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Military Police Complaints Commission
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21 February 2007

Dear Mr. Tinsley:

RE: Transfer of detainees to a substantial risk of torture by Military Police in Afghanistan

This letter sets out, as follows, a joint conduct complaint of Amnesty International Canada and the British Columbia Civil Liberties Association in accordance with s. 250.18 of the *National Defence Act*:

- 1) The Provost Marshall and unidentified members of the Military Police have transferred and/or allowed to be transferred detainees to the Afghan National Police (ANP) and National Directorate of Security (NDS), notwithstanding knowledge that the transfer system is lacking effective safeguards against torture, and notwithstanding abundant evidence from publicly available credible reports that the ANP and NDS routinely torture detainees.
- 2) The Provost Marshall and unidentified members of the Military Police have also omitted to regularly follow-up and inspect the conditions in which detainees are held after they are transferred to the ANP and NDS. The totality of these circumstances is such that the Provost Marshall and unidentified members of the Military Police have exhibited a willful blindness to the consequences of transferring detainees in their custody and for whom they are responsible.
- 3) In so doing, the Provost Marshall and unidentified members of the Military Police may have aided or abetted the torture of detainees by ANP and NDS. Aiding or abetting torture is an offence in both Canadian and international humanitarian law, and discredits the Military Police.

This complaint is based on public documents only. In presenting the factual basis of the complaint, we adopt the convention of providing footnoted references to sources of evidence.

GROUND FOR COMPLAINT:

We submit that the above facts may disclose the following wrongful acts or omissions by the Provost Marshall and unidentified members of the Military Police in respect of detainees in their custody, falling within the jurisdiction of the MPCC under the *Complaints about the Conduct of Members of the Military Police Regulations* and s. 250.18 of the *National Defence Act*:

1. Failure by the Provost Marshall and unidentified members of the Military Police to ensure detainees are transferred to the GoA under conditions and safeguards ensuring that no substantial risk of torture exists, where torture is an offence against the laws of Canada and international human rights and humanitarian law;
2. Failure by the Provost Marshall and unidentified members of the Military Police to make use of the alternatives permitted by the “Arrangement for the Transfer of Detainees Between the Canadian Forces and the Ministry of Defence of the Islamic Republic of Afghanistan” (“Detainee Agreement”), such as to hold detainees in ongoing Canadian custody, or to transfer detainees to an alternative detaining state (*i.e.* not the GoA) where there is no substantial risk of torture;
3. Failure by the Provost Marshall and unidentified members of the Military Police to take into account publicly available and credible reports that the ANP and NDS are routinely inflicting torture in detention;
4. Failure by the Provost Marshall and unidentified members of the Military Police to initiate the return of transferred detainees as stipulated by CF doctrine, in the event they may have been tortured by GoA; and
5. Such other wrongful acts or omissions by the Provost Marshall and unidentified members of the Military Police in this matter, which are unknown because they are undisclosed by DND at the current time.

FACTUAL BACKGROUND:

Since January 2002, the Canadian Forces in Afghanistan have arrested detainees and transferred them to other countries. Initially those transfers were made to the custody of US officials, and it is reported that some of those persons were sent by the US to Guantanamo Bay, where they may or may not remain.¹

¹ David Pugliese, “Canada’s JTF2 captives vanish at Guantanamo”, The Ottawa Citizen, 14 Feb 2005.

The Chief of Defence Staff (CDS) and his Afghan counterpart signed on 18 December 2005 an agreement establishing and setting conditions for persons temporarily detained by the Canadian Forces to be transferred to the custody of the GoA.²

Several transfers have occurred under this Detainee Agreement. Attached as a supplement to this letter is a collection “Detainee Transfer Records” obtained from DND under the *Access to Information Act*. According to these records in about a two month period (April-June 2006), Military Police transferred 18 persons to the ANP or NDS.³ Both the ANP and NDS are branches of the GoA.

This complaint concerns the past and continuing acts of the Military Police to transfer detainees to the GoA in the manner illustrated by the attached examples, which we allege is illegal in the face of a substantial risk of torture. We set out in the following subsections what is known about the GoA’s treatment of detainees, and a brief analysis of the Detainee Agreement.

(I) Treatment of Detainees by the Government of Afghanistan

Afghanistan does not currently have fully-formed and mature systems for policing and justice. The effect is that the prohibition on torture is frequently not observed, as documented in a number of highly credible reports on Afghanistan.

The Afghan Independent Human Rights Commission (AIHRC) is a branch of the GoA, entrenched in the Constitution of Afghanistan as a national human rights watchdog. It functions include monitoring the conditions of detainees. Canada acknowledges AIHRC’s expertise in this area, and, in paragraph 11 of the Detainee Agreement, the CF “recognize[s] the legitimate role of the Afghan Independent Human Rights Commission”.

The 2004-2005 annual report of AIHRC (released in 2006) warns that the ANP engages in illegal detention and “routine” torture. To quote AIHRC:

*Torture continues to take place as a routine part of ANP procedures and appears to be closely linked to illegal detention centers and illegal detention, particularly at the investigation stage in order to extort confessions from detainees. Torture was found to be especially prevalent in Paktia and Kandahar provinces, linked to the high numbers of illegal detainees...*⁴

² Arrangement for the Transfer of Detainees Between the Canadian Forces and the Ministry of Defence of the Islamic Republic of Afghanistan, signed 18 December 2005, available at http://www.dnd.ca/site/operations/archer/agreement_e.asp.

³ The records obtain from DND ATI file A-2006-00441/Team 3, and correspond to these page numbers therein: 11, 32, 49, 65, 83, 101, 119, 137, 157, 174, 189, 207, 250, 309, 321, 345, 376, 406. Note that in each of these records, the “Unit Transferring” box contains the acronym of some formation of the Military Police (e.g. GS MP P1) and the “Unit Accepting Custody” box contains either ANP or NDS.

⁴ Afghan Independent Human Rights Commission, Annual Report 2004-2005. See http://www.aihrc.org.af/anl_rept_2005.pdf (accessed 30 December 2006).

Kandahar is exactly where the Military Police transfer detainees to the ANP.

The United Nations Office of the High Commissioner for Human Rights has also reached similar conclusions about torture. In March 2006, the report of the UN High Commissioner noted “serious concerns” over reports of torture:

The NSD [same as the NDS], responsible for both civil and military intelligence, operates in relative secrecy without adequate judicial oversight and there have been reports of prolonged detention without trial, extortion, torture, and systematic due process violations... Complaints of serious human rights violations committed by representatives of these institutions, including arbitrary arrest, illegal detention and torture, are common. Thorough, transparent and public investigations are absent and trials regularly occur without adhering to the due process rights enshrined in the Constitution. Serious concerns remain over the capacity and commitment of these security institutions to comply with international standards.⁵

The NDS is the other branch of the GoA, apart from the ANP, to which the Military Police regularly transfer detainees. According to the UN High Commissioner, a variety of grave abuses practiced by the NDS, including torture, have been reported, and those reports “are common”.

We cannot be certain which techniques of torture the ANP and the NDS use. However, the US State Department, which in a March 2006 report concurred in observations that Afghan local authorities “routinely” torture detainees, cites these methods:

Afghanistan's human rights record remained poor... There continued to be instances in which security and factional forces committed extrajudicial killings and torture...

Torture and abuse consisted of pulling out fingernails and toenails, burning with hot oil, sexual humiliation and sodomy...⁶

The three reports excerpted above differ in their specifics, but all generally concur in this conclusion: the GoA security forces, particularly the ANP and NDS, torture detainees. All the reports are from highly credible sources: the United Nations, the US State Department, and even the GoA itself (as represented by the AIHRC). All the reports are found on public websites, such that due diligence would cause the Military Police to be aware of them.

Torture has also been consistently raised as a concern by AI and BCCLA in corresponding or meeting with the Minister of National Defence, the Minister of Foreign Affairs and the Judge

⁵ Report of the High Commissioner for Human Rights on the situation of human rights in Afghanistan and on the achievements of technical assistance in the field of human rights. UN Commission on Human Rights, 62nd session, document E/CN.4/2006/108 (3 March 2006). See www.ohchr.org/english/bodies/chr/docs/62chr/ecnr4-2006-108.doc (accessed 13 February 2007).

⁶ US Department of State. Country Reports on Human Rights Practices: Afghanistan. 8 March 2006. See <http://www.state.gov/g/drl/rls/hrrpt/2005/61704.htm> (accessed 13 February 2007).

Advocate General, going back as far as 2002. The concern has also been aired in *The Globe and Mail*, which published excerpts of the above cited reports.⁷

Further, it is possible that the Military Police themselves have firsthand knowledge of torture or related abuses by the GoA. In testimony before Parliament, Mr. Vincent Rigby (Acting Assistant Deputy Minister, Policy, DND) has stated that visits to Afghan detention centres by Canadian personnel have occurred, but that they are “informal ad hoc visits” that occur only “on an irregular basis”.⁸ The findings of those visits remain undisclosed.

For the foregoing reasons, we believe government and military officials, including the Military Police, had many opportunities to know that there is a substantial risk of torture when they transfer detainees to GoA custody, yet continued to do so well into 2006, and very likely continue to do so currently.

(II) Analysis of the Detainee Agreement

The Detainee Agreement is the enabling instrument for the Military Police to transfer detainees to the GoA. It is signed by the CDS personally, and mirrors a parallel set of orders (the *Task Force Afghanistan (TFA) Theatre Standing Order (TSO) 321A Detention of Afghan Nationals and Other Persons*) which concern the detention and transfer of persons to the GoA.⁹ We draw your attention to these features of the Detainee Agreement:

- Afghanistan is the preferred, but not the exclusive, recipient of detainees transferred by CF. Paragraph 1 of the Detainee Agreement reads that its provisions apply only “in the event of a transfer” to the GoA. There is no language that makes it mandatory for the CF to transfer detainees to the GoA. Accordingly, the Military Police could choose to transfer detainees to a recipient other than the GoA, or could choose not to transfer detainees at all.
- By virtue of paragraph 4, the Detainee Agreement confers on “the International Committee of the Red Cross [ICRC] ... a right to visit detainees at any time while they are in custody”. While welcome, ICRC inspections are inadequate as a safeguard of proper treatment for detainees transferred to the GoA by the CF, because ICRC reports of detainee inspections are confidential to the detaining power only. Hence, the ICRC would not normally notify Canada if a detainee transferred to GoA custody was mistreated.
- The Detainee Agreement does not provide Canadian officials with the right to oversee or inspect the treatment and conditions in which detainees are held after transfer to the

⁷ Paul Koring, “Canada to hand over suspects to Kabul”, *The Globe and Mail*, 24 March 2006.

⁸ Standing Committee on National Defence, hearing transcript of 11 December 2006.

⁹ A redacted copy of TSO 321A was obtained under ATI and is attached to this letter.

GoA. Although Canadian inspections could possibly go some way to filling the lacuna left by the ICRC process, the CF admit that visits to the detention centres are done only irregularly and on an ad hoc basis.

- Paragraph 7 of the Detainee Agreement specifically contemplates that a detainee received from CF may be “subsequently transferred” by the GoA to a “subsequent Accepting Power”. However, there is no right of Canadian officials to review and (in appropriate cases) veto the onward transfer of a detainee to a country where torture or other serious human rights concerns arise. Canada is not even required to be notified when the GoA transfers a detainee to a subsequent accepting power.

These provisions provide no effective safeguards against torture. On the contrary, they create a system in which the GoA may torture detainees, or transfer them to a third country where torture is practiced, without Canada becoming aware.

Other countries have detainee transfer systems with the GoA that address these weaknesses. Both the Dutch and British governments have signed agreements with the GoA that are similar in function to Canada’s Detainee Agreement.¹⁰ However in both those cases, the Dutch and British reserved the right of their own government officials and designated UN or NGO officials to inspect detainees in GoA custody. The British agreement also allows its government officials to veto subsequent transfer of detainees by GoA to third countries.

The CDS did not obtain for Canada the same safeguards as the Dutch and British governments. When the Minister of Defence was questioned in Parliament about the comparative inadequacy of Canada’s approach, he said there is “no need to make any change in the [existing] agreement”.¹¹

REMEDY SOUGHT:

The foregoing is submitted as a conduct complaint pursuant to s. 250.18(1) of the *National Defence Act*. AI and BCCLA note that it may be possible to consolidate our complaint with a complaint on detainee treatment currently before the MPCC under your file MPCC-2007-003 (Attaran). We note your comments in *The Globe and Mail* on 10 February that “the commission [in the Attaran matter] is not restrained from [progressing] from the facts of a case to systemic issues”. Since the three detainees at issue in the Attaran matter are among

¹⁰ The Dutch and British agreements are annexed to this letter, but may also be downloaded at http://www.minbuza.nl/nl/actueel/brievenparlement.2006/02/kamerbrief_afghanistan_overzicht_van_bijdragen_x_eu_inzet_volgens_razeb_en_verslag_van_de_londen_conferentie_bijlage_3.html and <http://www.publications.parliament.uk/pa/cm200607/cmselect/cmfaff/44/4412.htm>, respectively. (Accessed 12 February 2007).

¹¹ See House of Commons Debates (Hansard), dated 5 April 2006.

the detainees at issue in the present complaint, AI and BCCLA do not object to you seeking the consent of the parties to consolidate and join this complaint to the Attaran matter, if that your preference.

We also request that you exercise your discretion pursuant to s. 250.38(1) of the *National Defence Act* to initiate an investigation to reserve the possibility of a hearing on this matter in the public interest. On this issue, we adopt, *mutatis mutandis*, the submissions of the applicant in the Attaran matter.

We believe that the indicia cited in your decision of 9 February to grant a public investigation in the Attaran matter are satisfied even more completely by the present complaint.

First, you cited “the inherent seriousness of the allegations”. In the Attaran matter, the allegations concerned three men who as a working hypothesis may have been beaten. In the present matter, we have provided evidence that at least 18 detainees have been transferred to known torturers.

Second, you cited “the considerable interest and attention already demonstrated in the media and by others in the community, [which] raise the issue of public confidence”. We ask that you exercise your discretion to take notice of the fact that many of the media reports in the Attaran matter also discussed the systematic issue of detainees being transferred to Afghanistan, where they face a substantial risk of torture. The above-mentioned article in *The Globe and Mail* on 10 February, in which you are quoted, is one such example.

Public confidence in the CF is prone to be affected where the Minister and DND affect complacency with circumstances that are apt to lead to torture. Public confidence in the CF would be very much more severely affected if it was found that a person transferred by the Military Police to GoA were tortured. We believe this is possible; indeed it becomes more likely with time, as the number of transferred detainees and the duration of detentions increases. The public interest is better served by a timely s. 250.38(1) investigation, which is far preferable to the alternative, time-consuming procedure of referring the matter to the Provost Marshal initially. Further, the Provost Marshal would have had at least tacitly approved of the transfers that the Military police made to the GoA under CDS instructions, such that it would be illogical and a conflict of interest to request the Provost Marshall to investigate.

ABOUT THE COMPLAINANTS:

Both the complainants are legal persons, having reference to s. 250.18 of the *National Defence Act* which allows complaints to be filed by “persons”.

Amnesty International’s Canadian Section (English branch) is a non-profit organization incorporated on 2 April 1981, pursuant to the *Canada Corporations Act* (it is this part of Amnesty International that is referred to herein as “AI”). AI has a long history of

documenting serious human rights violations associated with governments' national security laws, policies and practices. AI has actively reported and campaigned about a range of other domestic national security concerns as well including immigration security certificates, laws allowing deportations of individuals at risk of torture, provisions in Canada's *Anti-Terrorism Act*, and concerns about the possible use of Canadian airspace and airstrips by planes that may have been used in acts of extraordinary rendition. AI has consistently raised with the government its concerns about Canada's approach to the handling of detainees captured by Canadian Forces in the course of military operations in Afghanistan, in correspondence with the government since 2002 and before the House of Commons Standing Committee on National Defence in December 2006.

The British Columbia Civil Liberties Association (BCCLA) is a society duly incorporated on 27 February 1963, pursuant to the British Columbia *Society Act*. The object of the BCCLA is to promote, defend, sustain and extend civil liberties and human rights. The Association's mandate includes advocacy to ensure that the Canadian government's laws, policies and practices guarantee the lawful and humane treatment of prisoners in Canadian custody and, where there are transfers of prisoners, in the custody of recipient countries. The BCCLA has a long history of addressing the protection of civil liberties in the context of national security, including intervening before the Arar Commission, as well as drafting and advocating for the adoption of the *Prevention of Torture Act*. The BCCLA has previously voiced its concerns about the transfer of detainees to a substantial risk of torture in Afghanistan in correspondence with the government in 2006 urging a renegotiation of the detainee transfer agreement between Canada and Afghanistan.

Please direct any inquiries or follow-up to our lawyer on this matter, Paul Champ, at (613) 567-2441.

All of which is respectfully submitted.

Sincerely,



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cc: The Hon Gordon O'Connor, Minister of National Defence
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