IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

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

-and-

CANADIAN CIVIL LIBERTIES ASSOCIATION

Intervener

APPLICANTS' MEMORANDUM OF ARGUMENT

PART I – STATEMENT OF FACTS

Overview

1. Human rights are often most at risk in times of war. This appeal concerns the plight of individuals detained by the Canadian military in Afghanistan, and asks whether the *Canadian Charter of Rights and Freedoms* places any duty on the Canadian Forces to refrain from participating in a process that results in torture. In a decade when the "war on terror" has obliged the United States Supreme Court and the British House of Lords to uphold the rights of war detainees, this is the first appeal to call on the Supreme Court of Canada to do likewise.

2. For more than seven years, Canada has been engaged in an armed conflict in Afghanistan. As part of that operation, Canadian soldiers are under standing orders to detain individuals. Once arrested, detainees are transported by the Canadian Forces ("CF") to a facility that is under exclusive CF command and control. Each person is processed at the facility, after which the CF commander in Afghanistan exercises his "sole discretion" to release, to continue detaining, or to transfer the individual into the hands of Afghan authorities.

3. The Applicants do not object to Canada's deployment in Afghanistan, or the detention of individuals by the Canadian Forces. But the Applicants are seriously concerned that the Canadian military transfers detainees to Afghanistan authorities despite overwhelming evidence that torture is widespread in Afghan custody. Indeed, when Canadian officials inspected Afghan prisons, several of Canada's former detainees gave credible, first-hand accounts of brutal torture.

4. The Applicants initiated a judicial review application in the Federal Court, contending that individuals held in detention by the Canadian Forces in Afghanistan were protected from torture by the *Canadian Charter of Rights and Freedoms*. On a motion to determine preliminary questions of law, the Federal Court dismissed the application by ruling that the *Charter* could not apply extraterritorially in this case, even if it were established that the transferred detainees faced a substantial risk of torture. The Federal Court of Appeal affirmed the judgment.

5. The Applicants submit that, with these rulings, Canadian law is badly out of step with the jurisprudence in other countries. While the issue is new to Canada, the difficult question of jurisdiction and detention by military forces on foreign soil has been addressed by the House of Lords, the United States Supreme Court, and the European Court of Human Rights. All of these Courts concur that when a military has *de facto* control of war detainees on foreign sovereign territory, those

detainees are entitled to certain protections of the detaining power's human rights law. Canada is now alone among western powers in rejecting this principle.

6. The fact that the Canadian Forces, despite the Respondents' reassurances, transferred individuals into the hands of known torturers has triggered enormous public debate in Canada. Newspapers from across the country have carried dozens of lead stories, editorials, and letters. Parliamentarians have regarded the matter as so serious that *Hansard* records a total of 75 days of debates in the House of Commons. The Military Police Complaints Commission—a body established on the recommendation of former Chief Justice Brian Dickson after the Somalia detainee torture scandal—is preparing for only the second public hearings of its history. Given these facts, the public interest would be served by granting leave for this appeal.

7. The present case will not only have enormous precedential value for future Canadian military operations abroad, it will obviously be of critical importance for those individuals who are captured and detained by the Canadian Forces in Afghanistan and are fearful of being transferred to abuse or torture by Afghan authorities. The case is also important because it will reconcile Canadian law with the jurisprudence of its allies on jurisdiction and extraterritorial detention.

8. The Applicants submit that the proposed appeal represents a profound test of Canada's commitment to fundamental human rights. As the *Charter* was designed to protect individuals from abuses of state power, a purposive analysis demands that its application be co-extensive with the projection of that power. The *Charter* should not be sidelined in times of war, as the Respondents suggest, when the Canadian state exercises the most extreme forms of coercive power and human rights are so demonstrably at risk. The application for leave to appeal should be granted so Canada's highest Court can consider this important question.

The Canadian Military in Afghanistan

9. 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. While Canada initially invaded Afghanistan with the goal of overthrowing the Taliban government, Canada and the International Security Assistance Force ("ISAF") are now in Afghanistan with the consent of the current government.[1]

10. On December 18, 2005, Canada and Afghanistan signed a document outlining the nature of Canada's involvement and powers within Afghanistan. According to these "Technical Arrangements", Canadian soldiers are authorized 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.[2]

11. The Canadian Forces and Afghanistan 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.[3]

12. The governments of Canada and Afghanistan signed a supplementary detainee arrangement on May 3, 2007 (the second Detainee Agreement). In the new arrangement, Afghanistan agreed to give Canadian officials access to former

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[1] Federal Court, Reasons for Order and Order, March 12, 2008, paras. 22-33 and 40 [Application For Leave to Appeal ("AFLTA"), Vol. II, Tab 5, p. 477]
[2] Federal Court, Reasons for Order and Order, March 12, 2008, para. 47[AFLTA, Vol. II, Tab 5, p. 483]
[3] Arrangement for the Transfer of Detainees between the Canadian Forces and the Ministry of Defence of Afghanistan, dated December 18, 2005 [AFLTA, Vol. III, Tab 10, pp. 615-616]

CF detainees in Afghan detention facilities. Afghanistan also agreed to respect the prohibition against torture and to investigate any allegations of mistreatment.[4]

13. The Canadian Forces possess an unfettered discretion to detain Afghan civilians, including those having no direct role in hostilities. Following capture, CF detainees are transported to and held in CF detention facilities at Kandahar Airfield, the CF base for operations in Kandahar province. Canada has exclusive command and control over the CF detention facilities.[5]

14. Canada informs the International Committee of the Red Cross when the Canadian Forces detain an individual in Afghanistan, but does not notify the Afghanistan government unless the detainee is transferred to Afghan custody.[6]

15. The CF commander has the sole discretion to decide whether a detainee shall be retained in custody, transferred to Afghan authorities, or released. These determinations are made by the CF commander at regular review meetings. The Respondents deny detainees' access to legal counsel during detention, and no detainee is allowed to appear or make representations at the review meetings.[7]

16. It is CF policy to make the decision to transfer or release a given detainee within 96 hours of capture. However, the Canadian Forces have the exclusive power and authority to hold detainees for longer periods. For example, the CF commander suspended all detainee transfers from November 6, 2007 to February

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[4] Arrangement for the Transfer of Detainees between the Government of Canada and the Government of Afghanistan, May 3, 2007, paras. 4, 8 and 10 [AFLTA, Vol. III, Tab 11, pp. 617-618]

[5] Federal Court, Reasons for Order and Order, dated March 12, 2008, paras. 54, 57-58; [AFLTA, Vol. II, Tab 5, p. 485-486]; CF Task Force Afghanistan, Theatre Standing Order (TSO) 321A, Detention of Afghan Nationals and Other Persons, paras. 13, 19-20 [AFLTA, Vol. III, Tab 12, pp. 622 and 624]

[6] Federal Court, Reasons for Order and Order, date March 12, 2008, para. 60 [AFLTA, Vol. II, Tab 5, p. 486]

[7] Federal Court, Reasons for Order and Order, dated March 12, 2008, paras. 62-63 [AFLTA, Vol. II, Tab 5, p. 486-487] [AB, Vol. I, Tab 2, p. 23-24]; Theatre Standing Order 321A, para. 32 [AFLTA, Vol. III, Tab 12, p. 626]

26, 2008, due to concerns about the safety of detainees in Afghan custody. Notwithstanding Afghanistan's sovereignty over its territory and citizens, the Afghan government cannot compel Canada to turn over detainees.[8]

Torture and Abuse in Afghan Custody

17. The U.N. Secretary General, the U.N. High Commissioner for Human Rights, the United States State Department, and the Afghan Independent Human Rights Commission have all maintained that individuals are routinely tortured and abused in Afghan custody. These reputable bodies describe torture committed by Afghan authorities as "common" and "routine".[9]

18. Canada's Department of Foreign Affairs and International Trade prepares annual reviews of the human rights situation in Afghanistan. In 2007, the Department concluded, "Extrajudicial executions, disappearances, torture and detention without trial are all too common."[10]

19. 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. After monitoring commenced, Canadian officials heard at least eight first-hand complaints of torture from these detainees within the first six months. As observed by the Motions Judge,

> These complaints included allegations that detainees were 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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[8] Federal Court, Reasons for Order and Order, dated March 12, 2008, paras. 75-81 and 197 [AFLTA, Vol. II, Tab 5, p. 489-490 and 517]
[9] *Amnesty International Canada v. Canada (Canadian Forces),* [2008] F.C.J. No. 198, paras. 103-106 [AFLTA, Vol. III, Tab 9, p. 608]
[10] *Amnesty International Canada v. Canada (Canadian Forces),* [2008] F.C.J. No. 198, para. 105 [AFLTA, Vol. III, Tab 9, p. 608]

> 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".[11]

20. 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 by the Canadian Forces from November 5, 2007 to February 26, 2008.[12]

Federal Court Judgment

21. The parties agreed to submit questions of law to the Court for determination pursuant to Rule 107 of the *Federal Courts Rules*. The questions asked were as follows:

> (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? [13]

22. The Motions Judge dismissed all of the Applicants' arguments and ruled that the *Charter* did not apply, regardless of the risk of torture. According to the Court, Afghanistan agreed to Canadian soldiers exercising complete control over detained Afghan citizens, but did not expressly agree to those individuals being allowed *Charter* protections. The Court rejected jurisprudence from the House of Lords and

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[11] *Amnesty International Canada v. Canada (Canadian Forces),* [2008] F.C.J. No. 198, paras. 74-87, with quotations at paras. 85 and 87 [AFLTA, Vol. III, Tab 9, p. 606]
[12] Federal Court, Reasons for Order and Order, dated March 12, 2008, paras. 76, 78 and 81 [AFLTA, Vol. II, Tab 5, pp. 489-490]
[13] Federal Court, Reasons for Order and Order, dated March 12, 2008, para. 13 [AFLTA, Vol. II, Tab 5, pp. 474-475]

U.N. commentaries that supported an alternative ground of extraterritorial jurisdiction, namely the principle of "effective control". The Court dismissed these authorities as improperly grounded in international law, or as advocacy.[14]

23. 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 *R. v. 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.[15]

Federal Court of Appeal

24. The Federal Court of Appeal upheld the ruling of the Motions Judge, and found the *Charter* did not apply to individuals detained by the CF in Afghanistan, even if the actions of the CF violated fundamental human rights protected by international law. Madam Justice Desjardins, writing for the Court, agreed with the Motions Judge that the Supreme Court did not necessarily create a "fundamental human rights exception" justifying the extraterritorial application of the *Charter*:

> I understand the Supreme Court of Canada to be saying that deference and comity end where clear violations of international law and fundamental human rights begin. This does not then mean that the *Charter* then applies as a consequence of these violations.[16]

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[14] Federal Court, Reasons for Order and Order, dated March 12, 2008, paras. 214, 239, and 264 [AFLTA, Vol. II, Tab 5, pp. 527 and 533]
[15] Federal Court, Reasons for Order and Order, dated March 12, 2008, paras. 324 and 339 [AFLTA, Vol. II, Tab 5, pp. 548 and 551]
[16] Federal Court of Appeal Reasons for Judgment, dated December 17, 2008, at para. 20 [AFLTA, Vol. II, Tab 6, pp. 562-563]

25. The Court of Appeal also found that the Motions Judge did not err by rejecting jurisprudence from sources such as the House of Lords and the European Court of Human Rights. According to the Court of Appeal, the "effective control" principle arising from this jurisprudence was problematic in the context of a multinational effort as it would result in a "patchwork of different national legal norms". The Court concluded that the consent-based test in *Hape* was the appropriate rule in the circumstances. [17] The appeal was dismissed with costs.

National Importance

26. Canadians have closely followed the issue of CF detainee transfers to Afghan authorities since 2006. A non-exhaustive search of newspapers from across Canada indicates that at least 179 articles were published on the issue from 2006 to 2008. Moreover, Canada's Parliamentarians have extensively debated the issue of detainee transfers in the House of Commons on 75 different days during that same period. Two different Parliamentary Standing Committees heard witnesses on the issue, and a comprehensive report on the Afghan conflict by the Standing Committee on National Defence dedicated significant portions to the controversy.[18]

27. Further, the Military Police Complaints Commission – a body established in the wake of the Somalia detainee torture scandal – has decided to hold public interest hearings into the handling of detainees in Afghanistan. The Commission noted that the "inherent seriousness" of the allegations and the significant media attention were grounds for investigating the matter.[19]

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[17] Federal Court of Appeal Reasons for Judgment, dated December 17, 2008, at para. 34 [AFLTA, Vol. II, Tab 6, pp. 567]
[18] Affidavit of Shauna Troniak and All Exhibits [AFLTA, Vols. I-II, Tab 2, pp. 2-456]
[19] Military Police Complaints Commission, decisions dated February 26, 2007 and March 12, 2008 [AFLTA, Vol. II, Tab 3, pp. 459-467, 460 for quote]

PART II – QUESTIONS IN ISSUE

28. The present application for leave to appeal raises the following issue:

(a) Does the question of the application of the *Canadian Charter of Rights and Freedoms* to individuals held by the Canadian military in a Canadian facility on foreign soil, and the transfer of those individuals into the custody of those who would commit torture, raise issues of national public importance such that the Court should grant leave to appeal?

29. The Applicants submit that the proposed appeal raises matters of profound national importance and significant public interest. The application ought to be allowed.

PART III – STATEMENT OF ARGUMENT

30. 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 case has national importance not simply in relation to Canada's ongoing involvement in the Afghanistan conflict, but it also has precedential value for future Canadian missions abroad.

31. Extraterritorial application of the *Charter* is an area of jurisprudence that continues to evolve. In *Hape* and *Khadr*, the Supreme Court of Canada developed a new approach for determining when the *Charter* should apply to Canadian authorities acting abroad.[20] It is the Applicants' view that these cases stand for the following principle: the *Charter* will not apply to Canadian authorities on foreign soil unless the host country consents or the Canadian authorities act in a manner that violates Canada's binding human rights obligations at international law.

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[20] *R. v. Hape*, [2007] S.C.J. No. 26 and *Canada (Justice) v. Khadr,* [2008] S.C.J. No. 28

32. The Applicants argued in the Courts below that the *Charter* applied to CF detention of individuals in Afghanistan on the basis of both consent and the fundamental human rights exception. But it was also submitted that the case could be distinguished by its military context. Military activities are inherently different from the functions of other state actors, such as the police. Unlike the usually domestic-bound RCMP at issue in *Hape*, the Canadian Forces operate pursuant to statutes and regulations, including those dealing with prisoners of war, and are self-evidently matters within the authority of Parliament.[21] Accordingly, when the Canadian Forces exercise the most extreme forms of coercive power abroad, it necessarily raises different considerations.

33. The highest courts of the United States (*Boumediene*) and the United Kingdom (*Al Skeini*) have recently had occasion to consider the application of human rights protections to extraterritorial detention by the military. This jurisprudence as well as authorities from international human rights law has consistently held that a detaining power has jurisdiction over individuals held in a military facility on foreign soil.

34. The national importance of this appeal is established not only by the significant liberty interests at stake or the novelty of the legal question. The Canadian public is obviously deeply concerned about whether the Canadian military in Afghanistan is acting in a manner that respects fundamental human rights. Parliamentarians have been significantly engaged by the issue, debating the matter on 75 days in the House of Commons. This level of public engagement demonstrates the national importance of the appeal.

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[21] *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.

A. MILITARY FORCE AND EFFECTIVE CONTROL

35. In the Courts below, the Applicants relied on a large body of jurisprudence and 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".[22] The Court of Appeal concurred, finding that the theory is problematic in the context of a multinational effort "since it would result in a patchwork of different national legal norms applying to detainees".[23]

36. With respect, the Applicants submit that the principle of effective control, though articulated in slightly different forms, is a widely accepted basis for extraterritorial jurisdiction in other countries, particularly in the context of extraterritorial military detention.

37. In *Boumediene v. Bush*, the U.S. Supreme Court recently affirmed that individuals detained in military custody on foreign soil at Guantánamo Bay, Cuba, cannot be denied the fundamental protections of the U.S. Constitution. 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."[24] The Court concluded,

> It is true that before today the Court has never held that noncitizens detained by our Government in territory over which another country maintains *de jure* sovereignty have any rights under our Constitution. But the cases before us lack any precise historical parallel. They involve individuals detained by executive order for the duration of a conflict that, if measured from September 11, 2001, to the present, is already among the longest wars in American history. The detainees, moreover, are held in a territory that, while technically

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[22] Federal Court, Reasons for Order and Order, dated March 12, 2008, para. 214 [AFLTA, Vol. II, Tab 5, p. 521]
[23] Federal Court of Appeal, Reasons for Judgment, para. 34 [AFLTA, Vol. II, Tab 6, p. 567]
[24] *Boumediene et al v. Bush*, 553 U.S. 466 (2008), Opinion of the Court, at pp. 23-24 and 34 (emphasis added).

> not part of the United States, is under the complete and total control of our Government. Under these circumstances the lack of a precedent on point is no barrier to our holding. [25]

38. The House of Lords also recently dealt with the issue of extraterritorial detention by the British military in a foreign country. *Al Skeini et al v. Secretary of State for Defence* concerned claims brought under the U.K. *Human Rights Act* by the families of six 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.[26]

39. The House of Lords concluded that there was no jurisdiction in respect of the five Iraqis killed in the city streets as the British military did not have a sufficient degree of control over that environment. However, the House of Lords unreservedly concluded that British human rights jurisdiction extended to a British detention facility in Iraq, and therefore Mousa had rights in the circumstances.[27]

40. The European Court of Human Rights has similarly found that there is jurisdiction under the European Convention when a state's military exercises effective control of an area outside of its sovereign territory.[28] The European Court has also held that military control over an individual outside that state's sovereign territory is enough to attract jurisdiction:

> [A] state may also be held accountable for violations of the convention rights and freedoms of persons who are in the territory of another state but

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[25] *Boumediene et al, supra,* at p. 41

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

[27] *Al Skeini et al, supra,* at. paras. 61, 75, 79, 91, 93 and 97, for the various concurring opinions.

[28] 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."

> 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. [29]

41. The Motions Judge rejected the effective control principle by placing great weight on another judgment of the European Court of Human Rights, *Banković v. Belgium and Others*.[30] With respect, it is submitted that *Banković* actually affirms the principle of effective control as a lawful exception to the general rule against extraterritorial jurisdiction.[31]

42. What is most significant about *Banković* is that all of the respondent governments in that case conceded that military detention on foreign territory would constitute effective control of a sufficient degree to attract extraterritorial jurisdiction. The respondents contended that bombing a territory – in that case Serbia – did not bring individuals within the effective control of the states carrying out the attack. In opposing jurisdiction, 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."[32]

43. The principle of effective control as a basis for jurisdiction has also been adopted in the context of international human rights treaties. 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 interpreted Article 2 in the following manner:

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[29] 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.

[30] *Banković v. Belgium and Others,* 2001–XII Eur. Ct. H.R. 333 (GC)

[31] *Banković, supra,* para. 71

[32] *Banković v. Belgium*, paras. 36-37 (emphasis added). The responding states who accepted this proposition were Belgium, Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Turkey and the United Kingdom.

> ...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.[33]

44. The Committee Against Torture has also stated that the protections under the *Convention Against Torture* 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. [34]

45. While the Motions Judge questioned the legal authority of the above commentaries, the International Court of Justice has relied on the Human Rights Committee's interpretation of the *ICCPR* to reach its own understanding of the jurisdictional scope of the treaty. In *Legal Consequences of the Construction of a Wall*, the I.C.J. unreservedly concluded that international human rights law applied extraterritorially and in times of armed conflict.[35]

46. The Motions Judge suggested that, in any event, the U.N. Committees speak only to the scope of legal obligations under the human rights treaties, and their

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[33] 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), paragraphs 10-12, 10 for quote.

[34] 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. The Committee has also released an interpretive commentary that explicitly finds that the *Convention* extends to military detention facilities "over which a State exercises factual or effective control". See U.N. Committee Against Torture, *General Comment No. 2, Implementation of article 2 by States Parties* (23/10/2007, CAT/C/GC/2/CRP.1/Rev. 4), at para. 16.

[35] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,Advisory Opinion,* I.C.J. Reports 2004, at paras. 106-111.

comments "do not address the extraterritorial reach of domestic laws".[36] With respect, this is inconsistent with this Honourable Court'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."[37] In short, a purposive analysis of the *Charter* finds that its jurisdictional reach should be co-extensive with international human rights treaties.

47. Based on the foregoing authorities, the Applicants 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 principle widely accepted by other courts and legal authorities. Canadian courts may find that there are sound reasons for departing from the principles developed in the above cases. But given the significance of the liberty interests at stake, it is submitted that these issues should be resolved, and the international jurisprudence reconciled, by this Honourable Court.

B. CONSENT

48. The present appeal also raises serious questions regarding the application of the consent-based test for jurisdiction in *Hape*. This Honourable Court has yet to provide any guidance regarding this new test of consent, such as, for example, how consent is to be defined, and who bears the burden of proof. As LeBel J. explained in *Hape*, "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."[38]

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[36] Reasons for Order and Order, dated March 12, 2008, para. 240 [AB, Vol. I, pp. 64-65]
[37] *Hape, supra*, paras. 55-56, 56 for quotation.
[38] *Hape, supra*, para. 106.

49. In the case at bar, the Afghanistan government 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 Canadian soldiers the authority to exercise force over Afghan nationals, including the use of deadly force or detention, anywhere throughout the country.[39]

50. Further, the Canadian Forces hold detainees in a facility under exclusive Canadian command and control. Canada has no duty to inform Afghanistan of any such detention, and as a matter of practice it does not. The 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. Notwithstanding Afghanistan's sovereignty over its territory and citizens, Canada cannot be compelled to hand over detainees to Afghan authorities, and the sole discretion to release, transfer, or continue detention in Canadian custody resides with the CF commander. [40]

51. In these circumstances, the Applicants submit that the Courts below erred in law by setting an unreasonably high standard for establishing consent by a foreign state. The Federal Court did not view practice or conduct as relevant, but rather searched only for explicit language referring to the *Charter* in the bilateral arrangements. [41] Failure to have regard to the practices of the states concerned would make it impossible, in many cases, for a claimant to establish consent.

52. In addition to the practical problems related to the Federal Court's strict interpretation of consent, there are also serious public policy issues. The Court's ruling approves the theory that Afghanistan can consent to the CF exercising an

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[39] Applicants' Memorandum of Argument, *supra*, paras. 9-16.
[40] Applicants' Memorandum of Argument, *supra*, paras. 9-16.
[41] Federal Court, Reasons for Order and Order, dated March 12, 2008, paras. 159, 170-174, 172 for quotation [AFLTA, Vol. II, Tab 5, pp. 509, 511-512]
[43] 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)

unlimited range of coercive powers within its territory, while withholding consent only to the application of the *Charter*. A model for the dangers of this approach is the U.S. establishment of secret CIA prisons around the world, with the consent of the host states.[43] This allows governments to act in concert and manipulate their agreements to create a legal vacuum for human rights. This kind of approach is inconsistent with the objects and purposes of the Charter.

C. FUNDAMENTAL HUMAN RIGHTS EXCEPTION

53. 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.[44] 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."[45]

54. One of the questions of law agreed to by the parties asked whether the *Charter* would apply in the event the Applicants established that transfers exposed detainees to a substantial risk of torture. In short, it assumed that transfers were being carried out in spite of a risk of torture.

55. The Applicants argued in the Courts below that *Hape* and *Khadr* had created a "fundamental human rights exception" to principles of international law that would otherwise prohibit the application of the *Charter* in a foreign country. The

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[44] *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.

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

Federal Court judgment, released while *Khadr* was *sub judice*, interpreted the majority's reasoning in *Hape* differently, concluding that

> ...it 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.[46]

56. It was the Applicants view that the above reasoning was overturned by the Supreme Court of Canada in *Khadr*, where it was found that the *Charter* applied to the interrogation of Omar Khadr by Canadian agents in Cuba. According to this Honourable Court, "if Canada was participating in a process that was violative of Canada's binding obligations under international law, the *Charter* applies to the extent of that participation."[47]

57. In the case at bar, the Federal Court of Appeal did not appear to accept that *Khadr* affirmed a fundamental human rights exception permitting extraterritorial application of the *Charter*. Writing for the Court, Madam Justice Desjardins wrote:

> I understand the Supreme Court of Canada to say that deference and comity end where clear violations of international law and fundamental human rights begin. This does not mean that the *Charter* then applies as a consequence of these violations.[48]

58. With respect, the Applicants submit that the above reasoning appears to be at odds with the *ratio* in *Khadr*. It would seem that the "fundamental human rights exception" that this Honourable Court suggested in *Hape*, and affirmed in *Khadr*, requires further clarification before it will attract meaningful application by the Courts below.

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[46] Federal Court, Reasons for Order and Order, dated March 12, 2008, at para. 324 [AFLTA, Vol. II, Tab 5, p. 548]
[47] *Khadr, supra*, at paras. 18-19, 19 for quote.
[48] Federal Court of Appeal, Reasons for Judgment, at para. 20. [AFLTA, Vol. II, Tab 6, pp.562-563]

D. CONCLUSION

59. The Canadian Forces continue to transfer individuals into the hands of Afghan authorities, despite the evidence that former Canadian detainees have been subjected to torture. The enormous public attention and debate that this practice has generated shows that Canadians care deeply about the values on which this country is founded. Canadians want to know that their representatives respect human rights and the rule of law, even when they engage in war and act outside Canada's borders.

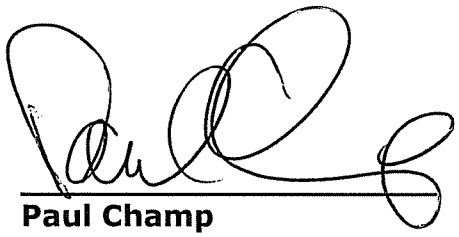
60. As the case at bar surely demonstrates, the protection of human rights is ill served by a legal vacuum. It presents a novel legal question of national importance, namely whether the actions of the Canadian military abroad must conform to the supreme law of Canada, the *Charter of Rights and Freedoms*. It is submitted that this application for leave to appeal should be allowed.

PARTS IV & V – ORDER REQUESTED

61. The Applicants request that the application for leave to appeal be allowed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: February 17, 2009



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PART VI

TABLE OF AUTHORITIES

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