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STRUGGLING WITH OUTDATED RULES: INTERNATIONAL HUMANITARIAN LAW AND ITS IMPACT ON CANADIAN DETAINEE POLICY

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STRUGGLING WITH OUTDATED RULES: INTERNATIONAL HUMANITARIAN LAW AND ITS IMPACT ON CANADIAN DETAINEE POLICY

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ABSTRACT

The conflicts of today are increasingly of an intra-state nature, with civil wars and insurgencies more prevalent in the last decade than wars between states. The terrorist attacks of September 11, 2001 ended the perceived isolation of these conflicts and demonstrated the link between instability across the globe and threats to international security. The international community has demonstrated a willingness to intervene in response, but increasingly has found that the nature of these conflicts poses a number of challenges to current International Humanitarian Law (IHL). This is particularly apparent in the issues surrounding detention of individuals who are party to a conflict but cannot be defined as combatants under IHL, and therefore do not warrant the legal protections afforded to more traditional prisoners of war. A review of the international legal framework regarding the detention of individuals in conflict, and the limitations and challenges these have placed on Canada and other NATO nations conducting operations in Afghanistan, demonstrates that the implementation of an effective detention strategy as part of counter-insurgency operations is incompatible with strict adherence to the conventions of IHL. Consequently, Canada must, in cooperation with its traditional allies and other like-minded states, advocate for the development of new conventions to address the threats posed by unprivileged belligerents in contemporary conflicts. Until such conventions are put in place, Canada must accept that the implementation of an effective detainee handling strategy in any future mission may require operating outside the confines of existing IHL, and that this will engender criticism and political risk. For any future mission Canada must either accept this risk or reconsider its participation.

INTRODUCTION

The years following the end of the Cold War have not been peaceful. Intra-state conflicts such as civil wars and genocide, as in the Democratic Republic of the Congo and Rwanda; wars of independence, including those in the Balkans; and insurgencies against ruling governments, most notably in Afghanistan, have proven to be increasingly common. These conflicts have presented and continue to pose a significant challenge to international peace and security. Consequently they have garnered the attention of the international community, eliciting a range of responses from diplomatic condemnations to humanitarian or military interventions. Although Canada has engaged in these conflicts to varying degrees, they were often perceived as distant and isolated, with the instability they created posing only a limited threat to the security and national interests of the western democracies upon whom much of the burden of international intervention has traditionally rested.

The terrorist attacks of September 11, 2001 changed this attitude toward foreign conflicts, ending their perceived distance and establishing a link between instability in seemingly remote regions of the globe and potential violent attacks at home. With the protection of international security, stability and economic prosperity now tied to emerging threats, intervention is becoming less an option than an imperative, despite the conceptual and pragmatic challenges they pose to the legal framework created to govern the conduct of warfare. Canada has demonstrated its intention to be part of responsive international interventions, most notably by its participation in the United Nations-sanctioned, NATO-led mission to support the Government of the Islamic Republic of Afghanistan against an insurgency led by the Taliban.

International Humanitarian Law (IHL), primarily in the form of the Geneva Conventions, has developed over several decades to define the laws of war and to protect civilians based on the experiences of previous wars and conflicts. However, as this paper will explore, the complexity of modern conflict has raised challenges to the applicability of IHL in its current form. In particular, the issue of individuals detained by international forces during the course of military operations is at question, as IHL struggles to define their status and public scrutiny questions the ethics of their treatment.

In Canada, much of the media attention and public criticism of detainee policy has been rooted in allegations of abuse or torture of detainees at the hands of the Afghan security forces to whom detainees had been transferred by the Canadian Forces.[1] While allegations of abuse are a serious concern, these criticisms reflect only one aspect of the broader detainee issue. What they fail to adequately consider is the legal basis for the detention of individuals by the Canadian Forces, the legal status of these individuals, and the options available to Canada for their disposition following their detention. A more extensive examination of these points is required to better understand Canadian detainee policy and to assess whether it is effective in the context of the Afghan mission, in order to develop a legally defensible and effective detainee policy for future Canadian missions.

Through a survey of the international legal framework surrounding the detention of individuals in conflicts and a comparison of Canadian, American, Australian, British

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[1] David Akin, "Canada's Military Halted Detainee Transfers Several Times over Mistreatment Fears," http://www2.canada.com/components/print.aspx?id=2257099&sponsor=Xerox; Internet; accessed 27 February 2011. This reference is only one example of an article that outlines the main criticism of Canada's detainee policy in Afghanistan. Additional articles reporting criticisms of Canada's detainee policy can be found by searching any of the various online news sources including CBC (www.cbc.ca/news), CTV (www.ctv.ca/news) the National Post (www.thenationalpost.com) and the Toronto Star (www.thestar.com.).

and Dutch detainee policies and practices in Afghanistan, this paper will seek to demonstrate the challenges of applying IHL in its current form to contemporary conflicts and the impact this has on the practical application of detainee handling policies in operations. In Chapter 1, the international legal framework for the detention of individuals during conflicts will be outlined and examined. In Chapter 2, the Canadian Forces' detainee policy in Afghanistan will be reviewed, including its foundation in international law, and its effectiveness and shortcomings in the context of counter-insurgency operations. In Chapter 3, the Canadian policy in Afghanistan will be compared with the policies of its closest allies in Afghanistan. Finally, Chapter 4 will propose how the Canadian Forces should approach the establishment of detainee policy for potential future operations and provide recommendations on steps Canada should take in the development of that policy.

CHAPTER 1 – LEGAL FRAMEWORK FOR DETENTION

INTRODUCTION

The international legal framework supporting the detention of individuals in the course of military operations is a mixture of International Humanitarian Law (IHL), articulated in the Geneva Conventions and associated protocols, International Human Rights Law, International Criminal Law, and in some cases influenced by domestic law. Much of the existing legal framework, IHL in particular, has been in place for several decades and was developed based on the international community's experience of previous conflicts. It has been argued that these laws are no longer adequate to address the legal challenges of today's conflicts, and that the nature of intra-state conflicts, the way in which technology has changed how wars are fought, and the increasing willingness for the international community to intervene in what were previously seen as internal security matters have rendered these provisions obsolete and in need of an update.[2] Will Marshall of the Progressive Policy Institute has argued that a new Geneva Convention is required to address the threats posed to international security by terrorism and insurgencies conducted by various resistance groups.[3] Another view advanced by Charli Carpenter, Associate Professor at the University of Massachusetts-Amherst, is that protections provided to civilians by IHL and International Human Rights Law (IHRL) must be clarified and strengthened by the development of additional treaties to address

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[2] David Wippman and Matthew Evangelista, eds., *New Wars, New Laws?: Applying the Laws of War in 21st Century Conflicts* (Ardsley, NY: Transnational Publishers Inc, 2005), 1.

[3] Will Marshall, "Rewrite the Rules of War," *Foreign Policy* November 2010, 76. The author also expresses that having IHL address the issue of terrorist and insurgents would resolve the "neither soldier nor criminal" dilemma that is faced by armed forces in conflict with such groups, and would also "stigmatize the routine use of violence against civilians" and provide the legal basis to indict and prosecute those responsible for planning and conducting such violence.

the increased threat to civilians in contemporary conflicts, rather than just revising IHL to allow more scope to combat insurgents.[4] In short there is no consensus on what action may be required, or even that changes to the extant legal framework are required at all. The nature of intra-state conflict in its current form does pose some interesting legal questions, not the least of which are those surrounding the status, treatment, and eventual disposition of detainees taken into custody in the course of conflicts, which is the subject of this paper.

INTERNATIONAL HUMANITARIAN LAW

The principal sources of IHL relevant to the detention and treatment of persons in custody of an armed force are the Geneva Conventions of 1949 and the Additional Protocols to these conventions agreed upon in 1977. The Third Protocol to the Geneva Convention (GC3) deals with issues related to the treatment of prisoners of war (POWs), while the Fourth Protocol (GC4) governs protection of civilians in times of war or conflict. The two Additional Protocols were developed to expand on the provisions of the Geneva Conventions with Additional Protocol I (AP1) dealing with issues relating to the protection of victims of international conflicts, and Additional Protocol II (AP2) addressing the protection of persons during non-international armed conflicts.[5] The application of AP1 and AP2 is somewhat uneven however as some prominent states, including the United States and Israel, are not signatories to these protocols while others,

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[4] Charli Carpenter, "Fighting the Laws of War: Protecting Civilians in Asymmetric Conflict," *Foreign Affairs* 90, no. 2 (2011), 146.

[5] Canada. Office of the Judge Advocate General., "Geneva Convention (III) Relative to the Treatment of Prisoners of War - 1949," in *Collection of Documents on the Law of Armed Conflict, 2005 Edition*, ed. Directorate of Law Training (Ottawa: DND, 2005), 95-117. Geneva Convention IV, Additional Protocol I, and Additional Protocol II are also contained in this collection of documents.

such as Canada, signed the conventions with a number of stated reservations.[6] The overall intent of IHL is to govern how wars are fought so as to limit the inevitable human suffering experienced in any armed conflict.[7] It does this in part by clearly delineating between lawful and legitimate armed parties to the conflict, termed combatants, and civilians, while providing protections to both.[8] By defining individuals this way, and setting out conditions under which a person could be considered either a combatant or a civilian, IHL seeks to differentiate between the two groups and make it easier for combatants to distinguish civilians from the adversary in order to avoid unnecessary targeting of civilians and maximize their safety during conflict.[9]

Combatants

Article 4 of GC3 specifically defines combatants as members of the armed forces of a state that is party to the conflict, including militias and volunteer corps that are part of that armed force as well as other organized militias, volunteer corps, and resistance movements as long as they meet specific criteria. These specific criteria are outlined in Article 4(2) as:

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[6] Canada. 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," in *Collection of Documents on the Law of Armed Conflict, 2005 Edition*, ed. Directorate of Law Training (Ottawa: DND, 2005), 139. Although AP1 was signed by Canada on 12 December 1977, the convention was not ratified until November 20 1990. In signing on to AP1, Canada expressed reservations with Articles 11, 38, 39, 44, 51, 52, 53, 56, 57, 58, 62, 78, 86, 90, and 96 including interpretations of Article 44 governing combatant status and Articles 51-53 governing protections to civilians and civilian objects. This number of reservations and the delay in ratification is indicative of the somewhat contentious nature of the Additional Protocols.

[7] Michael Byers, *War Law: Understanding International Law and Armed Conflict* (Vancouver, BC: Douglas & McIntyre, 2005), 115.

[8] *Ibid*., 9.

[9] *Ibid*., 118.

(a) that of being commanded by a person responsible for his subordinates;
(b) that of having a fixed distinctive sign recognizable at a distance;
(c) that of carrying weapons openly;
(d) that of conducting their operations in accordance with the laws and customs of war.[10]

While these criteria are fairly clear and would seem to be easily met by members of a state armed force taking part in the conflict, there are times when these criteria may be violated in the normal and lawful conduct of war by legitimate combatants. Article 44 of AP1 addresses these situations and expands on the application of the combatant criteria outlined in GC3. Paragraph 3 of Article 44 confirms that ". . . combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack . . ." but recognizes that sometimes this may not be possible.[11] In this case an individual would retain their combatant status as long as they carry arms openly:

(a) during each military engagement; and
(b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is about to participate.[12]

AP1 further reinforces the requirement for combatants to distinguish themselves from civilians in Article 37 which prohibits acts of perfidy, including ". . . the feigning of civilian, non-combatant status. . ." in the course of operations in order to avoid being

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[10] Canada. Office of the Judge Advocate General., *Geneva Convention (III) Relative to the Treatment of Prisoners of War - 1949*, 95.

[11] Canada. 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," in *Collection of Documents on the Law of Armed Conflict, 2005 Edition*, ed. Directorate of Law Training (Ottawa: DND, 2005), 148.

[12] *Ibid*., 148.

targeted or engaged by adversary forces.[13] The definition and criteria for establishing an individual as a combatant are important as Article 4 of GC3 specifically defines POWs as combatants that "have fallen into the power of the enemy . . ."[14] With status as a POW come a number of protections and guarantees, including the right to humane treatment and respect for their person, spelled out in detail in subsequent sections of GC3; however the convention also provides that the capturing party may detain a POW until ". . . after the cessation of active hostilities"[15] after which they are to be returned to their home state as soon as is practical and without prejudice. In short, an individual that meets the definition of a combatant and is captured by the adversary power is a POW that may be detained until the end of hostilities, but while in custody is entitled to a number of rights and protections.

In cases where an individual is captured committing a belligerent act in the course of hostilities, and there is doubt regarding their status as a legitimate combatant as described in Article 4 of GC3, IHL gives the captured individual the benefit of the doubt. Article 5 of GC3 provides that such an individual would be granted POW status ". . . until such time as their status has been determined by a competent tribunal."[16] GC3 does not provide a definition of what constitutes a competent tribunal however, and such a tribunal's composition and procedures is left to the detaining power to clarify. The lack of a clear definition for such a tribunal in IHL and the application of the provisions of

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[13] *Ibid*., 147.

[14] Canada. Office of the Judge Advocate General., *Geneva Convention (III) Relative to the Treatment of Prisoners of War - 1949*, 95.

[15] *Ibid*., 110.

[16] *Ibid*., 96.

Article 5 have proven problematic in recent times and have been the subject of debate.[17] Further examination of this issue in the context of the conflict in Afghanistan is contained in Chapters 2 and 3.

A particularly important protection provided to POWs is the concept of "combatant privilege."[18] The foundation for this concept is found in Article 99 of GC3 which states "[n]o prisoner of war may be tried or sentenced for an act which is not forbidden by the law of the Detaining Power or by international law, in force at the time the said act was committed."[19] In other words, combatant privilege prevents POWs from being prosecuted and imprisoned for acts of violence committed in the course of hostilities, provided these acts did not violate the laws of war. For example, a POW could not be tried for murder for killing an enemy soldier prior to their capture provided they did so in a manner not prohibited by IHL. This concept provides legitimacy to violent acts, including the killing and wounding of other human beings, when they are performed by an individual recognized in IHL as a legitimate combatant. Implicit in this concept, however, is the idea that violent acts performed by an individual not entitled to combatant status as defined in IHL are not legitimate and are thus subject to prosecution. In effect, violence in war is either licit or illicit depending on the status of the individual

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[17] "Decision Not to Regard Persons Detained in Afghanistan as POWs," *The American Journal of International Law* 96, no. 2 (Apr., 2002), 478, http://www.jstor.org/stable/2693945. There was considerable debate within the Bush Administration in late 2001 and early 2002 regarding the requirement to conduct a tribunal under Article 5 to determine if suspected members of al-Qaeda or the Taliban were entitled to POW status. The eventual position of the US was they would not be entitled to tribunals. This was supported by a legal opinion provided to President Bush by Assistant Attorney General Bybee in February 2002. This issue will be discussed in greater detail in Chapter 3.

[18] Craig Forcese, *National Security Law: Canadian Practice in International Perspective* (Toronto: Irwin Law Inc., 2008), 533.

[19] Canada. Office of the Judge Advocate General., *Geneva Convention (III) Relative to the Treatment of Prisoners of War - 1949*, 108.

performing, or responsible for, the act.[20] This critical point will be the subject of greater examination later in this chapter.

As mentioned previously, combatant privilege only extends to those acts not prohibited by IHL. A combatant who has conducted acts that violate IHL is subject to prosecution for those acts as war crimes, either following the cessation of the conflict or if he is captured by the adversary and becomes a POW.[21] If the adversary power decides to prosecute a POW for war crimes prior to the end of hostilities and while the offender is still in their custody, GC3 provides that such a proceeding must be fair and identical in process to that which the adversary power's soldiers would be subject to in similar circumstances.[22] It is worth noting that a combatant that acts in a manner not in accordance with the provisions of IHL is held individually responsible for their crimes, and this action has no effect on a fellow soldier's entitlement to combatant status as defined by Article 4(2) of GC3, specifically the requirement for a force to conduct itself in accordance with the laws and customs of war. Only an armed force that systematically and repeatedly demonstrates its disregard for the rules of war could be considered to fall outside of the requirements of Article 4(2) and therefore give up its entitlement to combatant status for its members.

The right to humane and dignified treatment, the concept of combatant privilege, and the guarantee of repatriation and release without prejudice following hostilities are

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[20] Ben Saul, *Defining Terrorism in International Law* (New York, NY: Oxford University Press, 2006), 293-294.

[21] Antonio Cassese, *International Criminal Law* (New York, NY: Oxford University Press, 2003), 47.

[22] Canada. Office of the Judge Advocate General., *Geneva Convention (III) Relative to the Treatment of Prisoners of War - 1949*, 108-109.

key protections provided to combatants who are captured and become POWs. IHL provides similar protections for civilians taken into custody during armed conflicts.

Civilians or Non-Combatants

While the definition of a combatant in IHL is precise and comprehensive, the definition of a civilian, or non-combatant, is less so. Both GC3 and GC4 refer to "persons taking no active part in hostilities" but provide little detail beyond this phrase as to what is specifically meant to define a civilian.[23] Article 50 of AP1 proposes to define a civilian as follows:

> A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person should be considered to be a civilian.[24]

In simple language, Article 50 defines a civilian as an individual who is not a combatant as defined by IHL. This imprecise provision, determining what something is by what it is not, has proven problematic. In particular, the subject of what actions constitute taking direct part in hostilities, and therefore negate the protections provided to civilians, has been the subject of considerable interpretation and is a point that will be discussed in more detail later in this chapter. By defining civilians in this way IHL creates two broad classes of individuals: combatants that meet the criteria described in the previous section and whose protections are outlined in GC3, and civilians whose protections are outlined

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[23] *Ibid*., 96 and Canada. Office of the Judge Advocate General., "Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War - 1949," in *Collection of Documents on the Law of Armed Conflict, 2005 Edition*, ed. Directorate of Law Training (Ottawa: DND, 2005), 118.

[24] Canada. 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*, 149.

in GC4. Although AP1 does introduce additional classes of individual, specifically spies and mercenaries as defined in Articles 46 and 47 respectively, the associated definitions are restrictive enough that they would apply to relatively small and clearly identifiable groups.

IHL provides a number of protections for those individuals classified as civilians, which extend to all civilians in an area of conflict regardless of race, nationality, religion or political opinion. The most fundamental of these protections is that civilians may not be directly targeted in the course of operations, and parties to the conflict are required to do everything in their power to avoid civilians coming to harm as a result of their operations. This does not mean that civilians cannot come to harm or be killed legally by a combatant in the course of hostilities. The death of innocent civilians is permissible under IHL so long as this is a result of collateral damage associated with an attack on a legitimate military target, and the resulting civilians deaths are not out of proportion with the military advantage gained by the attack.[25] In addition to the protection from being attacked or targeted directly, civilians are afforded protections from the following actions as outlined in Article 3(1) of GC4 at all times:

> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
> (b) taking of hostages;
> (c) outrages on personal dignity, in particular humiliation and degrading treatment;
> (d) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.[26]

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[25] David Cole, ed., *The Torture Memos: Rationalizing the Unthinkable* (New York, NY: The New Press, 2009), 7. Article 51 of Additional Protocol I contains this provision.

[26] Canada. Office of the Judge Advocate General., *Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War - 1949*, 118. The Geneva Conventions and associated Additional Protocols can also be obtained from the website of the International Committee of the Red

Civilians are also afforded protection from unwarranted or indiscriminate detention, and in the case where detention may be warranted the time for which they may remain in custody is more limited than is the case for POWs. Civilians may be detained by one of the armed parties to the conflict if the individual is definitely suspected of, or engaged in, actions related to the conflict, in which case they must be informed of the reasons for their detention and then made subject to judicial proceedings. If a civilian is detained for any other reason, or is no longer suspected of taking part in actions related to the conflict, they must be released from custody with the minimum possible delay.[27]

While civilians cannot be targeted with impunity like combatants and cannot be held in custody until the end of hostilities, their protections are not without limits. As they lack the legal status of combatants, the concept of combatant privilege does not apply to civilians and consequently there is no immunity from prosecution for violent acts a civilian may commit during periods of conflict as in times of peace. Nor are the other protections afforded civilians inviolable irrespective of their actions. Article 51 of AP1 states that civilians are entitled to the protections delineated in GC4 in all circumstances ". . . unless and for such time as they take a direct part in hostilities."[28] Should a civilian, or any other individual who does not meet the criteria for a combatant, take up arms and take part in a hostile act against an adversary armed force or another civilian, they could be directly targeted or, if detained, be prosecuted for their actions.

Cross (ICRC) at http://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/index.jsp. The ICRC is the internationally recognized custodian of IHL.

[27] Canada. 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*, 155.

[28] *Ibid*., 150.

However this is a relatively simplistic example where a single individual performs a single overtly hostile act that is easily identifiable as such. A more complicated situation is one that has been witnessed several times in the course of contemporary intra-state conflicts, particularly insurgencies, where a group of individuals commits a series of hostile acts over an extended period of time, but the group does not meet the criteria of a combatant armed force. In these circumstances it is not as clear whether an individual is a combatant or a civilian and under what circumstances these designations would apply. This issue and the challenges it poses to IHL will be explored in the following section.

Unprivileged Belligerents

Some of the most difficult contemporary conflicts, such as insurgencies, are characterized by the presence of one or more non-state armed groups that do not wear uniforms and intentionally mingle with the civilian population as part of their tactics and common operating procedures.[29] While the criteria for qualification as a combatant are well established in IHL, as is the concept that if an individual is not a combatant they are a civilian, IHL is less clear on the status of individuals who deliberately and consistently engage in hostilities but do not meet the combatant criteria, and there is no recognized term in IHL to describe such groups. Given the prevalence of these types of groups in contemporary conflicts and lacking recognition for them in IHL, several terms have been proposed to characterize their status including unlawful participants, unlawful

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[29] Ryan Goodman and Derek Jinks, "The ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Law: An Introduction to the Forum," http://www.law.nyu.edu/ecm_dvl1/groups/public/@nyu_law_website_journals_journal_of_international_law_and_politics/documents/documents/ecm_pro_065929.pdf; Internet; accessed 21 January 2011.

combatants, and unlawful belligerents.[30] A term that appears more commonly in related literature, and the one that will be used in this paper, is "unprivileged belligerent".[31] This term is not a recognized concept in IHL. It implies that identified individuals do not meet the standard of combatants, but are also not civilians given their participation in hostilities. This is not an entirely new concept in international law as some have suggested, as categories of non-IHL recognized combatants such as spies and mercenaries are recognized in AP1.[32] In determining what would constitute labelling an individual or group as unprivileged belligerents (UPBs) there are two conditions therefore that must be examined: whether they meet the criteria of a combatant or not, and whether they are taking direct part in hostilities. Both conditions are subject to interpretation which in part explains why the concept of UPBs remains controversial.[33]

Before a group could be labelled as UPBs, their status as combatants must be examined. Article 4 of GC3 and Articles 43 and 44 of AP1 outline the criteria that must be met to be considered a combatant. Those groups typically labelled as UPBs violate at least one, and often more, of these criteria. The first criterion listed in Article 4 is the

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[30] Newton, *Unlawful Belligerency After September 11: History Revisited and Law Revised*, 78.

[31] Forcese, *National Security Law: Canadian Practice in International Perspective*, 530. Anthony Dworkin also uses the term UPB and describes it as "individuals not entitled to engage in hostilities [as combatants that] nevertheless join in the conflict". (Anthony Dworkin, "Military Necessity and Due Process: The Place of Human Rights in the War on Terror," in *New Wars, New Laws? Applying the Laws of War in 21st Century Conflicts*, eds. David Wippman and Mattew Evangelista (Ardsley, NY: Transnational Publishers Inc., 2005), 62.) Michael Newton uses the term and describes them as "persons who have no legal right to wage war" but do so anyway. (Newton, *Unlawful Belligerency After September 11: History Revisited and Law Revised*, 76).

[32] Newton, *Unlawful Belligerency After September 11: History Revisited and Law Revised*, 85.

[33] "The Public Committee Against Torture in Israel v. the Government of Israel (2006)," http://eylon1.court.gov.il/files_eng/02/690/007/a34/02007690.a34.pdf; Internet; accessed 24 January 2011. Much of the discussion in this case surrounded the status of individuals as combatants or not, particularly regarding how the phrases "for such time" and "taking direct part" affect their legal status.

requirement for the group to fall under command of an individual that is responsible for his subordinates. Article 43 of AP1 goes further by stating that such a group must be ". . . subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict."[34] Implicit in this statement is that it is not enough to simply have an established chain of command to meet the combatant requirement, but that this chain of command must monitor and control its subordinates, and take action when they violate the rules of warfare. This is something many insurgent groups that have been labelled as UPBs lack to varying degrees. By their nature insurgencies have a fluid and decentralized chain of command, and it is not evident in all cases that there is a functioning disciplinary system beyond the personal efforts of a local commander. It is also not clear if steps to ensure conformity to the laws and customs of war are taken by the leadership of insurgent groups, such as the Taliban, given the frequent violations demonstrated by them.

The second and third criteria provided in Article 4 are that combatants must project a distinctive emblem or sign recognizable at a distance and carry weapons openly. AP1 relaxed these criteria to the requirement to carry weapons openly and visibly when conducting hostile operations or when moving into position to do so, however even this relaxed requirement has been subject of discussion. The important component of this requirement is not necessarily the wearing of distinctive uniforms or the carrying of weapons, but ". . . whether or not belligerent forces recognize members of their own force, and those they are fighting against, and that members of parties to a conflict do not

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[34] Canada. 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*, 148.

confuse each other with civilians. . . ."[35] This idea speaks to the central tenet of IHL; the need to distinguish combatant from civilian in order to minimize civilian deaths and suffering. However the tactics pursued by many contemporary insurgent groups, such as actively hiding among the civilian population and maintaining the façade of being a non-combatant up to the very moment an attack is launched, would seem to violate even this less stringent criterion.

The final criterion contained in Article 4 is the requirement for a group to conduct its operations in accordance with the laws and customs of war. For a group to violate this requirement it must demonstrate consistently through its actions that it is willing to violate the laws of war. Here also a number of contemporary insurgent groups, such as the Taliban and Hamas, fail to meet the IHL combatant criteria. They routinely violate the prohibition against perfidy contained in Article 37 of AP1 by utilizing the tactic of posing as civilians in order to avoid detection and attack. In addition, many use terror against the civilian population as a key component of their efforts in order to compel material and financial support, or to spread terror in hopes of undermining the reputation of the forces they are fighting against, which is a clear violation of the prohibition of such tactics detailed in Article 51 of AP1 and Article 13 of AP2. The danger such groups pose to the safety of civilians through acts of perfidy and violence in defiance of the provisions of IHL supports the argument for their recognition as UPBs and not as combatants.

It has been established that there are contemporary examples of armed groups, such as insurgencies, which do not meet the criteria for combatant status provided in IHL. Given that this is the case, Articles 50 and 51 would define these groups as civilians, or

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[35] Falk, *The Global War on Terror and the Detention Debate: The Applicability of Geneva Convention III*, 48.

non-combatants, unless and until they are taking direct part in hostilities. The determination of what taking direct part in hostilities entails, and what it does not, is not clearly defined in IHL and attempts to clarify the issue have been the source of great debate.

Debate on this issue is generally focussed on how widely or narrowly the concept of taking direct part in hostilities should be interpreted. One school of thought would see the definition extended to include such activities as planning attacks and coordinating logistical efforts, while the other would see the definition limited only to periods when individuals were openly bearing arms or in the process of preparing to do so.[36] These two interpretations and their application have a considerable impact on the concept of UPBs and in particular when this definition is or is not applicable.

The first school that advocates a broader interpretation of taking direct part in hostilities generally argues that individuals who repeatedly conduct hostile acts, with periods between these acts during which they assume the mantle of civilians, should not enjoy the protection of civilians during these breaks. For example, an individual who fights by night and pretends to be a farmer by day is not a civilian and is not entitled to the protection afforded one.[37] Central to this idea is that the act of participation is enduring, and the times in between overt acts are simply rest periods during which the

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[36] This debate is at the heart of the case *The Public Committee Against Torture in Israel v. the Government of Israel (2006)*. The Israeli government's broad interpretation of what constitutes taking part in hostilities is generally shared with writers such as Marshall (Will Marshall, "Rewrite the Rules of War," *Foreign Policy* November (2010), 76) who would see IHL modified to assist governments and militaries in fighting insurgents, while the Public Committee's desire for a narrow definition is supported by those like Carpenter (Charli Carpenter, "Fighting the Laws of War: Protecting Civilians in Asymmetric Conflict," *Foreign Affairs* 90, no. 2 (2011), 146) who would rather emphasize enhancing protection of civilians in IHL.

[37] Byers, *War Law: Understanding International Law and Armed Conflict*, 118.

individual is in fact preparing to conduct another attack. By this argument, since the participation in hostilities is enduring, the loss of protection for civilian status is enduring as well and the individual could be targeted at any time. This was the essence of the argument advanced by the Israeli government in the case of *The Public Committee against Torture in Israel v. The Government of Israel* heard by the Israeli Supreme Court.[38] The Israeli government argued that terrorists constitute an armed group that take continuous part in hostilities against Israel, and are therefore legitimate targets as long as the hostilities continue. In its findings the Israeli Supreme Court did not accept this argument, but did extend those acts considered as taking direct part in hostilities to include not only committing the actual act, but acts of facilitation including planning and directing the act to occur. In addition, the Court found that individuals who join an organization and who commit a chain of attacks or activities lose their civilian protection as long as participation in the chain of acts continues.[39] This would in effect mean that the insurgent who farmed by day and fought by night could be targeted in the day while working his fields, so long as his pattern of night time hostile activity continued. This would seem to offer such individuals even less protection from attack than that provided to legitimate combatants under IHL, who are protected from being attacked during periods when they are *hors de combat* such as in hospital or on leave out of the theatre of conflict. This is a very broad interpretation of direct participation in hostilities and is one that has not found widespread support in the international community.

A narrower interpretation is advanced by the International Committee of the Red Cross (ICRC) in its *Interpretive Guidance on the Notion of Direct Participation in*

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[38] *The Public Committee Against Torture in Israel v. the Government of Israel (2006).*

[39] *Ibid*.

Hostilities under International Humanitarian Law.[40] This document, the product of six years of study and consultation with international law and military experts between 2003 and 2008, sought to provide greater clarity on the question of what constituted direct participation in hostilities, while preserving and advancing the protection of civilians in areas of conflict. Among the ten recommendations contained in the ICRC report are several important points regarding direct participation in hostilities worth noting. The report proposed that in order for an act to constitute direct participation in hostilities it had to have the following elements:

1. The act must be likely to adversely affect the military operation or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm), and
2. there must be a direct casual link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation), and
3. the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).[41]

In essence, the report recommends that the understanding of direct participation in hostilities be restricted to those acts that are likely to directly cause harm to a specific party to the conflict. Activities such as planning operations and coordinating activities do not meet the required threshold. The ICRC report also recommends that measures taken in preparation for a specific direct hostile act, including movement to and from the site of the attack, form a part of the act itself.[42] Applied to the example used previously, the

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[40] "The ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Law," http://www.aco.nato.int/resources/20/Legal%20Conference/ICRC_002_0990.pdf; Internet; accessed 16 February 2011.

[41] *Ibid*., 16-17.

[42] *Ibid*., 17.

ICRC report would determine that the farmer that fights at night would be taking part in direct hostilities while conducting an attack and moving to and from his farm, but once he had returned and commenced his day time farming routine he would be once again considered a civilian and would benefit from all of the protections offered to civilians under IHL.

This is exactly the problem faced today in many contemporary conflicts, where insurgents act as civilians and hide behind IHL protections when it is convenient. The ICRC report at least obliquely recognizes this problem when it makes one additional recommendation that would appear to support the concept of UPBs. It recommends that groups that "constitute the armed forces of a non-State party to the conflict and consist of individuals whose continuous function is to take direct part in hostilities"[43] are not considered civilians. This would seem to describe UPBs and give some legitimacy to the concept. However, in the foreword to the report, the ICRC states its intent to comment on the issue of direct participation in hostilities only, and not on the consequences of direct participation once an individual falls into the custody of the adversary force.[44] So while the report recognizes the existence of non-state armed groups that are party to a conflict, they do not comment on whether these groups can be considered as lawful combatants as defined by IHL and therefore whether they are entitled to be treated as POWs once captured, or if they are better identified as UPBs. Finally, it is important to put the ICRC report in context. While it is the result of several years of effort and consultation, it is only interpretative guidance and is not a legally binding text that nations are bound to follow. Nevertheless, the considerable reputation of the ICRC as a

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[43] *Ibid*., 16.

[44] *Ibid*., 7.

neutral international organization and the consultative efforts to which it went in producing the report, impart significant legitimacy to its recommendations and ensure that states will give them considerable attention.

Having examined the issue of combatant status and direct participation in hostilities, a clearer definition of what constitutes a UPB appears. A UPB is an individual or group who employs violence that amounts to taking direct part in hostilities without the affirmative legal authority to do so imparted upon them by meeting the criteria for combatant status under IHL. Defined this way, it is clear that UPBs do violate the spirit of IHL. They actively attempt to blur the distinction between combatants and civilians, violating a core tenet of IHL, and seek to take advantage of the protections offered to both. It is these often successful efforts to exploit loopholes in IHL that leads to the question of whether IHL is still entirely applicable to contemporary conflicts or is in need of an update.

Given that the concept of UPBs is not recognized in IHL it should not be surprising that there are no specific articles in IHL governing their rights and protections once they are in custody of an adversary force. However, some implicit conclusions can be drawn from IHL as to the applicable treatment of UPBs post capture. Articles 46 and 47 of AP1 deny POW status to spies and mercenaries and it is logical that this would apply to other belligerents that do not have combatant status.[45] While UPBs may not have POW status once in the custody of an adversary force, there are a number of guarantees for their proper treatment provided by IHL. The prohibitions against inhumane treatment outlined in Common Article 3 of GC3 and reinforced in Article 4 of

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[45] Forcese, *National Security Law: Canadian Practice in International Perspective*, 530.

AP2 are applicable to all persons regardless of their status as combatants or not.[46] The protections amount not only to humane treatment, but freedom from torture, corporal punishment, outrages against personal dignity, and any threats of abuse or inhumane treatment. While UPBs are therefore provided protection against inhumane treatment while in custody similar to that extended to POWs, their lack of status as such means that the provisions governing length of detention and combatant privilege are different.

There is no clear statement in IHL governing how long those without POW status may be retained in custody, and this is particularly true in the case of non-international conflicts.[47] Article 75 of AP1 states that "[e]xcept in cases of arrest or detention for penal offenses [non POWs] shall be released with the minimum delay possible, and in any event as soon as the circumstances justifying the arrest, detention, or internment have ceased to exist," a definition that is open to interpretation on a number of points, not the least of which is who determines that the conditions are right for release from custody.[48] In other words a UPB could be retained in custody pending prosecution for an offence and for any subsequent period of incarceration following a conviction, or released as soon as it is determined that a prosecution will not take place. Another interpretation of this article is that detention may continue until the circumstances leading to it cease to exist, which could be interpreted to mean the end of hostilities. This again is problematic in the

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[46] Canada. Office of the Judge Advocate General., *Geneva Convention (III) Relative to the Treatment of Prisoners of War - 1949*, 95. and Canada. Office of the Judge Advocate General., "Protocol Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of Non-International Conflicts (Protocol II) - 1977," in *Collection of Documents on the Law of Armed Conflict, 2005 Edition*, ed. Directorate of Law Training (Ottawa: DND, 2005), 166-167.

[47] Forcese, *National Security Law: Canadian Practice in International Perspective*, 535.

[48] Canada. 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*, 155.

case of contemporary conflicts, such as insurgencies, which have no clearly identifiable end and therefore this interpretation could be used to justify indefinite detention. Different interpretations of how long a UPB may be detained continue to be a source of discussion, and prolonged detention of detainees without any prosecution taking place remains one of the significant points of contention in current debates.

As is implied by the wording of Article 75 of AP1, UPBs can be prosecuted for their actions and do not enjoy combatant privilege accorded POWs. "Persons who employ violence amounting to the conduct of hostilities governed by the law of war do so unlawfully unless they can find affirmative legal authority for their acts under international law" and as individuals that do not meet the criteria of combatants, UPBs have no affirmative legal authority to employ violence.[49] IHL is not clear on the exact form that the prosecution of a UPB should take, although Article 6 of AP2 lays out the rights of the accused to a fair and open trial. What remains unclear is who has the authority to conduct the prosecution, the detaining power or the government of the state in which the offence took place. Article 3 of GC3 only specifies that any trial be conducted by a regularly constituted court, and therefore implicitly not by a court that is constituted and convened solely for the purpose of prosecuting UPBs.

A final important element of UPB treatment given many contemporary criticisms and concerns is the transfer of a detained individual from the detaining power to a third party.[50] The transfer of detained individuals to a third party is permitted and governed by

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[49] Newton, *Unlawful Belligerency After September 11: History Revisited and Law Revised*, 76.

[50] Naureen Shah, "Don't Deliver Afghans to Torture on a Promise Alone," www.theage.com.au/opinion/dont-deliver-afghans-to-torture-on-a-promise-alone-20110107-19ien.html; Internet; accessed 10 April 2011. While this article's criticisms are primarily directed at Australia, Canada, the UK, and the US are also criticized for turning over detainees to another authority, the Afghan security

Article 12 of GC3.[51] This article outlines two specific responsibilities on the transferring power: it must ensure that the receiving power is a party to the Geneva Conventions and has every intention of applying the protections stipulated by them regarding treatment of a detained individual, and if the gaining power fails to carry out the provisions of the convention, the transferring power must take measures to correct the situation or request the return of the detainee. It is this aspect of the treatment after capture of a detainee that has come under the most criticism and scrutiny in Canada as will be discussed in Chapter 2.

Given the uncertainty and lack of legal clarity surrounding the concept of UPBs, it would seem simpler for states engaged in a conflict to recognize these groups as legitimate combatants and consequently confer POW status upon them when captured. There are several reasons why this is not done in the context of contemporary conflicts of a non-international nature. The first is that conferring combatant status on UPBs lends a perception of legitimacy to these groups on par with armed forces which, given many of the typical tactics employed by UPBs described previously, many states such as Canada and the United States are loath to do. A second reason is the desire to prosecute UPBs for any unlawful violence or hostile acts, which would not be possible given the combatant privilege conferred upon POWs. The final and overriding reason is that to do so would undermine the underlying intent of IHL. Recognizing armed groups as combatants when they do not meet the criteria would set a precedent which would be likely to encourage other groups to undertake tactics not in accordance with IHL, safe in

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services, and not doing enough to ensure their proper treatment. This, as noted in the Introduction chapter, is a common criticism.

[51] Canada. Office of the Judge Advocate General., *Geneva Convention (III) Relative to the Treatment of Prisoners of War - 1949*, 97.

the knowledge that they would enjoy POW status if they were to be captured. This would only exacerbate the problem of distinguishing combatants from civilians in the course of hostilities and further undermine the safety of civilians on the battlefield.

IHL provides a substantial legal framework for the status of individuals in conflict, their protections from attack, and the applicable standards of treatment should they be captured and fall into the control of an adversary armed force. What it does not do is address the issue of UPBs and the underlying threat they pose to the protection of civilians in conflict. The failure of IHL to provide a framework to address the challenges presented by UPBs and their actions translates into a number of problems in the practical application of a detainee policy in operations.

However it is not the only international law that is applicable in the case of detention. While IHL is specifically established to govern the actions of parties to armed conflict, there is increasing interest within the international community to extend the applicability of International Human Rights Law to armed conflicts as well. The following section will address the applicability of some of these treaties and conventions to detention of individuals in armed conflict and their treatment while in custody

INTERNATIONAL HUMAN RIGHTS LAW

There are two principal conventions among the many treaties that make up the body of International Human Rights Law (IHRL) that are applicable to the issue of detaining individuals. They are the International Covenant on Civil and Political Rights (ICCPR) of 1966,[52] and the Convention against Torture and other Cruel, Inhuman, and

[52] Office of the United Nations High Commissioner for Human Rights, "International Covenant on Civil and Political Rights," http://www2.ohchr.org/english/law/pdf/iccpr.pdf; Internet; accessed 21 February 2011.

Degrading Treatment or Punishment (CAT) of 1984.[53] Both of these treaties are considered to have *jus cogens* status and as such are considered customary international law that governs all states regardless of whether or not they are signatories to the conventions.

The overriding intent of the ICCPR is to recognize inalienable human rights and the advancement of freedom, justice and peace throughout the world. The first three parts of the ICCPR are concerned with defining those inalienable rights and the duties of states that are party to the convention to promote them, while the fourth and final part concerns the establishment of a Human Rights Committee. The three articles of the convention that are applicable to detention of individuals are Article 7, which states that no one shall be subjected to torture or cruel and degrading treatment; Article 9 which deals with a prohibition on arbitrary detention and the right to a fair and speedy trial; and Article 10 which states that all persons deprived of liberty will be treated with dignity and respect. These articles complement rather than replace the provisions of IHL that require humane treatment and the right to a fair trial for all those taken into custody in the course of armed conflict. In fact, the ICCPR implicitly recognizes the primacy of IHL in situations of armed conflict by acknowledging in Article 4 that "[i]n time of public emergency which threatens the life of the nation . . ."[54] states may take action to derogate from their obligations under the convention. In times of war states may opt out of specific portions of the convention, however they still remain subject to the statutes of

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[53] Office of the United Nations High Commissioner for Human Rights, "Convention Against Torture and Other Cruel, Inhuman, Or Degrading Treatment Or Punishment," http://www2.ohchr.org/english/law/pdf/cat.pdf; Internet; accessed 21 February 2011.

[54] Office of the United Nations High Commissioner for Human Rights, *International Covenant on Civil and Political Rights*. Specifically Article 4 of the treaty is applicable.

IHL. In truth, it is arguable whether a state engaged in a non-international conflict in a peace support or peace making role is in a situation where its very existence as a nation is threatened, and therefore derogation under these circumstances is unlikely to be justifiable. However one portion of the ICCPR from which states may not derogate under any circumstances is Article 7 prohibiting torture and inhumane treatment, which is enhanced by the CAT.

The intent of the CAT is to further define exactly what acts constitute torture and to reinforce that nations may not derogate from their responsibilities to prevent it, regardless of the circumstances. Article 2 of the CAT states that "[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political in stability [*sic*] or any other public emergency, may be invoked as a justification of torture."[55] This means that states that are signatories to the convention accept its applicability both in times of peace and in times of conflict, effectively augmenting the prohibitions under IHL against cruel and degrading treatment and reinforcing the *jus cogens* status of this treaty. The CAT also states that an order to commit torture, whether from a superior officer or public authority of any rank, is unlawful and cannot be used as a justification for the act. A final provision of the CAT which is applicable to the issue of detention is the prohibition in Article 3 on expelling or returning an individual to another state where there is an expectation that they would be subjected to torture. This could be interpreted to also apply to the requirement not to transfer an individual detained in the course of armed conflict to another party where they are likely to be tortured. This article would seem to complement the provisions of IHL where the transferring party must

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[55] Office of the United Nations High Commissioner for Human Rights, *Convention Against Torture and Other Cruel, Inhuman, Or Degrading Treatment Or Punishment*. Specifically Article 2 of the treaty is applicable.

ensure that the gaining party will adhere to the conventions guaranteeing protections to the detained individual.

The net effect of these two conventions under IHRL on states that are parties to them is the further entrenchment of the rights of any detained person to humane treatment free from torture and to a speedy and fair judicial process. Torture is prohibited in all circumstances, regardless of the status of the detained person as a combatant, civilian, or UPB.

CANADIAN DOMESTIC LAW

Although IHL and, to a lesser extent IHRL form a substantial framework of law guiding the detention of individuals during conflicts, its interpretation and implementation are nevertheless shaped to some extent by the domestic laws governing detention of the detaining state. Domestic law provides not just the legal approach to detentions and any reduction of liberty within a given state, but also reflects the customary concept of justice of the particular society. This remains true in the case of Canada and its approach to detainee policy when participating in conflicts.

The bulk of domestic Canadian law governing the taking of an individual into custody and deprivation of liberty exists in the context of criminal law, and gives the power to arrest and detain to duly appointed peace officers, typically police forces. This aspect of detention is directed towards those individuals who are suspected of having committed a crime by the state, and therefore is punitive in nature. Recently however there have been amendments to some domestic laws, such as the *Immigration and*

Refugee Protection Act,[56] and the introduction of new legislation in the form of the *Anti-Terrorism Act,*[57] that introduce measures that allow for detention of individuals who, in the opinion of the state, pose a risk to national security. The detentions envisioned by these acts of legislation are preventative in nature, and are based not on what an individual may have done, but on what they potentially might do. Preventative detention remains a point of debate in Canada given the need to properly balance individual rights to liberty and protection against detention without lawful justification that are fundamental in a free and democratic society, against the responsibility of government to guard its citizens against threats of violence and threats likely to undermine the state. Many Canadian lawyers and citizens feel that ". . . preventative detention is a dangerous tool [of the government] that must be closely guarded,"[58] even though both acts that allow for preventative detention impose the requirement for judicial review of each case to ensure such detentions are warranted. Thus the reluctance to fully endorse the idea of preventative detentions stem both from legal requirements to protect individuals from unregulated state power and the underlying emotional idea held among Canadians that they are inherently unfair in a free and democratic society. Both of these aspects of the argument against preventative detention have an impact on how Canada acts when taking detainees in the context of international conflicts.

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[56] "Immigration and Refugee Protection Act S.C. 2001, c. 27," http://laws.justice.gc.ca/PDF/Statute/I/I-2.5.pdf; Internet; accessed 21 February 2011.

[57] "Anti-Terrorism Act, SC 2001, c. 41," http://laws.justice.gc.ca/PDF/statute/A/A-11.7.pdf; Internet; accessed 16 January 2011.

[58] Beverly McLachlin, "Remarks of the Right Honourable Beverly McLachlin, P.C. Chief Justice of Canada: Symons Lecture - 2008," http://www.scc-csc.gc.ca/court-cour/ju/spe-dis/bm2008-10-21-eng.asp; Internet; accessed 24 January 2011. Section D paragraph 1 Detention.

Again, the concept of the preventative detention of an individual based on what they might do parallels the provisions for detention outlined in IHL. Combatants may be taken into custody and detained until the end of hostilities as POWs solely based on their belonging to an armed force party to the conflict and the potential that they could take part in armed hostile action, and not that they had actually done so. Similarly, IHL provides for the detention of civilians in the course of armed conflict, but requires they be released as soon as circumstances permit or they are prosecuted by free and fair trial if suspected to have engaged in criminal activity or hostilities. Both of these examples from IHL amount to preventative detentions, but the existence of these provisions does not cause much controversy. However, the application of these detention provisions to UPBs is subject of considerable debate in Canada and in many other western democracies. In large part, the challenge surrounding the issue of detaining UPBs rests with their existence outside of IHL as neither combatants nor civilians, and consequently with how the concept of preventative detention should be applied to them in order to meet security needs while protecting their individual rights.

One of the most substantial, and well known, manifestations of this debate was the suit brought against the Canadian government by two non-governmental organizations with regard to the Canadian policy for the handling of detainees in Afghanistan. The case of *Amnesty International Canada and British Columbia Civil Liberties Association v. Chief of Defence Staff for the Canadian Forces, Minister of National Defence, and Attorney General of Canada* argued that the protections guaranteed to an individual by the Canadian Charter of Rights and Freedoms should be extended to non-Canadian detainees in the custody of the Canadian Forces in Afghanistan, in order to ensure that their detention was fair and that they not abused or

tortured while in custody either of the Canadian Forces or the Afghan government.[59] This argument was ultimately rejected by a Federal Court ruling in March 2008 when it found that IHL provides sufficient protections, a decision which was effectively upheld by the Supreme Court when it refused to hear an appeal of the Federal Court decision. The case nevertheless underlines the absence of consensus in Canada with regard to IHL provisions of detention when applied to UPBs.[60]

Canadian domestic law with regard to preventative detentions, and the public uneasiness with the detention of non-combatant individuals by the Canadian Forces, has an impact on the procedures followed by the Canadian Forces, the meticulousness with which files related to detentions are maintained, and the overall scrutiny paid to detention issues throughout the Canadian Forces chain of command. How this has specifically impacted on the Canadian approach to detainees in Afghanistan will be explored in more detail in Chapter 2.

CONCLUSION

There is a considerable body of international law, treaties, and conventions that allow for the detention of individuals in the course of armed conflicts and provide protections to these detained individuals. These provisions, shaped by domestic and international laws, interpretations and public opinion, form the framework into which Canadian detention policy and procedures in any armed conflict must fit. Unfortunately,

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[59] "Amnesty International Canada and British Columbia Civil Liberties Association v. Chief of Defence Staff for the Canadian Forces, Minister of National Defence, and Attorney General of Canada," http://decisions.fct-cf.gc.ca/en/2008/2008fc33b/2008fc33b.pdf; Internet; accessed 21 February 2011.

[60] Janice Tibbetts, "Supreme Court Rejects Charter Protection for Afghan Detainees," http://www.nationalpost.com/news/canada/story.html?id=1616100; Internet; accessed 21 February 2011.

the existing legal framework does not recognize the concept of UPBs, and consequently does not address the challenges of today's conflicts, in particular counter-insurgency conflicts such as Afghanistan. How well the Canadian detention policy in Afghanistan fits into the international legal framework and deals with the UPB challenges posed by insurgents in that country, while still improving security and bringing peace to a war torn society, will be the subject of the next chapter.

CHAPTER 2 – CANADIAN DETENTION POLICY IN AFGHANISTAN

INTRODUCTION

Canada's participation in both combat and peace support operations in Afghanistan since 2001 represents its most challenging mission since its contribution to the United Nations (UN) forces in the Korean War from 1950 until 1953. It is also the first time since that conflict that Canada had participated in a mission where it was in a position to detain significant numbers of adversaries in the course of combat operations. Given that a number of decades had passed between these missions, and the fact that the nature of international conflict had significantly changed over that time, it should come as no surprise that Canada, like many of its allies, initially struggled with finding an appropriate and effective detainee handling policy for Afghanistan. Over the course of the last ten years, the Canadian detainee policy has evolved from one that essentially avoided the issue, to a much more robust and clearly expressed policy that adheres to conventions of international law while seeking to improve security and governance in Afghanistan.[61] How this evolution took place and how effective this policy is in practice is the subject of this chapter.

PRE-2005 CANADIAN POLICY

The terrorist attacks in New York and Washington on September 11, 2001 set the stage for an intervention by the United States (US) in Afghanistan to capture members of the al-Qaeda terrorist organization responsible for the attacks and to remove the Taliban government in Afghanistan that supported them. As a long time ally of the US and a

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[61] "Canadian Forces Release Statistics on Afghanistan Detainees," http://www.afghanistan.gc.ca/canada-afghanistan/news-nouvelles/2010/2010_09_22b.aspx?lang=eng; Internet; accessed 16 January 2011.

member of the North Atlantic Treaty Organization (NATO), Canada supported the US action and the Canadian government announced shortly after the attacks that it would provide military forces to the international coalition gathering to conduct a campaign against terrorism. This initially took the form of a contingent of Canadian special forces soldiers from the Joint Task Force – 2 (JTF-2) that deployed to Afghanistan to assist US forces in late 2001. This was followed in January 2002 by the deployment of the 3rd Battalion Princess Patricia's Canadian Light Infantry Battle Group to Kandahar province, with the mission to assist US forces in rooting out al-Qaeda and Taliban elements in the area. Although this battle group returned to Canada in July 2002 and was not replaced, Canada's participation in Afghanistan was not at an end. In August 2003 Canadian forces returned to the country as part of the NATO International Security Assistance Force (ISAF) that had deployed at the request of the UN to assist the internationally recognized government of Afghanistan to maintain security in the national capital of Kabul and the immediate surrounding areas. Canada's contribution to ISAF in Kabul, numbering approximately 1900 soldiers, was maintained for several years until 2005 when ISAF, which was expanding its role outside the national capital, requested Canada deploy forces back to Kandahar province. Although some small training and headquarters elements remained, by the end of 2005 Canada had fully relocated its forces to the volatile southern province, where it was poised to take on sustained combat operations for the first time in over fifty years.[62]

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[62] Janice Gross Stein and Eugene Lang, *The Unexpected War: Canada in Kandahar* (Toronto: Viking Canada, 2007), 181-184. Stein and Lang cite a number of reasons why Canada took on the dangerous deployment to Kandahar in 2005 including the need improve Canada's relationship with the United States after failing to support the 2003 invasion of Iraq and refusing to take part in the Ballistic Missile Defence program. In addition, the Afghan mission was also seen as a way to earn the respect of

During this initial period of engagement in Afghanistan, Canada's detainee policy can be at best described as one that was following the lead of our principal ally the US, and at worst a policy of avoiding the issue of detainees entirely. As General Rick Hillier, Canadian Chief of the Defence Staff from 2005 to 2008, stated in his autobiography "over the first four years of operations in Afghanistan, there had essentially been no Canadian policy on handling of prisoners we took in operations against the Taliban."[63] What policy there was consisted of transferring those detainees suspected of being member of al-Qaeda or the Taliban directly to the custody of the US.[64] The underlying basis for this policy was that the US was the detaining authority for the coalition, and as such was the nation to which all prisoners should be transferred. In an effort to meet its obligations under international law, Canada obtained assurances from the US that all prisoners transferred to them would be humanely treated and that the condition of their detention would be monitored by a third party.[65] However, this policy quickly came under significant criticism after a photo was published in January 2002 showing members of JTF-2 handling detainees at Kandahar Airport, an action that came as a surprise to many Canadians who were used to Canada's image as peacekeepers. This criticism intensified when the prisoners were handed over to the custody of the US government, which was increasingly coming under considerable scrutiny, both internationally and

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key allies such as the UK and NATO, and improve credibility with the UN, after several years of declining Canadian military efforts in support of peace keeping or peace support operations.

[63] Rick Hillier, *A Soldier First: Bullets, Bureaucrats, and the Politics of War* (Toronto: HarperCollins Publishers Ltd., 2009), 457.

[64] Craig Forcese, *National Security Law: Canadian Practice in International Perspective* (Toronto: Irwin Law Inc., 2008), 541.

[65] "JTF2 Captured, Killed Enemies in Afghanistan: DND," http://www.ctv.ca/servlet/Article/print/CTVNews/20050921/JTF2_DNDbriefing_20050920; Internet; accessed 26 February 2011.

domestically, for its interpretation that the Geneva Conventions regarding detainees did not apply to al-Qaeda and Taliban prisoners.[66] Although this initial controversy died down relatively quickly, it became clear that a more clearly delineated policy would be required as the Canadian mission transitioned from a quasi-peace keeping mission in Kabul, to a peace support mission in Kandahar where prolonged combat operations were extremely likely.[67] Additionally, this policy needed to be one that no longer simply relied on transfer of detainees to US custody, given the volume of domestic and international criticism of US prisoner handling practices surrounding its facility in Guantánamo Bay and following the exposure in 2004 of prisoner abuse that took place at Abu Ghraib prison in Iraq.[68] It was politically unpalatable, and legally questionable, to continue to hand over detainees to the US in these circumstances. All of these considerations led to the development of the first arrangement between Canada and the government of Afghanistan governing the transfer of detainees, which will be discussed in the following section.

In assessing how well the initial Canadian policy, such as it was, adhered to the international legal framework outlined in the previous chapter, it is important to place the discussion into context. In 2001, it was anticipated that the majority of detainees taken into Canadian custody would be members of al-Qaeda that, as members of a trans-national terrorist organization, were not covered by IHL but subject to criminal

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[66] Stephanie Carvin, "Make Law Not War: Canada and the Challenge of International Law in the Age of Terror," *International Journal* 62, no. 3, What Kind of Security? Afghanistan and Beyond (Summer, 2007), 613-614, http://www.jstor.org/stable/40184863.

[67] Hillier, *A Soldier First: Bullets, Bureaucrats, and the Politics of War*, 458.

[68] James Travers, "Travers: Did we Turn a Blind Eye to Afghan Prisoners?" http://www.thestar.com/printarticle/771199; Internet; accessed 26 February 2011.

prosecution for their actions.[69] Given that President Bush had issued a Military Order in November 2001 that indicated US intent to try members of al-Qaeda by military commission, it made sense to hand over detainees to US custody for prosecution, although the prolonged detention of these individuals by the US without judicial proceedings taking place makes it appear a less attractive option in retrospect.[70] The issue of Taliban prisoners is somewhat less clear. At the outset of the US invasion of Afghanistan in 2001, Taliban fighters in effect constituted the armed forces of Afghanistan, even if their government was not widely recognized by the international community. Consequently a case could be made that detained Taliban should have been given POW status. Once the international community endorsed a new government for Afghanistan as part of the Bonn Agreement of December 2001 however, the Taliban became an insurgent force fighting a civil war. In either case, a policy of turning detained Taliban members over to the US, despite their assurances to Canada that they would be humanely treated, would seem to be out of line with the provisions of IHL regarding detention of combatants and UPBs and their subsequent transfer to a third party. In recognition of these issues, along with increasing uneasiness with US actions, and faced with the prospect of taking greater numbers of detainees in operations in

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[69] David Wippman and Matthew Evangelista, eds., *New Wars, New Laws?: Applying the Laws of War in 21st Century Conflicts* (Ardsley, NY: Transnational Publishers Inc, 2005), 3-4.

[70] S. Silliman, "Prosecuting Alleged Terrorists by Military Commission: A Prudent Option," *Case Western Reserve Journal of International Law* 42, no. 1/2 (2009), 289-291, http://proquest.umi.com/pqdweb?did=1965341041&Fmt=7&clientId=1711&RQT=309&VName=PQD. The relevant order is Military Order, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001) that outlined who this applied to and the terms of detention and trials. During the period after the issue of the order and summer 2006 no trials by military tribunal took place and consequently the US Supreme Court directed changes to the established tribunal system including speeding up the process. Despite this, by January 2009 only three trials by military commission had occurred.

Kandahar, the Canadian government decided to seek a bi-lateral arrangement with the government of Afghanistan for the handling of detainees.[71] This arrangement was signed on 18 December 2005, just weeks before the first Canadian Battle Group would begin operations in Kandahar province.

2005 TRANSFER ARRANGEMENT

The bi-lateral arrangement between the Canadian government and the government of Afghanistan, titled *Arrangement for the Transfer of Detainees between the Canadian Forces and the Ministry of Defence of the Islamic Republic of Afghanistan* represented a fundamental shift in Canadian detainee policy.[72] First, it ceased the transfer of detainees from the Canadian Forces to the US, and instead set the conditions whereby detainees initially in Canadian custody would be transferred to the custody of the Afghan government. Part of the transfer arrangement specified that the Afghan government would treat detainees in accordance with the standards established in GC3, that detailed written records accounting for all detainees would be maintained, and that the ICRC would be provided with access to Afghan prison facilities to both inspect these written records and visit with detainees to verify their condition. The arrangement also specifically recognized the legitimacy of the Afghan Independent Human Rights Commission and its role in overseeing the treatment of any detainees in custody in Afghanistan. All of these provisions are in keeping with those set out in IHL that

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[71] Stein and Lang, *The Unexpected War: Canada in Kandahar*, 247. Stein and Lang also state that the fact that the Minister of National Defence at the time, Bill Graham, was "an international lawyer with a strong interest in international law" who had serious personal concerns with turning detainees over to the US also played a role in the decision to establish an independent Canadian policy.

[72] "Arrangement for the Transfer of Detainees between the Canadian Forces and the Ministry of Defence of the Islamic Republic of Afghanistan," http://www.afghanistan.gc.ca/canada-afghanistan/assets/pdfs/Dec2005.pdf; Internet; accessed 16 Jan, 2011.

guarantee humane treatment to all individuals while in custody, the requirement to keep records on all detained personnel, and the right of a neutral third party to oversee the circumstances of detention. It may have been overly optimistic in 2005 to expect the nascent Afghan security and judicial systems to be able to meet all of these obligations. Notwithstanding this, taken at face value the arrangement was a positive step forward in addressing the shortcomings of Canadian detainee policy prior to 2005.

Nevertheless, the arrangement quickly came under criticism. Canadian legal scholar Michael Byers deemed the arrangement to be inadequate on a number of points, the most significant of which was that it failed to provide for visits to Afghan held detainees and inspections of Afghan detention facilities by Canadian government officials, leaving this responsibility with the ICRC.[73] This was seen in contrast to the arrangement reached between the Dutch and Afghan governments that provided Dutch government officials full access to any detainee that had been transferred from Dutch custody to the Afghan government. Amir Attaran, a University of Ottawa professor, also raised significant concerns with the agreement, in particular with the idea of transferring detainees to the Afghans whom he believed were dangerously unreliable.[74] These criticisms gained additional weight when it was revealed in 2007 that the ICRC, while it conducted its own monitoring of detainees held in Afghan custody, did not report its

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[73] 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," http://www.ligi.ubc.ca/sites/liu/files/Publications/10Apr2006_MByersOpinion_Canada-Afghanistan.pdf; Internet; accessed 26 January 2011.

[74] Amir Attaran, "Don't Back Down; A Useful Compromise is Possible on the Issue of the Afghan Detainee Documents -- but the Opposition must be Willing to Risk an Election," *The Ottawa Citizen* May 1, 2010, http://proquest.umi.com/pqdweb?did=2024039841&Fmt=7&clientId=1711&RQT=309&VName=PQD.

findings on Canadian-transferred detainees to Canada, nor did it intend to do so.[75] Given that the only provision for monitoring of detainees in the arrangement relied on the ICRC to do this, the arrangement ultimately provided ". . . little-to-no enforceable guarantees for ensuring proper treatment "of transferred detainees.[76] In this respect, Canada seemed to be failing its responsibilities under Article 12 of GC3 to take active measures to ensure for proper treatment of any transferred detainees and to take steps to rectify any concerns with respect to proper treatment.

A second major criticism of the arrangement pertained to a provision that indicated that a detainee could be subsequently transferred by the Afghan government to a third party without any requirement to inform the Canadian government of the transfer taking place.[77] Under this provision a detainee could have been transferred to another state, including one that did not intend to abide by the protections provided by IHL, without Canada being aware and thereby undermine its ability to ensure adequate treatment for all detainees that it had transferred. In fact this provision could mean that Canadian transferred detainees could end up in US custody, one of the issues that the arrangement was trying to address in the first place.

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[75] Stein and Lang, *The Unexpected War: Canada in Kandahar*, 253. Specifically the ICRC only reports its findings to the detaining government, and does not report any findings to a transferring power. In this case, findings would be reported to the government of Afghanistan but not to Canada. This would have been clearer to the Government of Canada had the ICRC been consulted during the drafting of the arrangement. The fact that the arrangement was being drafted during an election campaign, one which ultimately saw a change of government, further complicated the situation (see pg 249).

[76] Carvin, *Make Law Not War: Canada and the Challenge of International Law in the Age of Terror*, 614.

[77] *Arrangement for the Transfer of Detainees between the Canadian Forces and the Ministry of Defence of the Islamic Republic of Afghanistan*. Paragraph 7 discusses the need to transfer copies of all related documentation to the gaining party should a detainee be subsequently transferred. This implicitly approves the transfer of a detainee to a third party.

These specific criticisms of the provisions of the 2005 Arrangement were entirely justified, but they were not the only problems. The arrangement could be described, quite charitably, as somewhat vague in its wording. It did not specify to which ministry or arm of the Afghan government a detainee could be transferred, nor in which facilities could a detainee be held. This is a significant oversight given that the competence of the various arms of the Afghan government, and the state of its various prison facilities, could be expected to vary widely given its relatively recent emergence from a devastating civil war. It also made no provision for any effort on the part of Canada to assist Afghanistan in rebuilding its justice and corrections systems, despite generally accepted shortfalls in Afghan capacity in both areas. Finally, the nature of the document itself was somewhat controversial, being an arrangement between the Canadian Forces and the Afghan Ministry of Defence, and having been signed by the Chief of Defence Staff General Hillier on behalf of the Canadian Minister of National Defence and the Afghan Minister of Defence Abdul Raheem Wardak. Agreements between defence ministers are normally classed as Memoranda of Understanding (MOUs) governing issues of mutual support in the course of military action and not bi-lateral arrangements between states. This approach to the arrangement seems to indicate the Canadian Government's belief that the detainee issue was a purely military one to be managed by uniformed personnel alone, despite the fact that IHL clearly indicates that guarantee of proper treatment of persons in custody is the responsibility of the state, and not of its armed forces. This lack of engagement and mutual cooperation on the issue by other departments of the government, most notably the Department of Foreign Affairs and International Trade

(DFAIT), was a serious oversight and one that would be rectified in 2007 when a new supplemental arrangement was put in place.[78]

2007 SUPPLEMENTAL ARRANGEMENT

In April 2007 a series of articles appeared in the *Globe and Mail* alleging that detainees that had been transferred by the Canadian Forces to the Afghan government had been subjected to torture and abuse at the hands of members of the Afghan security forces.[79] These allegations, followed by the revelations that the ICRC was not reporting the status of Canadian transferred detainees to the Canadian government, prompted the development of a new and more robust transfer arrangement. This document, titled *Arrangement for the Transfer of Detainees between the Government of Canada and the Government of the Islamic Republic of Afghanistan* was signed on the 3 May 2007 and addressed many of the shortcomings of the 2005 Arrangement.[80] The new approach was generally accepted by critics of the previous arrangement, such as Byers, and ". . . compared quite favourably with similar arrangements concluded between Afghanistan and other NATO states."[81]

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[78] Stein and Lang, *The Unexpected War: Canada in Kandahar*, 253-254. Stein and Lang note that normally DFAIT is "central to the negotiation and signing of all state-to-state agreements" but in this case they "took a back seat" to DND and the CF, apparently due to a desire to avoid becoming entangled in what was sure to be a sensitive issue. Stein and Lang call the lack of DFAIT involvement "surprising – and worrying".

[79] Graeme Smith, "From Canadian Custody into Cruel Hands," http://v1.globeandmail.com/servlet/story/RTGAM.20070423.wdetainee23/BNStory/GRAEME+SMITH/?pageRequested=1; Internet; accessed 29 January 2011.

[80] "Arrangement for the Transfer of Detainees between the Government of Canada and the Government of the Islamic Republic of Afghanistan," http://www.afghanistan.gc.ca/canada-afghanistan/assets/pdfs/agreement_detainees_030507.pdf; Internet; accessed 16 January 2011. This arrangement supplements the 2005 Arrangement but does not replace it.

[81] Forcese, *National Security Law: Canadian Practice in International Perspective*, 545.

Where the 2005 Arrangement did not specify an active role for representatives of the Government of Canada in the monitoring of detainee treatment and status, the 2007 Supplemental Arrangement specifically empowers them to have unrestricted access to Canadian transferred detainees, all facilities where they are held, and all associated documentation at any time and without warning. It also requires the Afghan Government to advise Canada of changes to the status of detainees including notification of any legal proceedings being brought against them and notice of intent to release any detainees from custody, and to advise Canada of any instance of alleged mistreatment of a Canadian-transferred detainee in Afghan custody. It specifies the actions that the Afghan Government must take in response to any allegations of mistreatment, including mandating investigations and reports of findings back to the Canadian government. The supplemental arrangement also confirms that no Canadian-transferred detainee may be subsequently transferred to a third party by Afghanistan without prior written concurrence from the Government of Canada.

The 2007 Supplemental Arrangement also crucially recognized the idea that issues and policies related to detainees were not the sole purview of the Canadian Forces. The new arrangement is specifically titled as an arrangement between the two governments, unlike the 2005 Arrangement, and was signed by Canada's then Ambassador to Afghanistan, Arif Lalani. It entrenches a role for government representatives outside of the Department of National Defence in the monitoring of detainee status and treatment, and confirms the responsibility of the Government of Canada to assist Afghanistan with capacity building measures to improve prison facilities

and rebuild the Afghan judicial system.[82] Overall, the improved 2007 Supplemental Arrangement is a recognition that the detainee issue is a multi-departmental one that cannot be simply left to the Canadian Forces to solve.

The 2007 Supplemental Arrangement has remained in place throughout the remainder of the Canadian Forces mission in Kandahar province, which is set to end in the summer of 2011. While there are those, such as Amir Attaran and Amnesty International Canada, that remain critical of the Canadian detainee policy in Afghanistan, it is generally accepted that the processes put in place by the 2007 Supplemental Arrangement have worked well and the majority of ongoing controversy concerns events that took place prior to its implementation.[83] Nevertheless, the question remains how truly effective it is in meeting the goals of adhering to international law and contributing to the overall security of Afghanistan.

CANADA'S POLICY EXAMINED

In examining Canada's current detainee policy in Afghanistan there are two principal issues to consider. The first is to consider how well the policy conforms to the international legal framework governing the detention of individuals that was described in Chapter 1. Next, the policy must be evaluated to determine how effective it is in

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[82] *Arrangement for the Transfer of Detainees between the Government of Canada and the Government of the Islamic Republic of Afghanistan*. Paragraph 11 of the arrangement contains this provision.

[83] David Akin, "Canada's Military Halted Detainee Transfers several Times Over Mistreatment Fears," http://www2.canada.com/components/print.aspx?id=2257099&sponsor=Xerox; Internet; accessed 27 February 2011.

advancing Canada's stated goal ". . . to leave Afghanistan to Afghans, a viable country that is better governed, more peaceful and more secure."[84]

As was discussed in the previous section, Canada's current detainee policy based on the 2007 Supplemental Arrangement has been generally accepted as an improvement over the 2005 Arrangement, in large part because it conforms well to the international legal framework governing detention of individuals in conflict. The policy is built on the principles and spirit of IHL, adapted to the situation in Afghanistan where the Canadian Forces are engaged in a counter-insurgency peace support operation of a non-international nature.

Canada's currently stated view of the Taliban in Afghanistan is that "[t]hese insurgents are not a professional military force . . .[who]. . . do not follow the laws of armed conflict or respect the conventions of war. They do not wear uniforms, but rather hide within the general population."[85] With this statement, the Government of Canada confirms that, in effect, it does not view the insurgents as lawful combatants, but as UPBs. This is a view that is widely accepted by Canada's allies in Afghanistan, including the US.[86] The Taliban insurgents, considered as UPBs, are therefore not entitled to POW status when detained by the Canadian Forces in Afghanistan. This view of the detainees' legal status is implicit in the wording of the 2007 Supplemental Arrangement where it specifies that Canada will be notified of any judicial proceedings being initiated, and that Canada will commit to the capacity building projects designed to

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[84] *Canadian Forces Release Statistics on Afghanistan Detainees*

[85] "Statement by the Government of Canada," http://www.afghanistan.gc.ca/canada-afghanistan/news-nouvelles/2009/2009_11_23.aspx?lang=eng; Internet; accessed 16 January 2011.

[86] Wippman and Evangelista, *New Wars, New Laws?: Applying the Laws of War in 21st Century Conflicts*, 4.

build Afghan corrections and judicial capacity. The underlying assumption in the arrangement is that transferred detainees will be subject to prosecution by Afghan authorities, something that combatant privilege would prevent in most cases if the detainees were recognized as POWs.

However, Canada does not simply label all detained individuals as UPBs. In keeping with the spirit of Article 5 of GC3,[87] a review of each detainee's particular circumstances is conducted, normally within 96 hours of capture, to determine their legal status and whether continued detention is warranted or not.[88] This committee is composed of a military legal representative, a civilian policy advisor, a military policeman, and specially appointed staff officers, and is charged with making a recommendation to the Canadian Commander on whether it is appropriate to transfer the individual to the Afghan security forces or release from custody. The committee seeks to determine if a detainee falls into one of three categories: a civilian who has committed a criminal or hostile act, an insurgent UPB, or a civilian who the available information indicates poses no threat to either NATO forces or Afghans. Detainees that fall into the first two categories are transferred into the custody of Afghan officials for further investigation and prosecution, while those that fall into the latter category are released from custody. In addition, the committee advises the Commander on whether there is any evidence or belief that there is a real risk of the transferred detainee being mistreated

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[87] Canada. Office of the Judge Advocate General., "Geneva Convention (III) Relative to the Treatment of Prisoners of War - 1949," in *Collection of Documents on the Law of Armed Conflict, 2005 Edition*, ed. Directorate of Law Training (Ottawa: DND, 2005), 96. ;}} The relevant text in Article 5 is "Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4 [eg combatants] such persons shall enjoy the protection under the present Convention until such time as their status has been determined by a competent tribunal". The advisory committee referred to in this paragraph constitutes the competent tribunal under current Canadian policy.

[88] *Statement by the Government of Canada*.

at the hands of the Afghans. If there is, the Commander will not authorize a transfer and will seek to address any concerns with Afghan interlocutors. Once the Commander is satisfied that there is no specific risk of mistreatment, the transfer will be allowed to proceed. When the transfer of a detainee from Canadian to Afghan custody takes place, information about the individual's particular case, including whether they are believed to be UPBs or not, is passed to the Afghan security forces.[89] This review process meets a number of provisions of IHL including the requirement to confirm the status of an individual in custody when there is any doubt, the provision that civilians be released as soon as the circumstances that prompted their custody have ceased to exist, and the responsibility to ensure that transferred detainees are not mistreated by the gaining party.

The protections provided to a detained individual that ensure humane treatment and fair prosecution also apply to both civilians and UPBs, and the guarantee of these protections as provided by IHL and IHRL are firmly established in the 2007 Supplemental Arrangement. This arrangement makes clear that detainees will not be mistreated, tortured or submitted to degrading treatment, and provides for unrestricted visits by Canadian government officials and representatives of the ICRC and Afghan Independent Human Rights Commission to monitor the status and treatment of detainees to ensure no mistreatment has occurred. In addition, by restricting the transfer of detainees from Afghan custody to a third party to only those cases Canada has approved ahead of time, the supplemental arrangement ensures that no detainee will end up in the hands of a state that Canada is not convinced will provide the same guarantees of humane treatment. In this respect the supplemental arrangement meets the requirements of

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[89] The description of the composition and role of the committee is based on the author's experience as Chair of the Commander's Advisory Group on Detainees in Afghanistan from 16 February to 15 November 2009.

Article 12 of GC3 that requires the transferring party to protect the transferred individual from mistreatment at the hands of the gaining power. Critics of the 2007 Supplemental Arrangement, such as Secretary General of Amnesty International Canada Alex Neve[90], and Amir Attaran,[91] charge that detainees are routinely mistreated and tortured at the hands of Afghans, and further alleges that Canada is therefore committing a war crime by transferring these individuals to Afghan custody.[92] However these charges do not take into account Canada's continuing regime of frequent visits to Afghan facilities to monitor treatment, and its track record of promptly addressing and investigating any allegations of mistreatment at the hands of Afghan security forces, actions which establish Canada's intention to exercise due diligence to protect transferred detainees.[93]

Canada's detainee policy for Afghanistan in the form of the 2007 Supplemental Arrangement meets Canada's responsibilities under international law, but whether it is an

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[90] BBC News, "Canada Signs Afghan Detainee Deal," http://news.bbc.co.uk/2/hi/south_asia/6623021.stm; Internet; accessed 4 April 2011.

[91] Attaran, *Don't Back Down; A Useful Compromise is Possible on the Issue of the Afghan Detainee Documents -- but the Opposition must be Willing to Risk an Election*, B.7.

[92] Janice Tibbetts, "Supreme Court Rejects Charter Protection for Afghan Detainees," http://www.nationalpost.com/news/canada/story.html?id=1616100; Internet; accessed 21 February 2011. Both Amnesty International Canada and the British Columbia Civil Liberties Association continue to maintain that the policy of turning over detainees to Afghan custody, where they assert detainees will be subject to mistreatment and torture, are in violation of international law regardless of any monitoring activities that take place as they deem such visit and inspection regimes as ineffective.

[93] Amir Attaran, "Detainees should have Rights; it is an Embarrassment that Canada's Supreme Court Won't Recognize that the Charter should Apply to Prisoners of Canadian Forces," *The Ottawa Citizen* May 28, 2009, http://proquest.umi.com/pqdweb?did=1736083851&Fmt=7&clientId=1711&RQT=309&VName=PQD. In fact Dr. Attaran's explanation of the detainee handling process omits several key actions, the inclusion of which would not support his argument. He declines to recognize the role of the Commander's Advisory Group on Detainees when he states that ". . .after some bureaucratic processing, but not necessarily any questions. . " detainees are transferred, failing to mention that each case is reviewed by a committee after one or more interviews with the detainee to determine the circumstances of his capture. He also fails to mention the detailed visit regime by government officials, that the ICRC is notified of all transfers, or that all charges of abuse are investigated.

effective policy that contributes to the establishment of a more peaceful, secure Afghanistan is another question. Certainly detaining insurgents and denying their ability to continue to take part in hostilities is of some short term benefit to security, but to have an enduring impact these individuals must be prosecuted for their crimes and incarcerated for an appropriate time to prevent their return to the battlefield. The Canadian detainee policy falls short in this aspect for two key reasons. First there is a reliance on the Afghan judicial system to carry out legal proceedings against detained individuals, and second, there is inadequate differentiation between those suspected of being dedicated insurgents and lower level criminals.

The 2007 Supplemental Arrangement is squarely focussed on ensuring the proper treatment of transferred detainees. Eight of the ten provisions listed in this arrangement concern treatment of detainees, while only two any make mention of subsequent judicial proceedings.[94] The two provisions that do refer to judicial and corrections issues concern the promise by Canada to undertake judicial and correction services capacity building projects and the requirement of the Afghan government to notify Canada of any judicial proceedings or releases that will take place. While the Canadian government takes notice of any proceedings or releases of which it has been advised, there is no provision in the supplemental arrangement to ensure that prosecution of transferred individuals actually takes place, including prosecution of those individuals suspected of taking part in attacks that have killed or injured Canadian, NATO or Afghan soldiers. While it seems perfectly reasonable under normal circumstances for a county to have no influence over how another country conducts judicial proceedings against its citizens, the situation in

[94] *Arrangement for the Transfer of Detainees between the Government of Canada and the Government of the Islamic Republic of Afghanistan*. The supplemental arrangement consists of 13 paragraphs, of which three are administrative nature while the remaining ten contain provisions of the arrangement.

Afghanistan is not normal and Canada has vested political and legal interests in seeing successful prosecutions of Taliban insurgents.

A major weakness of the 2007 Supplemental Arrangement is its reliance on the Afghan police services and judicial systems to conduct investigations and prosecute transferred individuals, despite the fact that the Afghan system is notoriously unreliable and subject to outside influence. Despite several years of capacity building projects and mentoring of Afghan officials, the Independent Panel on Canada's Future Role in Afghanistan found in 2008 that:

> The judiciary is reportedly subject to interference from government officials and militia commanders; judges, lawyers, and police are poorly paid and generally under-trained. The security and justice sectors overall – police, courts, and prisons – display persisting inadequacies.[95]

In addition, the panel found "[c]orruption is widespread, characterized by cronyism [and] bribery . . ."[96] Few believe that the situation has improved much in the years since the panel produced this report, and the perception of Afghan officials as corrupt and ineffective persists. One belief is that "[w]hen the Afghans aren't being too harsh with detainees, they are often too lenient – letting them go as a result of bribery or intimidation . . . "[97] Another is that the situation remains one where "Canadians capture Taliban fighters and transfer them to corrupt Afghan jailers who free them for bribes" and that this actually endangers Canadian soldiers by not ensuring violent insurgents remain in

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[95] Independent Panel on Canada's Future Role in Afghanistan, *Independent Panel on Canada's Future Role in Afghanistan: Final Report* (Ottawa: Public Works and Government Services Canada, 2008), 16.

[96] *Ibid*., 16.

[97] Max Boot, "U.S. and Allies must Detain Afghan Prisoners," http://www.washingtonpost.com/wp-dyn/content/article/2009/12/28/AR2009122802014_pf.html; Internet; accessed 29 January 2011.

custody. [98] Finally the Afghan judicial system has been described as "barely functioning' and representing a "revolving door."[99] Simply put, the Afghan judicial system cannot be counted upon to ensure that detained insurgents are prosecuted, and incarcerated, for their actions. A Canadian detainee policy which relies on them to do so cannot effectively contribute to an enduring improvement to peace and security, or support the Canadian government goal of leaving Afghanistan more peaceful and secure.

Another significant weakness of the policy in its ability to promote security is the lack of differentiation between low-level criminals and dedicated insurgents. The policy does not make any distinction between an individual detained for a relatively minor crime, such as breaking into a NATO facility to steal supplies, and an insurgent who has been positively linked to attacks against NATO or Afghan soldiers or civilians. Under the Canadian policy, all detainees that are suspected of criminal or insurgent activities are transferred to the Afghan government. The requirement to prosecute all of these individuals places a serious burden on a weak Afghan judicial system, particularly when it comes to initiating proceedings against dedicated insurgents as these cases are normally much harder to prosecute. Individuals are often linked to the insurgency and specific attacks by intelligence, and not necessarily by physical evidence or witnesses, and turning intelligence into evidence is notoriously challenging even in western democracies with well established judicial systems.[100] In addition, Afghan officials will often be subject to

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[98] Attaran, *Don't Back Down; A Useful Compromise is Possible on the Issue of the Afghan Detainee Documents -- but the Opposition must be Willing to Risk an Election*, B.7.

[99] Tom Hyland and Bette Dam, "Revolving Door for Taliban Suspects," http://www.watoday.com.au/world/revolving-door-for-taliban-suspects-20110326-1cb3h.html; Internet; accessed 10 April 2011.

[100] Beverly McLachlin, "Remarks of the Right Honourable Beverly McLachlin, P.C. Chief Justice of Canada: Symons Lecture - 2008," http://www.scc-csc.gc.ca/court-cour/ju/spe-dis/bm2008-10-21-eng.asp; Internet; accessed 24 January 2011.

intimidation, threats against their families, or offered bribes to let more important insurgent members go free, with the degree of intimidation or value of the bribe increasing with the importance of the specific detainee to the insurgency. In these circumstances it is not hard to envision a situation where an insurgent who has been positively linked to an attack that killed NATO or Afghan soldiers, including Canadians, could be released from Afghan custody either due to problems with converting intelligence into evidence or by having supporters buy their release from custody.[101] In fact Australia, one of Canada's main allies in Afghanistan, saw this exact situation play out when a senior Taliban leader positively linked to the deaths of Australian soldiers was released from Afghan custody just two years after his capture.[102] Besides presenting an affront to the concept of justice, the release of an insurgent from custody free to commence hostile activities again certainly does not contribute positively to the security situation or protect Afghan civilians. An insurgent release would also present a significant risk to the force protection of NATO and Canadian soldiers as the insurgent would almost certainly become active in hostilities again after release. Relying on the Afghan judicial system to prosecute even the most dedicated and dangerous of

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[101] Attaran, *Don't Back Down; A Useful Compromise is Possible on the Issue of the Afghan Detainee Documents -- but the Opposition must be Willing to Risk an Election*, B.7. Attaran suggests that detainees turned over to the Afghans could be released in exchange for bribes to corrupt jailers or officials. Presumably, the more important the prisoner would be to the insurgency, the bigger the bribe and the more likely it would be accompanied with threats. The situation where a detainee could be linked to the death of a Canadian was discussed among key staff including the author in Afghanistan in 2009. It was agreed that in accordance with Canadian policy the only option would be to transfer the detainee and hope the Afghans would not release him. As the details and circumstances on specific detainees are classified, there is no way to positively confirm if this has already happened, however it is an unsettling possibility.

[102] Tom Hyland and Bette Dam, "Revolving Door for Taliban Suspects," http://www.watoday.com.au/world/revolving-door-for-taliban-suspects-20110326-1cb3h.html; Internet; accessed 10 April 2011.

insurgents, and therefore putting procedure and policy far ahead of security in importance, is another shortcoming of Canada's detainee policy.

CONCLUSION

The current Canadian policy governing the detention and transfer of individuals by the Canadian Forces in Afghanistan is one that has evolved over the course of a decade of operations and experience. It seeks to conform to the established framework of existing international law and, although still the subject of some criticism, it demonstrates Canada's intent to meet its obligations and responsibilities under IHL and IHRL to ensure the proper treatment of those it has detained. However, the policy is less concerned with enhancing security in Afghanistan, and protecting Canadian, NATO and Afghan soldiers and civilians. While Canada is not alone among ISAF nations in following a detainee policy in Afghanistan that is less focussed on security, other ISAF nations have taken a different approach. Comparing the Canadian policy with those of some of its key allies in Afghanistan and explaining how they differ will be the subject of the Chapter 3.

CHAPTER 3 – COMPARING ALLY NATIONS' DETAINEE POLICIES

INTRODUCTION

Having examined Canada's detainee handling policy in the previous chapter, it is worthwhile to compare it to the policies of Canada's allies in Afghanistan in order to put its strengths and weaknesses into context. More than forty states from all regions of the world contribute forces to the ISAF mission, but for the purposes of comparison this paper will focus on the nations with which Canada frequently operates in southern Afghanistan. The four nations being considered here - the United Kingdom (UK), the Netherlands, the United States and Australia - are all considered to be progressive western democracies with generally good reputations as states that uphold the ideals of justice, freedom, and human rights and historic adherence to international law. Despite their common backgrounds, there are differences in their individual detainee policies, both in application and in how they balance individual rights with the desire to improve security. Explaining these differences and contrasting them with Canada's detainee policy will be the subject of this chapter.

LIKE-MINDED NATIONS

The armed forces of the United Kingdom and the Netherlands, at least until the withdrawal of the majority of Dutch soldiers from Afghanistan in the summer of 2010, have been major partners of the Canadian Forces operating in southern Afghanistan and both countries have pursued detainee handling policies very similar to Canada's. Both the UK and Dutch military forces deployed to southern Afghanistan in the summer of 2006 as part of the ISAF expansion that saw the NATO mission take over responsibility for the region from US forces operating as part of Operation Enduring Freedom, the US counter-

terrorism operation in Afghanistan. Criticism of US detention practices was widespread and intense in both states at the time, and consequently both sought early on to put in place detainee handling policies that would distinguish themselves from US actions and ensure that detainees taken into custody by either's forces would not end up in US custody. Both countries were able to reach bi-lateral agreements with the Government of Afghanistan several months prior to the arrival of their soldiers in the theatre of conflict.

The UK signed a Memorandum of Understanding (MOU) with the Government of Afghanistan on 23 April 2005 that governed the transfer of detainees from the custody of UK military forces to the Afghan security services.[103] This agreement contained the same provisions later established in the Canadian 2007 Supplemental Arrangement, including a requirement for the Afghan security forces to treat all detainees humanely and in accordance with the provisions of international law.[104] The UK agreement also secured the right of UK Foreign Ministry officials to visit all Afghan facilities where UK-transferred detainees were held in custody in order to confirm their treatment and prison conditions. The Netherlands likewise completed a MOU with the Afghan government for the transfer of detainees in April 2006 that guaranteed the protection of detainees while in Afghan custody and provided for monitoring of transferred detainees in Afghan

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[103] "House of Commons Foreign Affairs Committee: Visit to Guantanamo Bay: Second Report of Session 2006-07," http://www.publications.parliament.uk/pa/cm200607/cmselect/cmfaff/44/44.pdf; Internet; accessed 4 April 2011. The UK MOU is contained as Appendix 3 to the cited report. Unlike in Canada, the UK MOU is not directly available from UK Government websites.

[104] Janice Gross Stein and Eugene Lang, *The Unexpected War: Canada in Kandahar* (Toronto: Viking Canada, 2007), 254. Canada was unaware of the ongoing UK-Afghan negotiations when the 2005 Arrangement was first drafted. However the UK MOU *was* considered in the development of the 2007 Supplemental Arrangement.

facilities by Dutch government and military officials.[105] Like the Canadian arrangement, the main focus of these documents is the treatment of the detainees post transfer. The only notable difference between these agreements and the current Canadian detainee policy is that both the UK and Netherlands agreements contain a single statement outlining that the Afghans would accept transfers of detained persons for the purpose of "investigation and possible legal proceedings," something that is not mentioned at all in the Canadian arrangement.[106] Interestingly both states had agreements in place with Afghan government before their forces began operations in southern Afghanistan, whereas it was not until almost two years after Canadian soldiers arrived in Kandahar that a similarly robust Canadian detainee handling arrangement was put in place.[107]

Given that the UK and Dutch agreements are so similar to Canada's, it is unsurprising that comparable criticisms have been brought against these agreements and their implementation. The UK government has been accused of having its "head in the sand" on this issue of mistreatment of detainees at the hands of members of the Afghan National Directorate of Security (NDS) to whom it transfers its detainees, and for not doing enough to ensure that abuse of detainees does not occur, an accusation echoing those brought against the Canadian government.[108] These charges have reached the High

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[105] "Memorandum of Understanding between the Ministry of Defense of the Islamic Republic of Afghanistan and the Minister of Defense of the Kingdom of the Netherlands Concerning the Transfer of Persons by Netherlands Military Forces in Afghanistan to Afghan Authorities," https://zoek.offcielebekendmakingen.nl/kst-27925-205-b3.pdf; Internet; accessed 2 April, 2011.

[106] *Ibid*. The UK MOU uses the phrase "investigation and possible criminal proceedings."

[107] "Arrangement for the Transfer of Detainees between the Government of Canada and the Government of the Islamic Repbulic of Afghanistan," http://www.afghanistan.gc.ca/canada-afghanistan/assets/pdfs/agreement_detainees_030507.pdf; Internet; accessed 16 January 2011. The 2007 Arrangement was the first Canadian policy that could be considered "robust."

[108] Duncan Gardham, "Britain "Hands Over Prisoners in Afghanistan to Face Torture", http://www.telegraph.co.uk/news/worldnews/asia/afghanistan/7607442/Britain-hands-over-prisoners-in-Afghanistan-to-face-torture.html; Internet; accessed 3 March 2011.

Court of Justice, which ruled in June 2010 that the UK forces could no longer transfer detainees to the NDS facility in Kabul due to the high risk they would be subjected to torture or mistreatment, and that transfer to any other NDS facility would only be permitted if supported by a stepped up monitoring regime.[109] The Dutch have also been accused of failing in their responsibility to ensure detainees they transfer into the custody of the Afghan NDS are not mistreated, something its government denies.[110] Lars van Troost, a Dutch political scientist, has also argued the MOU was flawed from the beginning citing inadequate monitoring regimes, and suggested a more robust, multi-lateral agreement between NATO and the Government of Afghanistan was required.[111] As in Canada, a central theme of the criticism levelled against the UK and Dutch governments is the ability to guarantee humane treatment while in the hands of Afghan security forces, a fact which points to the common weakness in all of these agreements: their reliance on the Afghan security and judicial system.

Like the Canadian arrangement, the UK and Dutch agreements rely on Afghan corrections and judicial systems to hold detainees in custody under humane conditions and prosecute them for their crimes and hostile acts, and Afghans have proven to be unreliable partners on both counts. The UK Secretary of State for Defence, Liam Fox

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[109] "Ruling of the High Court of Justice: The Queen (on the Application of Maya Evans) v Secretary of State for Defence Case no: CO/11949/2008," http://www.haguejusticeportal.net/DOCS/NLP/UK/Maya_Evans_v_SSDefence_Judgement_25-06-2010.pdf; Internet; accessed 4 April 2011.

[110] Vanessa Mock, "Dutch Accused of Complicity in Torture in Afghanistan," http://static.rnw.nl/migratie/www.radionetherlands.nl/currentaffairs/071113-torture-afghanistan-mc-redirected; Internet; accessed 3 March 2011.

[111] Lars van Troost, "Uruzgan in Den Haag: De Zachte Dood Van Harde Garanties, Lars Van Troost," http://ts.clingendael.nl/publications/articles/?id=6169&&type=summary; Internet; accessed 3 March 2011. This reference is a summary in English of a document written in Dutch criticizing the agreement.

recognized the importance of taking detainees into custody and ensuring they are prosecuted when he stated:

> Bringing to justice those who seek to kill and maim British troops, coalition forces, and Afghan civilians, including through the use of indiscriminate methods like the laying of roadside bombs, forms an essential part of our current operations. It makes Afghanistan a safer place for our service men and women, and it is our duty to do so.[112]

What he did not say was that the UK, like Canada and the Netherlands, counts on the Afghan judicial system to bring such individuals to justice, including those that have killed or maimed British troops.

The Canadian, British, and Dutch approaches to detainee handling policies are essentially the same, and exhibit familiar strengths and weaknesses. These policies all strive to balance the standards and provisions of international law with the challenges posed by UPBs, while simultaneously relying on the Afghan judicial system to prosecute the detainees for their crimes and hostile acts. Like Canada, the UK and Netherlands governments put adherence to international law regarding the treatment and handling of detainees ahead of concrete efforts towards the goal of improving peace and security in Afghanistan through the prosecution and incarceration of insurgents and criminals. Not all ISAF nations are as comfortable with this priority of effort however, and some have taken a different approach in their detainee policies.

STATES WITH DIFFERING POLICIES

Two other states with whose forces Canada has closely cooperated in southern Afghanistan are the US and Australia, yet both have adopted detainee policies that differ

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[112] Richard Norton-Taylor, "Afghan Detainees must be Safeguarded Against Abuse, Says High Court," http://www.guardian.co.uk/uk/2010/jun/afghan-detainees-safeguard-high-court; Internet; accessed 3 March 2011.

considerably from Canada's in important ways. While some aspects of the US and Australian detainee policies are similar to that of Canada, such as pledging to conform to the international standards that provide guarantees of humane treatment for individuals in their custody, they differ on the issue of how to address the question of improving security. Both the US and Australia have adopted a two-tier detainee policy that sees lower-level insurgents and minor criminals quickly turned over to the custody of the Afghan government, while those detainees assessed to pose a greater threat are retained in US custody or, in the case of Australia, transferred to US custody. The rationale for this kind of detainee handling framework is a shared belief in the need for greater emphasis on improving security in Afghanistan by ensuring the most dangerous insurgents remain in custody and not on the battlefield.

The US policy on the handling of detainees captured in Afghanistan has evolved over the past decade and has come under considerable domestic and international criticism along the way. Throughout the maturation of the US detainee policy, it has consistently stressed the issue of security as its priority, and has favoured security considerations ahead of the requirement to adhere to the standards of international law. The factor that initially contributed to this approach was the emotional shock that followed the terrorist attacks of September 11, 2001 and the subsequent fear that another such attack was imminent. There was also a widespread desire at the time in the US to strike back at the perpetrators of these attacks and bring them to justice, and this desire was very much at the forefront of US policy when it first attacked al-Qaeda and Taliban forces in Afghanistan in the fall of 2001. While some of these fears have eased in subsequent years, and despite several US Supreme Court rulings that came down in favour of detainee rights, there is still a strong desire in the US to ensure that security and

countering perceived threats remain the priority. This imperative drives their approach to detainee handling policy.[113]

US forces first entered Afghanistan in October 2001 as part of Operation Enduring Freedom, the Afghanistan portion of the US Global War on Terror, with the intent of killing or capturing members of al-Qaeda and removing the Taliban government that had supported the terrorist organization from power. The US policy on detainees was the subject of criticism from its inception. The Bush Administration announced at the outset of hostilities than none of those it would capture in Afghanistan, whether they be al-Qaeda or Taliban, were entitled to POW status or protection under IHL.[114] It argued instead that the detainees were "unlawful combatants" who fell outside the protections of GC3.[115] IHL is silent on the issue of trans-national terrorist groups, and al-Qaeda certainly fell into this category, nevertheless the position that they were not entitled to the protections guaranteed by IHL was subject to considerable debate. On the question of the Taliban however, the US position was even less sound.

In the fall of 2001 the Taliban constituted the only functioning government in Afghanistan, even if it was not recognized as such by the US and indeed most of the international community. As such the Taliban forces would normally have been

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[113] D. Fontana, "The Supreme Court," *Dissent* 55, no. 2 (Spring, 2008), 74, http://proquest.umi.com/pqdweb?did=1473418861&Fmt=7&clientId=1711&RQT=309&VName=PQD. 2004 US Supreme Court rulings in the cases *Rasul v Bush*, *Padilla v Rumsfeld*, and *Hamdi v Rumsfeld* all came down in favour of greater rights for detainees in US custody. However the author also focuses on the perceived lack of engagement by the US Supreme Court against those in the US who would see a restriction on the rights of detainees. Interestingly, the author cites the activism of the Canadian Supreme Court as a model to be followed.

[114] Michael Byers, *War Law: Understanding International Law and Armed Conflict* (Vancouver, BC: Douglas & McIntyre, 2005), 129.

[115] "Decision Not to Regard Persons Detained in Afghanistan as POWs," *The American Journal of International Law* 96, no. 2 (Apr., 2002), 477, http://www.jstor.org/stable/2693945.

considered legitimate combatants and afforded POW status on capture. Reflecting this viewpoint, in February 2002 the Bush Administration revised its policy on Taliban status. It recognized that IHL was applicable to the Taliban since there existed a state of conflict between two parties to the Geneva Conventions, namely the US and Afghanistan. Nevertheless, the US also maintained that given the Taliban's constant violation of the laws of war, in particular its failure to abide by the conditions to obtain combatant status outlined in Article 4 of GC3, it had given up its right to status and protection as POWs under IHL.[116] In effect, the US was labelling members of the Taliban as UPBs, and outlining its intent to treat them as such.

The policy of the Bush Administration was underpinned by an opinion written by Assistant Attorney General Jay Bybee that outlined exactly why the Taliban did not meet the standards of Article 4 of GC3 and consequently were not entitled to protections under IHL.[117] Even more controversially, the Bybee memorandum recommended that there would be no need to convene a tribunal under Article 5 of GC3 to determine the legal status of any detainee, arguing that the US Constitution empowered the President to interpret treaties on behalf of the nation and that he could therefore make a determination on detainee status that removed any doubt as to their status. This interpretation said that since Article 5 provides that tribunals are required when there is "any doubt" as to the status of the detainees, and given the President has the power to determine if there was

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[116] *Ibid*., 477.

[117] Jay S. Bybee, "Status of Taliban Forces Under Article 4 of the Third Geneva Convention of 1949: Memorandum Opinion for the Counsel to the President (2002)," http://www.justice.gov/olc/2002/pub-artc4potusdetermination.pdf; Internet; accessed 24 January 2011.

any doubt or not, the tribunals were not required. [118] In short, the US position implied that the old rules of IHL simply did not apply to the new unconventional conflicts against terrorism and insurgency.[119] This US position was roundly criticized by scholars of international law, their European allies, and by some within the administration itself.[120] This criticism intensified once it was learned that the detainees were being held in a facility in Guantanamo Bay without trial and being subjected to treatment in violation of international law, and in particular contrary to the CAT. Facing intense criticism and an increasingly overfull facility, in 2003 the Bush Administration changed its criteria for which detainees would be transferred to Guantanamo Bay to only those high level terrorists who posed an ongoing threat to the US.[121] As a consequence of this change of policy, US forces began holding Afghan detainees in a facility at Bagram, a US base north of Kabul, where it pledged to provide humane treatment in accordance with the provisions of GC3. This shift of detention facilities from Guantanamo Bay to a facility in Afghanistan represents a turning point in the evolution of US policy regarding detainees in Afghanistan.

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[118] Canada. Office of the Judge Advocate General, "Geneva Convention (III) Relative to the Treatment of Prisoners of War - 1949," in *Collection of Documents on the Law of Armed Conflict, 2005 Edition*, ed. Directorate of Law Training (Ottawa: DND, 2005), 96.

[119] Carvin, *Make Law Not War: Canada and the Challenge of International Law in the Age of Terror*, 613.

[120] *Decision Not to Regard Persons Detained in Afghanistan as POWs*, 477. Specifically there were those in the administration, in particular Secretary of State Colin Powell, who argued that Convention protections should be provided if only to ensure US troops would be equally well treated. He also argued that Article 5 of GC3 be applied, and each case reviewed to determine the detainees' legal status. The US Supreme Court eventually upheld this view when it ruled in 2004 that detainees had a habeas corpus right to challenge their detention.

[121] Jeff Stein, "Rumsfeld Complained Of Low Level GTMO Prisoners, Memo Reveals," http://voices.washingtonpost.com/spy-talk/2011/03/rumsfeld_complained_of_low_lev.html; Internet; accessed 5 March 2011.

While the US has not confirmed the exact numbers of detainees held in its Bagram facility, it is generally accepted that approximately 600 detainees are in custody there at any one time[122] The US policy regarding their legal status has not changed, and most remain subject to long term or indefinite detention without any legal proceedings being brought against them.[123] The US still regard these Afghan detainees as UPBs and not as POWs. However, there has been some evolution in the US detainee framework in recent years. The US no longer treats all detainees the same, but maintains a two-tiered policy in Afghanistan. Lower level insurgents and criminals are transferred into the custody of the Afghan NDS with provisions for treatment and monitoring of the facilities similar to those of Canada, while higher threat individuals remain in US custody at Bagram. Procedures for those held at Bagram have also changed. As late as 2006, there was still no status or case review process in place at Bagram that would consider whether an individual should remain in custody or be released. Even after a review tribunal process was approved and implemented in 2007, it still did not allow the detainee to attend the hearing, call witnesses, or see the evidence that was being presented against them. This policy was changed in 2009, and currently detainees are assigned a US military representative that reviews their case, they are entitled to call witnesses and be present at their hearings, and they are entitled to a hearing shortly after their arrival at Bagram and every six months thereafter when their case is reviewed and reconsidered.[124]

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[122] "United States Holds Large Numbers of Detainees in Iraq, Afghanistan," *The American Journal of International Law* 102, no. 4 (Oct., 2008), pp. 879-880, http://www.jstor.org/stable/20456696.

[123] Farah Stockman, "Kinder Prison, Swifter Justice for US Detainees in Afghanistan," http://www.boston.com/news/world/asia/articles/2011/01/18/kinder_prison_swifter_justice_for_us_detainees_in_Afghanistan/; Internet; accessed 4 March 2011.

There are three possible outcomes of these hearings; release from custody, transfer to Afghan authorities, or retention in custody at Bagram. There have also been some adjustments to how judicial proceedings are brought against those retained in custody at Bagram. Previously detainees were held without any prospect of being brought before a court, but this has changed. Today there is a special Afghan court, mentored by US legal officers, which carries out proceedings at Bagram and is able to try complicated insurgent cases that often involve the interpretation of forensic and intelligence generated evidence. It is the eventual goal of the US that these courts will succeed the existing US review tribunals effectively transferring all authorities for detainees to the Afghan government.[125]

The current US policy conforms much better to the provisions of IHL than the initial policy of 2001. Detainees are treated humanely in accordance with the protections outlined in GC3, and their individual cases are subject to a review process where their status and requirement for continuing custody is determined. While the US is still criticized for holding detainees for long periods without commencing legal proceedings, and for their use of military tribunals instead of civilian courts once they do, efforts are being made to change this and to develop the capacity in the Afghan judicial system to take on the responsibility for conducting prosecutions of insurgent detainees. While the overriding US priority remains improving security, it is increasingly working towards achieving this through courts of law rather than indefinite detention.

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[124] Karen De Young and Peter Finn, "New Review System Will Give Afghan Prisoners More Rights," http://www.washingtonpost.com/wp-dyn/content/article/2009/09/12/AR2009091202798.htm; Internet; accessed 4 March 2011.

[125] Stockman, *Kinder Prison, Swifter Justice for US Detainees in Afghanistan*

Although Australia's engagement in the conflict in Afghanistan has not been as prolonged as that of the United States, it has also seen an evolution of its detainee handling framework. Australian armed forces first deployed to southern Afghanistan in the summer of 2006 when a small contingent was partnered with forces of the Netherlands in the province of Uruzgan. As the Australians were operating as a part of the Dutch contingent, their initial detainee handling policy consisted of transferring any detainees in their custody to the Dutch forces, after which the detainees would be processed in accordance with the MOU between the Dutch and Afghan governments. However when the majority of Dutch forces departed Afghanistan in the summer of 2010, Australia assumed responsibility for operations in Uruzgan province, and therefore needed an independent detainee handling policy. In December 2010, Stephen Smith, Australian Minister for Defence, announced the details of the new Australian detainee management framework. At the outset of this announcement he confirmed what Australia saw as its two priorities for its detainee policy:

> First, the critical need to remove insurgents from the battlefield, where they endanger Australian, International Security Force and Afghan lives, and Second, the need to ensure humane treatment of detainees, consistent with Australian values and our legal obligations.[126]

He then went on to describe the Australian policy in more detail, outlining the two-tier approach to the transfer of detainees. Those detainees that posed "a less serious threat" would be transferred to Afghan NDS in Uruzgan, while those that were deemed to pose "a serious threat" would be transferred to the US-run detention centre in Bagram as it

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[126] Stephen Smith, "Detainee Management in Afghanistan," http://www.minister.defence.gov.au/smithpl.cfm?CurrentId=11212; Internet; accessed 26 January 2011. The details of the Austrailian agreement with the government of Afghanistan are not available to the public and are classified. (see Naureen Shah, "Don't Deliver Afghans to Torture on a Promise Alone," http://www.theage.com.au/opinion/dont-deliver-afghans-to-torture-on-a-promise-alone-20110107-19ien.html; Internet; accessed 10 April, 2011).

provided a facility more appropriate for higher risk insurgents.[127] The framework also included provisions for Australian military and government officials to monitor the welfare and conditions of detainees both in Afghan and US custody, and assurances from both that all transferred detainees would be treated humanely at all times. In essence, the Australian framework mirrors that of the US in many ways, and puts greater weight on the issue of security than does the Canadian policy. It also demonstrates Australian confidence in the US detainee framework as it currently exists. The order in which the Australian Minister of Defence listed his country's priorities (security first, treatment second) speaks to the emphasis and importance that Australia places on ensuring that insurgents are removed from the battlefield for the long term, and its lack of confidence in the ability of the Afghan judicial system to effect this. The new Australian framework has been challenged by Amnesty International for its provision allowing for the transfer of detainees into prolonged US custody,[128] while others such as lawyer Naureen Shah criticize the plan to hand some detainees over to the custody of the Afghans.[129] Despite these criticisms the Australian government remains firm in its opinion that its detainee framework is consistent with IHL and applicable international standards, while contributing to the advance of peace and security in Afghanistan.

CONCLUSION

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[127] *Ibid*. In his statement, Minister Smith defines implicitly defines a "serious threat" detainee as a "high risk insurgent." Those that do not fit that definition would presumably pose a "less-serious threat."

[128] "Australia's New Afghan Prisoner Policy could Violate International Law," http://www.amnesty.org.au/news/comments/24367/; Internet; accessed 3 March 2011.

[129] Naureen Shah, "Don't Deliver Afghans to Torture on a Promise Alone," http://www.theage.com.au/opinion/dont-deliver-afghans-to-torture-on-a-promise-alone-20110107-19ien.html; Internet; accessed 10 April, 2011.

In comparing Canada's detainee policy with those of its four principal allies in southern Afghanistan, both commonalties and differences can be identified. The policies of all five states rely to some degree on the competence and effectiveness of the Afghan security forces and judicial system, and all have been criticized for this aspect of their policies particularly on the issue of detainee treatment in Afghan custody. Where the policies diverge is the priority given to the goal of improving security relative to the responsibility to follow international standards and accepted legal and human rights norms regarding detention of individuals. The Canadian policy differs significantly in this regard from the US and Australian policies. Indeed, how much this approach was a conscious decision on the part of the government of Canada, and how much it was a result of a desire to simply distance itself from the controversy surrounding US detention practices after the attacks of September 11, 2001, is unclear. Certainly the US policy of 2011 is very different than that in existence in 2005 when Canada developed its first substantial policy, and is now one that Australia at least is comfortable following. While it is highly unlikely that Canada would change its detainee policy today, given the impending cessation of Canadian combat operations in the summer of 2011 and the contunued media and political scrutiny surrounding the detainee issue in Canada, current US policy would seem more palatable and more likely to advance the stated Canadian goal leaving Afghanistan "more peaceful and more secure."[130]

All of the states examined here face the same fundamental challenge in developing and applying their detainee policies in Afghanistan. Specifically, how can a policy both adhere to the provisions of international law, and successfully address the

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[130] "Canadian Forces Release Statistics on Afghanistan Detainees," http://www.afghanistan.gc.ca/canada-afghanistan/news-nouvelles/2010/2010_09_22b.aspx?lang=eng; Internet; accessed 16 Jan, 2011.

security challenge posed by individuals who refuse to be bound by the laws of war as expressed in IHL? Having examined the policies of Canada and its allies and how they evolved into their current forms in an attempt to find this balance, a number of lessons can be identified. Discussion of these lessons, and recommendations on how they should be applied to the development of detainee policies for future Canadian missions, is the subject of the next chapter.

CHAPTER 4 – LESSONS IDENTIFIED AND THE WAY AHEAD

INTRODUCTION

Chapter 1 reviewed the existing international legal framework governing the detention of individuals in the course of conflict, and identified a limitation in the application of IHL regarding the status of insurgents. Chapters 2 and 3 examined the detainee policies of Canada and some of its principal allies in Afghanistan, exploring the practical application of legal theory to the conduct of detention operations, and noting the concerns and challenges experienced during its implementation. This final chapter will identify lessons drawn from these experiences and propose how Canada can apply them to improve detainee policy development for future missions. Although the lessons discussed in this paper were derived from the ISAF mission in Afghanistan, they are broadly applicable to any combat or peace support mission where Canada can expect to take individuals into custody during the course of operations. Challenges Canada has experienced with detainee operations on other missions, including during the conduct of counter-piracy missions off the coast of Somalia in 2009, have reinforced the need to learn from the Afghanistan experience to ensure that suitable detainee policies are put in place for any future missions. [131]

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[131] Dan Lett, "Canada Asks Kenya to Prosecute Pirates; Defence Minister Pushing for Action After Touring Frigate," *Edmonton Journal* May 22, 2009, http://proquest.umi.com/pqdweb?did=1726498981&Fmt=7&clientId=1711&RQT=309&VName=PQD. In the article it is noted that Canada is criticized for releasing suspect pirates rather than brining them to Canada for prosecution. At that time Canada was working on a third party arrangement with Kenya for the prosecution of suspected pirates that Canada had detained, rather than have them brought to Canada and potentially use the opportunity to claim refugee status. For a more complete examination of the issue of detaining pirates on international waters, see Julien, Jim. "Practicing What We Preach: Canadian Options For Dealing With Terrorist Detainees at Sea." Toronto: Canadian Forces College Joint Command and Staff Program Master of Defense Studies Paper, 2010.

LESSONS IDENTIFIED IN AFGHANISTAN

Although the detainee policies of Canada and its allies discussed in this paper are not identical in focus or application, a number of the challenges that have arisen during their implementation in Afghanistan are nevertheless common to their approaches.

The first shared lesson to be drawn is that the exact legal status of individuals taken into custody in the course of counter-insurgency operations is complicated and is not always easily addressed by existing international legal frameworks. For those detained individuals who are simply civilians who committed a crime or engaged in a single hostile act, the provisions of IHL are clear and easily applied. Conversely the status of individuals who are serious and active participants in one of the insurgent groups operating in Afghanistan is much less clear. These groups do not meet the criteria of combatants as outlined IHL and the term that is proposed in this paper, unprivileged belligerents (UPBs), currently has no standing in international law. It is also unlikely that the situation in future missions will be any less complicated. Tactics used by insurgents in Afghanistan are similar to those used in other recent conflicts in Iraq, Lebanon, and the Palestine Territories, and are likely to be reused again by future insurgencies for the simple reason that they work. Tactics that operate outside of IHL and attempt to take advantage of protections offered by it under false pretences will continually pose a challenge for those states, such as Canada, which are committed to operate within the framework of IHL.[132] Future conflicts and peace support operations will exist in a

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[132]C. Dungan, "Fighting Lawfare," *Special Warfare* 21, no. 2 (Mar/Apr, 2008), 9, http://proquest.umi.com/pqdweb?did=1451838041&Fmt=7&clientId=1711&RQT=309&VName=PQD. This article cites the Taliban tactics of blaming all civilian deaths no matter the cause on international forces, and inflating the number of dead, in hopes of getting international forces to change tactics and further restrain the use of force. Most relevant to this paper, the article also describes the common tactics

complex environment containing civilians, combatants, and potentially those who, like the Taliban insurgents in Afghanistan, fall somewhere in between. Careful consideration will be required in the development of any future detainee policy, and the different and complex political, security and threat factors unique to each mission will make it extremely difficult to develop a single general detainee policy that will fit every circumstance. Rather, a mission specific policy that takes into account the status of the various groups participating in the conflict, the existence and capacity of a host nation or third party judicial system, and the threat environment specific to that mission will be required.

The next lesson is that, regardless of the emphasis placed on either adherence to IHL or security, any detainee handling policy will be subject to criticism and entail a degree of political risk. Given the complex legal questions regarding the issue of detainee status in Afghanistan, it is no surprise that these policies have been subject to criticism regardless of whether the policy sought primarily to follow IHL with respect to the rights of the detained individual, as is the case with Canada's policy, or took an approach that favoured security, like the US and Australian policies. Legal scholars, the media, non-government agencies such as Amnesty International, and opposition political parties have all attacked these strategies for not respecting international law or, alternatively, as being too lenient on insurgents. In other words, no matter what detainee policy option is pursued, it will be the subject of some degree of public criticism and therefore will entail political risk for the government of the day. The only question in the

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for Taliban detainees to claim abuse and mistreatment a soon after capture in order force investigations to be launched and plant mistrust between international troops and Afghan security forces.

formulation of a detainee policy is how much criticism and political risk a government is willing to accept.

The Canadian government set itself up for easier criticism, and learned another lesson, due to its initial approach to the detainee issue that saw it treated as a predominantly, if not entirely, military one. The 2005 Arrangement put in place by Canada prior to the deployment to Kandahar was signed on behalf of Canada by a military officer, and failed to establish a role for government officials from other departments. It neither guaranteed access to Afghan facilities by government officials nor made any specific commitments to develop Afghan judicial capacity, despite the fact that two of Canada's allies, the UK and the Netherlands, were in the process of developing agreements that did so. The lack of institutional buy-in to the 2005 Arrangement from other government departments, particularly from DFAIT, facilitated criticism of the policy and resistance to its implementation from within the government bureaucracy. Canada, unlike its allies, had to learn that the political risk and sensitivity surrounding the detainee issue demands a comprehensive approach to policy development and implementation that includes all impacted government departments. In contrast the 2007 Arrangement, which affirmed a role for DFAIT officials in both monitoring of detainees in Afghan custody and judicial capacity building, has been more productive and detainee operations conducted under this arrangement have been subject to considerably less criticism than those that took place before it came into effect.[133]

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[133] David Akin, "Canada's Military Halted Detainee Transfers several Times Over Mistreatment Fears," http://www2.canada.com/components/print.aspx?id=2257099&sponsor=Xerox; Internet; accessed 27 Feb 2011. In the article Liberal leader Michael Ignatieff states "The core of [the detainee abuse] issue is what happened between January of 2006 and the summer of 2007 when they changed the detainee regime", highlighting that the majority of criticism predated the 2007 Supplemental Arrangement.

A common element of all the detainee policies examined in this paper is a reliance on the Afghan security forces and the Afghan judicial system to investigate and prosecute those detainees suspected of criminal or hostile acts, and from this is derived the third significant lesson. As was discussed in Chapter 3, this reliance is a shared weakness of all of the policies examined in this paper, and the unreliability of the Afghan security forces has been a consistent point of criticism. Reliance on third party or host nation legal, judicial, and governmental capacity risks undermining the intent of the arrangement, in particular if the nation has different standards with respect to justice and human rights. Additionally, the lack of credible judicial capacity is likely to result in fewer prosecutions, ineffective investigations, and charges of corruption, all of which are detrimental to the promotion of security and credible governance. The unfortunate dilemma for countries such as Canada is that turning over investigation and prosecution to the Afghan government is one of the major conditions that must be met as part of the ISAF exit strategy from Afghanistan. Handing over responsibility for security operations, including detention, investigation, and prosecution of criminals and insurgents, to local governments is likely to be the long term solution and end state for future missions in similar circumstances, and consequently inclusion of host nation security forces into any future detainee handling regime will be unavoidable. Given this, and making the assumption that development of security and judicial capacity is unlikely to occur quickly, there is a need to have in place a strategy to govern the handling of detainees until this capacity is developed.

This provides the final lesson for the development of a detainee policy. An interim plan to bridge the gap until local capacity can be developed is an essential component of a detainee strategy. Canada's detainee policy in Afghanistan relies to a

significant extent on the reliability and effectiveness of the Afghan security forces and judicial system, and given the state of Afghan government institutions in 2005 and today, it is not unreasonable to suggest that a plan was needed to both develop Afghan capacity and ensure the effective implementation of a detainee policy until sufficient judicial and security services were in place. The 2005 Arrangement did nothing to address these issues, and the 2007 Arrangement did so only partially by putting in place the promise of capacity building and mentoring programs, while still failing to address the issue of ensuring that those detainees suspected of conducting criminal or hostile acts were prosecuted and sentenced for their actions. In contrast, the US detainee policy recognized the inability of the Afghan government to take on responsibility to investigate and prosecute insurgents, and therefore chose to retain these individuals in US custody until credible Afghan institutions could be developed. Both approaches have been criticized. In the case of Canada, criticisms have been a result of the poor performance and allegations of detainee abuse at the hands of the Afghan security services, while in the case of the US the criticisms have surrounded the prolonged detention of Afghan prisoners in US custody without judicial review. Both of these examples argue for a clearly defined and communicated strategy for how detainee operations are going to be conducted, respecting international law to the maximum extent possible while still contributing to security, until sufficient local judicial and security services are functioning and capable of taking on the responsibility. Failure to do develop such a strategy risks criticism and loss of credibility in the international community, at home, and most critically with the population that the mission in intended to support.

In summary, Canada's experience with detainee operations in Afghanistan has highlighted a number of policy related issues. It is clear that the development of a

detainee handling regime is a complicated process that cannot be taken lightly. Policy development will involve negotiating difficult legal issues, is likely to be subject to criticism from a number of sources, and consequently presents considerable political risk. This risk becomes greater when the policy relies on the credibility and effectiveness of the judicial system of another government, particularly one that is less developed than Canada's or does not share similar values with respect to democracy or human rights. The Afghanistan experience and the challenges it has presented will be wasted if Canada does not make use of these hard earned lessons when developing detainee policies for future missions.

THE WAY AHEAD FOR CANADIAN DETAINEE POLICY

First and foremost, any future Canadian detainee policy must be developed in a top down manner based on direction from the highest levels of government and with the involvement of all stakeholder departments, in particular DND, DFAIT, and the Privy Council Office. The policy must take into consideration the specifics of the particular mission, including the potential legal status of those that could be detained, the threat environment, and the capacity of the host nations' judicial and security services. It must be recognized that any approach will be criticized, and any attempts to develop a policy immune from criticism would be naïve folly. Rather, the detainee strategy must be clearly explained and proactively communicated to Canadians and the international community in order to counter the inevitable criticism. Canada must learn from its experience developing its detainee strategy for Afghanistan that the detainee issue is not the sole purview of the CF or DND, and that it is far easier to explain the policy up front than respond to criticism after the fact.

To further bolster the legitimacy of its approach and address the inevitable criticisms, Canada should seek to engage in multi-party detainee arrangements, rather than bi-lateral arrangements of the type put in place in Afghanistan. A multi-lateral rather than unilateral approach to international issues is recognized as result of consensus among several states and is therefore seen as less controversial, which is particularly helpful when addressing a politically sensitive issue such as detainee policy. In addition, working cooperatively with other states would lend greater diplomatic weight to the Canadian effort, both during the initial negotiations of a detainee transfer arrangement and afterwards during monitoring or capacity building efforts.[134] In the case of Afghanistan, the policies of Canada, the UK and the Netherlands were almost identical, yet each state chose to negotiate a bi-lateral arrangement with the government of Afghanistan. A multi-party arrangement between the three countries and the government of Afghanistan would have helped protect each government from domestic criticism.[135] In addition, in the arena of international opinion and international law, a partnership of like minded states is seen as more legitimate and credible than the unilateral action of a single country. When dealing with a sensitive and complicated issue such as detainee policy, Canada would greatly benefit from combining its actions

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[134]Naureen Shah, "Don't Deliver Afghans to Torture on a Promise Alone," www.theage.com.au/opinion/dont-deliver-afghans-to-torture-on-a-promise-alone-20110107-19ien.html; Internet; accessed 10 April 2011. The article suggest that if countries would work together they could "force the NDS's hand" to follow international standards for treatment and judicial fairness. To some extent, this is already happening in Afghanistan, with mixed results.

[135]Ashley Deeks, "Detention in Afghanistan: The Need for an Integrated Plan," http://csis.org/files/media/csis/pubs/080213_deeks_afghanistan.pdf ; Internet; accessed 26 Jan 2011. Deeks suggests that NATO nations work together to establish a ISAF-wide detention facility in order to buy time until the Afghan judicial system is developed enough to take on both detention and prosecution of insurgents. One of the key benefits he cites to this approach is that it would be "easier to explain to the partners' publics" given its multi-lateral approach.

with credible, democratic partners such as those nations that constitute NATO and non-NATO nations such as Australia and New Zealand.

Given the difficulty that IHL has in dealing with insurgencies and guerrilla warfare highlighted in Chapter 1, Canada should seek, along with like minded states, a reopening of IHL to negotiate an additional protocol that would address the issue of UPBs and ensure this is recognized in international law. Until this is done, insurgents will be able to take advantage of the protection offered by IHL under false pretences to conduct their campaigns and cause human suffering in times of conflict. In addition, nations that are bound to act in accordance with IHL will be forced into a difficult position in dealing with such hostile actors. Nations must either remain within the confines of IHL and be seriously constrained in their ability to combat these parties, or stray outside the confines of international law to deal more effectively with them but at the cost of exposing themselves to criticism for violating international law.[136]

An effort to reopen IHL is certainly a morally defendable approach to take, because the kinds of insurgent actions that undermine IHL also undermine its fundamental purpose: the protection of innocent civilians and the minimizing of human suffering in times of conflict. This is the justification provided by Carpenter in arguing for the development of new conventions to strengthen IHL's ability to protect civilians in contemporary conflicts.[137] Certainly the promotion of international law and the protection of civilians in conflict are Canadian values worth advancing. In addition, the

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[136] C. Dunlap JR, "Lawfare: A Decisive Element of 21st-Century Conflicts?" *Joint Force Quarterly : JFQ*, no. 54 (Third Quarter, 2009), 35-36, http://proquest.umi.com/pqdweb?did=1771541141&Fmt=7&clientId=1711&RQT=309&VName=PQD.

[137] Charli Carpenter, "Fighting the Laws of War: Protecting Civilians in Asymmetric Conflict," *Foreign Affairs* 90, no. 2 (2011), 146.

recognition of the concept of a UPB by international convention and agreement and on the applicable conditions of detention and prosecution, or as suggested by Marshall the development of a new Geneva Convention governing terrorism and insurgencies, would advance the cause of international law and justice.[138] The development and ratification of a convention or protocol recognizing UPBs in international law would take several years or more, but the existence of such discussions would lend additional legitimacy to the concept of UPBs in international law and make detainee policies that incorporate the idea more legally defensible and less exposed to criticism on legal grounds. The modernization of IHL through the development of new conventions or protocols that better address today's conflicts would be of tremendous benefits to Canada in future conflicts, and is something Canada should actively promote in cooperation with other like minded states.

Until IHL can be expanded to better address contemporary conflicts and more clearly define the legal status of detainees, Canada must still ensure that any detainee policy developed for a future mission addresses both IHL concerns and advances the mission. As has been discussed, the current Canadian policy does not meet these criteria. Instead, Canada has developed a policy for Afghanistan that attempts to follow international law and avoid criticism and political risk, to the detriment of advancing peace and security in Afghanistan. Canada should pursue a detainee policy that more effectively keeps insurgents and hostile actors off the battlefield for benefit and safety of its soldiers and the civilians they are there to protect. This may mean keeping detainees in Canadian custody for longer periods of time and operating on the edge, or possibly outside of, current IHL, which will be uncomfortable for many. However, maintaining

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[138] Will Marshall, "Rewrite the Rules of War," *Foreign Policy* November (2010), 76.

policies that simply attempt to avoid criticism and not address security, such as the Afghanistan policy or the "catch and release" policy applied to counter-piracy missions off the Horn of Africa, is unworthy of a nation that professes to advance freedom, democracy and human rights. [139] If a cause is truly worth fighting and shedding blood for, then it is worth some political discomfort to do the right thing. However, if the opinion of the government is that the cause is not worth the political risk that would come with a more robust detainee policy, then it is certainly not worth the life or limb of a single soldier and Canada should focus its attention elsewhere.

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[139] Dan Lett, "Canada Helps Capture Unlucky Pirates, but Too often it's 'Catch and Release'; Jurisdiction, Nationality Issues are Complex a Lawyer Advises Warship Commander," *Edmonton Journal* May 23, 2009, http://proquest.umi.com/pqdweb?did=1727871551&Fmt=7&clientId=1711&RQT=309&VName=PQD.

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