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Marc Gionet

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Article abstract

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by
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ABSTRACT

As a result of its engagement in combat operations in Afghanistan, the Canadian Forces have detained a number of individuals and subsequently transferred these detainees to a third party. This article will discuss the relevance of international humanitarian law and international human rights law in regards to the responsibility of the Canadian government for the treatment of these individuals. In order to provide an accurate examination of this issue, it is necessary to identify the classification of the armed conflict in Afghanistan during the initial invasion and consequently after the establishment of the Afghan Transitional Government. It will be noted that this shift in classification will have a significant effect on the pertinent rules of international humanitarian law governing the treatment of the detained. However, the consistent applicability of international human rights law will demonstrate its omnipresence, coupled with the prospect of Canadian domestic human rights protections.

INTRODUCTION

Following the United States claim to individual and collective self-defence under Article 5 of the North Atlantic Treaty Organization Charter¹ and Article 51 under the United Nations Charter,² Operation Enduring Freedom (OEF) was launched in Afghanistan. From the operation's beginning in 2001, the Canadian Forces (CF) have been actively engaged in combat — initially operating under OEF command and subsequently with the UN-sanctioned International Security Assistance Force (ISAF).³ As a result of its engagement in combat operations, the Canadian Forces have detained a number of individuals under both OEF and ISAF command, and subsequently transferred these detainees to a third party. This article will discuss the relevance of international humanitarian law and international human rights law in regards to the responsibility of the Canadian Forces and the Canadian government for the treatment of these individuals.

In order to provide an accurate examination of this issue, it is necessary to identify the classification of the armed conflict in Afghanistan during the initial invasion and, consequently, after the establishment of the Afghan Transitional Government. It will be noted that this shift in classification will have a significant effect on the pertinent rules of international humanitarian law governing the treatment of the detained. However, the consistent applicability of international human rights law will demonstrate its omnipresence, coupled with the prospect of Canadian domestic human rights protections. Through this analysis, it will be possible to measure Canada's adherence to international humanitarian law and international human rights law regarding the treatment of those detained during combat missions in Afghanistan and its evolving policy which has yet to meet the required standards.

The “Fall” of the Taliban

The Taliban were effectively notified of Operation Enduring Freedom on 7 October 2001 when US planes and UK warships launched missiles against Kandahar, Kabul, and terrorist training camps in Eastern Afghanistan.⁴ The toppling of the Taliban *de facto* government came quickly, with the US claiming air supremacy in less than a week, and the Northern Alliance capturing the capital of Kabul a month later. The International Committee of the Red Cross (ICRC) moved just as quickly to classify the armed conflict between the US-led coalition and the Taliban as an international armed conflict, issuing a press release on 24 October 2001, which stated that:

Combatants captured by enemy forces in the international armed conflict between the Taliban and the US-led coalition must be treated in accordance with the Third Geneva Convention. Civilians detained by a party of which they are not nationals must be treated in accordance with the Fourth Geneva Convention. The ICRC must therefore be allowed to visit them.⁵

Although the classification of the armed conflict by the ICRC might seem straightforward, it is important to analyze how it reached its conclusion and when this classification took effect. At the outset, it is necessary to establish a definition of an international armed conflict. For the purposes of this article, an international armed conflict will be defined as:

Any difference between two States and leading to intervention of armed forces . . . is an armed conflict within the meaning of Article 2 [common to the Geneva Conventions], even if one of the parties denies the existence of a state of war. It makes no difference how long the conflict lasts or how much slaughter takes place.⁶

Although *al-Qaeda*'s leadership planned and trained for their 11 September 2001 attacks against the US from Afghanistan, their attacks should not be classified as the commencing of hostilities between the two states. The Taliban *de facto* government did allow *al-Qaeda* to act freely within its borders, but *al-Qaeda*'s actions were not of the Taliban state apparatus, as they had maintained a separate identity, ideology, membership, and command structure.⁷ Resulting from the Taliban's reluctance to cooperate with the international community, they became an additional target of the US-led coalition. Therefore, the commencement of an international armed conflict began with the landing of the first American and British missiles on Afghan soil following the Taliban's refusal to denounce and surrender *al-Qaeda*, and not the attacks of 11 September 2001.

Although the US maintained that the characteristics of the Taliban did not satisfy any of the groups enumerated by the Geneva Conventions identifying prisoners of wars, this article will argue that as the *de facto* government the Taliban did meet the criteria established by Geneva Convention III to receive such treatment. Article 4 A (1) of Geneva Convention III states that "members of the armed forces of a Party to the conflict as well as militias or volunteer corps forming part of such forces" are entitled to Prisoner of War (POW) status.⁸ Additionally, the Taliban is required to honor the customary principle of distinction.⁹ It can be said with a degree of certainty that the Taliban is a party to the conflict, exercising the use of its standing army and participating in large-scale hostilities.¹⁰ Contributing to this argument is the manner in which the coalition carried out its initial attacks. These attacks focused on the Taliban's command and control centers suggesting that there was a defined hierarchical leadership and substantive organizational structure, typical of a conventional armed force.¹¹ It is also plausible, but more difficult, to situate *al-Qaeda* under this category as an adjunct militia or volunteer corps of the Taliban. In order to do so, it would have to be demonstrated that the Taliban exercised effective control over *al-Qaeda* in coordinating its efforts within Afghanistan against the US-led coalition.¹²

The US, on the other hand, insisted that attempts to categorize the Taliban should fall under Article 4 A (2), which is designed specifically for militias and volunteer corps who meet four established conditions (which the US argued they do not satisfy).¹³ Regardless, as stipulated by Article 5, if there is any doubt as to whether a person belongs to any of the categories enumerated in Article 4, they will enjoy POW protection until their status is determined by a competent tribunal.¹⁴

Although neither the US nor Afghanistan have ratified the Additional Protocols to the Geneva Conventions, Canada has and therefore is bound by its provisions. Under Additional Protocol I, the requirements for obtaining POW status are relaxed. This expanded definition, found in Article 43, describes an armed force as consisting of:

. . . all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government of an authority not recognized by an adverse Party.¹⁵

Article 44 states that any combatant that meets this description is provided POW status. Additionally, Article 44 notes that, although combatants are obliged to adhere to international humanitarian law, violations will not result in the loss of POW status or recognition as a combatant.¹⁶ Therefore, with the provisions granted in Geneva Convention III and Additional Protocol I the Canadian government has no opportunity to refute the categorization of Taliban fighters as legitimate combatants entitled to POW status, despite the contentions of the United States.

At issue in this analysis is the Canadian Forces' transference of detainees to a third party, for which the Geneva Conventions also makes provisions. Article 12 of Geneva Convention III regulates the transfer of POWs to a third party, requiring a number of conditions be met on behalf of the detaining power and the third party.¹⁷ First, the third party must be a signatory to the Geneva Conventions, and the detaining power must be satisfied by its willingness to apply the convention.¹⁸ Once the POWs are in the care of the third party, it is that party's responsibility to apply the convention.¹⁹ Nevertheless, if the receiving power fails to carry out the provisions of the convention, the detaining power must rectify the situation or request the return of the POWs.²⁰ In order to fulfill these provisions, it would be necessary for CF personnel to positively identify each individual that comes under its control and monitor their treatment while detained by the United States. Linked to the treatment of POWs is Article 118 of Geneva Convention III, which provides guidance on the duration of detention for POWs. This article states that "Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities."²¹ Although the US has labelled the war in Afghanistan as part of the global "War on Terror," this article argues that the interpretation of hostilities in Article 118 would be restricted to the conflict confined to Afghanistan. Additionally, once it became clear that the US would not be granting the Taliban POW status, which it did on 7 February 2002, it would be the responsibility of the Canadian government to request the return of those it took prisoner.²² The Canadian government was fully aware of its obligations and the shortcomings of the US as noted by a Canadian Member of Parliament (MP) who stated that, "At some point, Canada will have to ask the United States to return the three prisoners captured by Canadian commandos if the federal government fails to persuade the U.S. administration [to convene proper tribunals]."²³ To date, the Canadian government has not fulfilled these obligations, resulting in Canadian-captured detainees being subjected to treatment tantamount to torture while in US custody.²⁴

In this analysis, it is imperative to note the chronology of events. As stated above, the US-led coalition's initial victory over the Taliban came very quickly with the campaign beginning on 7 October 2001 and the installation of an Afghan Interim Government taking office on 22 December 2001.²⁵ During this time, a limited number of Special Forces ground troops were used by OEF, including Canada's Joint Task Force 2 (JTF2) in Operation *K-Bar*. In 2005, it was reported that JTF2's involvement in *K-Bar* (which extended to March 2002) contributed to the killing of at least 115 Taliban and *al-Qaeda* fighters and the capture of 107 senior Taliban leaders.²⁶ The important question at this point is how many of these 107 Taliban fighters were captured between 7 October and 22 December 2001 by JTF2 soldiers while hostilities were classified as an international armed conflict? Although JTF2 participated in *K-Bar* as part of an integrated, multinational operation that was effectively under the tactical command or even the operational command of US forces, the Government of Canada still maintained full command (or national command) over these troops, thus retaining responsibility for their conduct.²⁷

As such, the Minister for the Department of National Defence, Art Eggleton, must have formulated a policy regarding JTF2 soldiers taking prisoners. In fact, it could be argued that the US Secretary of Defence, Donald Rumsfeld, set Canadian policy and Eggleton conceded to the arrangement with the commitment and role of Canadian troops. In December 2001, Rumsfeld stated that "Either a country will indicate that they will turn them [detainees] over to us . . . or they will be positioned in places where they're unlikely to come in contact with someone that we would like to have control over."²⁸ Unfortunately, the Canadian government refused to confirm Canadian Forces' operations in Afghanistan until a NATO meeting on 19 December 2001, three days before the Karzai government took office.²⁹ Once the Canadian government admitted that the Canadian Forces were operating in Afghanistan, the policy regarding Canadian captured detainees became quite clear: hold them for the shortest period possible and then hand them over to the US.³⁰ In fact, as one senior military official notes, a separate detention facility for prisoners taken by Canadian Forces personnel had not even been discussed.³¹ This in itself is clearly a policy issue that would have been formulated within the Canadian military in conjunction with its political leaders prior to deployment. Even if the negative effects of this decision are carried out by a foreign power, the Canadian government still holds the responsibility for providing the opportunity for such abuses to take place.

Nevertheless, if it ever comes to light that Canadians captured Taliban fighters during this time (and they most likely did), they should be held accountable to the procedures of transference outlined above. As one MP correctly notes in reference to the policy, "we can't outsource our moral obligations."³² This notion can be extended, in a more binding nature, to exclude the possibility of detaining powers outsourcing their legal obligations for the protection of POWs.³³ What will become evident in the development of this analysis is the Canadian government's reluctance to accept responsibility for the welfare of those it detains.

A New Regime and New Rules of War

22 December 2001 was a day of significance for a multitude of reasons. Perhaps to the casual observer of world events it simply marked the instalment of a flimsy, Western-backed government in Afghanistan that few endowed with longevity.³⁴ Official government quotes peppered news headlines with promises of Afghanistan as a democratic beacon of hope in the Middle East and an end to the tyrannical oppression of Afghan women inflicted by the Taliban regime. What these headlines neglected to capture was a subtle move in diplomatic matters that would change the characteristics of the conflict for its remaining years. One of the first orders of business for the Karzai government was to extend an invitation to the US-led coalition to continue its campaign against the Taliban and *al-Qaeda* on the new government's behalf.³⁵ As will be illustrated, this invitation changed the nature of the armed conflict from that of an international armed conflict to a non-international armed conflict.

Karzai's invitation had little immediate effect on the US-led coalition. A national army (loyal to the state and not the Taliban) was nonexistent at this point, therefore Karzai could not offer troops and the US was already collaborating with the Northern Alliance.³⁶ Presumably the purpose was twofold: to allow his government to gain intelligence on the status of foreign troop operations in Afghanistan and to exercise the sovereign will of the new interim government. Perhaps the unseen consequence of the invitation was that the US-led coalition ceased to be an invading force. What replaced this invading force was the Afghan Interim Government fighting an armed group within its borders alongside international military assistance forces. This assistance also came in the form of a UN-sanctioned force, referred to as ISAF, which began its initial six-month mandate by providing security for Karzai's inauguration.³⁷ Although the definition of a non-international armed conflict is somewhat elusive, the conditions outlined by the Geneva Conventions and Additional Protocols are quite characteristic of the situation in Afghanistan.

Although the Geneva Conventions' only mention of a non-international armed conflict is within the context of common Article 3, this provides substantive protections for those detained by parties to the conflict. Namely, Article 3 prohibits murder, mutilations, cruel treatment, torture, outrages upon personal dignity, and degrading treatment, while ensuring all the judicial guarantees recognized as indispensable before the carrying out of executions or passing of sentences. Additional Protocol II, Article 1 supplements common Article 3, expanding the field of application to include:

. . . armed conflicts which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations . . .³⁸

The endurance of the conflict is evidence of the Taliban's military sustainability and its successful maintenance of a southern stronghold, thus fulfilling the requirements set out in Article 1. Article 4 of Additional Protocol II enumerates fundamental guarantees that are extended to all persons who have ceased to take part in hostilities.³⁹ In regards to detention, Article 75(3) of Additional Protocol I states:

Any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken. Except in cases of arrest or detention for penal offences, such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.⁴⁰

Again, it is important to keep in mind that neither Afghanistan nor the US are signatories of the Additional Protocols I or II, but Canada is and compliance with these treaties is not based on reciprocity of additional parties to the conflict. Therefore, those captured by the Canadian Forces would be entitled to the protections outlined above in both common Article 3 and Additional Protocol articles. In keeping with the spirit of the Geneva Conventions, the transference of detainees to a third party during a non-international armed conflict would not negate the detaining power's responsibilities to monitor and ensure proper treatment is provided for detainees while in the custody of a third party.

On 29 January 2002, while *K-Bar* was still ongoing, the Canadian government was forced to confirm that JTF2 soldiers had, by this point, taken prisoners in Afghanistan and handed them over to their US counterparts.⁴¹ By early February 2002, Canada had added the 3rd Battalion of the Princess Patricia's Canadian Light Infantry to the US coalition forces operating in Afghanistan. With this increase of approximately 750 soldiers came greater likelihood of Canadians

taking prisoners. Despite this increase in probability, and compounded by the Bush administration's internal struggle on how to categorize the detainees being shipped to Guantanamo Bay under their vague tribunal procedures, the Canadian government maintained its policy of default handovers.⁴² Not long after, President Bush clarified his administration's stance, stating that neither Taliban nor *al-Qaeda* fighters would receive POW status, although they would be treated humanely while detained in Guantanamo. It must be noted that the US made no distinction in their decision between those fighters captured before 22 December 2001 and those afterwards. The ICRC rejected Bush's position stating that, "The ICRC stands by its position that people in a situation of international conflict are considered to be prisoners of war unless a competent tribunal decides otherwise," and was supported in their statements by the International Commission of Jurists, which noted, "Only a U.S. court and not the administration has the legal authority to make such a determination." Nevertheless, the Canadian government accepted Bush's clarification as adhering to their Geneva Convention obligations.⁴³ This article agrees with the ICRC's response, so long as the categorization of an international armed conflict is restricted to the period between the dates of 7 October and 22 December 2001. With that said, it is in no way implied that subsequent to 22 December the US had *carte blanche* for its treatment of detainees and Canada was no longer responsible for the fate of those it captured. As outlined above, the Canadian government is still bound by the Geneva Conventions and Additional Protocols in conjunction with international human rights law.

Canada's policy of default handovers continued into 2002 as the battalion's mission operating under the US came to an end (except for air, sea, and Special Forces) and 1,000 additional troops were deployed under the British-led ISAF. The change in command had no effect on Canada's policy, despite the fact that, on 30 April 2002, Britain announced that it would not be transferring captured Taliban or *al-Qaeda* to the US. Instead, they would be granted POW status and transferred to the Afghan Interim Government.⁴⁴ Prior to this, in March 2002, the US was heavily criticized by the UN Human Rights Commission with the High Commissioner for Human Rights Mary Robinson demanding that prisoners at Guantanamo be afforded POW status and that trials take place before a competent tribunal and not military tribunals.⁴⁵ The Canadian Department of National Defence still maintained that the reasoning behind the transfers to the US was simply because Canada did not have the capability or the facilities to keep their own prisoners. The DND spokesperson also reiterated that the Canadian government was satisfied with the treatment prisoners were receiving in US custody.⁴⁶ On the international stage, Canada's support for the US regarding treatment of detainees increasingly became a voice of isolation as Pentagon photographs of bound, shackled prisoners, with their heads and eyes covered, kneeling before American soldiers provoked the British government to openly criticize the policy and called for reform.⁴⁷

On 24 May 2002, the Canadian Forces participated in a raid that led to the capture of 55 Taliban and *al-Qaeda* suspects. Once again, JTF2 was suspected of being involved. When asked if any Canadian Forces personnel took prisoners, DND reaffirmed that anyone captured by Canadian troops would be handed over to US troops since it was a US-led mission.⁴⁸ A week after the raid, testimony from villagers accused coalition troops of throwing stun grenades into houses, breaking walls, tying villagers up during interrogations, beatings, and humiliations.⁴⁹ Of the 55 captives originally taken, 50 were released. As transfers continued and the international spotlight shone more brightly on the harsh conditions suffered by those in Guantanamo Bay, the Canadian government began to feel pressured to halt transfers to US authorities. Over the following years, organizations such as Amnesty International, Human Rights Watch, the Organization of American States, and the United Nations took increasing interest in the methods used by the US in Guantanamo in regards to interrogation, detention, and due process.⁵⁰ At the end of 2005, this pressure finally resulted in a slight change in Canadian policy.

Continuing the Policy of Outsourcing Responsibility

On 18 December 2005, Canada signed an agreement with the government of Afghanistan that established the conditions for transferring Canadian captured detainees into Afghan custody.⁵¹ The document, comprised of 13 paragraphs, lacks any sort of preamble or background. It is of interest to note that the agreement fails to mention if Canada satisfied itself in determining whether the Afghan authority possessed the capacity to accommodate detainees according to international, Afghan, or Canadian standards.⁵² What the agreement does provide is the possibility for any individual (for any reason) to be transferred to the Afghan authority and be detained in any detention facility within Afghanistan. As the solitary source of legal framework for treatment, the agreement calls for detainees to be treated in accordance with the provisions of Geneva Convention III, which could be interpreted as providing POW status.⁵³ It requires the Afghan authority to maintain accurate written records of those transferred into its power, but makes no mention of Canadian documentation of detainees or the right of Canadian officials to visit detainees and monitor their conditions of detention.⁵⁴

Instead, the agreement identifies the ICRC and the recently established and under-resourced Afghan Independent Human Rights Commission as the monitoring bodies for the detainee's treatment.⁵⁵ Although the agreement states that no one transferred to the Afghan authority will receive the death penalty, it lacks any provisions requiring the Afghan authority to notify Canada prior to commencing legal processes that may lead to transference to a third party, sentencing, or release.⁵⁶

Although the agreement is obviously based on the provisions of Geneva Convention III, with some wording presented *verbatim*, the absence of any mention of the other Conventions and Additional Protocols cannot be a mistake. As noted above, Canada is a signatory to the Additional Protocols where Afghanistan is not. This would have been an ideal opportunity for Canada to ensure the rights guaranteed under the Additional Protocols for the detainees. Instead, it chose not to. This could be seen as a violation of Additional Protocol I Article 80 (2).⁵⁷ A possible motivation for this could be the expanded definition of a combatant and Afghanistan's desire not to afford fighters such protections, leaving open the possibility for criminal prosecution for their participation in the conflict.⁵⁸ Additionally, the agreement fails to mention any international human rights law. International jurisprudence has established that states who are party to a conflict maintain their responsibility for observing international human rights law as well as international humanitarian law.⁵⁹ In relation to the treatment of detainees, all parties to the conflict — the US, Afghanistan, and Canada — have ratified the International Covenant on Civil and Political Rights (ICCPR) and are legally bound by its obligations.⁶⁰ They include non-derogable rights such as the right to life,⁶¹ freedom from torture,⁶² due process,⁶³ and for those denied their liberty in conformity with the law to be treated humanely and with dignity.⁶⁴ General Comment no. 31 establishes the jurisdiction of the ICCPR and Canada's obligations in extraterritorial circumstances, stating that:

. . . a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party. As indicated in General Comment 15 adopted at the twenty-seventh session (1986), the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party.⁶⁵

In regards to effective control, there is an increasing body of jurisprudence developing that establishes the parameters of application.⁶⁶ This article argues that the act of state agents (the Canadian Forces) detaining an individual in Afghanistan would constitute exercising effective control over those individuals. Despite the existence of the transfer agreement and its skeletal protections, Canada must have been aware of Afghanistan's less-than-stellar human rights record and patterns of treatment for incarcerated individuals. As Canada became acutely aware, due to *Kindler v Canada*, a government holds the responsibility not to extradite an individual to a third party if there exists a foreseeable danger that the third party will not adhere to the convention.⁶⁷ As stated by the UN Human Rights Committee:

. . . a State party clearly is not required to guarantee the rights of persons within another jurisdiction. However, if a State party takes a decision relating to a person within its jurisdiction, and the necessary and foreseeable consequence is that that person's rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant. That follows from the fact that a State party's duty under article 2 of the Covenant would be negated by the handing over of a person to another State (whether a State party to the Covenant or not) where treatment contrary to the Covenant is certain or is the very purpose of the handing over.⁶⁸

Additionally, all three states have signed and ratified the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.⁶⁹ Of particular relevance, is Article 2 that requires states to prevent torture on any territory under its jurisdiction. Article 3 ensures that "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."⁷⁰ The Special Rapporteur on Torture has followed up on the comments made by the Human Rights Committee by stating that:

It is the responsibility of States . . . to prevent such acts by not bringing persons under the control of other States if there are substantial grounds for believing that they would be in danger of being subject to torture.⁷¹

As the name of the convention suggests, it also prohibits "other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture."⁷² Additionally, the convention guarantees that states maintain a systematic

review of rules regulating methods of interrogation⁷³ and that statements made under conditions of torture are not used as evidence in criminal proceedings.⁷⁴

For the next two years, with condemning reports of jail conditions and Afghanistan's haphazard judicial system being published by the US State Department, the UN High Commissioner for Human Rights, and secretly by the Canadian Embassy in Afghanistan until forcefully disclosed, transfers continued under the impotent protections of the agreement.⁷⁵ Increasingly negative attention was brought when Canada's then- Defence Minister Gordon O'Connor responded to a question in the House of Commons by stating that the ICRC would report abuse allegations of detainees handed over to the Afghan authorities to Canada. The ICRC was quick to respond, clarifying that "The ICRC is under no obligation to share information with Canada on treatment of detainees handed over to the Afghan authorities. The ICRC provides this information to Afghanistan."⁷⁶ On 23 April 2007, *The Globe and Mail* published an exclusive investigation that documented firsthand accounts of multiple Canadian captured detainees, 30 in all, who faced severe abuse and torture at the hands of Afghan authorities.⁷⁷ O'Connor attempted to shift the blame and responsibility for the abuse by stating that "The [Afghan Independent] Human Rights Commission promised to advise us if any of our detainees are abused."⁷⁸ Following *The Globe and Mail* report, two leading human rights academics (Michael Byers and William Schabas) sent a letter to the International Criminal Court's chief prosecutor requesting an inquiry into the possibility of war crimes.⁷⁹ The Canadian government was put under increasing pressure when Amnesty International and the British Columbia Civil Liberties Association filed for an injunction in Canada's federal court system to stop future transfers to Afghan authorities on 3 May 2007. The hearing was suspended on that same day when the court was informed Canada and Afghanistan had signed an additional agreement regulating the transfer of detainees.⁸⁰ The timing should be noted as peculiar.

The Second Agreement and Canadian Human Rights Abroad

It must be said that the second agreement does make an effort to address the core criticisms of the initial agreement. It provides full and unrestricted access to detainees by Canadian government or military officials along with the Afghan Independent Human Rights Commission (AIHRC), the ICRC, and relevant human rights institutions within the UN.⁸¹ It obligates Afghan authorities to notify Canadian officials before commencing any proceedings that would result in a change of status for the detainee or release and requires written consent from Canadian officials before transferring a detainee to a third party.⁸² The second agreement also calls on Afghanistan to respect its international human rights obligations in regards to detainee treatment and prohibition of torture and cruel, inhuman, or degrading treatment.⁸³ The number of detention facilities is also limited and requires unrestricted access for the Afghan Independent Human Rights Commission and Canadian officials where they may hold private interviews upon request.⁸⁴ Finally, the second agreement requires Afghan authorities to investigate and prosecute anyone involved in the mistreatment of detainees while notifying Canada, the Afghan Independent Human Rights Commission, and the ICRC of measures taken in redress.⁸⁵

Nevertheless, the notion that such an agreement would put a halt to the widespread abuse that is all too common in Afghan jails is foolhardy without measures enabling direct Canadian oversight. Subsequent to the second agreement, no arrangements were made by Canada to ensure Afghan correctional workers, police officers, or interrogators received proper training on treating detainees in accordance with recognized national and international obligations. Six months after this agreement was signed, the Afghan Human Rights Commissioner was quoted as saying that one third of Afghan prisoners were tortured.⁸⁶ In a subsequent report published by the AIHRC in 2009, it was found that "torture and other cruel, inhuman, and degrading treatment are a commonplace practice in the majority of law enforcement institutions and that at least 98.5% of interviewees believed they had been tortured by these institutions."⁸⁷

In November 2007, a Canadian Federal Court judge ruled that a court challenge filed by Amnesty International and the BC Civil Liberties Association alleging the Canadian-Afghan detainee policy violated the *Charter of Rights and Freedoms* had grounds to continue.⁸⁸ It was the first case in which a court was asked whether the Charter applies to Canadian troops while serving abroad. On 22 January 2008, a secret communiqué between a Canadian diplomat in Kandahar and senior military officials and politicians in Canada, said to have been written in November 2007 (after the second agreement was signed), was revealed in court.⁸⁹ The communiqué described a Canadian human rights officer's inspection of a detention facility and interviews with detainees. During the inspection the officer reported discovering a detainee without toenails, a beaten detainee who was able to show where the cable used in his assault was hidden in his cell, and a number of other detainees who had similar experiences of torture by electrocution. The report also revealed

poor upkeep of written records on Afghanistan's behalf leading to difficulties locating and identifying the Canadian captured detainees. On 25 January 2008, the court heard that the Canadian Forces had stopped transfers to the Afghan authorities on 6 November 2007, after receiving the communiqué, but failed to make the policy public. This allowed the federal lawyers to argue that an injunction was a moot point, since the transfers had stopped months ago. The lawyer for the rights groups contested that, since the government failed to notify the public of the decision to halt transfers, there existed a likelihood of the government restarting the transfers without notifying the public.⁹⁰ On 7 February 2008, Justice Anne MacTavish gave her ruling that denied the injunction but left the door open for review if the transfers continued.⁹¹ In her reasoning, she concluded that, "Given the current uncertainty surrounding the future resumption of transfers, and the lack of clarity with respect to the conditions under which those transfers may take place, the applicants have not satisfied this aspect of the injunctive test."⁹² Justice MacTavish did, however, provide space in her ruling to address the evidence presented by Amnesty International and the BC Civil Liberties Association, stating that:

The evidence adduced by the applicants clearly establishes the existence of very real concerns as to the effectiveness of the steps that have been taken thus far to ensure that detainees transferred by the Canadian Forces to the custody of Afghan authorities are not mistreated.⁹³

No less than 22 days after Justice MacTavish gave her ruling, the Canadian Forces announced they had resumed transfers to the Afghan authorities but refused to divulge the date this resumption took place.⁹⁴ Both Canadian government and military officials claimed they were satisfied with improvements made to Afghan prisons since torturous treatment was exposed in November 2007, which had caused transfers to stop. Improvements included photographing detainees during registration with the Afghan authority, the suspension of one Afghan interrogator, and Canadian training on acceptable interrogation techniques. Once again, Canadian officials took the opportunity to place responsibility with the Afghans for the treatment of detainees,

It should be emphasized that while Canada is contributing to the above activities [training Afghan interrogators], it is not in the business of building or managing corrections facilities in Afghanistan. That is the responsibility of the Afghan government.⁹⁵

In March 2008, Justice MacTavish gave her ruling on the extraterritorial application of the Charter. Her judgement was primarily derived from a Supreme Court of Canada ruling, *R v Hape*, which established a three-point test for extraterritorial Charter application on state agents.⁹⁶ In her conclusion, it was ruled that Afghanistan did not actively concede to the application of Canadian laws or its human rights regime within its borders and for the court to provide jurisdiction to enforce such laws would result in a breach of Afghan sovereignty. The applicants argued that consent, in regards to military activities, was misguided, naming a number of past circumstances where Canada Forces were not able to obtain consent of the state where operations were taking place.⁹⁷ Justice MacTavish also dismissed the argument of the "effective military control" test advocated by the applicants as a basis for extending the extraterritorial reach of the Charter, stating it has "not been generally accepted in international law."⁹⁸ In reaching this conclusion, Justice MacTavish noted the difference in rulings between *Banković* and *Issa* adding that she believed *Banković* was "better law" in relation to jurisdictional issues.⁹⁹ As a consultative gesture in her conclusion, Justice MacTavish reminded the applicants that:

. . . it must be noted that the finding that the Charter does not apply does not leave detainees in a legal "no-man's land", with no legal rights or protections. The detainees have the rights conferred on them by the Afghan Constitution. In addition, whatever their limitations may be, the detainees also have the rights conferred on them by international law, and, in particular, by international humanitarian law.¹⁰⁰

Of course, this ruling was disheartening for those who wanted to see increased jurisdiction of the Charter in an effort to obtain accountability for Canadian Forces' conduct abroad. Although an appeal was made to the Supreme Court of Canada, it refused to hear the argument in May 2009, marking the end of the domestic legal road.

On 12 March 2008, the same day as Judge MacTavish's ruling, Peter A. Tinsley, Chairperson of the Canadian Military Police Complaints Commission, announced that the investigation into the transfer of detainees by military police in Afghanistan, launched following a complaint submitted by Amnesty International and the BC Civil Liberties Association, was moving to a public hearing process.¹⁰¹ This move was provoked by the government's refusal to cooperate with the investigation and make available pertinent uncensored documents and witnesses. The power of a public hearing is rooted in its ability to subpoena. Unfortunately, the government's hindrances of the MPCC inquiry continued, climaxing with the refusal to allow diplomat Richard Colvin to testify despite being subpoenaed. On 18 November 2009,

Mr. Colvin delivered his testimony in front of the House of Commons Special Committee on the Canadian Mission in Afghanistan after being summoned by the joint opposition. In his opening statement, Mr. Colvin characterized Canada's approach to detainee transference as a cumbersome process which violated international law and resulted in "the likelihood that all the Afghans we handed over were tortured."¹⁰²

The Issue of Accountability

Clearly, this issue has not been resolved, with the policy continuing and failure to locate or account for the treatment of previously transferred detainees. What this article has endeavored to demonstrate is that, although the classification of the conflict is important, Canada's obligations under both non-international and international armed conflicts prevents it from deflecting responsibility for those that come under its effective control to a third party. This indifference to third-party treatment was maintained by the Liberal government while Canadian-captured detainees were being denied POW status during an international armed conflict and shipped to Guantanamo Bay to face torturous conditions. When the opposition questioned the policy, Liberal Prime Minister Jean Chrétien accused them of supporting terrorists and shrugged off the country's Geneva Convention obligations. Once evidence of such conditions in US hands became overwhelming, the government simply changed the third-party recipient. This time Canada elected Afghanistan, with a notoriously dismal human rights record, to bear the responsibility. After signing two impotent agreements governing transfers within the context of a non-international armed conflict and the wide publication of abuses in Afghan hands, the Conservative government dismissed such claims as "Taliban propaganda," refusing to investigate or confirm allegations. Such blatant disregard (over the course of eight years and two governments) for Canada's international human rights obligations under the ICCPR and CAT in addition to the continued obligations under humanitarian law has led to unimaginable suffering for torture victims and the undermining of Canada's objectives in Afghanistan, and has done irreparable harm to Canada's reputation as a human-rights vanguard.

Accountability seems elusive with the Harper government taking proactive measures to ensure the issue is marginalized. By proroguing Parliament from late December 2009 until 3 March 2010, the government shut down the joint House of Commons committee investigating the detainee matter. In addition, the unprecedented step of not extending Chairman Tinsley's mandate until the conclusion of the MPCC's investigation placed that oversight body on hold until the government announced a new appointment. This decision should be viewed as the equivalent of changing a judge midway through a trial. On the side of the Official Opposition, calls for a public inquiry were made but to limit that investigation to post-2006 when the Conservatives came into power, shielding the probe from the Liberal's involvement in establishing the policy.

While a positive ruling by Justice MacTavish would have stopped the transfers, it is a comfort to know it is not the only avenue for a resolution. Once all domestic remedies have been exhausted, the UN Human Rights Committee and CAT could play a principled role in establishing state responsibility. Additionally, as mentioned above, the International Criminal Court has been notified of the potential violations of the Rome Statute, which could amount to war crimes, although indictments are not expected. Nevertheless, if nothing else, this case exemplifies civil society's keen engagement and desire for Canada to adhere to its international and domestic obligations. Unfortunately, to date these efforts have not borne fruit, reinforcing the reality that government holds the ultimate power to decide policy as well as the ultimate responsibility for its actions.

Marc Gionet is the Director of the Atlantic Human Rights Centre at Saint Thomas University in Fredericton, New Brunswick.

Endnotes

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¹⁹ *Ibid.*

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