

Canada

Briefing to the UN Committee against Torture, 48th Session, May, 2012, on Canada's Transfer of Afghan Detainees into the Danger of Torture by Other Authorities

from

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Re: Canada's failure to comply with legal obligations under The Convention against Torture and the Rome Statute which prohibits the transfer of detainees into danger of torture at the hands of other authorities.

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BACKGROUND. Danger of detainees transferred by Canada to other authorities being subjected to torture:

Through its actions as part of the U.S. Coalition forces (Coalition) which invaded and continues to occupy Afghanistan, Canada has demonstrably been, and continues to be, complicit in well-documented illegal actions which constitute international war crimes, including the transfer of detainees into the danger of being subjected to torture. From 2001 until 2005, Canada as a matter of official policy transferred all detainees to U.S. authorities. According to the *Report of the Independent Expert on the Situation of Human Rights in Afghanistan*, M. Cherif Bassiouni, to the UN Commission on Human Rights, March 11, 2005, U.S. Coalition criminal actions documented at that time included:

I. ILLEGAL ABUSES -- Arbitrary arrests and detentions above and beyond the reach of law under conditions commonly described as constituting gross violations of human rights law and grave breaches of international humanitarian law. Documented reports of serious violations by Coalition forces from victims, the Afghan Independent Human Rights Commission, NGOs and others include: Forced entry into homes; arrest and detention of nationals and foreigners without legal authority or judicial review -- sometimes for extended periods of time; forced nudity; hooding and sensory deprivation; sleep and food deprivation; forced squatting and standing for long periods of time in stress conditions; sexual abuse; beatings; torture, and use of force resulting in death. There are at least 8 cases of prisoners who have died while in United States custody in Afghanistan...

Coalition forces act in support of and collusion with the internationally widespread and systematic U.S. practice of “extraordinary rendition” – the covert practice of kidnapping suspects and their subsequent rendering to countries known to use torture to extract information. (ICC#1)

Following this report, which clearly establishes a substantial danger of torture for detainees transferred to U.S. authorities, Canada signed an agreement to begin transferring detainees to Afghan authorities in December, 2005. This was done without any official investigation – or expression of concern – about the welfare of detainees who had been transferred to known torturers. It was also done in spite of a number of credible expressed concerns indicating such detainees were again in substantial danger of being subjected to torture. Those concerns were soon confirmed when Canadian human rights lawyers and news reporters in 2007 discovered specific instances of torture of detainees who had been handed over by Canada. The transfer policy continued to be adhered to, however, until a 2011 report by the UN Assistance Mission in Afghanistan (UNAMA) established beyond a shadow of a doubt the very extreme substantial danger of torture at the hands of Afghan authorities – a danger that had been virtually ignored and covered up by Canada for some six years:

10 October 2011 - UNAMA today released a report that documents the torture and mistreatment of detainees in a number of detention facilities of the National Directorate of Security (NDS) and Afghan National Police (ANP) across the country...UNAMA found compelling evidence that NDS officials at five facilities systematically tortured detainees for the purpose of obtaining confessions and information.

These are the provincial NDS facilities in Herat, Kandahar, Khost and Laghman, and the national facility of the NDS Counter-Terrorism Department 124... in Kabul. UNAMA received multiple, credible allegations of torture at two other provincial NDS facilities in Kapisa and Takhar...The practices documented meet the international definition of torture. Torture occurs when State officials, acting in their official capacity inflict or order, consent or acquiesce to the infliction of severe physical or mental pain or suffering against an individual to obtain a confession or information, or to punish or discriminate against the individual. Such practices amounting to torture are among the most serious human rights violations under international law, are crimes under Afghan law and are strictly prohibited under both Afghan and international law. (ICC *Feb. 1, 2012)

Following the very publicly reported UNAMA report, in early 2012 Canada announced that it would begin transferring detainees to U.S. authorities – once again with no official investigation or expression of concern for the fate of detainees who been had transferred to known torturers. Ironically, shortly after this announcement, an official Afghan investigative commission accused the American military of abuse at its main prison in the country, repeating President Harmid Karzai's earlier demand that anyone held without evidence should be freed. Detainees interviewed during two visits to the U.S.-run portion of the prison outside Bagram Air Base north of Kabul complained of freezing cold, humiliating strip searches and being deprived of light, according to Gul Rahman Qazi, who led the investigation ordered by Karzai.

The following report provides an overview of documented violations of The Convention and the Rome Statute prohibiting torture and complicity in torture in the handling of Afghan detainees by Canada. This report deals with Canada's actions in handling detainees resulting from its military role in the invasion and occupation of Afghanistan in participation with United States coalition forces beginning in 2001; and as well with Canada's evolved Coalition roles as part of the International Security Assistance Force (ISAF), and as part of the North Atlantic Treaty Organization (NATO) in Afghanistan to the present time. The report was part of a complaint to the Office of the Prosecutor at the International Criminal Court in December, 2011, presented along with 202 documentations of evidence of complicity in torture by Canada (the complete set of these documents is available in digital format upon request by the CAT.) This report was first published in February 2012 on the LAW website:

<http://www.lawyersagainsthewar.org/letters/Canada.Detainee.Scandal.Feb.12.pdf>

It was prepared by Canadian LAW member John McNamer, a decorated Vietnam veteran and long-time human rights activist.

B. CANADA'S DETAINEE TORTURE SCANDAL: An Overview

Just about everyone has heard of “the fog of war,” but what many don't realize is that much – or most – of this fog is sometimes purposely generated to cover dark atrocities and illegal actions on the part of misguided and unprincipled participants in illegal activities, or war crimes.

Unfortunately, Canada clearly now falls into this dark and gloomy realm of illicit behavior through its longstanding brazen illegal transfers of Afghan detainees to known torturers in complete contempt of international law – and through its failure to bring about proper investigation and necessary legal action when such activities have come to light.

This unfortunate characterization can be clearly demonstrated to be valid to anyone who cares to take a clear, unflinching look at the history of Canadian detainee transfer in Afghanistan. And that is just what this article will demonstrate. This has already been demonstrated in a fairly significant way through complaints from more than one source (ICC#84 & #1-120) to the Office of the Prosecutor at the International Criminal Court in The Hague.

And Chief Prosecutor Luis Moreno-Ocampo has publicly indicated at least three times in the recent past that NATO and Canadian handling of detainees might be formally investigated by the ICC. In April 2011 Moreno-Ocampo was quoted in the Toronto Star specifically stating that if the federal government won't look into how Canadian soldiers handled detainees in Afghanistan for possible war crimes violations, his office will. “We'll check if there are crimes and also we'll check if a Canadian judge is doing a case or not. . . if they don't, the court has to intervene,” Moreno-Ocampo said. (ICC #38)

So, perhaps sadly for some Canadians, it appears that the Canadian fog of war may soon be dissipated by a strong wind necessarily emanating from a distant shore.

The ICC does not replace national criminal justice systems; rather, it complements them. It can investigate and, where warranted, prosecute and try individuals only if the state concerned does not, cannot, or is unwilling genuinely to do so. Oh, Canada.

The Canadian government and military establishment have for much of the past decade put on a dazzling display of fog-making ability that has effectively – and quite cynically – managed to keep an official lid on their abysmal failure to act in Afghanistan in accordance with clear legal obligations under international law, and related domestic law. Unlike coalition partner the United States, Canada is a full signatory to all aspects of the Geneva Conventions and the Rome Statute of the International Criminal Court, which specifically consider acts of torture and complicity in torture to be war crimes.

The transfer of detainees to another authority known to torture is a violation. Canada has long transferred detainees to U.S. authorities and Afghan authorities, both known to torture detainees. A transferring authority is legally obligated to know whether there even a threat of torture before handing detainees over, and also to follow the welfare of detainees to insure they are being properly treated. Ignorance of the fate of detainees is no excuse in the eyes of the law.

Top Canadian government and military officials responsible for ensuring such laws are obeyed have used, and continue to use, ‘national security’ and ‘The National Secrets Act’ along with

slick political maneuvering to skillfully obstruct any and all efforts over the past several years to bring forward legitimate and credible inquiry of any sort into troubling allegations and questions about war crimes on the part of Canadian Forces and other Canadian officials in relation to the Afghanistan mission.

Former Minister of Defence Thomas O'Connor actually misled the House repeatedly when detainee transfer questions started to come up, saying: "The Red Cross or the Red Crescent is responsible to supervise their treatment once the prisoners are in the hands of the Afghan authorities. If there is something wrong with their treatment, the Red Cross or Red Crescent would inform us and we would take action."

In a very unusual move for them, the International Committee of the Red Cross eventually publicly contradicted O'Connor. The ICRC stated that it was "informed of the agreement, but ... not a party to it and ... not monitoring the implementation of it." The ICRC also advised that, in accordance with its normal operating procedure, it would not notify any foreign government (Canada included) of abuse found in Afghan prisons. O'Connor subsequently acknowledged in an official release that his statement in Parliament was not true, and that the ICRC was not monitoring detainees and not informing Canada as he had claimed. This misinformation from the minister brought forth his forced resignation (ICC#120) – but not the truth about transfers into possible torture.

Threats of prosecution (ICC#24) have effectively prevented lesser government agents from coming forward with evidence about detainee torture for half-hearted bureaucratic investigations such as the Military Police Complaints Commission. When Richard Colvin, a top Canadian diplomat in Afghanistan, in 2009 courageously defied government attempts to gag him and testified that all detainees who had been transferred to Afghan authorities had likely been tortured (ICC#53), he was vilified and discredited by top officials and the allegations were never seriously probed by anyone.

A parliamentary committee inquiry – driven by opposition members – that had sprung up after Colvin's testimony and was threatening to get to the bottom of detainee transfers was first boycotted (ICC#65) by Tory members of the governing party, then unceremoniously killed when Prime Minister Stephen Harper persuaded Governor General Michaëlle Jean (coincidentally also the "Commander-in-Chief" of Canadian Forces) to prorogue, or suspend the workings of the House of Commons, literally locking the doors to parliament and killing ongoing committee work (ICC#36, 117).

Subsequently the government created a controversial parliamentary inquiry which was boycotted by the opposition NDP for being a "sham." A special committee sworn to secrecy was to be allowed to see only classified information that had first been approved by several retired judges handpicked by the attorney general (ICC#80). That special committee refused to acknowledge evidence submitted by concerned Canadian human rights activists knowledgeable about the issues (ICC#15, 107).

But even this so-called "inquiry" was killed when the government called an election. With the governing party's move from minority to majority status, there was a quick announcement that the mandate for the inquiry had died with the election of a new House and no further inquiry was deemed to be necessary by the government. (ICC#40, 82)

The parliamentary inquiries have stopped, but the basic question remains: Has Canada transferred detainees into possible torture? Despite endless assertions to the contrary by responsible officials, the unequivocal answer is: YES, Canada has done *nothing but* transfer detainees into conditions of torture at the hands of U.S. and Afghan authorities during virtually its entire mission in Afghanistan.

As early as 2002, University of Ottawa Law Professor Nicole Laviolette said in an interview that Canadian Forces in Afghanistan have an obligation to refuse to turn over prisoners to the U.S. until they “are sure that the conventions are being complied with.” In 2006, Dr. Michael Byers, who holds the Canada Research Chair in Global Politics and International Law at the University of British Columbia stated for the record that “for four years, Canadian soldiers in Afghanistan have violated international law by transferring suspected Taliban and al Qaeda fighters into the custody of the United States.”(ICC#3)

For very early on in the mission, Canada began what seems to have been an unquestioning handover of detainees to U.S. authorities, known to include covert Central Intelligence Agency (CIA) agents operating at illegal “dark sites” – now infamous across the world for unbelievably inhumane torture and in some cases, torture leading to death.

These torture techniques, called “enhanced interrogation” by President George W. Bush and his administration, were actually taken word for word from Chinese Communist torture manuals captured from the Korean War, and they had previously long been described by the Americans as “torture” on the part of the Communists when used against U.S. personnel (e.g., “waterboarding”). The “enhanced interrogation” was pioneered at Guantanamo Bay and in Afghanistan under the explicit approval of Defense Secretary Donald Rumsfeld, and used by both CIA and U.S. military interrogators. It later migrated to Iraq to be used in such places as the infamous Abu Ghraib prison. This was established in a 2009 report by the U.S. Senate Armed Services Committee. (ICC #94, 99, 118)

The above information detailing torture techniques utilized by U.S. authorities was sent to Gov. General/Commander-in-Chief Michaëlle Jean Dec. 5, 2009, with a request that she exercise her duty to act on it. She did not respond. The information was then provided May 5, 2010, to all members of the Special Committee on the Canadian Mission in Afghanistan and copied to the prime minister; the attorney general; again to the governor general; the Military Police Complaints Commission, and all opposition leaders in House of Commons. (ICC#15) No one responded.

In November 2005, the American Civil Liberties Union made public an analysis of new and previously released autopsy and death reports of detainees held in U.S. facilities in Iraq and Afghanistan, many of whom died while being interrogated. The documents show that detainees were hooded, gagged, strangled, beaten with blunt objects, subjected to sleep deprivation and to hot and cold environmental conditions. (ICC#102) “There is no question that U.S. interrogations have resulted in deaths,” said Anthony D. Romero, ACLU Executive Director.

The documents released by the ACLU include 44 autopsies and death reports as well as a summary of autopsy reports of individuals apprehended in Iraq and Afghanistan. The documents show that detainees died during or after interrogations by Navy Seals, Military Intelligence and “OGA”(Other Governmental Agency) — a term, according to the ACLU, that is commonly used to refer to the CIA.

According to the documents, 21 of the 44 deaths were homicides. Eight of the homicides appear to have resulted from abusive techniques used on detainees, in some instances, by the CIA, Navy Seals and military intelligence personnel. The autopsy reports list deaths by “strangulation,” “asphyxiation” and “blunt force injuries.” An overwhelming majority of the so-called “natural deaths” listed were attributed to “Arteriosclerotic Cardiovascular Disease.”

Also in 2005, when such reports of torture and illegal abuse by U.S. forces were beginning to seep out, Canada had to deal with potential fallout from the Report of the Independent Expert on the Situation of Human Rights in Afghanistan, M. Cherif Bassiouni, to the UN Commission on Human Rights (ICC#1). The devastatingly honest report documented previously secret U.S. coalition war crimes for all the world to see:

Arbitrary arrests and detentions above and beyond the reach of law under conditions commonly described as constituting gross violations of human rights law and grave breaches of international humanitarian law. Documented reports of serious violations by Coalition forces from victims, the Afghan Independent Human Rights Commission, NGOs and others include: Forced entry into homes; arrest and detention of nationals and foreigners without legal authority or judicial review -- sometimes for extended periods of time; forced nudity; hooding and sensory deprivation; sleep and food deprivation; forced squatting and standing for long periods of time in stress conditions; sexual abuse; beatings; torture, and use of force resulting in death. There are at least 8 cases of prisoners who have died while in United States custody in Afghanistan...

Coalition forces act in support of and collusion with the internationally widespread and systematic U.S. practice of “extraordinary rendition” – the covert practice of kidnapping suspects and their subsequent rendering to countries known to use torture to extract information. (ICC#1)

Within a matter of a few months Canada had scrambled to put into place, under the guise of “Afghan nation building,” an agreement to begin transferring detainees to Afghan authorities. The agreement, however, included no assurances that detainees would not be transferred to other authorities, such as the U.S. (ICC#85) And there were many questions yet to come about the efficacy and legitimacy of the agreement.

Canada was faulted in 2006 by its own NATO allies for secrecy in the handling of detainees in a story first revealed by the Globe and Mail newspaper. The story also said the Red Cross and others felt Canada was handing prisoners in the field directly to the Afghan National Security Directorate (NDS), thereby circumventing requirements to notify the ICRC of detainee transfers. The Globe also forced Canada's military to reluctantly admit the truth of a story revealing that in 2006 Canadian troops were forced to intervene and rescue one detainee they had just handed over who was immediately being beaten by detaining Afghan authorities (ICC#30). An inquiry into the case was promised by the military.

The validity of procedures under the 2005 agreement was first seriously tested in 2007, when two Canadian lawyers brought forth concrete evidence of torture of a detainee who had been transferred by Canadians (ICC#116). Canada claimed to have no knowledge whatsoever of detainee torture, but had secretly stopped transferring detainees to the Afghans before the news actually surfaced. The transfers were eventually resumed with fresh assurances there would be no torture. Details of the transfer policies continued to remain secret and there was no public accountability for flawed and apparently illegal transfers that had taken place up to that point.

And, in a real setback for the government's ongoing efforts to seamlessly glaze over problems with transfers, Globe and Mail reporter Paul Koring revealed Dec. 14, 2009, that "an unknown number of Taliban insurgents captured by Canadians and turned over to Afghanistan's secret police are unaccounted for – a serious violation of the Harper government's 'improved' detainee-transfer agreement. The story said "The latest detainee-transfer problem to emerge also threatens to undermine Prime Minister Stephen Harper's assertion that 'two, three, four years ago' his government fixed the problems that put Canada at risk of violating the Geneva Conventions by transferring detainees into torture. "This issue has long since been dealt with," Mr. Harper said. But a few days earlier, Foreign Minister Lawrence Cannon had quietly acknowledged that an unspecified number of transferred detainees can't be accounted for because Afghan security forces have failed to keep Canada informed of their fates. (ICC#63)

To further illustrate the government's intransigence on being up front about transfer policies, here are some specific questions – left mostly unanswered –which were directed personally to Minister of Defence Peter MacKay in an e-mail exchange with a human rights activist in 2009:

Are Canadian Forces turning detainees or any people in Afghanistan over to United States' control in the current situation and what records are being kept of this? b.) How many detainees or others have Canadian Forces turned over to the U.S. since October 2001? c.) What records are kept of people who have been turned over to the U.S. by Canadian Forces in Afghanistan since October 2001 and what tracking has been done of these people after they have been turned over to the U.S.? d.) I request that you provide me with Canadian Forces policy about fulfilling their obligation to continue to be

responsible for detainees who have been turned over to other authorities since 2001. Can you also please provide me with details of visits to and reports about such detainees who have been turned over to another authority since 2001, and the current policy for this under the arrangement signed Dec. 18, 2005? e.) Is there a specific agreement that the ICRC will receive notification of the identity and arrest and detention particulars of each and every detainee within 24 hours of the detention and that the ICRC will be thereafter allowed free and unrestricted access to detainees?

MacKay's response was eerily similar to the patronizing and questionable platitudes that led to his predecessor Gordon O'Connor's rather abrupt departure:

“As I mentioned to you in previous correspondence, as a matter of policy the Canadian Forces treats all detainees humanely and in accordance with the standards of protection afforded to prisoners of war under the Geneva Conventions. Canadian Forces members involved in the handling and transfer of detainees receive thorough training on appropriate procedures. Prior to the development of the December 2005 arrangement with the Government of Afghanistan, the Canadian Forces transferred detainees to United States authorities. These transfers were conducted in accordance with Canada's international legal obligations and with the knowledge of the International Committee of the Red Cross, which has a mandate to verify the treatment of detainees and was notified of these transfers. (ICC#14)

The veracity of MacKay's statement is severally challenged when held to the light of a November 2011 UN Assistance Mission in Afghanistan (UNAMA) report ascertaining widespread systematic detainee torture by Afghan officials. This report has once again forced Canada to stop transferring to the Afghans, but this time Canada announced it would once again begin detainee transfers to U.S. authorities. (ICC#*Feb.1, 2012)

Ironically, shortly after this announcement, an Afghan investigative commission accused the American military of abuse at its main prison in the country, repeating President Hamid Karzai's earlier demand that the U.S. turn over all detainees to Afghan custody and saying anyone held without evidence should be freed. Detainees interviewed during two visits to the U.S.-run portion of the prison outside Bagram Air Base north of Kabul complained of freezing cold, humiliating strip searches and being deprived of light, according to Gul Rahman Qazi, who led the investigation ordered by Karzai. (ICC#111)

The UNAMA report in November said it found:

compelling evidence that NDS officials at five facilities systematically tortured detainees for the purpose of obtaining confessions and information. These are the provincial NDS facilities in Herat, Kandahar, Khost and Laghman, and the national facility of the NDS Counter-Terrorism Department 124 ... in Kabul. UNAMA received multiple, credible allegations of torture at two other provincial NDS facilities in Kapisa and Takhar.

The report went on to specify some of the very ugly and inhumane forms of torture used.

Particular troubling in light of this information is an earlier report of NDS torture of children in the April 2010 UN document titled *Children and armed conflict Report of the Secretary General*, which says:

Approximately 110 children have been detained by the Afghan National Directorate of Security and international military forces on charges related to national security, including their alleged involvement or association with the Taliban or other armed groups. Access to detention facilities continues to be difficult and information on children detained by pro-Government forces remains limited...The use of harsh interrogation techniques and forced confession of guilt by the Afghan Police and NDS was documented, including the use of electric shocks and beating
Available information points to sexual violence as a widespread phenomenon. (ICC#109) (Emphasis added)

Perhaps even more alarming in light of this clearly documented abuse of children by the NDS is another document obtained by the Canadian Broadcasting Corporation's (CBC) investigative unit in November 2010 which indicates children were captured by Canada and that many were transferred to the NDS. Actual numbers are redacted — bureaucratise for blacked out — and Canadian Foreign Minister Lawrence Cannon would not disclose in the House of Commons whether Canadian soldiers had transferred children associated with the Taliban to the NDS following reports about the document. (ICC#108)

The seemingly difficult Canadian task of choosing between transferring detainees to U.S. authorities who have been known to torture or transferring to Afghan authorities who have been known to torture was probably not as complex as surface appearances might indicate. In reality, it was no choice at all. Toronto Star national affairs columnist Thomas Walkom broke the news in Canada in July, 2010, that the NDS had for years been completely financed by the U.S. Central Intelligence Agency:

For Canadians trying to puzzle out the so-called Afghan detainees scandal, one item stands out from the mass of raw intelligence leaked this week. It's the second-last line in a report of a March 8, 2008, meeting with Amrullah Saleh, at the time head of Afghanistan's National Directorate of Security. And it casually notes that until 2009, the entire budget of this secret police force was provided by America's Central Intelligence Agency. As the New York Times, one of the handful of newspapers first given the documents by the non-profit group WikiLeaks put it: 'For years, the CIA had essentially run the NDS as a subsidiary.' (ICC#41)

Prime Minister Stephen Harper said in a television interview reported by Canadian Press in December 2009 that allegations of detainee torture are a problem in Afghanistan that is beyond Ottawa's control. Harper insisted in an interview with Quebec's TVA television network that it is an issue for the Afghans to settle and that Canadian diplomats "reformed the transfer system" in 2007. "We are speaking here of a problem among Afghans," the prime minister said. "It's not a problem between Canadians and Afghans. We're speaking of problems between the government of Afghanistan and the situation in Afghanistan. We are trying to do what's possible to improve that situation, but it's not in our control." Harper called changes to the prisoner transfer agreement made in 2007 a success. "The system works very well," he said. "It's not perfect. There are problems from time to time." (ICC#66)

However, federal government documents on Afghan detainees suggest that Canadian officials actually intended some prisoners to be tortured in order to gather intelligence, according to a legal expert quoted in a March, 2010, CBC news story. If the allegation is true, such actions would constitute a war crime, said University of Ottawa law professor Amir Attaran, who has been digging deep into the issue and told CBC News he has seen uncensored versions of government documents released in 2009.

"If these documents were released [in full], what they will show is that Canada partnered deliberately with the torturers in Afghanistan for the interrogation of detainees," he said. "There would be a question of rendition and a question of war crimes on the part of certain Canadian officials. That's what's in these documents, and that's why the government is covering up as hard as it can."

Detainee abuse became the subject of national debate in 2009 after heavily redacted versions of these documents were made public after Attaran filed an access to information request. They revealed the Canadian military was not monitoring detainees who had been transferred from Canadian to Afghan custody. It was later alleged that some of those detainees were being mistreated. Until then, the controversy was centered on whether the government turned a blind eye to abuse of Afghan detainees.

However, Attaran said the full versions of the documents show that Canada went even further in intentionally handing over prisoners to torturers. "And it wasn't accidental; it was done for a reason," he said. "It was done so that they could be interrogated using harsher methods." The government maintains that nothing improper happened, said CBC. "The Canadian Forces have conducted themselves with the highest performance of all countries," Prime Minister Stephen Harper told the House of Commons.

But, said the CBC, many facets of the issue remain top secret, such as the role of Canada's elite Joint Task Force 2, or JTF2. There have been hints that JTF2 might be handling so-called high-value prisoners. "High-value targets would be detained under a completely different mechanism that involved special forces and targeted, intelligence-driven operations," Richard Colvin, the former senior diplomat with Canada's mission in Afghanistan, told a parliamentary committee in November, 2009. (ICC#69)

A recent story in The Guardian newspaper revealing new information about the nature of covert special forces operations by the U.S. and its coalition partners in Iraq is useful in illustrating how such highly secretive operations actually work in the field. (ICC#114)

The report came from information surfacing at an inquiry into the troubling death of a detainee being transported in an RAF helicopter, possibly kicked to death while being transported secretly for interrogation at a "black site" camp code-named H1, not known to or inspected by the Red Cross or any legal authorities. A British special forces unit, Task Force 14, and an Australian unit known as Task Force 64 were an integral part of operations at H1, with both units being under U.S. tactical control. A U.S. special forces unit, Task Force 20, was also part of H1 operations.

Persistent investigative efforts and leaked information finally revealed that 64 detainees, all in civilian clothes and unarmed, had been detained at a roadside checkpoint by 20 Australian troops who were accompanied by one member of the U.S. Air Force. The captured men were never recorded as prisoners of the 20 Australians, and the lone American was recorded as having captured them. This meant that the Australian government could consider itself not to be bound by Geneva Conventions that obliged it to demand the return of any prisoner it transferred to the U.S. if it became apparent that U.S. forces were not treating them in accordance with Geneva Conventions.

One former RAF trooper who was based at H1 for several months described to The Guardian having been involved in a number of similar missions in which prisoners were collected from coalition special forces. This always happened "under total darkness," he said. On arrival at H1, the prisoners were handed on to people whom he described as "other authorities," thought to be CIA and British MI6 intelligence operatives. This will not be confirmed or denied by British military officials.

However, the involvement of the CIA in Task Force 20 is no secret in the U.S., where it has been disclosed in Pentagon statements and congressional testimony. According to Human Rights Watch, the inter-agency unit was responsible for "some of the most serious allegations of detainee abuse" following the invasion of Iraq.

Perhaps relevant to concerns about Canada's covert operations in Afghanistan, The Guardian story noted that before the end of that year the unit merged with a similar unit previously based in Afghanistan and changed its name to Task Force 121. By then, however, some at the Pentagon were sufficiently concerned about its methods to send a special investigator to Iraq, who discovered that the unit was holding undeclared "ghost" detainees and operating a secret interrogation centre to conceal its activities. Some of its prisoners showed signs of having been beaten.

In 2006, an investigation by the New York Times found that some task force prisoners had been waterboarded, and others were beaten or shot with paintball guns. While a number of interrogators had been prosecuted in the course of the war, posters around one of their bases proclaimed "no blood, no foul": they would be safe as long as none of their subjects bled. Over the years that followed, the unit changed its name again, to Task Force 6-26, and later to Task Force 145, possibly in an attempt to confuse adversaries. Its precise size and the names of its commanders have never been disclosed. But its methods appear to have remained the same. The American Civil Liberties Union obtained a series of U.S. defense documents that showed that the unit's personnel had been investigated repeatedly over their alleged involvement in a catalogue of abuses.

"In one case, task force interrogators were said to have forced a 73-year-old woman to crawl around a room while a man sat on her back, before forcing a broom handle into her anus. Two of her fingers were broken. The woman, a retired teacher, said her interrogators demanded to know the whereabouts of her son and husband, both of whom she said were dead."

In Canada, a January 2002 news photograph from Afghanistan exposed the super-elite JTF2 unit transferring prisoners to U.S. troops, provoking a Parliament firestorm and damaging the career of then-Liberal defence minister Art Eggleton. And Jack Hooper, then Canadian Security Intelligence Service (CSIS) deputy director of operations, testified to a 2006 Senate committee that the spy agency had been actively supporting the troops since their Afghanistan deployment and claimed success in disrupting attacks, uncovering weapons and saving lives. (ICC#68) Investigative reporters have been mostly kept in the dark about anything to do with JTF2 but in December, 2010, the CBC did reveal several secretive probes into JTF2 activities. The report said Ottawa has been carrying out a closed-door investigation, called Sand Trap 2, to probe allegations that members of Joint Task Force 2 saw an American soldier killing an unarmed man during a joint mission.

That probe followed an earlier investigation into allegations that a member of JTF2 shot and killed an Afghan who was surrendering in 2006. The probe, called Sand Trap, ended without any charges being laid. CBC reported the Canadian military is also reviewing how the chain of command reacted to the allegations and what actions were taken to respond. (ICC#119) No details of these investigations have since been revealed publicly.

Accounts from detainees at Guantanamo Bay reveal that the United States operated secret prisons in Afghanistan where detainees were subjected to torture and other mistreatment. The largest CIA prison in Afghanistan was code-named the "Salt Pit." In November, 2002, a CIA case officer reportedly ordered guards to strip naked an uncooperative young detainee, chain him to the concrete floor and leave him there overnight without blankets. He froze to death, according to four U.S. government officials.

One of the chief U.S. Army interrogators of Canadian teen Omar Khadr after his capture in Afghanistan was accidentally revealed in court proceedings to have been involved in the horrific case of an Afghan taxi driver known as Dilwar who was literally tortured to death at Bagram detention center while hanging for four days from shackles suspended from the ceiling. Dilwar, thought by most Americans involved to be innocent of terrorism, was beaten so severely he couldn't bend his legs any more before he died. Lt. Col. Elizabeth Rouse, an Air Force medical examiner who performed an autopsy on Dilwar, said Dilwar's leg was pummeled so badly that the "tissue was falling apart and had basically been pulpified." (ICC#91).

Interrogator Sgt. Joshua Claus was instrumental in the interrogations of both Dilwar and Khadr, which raises troubling questions about the initial treatment of the 15-year-old Khadr, who was charged and convicted of the murder of a U.S. Special Forces soldier after being present and wounded at a firefight in a compound in Afghanistan.

Claus's involvement with Khadr is doubly troubling, said defence lawyer Lt.-Cmdr. William Kuebler at the time, because the Canadian was just 15 years old and severely wounded from the firefight. Khadr was interrogated at Bagram numerous times over a three-month period before he was sent to Guantanamo Bay, and his lawyer said he believed Klaus was present at most interrogations.

Khadr's three months in Bagram before he was sent to the U.S. prison camp in Cuba is the "critical period," said Kuebler. "His principal interrogator was somebody we know was involved in detainee abuse."(ICC#97)

Extraordinary Renditions

The Canadian government is also in a position of legal liability from actively participating in or facilitating by default the illegal CIA "extraordinary rendition" process by allowing private CIA aircraft used for this purpose to utilize Canadian airspace and to land for maintenance and refueling at Canadian airports.

A St. John's, Newfoundland, airport has been publicly identified as having been a "hub" for covert American air operations and a DeHavilland DHC-6-300 aircraft owned by a reported CIA front in the U.S. landed at Bar River airport near Sault Ste. Marie, Ontario, in early October, 2005, after taking off from Michigan. The Bar River airport is home to a company that specializes in work on DeHavilland aircraft. An airport official who asked not to be named said "I have no knowledge of any CIA aircraft," and told an inquiring reporter "I suggest you don't pursue this any further."

Montreal's La Presse newspaper reported in 2005 at least 55 flights operated by the CIA had passed through Canada. Deputy Prime Minister Anne McLellan acknowledged in an article December 7, 2005, that she had ordered officials to track down details of the 55 flights.

However, a spokesman for the Canadian government said in a story published the very next day that the government had no intention of questioning the U.S. about the flights, saying a preliminary review had turned up no evidence of illegal U.S. activity. There has since been no public discussion or disclosure about the issue by responsible Canadian officials.

Other declassified memos obtained under the Access to Information Act in the past have revealed government knowledge of at least 20 planes with alleged CIA ties having made 74 flights to Canada. Considerable portions of the memos obtained were blacked out for secrecy reasons.

Human Rights Watch says Syrian-born Canadian Maher Arar was transported on an extraordinary rendition flight out of the U.S. Arar was detained during a layover at John F. Kennedy International Airport in September 2002 on his way home to Canada from a family vacation in Tunis. He was held without charges in solitary confinement in the United States for nearly two weeks, questioned, and denied meaningful access to a lawyer. The U.S. government suspected him of being a member of Al Qaeda and deported him – not to his home in Canada, but to his native Syria, even though its government is known to use torture. He was detained in Syria for almost a year, during which time he was tortured, according to the findings of a commission of inquiry later ordered by the Canadian government, until his release to Canada. The Syrian government later said Arar was "completely innocent." The Canadian commission publicly cleared Arar of any links to terrorism, and the government of Canada settled out of court with Arar for \$10.5 million.

A leaked note in 2006 from the British Foreign Secretary's office to Prime Minister Tony Blair's office shows UK officials privately admitting knowledge of CIA "torture flights" and that people captured by British forces in Afghanistan or Iraq could have been illegally sent by the U.S. to CIA interrogation centres. "We have no mechanism for establishing this..." the document notes. This contradicts repeated statements of UK ministers that they were unaware of CIA rendition flights passing through Britain or of secret interrogation centres – and calls into question similar assertions by Canadian officials.

A European Union (EU) investigator said in an official report in 2005 that CIA prisoners were apparently abducted and moved between countries illegally, possibly with the aid of national secret services who did not tell their governments. Jack Straw, then British Foreign Minister, wrote U.S. Secretary of State Condoleezza Rice a letter on behalf of the EU asking for information about rendition reports. If true, the activities could be "violations of international law...and the EU would therefore be grateful for clarification," Straw said in the letter. (ICC#3)

A UK newspaper reported that previously concealed minutes of an EU/U.S. meeting from 2003 show that the EU secretly agreed to allow the U.S. to use transit facilities on European soil to transport "criminals", which contradicts repeated EU denials that it knew of rendition flights by the CIA. The original minutes show the EU agreed to give America access to facilities – presumably airports – in the confidential talks in Athens, during which the war on terror was discussed. But all references to the agreement were deleted from the record before it was published. The section including the agreement for "increased use of European transit facilities to support the return of criminal/inadmissible aliens," and others referring to U.S. policy, were deleted – as a "courtesy" to Washington.

Does the EU situation have relevance for Canada in terms of international law? The UK All Party Group on Extraordinary Rendition in a December 2005 briefing paper said in the forward: “This paper shows that there is a real and clear legal imperative to find out what is going on, and to ensure that no state engages in Extraordinary Rendition. This applies to the UK as much as it does to the U.S. and ‘seemingly innocuous acts (e.g. allowing refueling at airports of aircraft of another State) can become wrongful under international law if those acts facilitate Extraordinary Rendition.’” (ICC#3)

Afghans make up the largest group by nationality held at the Guantanamo Bay detention center following extraordinary rendition, an estimated 220 men and boys in all. Yet they were frequently found to have had nothing to do with international terrorism, according to more than 750 secret intelligence assessments that were written at Guantanamo between 2002 and 2009. The assessments were obtained by WikiLeaks and passed to McClatchy Newspapers in April 2011.

In at least 44 cases, U.S. military intelligence officials concluded that detainees had no connection to militant activity at all, a McClatchy Newspapers examination of the assessments, which covered both former and current detainees, found. (ICC#105)

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C. INDEX of footnoted documentations which are referenced in Overview (ICC#)

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D. SUMMARY OF LEGAL ARGUMENTS

Rome Statute: The Rome Statute of the International Criminal Court, to which Canada is a signatory, applies to the torture of Afghan detainees. Part 2, Art. 5, states that Crimes within the Jurisdiction of the Court include war crimes, and that:

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.
2. For the purpose of this Statute, "war crimes" means:
 - (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:
 - (ii) Torture or inhuman treatment, including biological experiments;
 - (vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
 - (vii) Unlawful deportation or transfer or unlawful confinement;

Article 3: Article 3(1) of the Convention reads as follows: “No State Party shall expel, return ("Refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”

E. RECOMMENDATIONS

- 1.) Canada should acknowledge that officials or military personnel acting under Canada's authority in Afghanistan may have violated the Rome Statute and Article 3 of the Convention with the complicit transfer of detainees into the danger of being subjected to torture, and with the overt or covert complicit support of extraordinary rendition "torture flights" to and by other States utilizing Canadian airspace and airport facilities.**
- 2.) Canada should immediately halt the practice of transferring Afghan detainees to any other authority due to the well-established danger of such detainees being subjected to torture.**
- 3.) Canada should establish a clear public policy prohibiting the use of Canadian airspace and Canadian facilities for purposes of extraordinary rendition of detainees by any State.**
- 4.) Canada should accept responsibility for immediately initiating an independent full judicial inquiry with the power of subpoena to establish the facts about possible violations of its legal obligations under the Rome Statute, the Geneva Conventions and related domestic law forbidding torture and complicity in torture.**
- 5.) Canada should appoint an independent Office of Special Prosecutor with the mandate and resources necessary to pursue the prosecution of any charges against Canadian officials or military personnel that may arise from the work of the judicial inquiry into possible war crimes related to the Afghanistan mission and to extraordinary rendition.**
- 6.) The UN Committee against Torture should recommend to the Office of the Prosecutor at the International Criminal Court in The Hague the initiation of a formal investigation into whether Canada has committed war crimes related to its military mission in Afghanistan and related to extraordinary rendition "torture flights," provided Canada fails to undertake recommendations 1 through 5 above in a timely way.**

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