

Monday, December 21, 2009

## **Open letter to the Parliamentary Special Committee on the Canadian Mission in Afghanistan**

Dear Committee Members:

Chair: Rick Casson, Vice-chair: Bryon Wilfert, Members: Jim Abbott, Ujjal Dosanjh, Francine Lalonde, Claude Bachand, Laurie Hawn, Dave MacKenzie, Paul Dewar, Greg Kerr, Deepak Obhrai:

Lawyers against the War (LAW) urges the Parliamentary Special Committee on the Canadian Mission in Afghanistan to recommend:

- The immediate cessation of transfers of people taken prisoner in Afghanistan (prisoners) by Canada, to third countries, including Afghanistan; and,
- That Canada immediately undertake effective protective and remedial measures with respect to all prisoners already transferred by Canada to third countries; and,
- The creation of a judicial inquiry mandated to inquire into allegations that the transfers violate Canadian and international law and to recommend the civil and criminal remedies required by law.

Concerned Canadians know that people taken captive in Afghanistan and transferred to either U.S. or Afghan custody are at risk of torture and other grave violations of their internationally protected rights. The facts establishing the illegality of the transfer of prisoners have been a matter public record since, at the latest, early 2004. Under Canadian and international law transfer to risk of such harm violates both Canadian and international law. Knowledge of the applicable law is presumed.

Evidence that Canada was and is, violating Canadian and international law by transferring people taken captive in Afghanistan to either U.S. or Afghan authorities has long been part of the public record. Since November 13 2001<sup>1</sup>, the world has known that the U.S. intended to illegally detain non-Americans taken prisoner in Afghanistan and to deny them access to properly constituted courts and other due process in violation of international law.<sup>2</sup> The world has known since February 7, 2002<sup>3</sup> that such prisoners transferred into U.S. custody would be denied the protection of the Geneva Conventions and subjected to whatever treatment, including torture and/or other prohibited treatment, the President or Secretary of Defense arbitrarily determined was 'required by the exigencies of the war on terror'. By the end of September 2004, concerned people and those in positions of responsibility knew, from the report of the Independent Expert on the Situation of Human Rights in Afghanistan, that prisoners were *routinely* subjected to torture and other internationally prohibited treatment in both Afghan-run and U.S.-run prisons within Afghanistan.<sup>4</sup>

Statements by Canadian officials that there was no torture or that, if there was they didn't know about it, ring hollow and remind us of similar statements by U.S. officials. Suggestions by Canadian officials that

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<sup>1</sup> Military Order of November 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the *War Against Terrorism*. <http://www.fas.org/irp/offdocs/eo/mo-111301.htm>

<sup>2</sup> *Denial of fair trial rights is a grave breach of the Geneva Conventions and a crime under the Rome Statute of the International Criminal Court and the Crimes against Humanity and War Crimes Act.*

<sup>3</sup> Humane Treatment of Taliban and Al Qaeda Detainees, February 7, 2002 memorandum from President Bush.

<sup>4</sup> Report of the Independent Expert of the Commission on Human Rights on the Situation of Human Rights in Afghanistan. U.N. GAOR. 59th Sess. Agenda Item 105(c). U.N. Doc. A/59/370. September 21, 2004.

the law doesn't apply to 'those people' also remind us of the statements of the Bush administration to justify treatment of people taken captive in Afghanistan. Such statements do not alter the known fact that these transfers violate the internationally protected rights of prisoners: nor do they alter the law. Canada has the legal duty to act effectively to ensure that past violations are remedied and future violations prevented. It is instructive to consider that some U.S. officials who used their status to facilitate the illegal detention and treatment of people taken prisoner in Afghanistan are now being prosecuted<sup>5</sup> and sued for damages for torture.<sup>6</sup>

Some of the reports detailing evidence of the likelihood and/or certainty that prisoners transferred to either U.S. or Afghan authorities would be subjected to criminal violations of their internationally protected rights including, but not limited to torture, are cited below. The Prime Minister and other political authorities responsible for ensuring adherence to the law received notice of these reports. They had a duty to ensure that military leaders were properly advised and instructed as a result.

- On 11 March 2005, the *Report of the Independent Expert on the Situation of Human Rights in Afghanistan, M. Cherif Bassiouni, to the UN Commission on Human Rights*, indicated there were reasonable grounds to believe that prisoners in Afghanistan were being subjected to torture. Professor Bassiouni reported that while he had difficulty gaining access to detention facilities, he had interviewed prisoners who alleged that, “...Coalition forces and special units of the Afghan security agencies and police act above and beyond the reach of the law by engaging in arbitrary arrests and detentions and committing abusive practices, including torture.” (paragraph 5) Professor Bassiouni also reported a grave situation with regard to, “The absence of due process in the arrest and detention of persons and the use of torture by various government intelligence entities, including those associated with the National Security Directorate, the Ministry of Defence and the Ministry of the Interior;” (paragraph 8.c) <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/128/24/PDF/G0512824.pdf?OpenElement>
- On February 1, 2006, the Afghanistan Compact, created at the London Conference, January 31-February 1, 2006, acknowledged that torture of prisoners was a systemic problem that could only be successfully remedied over a long period of time and set the following goal, , “By end-2010: The Government’s capacity to comply with and report on its human rights treaty

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<sup>5</sup> For example, in April 2009, the Spanish National Court accepted a criminal torture complaint against former U.S. Attorney General Alberto Gonzalez, William Haynes II, former general counsel for the Department of Defense; John Yoo, the former Justice Department lawyer who wrote secret legal opinions saying President George W. Bush had the authority to circumvent the Geneva Conventions; Douglas Feith, former undersecretary of defense for policy; Jay Bybee, Yoo's former boss at the Justice Department's Office of Legal Counsel; and David Addington, chief of staff and legal adviser to ex-Vice President Dick Cheney.

<sup>6</sup> For example, in *Padilla v. Yoo* U.S. filed in the District Court for the Northern District of California, Padilla claims damages for deprivation of constitutional rights against John Yoo for, during his tenure in the Office of Legal Counsel for the U.S. Justice Department, authoring memos purporting to legally justify “enhanced interrogation techniques” used on Padilla. Yoo advised, *inter alia*, that interrogation methods were not torture unless they caused pain “equivalent to the intensity of the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.” Dismissing Yoo’s application to dismiss the suit, the U.S. District Court ruled that Yoo, had “set in motion events that resulted in the deprivation of the Padilla’s constitutional rights” and that, “government lawyers are responsible for the foreseeable consequences of their conduct”

obligations will be strengthened; Government security and law enforcement agencies will adopt corrective measures including codes of conduct and procedures aimed at preventing arbitrary arrest and detention, torture, extortion and illegal expropriation of property with a view to the elimination of these practices;”

<http://unama.unmissions.org/Portals/UNAMA/Documents/AfghanistanCompact-English.pdf>

- On March 6, 2007 the [U.S. State Department Report on Afghanistan](#) reported that, “...human rights organizations reported that local authorities in Herat, Helmand, Badakhshan, and other locations continued to routinely torture and abuse detainees. Torture and abuse consisted of pulling out fingernails and toenails, burning with hot oil, beatings, sexual humiliation, and sodomy.” <http://www.state.gov/g/drl/rls/hrrpt/2006/78868.htm>
- On March 6, 2007, Lawyers against the War, sent a letter to Stephen Harper, Peter MacKay, Rob Nicholson and Gordon O’Connor, advising that, “Evidence clearly indicates that people transferred to U.S. or Afghan custody are at risk of criminal rights violations including serious injury or death. By transferring people to risk of such harm, Canada is violating its legal duty to uphold Canadian and international law and Canadians responsible for the transfers are exposed to possible criminal liability. We urge you act to ensure immediate strict adherence to applicable laws: the International Covenant on Civil and Political Rights; the Convention against Torture and Other Cruel, Inhuman or Degrading Punishment, the Standard Minimum Rules for the Treatment of Prisoners, Geneva Conventions Act, Charter of Rights and Freedoms, Criminal Code, and Crimes against Humanity and War Crimes Act.” <http://www.nightslantern.ca/LAW.Detainee.Transfer.Mar.8.07.pdf>
- On April 25, 2007, the Liu Institute on Global Issues of the University of British Columbia submitted a complaint, *War Crime and the transfer of detainees from Canadian custody in Afghanistan*, to the International Criminal Court (ICC) asking that General Hillier and others be investigated for possible war crimes in the transfer of prisoners in Afghanistan. Professors Michael Byers of the University of British Columbia and William Schabas, Director of the Irish Human Rights Centre, advised the ICC prosecutor that, “...we are concerned that Minister O’Connor and General Hillier might wilfully be placing detainees at risk of torture, cruel treatment and outrages upon personal dignity. If so, they would appear to be violating Articles 8 and 25 (and perhaps Article 7) of the Rome Statutes of the International Criminal Court.”
- On March 4, 2008, Alex Neve Secretary General of Amnesty International/Canada gave this evidence to the Standing Committee on Foreign Affairs and International Development regarding prisoners apprehended by Canadian troops, “Amnesty International first raised concerns about this issue in early 2002, when Canada first deployed in Afghanistan. At that point, our concerns were with respect to the policy of handing over detainees to U.S. forces and the likelihood of such prisoners ending up at Bagram Air Base or Guantánamo Bay. That approach came to an end in December 2005, with the first agreement between Canada and Afghanistan, under which prisoners were to be transferred into Afghan custody, with indications that the International Committee of the Red Cross and the Afghanistan Independent Human Rights Commission would play a role in monitoring.

We immediately stressed that it had not solved the problem, given the widespread, long-standing reality of torture throughout the Afghan prison system. We urged Canada to consider a different approach, one that would accord with our international obligations.”

On February 1, 2004 LAW sent a legal brief to the Prime Ministers and other Members of Parliament advising that the transfer of prisoners in Afghanistan violated the law,

“The transfer by Canadian soldiers effectively deprives transferred prisoners their rights and leaves the determination of their status, treatment, trial and punishment subject solely to the arbitrary standards President Bush and his advisors determine.

Those potentially liable under this statute [*Crimes Against Humanity and War Crimes Act*] include the person committing the offence(s), his/her military commander(s) and his/her superior(s). Superior is defined in this statute as a ‘person in authority other than a military commander.’ Both offences carry penalties of up to life in prison.

Clearly the interests of Canadian soldiers and prisoners alike require that the legality of prisoner transfer be determined before further transfers occur. In view of the U.S. demonstrated refusal to afford prisoner of war status to the prisoners pending determination, Canada is obliged by Article 12 to request the return of prisoners transferred by Canadian soldiers. The legality of the transfers ought to be referred immediately to the Supreme Court of Canada.

In June 2008, Maj. General Antonio M. Taguba (USA-Ret.), author of the U.S. Army’s 2004 internal report on Abu Ghraib wrote, “...After years of disclosures by government investigations, media accounts, and reports from human rights organizations, there is no longer any doubt as to whether the current [Bush] administration has committed war crimes.”<sup>7</sup>

Those same words apply to Canada’s transfer of prisoners in Afghanistan: there is no longer any doubt that the transfers are illegal. Neither is there any doubt that the law requires that the transfers be stopped, the violations investigated, identified and remedied and further violations prevented. While the personal knowledge of the Canadian officials in command of the transfers may be germane to future legal suits, this factor does not and cannot alter Canada’s legal duties now or then.

LAW urges the Committee to act responsibly to uphold the law: to stop the transfers, ensure the identification of and remedies for past violations and to prevent future violations.

Respectfully submitted.

Gail Davidson, Lawyers against the War.  
Copied to:  
The Clerk of the Committee is Carmen DePape  
Members of Parliament  
Senators

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<sup>7</sup> Preface to *Broken Laws, Broken Lives: Medical Evidence of Torture by U.S. Personnel and its Impacts*, A Report by Physicians for Human Rights, June 2008.