forces to Afghan detention facilities probably face torture, or death, or even abuses short of torture, would indeed be shocked.

However compelling the result of the section 7 analysis seems to be, it is not yet complete. Detainees have been shown to accrue Charter rights by reason of their initial capture by Canadian Forces, thus coming essentially under the control of the government of Canada. Their transfer to Afghan detention facilities is an action by the Canadian government, and is facilitated by the DTA. Transfer has as a consequence the real risk of exposure to abuses that shock and violate Canadian values. These abuses infringe the detainees' section 7 rights to life, liberty and security of the person, and there is no reason in the name of justice that would serve to rationalize their exposure to such unacceptable risk. What remains to be seen is whether, in a free and democratic society, the infringement of section 7 rights by the DTA is reasonable and demonstrably justified.

Charter Section 7: Effect of Section 1

The purpose of section 1 of the Charter is to afford society with a means to balance the collective needs of society against the needs of the individual. By providing a limit to the rights and freedoms guaranteed to individuals by the remaining sections of the Charter, the original authors of the Charter sought to ensure the continuity of the values of freedom and democracy which underpin Canadian society. In this way, section 1 allows government to enact laws, regulations and policies that infringe to some extent many of the individual Charter rights in order that society may flourish. In this case of detainee transfers, having determined that the DTA may infringe the section 7 rights of detainees, it is necessary now to look at the DTA through the perspective of section 1 to ascertain whether there is reasonable justification, in the interests of freedom and democracy, to infringe those rights.

Early on, the Supreme Court established a logical approach to section 1 analysis. It consists of a two-part test and was initially devised by Chief Justice Dickson in *R. v. Oakes (1986)*, and summarized later in *R. v. Chaulk (1990)* by Justice Lamer:

The procedure to be followed when the state is attempting to justify a limit on a right or freedom under s. 1 was set out by this Court in *Oakes*:

1. The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right or freedom; it must relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.
2. Assuming that a sufficiently important objective has been established, the means chosen to achieve the objective must pass a proportionality test; that is to say they must:
 - (a) be "rationally connected" to the objective and not be arbitrary, unfair or based on irrational considerations;
 - (b) impair the right or freedom in question as "little as possible"; and
 - (c) be such that their effects on the limitation of rights and freedoms are proportional to the objective.

This test requires that the objective of the disputed provision be sufficiently important to permit a rights infringement, and if so, then the infringement must be proportional to the importance of the provision. In the detainee transfer issue, the disputed provision referred to in the first part of the test is the DTA. What is not said explicitly, but is implied by the Court, is that the provision must be “prescribed by law;” in other words, the provision must be something which flows from a legal instrument.⁷¹ In order to meet the first part of the test, the DTA must be shown both to originate in law and to have as its objective a sufficiently important reason, from the perspective of a free and democratic society, to warrant infringing detainees’ established section 7 rights.

The status of the DTA, from the government’s perspective, was explained to parliamentarians at the December 2006 meeting of SCND. In her evidence, Colleen Swords stated: “I want to be clear that...the [DTA] is not a treaty and is not legally binding.”⁷² In response to a direct question as to whether the DTA is legally binding on Canada and on Afghanistan, Colonel G. Herfst, Deputy Judge Advocate General Operations in DND, said, “It’s a morally binding document, if you will.”⁷³ Still later, Ms. Swords added: “It’s really quite common to have an arrangement that gets into more detail than you do in the actual treaty. In this case, the actual treaties are Geneva

⁷¹ Beaudoin and Ratushny, *The Canadian Charter of Rights and Freedoms*, 63.

⁷² House of Commons, Standing Committee on National Defence, *Evidence*, Monday, December 11, 2006, at 1535 (Ms. Swords, Assistant Deputy Minister, International Security Branch and Political Director, Department of Foreign Affairs and International Trade); available from <http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?SourceId=188457>; Internet; accessed 3 January 2007.

⁷³ House of Commons, Standing Committee on National Defence, *Evidence*, Monday, December 11, 2006, at 1615 (Col G. Herfst, Deputy Judge Advocate General (Operations), Department of National Defence); available from <http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?SourceId=188457>; Internet; accessed 3 January 2007.

Conventions and all the human rights conventions that Afghanistan is a party to and we are a party to.”⁷⁴ From the government’s perspective, as provided by the representatives from DND and DFAIT above, the DTA has no legal status. The most it is accorded is a “moral” status, which realistically amounts to nothing more than a written “gentlemen’s agreement” between the Canadian Forces and the Afghan Ministry of Defence. If held true, then the DTA could not withstand scrutiny under section 1 because it is not a legal document.

However, and in stark contrast, Professor Michael Byers in his “Legal Opinion on the [DTA]” asserts just the opposite. He refers to Article 2 of the 1969 Vienna Convention on the Law of Treaties and writes that a “treaty” is “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.”⁷⁵ With this definition, it is difficult to see the DTA as anything other than a treaty: it embodies a written, agreed-to arrangement between two states – Canada and Afghanistan – and it relates to a matter which is governed specifically by international law, that of the transfer of detainees as prescribed at Article 12 of the Third Geneva Convention. Its formal appellation, “arrangement” vs. “agreement” is possibly a bit of sophistry, but clearly irrelevant according to the definition above. Professor Byers logically concludes that the DTA is in fact “an

⁷⁴ House of Commons, Standing Committee on National Defence, *Evidence*, Monday, December 11, 2006, at 1620 (Ms. Swords, Assistant Deputy Minister, International Security Branch and Political Director, Department of Foreign Affairs and International Trade); available from <http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?SourceId=188457>; Internet; accessed 3 January 2007.

⁷⁵ Michael Byers, “Legal Opinion....”

international treaty that creates binding obligations under international law.”⁷⁶ Obviously this matter of definition will be for the Federal Court to decide as they consider the AIC/BCCLA application for judicial review of the DTA.

In the meantime, Professor Byers’ perspective on the legal nature of the DTA is compelling. Indeed, if not a legally binding document, it is unfathomable how the government of Canada would expect the Afghan authorities to respect the provisions contained therein, because no legal basis or requirement would exist for the Afghan government to adhere to the arrangement. Therefore, it is reasonable to continue with the section 1 analysis as though the DTA were a treaty, legally binding and falling within the ambit of the first part of the section 1 test devised in *Oakes*.

The first part of the test requires that the objective of the DTA be sufficiently important to warrant the violation of the detainees’ section 7 rights to life, liberty and security of the person. Additionally, the sufficiency of this importance must relate to concerns which are pressing and substantial in a free and democratic society. Ms. Swords spoke on the purpose of the DTA in her evidence before SCOD in December 2006:

Intended primarily to provide commanders on the ground with clarity on what to do in the event of a transfer, the arrangement lays out two principles. The first principle is the recognition of the need for detainees to be treated humanely under any circumstance and in accordance with the standards set out for prisoners of war in the Third Geneva Convention. The second relates to the principle that Afghan authorities, in exercising sovereignty over their own territory, should have the ultimate responsibility for detainees transferred and held within Afghanistan. This is consistent with Canada’s key objective for Afghanistan, and indeed the

⁷⁶

Ibid.

international community's, namely to support Afghan authorities in strengthening local capacity and good governance.⁷⁷

Apparently, the main purpose of the DTA is to provide guidance to Canadian commanders in Afghanistan when detainees are transferred to Afghan authorities.⁷⁸ The February 2007 amendment to the DTA provides further instruction to commanders to notify the AIHRC whenever a detainee is transferred. Arguably, if the only purpose was to provide guidance to Canadian commanders, those instructions would more appropriately be contained in standard operating procedures that would be given only to Canadian Forces and would not be contained in a document signed by both Canada and Afghanistan. Thus, it would seem reasonable to look to the “principles” referred to by Ms. Swords for the real purpose of the DTA.

According to Ms. Swords' testimony, the DTA seeks to ensure two specific objectives: the need for detainees to be treated humanely and in accordance with the standards set out for prisoners of war in the Third Convention, and the visible support to the government of Afghanistan in strengthening their institution-building. These objectives are certainly important. However, the net effect of transfer, while it may contribute to the Afghan government's sense of self-sufficiency in some undisclosed way, it has in fact quite probably failed the first objective, namely the need for detainees to be treated humanely. Nevertheless, the intent to strengthen Afghanistan's sovereignty is certainly a pressing and substantial global objective, particularly in the name of

⁷⁷ House of Commons, Standing Committee on National Defence, *Evidence*, Monday, December 11, 2006, at 1530 (Ms. Swords, Assistant Deputy Minister, International Security Branch and Political Director, Department of Foreign Affairs and International Trade); available from <http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?SourceId=188457>; Internet; accessed 3 January 2007.

freedom and democracy. But it is questionable whether such a goal, lofty as it may be, is sufficiently important to warrant the infringement of a Charter right. In fact, sanction of the infringement of section 7 rights and the exposure of anyone to the risk of torture, death or other abuses, seems to be at cross-purposes to the goal of furthering freedom and democracy.

There is another purpose to the DTA which is not expressly stated anywhere, but is implied in the fact of transfer itself: detainees are transferred because Canada does not choose to deal with them. The experience of the US in dealing with captured members of the Taliban and Al-Qaeda is less than instructive, or constructive for that matter. Quite apart from the well-publicized problems which have plagued the US prisons at Abu Ghraib, Bagram and Guantanamo Bay, there is the legal quagmire of how to deal with detainees whose status has not been determined under law. As discussed earlier, Canada has side-stepped this issue completely by transferring detainees to another jurisdiction and by declaring that they will be treated according to the standard for Prisoners of War. This implied purpose of the DTA likewise would undoubtedly be considered insufficient to warrant violation of detainees' rights under section 7 of the Charter.

Lacking a clear, overriding reason why the objectives of the DTA would be sufficiently important to permit the effect of violating the detainees' right to life, liberty and security of the person, the DTA does not meet the first part of the Supreme Court test for the applicability of section 1. Consequently, because the second step of Chief Justice Dickson's test assumes the establishment of a sufficiently important objective, there is no basis to continue. Therefore, the December 2005 DTA, together with its February 2007

⁷⁸ While there is nothing in the DTA that expressly requires Canadian commanders to transfer detainees rather than hold them, it is possible that such direction is contained in higher orders, specifically

amendment, does seem to offend section 7 of the Charter in respect of the transferred detainees' rights to life, liberty and security of the person, and there is no demonstrably justifiable reason in a free and democratic society that can save it in accordance with section 1 of the Charter.

It is sadly ironic that while the DTA requires detainees to be treated humanely and in accordance with the standards set for Prisoners of War under the Third Convention, the very fact of transferring them to Afghan detention facilities has seemingly had the effect of nullifying that good intention. Apparently the DTA, amended or not, fails to ensure the care that Canadian Forces must take, in accordance with the *Charter of Rights and Freedoms* to prevent persons initially detained by the Canadian Forces from being tortured or abused following transfer to Afghanistan or a third country, a clear violation of their Charter rights to life, liberty and security of the person. The allegations made by human rights advocates such as the AIC and the BCCLA, and by legal experts who have become engaged in this issue, might have a valid basis to be proven and considered in court. This conclusion should not be remarkable, as an application to the Federal Court for judicial review is neither trivial nor inexpensive. The final decision as to whether the DTA is unconstitutional rests with the courts. Meanwhile, the DTA must also be considered for its conformity to both international humanitarian and human rights laws.

the NATO Operations Plan for ISAF; NATO operations plans are not publicly available.

CHAPTER 2: CONTRAVENTIONS UNDER INTERNATIONAL LAW

From a simple Charter analysis, it certainly appears that the DTA may be unconstitutional. Given the nature of the circumstances surrounding the transfer of detainees, it should be expected that the DTA may likewise contravene international laws as well. Three elements of international law bear upon the detainee transfer issue: international humanitarian law, international human rights law, and customary international law. The Geneva Conventions of 1949 together with the two Additional Protocols of 1977 form the heart of modern international humanitarian law, and relate specifically to the law of armed conflict. International human rights law, on the other hand, refers to the codified body of international law generally concerning human rights, also expressed in treaties or conventions that are signed and ratified by nations which in turn indicate willingness to abide by those laws. Much of this law has been promulgated under the auspices of the United Nations. Finally, customary international law is law which for the most part is unwritten, but has, over time, come to be accepted as international norms recognized by many nations. Together these laws form a framework that is meant to govern the way states interact with each other in the global arena, whether in times of conflict or in times of peace.

The Law of Armed Conflict

In his book, *The Contemporary Law of Armed Conflict*, L.C. Green describes at length the history of the development of the law of war from its first appearance in ancient military codes to its modern form in international humanitarian law. Through the ages, the slow march towards codifying acceptable conduct during war reflected

continuing efforts to reduce the suffering and devastation inherent in the resolution of conflict by violent means. Hugo Grotius developed the concepts of *jus ad bellum* and *jus in bello* in the 17th century, which respectively referred to the justness of war and the rules by which belligerents should conduct hostilities. Up until the end of the 19th century, *jus in bello*, or the laws of war were still largely by custom and unwritten. The Law of the Hague was devised in 1899 and represented, as Green describes, “the first codification of the laws and customs of war accepted by the powers in a binding multilateral document.”⁷⁹ The Law of the Hague, and later the first Geneva Protocol of 1929, were concerned primarily with setting down specific rules on how to conduct war. The first time that the international community addressed the issue of dealing with those who breached the rules of war, or of armed conflict as it has come to be known, was in 1949 with the signing of the four Geneva Conventions. Green writes: “The Conventions have introduced the concept of universal jurisdiction in so far as grave breaches are concerned.”⁸⁰ The Geneva Conventions introduced the term “grave breach” to indicate a serious violation of the laws of armed conflict and empowered states to bring to justice those who committed such breaches.

Indeed, the term “grave breach” is contained in each of the four Geneva Conventions and in the 1977 *Protocol Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*. It does not appear in *Protocol Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*,

⁷⁹ L.C. Green, *The Contemporary Law of Armed Conflict*, (New York: Manchester University Press, 1993), 32.

⁸⁰ *Ibid.*, 43.

which is the only one of these six instruments that deals specifically with non-international armed conflict. Breaches, therefore, seem to refer to failures to comply with the law of armed conflict as it relates to an international armed conflict, that is, an armed conflict involving two or more states. In order to consider the DTA with respect to the Geneva Conventions and the Additional Protocols, it is important to understand the nature of the armed conflict in Afghanistan.

The government of Canada has not formally declared one way or the other whether it considers the ISAF operations in Afghanistan to be an international armed conflict or a non-international armed conflict. This lack of precision contributes to the ambiguity of the legal status of the persons against whom the Canadian Forces are fighting, together with the United States and the other nations involved in ISAF. It also results in an ambiguity surrounding the applicability of international humanitarian law. However, the two Additional Protocols seem to offer a venue for discerning the nature of the armed conflict in Afghanistan.

Article 1 of Additional Protocol II (re non-international armed conflicts) describes its material field of application: “This Protocol...shall apply to all armed conflicts which are not covered by Article 1 of [Additional Protocol I] and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups.”⁸¹ Apparently, Additional Protocol II offers an inherent definition of non-international armed conflict: an armed conflict between a national government’s armed force and an organized armed force also of that nation, but

⁸¹ Office of the Judge Advocate General, “Protocol Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol I) – 1977, Article 1,” in *Collection of Documents on the Law of Armed Conflict*, 2005 ed. Edited by Directorate of Law Training (Ottawa: DND, 2005), 166.

acting in opposition to the government. It is an internal armed conflict that does not involve the armed forces of any other nation. On the other hand, the scope of application of Additional Protocol I (re international armed conflicts) encompasses armed conflicts referred to in Article 2 of the four Geneva Conventions, all of which relate to international armed conflicts between two or more states where a state of armed conflict has been formally declared. It also applies to cases of partial or total occupation of one state by another, whether resisted or not.⁸² Examination of the scope of application of the two Additional Protocols, where each one is applicable specifically to either a non-international or an international armed conflict, indicates that where an armed conflict involves the armed forces from at least a second state, then the armed conflict should be considered international in character.

No other convention or treaty exists to govern the conduct of states involved in assisting another state government in the repression of what has become an internal armed conflict, particularly where the situation derived from what was clearly an international armed conflict at the outset. It is well understood that following the attack on New York City on September 11, 2001, the US retaliated against the Taliban-controlled government of Afghanistan, unseated them and initiated the installation of a new Afghan government. Essentially, the Taliban now constitutes an internal, dissident armed force that is engaged in an active insurgency, and other nations, including Canada,

⁸² Office of the Judge Advocate General, “Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field – 1949, Article 2;” and “Geneva Convention (I) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea – 1949, Article 2;” and “Geneva Convention (III) for the Treatment of Prisoners of War – 1949, Article 2;” and “Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War – 1949, Article 2,” in *Collection of Documents on the Law of Armed Conflict*, 2005 ed., 79, 88, 95, 118.

are presently conducting combat operations in Afghanistan under the ISAF banner to assist the government of Afghanistan in defeating them. It is a unique situation that was not foreseen by the authors of the Geneva Conventions in 1949 or the Additional Protocols in 1977.

Neither the Geneva Conventions nor the Additional Protocols are worded in such a way that clearly and specifically indicate their application to the armed conflict in Afghanistan. But the Additional Protocol II scope of application for non-international armed conflicts does not apply to Afghanistan because the conflict there involves the armed forces of other nations. Thus, it is reasonable to conclude that the operations of ISAF, and, incidentally, the separate operations of the United States, in Afghanistan should be termed an international armed conflict. If held to be the case, then the Geneva Conventions and Additional Protocol I, and the grave breaches to which they refer, are applicable to the detainee transfer issue.

Moreover, by setting the standard for treatment of detainees at the Third Convention, as has been done by the Canadian Forces through the DTA, there seems to be tacit acknowledgement that the Canadian Forces are engaged in an international armed conflict in Afghanistan. Otherwise, the DTA could simply have set the standard at “humane,” which is the minimum standard set by Common Article 3 of the Geneva Conventions for armed conflict of any nature.⁸³ Realistically, the Canadian Forces have a clear and visible combat role in Afghanistan, and their actions must be governed by the law of armed conflict. Therefore, persons captured by Canadian Forces must be accorded

⁸³ Office of the Judge Advocate General, “Geneva Convention (III) for the Treatment of Prisoners of War – 1949, Article 3,” in *Collection of Documents on the Law of Armed Conflict*, 2005 ed., 95

the protections that were intended by the Geneva Conventions and the Additional Protocols. The Commentary to the Fourth Convention clarifies this requirement:

Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention. There is no intermediate status; nobody in enemy hands can be outside the law.⁸⁴

Obviously, persons captured by the Canadian Forces are in the hands of their enemy.

The Geneva Conventions clearly intended that captured persons be entitled to protection under either the Third Convention or the *Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War* (Fourth Convention).

The Canadian Forces have opted for the former by having set the standard of treatment at the Third Convention. As a result, the detainees cannot be protected under the Fourth Convention, which states at Article 4: “Persons protected by the [First, Second or Third Convention] shall not be considered as protected persons within the meaning of the present Convention.”⁸⁵ The application of the Third Convention thus constrains the status of the detainees. If they cannot be considered as protected civilian persons under the Fourth Convention, then where no intermediate status is available under the Geneva Conventions they must be Prisoners of War protected under the Third Convention. While the government of Canada has avoided this strict status declaration, applying the Third Convention has further implications.

⁸⁴ International Committee of the Red Cross, “Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949 – Commentary to Article 4 – Definition of Protected Persons,” <http://www.icrc.org/ihl.nsf/COM/380-600007?OpenDocument>; Internet; accessed 14 April 2007.

⁸⁵ Office of the Judge Advocate General, “Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War – 1949, Article 4,” in *Collection of Documents on the Law of Armed Conflict*, 2005 ed., 118.

The first implication concerns the rules for transfer. Article 12 of the Third Convention provides the rules for transfer of Prisoners of War and thus, by extension, for the detainees: “Prisoners of war may only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention.”⁸⁶ Both Canada in 1965 and Afghanistan in 1956 have ratified the Convention, and Canada, as the Transferring Power seeking to transfer detainees to Afghanistan as the Accepting Power, must demonstrate that it was satisfied with Afghanistan’s willingness and ability to treat the transferred detainees at least according to the minimum “humane” standard before it permitted their transfer.⁸⁷ These two criteria can be found in the DTA and in the human rights agencies’ reports.

The willingness criteria can be discerned within the DTA. Where Afghanistan at paragraph 3 affirms that it also “will treat detainees in accordance with the standards set out in the Third Geneva Convention,” and at paragraph 5 “will be responsible for maintaining and safeguarding detainees, and for ensuring the protections provided in paragraph 3,” willingness to treat the transferred detainees certainly seems evident.⁸⁸ The

⁸⁶ Office of the Judge Advocate General, “Geneva Convention (III) Relative to the Treatment of Prisoners of War – 1949, Article 12,” in *Collection of Documents on the Law of Armed Conflict*, 2005 ed., 95.

⁸⁷ International Committee of the Red Cross, “Geneva Conventions,” <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=375&ps=P>; Internet; accessed 23 March 2007. The website provides the dates of signature and ratification/accession of the 194 states which are party to the Geneva Conventions. Both Afghanistan and Canada are parties to the Geneva Conventions of 12 August 1949; per the website, Afghanistan signed on 8 December 1949 and ratified/acceded without reservation on 26 September 1956, and Canada signed on 8 December 1949 and ratified/acceded on 14 May 1965 without reservation.

⁸⁸ National Defence and the Canadian Forces, “Arrangement for the Transfer of Detainees between the Canadian Forces and the Ministry of Defence of the Islamic Republic of Afghanistan,” Paragraphs 3 and 5, http://www.forces.gc.ca/site/operations/archer/agreement_e.asp; Internet; accessed 28 March 2007.

Defence Minister's signature appears sufficient to confirm Afghanistan's willingness to comply with the provisions of the DTA. Although, given the government of Canada's firm denial that the DTA is a legally binding document, it could be argued that Canada took insufficient steps to confirm willingness. If the document is not legally binding, what guarantee does the signature of Afghanistan's Minister of Defence actually afford? Nevertheless, considering that in fact the DTA is more probably legally binding than not, willingness is certainly suggested by the Minister's signature.

Ability, on the other hand, is not so evident. The current reports of torture taking place in Afghan detention facilities indicate a significant lack of ability of the Afghan government to control its judicial and penal systems sufficiently in order to prevent this type of abuse. These reports are publicly available and have disclosed the same incidence of torture and extrajudicial killing in Afghan prisons every year since at least 2002.

With this credible evidence against Afghanistan's ability to meet the provisions of the Third Convention, the DTA fails to follow the two critical requirements beyond the fact that the Transferring and Accepting Powers must be signatories to the Convention. The Transferring Power must satisfy itself of the Accepting Power's willingness and ability to treat the transferred detainees humanely at a minimum. While the signature of a government official on a transfer arrangement document may be proof of willingness, ability is completely refuted by five years of consistent reporting from credible agencies that torture is a prominent feature of detention in the very institutions expected to accept transferred detainees. Transferring detainees, therefore, contravenes this rule. While the DTA appears *prima facie* to meet the requirements of the Geneva Conventions by setting

the standard of treatment of detainees at the Third Convention, ultimately the government of Canada through the Canadian Forces fails to meet that standard itself by its apparent disregard of the rule regarding transfer.

A further implication of making the Third Convention the standard for treatment of the detainees flows from the initial failure to respect the rules for transfer. The Third Convention standard was set without restriction in the DTA, and because Additional Protocol I refers specifically to persons protected by the four Geneva Conventions, Additional Protocol I must also apply to the persons captured by Canadian Forces and transferred to Afghan detention facilities.⁸⁹ Grave breaches of the Geneva Conventions are defined similarly in all four Conventions and specifically in the Third Convention at Article 130: “Grave breaches...shall be those involving any of the following acts, if committed against persons...protected by the Convention: wilful killing, torture or inhuman treatment...wilfully causing great suffering or serious injury to body or health.”⁹⁰ A grave breach of the Third Convention is an act which does not meet the minimum standard of humane treatment. Additional Protocol I goes one step further. First at Article 85(2) it equates grave breaches of the Conventions to grave breaches of

⁸⁹ Office of the Judge Advocate General, “Protocol Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) – 1977, Introduction,” in *Collection of Documents on the Law of Armed Conflict*, 2005 ed., 139. In ratifying API, Canada made several reservations including one which directly applies to whether the detainees here under discussion are lawful or unlawful combatants; however, because the government of Canada and the Canadian Forces have set the detainees’ treatment standard at the Third Convention, the reservation becomes moot.

⁹⁰ Office of the Judge Advocate General, “Geneva Convention (III) Relative to the Treatment of Prisoners of War – 1949, Article 51,” in *Collection of Documents on the Law of Armed Conflict*, 2005 ed., 101 – 102.

the Protocol, and then at Article 85(5) it classifies such grave breaches as war crimes.⁹¹ Therefore, the acts described at Article 130, when perpetrated against persons protected by the Third Convention, are war crimes. Detainees transferred by Canadian Forces through the DTA to Afghan authorities are to be afforded protections equivalent to those given by the Third Convention, and thus, should they be subjected to torture or inhuman treatment, they become the victims of war crimes. Obviously, it is not the Canadian Forces who are liable to have committed war crimes, assuming that such acts have not been committed by Canadian Forces members, and having established that such acts may have been or will be carried out against transferred detainees by Afghan authorities.⁹²

However, customary international law recognizes the concept of being an accessory to a crime at the level of states. Specifically, draft Articles of the *Responsibility of States for Internationally Wrongful Acts* (Responsibility of States) were recently completed by the Law Commission of the United Nations and adopted by the General Assembly in December 2001.⁹³ The Responsibility of States is not a formal convention, but it is meant to complement existing international laws by defining the

⁹¹ Office of the Judge Advocate General, "Protocol Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) – 1977, Articles 85(2) and 85(5)," in *Collection of Documents on the Law of Armed Conflict*, 2005 ed., 157.

⁹² Paul Koring, "Canada loses track of Afghan detainees," *Globe and Mail*, 2 March 2007, <http://www.theglobeandmail.com/servlet/story/RTGAM.20070302.wdetainee02/BNStory/Afghanistan/>; Internet; accessed 9 March 2007. The recent suggestions reported in the media that several detainees may have been abused during their detainment at the hands of Canadian Forces members are currently under investigation, and therefore will not be addressed in this paper. Of note, there are four investigations ongoing at this time: the Canadian Forces are conducting a Board of Inquiry into the allegations that prisoners/detainees were physically abused by Canadian Forces members prior to being transferred to Afghan authorities; the Canadian Forces National Investigation Service is attempting to locate three detainees who were allegedly abused and have since disappeared following their transfer; the Military Police Complaints Commission is conducting a parallel investigation into the abuse allegations, and a second investigation further to the allegations of unconstitutionality of the DTA made by AIC/BCCLA and their joint application for judicial review of the DTA.

⁹³ International Law Commission, "Introduction" and "Membership," <http://www.un.org/law/ilc/>; Internet; accessed 23 March 2007.

general conditions under those laws where a state can be found to be responsible for wrongful acts or omissions.⁹⁴ Where Afghan authorities may be found to have committed or be committing war crimes in respect of detainees transferred by Canadian Force, Article 16 of the Responsibility of States suggests that Canada may be implicated in the commission of those war crimes:

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

- (a) That State does so with knowledge of the circumstances of the internationally wrongful act; and
- (b) The act would be internationally wrongful if committed by that State.⁹⁵

By transferring detainees to the jurisdiction of a state which is known to commit what are in all likelihood war crimes according to Additional Protocol I, the Canadian Forces may

⁹⁴ International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries 2001*, http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf; Internet; accessed 23 March 2007. The draft articles of the Responsibility of States for Internationally Wrong Acts are published on the International Law Commission website. The text of the Responsibility of States was adopted by the General Assembly on 12 December 2001, per A/Res/56/83. On 14 December 2001, the General Assembly, per A/Res/59/35: “Commends once again the articles on responsibility of States for internationally wrongful acts to the attention of Governments, without prejudice to the question of their future adoption or other appropriate action.” The General Assembly also expects to consider the Responsibility of States during the 62nd session (it is currently in the 61st session).

⁹⁵ Michael Byers, “Legal Opinion...;” International Law Commission, *Responsibility of States for Internationally Wrongful Acts 2001*, http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf; Internet; accessed 21 March 2007; and United Nations General Assembly Archives, “General Assembly Resolution 59/35,” A/Res/59/35, 16 December 2004, <http://daccessdds.un.org/doc/UNDOC/GEN/N04/478/36/PDF/N0447836.pdf?OpenElement>; Internet; accessed 21 March 2007. Professor Byers refers to the Responsibility of States doctrine as being applicable to Canada: “This conclusion [that Common Article 3 imposes obligations on Canada that would be violated if a detainee transferred to Afghanistan was tortured] is buttressed by Article 16 of the UN International Law Commission’s Articles on State Responsibility. – which have been adopted by the UN General Assembly and are universally regarded as codifying customary international law.” The articles of the Responsibility of States for Internationally Wrong Acts are published on the International Law Commission website. The text of the Responsibility of States was adopted by the General Assembly on 12 December 2001, per A/Res/56/83. On 14 December 2001, the General Assembly, per A/Res/59/35: “Commends once again the articles on responsibility of States for internationally wrongful acts to the attention of Governments, without prejudice to the question of their future adoption or other appropriate action.” The

incur international responsibility for aiding or assisting the commission of these crimes. Clearly, a detainee would not face torture or extrajudicial killing, or any other physical abuse at the hands of Afghan authorities without first being transferred to them. It is thus the act of transfer and the lack of any process that would completely deter perpetrators that are the key elements in the fact that these war crimes might be committed. The reasonable conclusion under international humanitarian law and customary international law is that Canada and the Canadian Forces could be responsible for aiding and assisting war crimes committed by Afghan authorities against detainees transferred by the Canadian Forces to them.

Convention Against Torture

Among the recurring themes in human history is man's inhumanity to man. In his essay "Liberalism, Torture and the Ticking Bomb" for *The Torture Debate*, David Luban wrote: "Unhappily, torture is as old as human history."⁹⁶ He further quotes the Renaissance scholar Michel de Montaigne: "Nature, I fear, attaches to man some instinct for inhumanity."⁹⁷ The accuracy of these two assertions is evident in the laws that over time have been enacted in order to repress this sadistic human tendency. That there presently exists an extensive body of law designed to uphold the dignity and worth of all human beings, specifically in times of conflict, regardless of who or what they are,

General Assembly also expects to consider the Responsibility of States during the 62nd session (it is currently in the 61st session).

⁹⁶ David Luban, "Liberalism, Torture and the Ticking Bomb," in *The Torture Debate*, ed. Karen Greenberg (New York: Cambridge University Press, 2006), 37.

⁹⁷ Michel de Montaigne, "Of Cruelty" in *The Complete Essays of Montaigne* 316 (Donald M. Frame trans., 1958), quoted in David Luban, "Liberalism, Torture and the Ticking Bomb," in *The Torture Debate*, ed. Karen Greenberg (New York: Cambridge University Press, 2006), 37.

speaks volumes about the prevalence of the tendency to do otherwise. Philippe Sands, in his book *Lawless World: America and the Making and Breaking of Global Rules*, writes about the intersection of human rights abuse and the law:

This is one area in which the rules of international law are clear. It does not matter whether a person is a criminal, or a warrior combatant, or a lawful combatant or an unlawful combatant, or an al-Qaeda militant, or a private American contractor. He may not be tortured. He may not be subjected to other cruel, inhuman, or degrading treatment. If he is, then the perpetrator of such acts must be punished under the criminal law.⁹⁸

Those who employ terrorist tactics in order to achieve their goals are perhaps the most reviled of opponents, but even they are human beings deserving of the right to be treated humanely. However, the international right of everyone to be free from torture or cruel, inhuman or degrading treatment is a new concept; it is only in the past sixty years or so that global society has formally denounced such acts. Torture and similar abuses were formally proscribed with the United Nations' adoption of the *Universal Declaration of Human Rights* in 1948: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."⁹⁹ These words of the Universal Declaration are reflected in the grave breach provisions of the Geneva Conventions and the Additional Protocols, and were codified in international human rights law with the United Nations' adoption in 1984 of the *Convention Against Torture and Other Cruel, Inhuman or*

⁹⁸ Philippe Sands, *Lawless World: America and the Making and Breaking of Global Rules*, (New York: Viking Penguin, 2005), 207 – 208.

⁹⁹ United Nations, "Universal Declaration of Human Rights," <http://www.un.org/Overview/rights.html>; Internet; accessed 23 March 2007.

Degrading Treatment, or Punishment (Convention Against Torture), which Canada signed in 1985 and later ratified in 1987.¹⁰⁰

Nothing in the Convention Against Torture limits its application to specific circumstances, and regardless of whether one prefers to view the actions of ISAF in Afghanistan as a police action or as an armed conflict, the provisions of the Convention Against Torture apply to the matter of the transfer of detainees under the DTA because of the credible risk of torture that exists following their transfer. The relevant provisions include Article 1, which gives a broad definition of what is meant by the term “torture,” and Article 16, which extends several of the provisions of the Convention Against Torture to the commission of “acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture.”¹⁰¹ Most important, however, is Article 3(1) that states: “No State Party shall expel, return (*refouler*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subject to torture.” This concept of return, or “*refoulement*,” is directly applicable to the matter of the transfer of detainees. The act of transfer in this case is essentially the return of Afghan nationals to the Afghan state. Article 3(2) then defines “substantial grounds” as being “all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.”¹⁰² Reasonably, then, the transfer of detainees by Canadian Forces, and

¹⁰⁰ Office of the High Commissioner for Human Rights, “Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment – Declarations and reservations,” <http://www.ohchr.org/english/countries/ratification/9.htm>; Internet; accessed 23 March 2007.

¹⁰¹ Office of the Judge Advocate General, “Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 16,” in *Collection of Documents on the Law of Armed Conflict*, 2005 ed., 224.

¹⁰² *Ibid.*, Article 3(1), 223.

therefore by the government of Canada, constitutes “return” or “*refoulement*.” Furthermore, substantial grounds are proven in the myriad of US State Department, AIHRC, and UNHCHR reports. It would be hard not to infer from those reports that a consistent pattern of human rights violations, and specifically torture, did not exist in Afghanistan prior to the signing of the DTA in December 2005. Consequently, it would appear that the transfer of detainees by Canadian Forces to Afghan authorities under any arrangement violates the non-*refoulement* rule at Article 3 of the Convention Against Torture.

However, accepting that the DTA was negotiated in good faith, and that transfers have been done since December 2005, there is a further requirement that Canada should have ensured some sort of sufficient monitoring process in order to prevent transferred detainees from being abused. Article 11 of the Convention Against Torture requires that each State Party “keep under systematic review... arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture.”¹⁰³ Even though Article 11 is more clearly applicable to the government of Afghanistan, where it has been reported that the Afghan government has been unable to prevent abuses such as torture specifically, and where Canada has decided to transfer detainees, it would seem incumbent upon Canada to have taken steps to ensure that persons detained by them did not fall victim to torture or other human rights abuses, steps that were clearly missing in the December 2005 DTA and which with the amendment of February 2007 are quite probably still inadequate.

¹⁰³ *Ibid.*, Article 11, 224.

It is unlikely that the DTA was crafted with the intent of skirting the rule of law, but even a cursory review indicates that the DTA may fail to safeguard detainees from the credible risk of human rights abuses and thus contravenes both international human rights law and international humanitarian law. The Convention Against Torture categorically obliges Canada not to return persons to a jurisdiction where torture is a risk. By transferring detainees under the DTA and by neglecting to monitor effectively their situation post-transfer, Canada violates this international human rights law. Furthermore, whatever the nature of the armed conflict in Afghanistan is eventually determined to be, it remains that the Canadian Forces under ISAF are engaged in combat and are subject to international humanitarian law. The DTA attempts to respect the Geneva Conventions, but fails, ironically, at the outset to follow the rules of the Third Convention. As a result, Canada could be held responsible for aiding or assisting war crimes committed by Afghan authorities. The transfer of detainees under the DTA, either with or without the February 2007 amendment, appears to offend the rule of law, both domestically and internationally, and the principles of fundamental justice demand that those who do not respect the rule of law are expected to face consequences.

CHAPTER 3: CONSEQUENCES

In *Leviathan*, Thomas Hobbes describes man's need for what he termed the Commonwealth, or civilization in contemporary language. Of the many concepts he formulated, perhaps the most important was that of the rule of law, for without it, civilization cannot be maintained.¹⁰⁴ Yet, the rule of law is meaningless without consequences for those who would stand above it. By making laws for the conduct of war, the international community has recognized, contrary to the popular adage, that fairness in war has to be codified in order to achieve it. Today, international law has removed impunity for those who would go beyond what is acceptable conduct in the resolution of armed conflict. The Geneva Conventions and Additional Protocols identify grave breaches and further label them as war crimes, and the *Rome Statute of the International Criminal Court* (Rome Statute) creates international jurisdiction for the prosecution of war crimes as well as crimes against humanity, genocide, and crimes of aggression. In concert with the Rome Statute, Canada has refined its own legislation in respect of such crimes and in 2000, passed the *Crimes Against Humanity and War Crimes Act* (CAH&WC Act).¹⁰⁵ Where the DTA apparently offends not only the *Canadian Charter of Rights and Freedoms*, but also the law of armed conflict and the

¹⁰⁴ Thomas Hobbes, *Leviathan*, (New York: Simon & Schuster, 1962), 138. "For without the decision of controversies, there is no protection of one subject, against the injuries of another; the laws concerning *meum* and *tuum* are in vain; and to every man remaineth, from the natural and necessary appetite of his own conservation, the right of protecting himself by his private strength, which is the condition of war, and contrary to the end for which every Commonwealth is instituted."

¹⁰⁵ *Criminal Code* (R.S., 1985, c. C-46), online: <http://laws.justice.gc.ca/en/ShowFullDoc/cs/C-46//en>; Internet; accessed 16 April 2007. While war crimes are also offences that could attract indictment under the NDA, and possibly the Criminal Code (depending on the nature of the crime, e.g. torture is specifically indictable under the Criminal Code at section 269.1), this study is not intended to discuss the legal procedures that a prosecutor would or would not take in respect of a war crimes indictment, but instead will focus on the international statute and the CAH&WC Act.

Convention Against Torture, it is hardly surprising that there are consequences under law for these breaches.

The Geneva Conventions and the Additional Protocols clearly identify what actions constitute breaches of their provisions, and together with the Rome Statute, there is a defined path for obtaining justice, at least internationally. Interestingly, though, missing from the Convention Against Torture is any mention of what measures are to be taken against a state that has failed to respect its provisions. In this instance, guidance is found in customary international law and specifically in the Responsibility of States at Article 12: “There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.”¹⁰⁶ Thus, according to customary international law, Canada may be in breach of its international obligation to respect the Convention Against Torture, initially by transferring detainees to Afghan authorities who are known to commit human rights abuses, and subsequently by apparently neglecting to adequately monitor the situation for those detainees. There are no formal repercussions at the state level for breaches of international obligation. Morally, however, in a country which is founded on the rule of law, Canadians would probably find it incomprehensible that their government has taken actions which breach an international law. Equally difficult for the government to defend would be the failure of the DTA to respect the law of armed conflict.

¹⁰⁶ International Law Commission, *Responsibility of States for Internationally Wrongful Acts 2001*, http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf; Internet; accessed 21 March 2007.

In this regard, it has been alleged that Canadian Forces members could be indicted under the Rome Statute for assisting in the commission of war crimes.¹⁰⁷ Realistically, however, there is little risk that a member of the Canadian Forces would be indicted for war crimes under the Rome Statute, given its expected jurisdiction as provided at Article 8: “The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.”¹⁰⁸ Article 8 implies a standard of intent with respect to the commission of war crimes. It is doubtful that the court would view the transfer of detainees as part of a plan or policy to commit war crimes. This conclusion is buttressed by considering the definition of individual criminal responsibility at Article 25(3)(c):

In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of this Court if that person...for the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission.¹⁰⁹

Professor Byers cites this article in his argument for possible indictment under the Rome Statute, but he seems to have missed the most important point. Article 25(3)(c) is clearly meant to prescribe the elements necessary for a finding of individual criminal

¹⁰⁷ Michael Byers, “Legal Opinion...,” and House of Commons, Standing Committee on National Defence, Evidence, Monday, December 11, 2006, at 1535 (Mr. Michael Byers (Professor and Canada Research Chair (Tier One) in Global Politics and International Law, University of British Columbia); available from <http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?SourceId=188457>; Internet; accessed 3 January 2007. Professor Byers voiced his opinion (also written) on the probability that Canadian soldiers may be in violation of the Rome Statute: “I would suggest that handing over a detainee provides the means for the commission of war crimes....Canada ratified the Rome Statute in July 2000. Consequently any torture, cruel treatment, or other outrages upon personal dignity that are aided, abetted, or otherwise assisted by Canadian soldiers in Afghanistan are subject to the jurisdiction of the [International Criminal Court].”

¹⁰⁸ Office of the Judge Advocate General, “Rome Statute of the International Criminal Court – 1998, Article 8(1),” in *Collection of Documents on the Law of Armed Conflict*, 2005 ed., 307.

¹⁰⁹ Office of the Judge Advocate General, “Rome Statute of the International Criminal Court – 1998, Article 25(3)(c),” in *Collection of Documents on the Law of Armed Conflict*, 2005 ed., 307.

responsibility, of which there are essentially two: first, there has to be some contribution towards the commission of a crime, which in this case is war crimes possibly committed by Afghan authorities; and second, the contribution has to have as its purpose the commission of those crimes. It is indisputable that the act of transferring detainees under the DTA directly facilitates, or assists, the possible commission of war crimes by Afghan authorities against the detainees, which could satisfy the first element. However, while the DTA has several failings with respect to the rule of law, nothing in it could imply that detainee transfers were undertaken for the purpose of facilitating the commission of war crimes. While the transfer of detainees can be considered as contributing to the commission of war crimes, in that the transfer “provided the means,” that contribution did not have as its purpose the commission of war crimes. Without both elements, individual criminal responsibility for war crimes cannot be established under Article 25(3)(c).

More likely, however, indictment under the Rome Statute would be restrained because Canada has indicated its willingness to prosecute under its own jurisdiction by passing the CAH&WC Act. Therefore, if a Canadian Forces member was to be indicted in relation to the commission of war crimes, it would be done in Canada and under the CAH&WC Act, although, again the probability for indictment is similarly low.¹¹⁰ The relevant provision of the CAH&WC Act is section 6(1): “Every person who, either

¹¹⁰ *Criminal Code* (R.S., 1985, c. C-46), online: <http://laws.justice.gc.ca/en/ShowFullDoc/cs/C-46//en>; Internet; accessed 16 April 2007; and *National Defence Act* (R.S., 1985, c. N-5), online: <http://laws.justice.gc.ca/en/ShowFullDoc/cs/N-5//en>; Internet; accessed 16 April 2007. While war crimes are also offences that could attract indictment under the NDA at section 130, and possibly the Criminal Code (depending on the nature of the crime, e.g. torture is specifically indictable under the Criminal Code at section 269.1), this study is not intended to discuss the legal procedures that a prosecutor would or would not take in respect of a war crimes indictment, but instead will focus on the international statute and the CAH&WC Act.

before or after the coming into force of this section, commits outside Canada... (c) a war crime, is guilty of an indictable offence and may be prosecuted for that offence.”¹¹¹ The definition of war crime is provided at section 6(3): “‘War crime’ means an act or omission committed during an armed conflict that, at the time and in the place of its commission, constitutes a war crime according to customary international law or conventional international law applicable to armed conflicts.”¹¹² The language of section 6 is direct and succinct, and would seem to imply that prosecution is intended under the CAH&WC Act for the person or persons who actually commit war crimes. While the Responsibility of States implies that Canada could be internationally responsible for aiding or assisting the commission of war crimes where it could be proven that a detainee was abused at the hands of Afghan authorities as a direct result of being transferred by Canadian Forces, this responsibility resides at the level of the state. Therefore, and given the direct language of the CAH&WC Act, it is doubtful that individual Canadian Forces members involved in the transfer would be indicted for the offence of committing a war crime. Instead, the more compelling case may be made against the military commander who allowed or authorized the transfer which led to the possible commission of war crimes, and in so doing may have committed a breach of command responsibility, an offence which also comes within the ambit of both the Rome Statute and the CAH&WC Act.

It may be that Sun Tzu, in his oft-quoted *The Art of War*, was the first to record a code of command responsibility when he exhorted his commanders “to provide for the

¹¹¹ *Crimes Against Humanity and War Crimes Act* (2000, c.24), online: <http://laws.justice.gc.ca/en/showtdm/cs/C-45.9>; Internet; accessed 16 April 2007.

¹¹² *Ibid.*

captured soldiers and treat them well.”¹¹³ Certainly, military command bears an immense degree of responsibility, not only for the lives of subordinates, but also for their conduct as members of an armed force, particularly towards people who come under their control during times of conflict. Over time, the principle of command responsibility has grown and been codified in the growing body of international humanitarian law and most recently in the Rome Statute and the CAH&WC Act in Canada. In the aftermath of each war of the last century, military commanders were put on trial for having failed in some manner to have adequately discharged the responsibilities of command in respect of the actions of their subordinates. Two noteworthy cases were those of Brigadeführer Kurt Meyer and General Tomoyuki Yamashita, both of whom were brought to trial in December 1945.

Brigadeführer Meyer was the Commander 25th S.S. Panzer Grenadier Regiment in June 1944. In the days following the Normandy invasion, several Canadian soldiers were captured by the 25th Panzer Grenadiers and, as was discovered later, were apparently shot on the implied orders of Brigadeführer Meyer. Following capitulation, Brigadeführer Meyer was arrested and charged with having incited and counselled his men to deny quarter and with four separate counts of having been responsible for the murder of Canadian prisoners of war. Bruce Macdonald, Chief Prosecutor at the Meyer trial wrote in his book *The Trial of Kurt Meyer*:

It would...be the first occasion in the prosecution of war criminals in Europe where an effort would be made to establish the immediate responsibility of a high ranking officer for crimes committed on his order, and also his vicarious responsibility for the commission of such crimes by

¹¹³ Sun Tzu, *The Art of Warfare*, trans. Roger T. Ames (New York: Ballantine Books, 1993), 109.

troops under his command but where he had given no direct order for so doing.¹¹⁴

This case was significant because it established that a commander would be held responsible for crimes committed by his subordinates, not only if he or she directly ordered the criminal acts, but also if no such order was directly given. Brigadeführer Meyer was found guilty of the first charge of incitement and counselling to deny quarter, and was held responsible for the murders of eighteen prisoners of war by his soldiers at his headquarters in L'Ancienne Abbaye d'Ardenne (fourth and fifth charges) even though he had not given orders that they should be executed.¹¹⁵ He was sentenced to death, but the death penalty was later commuted to a life sentence. Macdonald explains the principle of command responsibility established in the *Meyer* case: "Commanders were [to be] held responsible for the acts of their subordinates, and paid for it with their lives or with life sentences."¹¹⁶ Similar findings were being made by British and American tribunals under the auspices of the United Nations War Commission, including that of General Tomoyuki Yamashita.

General Yamashita was appointed Commanding General of the Fourteenth Army Group of the Imperial Japanese Army in the Philippine Islands in the fall of 1944. At the end of the war, troops under his command in the Philippines were found to have committed numerous crimes including the murder, rape, starvation, and extrajudicial killing of Prisoners of War and other internees. The case brought against General

¹¹⁴ Bruce Macdonald, *The Trial of Kurt Meyer*, (Toronto: Clarke, Irwin & Company Limited, 1954), 90 – 91.

¹¹⁵ Web Genocide Documentation Centre, "The Abbaye Ardenne Case Trial of S.S. Brigadeführer Kurt Meyer," <http://www.ess.uwe.ac.uk/WCC/Meyer.htm>; Internet; accessed 23 March 2007.

¹¹⁶ Macdonald, *The Trial of Kurt Meyer*, 211.

Yamashita focused on his responsibility as a commander, under international law, to keep himself apprised of the manner in which his subordinate commanders and soldiers executed their duties and responsibilities. The United Nations War Commission report of his trial noted:

The evidence...regarding [General Yamashita's] knowledge of, acquiescence in, or approval of the crimes committed by his troops was conflicting, but of the crimes themselves, many and widespread both in space and time, there was abundant evidence, which in general the Defence did not attempt to deny."¹¹⁷

In the end, and despite a degree of uncertainty as to how or whether he could have known of the crimes being committed by his troops, General Yamashita was found guilty of “unlawfully disregarding and failing to discharge his duty as commander to control the acts of members of his command by permitting them to commit war crimes.”¹¹⁸ The basis for conviction lay in the court's finding that, regardless of any extenuating circumstances, as the commander he should have known that his subordinates were committing war crimes and that he failed to do anything to prevent them. Ultimately, General Yamashita was executed for this breach of command responsibility.

The *Meyer* case was the first instance where a Canadian Military Court upheld the principle that crimes committed by subordinates at the express or implied orders of their commander are the responsibility of the commander and that he or she is therefore accountable for the commission of such crimes. The same principle of accountability appears in *Yamashita*, with the additional obligation that a commander is responsible also

¹¹⁷ Web Genocide Documentation Centre, “Case No. 21 Trial of General Tomoyuki Yamashita,” <http://www.ess.uwe.ac.uk/WCC/Yamashita1.htm>; Internet; accessed 23 March 2007. This website, sponsored by the University of Western England, uses as its source for General Yamashita's trial the Law Reports of Trials of War Criminals. Selected and Prepared by the United Nations War Crimes Commission. Volume IV. London: HMSO, 1948.

¹¹⁸ *Ibid.*

to know and control the acts of subordinates under his command. These findings were made prior to the promulgation of the four Geneva Conventions in 1949, and thus were reflective of the Law of the Hague and other earlier conventions, in which there were no specific references to breaches of command responsibility .

The modern parameters of command responsibility first appear explicitly in the Additional Protocol I at Article 86(2):

The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.¹¹⁹

This article must be read in conjunction with Article 87 on the Duty of Commanders:

“The High Contracting Parties and Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command...to prevent and...to suppress breaches of the Conventions and of this Protocol.”¹²⁰ The two articles taken together frame the degree of responsibility and accountability demanded of military commanders: at all times, commanders are required to prevent and suppress possible breaches of the law of armed conflict, and the commander will be held criminally responsible if the commander knew a breach was being or going to be committed and he or she acted insufficiently to prevent or suppress the breach. These

¹¹⁹ Office of the Judge Advocate General, “Protocol Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) – 1977, Article 86(2),” in *Collection of Documents on the Law of Armed Conflict*, 2005 ed., 158.

¹²⁰ Office of the Judge Advocate General, “Protocol Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) – 1977, Article 87,” in *Collection of Documents on the Law of Armed Conflict*, 2005 ed., 158.

parameters outline the elements on which an allegation of breach of command responsibility must be based.

Recently, these elements were reviewed and tested by the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the Celebici case (Trial Chamber, Judgement of 1998). In their deliberation of the applicable law to the various charges of “superior with responsibility” or “superior with command responsibility,” both for crimes committed by subordinates, the judges in the Celebici case distilled three essential elements of command responsibility for failure to act:

- (i) the existence of a superior-subordinate relationship;
- (ii) the superior knew or had reason to know that the criminal act was about to be or had been committed; and
- (iii) the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.¹²¹

These three elements reflect the parameters of command responsibility as they were initially expressed in Articles 86 and 87 of Additional Protocol I. They also appear now in both the Rome Statute at Article 28 and the CAH&WC Act at sections 5 and 7. Consequently, a prosecutor would require evidence of all three elements in order to consider indicting a commander under either statute in respect of war crimes committed by his or her subordinates.

In the matter of the transfer of detainees, the CDS personally signed the DTA, and thus it is reasonable to assume that he would be the military commander singled out to be held accountable for failure to act under the principle of command responsibility. The

¹²¹ United Nations International Criminal Tribunal for the Former Yugoslavia, “Celebici Camp, Mucic et al (IT-96-21), III – Applicable Law, G. Individual Criminal Responsibility under Article 7(3), paragraph 346,” <http://www.un.org/icty/celebici/trialc2/judgement/index.htm>; Internet; accessed 2 April 2007. The court identified the essential elements of command responsibility for failure to act from the Statute of the International Criminal Tribunal for the Former Yugoslavia, Article 7(3), adopted by a resolution of the Security Council on 25 May 1993, S/RES/827(1993).

first element of command responsibility requires the existence of a superior-subordinate relationship between the commander and the persons committing war crimes, but the alleged perpetrators of war crimes would be persons in charge of Afghan detention facilities who actually commit or have committed abuses on detainees transferred by Canadian Forces. However, the Responsibility of States implies that Canada would be responsible for aiding or assisting the commission of those war crimes. The Canadian Forces are part of the government of Canada, and it is reasonable to suggest that the Canadian Forces would bear the responsibility of aiding or assisting because the transfer of detainees is physically carried out by them. If so, then there is a clear superior-subordinate relationship between the CDS and those responsible for aiding or assisting the commission of war crimes, namely the Canadian Forces in Afghanistan.

The second element requires that “the superior knew or had reason to know that the criminal act was about to be or had been committed.” Thus, where the criminal act is the possible commission of war crimes by Afghan authorities against detainees transferred to them by Canadian Forces, it remains to consider whether the CDS knew or had reason to know that such crimes were about to be or had been committed. Again, the reports of the US State Department, the AIHRC, and the UNHCHR have to be taken as strong evidence of the credible risk that these crimes were being committed. The deplorable human rights situation in Afghan detention facilities has been reported extensively every year since at least 2002. Furthermore, human rights advocates have echoed these reports in their concerns about the impact of the DTA on transferred detainees since it was signed in December 2005. Their concerns have been clearly laid out in letters and visits to the Minister of National Defence, and in testimony before the

SCOND. It seems unusual that the CDS would have been completely unaware of the war crimes risk to detainees transferred by Canadian Forces under the DTA.

Having established the first and second elements, the third element then requires that the commander failed to take necessary and reasonable measures to prevent the criminal act or to punish those who committed the criminal act. In fact, by signing the DTA in December 2005, the CDS actually provided the avenue by which detainees transferred by Canadian Forces could be vulnerable to war crimes. No change was made to the DTA until February 2007, more than a year after its inception, and it remains that the amendment is of little material effect given the probable inability of the AIHRC to track every detainee transferred to an Afghan detention facility.

Apparently, the CDS may be in breach of his command responsibility to ensure that his subordinates do not aid or assist the commission of war crimes. It is beyond the scope of this study to determine categorically that this is so; however, the elements required to validate a breach of command responsibility seem to be evident, and it is possible therefore that a Canadian military commander, most probably the CDS, could face indictment under the CAH&WC Act, if not the Rome Statute. Responsibility has always been the cornerstone of military command. It requires commanders to ensure that their subordinates not only carry out their lawful orders, but that the orders they issue are lawful. Furthermore, it requires commanders to ensure that their subordinates' actions, particularly with respect to vulnerable persons, be they prisoners, detainees, or innocent civilians, at any time, are fully respectful of the intent of international humanitarian law. Likewise, Canadian law would seem to demand that the actions of Canadian Forces conform to the *Charter of Rights and Freedoms*.

Whether or not the DTA offends the Charter is now a matter for the courts to decide. Should the AIC/BCCLA fail to prove that the DTA offends section 7 of the Charter, then the Canadian Forces will not be constrained by Charter considerations in their handling of detainees. On the other hand, should the judgement be otherwise, the consequences could be considerable. Operationally, commanders in Afghanistan would have to devote scarce resources to building, manning and supporting detention facilities. Politically, the public outcry would be predictably harsh, and the Canadian Forces would once again field accusations of operating outside the law, as they did following the Somalia incident. Eventually, Canada would have to make its own determination on the legal status of the detainees and then deal with them accordingly. The current Canadian ambiguity on the legal status of detainees reflects an obvious sensitivity to the US Administration's decision to avoid status determination under the Geneva Conventions, and undoubtedly, future decisions made by Canada in this regard would have international, political impact. In the meantime, public awareness of this issue continues to grow.

Beyond the Canadian Forces' internal investigations into a new question about the possible abuse of detainees by Canadian Forces prior to their transfer to Afghan authorities, the Military Police Complaints Commission has just launched two public interest investigations of its own. As a quasi-judicial, independent civilian agency, the Military Police Complaints Commission responds primarily to complaints received about the conduct of military police members in the exercise of their policing duties or

functions.¹²² The first is in response to a complaint received by the Commission concerning the possible abuse of detainees by Military Police and the second is in response to a joint AIC/BCCLA complaint that detainees are at risk of torture after being transferred by Canadian Forces to Afghan authorities.¹²³ As with the AIC/BCCLA application for judicial review, the results of these investigations will continue to inform the public of the alleged failures of the Canadian Forces' transfer policy under the DTA.

Finally, whatever possible consequences may issue to the Canadian Forces in this matter, the consequences to transferred detainees may be far more severe. Torture, extrajudicial killing, and other human rights abuses are acts which have at their core a denial of humanity. Where the DTA seems to expose transferred detainees to the probability that they may be victimized in this manner, Canada and the Canadian Forces should be held both responsible and accountable for failing to prevent this consequence.

¹²² Military Police Complaints Commission, "About the Complaints Commission," http://www.mpcc-cppm.gc.ca/100/100_e.aspx; Internet; accessed 14 April 2007. Detainees are most probably held by Military Police and transferred by them to Afghan authorities.

¹²³ Military Police Complaints Commission, "Afghanistan Public Interest Investigations," http://www.mpcc-cppm.gc.ca/300/Afghanistan/index_e.aspx; Internet, accessed 14 April 2007.

CONCLUSION

An application for judicial review of a government matter is not trivial. It essentially removes the matter from the purview of the legislative and executive branches of government and invites a binding judgement that may have wide-ranging repercussions. Significantly, an application for judicial review from an outside agency sends a strong, public signal of disapproval. In this way, the recent AIC/BCCLA application for judicial review of the DTA that governs the transfer of detainees by Canadian Forces to Afghan detention facilities constitutes a direct challenge to the government's approach to detainee handling. A real probability exists that transferred detainees may be treated less than humanely in Afghan prisons. The AIC and BCCLA contend that, as a result, the DTA offends section 7 of the Charter in that it infringes the transferred detainees' right to life, liberty and security of the person. Other critics go further and suggest that not only does the DTA offend the Charter, it also violates international laws, including the law of armed conflict and the Convention Against Torture. These allegations are all based on the lack of a credible guarantee that the transferred detainees will be treated humanely in the hands of Afghan detention authorities.

Analysis of these allegations is thus focused on the law. From a simple study of the DTA against the *Charter of Rights and Freedoms*, the Geneva Conventions and the Additional Protocols, as well as the Convention Against Torture, it would appear that by law Canadian Forces should never have transferred detainees to Afghan detention facilities. Transfer appears to contravene the unconditional prohibition in the Convention Against Torture on returning persons to a jurisdiction known to commit human rights

abuses, and likewise to contravene the rules for transfer of Prisoners of War given by the Third Geneva Convention. Ultimately, it could implicate Canadian Forces in the commission of what amount to war crimes. Furthermore, because persons captured by Canadian Forces seem to accrue Charter rights, their exposure to the probability of inhumane treatment post-transfer could indeed infringe their right to life, liberty and security of the person.

Unsurprisingly, these contraventions attract significant consequences. While Canadian Forces members may not be held individually liable for assisting in the commission of war crimes under the Rome Statute or the CAH&WC Act, the commander who signed the DTA may attract prosecutorial attention under those same statutes for breach of command responsibility. What cannot be overlooked is the possible harm that may be inflicted on persons who came under Canadian control and then were relinquished to authorities known to commit serious human rights abuses. This risk is the real basis for concern and is what lies behind the Charter challenge now before the courts.

The Charter has become an essential element of Canadian national identity, and Canadians have come to respect its demands on our institutions as a reflection of their most important values. Should the courts hold that the DTA does indeed offend the Charter by exposing persons captured and detained by Canadian Forces to possible war crimes at the hands of Afghan authorities as a result of being transferred to them, it is more than likely that Canadians' faith in the Canadian Forces will be shaken once again. Far from home, and having lost over 50 members to date, Canadian Forces soldiers are engaged in operations to assist the Afghan government in establishing security, governance, and sustainable development. Their actions are necessarily governed by

several layers of domestic and international law, but shortly, they will have to respond to allegations that they may be in breach of one or more of those laws, allegations which, if proven true would call into question the moral basis for their presence in Afghanistan.

At the moment, Canadians are supportive of the Canadian Forces' mission in Afghanistan, and they are supportive of their efforts to help re-build Afghan institutions and society in order to eliminate sources of threat to the international community. They are accepting, also, of the terrible toll this mission has taken on Canadian lives. On the other hand, that support may wither if the courts find in favour of those who say the Canadian Forces' handling of detainees breaks the law. The principle of the rule of law is embedded in the Constitution as a fundamental cornerstone of Canadian society. It is what gives us the peace, order, and good government that is the founding concept for our nation. Whatever they do, wherever they are, and as they increasingly take on nation-building roles in support of international security, the Canadian Forces must ensure their every action is in consonance with the full scope of law which binds them to the highest code of behaviour demanded of soldiers and citizens of Canada.

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