Court File Number: T- 324 -07

FEDERAL COURT

B E T W E E N:

AMNESTY INTERNATIONAL CANADA and BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

Applicants

-and-

CHIEF OF THE DEFENCE STAFF FOR THE CANADIAN FORCES, MINISTER OF NATIONAL DEFENCE and ATTORNEY GENERAL OF CANADA

Respondents

APPLICANTS' MEMORANDUM OF FACT AND LAW

RE MOTION TO DETERMINE APPLICATION OF THE CHARTER TO CANADIAN FORCES IN AFGHANISTAN

PART I – FACTS

Overview

1. Canada has been engaged in an armed conflict in Afghanistan since 2001, with significant forces deployed in early 2002. As part of that operation, Canadian Forces ("CF") are apprehending individuals and detaining them in a facility that is under CF command and control. Current CF practice is to interrogate the detainees and then transfer them into the hands of Afghan authorities, despite overwhelming evidence that torture is widespread in Afghan custody. By this application, the Applicants are asking the Court to apply the protections of the *Canadian Charter of Rights and Freedoms* to those individuals held in CF detention.

2. The purpose of this motion is to determine whether the Charter can apply to the actions of the CF in Afghanistan. The Supreme Court of Canada has already ruled that the Charter may apply outside Canada's borders, though the circumstances are rare. This case will be the first time Canadian Courts have considered if the Charter protects individuals detained by Canadian soldiers on foreign soil, excluding CF personnel.

3. Military force is the most fundamental projection of state power. By choosing to deploy the CF in Afghanistan, and directing Canadian soldiers to exercise coercive power in depriving individuals of their liberty, the Respondents are bringing detainees under the effective control of Canada and thus within the jurisdiction of Canadian law. It cannot be that Canadian courts have no supervisory power whatsoever, particularly in circumstances where fundamental human rights are at risk.

4. While this situation is new to Canada, the issue of jurisdiction and detention by military forces has been addressed by jurisprudence in other countries as well as United Nations (U.N.) bodies such as the Committee Against Torture and the Human Rights Committee. These authorities consistently find that a country's military power is subject to its human rights law, and support the Applicants' position that Charter rights must be extended to individuals held by the CF in Afghanistan. The motion should be found in favour of the Applicants.

The Canadian Mission in Afghanistan

5. Canadian Forces have participated in the armed conflict in Afghanistan since 2001. Approximately 2,500 CF personnel are currently deployed in that country, largely in the southern province of Kandahar.[1]

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[1] DND/CF Backgrounder: Canadian Forces Operation in Afghanistan, dated January 5, 2007 [Applicants' Injunction Motion Record ("AIMR"), Vol. I, Tab 5, p. 48]

6. The events leading to Canada's military involvement in Afghanistan started in 2001. Following the terrorist attacks of September 11, 2001, the United States of America invaded Afghanistan and – with assistance from Canada and other countries – overthrew the Taliban government on the basis it was providing a safe haven to Al Qaeda training camps. This U.S. campaign, which continues to this day, is named Operation Enduring Freedom ("OEF"), and was initiated on the basis of the right of states to individual and collective self-defence.

Hameed Exhibits, C, D & E

7. The Canadian government advised the UN in October 2001 that it would be joining the U.S. in attacking Afghanistan on the basis of individual and collective self-defence. After the Taliban government was defeated in December 2001, the UN Security Council authorized the creation of the International Security Assistance Force (ISAF) to provide security and support to the newly established interim Afghan governing authority.

Hameed Exhibit C, F, G, Letter attached to Deschamps

8. From 2001 to the present, the CF has been continually deployed in Afghanistan, from time to time under the authority of OEF or ISAF, and often both. The present operation in Kandahar province commenced in December 2005. At that time, a large contingent of CF troops moved to Kandahar, operating under OEF authority and with the objective of engaging in counterinsurgency combat operations.

Hameed Exhibit A, C

9. On December 18, 2005, Canada and Aghanistan signed a document outlining the nature of Canada's involvement and powers within Aghanistan. According to these "Technical Arrangements", Canada's presence is predicated on, among other things, the country's right to self-defence. Canada's objectives include providing security and stability to Afghanistan as well as eliminating Al Qaida, the Taliban and other groups that threaten international peace and security.[2]

10. There is no mechanism or provision in the Technical Arrangements that would require Canada to leave Afghanistan in the event it was invited to do so. Despite the fact the Arrangements concern the deployment of a foreign military force in Afghan territory, the senior Canadian military commander is identified as the final authority regarding their interpretation, and his determinations are final.[3]

11. Canada also signed a Status of Forces Arrangement, which is an annex to the Technical Arrangements. This document indicates that Canadian personnel are immune from Afghan law and "have complete and unimpeded freedom of movement throughout the territory and airspace of Afghanistan."[4]

12. On July 31, 2006, or approximately seven months after the CF began transferring detainees to Afghan authorities, CF in Kandahar were assigned from OEF leadership to the ISAF. Their day-to-day operations and responsibilities did not change. Today, nearly all the CF in Afghanistan remain part of the ISAF mission and are located in Kandahar province.[5]

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[2] Technical Arrangements Between the Government of Canada and the Government of the Islamic Republic of Afghanistan, paras. 4 and 9 [AIMR, Vol. I, Tab 5, p. 209 and 211]

[3] Technical Arrangements Between the Government of Canada and the Government of the Islamic Republic of Afghanistan, para. 13. [AIMR, Vol. I, Tab 5, p. 212]

[4] Arrangement Regarding the Status of Canadian Personnel in Afghanistan, paras. 1.1, 1.3, 4.1 and 6.1. [AIMR, Vol. I, Tab 5, p. 213-215]

[5] Hameed Affidavit, Exhibit H

13. Various Afghan government officials have said that the Afghan government would be unsustainable without the military support of Canada and other countries. President Hamid Karzai has said that, without the presence of the CF, the country would fall into anarchy.[6]

Canadian Forces' Detention of Individuals in Afghanistan

14. As part of Canada's military operations in Afghanistan, Canadian Forces have captured and detained individuals since January 2002.[7]

15. The Afghanistan government has given its consent to Canadian military forces detaining its nationals on its soil. This consent is reflected in the Technical Arrangements, which state,

> [T]he Participants understand that the Canadian personnel may need to use force (including deadly force) to ensure the accomplishment of operational objectives, and the safety of the deployed force, including designated persons, designated properties, and designated locations. Such measures could include the use of close air support, firearms or other weapons; detention of persons; and the seizure of arms and other materiel. Detainees would be afforded the same treatment as Prisoners of War. Detainees would be transferred to Afghan authorities in a manner consistent with international law and subject to negotiated assurances regarding their treatment and transfer.[8]

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[6] Hameed Affidavit, Exhibit N; Neve Affidavit, Exhibit Y

[7] "Canada's JTF2 captives vanish at Guantanamo", *The Ottawa Citizen*, February 14, 2005 [AIMR, Vol. III, p. 562]

[8] Technical Arrangements Between the Government of Canada and the Government of the Islamic Republic of Afghanistan, dated December 18, 2005, para. 12 (emphasis added). [AIMR, Vol. I, Tab 5, p. 212]

16. According to CF operating policies, the CF possess a wide discretion to detain Afghan civilians, including those having no role in hostilities. The CF Theatre Standing Order regarding "Detention of Afghan Nationals and Other Persons" (TSO 321A) states that the CF may detain any person on a "reasonable belief" (defined as "neither mere speculation nor absolute certainty") that he or she is adverse in interest. This includes "persons who are themselves not taking a direct part in hostilities, but who are reasonably believed to be providing support in respect of acts harmful to the CF / Coalition Forces".[9]

17. Following capture, CF detainees are held in CF detention facilities at Kandahar Airfield ("KAF"), the CF base for operations in Kandahar province. The base is not under the control of the Afghanistan government, and Canada has command and control over the CF detention facilities.[10]

18. Canada informs the International Committee of the Red Cross (ICRC) when the CF detain an individual in Afghanistan. No notice is given to the Afghanistan government unless the detainee is transferred to Afghan custody.[11]

19. It is CF policy to transfer or release detainees within 96 hours. But the CF has the ability to hold detainees for longer periods, and has done so for various reasons. In at least two cases, a detainee was held by the CF for more than 30 days before being transferred to Afghan authorities.[12]

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[9] CF Task Force Afghanistan, Theatre Standing Order (TSO) 321A, Detention of Afghan Nationals and Other Persons, paras. 13, 19-20 [AIMR, Vol. II, Tab 5, p. 448]

[10] Transcript of the Cross Examination of Joseph Paul Andre Deschamps, dated January 4, 2008, Questions 89-95 ("Deschamps Transcript") [AIMR, Vol. VII, Tab 14, p. 1721]; Transcript of the Cross-Examination of David Connor dated January 3, 2008 ("Connor Transcripts"), Questions 47-48 [AIMR, Vol. V, Tab 11, pp. 1402-1403]

[11] Produced Document

[12] CF Task Force Afghanistan, Theatre Standing Order (TSO) 321A, Detention of Afghan Nationals and Other Persons, para. 32[AIMR, Vol. II, Tab 5, p. 450]; and DND/CF Detainee Transfer Records [AIMR, Vol. II, Tab 5, pp. 487-488]

20. At the KAF detention facility, the CF interrogate detainees, search their belongings, and take their photographs and fingerprints. All of this information is transmitted to Afghan authorities at the time of transfer. The Respondents deny detainees' access to legal counsel during detention.[13]

21. The CF have sole discretion to determine whether a detainee "shall be retained in custody, transferred to ANSF [i.e. Afghan National Security Forces] or released." These determinations are made by the Canadian commander of Task Force Afghanistan at regular review meetings. The detainee is not permitted to make representations at those meetings.[14]

22. The Respondents will not disclose the number of individuals who have been detained or transferred by the CF in Afghanistan. Between January 2002 and April 2006, the CF had transferred approximately 40 detainees, with at least 21 of those since signing the Detainee Agreement. More recent documents suggest that the number of transferred detainees to date is over 100, with at least 85 going to the National Directorate of Security (NDS or NSD in some exhibits).[15]

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[13] Theatre Standing Order 321A, paras. 35-37 [AIMR, Vol. II, Tab 5, p. 451]; DND/CF Tactical Questioning Report, dated June 1, 2006 [AIMR, Vol. II, Tab 5, p. 472]; Letter from General R.J. Hillier to Yavar Hameed, dated July 17, 2006 [AIMR, Vol. II, Tab 5, p. 508]; and Canadian Forces' Joint Doctrine Manual, *Prisoner of War Handling, Detainees and Interrogation & Tactical Questioning in International Operations*, August 1, 2004, at pages 4-1 to 4A-2 ("Detainee Doctrine Manual") [AIMR, Vol. II, Tab 5, pp. 378-381]

[14] Theatre Standing Order 321A, para. 32 [AIMR, Vol. II, Tab 5, p. 450]; and Deschamps Transcripts [AIMR, Vol. VII, Tab 14, p. 1721]

[15] DND/CF Detainee Transfer Log [AIMR, Vol. I, Tab 5, p. 237-238]; and Email from C. Borlé to E. Laporte, dated June 1, 2007 (EV.DFAIT.0002.0184), p. 2 of 5 [AIMR, Vol. VIII, Tab 15, p. 1973]

PART II – ISSUES

23. As agreed by the parties, and as Ordered by this Honourable Court, the questions to be determined on this motion are:

(1) Does the *Canadian Charter of Rights and Freedoms* apply during the armed conflict in Afghanistan to the detention of non-Canadians by the CF or their transfer to Afghan authorities to be dealt with by those authorities?

(2) If the answer to the above question is "No", would the Charter nonetheless apply if the Applicants were able to establish that the transfer of detainees in question would expose them to a substantial risk of torture?

PART III – ARGUMENTS

24. The present case is the first time the Canadian Courts have considered whether individuals detained by the Canadian military on foreign soil can claim the protections of the *Canadian Charter of Rights and Freedoms*. The parties have agreed to two questions on this issue which are derived primarily from the legal framework proposed by the Supreme Court of Canada in *R. v. Hape*.[16]

25. While the Applicants have agreed to these questions, it must be emphasized that informing and cutting across all the submissions that follow is the proposition that military activities are inherently different from the functions of other state actors. Unlike the usually domestic-bound RCMP, the armed forces are created with the purpose of projecting state power extraterritorially and, like other militaries, the Canadian Forces do exercise coercive powers abroad, including the detention of individuals. Thus, the primary submission of the Applicants is that the Charter applies whenever the CF bring a person within their effective control, as by detention or transfer, and the Applicants' *Hape*-based arguments on consent are in the alternative.

26. The Applicants' arguments are in four sections. First, the Applicants speak to the current jurisprudence on extraterritoriality and draw a distinction between police officers and soldiers. Second, the Applicants define and argue the doctrine of effective control and apply it to the Canadian legal context. Third, the Applicants describe the nature and scope of Afghanistan's consent to the activities of the CF. Fourth and finally, the Applicants submit that the scope of the Charter must be interpreted in light of the principle that the absolute prohibition against torture is a *jus cogens* rule of international law.

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[16] *R. v. Hape*, 2007 SCC 26

A. Extraterritorial Application of the Charter – Difference Between Police and Military Functions

27. The *Canadian Charter of Rights and Freedoms* applies "in respect of all matters within the authority of Parliament". Section 32 of the Charter does not mention territorial limitations to its jurisdiction, and the Supreme Court of Canada has confirmed that the Charter's reach may extend to government agents acting in foreign countries.[17] Further, the statutes on which the Canadian Forces are constituted and operate, or handle war detainees, are self-evidently matters within the authority of Parliament, and Parliament passed them expressly to be used extraterritorially in foreign wars.[18]

28. Recently, the Supreme Court of Canada reconsidered its approach to extraterritorial application of the Charter. The majority in *R. v. Hape* entered into a discussion on the principles of sovereignty and comity, and opined that the earlier jurisrprudence did not consider the theoretical difficulties associated with extraterriorial enforcement of the Charter on foreign soil. According to LeBel J., enforcement of Canadian law in a foreign territory *prima facie* interferes with that other state's sovereignty, and therefore extraterritorial application of the Charter should be limited to circumstances in which the foreign country consents.[19]

29. The two minority judgments in *Hape* viewed LeBel J.'s approach as unduly restrictive, and suggested more flexibility was required to ensure the application of the Charter was not foreclosed in appropriate circumstances. The four justices in the minority also found that the Charter applied in *Hape*, but ruled that it was not

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[17] *Canadian Charter of Rights and Freedoms*, section 32(1)(a); *Hape, supra*

[18] *National Defence Act*, R.S. 1985, c. N-5, sections 4, 18, 31, 67-68, 77, 132; and *Geneva Conventions Act*, R.S.C. 1985, c. G-3, sections 1-3, Schedules I-III, Common Article 3

[19] *Hape, supra*, paras. 83-87

violated, and thus they concurred in the result. Notwithstanding these differences, the entire Court recognized that violations of fundamental human rights may affect the analysis.[20]

30. For the reasons outlined in a section below, the Applicants submit that, per *Hape*, the Charter clearly applies to the detention of individuals in Afghanistan by the CF on the basis of consent. However, distinguishing *Hape*, *Charter* jurisdiction can and should be founded upon a doctrine which is identified in the international jurisprudence, and one that is more suited to the present circumstances: military effective control.

31. The general rule in *Hape* - Canadian enforcement jurisdiction is barred, out of respect for sovereign equality, except where there is consent - arose in a case where the enforcement jurisdiction at issue was that of the RCMP exercising police functions. The rule does not translate well, if at all, to the Canadian Forces exercising military functions.

32. The notion that the Canadian Forces would in all circumstances have to respect sovereign equality and proceed by consent as the RCMP do is fundamentally misguided. Unlike police functions, military functions at times include the use of force, even deadly force, on foreign soil, and the sovereignty of the other state is necessarily impaired.

33. Consequently, given the nature of military force, the consent of the affected sovereign may play no part in whether the Canadian military can exercise governmental functions in the territory of a foreign state. For example, the CF have been deployed in some countries, such as Somalia, where there was no recognizable government to give consent. Similarly, the CF have been deployed in

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[20] *Hape, supra*, paras. 124-125 and 181-183

the Former Yugoslavia, where sovereignty over a given territory was contested and it is not clear which state should consent. Indeed, there may be circumstances, as in the case of Afghanistan, where the CF actually invade the territory of another state for the express purpose of overthrowing the sovereign government. Consent is a fraught criterion upon which to hinge Charter application when military action is involved.

34. Moreover, the extraterritorial activities of the CF are, by statute, explicitly a matter within the authority of Parliament and thus s. 32 of the Charter. In that regard, the purpose of the *National Defence Act* is to govern the establishment and operation of the CF, including military operations abroad.[21] This includes military functions that may, as in the case of Afghanistan at the time of invasion, offend the principle of sovereign equality, but which are otherwise permitted by other rules of international law, such as self-defence or Security Council authorization.

35. If the Charter's application depended on consent, then the impractical situation could occur where some Canadian Forces in a country are subject to the Charter (e.g. those in ISAF) and others are not (e.g. those in OEF, who arrived on Afghan territory before there was the current government in Kabul to consent), even though they are all under the same Canadian command.

36. Returning to *Hape*, LeBel J.'s rule was not as categorical as the Respondents' suggest. The Court observes in the context of enforcement jurisdiction that "a state cannot act to enforce its laws within the territory of another state absent either the consent of the other state or, in exceptional cases, some other basis under international law."[22]

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[21] *National Defence Act, supra,* sections 4 and 18

[22] *Hape, supra*, para. 65

37. For all of the above reasons, the Applicants submit that determinations regarding the application of the Charter to military activities abroad cannot turn on the issue of consent alone and the general rule in *Hape* is inappropriate. Nevertheless, as will be argued further below, it is clear that the CF detention activities are also carried out with the consent of the Afghanistan government.

B. Military Force and Effective Control

38. The *raison d'être* of a military force is to exercise coercive state power, often on foreign territory. By exercising such power abroad, the CF are fundamentally an extension of the Canadian state, and thus fall within the scope of the Charter. As the Supreme Court observed in *Hape*,

> When it applies, the Charter imposes limits on the state's coercive power. It requires that state power be exercised only in accordance with certain restrictions. As a corollary, where those restrictions cannot be observed, the Charter prohibits the state from exercising its coercive power.[23]

39. The ability to coerce those under one's control is a criterion for Charter application. As Sopinka J. wrote in *McKinney*, "We must bear in mind that the role of the Charter is to protect the individual against the coercive power of the state."[24] The logic of coercion has figured in the Supreme Court finding, for example, that municipalities are subject to the Charter.[25] Certainly the coercion exercised by the Canadian Forces, including lethal force, surpasses a municipality.

40. The power to deprive an individual of liberty is paradigmatic of state sovereignty and jurisdiction.[26] Accordingly, the Applicants submit that Canadian

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[23] *Hape, supra*, para. 97 (emphasis added).

[24] *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, per Sopinka J.

[25] *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844, per LaForest J. at para. 51.

[26] *Hape, supra*, para. 87.

jurisdiction and the Charter are engaged whenever CF soldiers bring a person within their effective control, as by detention or transfer.

41. The Respondents agree that a test of "effective control" is an appropriate legal approach for determining the application of the Charter to military action beyond Canada's borders. However, they contend that a high but unspecified degree of control over a particular territory is required to meet that test.[27]

42. The relevant authorities do not support the Respondents' position. In *Banković v. Belgium and Others*, the European Court of Human Rights found that the respondent governments did not control the territory of the former Yugoslavia prior to embarking on a bombing campaign. But those same governments conceded that detention of an individual on foreign territory would constitute effective control. As the responding states noted, arrest and detention of persons represented "a classic exercise of such legal authority or jurisdiction over those persons by military forces on foreign soil."[28]

43. The House of Lords in *Al Skeini* also took the view that custody and detention in facilities controlled by the military abroad will almost always attract the legal jurisdiction of the home state. That case concerned claims on behalf of six Iraqi individuals who died at the hands of British soldiers in Iraq. Five of the six were killed while the soldiers were on patrol in the city of Basrah. The Law Lords found that the U.K. *Human Rights Act* did not apply in those circumstances because the requisite degree of control was not established.[29]

44. However, the sixth man in *Al Skeini*, Baha Mousa, was clearly under British control: he was detained by British soldiers and taken to their base, where he was

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[27] Respondents' Factum, paras. 63-65.

[28] *Banković v. Belgium*, paras. 36-37 (emphasis added)

[29] *Al Skeini et al v. Secretary of State for Defence,* [2007] UKHL 26

beaten and died of his injuries.[30] That was a significant difference for the House of Lords, as the majority ruled that the British exercised sufficient control over Mousa to engage that country's legal jurisdiction on an extraterritorial basis. It is both that the British Army was under Parliament's authority, and that the deprivation of Mousa's right to life was linked to U.K. state power, which the Law Lords cited to put the matter under U.K. jurisdiction notwithstanding that the events happened in Iraq.[31]

45. U.S. jurisprudence adds further support to the Applicants' position, finding that individuals in military custody abroad are within the jurisdiction of that country's courts. In *Rasul v. Bush*, the U.S. Supreme Court was satisfied that American courts had *habeas corpus* jurisdiction over foreign individuals held in military custody at Guantánamo Bay.[32] This result was possible because although Guantánamo Bay is located in Cuba, the U.S. possessed "complete jurisdiction and control" over its military facilities and detainees.[33] Similarly, the U.S. Court of Appeal allowed in *Omar* that an individual detained by the U.S. military in Iraq was subject to the jurisdiction of the U.S. courts because he was "in custody under or by color of authority of the United States."[34]

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[30] Al Skeini, supra, at para. 6.

[31] Al Skeini, supra, at para. 64, per Rodger LJ. The Applicants note that the Respondents' factum repeatedly and incorrectly cites the dissenting opinion of Lord Bingham as good law. The Applicants would also commend to the Honourable Court the discussion of the European jurisprudence by Lord Justice Brooke from the lower Court, the English Court of Appeal. See *Al Skeini et al v. Secretary of State for Defence,[2005[EWCA Civ 609,* at paras. 54-112.

[32] *Rasul v. Bush*, 542 U.S. 466 (2004).

[33] *Rasul*, supra, at Part I, per Stevens J. See also in that judgment the citations at footnote 12 and accompanying reasons, which make clear that as early as the 17th century, the common law courts had jurisdiction to hear *habeas corpus* petitions over persons detained in the so-called "exempt jurisdictions" where otherwise the writ of the court would not run.

[34] *Omar et al v. Secretary of the United States Army et al.* (2007), U.S.C.A. for the District of Columbia (No. 05cv02374) at p. 14.

46. Based on the foregoing jurisprudence, the Applicants suggest the following jurisdictional rule: once an individual is arrested by CF soldiers, by whatever means, and detained in a base or facility controlled by the CF, and subject to ongoing detention or release at the sole discretion of the CF, that individual is within the effective control of Canada and the reach of the Charter and Canadian courts.

47. The test of effective control sits comfortably with the judgment in *Hape*. As the Supreme Court of Canada observed, the Charter cannot apply extraterritorially if the relevant state actors do not have the power or ability to comply with its requirements. Indeed, this was the majority's fundamental concern with enforcement jurisdiction.[35]

48. On the facts of this case, there can be no question that the CF in Afghanistan have the ability to comply with the Charter, at least in connection with individuals held in military custody at Kandahar Airfield. Significantly, the Respondent Chief of the Defence Staff has no problem issuing orders from Canada to CF personnel operating in Afghanistan. As the record indicates, these orders include directions as to whether the CF should release, transfer or retain a detainee in custody.

49. If General Hillier can issue orders that are followed by the CF in Afghanistan, particularly with respect to detainees, including on detention and transfer, there is no reason why this Honourable Court cannot do so as well. It is worth noting that General Hillier's legal authority to give orders to the CF abroad is contained in s. 18(2) of the *National Defence Act*, which states:

> ...all orders and directions to the Canadian Forces that are required to give effect to the decisions and to carry out the directions of the Government of Canada or the Minister shall be issued by or through the Chief of the Defence Staff.

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[35] *Hape, supra*, paras. 85 and 91-92.

50. It is a Canadian Forces commander who, within his or her discretion, issues the order to keep detaining or to transfer a detainee to Afghan authorities. The commander makes that discretionary order pursuant to delegated statutory authority that also originates with the Chief of the Defence Staff and s. 18(2) of the *National Defence Act*. The Federal Court of Appeal ruled in *Liebmann v. Canada (Minister of National Defence)*[36] that discretionary decisions made outside Canada by CF officers acting under s. 18(2) of the *Act* can be reviewed on *Charter* grounds.

51. To conclude, the Applicants submit that individuals detained by CF in Afghanistan are under Canada's effective control. Decisions by CF commanders to release, transfer or continue the detention of these individuals is authorized by s. 18(2) of the *National Defence Act*, and thus are "matters within the authority of Parliament". For these reasons, the Charter applies during the armed in Afghanistan to the detention or transfer of individuals held in CF custody.

C. Consent

52. The Government of Afghanistan has consented to the operation of Canadian jurisdiction within its territory. In that regard, Afghanistan has surrendered significant powers to Canada, including and most strikingly the usual state monopoly over the use of coercive power within its territory. Indeed, Afghanistan has given CF personnel the authority to exercise force over Afghan nationals, including the use of deadly force or detention, anywhere throughout the country.

53. As recited in the facts, CF apprehend individuals in Aghanistan at will and hold them in a detention facility controlled by Canada at Kandahar Airfield. Canada

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[36] *Liebmann v. Canada (Minister of National Defence)*, [2002] 1 F.C. 29 (Fed. C.A.) at para. 29. Also see *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at 1078: Discretionary authority conferred by statute must be interpreted in a manner that does not infringe Charter rights. (Note that Lamer J. dissented in the result, but on the issue cited here, he wrote for the unanimous Court.)

has no duty to inform Afghanistan of any such detention, and as a matter of practice it does not. The Technical Arrangements between the two countries do not place any limits on Canada's power to keep individuals in detention, except to stipulate a standard of proper treatment. The Technical Arrangements state:

> Detainees would be afforded the same treatment as Prisoners of War. Detainees would be transferred to Afghan authorities in a manner consistent with international law and subject to negotiated assurances regarding their treatment and transfer.[37]

54. While these Arrangements imply that Canada will transfer detainees to Aghan authorities, it is notable that the text uses the word "would" instead of the mandatory "shall". Accordingly, it appears that Afghanistan consented to Canada holding individuals in detention for an extended or undetermined period of time.

55. Furthermore, the Technical Arrangements place conditions on transfers to Afghan custody. Such transfers, if they occur, must be "in a manner consistent with international law and subject to negotiated assurances regarding their treatment and transfer." As the following Section D explains, transferring individuals to a substantial risk of torture violates numerous international treaties, and thus would not be "consistent with international law".

56. Canada and Afghanistan have "negotiated assurances" regarding the treatment and transfer of detainees. But the original Detainee Arrangement, and the Supplementary Arrangement, similarly do not include any requirement to transfer. Rather, those arrangements speak to a protocol or procedure "in the event of" a transfer to Afghan custody.

57. In the Detainee Arrangements, Afghanistan agreed that it will treat CF-transferred detainees humanely and in accordance with international human rights

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[37] Technical Arrangements Between the Government of Canada and the Government of the Islamic Republic of Afghanistan, para. 12.

law, including the prohibition against torture.[38] In addition to the lack of any mandatory language requiring transfers by Canada, a reasonable interpretation of these provisions would indicate that Afghanistan has consented to Canada suspending transfers until it can demonstrate it can meet those commitments, including the obligation not to commit torture.

58. These various arrangements appear to grant Canada very wide discretion in respect of its detention activities. This view is supported by the CF Theatre Standing Orders, which state that the CF Commander in Afghanistan is

> the **sole authority** empowered to make the determination whether a temporarily detained person shall be **retained in custody**, transferred to ANSF or released.

59. The Respondents' submission on the issue of consent fails to even address the nature or extent of Canada's power to consensually detain individuals. The position appears to be that, absent express language, it cannot be assumed that Afghanistan has consented to detainees being afforded Charter protections. This view is inconsistent with the broad and open-ended language of the Technical and Detainee Arrangements.

60. Moreover, the Respondents appear to entertain the theory that Afghanistan can consent to the CF lawfully carrying out all manner of activities in its territory under s. 18(2) of the *National Defence Act*, while withholding consent to the application of the Charter. This would give Afghan officials the ability to pick and choose Canada's law on an *à la carte* basis as no Canadian can. Given the Supreme Court's dicta that statutory powers, even discretionary ones, must be exercised in accordance with the Charter,[39] the Canadian government would be incapable under the constitution of consenting to such an arrangement.

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[38] Detainee Arrangement, Articles 3 and 5. Supplementary Arrangement, Article 4.

[39] *Slaight Communications, supra*.

61. The evidence of how detainees are actually handled by the CF is telling. Some key facts are the following:

- Canada does not inform Afghanistan of when it detains or releases individuals. In fact, it would appear Canada could keep an individual indefinitely without Afghanistan being aware.
- Canada independently established its own criteria of who it will detain and in what circumstances. [40]
- There is no time limit on how long Canada can retain custody of a detainee. Although its policy is to transfer or release within 96 hours, the CF has kept detainees for much longer and acknowledge that they will do so if "there is a requirement to do so".[41]
- Although the new Afghan government was established at the ratification of its new constitution in January 2004, Canada continued to transfer its detainees to the custody of the U.S. December 2005, a period of almost two years.
- The CF has acknowledged that it retains the discretion to transfer detainees to the custody of third countries.[42]

62. In light of the foregoing, the Applicants submit that Afghanistan has consented to Canada exercising a wide discretion in how the CF handle detainees. There is no logical explanation for why this consent would be artificially limited to exclude the human rights protections contained in the Charter. In fact, the Respondents concede that they would not transfer detainees to a substantial risk of

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[40] CF Task Force Afghanistan, Theatre Standing Order (TSO) 321A, Detention of Afghan Nationals and Other Persons, paras. 13, 19-20 [AIMR, Vol. II, Tab 5, p. 448]

[41] CF Task Force Afghanistan, Theatre Standing Order (TSO) 321A, Detention of Afghan Nationals and Other Persons, para. 32[AIMR, Vol. II, Tab 5, p. 450]; and DND/CF Detainee Transfer Records [AIMR, Vol. II, Tab 5, pp. 487-488]; Noonan Transcripts, Question 51.

[42] Hameed Exhibit N

torture. This commitment supports and is consistent with the proposition that the application of the Charter accords with Afghan consent.

63. For all the foregoing reasons, it is submitted that consent is a separate and independent basis for finding that the Charter applies to detainees in Afghanistan.

D. Exception for Fundamental Human Rights

64. It cannot be disputed that the right to be free from torture is a fundamental human right. It is not only codified in the *Geneva Conventions*, the *International Covenant on Civil and Political Rights*, and the *Convention against Torture*, it is a *jus cogens* rule of international law that is not derogable—not even in war.[43] Torture is a crime against humanity that admits no defences or exceptions, and it includes the duty to prevent torture. As Justice O'Connor stated in the Arar Inquiry, "Canada should not inflict torture, nor should it be complicit in the torture of others."[44]

65. The Applicants submit that, regardless of any other basis for jurisdiction, the Charter can and must apply to the CF exercising coercive powers on foreign territories when fundamental human rights are at stake. Even if Afghanistan did not consent to CF detainees being afforded Charter protections, Canada would not be bound by that agreement where it is found that transfers would expose detainees to the risk of being tortured.

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[43] Geneva Conventions Act, supra, Schedules I-IV, Common Article 3; International Covenant on Civil and Political Rights, Art. 7; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 2(2); and Suresh v. Canada, [2002] 1 S.C.R. 3 at paras. 61-65.

[44] Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, Analysis and Recommendations (2006), p. 346.

66. This position is consistent with both international law and the Supreme Court of Canada jurisprudence in *Hape*. The Applicants submit that Canada breaches international law where it aids or assists Afghanistan by transferring detainees, with knowledge of circumstances that an internationally wrongful act – torture – will result. This conclusion is supported by the UN International Law Commission's Articles on State Responsibility, which have been adopted by the UN General Assembly and are universally regarded as codifying customary international law. Article 16 reads:

> *A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:*
>
> *(a) That State does so with knowledge of the circumstances of the internationally wrongful act; and*
>
> *(b) The act would be internationally wrongful if committed by that State.*[45]

67. Simply put, Canada's breach of international law is no less than it would be if Canada tortured the detainee itself. This includes international humanitarian law and Common Article 3 of the Geneva Conventions[46] as well as international human rights law under Article 7 of the the *International Covenant on Civil and Political Rights*, Article 3 of the *Convention against Torture*, and the *jus cogens* rule of the absolute prohibition against torture.[47]

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[45] United Nations (International Law Commission), *Responsibility of States for Internationally Wrongful Acts* (2001), Art. 16.

[46] Common Article 3 is a keystone provision that is found in all four of the 1949 Geneva Conventions and applies to non-international (i.e. internal) conflicts of precisely the kind that now exists in Afghanistan. It expressly protects persons held in detention and prohibits, *inter alia*, "cruel treatment and torture" and "outrages upon personal dignity, in particular, humiliating and degrading treatment", and states that those prohibitions "are and shall remain absolutely prohibited at any time and in any place whatsoever." The absolute, territorially-unlimited and time-unlimited character of Common Article 3 imposes obligations on Canada that would be violated if a detainee transferred to Afghanistan was tortured or otherwise mistreated in the custody of either Afghanistan or a third country.

[47] ICCPR, Article 7; CAT, Article 3; and *Suresh, supra*.

68. Numerous authorities support the position that Canada's jurisdiction is extraterritorial when fundamental human rights are at stake. Article 2 of the *International Covenant on Civil and Political Rights* states that the protections of the Covenant must be extended to any individual "within (the State Party's) territory and subject to its jurisdiction". The U.N. Human Rights Committee has interpreted Article 2 of the Covenant in the following manner:

> ...the enjoyment of Covenant rights is not limited to citizens of State 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. **This Principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained**, such as forces constituting a national contingent to an international peace-keeping or peace-enforcement operation.[48]

69. The United Nations Committee Against Torture has also stated that the obligations of the *Convention against Torture* apply to detainees held by military forces in a foreign territory, including the duty not to return an individual to the jurisdiction of another state where there is a substantial risk of torture. In fact, the Committee against Torture considered this same armed conflict in Afghanistan and found that Denmark violated its non-refoulement obligation when it transferred detainees to the jurisdiction of another state. Having so found, the Committee stated:

> The Committee recalls its constant view (CAT/C/CR/33/3, paras. 4b, 4d, 5e and 5f and CAT/C/USA/CO/2m paras. 20 and 21) that article 3 of the Convention and its obligation of non-refoulement applies to a State party's military forces, whereever situated, where they exercise effective control over an individual. This remains so even if the State party's forces are

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[48] United Nations Human Rights Committee, *General Commentary No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant* (26/05/2004, CCPR/C/21/Rev/1/Add.13), paragraph 10. Also see paragraphs 11-12.

> subject to operational command of another State. Accordingly, the transfer of a detainee from its custody to the authority of another State is impermissible when the transferring State was or should have been aware of a real risk of torture. (article 3)[49]

70. The violations of international law explained above, including and in particular the *jus cogens* rule prohibiting torture, constitute an exception to the principle of sovereign equality. These exceptions are developments in international law since the 1927 *Lotus* case cited by the Respondents.[50]

71. The Supreme Court of Canada has found on numerous occasions that international law, particularly international human rights law, inform the interpretation of the Charter. The Supreme Court of Canada confirmed in *Hape* that this interpretive principle also applies to s. 32 and the scope of the Charter's extraterritorial reach.[51]

72. The majority in *Hape* ruled that extraterritorial enforcement of the *Charter* will usually—but not always—be limited to circumstances in which the foreign country consents to the application of Canadian law. Consent has as its *raison d'être* the maintenance of comity between Canada and the foreign state as sovereign equals. But the deference Canada shows to another country out of respect for sovereign equality and the preservation of comity is not absolute. As

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[49] United Nations Committee Against Torture, *Consideration of Reports Submitted by State Parties under Article 19 of the Convention, Conclusions and recommendations on the fifth periodic report of Denmark* (16/05/2007, CAT/C/DNK/CO/5) at paras. 12-13, 13 for quote. Also see: United Nations Committee Against Torture, *Consideration of Reports Submitted by State Parties under Article 19 of the Convention, Conclusions and recommendations on the fourth periodic report of United Kingdom* (10/12/2004, CAT/C/CR/33/3) at para. 4b.

[50] J.A.C. Salcedo (1997), "Reflections on the Existence of a Hierarchy of Norms in International Law", 8 *European Journal of International Law* 583, at 594.

[51] *Hape, supra*, paras. 55-56. At para. 56, the Court states: "In interpreting the scope of the application of the *Charter*, the courts should seek to ensure compliance with Canada's binding obligations under international law where the express words are capable of suppoting such a construction."

LeBel J. stated, "deference ends where clear violations of international law and fundamental human rights begin".[52]

E. CONCLUSION

73. The purpose of the military is to carry out operations on foreign soil that may involve the use of force. The exercise of coercive power is a fundamental projection of the state and is inseparable with the application of the Charter, particularly when fundamental human rights are at stake. When the CF hold an individual in custody, they bring that person under the jurisdiction of the Charter on the basis of effective control.

74. For too long, Canada's military has acted outside Canada's borders without appropriate legal supervision and accountability. As the case at bar surely demonstrates, this must change. It is respectfully submitted that this Honourable Court rules that the actions of the Canadian Forces in Afghanistan must conform to the supreme law of Canada, the *Charter of Rights and Freedoms*.

PART IV – ORDER REQUESTED

75. The Applicants request that the first question to be determined in the motion be answered in the affirmative. In the event the answer is negative, the Applicants respectfully submit that the second question must be answered in the affirmative in accordance with the purpose of the Charter as a whole and in light of the guidance from international law.

76. Finally, the Applicants are public interest organizations that have raised a matter of significant public importance. Without their actions, this issue, and the

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[52] *Hape, supra*, at para. 52. Also see para. 101.

scrutiny which has since attended to Canada's handling of detainees in Afghanistan, would not have occurred. For these reasons, the Applicants request that the Respondents be ordered to pay their costs in this motion regardless of the outcome.

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PART V
LIST OF AUTHORITIES

ACTS AND TREATIES

Canadian Charter of Rights and Freedoms, section 32

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, entry into force 26 June 1987

Geneva Conventions Act, R.S.C. 1985, c. G-3, sections 1-3, Schedules I-III, Common Article 3

International Covenant on Civil and Political Rights, Art. 7

National Defence Act, R.S. 1985, c. N-5, sections 4, 18, 31, 67-68, 77 and 132.

United Nations (International Law Commission), *Responsibility of States for Internationally Wrongful Acts* (2001), Art. 16.

CASES

Al Skeini et al v. Secretary of State for Defence, [2007] UKHL 26.

Al-Skeini et al v. Secretary of State for Defence [2005] EWCA Civ 1609.

Banković v. Belgium, 2001-XII Eur. Ct. H.R. 333 (GC).

Godbout v. Longueuil (City), [1997] 3 S.C.R. 844, per LaForest J. at para. 51

Liebmann v. Canada (Minister of National Defence), [2002] 1 F.C. 29 (Fed. C.A.)

McKinney v. University of Guelph, [1990] 3 S.C.R. 229.

Omar et al v. Secretary of the United States Army et al. (2007), U.S.C.A. for the District of Columbia (No. 05cv02374)

R. v. Hape, 2007 SCC 26

Rasul v. Bush, 542 U.S. 466 (2004).

Slaight Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038

Suresh v. Canada, [2002] 1 S.C.R. 3.

REPORTS AND SCHOLARLY AUTHORITY

Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, Analysis and Recommendations (2006), pp. 344-349.

J.A.C. Salcedo (1997), "Reflections on the Existence of a Hierarchy of Norms in International Law", 8 *European Journal of International Law* 583

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United Nations Committee Against Torture, *Consideration of Reports Submitted by State Parties under Article 19 of the Convention, Conclusions and recommendations on the fourth periodic report of United Kingdom* (10/12/2004, CAT/C/CR/33/3)

United Nations Human Rights Committee, *General Commentary No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant* (26/05/2004, CCPR/C/21/Rev/1/Add.13)