

January 25, 2013

Mr. Wayne G. Wouters  
Clerk of the Privy Council and Secretary to the Cabinet by the Prime Minister  
Privy Council Office  
Room 1000  
85 Sparks Street  
Ottawa, Canada K1A 0A3

RE: Request for judicial inquiry into possible war crimes by Canadian officials and military

Dear Mr. Wouters:

I earlier wrote and provided extensive information to Governor General/Commander-in-Chief David Johnston and Attorney General/Minister of Justice Rob Nicholson, asking them to initiate a full judicial inquiry related to possible war crimes involving Canada's participation for the past decade in the invasion and occupation of Afghanistan and in other events of the so-called international war on terror. Though there has been no reply from Governor General Johnston, I am now writing to you in light of the response from a spokesperson for Minister Nicholson indicating I should contact the Privy Council with my request:

"On behalf of the Honourable Rob Nicholson, Minister of Justice and Attorney General of Canada, I acknowledge receipt of your correspondence of April 30, 2011, requesting a judicial inquiry into the Afghan detainees issue.

As Minister of Justice and Attorney General of Canada, Minister Nicholson does not have the authority to order a federal government inquiry into this matter. Federal commissions of inquiry are governed by the *Inquiries Act*. Section 2 states, 'The Governor in Council may, whenever the Governor in Council deems it expedient, cause inquiry to be made into and concerning any matter connected with the good government of Canada or the conduct of any part of the public business thereof.'"

**Formal requests.** I therefore now wish to formally request with this correspondence: **a.)** That the Privy Council take the actions necessary to initiate an independent full judicial inquiry related to possible war crimes involving Canada's participation in the invasion and occupation of Afghanistan and Canada's participation in the so-called international war on terror during the same time frame, specifically 2001-2013; **b.)** That the Privy Council remove itself from deliberations on this request by asking the Chief Justice of the Supreme Court of Canada for an advisory opinion on how to proceed with this matter.

The request that the Privy Council remove itself from deliberations is very important. I have been reluctant to approach the Privy Council because I see a very real potential for a conflict of interest on the part of Governor General/Commander-in-Chief David Johnston and Prime Minister Stephen Harper. Both are intimately involved with the Privy Council and both have been intimately involved in processes directly related to possible violations of international law and related domestic law, as was Mr. Johnston's predecessor and as has been the current attorney general/minister of justice; and

c.) That any judicial inquiry that might go forward include an investigation of the orchestrated cover-up of possible wrongdoing through actions of top government officials, to determine whether these actions in and of themselves constitute criminal activity. The Harper government has used its vast array of resources to quite effectively bludgeon, kill and deeply bury any and all legitimate attempts to bring forward any sort of effective legal inquiry leading to the hard evidence of illegal actions.

This includes the arbitrary shutting down of a special parliamentary investigation, which happened immediately after an election gave the ruling Harper government the ability to use – and quickly abuse – the power of majority status to prevent the workings of justice. Other abuse of power includes the threat of criminal prosecution for anyone in the government or military who might bring forward possibly incriminating information – even in the form of sworn evidence to an official government body with a parliamentary legal mandate to gather such evidence, e.g., the Military Police Complaints Commission and the aforementioned special parliamentary investigation.

Perhaps the most egregious example of this abuse of power was when the Prime Minister and the Governor General (coincidentally also Canada’s “Commander-in-Chief”) went so far as to collaborate to prorogue the House of Commons, effectively shutting down democratic process and effectively killing the House committee which was actively threatening to uncover information on possible illegal activities related to detainee torture.

**Possible criminal actions.** There are numerous credible documentations and formal findings by relevant international bodies to demonstrate a grave concern about possible criminal behavior with apparent legal impunity on the part of high-level Canadian officials and members of Canadian Forces. The evidence indicates possible systemic violations of international law and related domestic law which were overseen by government and military officials at the highest levels.

Such possible criminal actions include, but are not limited to:

1.) Canada’s complicity in illegal abuses as an active partner in the U.S. Coalition forces in Afghanistan, including but not limited to, the illegal transfer of Afghan detainees to United States and Afghanistan authorities when there was, and continues to be, an extreme risk of torture. This was first publicly documented by a 2005 UN report.

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, attached Index)

- 2.) Canada’s active participation in the covert illegal “extraordinary rendition” scheme of kidnapping, torture and indefinite detention of detainees from around the world by the U.S. Central Intelligence Agency and its Coalition collaborators.
- 3.) Canada’s transfer of child detainees to authorities of these same countries when there was an extreme risk of torture, and an extreme risk of sexual abuse.
- 4.) Canada’s specific complicity in the torture and the abuse of the human rights of Canadian citizens Omar Khadr – by the U.S. – and of Abdullah Almalki, Ahmad Abou Elmaati, and Muayyed Nureddin – by Syria and Egypt – following the extraordinary renditions of all four.
- 5.) Failure to comply with legal and credible demands to obey Canada's obligations under the UN Convention Against Torture by submitting self-confessed torturer George W. Bush for prosecution when he visited Canada in October 2011, with the Harper Government refusing to take action. Faced with privately initiated charges on the same matter, the Attorney General of British Columbia intervened to shut down that case.
- 6.) The participation of Joint Task Force 2 Special Forces (JTF2) in the secret transfer of detainees to authorities of other countries when there was a risk of torture, and risk of rendition to torture.
- 7.) The failure to pursue charges after the secret investigation of allegations that members of JTF2 saw an American soldier killing an unarmed man during a joint mission and also after an earlier investigation into allegations that a member of JTF2 shot and killed an Afghan who was surrendering in 2006.
- 8.) The participation of Canada's spy agency, Canadian Security Intelligence Service, in secret interrogations to prescreen captured Taliban fighters and other detainees. Detainees were then subjected to possible illegal extraordinary rendition to CIA “dark sites” and the risk of torture when covertly transferred to other authorities.
- 9.) The Harper government’s recent authorization directing Canada’s national police force and the federal border agency to use and share information that was likely extracted through torture, coupled with the recent introduction of Bill C-42, which lays out sanctions including dismissal for those who might openly question the illegal nature of this practice.

**10.)** Canada's failure to establish effective independent monitoring mechanisms to ensure that intelligence gathered by Canada's drones in Afghanistan which was shared with NATO and ISAF allies has not been used to attack and kill helpless civilians on the ground.

I am fully aware of the serious nature of these allegations of possible criminal wrongdoing, and I am prepared to submit all complete documentations about these issues in the form of a legal affidavit. I am a Canadian citizen and a decorated military veteran, having been awarded a Bronze Star Medal for service in Vietnam. I have followed these issues closely and lobbied responsible authorities since 2005.

**UN Committee against Torture.** A report I authored was prominent among those utilized by the UN Committee against Torture last spring when it pronounced Canada to be "complicit in torture." The report, entitled "*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*" can be accessed by clicking on "John McNamer" after scrolling down to **Canada** on the committee website at <http://www2.ohchr.org/english/bodies/cat/cats48.htm> A written copy of this report is attached to this document, and I ask that it be considered to be part of the formal submission of evidence contained in this document demonstrating possible illegal activities on the part of responsible Canadian officials and military personnel.

Last June, Canada's actions over the past five years were closely examined by the UN Committee against Torture, one of the world's most knowledgeable and respected bodies with respect to obligations of international law. The committee regularly examines the compliance of nations which are signatory to the Convention against Torture and the Rome Statute. In a report that was shocking to many, this committee not only found Canada to be "complicit in torture," but it also told Canada it "should adopt a policy for future military operations which clearly prohibits the prisoner transfers to another country when there are substantial grounds for believing that he or she would be in danger of being subjected to torture, and recognizes that diplomatic assurances and monitoring arrangements will not be relied upon to justify transfers when such substantial risk of torture exists."

Almost equally shocking was Canada's sole public response, a June 2, 2012, media foray splashed across international press pages in an Associated Press story with the headline: "Canada criticizes UN report accusing its troops of complicity in torture in Afghanistan." In that story a spokeswoman for Canada's Public Safety Minister said it is "disappointing" the UN committee spent time condemning Canada "when there are serious concerns regarding human rights violations across the world," adding that "Canada is a nation of laws and the actions of our Government uphold the highest standards in the protection of human rights."

Canada, however, has since made no public effort to remedy possible illegal actions in light of the committee's very serious and disturbing findings. Quite the opposite, in fact, for Canada has quietly defied the CAT recommendations by continuing to have an official policy of transferring Afghan detainees to the U.S., a nation known to torture. Also Canada has just recently issued new guidelines approving and directing the use by national police and border officials of evidence likely obtained through torture.

**Collaboration with Extraordinary Renditions.** Further evidence strongly indicating possible intentional systemic criminal activity by Canadian officials was contained in a [highly critical UN report](#) in March 2009 by Special Rapporteur Martin Scheinen, which said that actions by countries to send interrogators to Guantanamo Bay – which Canada did with Omar Khadr – "can be reasonably understood as implicitly condoning torture and ill-treatment."

The report went on to specifically cite Canada's "collaboration" in illegal extraordinary renditions:

While the practice of extraordinary rendition was put in place by the US, it was only possible through collaboration from other countries, the report says. It identifies the UK, with Bosnia and Herzegovina, Canada, Croatia, Georgia, Indonesia, Kenya, Macedonia and Pakistan, as countries that provided "intelligence or have conducted the initial seizure of an individual before he was transferred to (mostly unacknowledged) detention centres in Afghanistan, Egypt, Ethiopia, Jordan, Pakistan, Morocco, Saudi Arabia, Yemen, Syria, Thailand, Uzbekistan ... or to one of the CIA covert detention centres, often referred to as 'black sites'".

The report continues: "The active or passive participation by states in the interrogation of persons held by another state constitutes an internationally wrongful act if the state knew or ought to have known that the person was facing a real risk of torture or other prohibited treatment." (#163, attached Index)

## **Conclusion.**

The above documentation of wrongdoing, which is just a very brief representation of available evidence, surely begs the question: Is Canada truly a nation of laws? There is plenty of evidence to indicate that this is not the case when it involves torture or rendition of detainees and other activities which are part of a clearly constructed plan to intentionally attempt to circumvent Canada's obligations to abide by the Convention against Torture, the Rome Statute and related domestic law.

Officials of the government of Canada have demonstrated time and again that they have contempt for international law and related domestic law forbidding complicity in torture, and that they cannot or will not act with legal and moral integrity on these issues. It is painfully apparent that the only way the truth will be found about possible systemic criminal violations – short of intervention by international authorities – is through an independent full judicial inquiry with a special prosecutor who is given the power of subpoena and the power to lay charges when warranted.

The Office of the Prosecutor (OTP) at the International Criminal Court (ICC) has publicly indicated at least four times in recent years that it is considering an investigation of possible war crimes in Afghanistan related to torture. In April, 2011, former Chief Prosecutor Luis Moreno-Ocampo was quoted in the Toronto Star specifically stating that if the Canadian government won't look into how Canadian soldiers handled detainees in Afghanistan for possible war crimes violations, the prosecutor's 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. Even though a new prosecutor was recently appointed, current information on the public record indicates that the possibility of an investigation into Afghanistan has not been dropped by the OTP.

**(Note:** Please be aware that a copy of this document will be submitted to the ICC and relevant UN agencies as part of the ongoing documentation of evidence about Canada's involvement in detainee torture and other violations.)

There is much more that can be said, but for now I draw your attention to the attached Index of Submissions, which summarizes and dates the many documentations I have personally sent to the International Criminal Court supporting my 2009 request for an investigation into possible war crimes by Canadian officials and military. I hereby request that this Index of Submissions be taken to be part of the evidence submitted in this document to support the request to the Privy Council for a judicial inquiry.

A careful reading of just the one-line capsule summaries in the Index quickly reveals that it is quite a disturbing compendium demonstrating a large-scale, long-term systemic violation of international and domestic law forbidding complicity in torture. And it also reveals a secretive, extreme serial abuse of power to hide possible criminal activity by Canadian officials apparently committed to pursuing by any means – illegal or otherwise – active participation in the "dark side" (the secret illegal side) of the so-called war on terror. In my view, it's a true horror story that shocks the conscience, morally as well as legally, and it demands an immediate independent full judicial inquiry.

With respect,

John McNamer, PO Box 845 Stn Main, Kamloops, BC V2C 5M8 email: [jhnmcnamer@yahoo.ca](mailto:jhnmcnamer@yahoo.ca)

*(Printed copy to follow via Canada Post Express Mail)*

**(MORE BELOW)**

**ATTACHMENTS: A.) Index of Submissions**

**B.) Report to UNCAT, by John McNamer (includes a summary of legal arguments)**

(Both pasted below and also attached to email as Word documents)

**A.) Index of Submissions by John McNamer to OTP at ICC:**

1. Brief by John McNamer detailing war crimes in Afghanistan included in 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; sent to PM, GG, etc., dated Feb. 27, 2006
2. Canada's secret trial cases built on torture evidence; Dec. 31, 2011
3. 2nd John McNamer brief expanding on Convention violations, to top officials; Mar. 25, 2006
4. DND e-mails, refusal to give detainee policy details; Nov. 16, 2006
5. War crimes charges against U.S. officials laid in Germany; sent to PM, et.al., Nov. 16, 2006
6. DND confirms receipt of McNamer brief; Nov. 16, 2006
7. Rule of law or bomb? Kamloops Daily News story sent to officials; Mar. 7, 2006
8. MoD confirms receipt of first brief; Mar. 9, 2006
9. MoD and PM acknowledge first brief; March 13, 2006
10. MoD received second brief; Mar. 24, 2006
11. Def. Min. O'Connor e-mail: 'confident of monitoring'; May 12, 2006
12. O'Connor e-mail: detainees treated according to Geneva Conventions; Aug. 30, 2006
13. Confirmation that MoD received #5; Aug. 16, 2006
14. Min. MacKay e-mail exchange with John McNamer as sent to ICC; Sep. 22, 2009
15. McNamer request to Special Committee, w/complaint to GG about Sen. Armed Svc. Committee torture report May 5, 2010

16. Complete correspondence around McNamer complaint to MPCC: rejected for being "historical"; Oct 31, 2008
17. Academic details torture history, points at PM; Apr. 26, 2011
18. McNamer's Conscientious Objector declaration to officials following machine-gunning of 9 young Afghan boys by NATO; Mar. 8, 2011
19. Abu Ghraib photos frame Canada's problem, Toronto Star: to GG, AG, et.al.; May 8, 2010
20. MPCC chair dumped midstream; Dec 11, 2009
21. Globe editorial: MPCC situation 'close to offensive'; Apr. 22, 2010
22. Harper gvmnt fights MPCC demand for detainee records; June 9, 2010
23. Gvmnt redactions hamper MPCC probe; Dec 2009
24. Gvmnt threatens MPCC witnesses with prosecution under 'section 38'; Oct. 7, 2009
25. Defiant diplomat Colvin testifies despite threat; Oct. 8, 2009
27. Secret abuse photos implicate Canada, story sent to PM; May 14, 2009
28. Request MPCC review of 'cover-up' of issues in McNamer complaint; Apr. 30, 2009
29. Colvin says Ottawa warned of torture in early 2006; Oct. 14, 2009
30. Canadian Forces handing detainees directly to NDS; allies concerned about Cdn. secrecy; Dec. 15, 2009
31. Military Police ordered to withhold information; Apr. 5, 2010
32. Military Police "not responsible" for detainee torture; Apr. 15, 2010
33. UK worried Canadian torture scandal could spread; Apr. 21, 2010
34. Military Police investigator in dark about torture; Nov. 29, 2010
35. Military Police reorganize; Apr. 4, 2011
36. Prorogue shuts Commons to kill detainee inquiry; Dec. 31, 2009
37. Story details the killing of innocent Afghan civilians with drone; Apr. 13, 2011
38. ICC prosecutors may investigate Canada, to AG & GG; Apr. 30, 2011
39. Reply from AG saying he has no mandate to initiate judicial inquiry into war crimes; June 7, 2011
40. Special Committee detainee probe shut down with Harper majority win; June 7, 2011



41. Wiki Leaks reveals CIA fully funded NDS past 9 years; Aug. 4, 2010
42. Detainee issue can't be dismissed, Kamloops Daily News story to AG, ICC; Aug. 16, 2011
43. LAW request to bar Cheney from Canada; Sep. 20, 2011
44. Groups say Canada must investigate, charge Bush on entry to Canada; Sep. 29, 2011
45. LAW letter to MPs re: Bush visit; Sep. 30, 2011
46. LAW letter to RCMP re: Bush visit; Oct. 11, 2011
47. LAW to RCMP war crimes unit re Bush; Oct. 13, 2011
48. Rights groups again inform AG about illegalities of Bush visit; Oct. 14, 2011
49. Torture victims file Canadian court action against Bush; Oct. 19, 2011
50. Amnesty International to justice minister: Arrest Bush on entry into Canada; Oct. 20, 2011
51. RCMP war crimes unit refuses to act, LAW's reply; Oct. 14, 2011
52. Bush visits Canada unhampered, despite protests; Oct. 20, 2011
53. Canada alienated Afghans with "complicity in torture" diplomat Colvin tells MPCC Nov. 18, 2009
54. Ottawa forces removal of key witnesses at MPCC inquiry; Oct. 1, 2009
55. Ottawa blocks top military police officer from handing over documents to MPCC; Oct. 7, 2009
56. Gen. Rick Hillier: Political masters always fully informed of detainee conditions, despite ministerial denials; Oct. 21, 2009
57. It's a "cover-up" on detainees say opposition critics; Oct. 15, 2009
58. NDP wants public inquiry; Nov. 19, 2009
59. Ottawa blocks Colvin from giving evidence to Special Committee inquiry; Nov. 27, 2009
60. Canada has failed to follow law on detainees: Toronto Star column; Nov. 28, 2009
61. General didn't know, but one Kamloops guy knew torture risk: Canada.com story; Dec. 1, 2009
62. Globe: the record and the falsehoods; Dec. 8, 2009
63. Detainees still unaccounted for under new agreement; Dec. 14, 2009
64. Canadian officials could face prosecution: Star news story; Dec. 19, 2009
65. Tories boycott detainee inquiry to slurp eggnog; Dec. 22, 2009

66. PM Harper says detainee torture not Canada's problem; Dec. 29, 2009
67. Amnesty: detainees still at risk; Dec. 22, 2009
68. Did Canada turn blind eye to killings? ICRC concerned (JTF2) Toronto Star; Feb. 25, 2010
69. Canada wanted some detainees tortured: Amir Attaran cites secret documents; May 7, 2010
70. Ottawa knew NATO concerns on torture in 2006; Mar. 12, 2010
71. Afghans said to routinely execute detainees; Apr. 3, 2010
72. Canada stymied Red Cross detainee monitoring in 2006: Colvin to MPCC; Apr. 13, 2010
73. Kafka'd be proud of Canada's censorship: article sent to AG & GG; Apr. 14, 2010
74. Top investigator: 'Possibly' war crimes, but still not investigated; Apr. 12, 2010
75. Canada subcontracts torture, says Afghan-Canadian accuser; Apr. 14, 2010
76. Investigators 'willfully blind' Globe editorial; April 17, 2010
77. Troops were aware detainees regularly beaten by Afghan authorities; May 7, 2010
78. PM Harper gags staff to curb detainee scandal; June 14, 2010
79. More than 400 detainee transfers by Canada; Sep. 9, 2010
80. Secretive panel of retired judges for Special Committee 'inquiry'; Feb. 21, 2011
81. Tories desperate to 'deep-six' investigation: Lawrence Martin column; Apr. 21, 2011
82. Special Committee inquiry called a 'sham'; June 27, 2011
83. Ottawa loses bid to censor MPCC report; Sep. 30, 2011
84. Request from Prof. Byers & Schabas for ICC probe of 'possible war crimes'; Jan. 12, 2008
85. 2005 Detainee Transfer Agreement
86. ACLU complaint wants to lift secrecy on Bagram detainees; Sep. 24, 2009
87. Prominent international activists ask U.S. AG to investigate torture; Sep. 8, 2009
88. UN rights chief wants CIA prosecutions; Apr. 25, 2009
89. Bagram detainees treated worse than animals; June 27, 2009
90. Canadians participate in strike that killed many civilians; Aug. 5, 2009

91. Afghan detainee Dilwar tortured to death at Bagram; June 25, 2009
92. Blocked photos show detainee abuses in Afghanistan, Iraq; May 29, 2009
93. Up to 2000 photos blocked; May 13, 2009
94. US Senate committee report names torture techniques, points to Rumsfeld; Apr. 21, 2009
95. Detainee deaths at hands of CIA revealed; Apr. 21, 2009
96. Drones kill Pakistani civilians; Apr. 15, 2009
97. Khadr investigator linked to Afghan detainee torture; Mar. 15, 2008
98. Two Innocent Afghan teens on motorcycle killed by Canadians; Oct. 2, 2009
99. McNamer request to GG to withdraw troops, citing UN and US Senate Armed Svcs Committee torture documentations; Dec. 15, 2009
100. Judge Advocate General told military brass in 2007 to heed abuse claims; Feb. 25, 2010
101. New 2010 Bagram abuses in 'secret jail' claimed; Apr. 17, 2010
102. At least 44 U.S. detainee deaths in Iraq, Afghan by 2005: ACLU; Oct. 24, 2005
103. JFT2 special forces secretly investigated for killings; Dec. 2, 2010
104. Indefinite detainee detention illegal: HRW; Jan. 25, 2011
105. Rendered Guantanamo detainees often innocent; Apr. 27, 2011
106. Ottawa has covered up illegal actions, academic says; June 3, 2011
107. LAW letter to Special Committee citing illegalities; Dec. 21, 2009
108. Canada transfers child detainees to Afghan NDS; Nov. 30, 2010
109. Sexual abuse & torture of children by NDS documented in UN report; April 2010
110. MPCC report given to MacKay; Dec. 22, 2011
111. Afghan gvmt commission alleges detainee abuse by U.S.; Jan 7, 2012
112. Appeal of torture case denied by Cdn. supreme court; Jan. 19, 2012
113. Halting Bush prosecution violated international law: Jurist law journal article; Jan. 19, 2011
114. Iraq revelations reveal systemic illegal 'dark sites' and special forces tactics; Feb. 7, 2011
115. Canada still willing to use evidence obtained from torture; Feb. 9, 2012

116. Torture case discovered in 2007 is 'tip of iceberg': Law Times; Feb. 2008
117. PM Harper, GG prorogue Parliament; Dec. 30, 2009
118. Chinese communist techniques inspired U.S. 'enhanced interrogations'; July 2, 2008
119. JTF2 investigated for killings: CBC; Dec. 2, 2010
120. Defence Minister O'Connor misleads House on torture, forced to resign in 2005
121. Kamloops activist submits detainee torture documents to ICC: Daily News; Feb. 15, 2012
122. Top military cop: 'it's a foreign policy decision'; Apr. 1, 2009
123. Military has secret investigation, says top military cop won't be prosecuted; Sep. 5, 2007
124. Top military cop hires own criminal defense lawyer; Dec. 4, 2008
125. GG receipt of e-mail w/article "Canada's Detainee Torture Scandal: An Overview"; Feb. 14, 2012
126. GG receipt of McNamer e-mail offering to forward all documents sent to OTP @ ICC Feb. 1, 2012
127. Canada has 'no idea' where 50 detainees are; Feb. 20, 2007
128. Government dismisses detainee torture reports as 'Taliban allegations'; Aug. 21, 2009
130. War crimes allegations 'un-Canadian': Defence Minister Peter MacKay; Nov.22, 2007
131. Opposition attacks Canada's transfers of child prisoners; Nov. 20, 2007
131. (*sic*) Amnesty International report says NATO complicit in detainee torture: Amir Attaran; Nov.16, 2007
132. Where are prisoners held when transfers suspended by Canada?; Jan. 25, 2008
133. Canadian 'mentors' of Afghan troops evade responsibility for fate of detainees; Jan. 30, 2008
134. Harper government kept secret its knowledge of detainee torture on part of Kandahar governor; Feb. 1, 2008
135. Amnesty to NATO: Torture should stop all transfers of detainees; Feb. 7, 2008
136. Ottawa won't become involved in Afghan prisons to stop detainee torture; Feb. 5, 2008
137. CIA admission of waterboarding must bring criminal investigation: Amnesty; Feb. 6, 2008
138. 'No evidence' of detainee torture, NATO responds to Amnesty International; Nov. 14, 2007
139. Canada's torture probe may not have been 'competent or impartial,' says Amnesty; Nov. 13, 2007

140. Amnesty sheds light on CIA 'disappearances' and 'black sites'; Mar. 6, 2008
141. 'Not our job to show jails free of torture' Ottawa argues; Mar. 6, 2008
142. Use of illegal interrogation by U.S. military special forces documented; Apr. 16, 2008
143. 'Child soldier' Khadr needed Canada's protection: Sen. Romeo Dallaire; May 13, 2008
144. U.S. interrogations copy Communist brainwashing manual: sent to PM Harper; July 17, 2008
145. Were Cdn. troops told to look other way about rape of boys by Afghan troops? Dec. 15, 2008
146. Khadr 'treated like human mop' by Guantanamo interrogators says lawyer; Dec. 12, 2008
147. Obama's order to close black sites; *"but there are also unknown unknowns - the ones we don't know we don't know"* -- Rumsfeld Jan.23, 2009
148. Waterboarding torture left Guantanamo detainee in life-threatening condition, official admits; Jan. 14, 2009
149. Hansard: questions to PM Harper on detainee torture; Mar. 15, 2009
150. The New Yorker's Jane Mayer discusses fallout from the Red Cross' "shocking" report on CIA torture and its serious legal implications; Apr. 13, 2009
151. Secret CIA prisons in Afghanistan to be closed; Apr. 14, 2009
152. Rice, Cheney approved waterboarding: Huffington Post; Apr. 22, 2009
153. Prisoner-abuse photos supposed to be released included locations in Afghanistan; Apr. 25, 2009
154. UN tortur envoy: US must prosecute officials responsible for torture; Apr. 24, 2009
155. *sic*
156. U.S. general who probed Abu Ghraib says Bush officials committed war crimes; Apr. 23, 2009
157. CIA torture started in Afghanistan in December 2001; Apr. 27, 2009
158. Obama to block release of hundreds of new abuse photos in Iraq and Afghanistan May 13, 2009
159. U.S. General Taguba, who investigated detainee abuse in 2004: 'These pictures show torture, abuse, rape and every indecency'; May 29, 2009
160. 'A window into CIA's embrace of secret jails', Washington Post; Aug. 12, 2009
161. Tony Blair knew of secret torture policy on terror interrogations; June 18, 2009

162. PM Harper misleads reporters over Canadian involvement in air strike killing many civilians; Apr. 5, 2009
163. UN identifies Canada as a collaborator in extraordinary renditions; Mar. 9, 2009
164. Ex-defence chief Hillier 'can't recall' reading 2006 Colvin report on torture risk to detainees; Oct. 22, 2009
165. Colvin warned Ottawa in early 2006 about risk of detainee torture; Oct. 14, 2009
166. 'I have not seen those reports,' says Defence Minister Peter MacKay; Oct. 15, 2009
167. Colvin's legal affidavit detailing his warnings about torture; Oct. 5, 2009
168. How Geneva Conventions applied in Afghanistan according to DND; Feb. 6, 2009
169. Two Afghans allege abuse in secret black site at Bagram; Nov. 28, 2009
170. MPCC chair upset about being dumped in middle of inquiry; Dec. 11, 2009
171. Ottawa's top man admits officials had early awareness of abuse allegations; Dec. 21, 2009
172. Colvin's rebuttal to Ottawa's denials; Dec. 16, 2009
173. Canada refused to monitor detainees; some went to "black site" jails; Dec. 16, 2009
174. Colvin hit with 'reprisal' from government; Jan. 25, 2010
175. 'Canadian Rendition' possibilities raised with revelation that CSIS involved in detainee interrogation; Mar. 8, 2010
176. Senior diplomat says she warned of torture in 2005 but was ignored; Mar. 10, 2010
177. Bush knew some Guantanamo prisoners were innocent, high level aide says; Apr. 9, 2010
178. The secret documents Canadians MPs wanted to see; Mar. 5, 2010
179. No one accountable for selection of detainee files to be turned over to MPCC; May 3, 2010
180. Osgoode Hall Law School submission to Special Committee; Mar. 13, 2010
181. *sic*
182. Red Cross confirms 'second jail' at Bagram; May 11, 2010
183. Leading UN official criticizes CIA's role in drone strikes; June 3, 2010
184. Classified documents reveal UK role in abduction and torture of own citizens; July 14, 2010
185. Diplomat had no time to interview detainees: 'My bosses had other priorities'; June 16, 2010

186. CSIS secretly reviews its dealings with detainees; Aug. 2, 2010
187. Former UN official wants inquiry into conduct of war in Afghanistan, civilian deaths; Sep. 26, 2010
188. Paramilitary forces: Outsourcing the dirty war in Afghanistan; Sep. 29, 2010
189. Amnesty and BCCLA condemn Canada's handling of child detainees; Nov. 30, 2010
190. Document reveals Ottawa warned in 2009 about possible complicity in NDS torture; Apr. 6, 2010
191. US documents show 190 detainee deaths in U.S. military custody in Afghanistan, Iraq, Guantanamo; Jan. 23, 2011
192. RCMP should probe Afghan abuse allegations: Human rights lawyer Paul Champ; Feb. 2, 2011
193. Guantanamo lawyer condemns drone strikes; Apr. 13, 2011
194. Harper government makes 'pre-emptive strike' to limit MPCC inquiry findings; Apr. 5, 2011
195. Australian special forces hand Afghan detainee to US, to be secretly flown to Iraq; Mar. 27, 2011
196. Top UK officials ordered to disclose involvement in US-led renditions; Apr. 18, 2011
197. Special Committee judges refuse to release any documents during election; Apr. 14, 2011
198. George W. Bush cancels trip to Switzerland, fearing detainee-torture arrest warrant & demonstrations; Feb. 6, 2011
199. McNamer letter to Canada's AG & GG: 'Your responsibilities under Geneva Conventions'; Apr. 30, 2011
200. NATO halts Afghan prisoner transfers anticipating UN report on NDS torture; Sep. 6, 2011
201. Danger to detainees continues under Obama, NYT; June 11, 2012
202. NATO order 2011 halted Canadian prisoner transfers to Afghans, CP; June 11, 2012
203. Judge denies Afghanistan man's bid to challenge detention at US air base, AP; June 26, 2012
204. Watchdog clears troops, slams brass in Afghan torture case, G&M; June 27, 2012
205. Harper government stonewalled detainee investigation, military watchdog concludes, G&M; June 27, 2012
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**B.) Report to UNCAT, by John McNamer:** *"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"* as published by the UN Committee Against Torture, June 2012

## **Canada**

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

**from**

**John McNamer**

**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.**

**John McNamer** is an independent journalist and long-time human rights activist from Kamloops, British Columbia, Canada. He is member of Lawyers Against the War (LAW).

McNamer was awarded the Bronze Star Medal for service with the 4<sup>th</sup> Infantry Division, U.S. Army, Republic of Vietnam.

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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 had been 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 — bureaucratized 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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