Court File No.: A-149-08

FEDERAL COURT OF APPEAL

B E T W E E N:

AMNESTY INTERNATIONAL CANADA and BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

Appellants

-and-

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

Respondents

APPELLANTS' MEMORANDUM OF FACT AND LAW

PART I – FACTS

Overview

1. Canada has been engaged in an armed conflict in Afghanistan since 2001. 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.

2. The Appellants initiated an application for judicial review concerning this practice, and asked for relief on the basis that the human rights of individuals held

in detention by the CF in Afghanistan were protected by the *Canadian Charter of Rights and Freedoms*. On a motion to determine a question of law, the Federal Court dismissed the application by ruling that the *Charter* cannot apply extraterritorially in these circumstances, regardless of whether detainees were being exposed to a substantial risk of torture.

3. The Supreme Court of Canada has held previously that the *Charter* may apply outside Canada's borders, though the circumstances are rare. In its most recent judgment, *Canada (Justice) v. Khadr*, 2008 SCC 28, the Supreme Court of Canada confirmed that there is a "fundamental human rights exception" to the general rule that Canadian laws cannot be enforced in foreign countries. While *Khadr* remained *sub judice*, the Motions Judge in the present case ruled no such exception existed, and the judgment must be overturned for this reason alone.

4. But the Appellants submit that the *Charter* can and should apply regardless of the risk of torture. According to the Court below, Afghanistan gave consent to Canadian soldiers killing and detaining Afghan citizens, but did not expressly agree to those individuals being allowed *Charter* protections. This strict test for "consent" is contrary to international law and carries dangerous policy implications.

5. Most importantly, 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 the Canadian military and thus within the jurisdiction of Canadian law. While this situation is new to Canada, the issue of jurisdiction and detention by military forces on foreign soil 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 extraterritorial military power is subject to its domestic human rights law, and support the Appellants' position that *Charter* rights must be extended to individuals held by the CF in Afghanistan. The appeal should be allowed.

The Canadian Mission in Afghanistan

6. 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]

7. The events leading to Canada's military involvement in Afghanistan began in the aftermath of the tragic events of September 11, 2001. The United States of America responded to this attack by invading Afghanistan, the country responsible for hosting Al Qaida training camps. This U.S. campaign is named Operation Enduring Freedom ("OEF"), and was initiated on the basis of the right of states to individual and collective self-defence.[2]

8. The Canadian government informed the U.N. on October 24, 2001, that it would be joining the U.S. in deploying military forces in Afghanistan in the exercise of its inherent right of self defence. After the Taliban government was defeated in December 2001, the U.N. 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.[3]

9. 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. A

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[1] DND/CF Backgrounder: Canadian Forces Operation in Afghanistan, dated January 5, 2007 [Appeal Book ("AB"), Vol. I, Tab 6, p. 177]
[2] Reasons for Order and Order, dated March 12, 2008, paras. 22-25 [AB, Vol. I, p. 14]; and Canada – Making a Difference in Afghanistan, September 2006 [AB, Vol. IV, pp. 1211-1212]
[3] Letter from Chargé d'Affaire of the Permanent Mission of Canada to U.N. Security Council, dated October 24, 2001 [AB, Vol. IV, p. 1237]; Canada – Making a Difference in Afghanistan, September 2006; [AB, Vol. IV, p. 1211-1212]; and U.N. Security Council Resolutions 1368 and 1373 [AB, Vol. V, p. 1354-1355]

large contingent of CF troops moved to Kandahar with the objective of engaging in counterinsurgency combat operations. Today, the majority of the CF in Afghanistan remain part of the ISAF mission and are located in Kandahar province, based at Kandahar Airfield (KAF). Canada retains operational command over CF personnel.[4]

10. Other Canadian government personnel are currently stationed in Afghanistan, including officials from the Department of Foreign Affairs and International Trade (DFAIT), the Correctional Service of Canada (CSC), and the Royal Canadian Mounted Police. Most of these officials are deployed in Kandahar as part of the Provincial Reconstruction Team (PRT), and work jointly with the Afghan government to extend its authority in the province.[5] A smaller contingent of Canadian officials are "embedded" in ministries and departments in Kabul, where they "work side-by-side" with individuals at "the higher levels of government", reporting directly to Afghan officials.[6]

11. Afghanistan President Hamid Karzai has said that, without the presence of the CF, the country would fall into anarchy.[7]

Consent of the Government of Afghanistan

12. While Canada initially invaded Afghanistan with the goal of overthrowing the Taliban government, Canada and ISAF are now in Afghanistan with the consent of that country's current government.[8]

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[4] DND/CF Backgrounder: Canadian Forces Operation in Afghanistan, dated January 5, 2007; 38 [AB, Vol. I, pp. 177-180]; DND/CF Backgrounder: Canadian Forces Operation in Afghanistan, dated July 21, 2005; [AB, Vol. I, pp. 277-279]; and Reasons for Order and Order, March 12, 2008, at paras. 31, 32-33 and 38 [AB, Vol. I, pp. 15-17]

[5] DND Backgrounder, Kandahar Provincial Reconstruction Team Activities, dated February 2, 2007, and Overview – Kandahar Provinical Reconstruction Team, dated January 25, 2007 [AB, Vol. I, pp. 300-307]

[6] Strategic Advisory Team - Brief Note, Communications Plan and Overview [AB, Vol. I, pp. 308-315]

[7] CBC News, "Afghans can't stand on their own by 2009, Karzai tells Canadians", dated September 18, 2007 [AB, Vol. III, Tab 7, p. 841]

[8] Reasons for Order and Order, March 12, 2008, para. 40 [AB, Vol. I, Tab 2, p. 18]

13. 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 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.[9]

14. The Technical Arrangements authorize Canadian personnel to use deadly force and detain individuals within the territory of Afghanistan. The Arrangements further provide:

> Detainees would be transferred to Afghan authorities in a manner consistent with international law and subject to negotiated assurances regarding their treatment and transfer.[10]

The final authority to interpret the Technical Arrangements is expressly reserved to the senior Canadian military commander in Afghanistan. [11]

15. Canada also signed a Status of Forces Arrangement, which is an annex to the Technical Arrangements. This document indicates that Canadian personnel are subject to the exclusive jurisdiction of Canadian authorities in relation to any criminal or disciplinary offences committed in the country and "have complete and unimpeded freedom of movement throughout the territory and airspace of Afghanistan."[12]

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[9] Technical Arrangements Between the Government of Canada and the Government of the Islamic Republic of Afghanistan, paras. 4 and 9 [AB, Vol. I, p. 316 and 318]
[10] Technical Arrangements Between the Government of Canada and the Government of the Islamic Republic of Afghanistan, para. 12 (emphasis added) [AB, Vol. I, p. 319]
[11] Technical Arrangements Between the Government of Canada and the Government of the Islamic Republic of Afghanistan, para. 13 [AB, Vol. I, Tab 5, p. 319]
[12] Arrangement Regarding the Status of Canadian Personnel in Afghanistan, paras. 1.1, 1.3, 4.1 and 6.1 [AB, Vol. I, p. 320-322]

Canadian Forces' Detention of Individuals in Afghanistan

16. The Canadian Forces and Afghanistan Ministry of Defence signed an arrangement on December 18, 2005 to establish procedures in the event of a transfer from Canadian to Afghan custody (the Detainee Agreement). Afghanistan agreed to "accept" detainees from the CF, and to not subject them to the death penalty. The parties also agreed to treat detainees in accordance with the Third Geneva Convention.[13]

17. The governments of Canada and Afghanistan signed a supplementary arrangement on May 3, 2007, regarding transferred detainees (second Detainee Agreement). In this second agreement, Afghanistan agreed to give Canadian officials access to former CF detainees in Afghan detention facilities. Afghanistan also agreed to respect the prohibition against torture and to investigate any allegations of mistreatment.[14]

18. The Canadian Forces possess an unfettered 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".[15]

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[13] Arrangement for the Transfer of Detainees between the Canadian Forces and the Ministry of Defence of Afghanistan, dated December 18, 2005 [AB, Vol. II, p. 573-574]
[14] Arrangement for the Transfer of Detainees between the Government of Canada and the Government of Afghanistan, May 3, 2007, paras. 4, 8 and 10 [AB, Vol. IV, p. 1259-1260]
[15] Reasons for Order and Order, dated March 12, 2008, para. 54 [AB, Vol. I, p. 22]; and CF Task Force Afghanistan, Theatre Standing Order (TSO) 321A, Detention of Afghan Nationals and Other Persons, paras. 13, 19-20 [AB, Vol. II, pp. 532 and 534]

19. 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 sole command and control over the CF detention facilities.[16]

20. Canada informs the International Committee of the Red Cross (ICRC) when the CF detain an individual in Afghanistan, but does not notify the Afghanistan government that one of its citizens has been detained, unless the detainee is transferred to Afghan custody.[17]

21. 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.[18]

22. The CF have sole discretion to decide whether a detainee "shall be retained in custody, transferred to ANSF [Afghan National Security Forces] or released." These determinations are made by the CF commander at regular review meetings. The detainee is not permitted to make representations at those meetings.[19]

23. It is CF policy to make the decision to transfer or release detainees within 96 hours of their capture. However, the CF have the exclusive power and authority to

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[16] Reasons for Order and Order, dated March 12, 2008, paras. 57-58; [AB, Vol. I, pp. 22-23]; Deschamps Transcript, Questions 89-95 [AB, Vol. VI, Tab 19, p. 1694-1695]

[17] Reasons for Order and Order, date March 12, 2008, para. 60 [AB, Vol. I, p. 23]; and Email from KAF to S. Proudfoot, dated March 15, 2007 [AB, Vol. VII, p. 1849]

[18] Reasons for Order and Order, dated March 12, 2008, para. 62 [AB, Vol. I, Tab 2, p. 23]; Theatre Standing Order 321A, paras. 35-37 [AB, Vol. II, p. 537]; Letter from General R.J. Hillier to Yavar Hameed, dated July 17, 2006 [AB, Vol. II, p. 577]; 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 [AB, Vol. II, pp. 467-468]

[19] Reasons for Order and Order, dated March 12, 2008, para. 63 [AB, Vol. I, Tab 2, p. 23-24]; Theatre Standing Order 321A, para. 32 [AB, Vol. II, p. 536]; and Deschamps Transcripts, Question 49 [AB, Vol. VI, Tab 19, p. 1682]

hold detainees for longer periods. For example, the CF suspended all transfers of detainees to Afghan authorities from November 6, 2007 to February 26, 2008, due to concerns about the safety of detainees in Afghan custody. The Afghan government cannot compel Canada to turn over detainees on Afghan territory.[20]

24. The Respondents refuse to disclose the number of individuals who have been detained or transferred by the CF in Afghanistan, claiming this information will imperil national security. The CF have disclosed that, between January 2002 and April 2006, approximately 40 detainees were transferred. More recent documents suggest that the number of transferred detainees is over 100, with at least 85 going to the National Directorate of Security (NDS or NSD in some exhibits).[21]

Torture and Abuse in Afghan Custody

25. The U.N. Secretary General, the U.N. High Commissioner for Human Rights and the Afghan Independent Human Rights Commission have all maintained that individuals are routinely tortured and otherwise abused in Afghan custody. Torture by Afghan authorities is described as "common"[22] and "routine"[23] by these reputable bodies. The U.N. Secretary General has reported to the General Assembly that U.N. officials continue to "receive and verify" complaints of torture in

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[20] Reasons for Order and Order, dated March 12, 2008, paras. 75-81 and 197 [AB, Vol. I, Tab 2, pp. 26-27]; Theatre Standing Order 321A, para. 32[AB, Vol. II, p. 536]
[21] DND/CF Detainee Transfer Log [AB, Vol. I, Tab 5, p. 324-325]; and Email from C. Borlé to E. Laporte, dated June 1, 2007, p. 2 of 5 [AB, Vol. VIII, Tab 15, p. 1931]
[22] Report of the U.N. High Commissioner for Human Rights on the situation of human rights in Afghanistan, March 3, 2006, at p. 15, para. 68 [AB, Vol. III, p. 682]
[23] Afghan Independent Human Rights Commission 2004-2005 Annual Report, Section 4.7 [AB, Vol. II, pp. 643 for quotation and 646 for data on torture complaints]

custody. The NDS, the sole authority to whom CF presently transfer detainees, is singled out as an agency of particular concern for perpetrating torture.[24]

26. Canada's Department of Foreign Affairs and International Trade (DFAIT) prepares annual reviews of the human rights situation in Afghanistan. In the report released in January 2007, the Department concluded, "Extrajudicial executions, disappearances, torture and detention without trial are all too common."[25] Previous DFAIT reports have described human rights violations such as torture and killing by police and government soldiers as "widespread" and "visible and flagrant". In the 2003 report, DFAIT provided details on the nature of the torture perpetrated by Afghan authorities:

> Common methods of torture included beating with an electric cable or metal bar, electric shocks, sleep deprivation and hanging detainees by their arms or upside down for several days. Juveniles were also reported to have been beaten and tortured.[26]

27. Until the second Detainee Arrangement was concluded on May 3, 2007, the Canadian government did not monitor or verify the condition of CF-transferred detainees in Afghan custody. In the first six months after monitoring commenced, Canadian officials heard at least eight first-hand complaints of torture from these detainees. As observed by the Motions Judge,

> These complaints included allegations that detaineeswere kicked, beaten with electrical cables, given electric shocks, cut, burned, shackled, and made to stand for days at a time with their arms raised over their heads.

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[24] Report of the U.N. Secretary-General, The situation in Afghanistan, dated September 21, 2007, at paras. 45 and 84 [AB, Vol. III, Tab 6, p. 817 and 824]; and Affidavit of Col. Steven Noonan, para. 53 [AB, Vol. III, p. 855]

[25] Reasons for Order and Order, dated February 7, 2008, para. 105 [AB, Vol. I, Tab 5, p. 128]

[26] DFAIT Annual Report on Afghanistan in 2002, Human Rights, Democratic Development, and Good Governance, para. 10 [AB, Vol. VI, p. 1736]; DFAIT Annual Report on Afghanistan in 2003, Human Rights, Democratic Development, and Good Governance, at paras. 13 and 18 for quotation [AB, Vol. VI, p. 1747, 1749]; DFAIT Annual Report on Afghanistan in 2004, Human Rights, Democratic Development, and Good Governance, at p. 5 of 18, para. 2 [AB, Vol. VI, p. 1773]

> Moreover, in some cases, prisoners bore physical signs that were consistent with their allegations of abuse. In addition, Canadian personnel conducting site visits personally observed detainees manifesting signs of mental illness, and in at least two cases, reports of the monitoring visits described detainees as appearing "traumatized".[27]

28. The CF received these monitoring reports. Transfers continued despite these reports until Canadian government officials found actual torture implements (braided electrical wire and a rubber hose) hidden under a chair and a detainee claimed he was beaten with them, showing physical marks consistent with his allegations. As a result of this incident, transfers were suspended from November 5, 2007 to February 26, 2008.[28]

Federal Court Judgment

29. The parties agreed to submit certain questions of law to the Court for determination pursuant to Rule 107 of the *Federal Courts Rules*. The questions asked whether the *Canadian Charter* applied to the detention of individuals by CF in Afghanistan, or their transfer to Afghan authorities, including circumstances in which the transfer would expose the individuals to a substantial risk of torture.[29]

30. The Motions Judge dismissed all of the Appellants' arguments and ruled that the *Charter* did not apply, regardless of the risk of torture. According to the Court, Afghanistan gave consent to Canadian soliders exercising complete control over detained Afghan citizens, but did not expressly agree to those individuals being allowed *Charter* protections. The Court rejected international jurisprudence and

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[27] Reasons for Order and Order, dated February 7, 2008, at paras. 74-87, with quotations at paragraphs 85 and 87 [AB, Vol. I, Tab 5, p. 124]; DFAIT Monitoring Visits to Detention Facilities in Kabul and Kandahar [AB, Vols. V and VII, Tabs 17, 22-23, pp. 1583, 1586, 1604-1605, and 1972-2006]

[28] DFAIT Monitoring Report KANDH0123 [AB, Vol. V, p. 1583]; and Reasons for Order and Order, dated March 12, 2008, paras. 76, 78 and 81 [AB, Vol. I, Tab 2, pp. 26-27]

[29] Court Order, dated January 4, 2008 [AB, Vol. I, Tab 4, p. 102-103]

U.N. commentaries that supported an alternative ground of extraterritorial jurisdiction, the principle of "effective control". The Court dismissed these authorities as improperly grounded in international law or as advocacy.

31. Transferring detainees to a substantial risk of torture was also not enough to establish *Charter* jurisdiction. The Motions Judge found the evidence of torture "very troubling", and expressed "serious concerns" about the adequacy of the measures adopted by the Respondents to stop its recurrence. However, these findings made no difference given the Court's interpretation of *Hape*:

> [I]t is clear that the majority decision in *Hape* did not create a "fundamental human rights exception" justifying the extraterritorial assertion of *Charter* jurisdiction where such jurisdiction would not otherwise exist.[30]

[30] Reasons for Order and Order, dated March 12, 2008, paras. 324 and 339 [AB, Vol. I, Tab 2, pp. 85 and 88]

PART II – ISSUES

32. As agreed by the parties, and as Ordered by the Court, the questions determined by the Motions Judges were:

> (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 Appellants were able to establish that the transfer of detainees in question would expose them to a substantial risk of torture?

33. The Appellants submit that the Motions Judge erred in law in several important respects in her approach and answer to these questions.

PART III – ARGUMENTS

34. The present case is the first time 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 agreed to two questions on this issue which were derived primarily from the legal framework proposed by the Supreme Court of Canada in *R. v. Hape*.[31]

35. While the Appellants 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 at issue in *Hape*, the armed forces are created and legislated by Parliament with the purpose of projecting Canadian 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 Appellants is that the *Charter* applies whenever the CF bring a person within their effective control, as by detention or transfer, and the Appellants' *Hape*-based arguments on consent are in the alternative.

36. Extraterritorial application of the *Charter* is an area of jurisprudence that continues to evolve. In *Hape*, the Supreme Court of Canada adopted a new test for determining when the *Charter* should apply to Canadian authorities acting abroad. According to the majority, the principles of sovereign equality and comity supported a general rule that the application of the *Charter* to Canadian authorities on foreign soil was prohibited "absent either the consent of the other state or, in exceptional cases, some other basis under international law."[32]

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[31] *R. v. Hape*, [2007] S.C.J. No. 26. The questions were determined pursuant to Rule 107 of the *Federal Courts Rules*, SOR/98-106.
[32] *Hape, supra*, para. 65 (emphasis added)

37. The majority's reasons in *Hape* also seemed to suggest that, in addition to consent, violations of fundamental human rights could constitute another exception to its exclusionary jurisdictional rule. The Motions Judge reviewed these passages in *Hape*, but ultimately concluded that the Court did not create a "fundamental human rights exception" to the general rule against extraterritoriality. [33] Not long after this ruling, the Supreme Court pronounced again on s. 32 of the *Charter*. Removing all ambiguity, the unanimous Court in *Canada (Justice) v. Khadr* confirmed that *Hape* did indeed find that the Charter applied extraterritorially in respect of fundamental human rights violations at international law.[34]

38. The Appellants' arguments are in three sections. First, the Appellants address the doctrine of "effective control" and jurisdiction at international law. Second, the Appellants explain that the legal test for "consent" is less rigid than that applied in the Court below, and describe the nature and scope of Afghanistan's consent to the activities of the CF. Third and finally, the Appellants 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, and thus constitutes a "fundamental human rights exception".

QUESTION 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?

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[33] Reasons for Order and Order, dated March 12, 2008, paras. 315-324 and 339 [AB, Vol. I, Tab 2, pp. 83-85 and 88]

[34] *Canada (Justice) v. Khadr,* [2008] S.C.J. No. 28, at paras. 18-19

A. MILITARY FORCE AND EFFECTIVE CONTROL

39. The *Canadian Charter of Rights and Freedoms* applies "in respect of all matters within the authority of Parliament".[35] 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 Canadian government agents acting in foreign countries.[36] Further, the statutes and regulations upon which the Canadian Forces are constituted and operate, including the handling of detainees captured in war, are self-evidently matters within the authority of Parliament, as Parliament passed them expressly to be used extraterritorially in foreign wars.[37]

40. The Appellants will argue in the next section that, per *Hape*, the *Charter* applies to the detention of individuals in Afghanistan by the CF on the basis of consent. However, it is also submitted here that *Hape* is distinguishable, and *Charter* jurisdiction in the case at bar 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.

41. Before discussing the international cases, it must be appreciated that the *Charter* jurisprudence on s. 32 has evolved primarily in the context of police investigations. For example, the general rule adopted in *Hape* - Canadian enforcement jurisdiction is prohibited due to principles of sovereign equality and comity, except where there is consent - arose in a case where the RCMP searched an empty office in the Turks and Caicos. Military action is often on another level, and can include the exercise of deadly force and other significant public powers in the territory of a foreign state.

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[35] *Canadian Charter of Rights and Freedoms*, 1982, section 32(1)(a)
[36] *R. v. Harrer*, [1995] 3 S.C.R. 562; *Schreiber v. Canada (Attorney General)*, [1998] 1 S.C.R. 841; *R. v. Cook*, [1998] 2 S.C.R. 597; and *Hape,supra,* at paras. 159-160
[37] *National Defence Act*, R.S. 1985, c. N-5, sections 4, 18, 31, 67-68, 77, 132; *Geneva Conventions Act*, R.S.C. 1985, c. G-3, sections 1-3, Schedule IV, Articles 1-3; and *Prisoner-of-War Status Determination Regulations*, S.O.R./91-134, section 2.

42. Furthermore, military force is often deployed in unstable or fragile countries where ascertaining the consent of the affected sovereign may be problematic. Somalia and the Former Yugoslavia are two examples. There may also 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. The evidentiary and even diplomatic problems of Canadian courts delving into the issue of consent in such circumstances are easy to imagine.

43. 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*. The Motions Judge dismissed out of hand the distinction between the RCMP in *Hape* and the CF in the case at bar.[38] With respect, there is a significant difference between the provisions and objects of the *Royal Canadian Mounted Police Act* and the *Geneva Conventions Act*. The latter incorporates all four *Geneva Conventions* into Canadian domestic law, including Common Article 3 in Schedules I-IV of the Act.[39] The territorially-unlimited character of Common Article 3 obliges Canada to ensure the humane treatment of all persons held in "detention".

44. In addition, the *Prisoner-of-War Status Determination Regulations* are a part of Canadian domestic law, and were promulgated to confer legal rights on individuals detained by CF on foreign territory.[40] While the Appellants are not necessarily arguing that CF detainees in Afghanistan have prisoner-of-war status under the Third *Geneva Convention*, the point is that detention by the CF on foreign soil is obviously a matter "within the authority of Parliament".[41] Thus, the failure by

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[38] Reasons for Order and Order, dated March 12, 2008, paras. 146-147 [AB, Vol. I, Tab 2, p. 43]
[39] *Geneva Conventions Act, supra*, Schedules I-IV, Article 3. Also see *Khadr, supra*, at para. 25; and *Antonsen v. Canada (Attorney General)*, [1995] F.C.J. No. 259 (FCTD) at para. 64
[40] In section 2 of the *Prisoner-of-War Status Determination Regulations*, supra, "detainee" is defined as "a person in the custody of a unit or other element of the Canadian Forces".
[41] *Canadian Charter of Rights and Freedoms, supra*, section 32(1)(a).

the Court below to distinguish between the *RCMP Act* and the special extraterritorial character of the legislation governing the CF was clearly an error of law.

(i) International Law and Effective Control

45. In the Court below, the Appellants relied on a large body of international legal authority for the proposition that international law has admitted a jurisdictional test premised on "effective control". The Motions Judge rejected this argument, finding that "the current state of international jurisprudence in this area is somewhat uncertain".[42] In reaching this conclusion, the Motions Judge dismissed the statements of authoritative U.N. treaty bodies as "advocacy", found the analysis of the House of Lords wanting, and rested her decision primarily on a case, *Banković*, that actually affirms "effective control" as a universally accepted basis for jurisdiction. With respect, the Court's legal reasoning should not be followed.

46. The most common source of international human rights law relied upon in Canadian courts is, quite properly, the U.N. treaties to which Canada adheres.[43] The Supreme Court of Canada has repeatedly affirmed the view that the *International Covenant on Civil and Political Rights* (*ICCPR*) and the *Convention against Torture* (*CAT*) inform the interpretation of the *Charter*.[44]

47. The Appellants submit that the *Charter* should "be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified", and this must necessarily include its jurisdictional scope.[45]

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[42] Reasons for Order and Order, dated March 12, 2008, para. 214 [AB, Vol. I, Tab 2, p. 58]
[43] See *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Can. T.S. 1987 No. 36; and *International Covenant on Civil and Political Rights*, Can. T.S. 1976 No. 47.
[44] See *Hape, supra*, at para. 55, and cases cited therein. Also see *Health Services and Support - Facilities Subsector Bargaining Asn. v. British Columbia*, [2007] S.C.J. No. 27, at para. 70.
[45] See *Hape, supra*, at paras. 55-56, 55 for quotation from Dickson, C.J., from previous cases.

48. Article 2 of the *ICCPR* 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 interpreted Article 2 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.[46]

49. The Committee Against Torture has also stated that the protections under the *CAT* extend to detainees held by military forces in a foreign territory. In fact, the Committee 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 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)[47]

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[46] 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.

[47] 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 quotation. 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. The above statements are unequivocal, but the Motions Judge summarily dismissed the U.N. Committees as advocacy groups with no status in interpreting law.[48] This regrettable view is at odds with the Supreme Court of Canada, which has regularly given favourable reception and acceptance to the interpretive comments made by these Committees.[49] It is also contrary to the treaties in question, which established the Committees to supervise implementation, and endowed the Committees with quasi-judicial powers to receive complaints, entertain submissions, and render decisions.[50] (The quasi-judicial status of the Committees is underscored by the fact Canada has appeared as a Respondent before them.[51])

51. Moreover, the International Court of Justice, the highest judicial authority on international law, recently relied on the Human Rights Committee's interpretation of the *ICCPR* to reach its own understanding of certain key provisions.[52] The International Commission of Jurists, an eminent international association of jurists and legal scholars, has stated that the Human Rights Committee "authoritatively interprets the *ICCPR*."[53] Renowned international jurist Thomas Buergenthal has written that the Committees have extensive experience dealing with individual complaints under their respective treaties. From this, he concludes:

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[48] Reasons for Order and Order, dated March 12, 2008, para. 239 [AB, Vol. I, Tab 2, p. 64]
[49] See *Suresh, supra*, paras. 66-67 and 73; *Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 519, at para. 133; and *B.C. Health Services, supra*, para. 74. Also see *Almrei v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 54 (FCA) at para. 124; and *Bouaouni v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1211 at paras. 34 and 41.
[50] *ICCPR*, Articles 28-45; and *CAT*, Articles 17-24.
[51] *Sandra Lovelace v. Canada*, Communication No. 24/1977 (6 June 1983), U.N. Human Rights Committee
[52] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,Advisory Opinion,* I.C.J. Reports 2004, at paras. 108-111 and 136.
[53] International Commission of Jurists, "Israel's Separation Barrier: Challenges to the Rule of Law and Human Rights" (6 July 2004), at Part II, 2.1. Accessed at http://www.icj.org/news.php3?id_article=3410&lang=en

> This practice **has produced a substantial body of international human rights law.** While one can debate the question of the nature of this law and whether or not it is law at all, the fact remains that **the normative findings of the treaty bodies have legal significance**, as evidenced by the references to them in international and domestic judicial decisions.[54]

52. The Motions Judge also suggests that, in any event, the U.N. Committees speak only to "the scope of the legal obligations" under the treaties, and their comments "do not address the extraterritorial reach of domestic laws".[55] With respect, this too is inconsistent with the Supreme Court of Canada's approach. In *Hape*, Lebel J. stated, "In interpreting the scope of 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 supporting such a construction."[56] In short, a purposive analysis of the *Charter* finds that its jurisdictional reach should be co-extensive with international human rights treaties.

53. Turning to the other authorities, the Court below placed great weight on the judgment of the European Court of Human Rights (ECtHR) in *Banković v. Belgium and Others*.[57] But that case unambiguously affirmed the principle that "effective control" is a lawful exception to the general rule against extraterritorial jurisdiction. The Grand Chamber (i.e., full bench) of the Court summarized its view as follows:

> In sum, the case-law of the Court demonstrates that its recognition of the exercise of extra-territorial jurisdiction by a Contracting State is exceptional: it has done so when the respondent State, through the **effective control** of the relevant territory and its inhabitants abroad, as a consequence of military occupation **or** through the **consent**, invitation or acquiescence of the Government of that territory exercises all or some of the public powers normally to be exercised by that Government.[58]

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[54] Thomas Buergenthal, "Centennial Essay: The Evolving International Human Rights System," (2006), 100 A.J.I.L. 783 at 789 (emphasis added). Judge Buergenthal is a present member of the International Court of Justice and previously sat as a judge and president of the Inter-American Court of Human Rights.
[55] Reasons for Order and Order, dated March 12, 2008, para. 240 [AB, Vol. I, pp. 64-65]
[56] *Hape, supra*, paras. 55-56, 56 for quotation.
[57] *Banković v. Belgium and Others,* 2001–XII Eur. Ct. H.R. 333 (GC)
[58] *Banković, supra,* para. 71

54. The Appellants had relied on *Banković* for the proposition that effective control and consent are recognized as two separate exceptions to the general rule. The real task for the Motions Judge was to interpret the "effective control" test and apply it to the facts of the case. Unfortunately, the Court did neither.

55. Briefly, there are two lines of authority in the ECtHR on "effective control". In one line of cases, jurisdiction is found when a state exercises effective control of an area outside of its sovereign territory.[59] The second line holds that a state has jurisdiction when its agents exercise control or authority over an individual outside that state's sovereign territory:

> [A] state may also be held accountable for violation of the convention rights and freedoms of persons who are in the territory of another state but who are found to be under the former state's authority and control through its agents operating – whether lawfully or unlawfully – in the latter state. [60]

56. Depending on the facts of the particular case, the ECtHR employs one test or the other, and both co-exist in European law. The main difference is that, if a state is found to have effective control of an area, then it is obliged to secure the human rights of all inhabitants within that area. For control or authority over a person, the responsibility is much narrower, and the state is only responisble for those individuals directly within its control.

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[59] In *Loizidou v. Turkey* (1995), 20 EHRR 99, the ECtHR ruled as follows: "Bearing in mind the object and purpose of the Convention, responsibility of a Contracting Party may also arise when as a consequence of military action – whether lawful or unlawful – it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate adminisration." Also see: *Ilascşu and Others v. Moldova and Russia*, [2004] ECHR 48787/99, where Court found concurrent jurisdiction.

[60] In *Issa v. Turkey*, [2004] ECHR 31831/96, the ECtHR found at para. 71 that Turkey could be responsible for the actions of its military in Iraq. Also see: *Öcalan v Turkey*, (2005) 41 EHRR 985.

57. The English Court of Appeal discussed these lines of authority extensively in *Al Skeini et al v. Secretary of State for Defence*.[61] The 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 sixth man, Baha Mousa, was detained by British soldiers and taken to their base, where he was held in detention and died after a brutal beating.

58. In a helpful shorthand, Lord Brooke referred to the effective control of an area test as "ECA" jurisdiction, and the effective control of a person - or state agent authority - test, as "SAA" jurisdiction. The Court concluded that both tests applied, and, if either was met, an individual fell within U.K. jurisdiction.[62] Though the bench disagreed somewhat regarding the content of the ECA test, they concurred that it was not met with respect to the five Iraqis killed in the city streets.[63] It was found that Mr. Mousa fell within SAA jurisdiction, and thus was entitled to the U.K.'s domestic human rights protections.[64]

59. The House of Lords in *Al Skeini* affirmed the English Court of Appeal. Much of the House of Lords' reasons concerned the relationship between the U.K. *Human Rights Act* and the *European Convention on Human Rights*, an issue irrelevant to the present case. Significantly, the House of Lords unreservedly confirmed that the ECA test is a legitimate ground for attracting jurisdiction, and accepted that British human rights jurisdiction extended to a British detention facility in Iraq.[65]

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[61] *Al Skeini et al v. Secretary of State for Defence,* [2005] EWCA Civ 1609 (Eng.C.A.) The U.K. *Human Rights Act* directly incorporates the *European Convention on Human Rights*. The British courts therefore refer to the jurisprudence of the European Court of Human Rights because the scope of the U.K. *Act* is the same as the *Convention*.

[62] See *Al Skeini, supra,* (Eng.C.A.), Lord Brooke, at paras. 124 and 147-148. The other Lords concurred, with Lord Sedley clarifying his view at para. 190 that both tests "do not represenet discrete jurisprudential classes" because "the single criterion is effective control."

[63] *Al Skeini, supra*, (Eng.C.A.), per Lord Brooke at para. 124, and per Lord Sedley at paras. 194-201 and 205

[64] *Al Skeini, supra* (Eng.C.A.), see paras. 6, 91, 108, 143, 147, 183 and 188, 183 for quotation

[65] *Al Skeini et al v. Secretary of State for Defence,* [2007] UKHL 26. Lord Rodger's opinion is the leading judgment, though he does not address his view on the basis of jurisdiciton

60. What is of greatest significance for the case at bar is that both *Banković* and *Al Skeini* confirm that the ECA (effective control of an area) test is a valid basis for the exercise of extraterritorial jurisdiction. Furthermore, both judgments affirm that military detention of an individual on foreign territory constitutes effective control of a sufficient degree to attract jurisdiction. The proposition is so uncontroversial at international law that all the respondent governments in *Banković* and *Al Skeini* conceded the point. (In opposing jurisdiction in *Banković,* the respondent governments argued that the circumstances in the case were unlike arrest and detention, which they said represented "a classic exercise of such legal authority or jurisdiction over those persons by military forces on foreign soil."[66])

61. In light of the above, it is very odd that the Motions Judge would adopt *Banković* but attack *Al Skeini*, as the *ratio* in both are essentially the same. In a confusing line of analysis, the Judge draws on caselaw not presented or argued before the Court below to conclude that the House of Lords was effectively equating embassies with military prisons, a comparison the Motions Judge rejected as "inapt".[67] But the Motions Judge makes no attempt to explain why the U.K. government would decide to concede the point, nor is there any reference to the fact that the governments of Belgium, Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain and Turkey all admitted in *Banković* that the military arrest and detention of individuals on foreign soil is a "classic exercise" of jurisdiction.

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over Mousa (paras. 61, 75 and 79). Baroness Hale implies Mousa is ECA (para. 91), as does Lord Carswell (paras. 93 and 97).

[66] *Banković v. Belgium*, paras. 36-37 (emphasis added). As Professor Christopher Greenwood, counsel for the United Kingdom conceded to the ECtHR in that case, **"A prisoner is the archetypal example of someone who comes within the jurisdiction of the detaining state which exercises the most extreme type of control over him."** Thus the SAA version of control cannot be doubted to exist: see Verbatim Record of the hearing held in *Banković*, 24 October 2001, at page 10; quoted in Michael O'Boyle, "The European Convention on Human Rights and Jurisdiction: A Comment on 'Life after *Banković*" in Fons Coomans and Menno Kamminga, Extraterritorial Application of Human Rights Treaties (Antwerp: Intersentia, 2004).

[67] Reasons for Order and Order, dated March 12, 2008, para. 264 [AB, Vol. I, Tab 2, p. 70]

62. There is significantly more international jurisprudence on this issue, all of it in favour of the Appellants' position. In *Legal Consequences of the Construction of a Wall*, the International Court of Justice approves extraterritorial jurisdiction on the basis of effective control:

> The Court would observe that, while the jurisdiction of states is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the *International Covenant on Civil and Political Rights*, it would seem natural that, even when such is the case, State parties to the covenant should be bound to comply with its provisions.[68]

63. The Inter-American Commission on Human Rights (IACHR) is the body authorized to interpret the *American Declaration of the Rights and Duties of Man*, a declaration binding upon Canada by virtue of Canada's membership in the Organization of American States.[69] In *Coard et al v. United States of America*, the IACHR ruled on a complaint by 17 people who were arrested and detained by the U.S. armed forces during the invasion of Grenada. The IACHR found there was jurisdiction, essentially on SAA principles:

> Given that individual rights inhere simply by virtue of a person's humanity, each American State is obliged to uphold the protected rights of any person subject to its jurisdiction. While this most commonly refers to persons within a state's territory, it may, under given circumstances, refer to conduct with an extraterritorial locus where the person concerned is present in the territory of one state, but subject to the control of another state – usually through the acts of the latter's agents abroad. **In principle, the inquiry turns not on the presumed victim's nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control.**[70]

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[68] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, supra*, para. 109

[69] See *American Declaration of the Rights and Duties of Man*; and *Regulations of the Inter-American Commission of Human Rights*, OAS Doc. OEA/Ser.L./II.71, Doc. 6 rev. 1, Articles 23 and 42

[70] *Coard et al v. United States of America* (1999), Inter-American Commission on Human Rights, Report No. 109/99, at para. 37 (emphasis added) [hereinafter "*Coard*"]

64. U.S. jurisprudence is consistent with the principles of effective control, finding that individuals in military custody abroad are within that country's jurisdiction. In *Boumediene v. Bush*, the U.S. Supreme Court recently affirmed that American courts have *habeas corpus* jurisdiction over individuals detained in military custody on foreign soil at Guantánamo Bay, Cuba. To ground extraterritorial jurisdiction, the U.S. Supreme Court observed that it should "inquire into the objective degree of control the Nation asserts over foreign territory." It was emphasized that "questions of extraterritoriality turn on objective factors and practical concerns, not formalism."[71]

65. Based on the foregoing authorities, the Appellants can safely say that the extraterritorial application of human rights law by means of effective control, particularly with respect to military detention facilities abroad, is a universally accepted principle of international law.[72] While this is sufficient to establish the serious error of law by the Motions Judge, the Appellants will discuss briefly how this principle sits comfortably with the judgment in *Hape*.

(ii) *Charter* and Effective Military Control

66. In *Hape*, LeBel J.'s rule was not as categorical as the Motions Judge suggests. LeBel J. observed 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."[73] The Appellants submit that, in light of the above authorities, military effective control is recognized as another basis to found extraterritorial juridiction at international law.

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[71] *Boumediene et al v. Bush*, 553 U.S. 466 (2008), Opinion of the Court, at pp. 23-24 and 34

[72] International Commission of Jurists, *supra*, at Part II, 2.1: "In light of the uniform practice of judicial and quasi-judicial bodies, at the universal as well as regional level, it cannot be doubted that the ICCPR and the ICESCR apply extraterritorially".

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

67. The Appellants submit that the differences between police and military functions are so significant that it justifies *Hape* being distinguished on its facts and as an issue of law. By recognizing effective military control as an exception to the general jurisdictional rule, the international jurisprudence cited above can co-exist harmoniously with the majority's *ratio* in *Hape*.

68. This distinction also makes sense given the special nature of the military. Totally unlike Canada's police, the *raison d'être* of Canada's military forces is to exercise the most coercive forms of state power on foreign territory. By carrying out these functions abroad, in accordance with the statutory authority of Parliament,[74] 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.[75]

69. The ability to coerce those under one's control is a primary 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."[76] Moreoever, the power to deprive an individual of liberty is paradigmatic of state sovereignty and jurisdiction.[77]

70. On the facts of this case, individuals are arbitrarily subjected to the exercise of discretionary power by the CF commander — to arrest and to detain, to release or to transfer, to yield into safe hands or the hands of torturers— without any recourse or protection at law. Discretionary decisions by Canadian state actors

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[74] *National Defence Act, supra*; and *Geneva Conventions Act, supra*.
[75] *Hape, supra*, para. 97 (emphasis added).
[76] *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, per Sopinka J.
[77] *Hape, supra*, para. 87.

must be subject to *Charter* scrutiny, particularly when they directly relate to the fundamental human rights of liberty and security of the person. [78]

71. By holding individuals in a facility under the "complete control" of the CF, Canada clearly has effective control over the detainees in accordance with the SAA doctrine of effective control.[79] The CF control over the military detenion facility itself also meets the ECA standard, as per *Al Skeini*.[80]

72. A finding of jurisdiction avoids the odd result that Canadian courts can prosecute Canadian soldiers for mistreatment of detainees on foreign soil, but are powerless to restrain the mistreatment from occuring in the first place.[81] It is the primary role of the Charter to ensure that *Charter* breaches are prevented.[82]

73. For all the foregoing reasons, the Appellants submit that Canadian jurisdiction and the *Charter* are engaged whenever CF soldiers bring a person within their effective control, as by detention or transfer.

B. CONSENT

74. In *Hape*, the Supreme Court expressed for the first time that, as a general rule, the *Charter* would apply to the actions of Canadian authorities on foreign territory only with the consent of the host state. However, the Court did not

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[78] *Canadian Charter of Rights and Freedoms*, section 7; and *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038.
[79] *Coard et al, supra.*
[80] *Al Skeini,* House of Lords, supra. The U.N. Committee Against Torture has also recently released *General Comment No. 2, Implenetation of article 2 by States Parties* (23/10/2007, CAT/C/GC/2/CRP.1/Rev. 4). At para. 16, the Committee says, "The reference to "any territory" in article 2, like that in articles 5, 11, 12, 13, and 16, refers to prohibited acts committed not only onboard a ship or aircraft registered by a State party, but also during military occupation or peacekeeping operations and in such places as embassies, military bases, detention facilities, or other areas over which as State exercises factual or effective control."
[81] *R. v. Brown*, [1995] C.M.A.J. No. 1; and *R. v. Seward*, [1996] C.M.A.J. No. 5
[82] *Hape, supra*, at para. 91

provide any guidance regarding this new test of consent, such as, for example, how was consent to be defined or proven, and who bore the burden of proof. As LeBel J. explained, "Consent clearly is neither demonstrated nor argued on the facts of the instant appeal, so it is unnecessary to consider when and how it might be established."[83]

75. The Appellants submit that the Motions Judge erred in law by setting an unreasonably high standard for establishing consent by a foreign state. The Court below did not view practice or conduct as relevant, but rather searched for explicit language that effectively states the Government of Afghanistan consents "to having Canadian *Charter* rights conferred on its citizens, within its territory."[84]

76. The ECtHR has defined the test of consent more broadly. In *Banković*, the ECtHR summarized its own jurisprudence as recognizing the exercise of extraterritorial jurisdiction when, "through the consent, invitation or acquiescence of the Government of that [foreign] territory", another state "exercises all or some of the public powers normally to be exercised by that Government."[85]

77. In the case at bar, the Motions Judge failed to have due regard to whether the conduct of Afghanistan amounted to "invitation or acquiescence" to *Charter* protections being afforded to its citizens held in detention by the CF. Thousands of Canadian soldiers, police, diplomats and aid workers are deployed in Kandahar, where the Afghan government clearly consents to them exercising a wide range of functions and powers, including the unfettered authority to kill or detain its citizens at will.[86] It is illogical to conclude that the Afghan government would consent to Canada exercising this kind of power over its citizens, but has drawn a line with respect to *Charter* protection of human rights.

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[83] *Hape, supra*, para. 106.
[84] Reasons for Order and Order, dated March 12, 2008, paras. 159, 170-174, 172 for quotation [AB, Vol. I, Tab 2, p. 46, 48-49]
[85] *Banković, supra*, at para. 71 (emphasis added)
[86] Technical Arrangements Between the Government of Canada and the Government of the Islamic Republic of Afghanistan, para. 12 [AB, Vol. I, Tab 5, p. 318-319]

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

- Canada independently established its own criteria of who it will detain and in what circumstances. The CF commander has sole discretion to decide who will be released, transferred or released.[87]
- Although CF policy is to transfer or release within 96 hours, the CF have kept detainees for much longer – almost four months during the suspension of all transfers.[88]
- The CF have "complete control" over detainees and cannot be compelled to hand them over to Afghanistan custody.[89]
- Canada does not inform Afghanistan of when it detains or releases individuals. Canada could hold an Afghan citizen indefinitely without Afghanistan being aware.[90]

79. There is also no dispute that Afghanistan has acquiesced to the CF commander being the "sole authority" to determine whether it is safe to transfer detainees to Afghan custody according to the substantial risk of torture standard. However, there is nothing in the Technical Arrangements or Detainee Agreements that specify that the CF commander should be that appropriate authority. Similarly, there is nothing that says the CF commander's discretion cannot be reviewed by other appropriate Canadian authorities, such as the Respondents or, as the Appellants contend, the Canadian courts.[91]

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[87] CF Task Force Afghanistan, Theatre Standing Order (TSO) 321A, Detention of Afghan Nationals and Other Persons, paras. 13, 19-20 [AB, Vol. II, p. 532, 534]
[88] CF Task Force Afghanistan, Theatre Standing Order (TSO) 321A, Detention of Afghan Nationals and Other Persons, para. 32 [AB, Vol. II, p. 536]; and Reasons for Order and Order, dated March 12, 2008, paras. 76, 78 and 81 [AB, Vol. I, Tab 2, pp. 26-27]
[89] Reasons for Order and Order, date March 12, 2008, para. 197 [AB, Vol. I, p. 54]
[90] Reasons for Order and Order, date March 12, 2008, para. 60 [AB, Vol. I, p. 23]
[91] United Nations *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (U.N. General Assembly Resolution 43/173 of 9 December 1988), Principle 4.

80. In summary, the Motions Judge erred by relying solely on the written instruments in place without regard to the surrounding context, including and in particular the practices of the parties. It is clear that the Technical Arrangements and Detainee Agreements do not constitute a comprehensive code that fully regulates Canada's exercise of powers within Afghan territory. Moreover, the instruments should be interpreted in a realistic manner that takes into account the practices of the parties as well as the underlying purposes and objectives of Canada's presence, namely protecting and promoting human rights and security in a fragile, re-building state.[92]

81. Finally, there are some serious public policy issues to weigh in light of the Motions Judge's strict interpretation of consent. The Court's ruling approves the theory that Afghanistan can consent to the CF lawfully carrying out all manner of activities in its territory, while withholding consent only to the application of the *Charter*. Particularizing consent in this extreme way 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*,[93] the Canadian government would be incapable under the constitution of consenting to such an arrangement.

82. More seriously, it is perverse to consent to total freedom of action and exercise of coercive powers, but withhold consent to human rights protections. A model for the dangers of this approach is the U.S. establishment of secret prisons - or "black sites" - around the world, with the consent of the host states. This allows governments to act in concert and manipulate their agreements to create a legal vacuum for human rights.[94] The United States Supreme Court has yet to consider

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[92] Afghanistan Compact
[93] *Slaight Communications, supra*.
[94] Council of Europe, Parliamentary Committee on Legal Affairs and Human Rights, *Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report*, (June 7, 2007)

these secret CIA prisons on foreign soil, but it has recently conveyed its view on the propriety of similar arrangements in *Boumediene*, stating that "Our basic charter cannot be contracted away like this."[95]

83. 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.

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

C. FUNDAMENTAL HUMAN RIGHTS EXCEPTION

84. 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.[96] When systematic and widespread, torture is a crime against humanity. It admits no defences or exceptions, and the human right includes the state's 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."[97]

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[95] *Boumediene, supra*, Opinion of the Court at 35
[96] *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
[97] Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, Analysis and Recommendations (2006), p. 346.

85. The Appellants submit that, regardless of any other basis for jurisdiction, the *Charter* can and must restrain the CF from participating in a process in a foreign territory that violates international law and fundamental human rights. 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.

86. The Appellants argued in the Court below that *Hape* had created a "fundamental human rights exception" to principles of international law that would otherwise prohibit the enforcement of the *Charter* in a foreign country. The Motions Judge interpreted the majority's reasoning in *Hape* differently, and concluded:

> [I]t is clear that the majority decision in *Hape* did not create a "fundamental human rights exception" justifying the extraterritorial assertion of *Charter* jurisdiction where such jurisdiction would not otherwise exist.[98]

87. Whatever ambiguity that may have existed in *Hape*, the Supreme Court of Canada firmly clarified the law in a judgment recently delivered by the Court in *Canada (Justice) v. Khadr*. At paragraph 24, the Court pronounced:

> In *Hape*, however, the Court stated an important exception to the principle of comity. While not unanimous on all the principles governing extraterritorial application of the *Charter*, the Court was united on the principle that comity cannot be used to justify Canadian participation in activities of a foreign state or its agents that are contrary to Canada's international obligations. It was held that the deference required by the principle of comity "ends where clear violations of international law and fundamental human rights begin" (*Hape*, at paras. 51, 52 and 101, *per* LeBel J.). The Court further held that in interpreting the scope and application of the *Charter*, the courts should seek to ensure compliance with Canada's binding obligations under international law (para. 56, *per* LeBel J.).[99]

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[98] Reasons for Order and Order, dated March 12, 2008, at para. 324. [AB, Vol. I, Tab 2, p. 85]

[99] *Khadr, supra*, at paras. 18-19, 18 for quotation.

88. It is submitted that *Khadr* is dispositive of this appeal. The Appellants submit that Canada breaches international law where it aids or assists Afghanistan by transferring detainees, with knowledge that they face a substantial risk of torture. This conclusion is further 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.[100]

89. 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 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 customary *jus cogens* rule of the absolute prohibition against torture.[101]

90. The violations of international law explained above, including and in particular the *jus cogens* rule prohibiting torture, constitute an exception to the principles of international law that prohibit jurisdiction on foreign territory. *Jus cogens* is a superior norm at international law.[102] The appeal must be allowed.

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

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

[102] See *Prosecutor v. Furundzja*, International Criminal Tribunal for former Yugoslavia, Case No, IT-95-17/1-T (10 December 1998) at paras. 147-157, esp. 153-154.

D. CONCLUSION

91. 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 from 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.

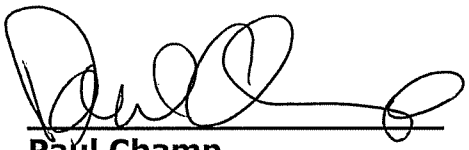
92. Canada's military is subject to the rule of law, even when it acts outside Canada's borders. As the case at bar surely demonstrates, the protection of human rights is ill served by a legal vacuum. It is respectfully submitted that this Honourable Court rule that the actions of the Canadian Forces in Afghanistan must conform to the supreme law of Canada, the *Charter of Rights and Freedoms*.

PART IV – ORDER REQUESTED

93. The Appellants request that the appeal be allowed, with costs here and in the Court below. The Court should declare that the first question be answered in the affirmative.

94. In the event the answer to the first question is negative, the Appellants respectfully submit that the second question must be answered in the affirmative in accordance with the Supreme Court's *ratio* in *Canada (Justice) v. Khadr*.

Dated: July 14, 2008



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PART V
LIST OF AUTHORITIES

ACTS AND TREATIES

American Declaration of the Rights and Duties of Man; and *Regulations of the Inter-American Commission of Human Rights*, OAS Doc. OEA/Ser.L./II.71, Doc. 6 rev. 1, Articles 23 and 42

Canadian Charter of Rights and Freedoms, 1987, sections 7, 12 and 32

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Can. T.S. 1987 No. 36, Articles 2, 3, 17-24

Federal Courts Rules, SOR/98-106, Rule 107

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, Can. T.S. 1976 No. 47, Articles 2, 7, 28-45

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

Prisoner-of-War Status Determination Regulations, S.O.R./91-134, section 2

United Nations *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (U.N. General Assembly Resolution 43/173 of 9 December 1988)

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

Antonsen v. Canada (Attorney General), [1995] F.C.J. No. 259 (FCTD)

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

Boumediene et al v. Bush, 553 U.S. 466 (2008)

Canada (Justice) v. Khadr, [2008] S.C.J. No. 28

Coard et al v. United States of America (1999), Inter-American Commission on Human Rights, Report No. 109/99

Health Services and Support - Facilities Subsector Bargaining Asn. v. British Columbia, [2007] S.C.J. No. 27

Ilascşu and Others v. Moldova and Russia, [2004] ECHR 48787/99

Issa v. Turkey, [2004] ECHR 31831/96

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,Advisory Opinion, I.C.J. Reports 2004

Loizidou v. Turkey (1995), 20 EHRR

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

Öcalan v Turkey, (2005) 41 EHRR 985

Prosecutor v. Furundzja, International Criminal Tribunal for former Yugoslavia, Case No, IT-95-17/1-T (10 December 1998)

R. v. Brown, [1995] C.M.A.J. No. 1

R. v. Cook, [1998] 2 S.C.R. 597

R. v. Hape, [2007] S.C.J. No. 26

R. v. Harrer, [1995] 3 S.C.R. 562

R. v. Seward, [1996] C.M.A.J. No. 5

Sauvé v. Canada (Chief Electoral Officer), [2002] 3 S.C.R. 519

Schreiber v. Canada (Attorney General), [1998] 1 S.C.R. 841

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

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

OTHER AUTHORITIES

Buergenthal, Thomas. "Centennial Essay: The Evolving International Human Rights System," (2006), 100 A.J.I.L. 783

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

Council of Europe, Parliamentary Committee on Legal Affairs and Human Rights, *Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report*, (June 7, 2007)

International Commission of Jurists, "Israel's Separation Barrier: Challenges to the Rule of Law and Human Rights" (6 July 2004)

O'Boyle, Michael. "The European Convention on Human Rights and Jurisdiction: A Comment on 'Life after *Banković*" in Fons Coomans and Menno Kamminga, Extraterritorial Application of Human Rights Treaties (Antwerp: Intersentia, 2004)

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)

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 Committee Against Torture, *General Comment No. 2, Implenetation of article 2 by States Parties* (23/10/2007, CAT/C/GC/2/CRP.1/Rev. 4)

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)