

Paul Champ

Direct Dial: (613) 567-2441
E-mail: pchamp@ravenlaw.com

Our File No.: 2257-7147

June 12, 2008

BY COURIER

Peter A. Tinsley
Chairperson
Military Police Complaints Commission
270 Albert Street, 10th Floor
Ottawa, ON K1P 5G8

Military Police
Complaints Commission
File No. 2007-006
2008-024/042
P-2.
May 25, 09
Ottawa
R. Champ

Dear Mr. Tinsley:

**Re: Update of Detainee Complaint MPCC-2007-006 and
Commencement of New Complaint**

I act for the Applicants, Amnesty International Canada and the British Columbia Civil Liberties Association, in the above-captioned matter. This letter sets out two requests by the Applicants, which briefly are:

1. To update their complaint now pending before the MPCC (your file MPCC-2007-006); and
2. To commence a new, discrete complaint in accordance with s. 250.18 of the *National Defence Act*, R.S.C. 1985, c. N-5, respecting the failure of the Military Police (particularly those assigned to the National Investigation Service) to investigate the officers having command responsibility for directing the transfer of detainees to the Afghan authorities, in the face of a known risk of torture.

These requests are dealt with in turn.

Enlargement and Updating of File MPCC-2007-006

By letter of February 26, 2007, the MPCC accepted jurisdiction over the Applicants' complaint in this matter. At the time, the Applicants' knowledge of individual detainee transfers was highly

limited by the secrecy of the Department of National Defence (DND), and the Applicants were unable to specify more than 18 occasions in which the Military Police transferred detainees to the Afghan authorities. All of these transfers occurred around April-June 2006.

Since the filing of the complaint, new evidence has come to light that the Military Police continued detainee transfers well beyond these dates. Based on this new evidence, the Applicants now request to update and enlarge their complaint to embrace all transfers of detainees to the Afghan National Police or the National Directorate of Security ("ANP" or "NDS", or simply the "Afghan authorities"), from April 2006 to the present. A brief rationale for this updating and enlargement follows.

The judgments of the Federal Court in proceedings brought by the Applicants, and reported at 2008 FC 162 and 2008 FC 336 (hereinafter "*Afghan Detainees I*" and "*Afghan Detainees II*", respectively¹), confirm new evidence that detainee transfer operations continued in 2007 and 2008. For example, the Court notes in *Afghan Detainees I* that on or about June 26, 2007, 12 persons were transferred to the NDS.² The Court also notes in *Afghan Detainees II* that transfer operations were ongoing as of February 26, 2008.³

Further, the Federal Court judgments also furnish new evidence that among the more recently transferred detainees, some were likely subject to ill treatment and torture. As the Court writes in *Afghan Detainees I*,

Eight complaints of prisoner abuse were received by Canadian personnel conducting site visits in Afghan detention facilities between May 3, 2007 and November 5, 2007. These complaints included allegations that detainees were kicked, beaten with electrical cables,

¹ These judgments relate to Federal Court file number T-324-08. The proper case citation for both is: *Amnesty International Canada and B.C. Civil Liberties Association v. Chief of the Defence Staff for the Canadian Forces, Minister of National Defence and Attorney General of Canada*. The first judgment, *Afghan Detainees I*, or 2008 FC 162, was a motion for an interlocutory injunction halting transfers. *Afghan Detainees II*, or 2008 FC 336, was a question of law on whether the *Canadian Charter of Rights and Freedoms* applies to CF transfer activities in Afghanistan. There is an earlier judgment concerning the same matter, 2007 FC 1147, in which the Court granted the Applicants public interest standing to challenge the Canadian Forces' policy of transferring detainees to Afghan authorities as being contrary to the *Charter*. The Court's judgment in *Afghan Detainees II* is currently before the Federal Court of Appeal under Court file number A-149-08.

² *Afghan Detainees I*, para. 81.

³ *Afghan Detainees II*, para. 81.

given electric shocks, cut, burned, shackled, and made to stand for days at a time with their arms raised over their heads.⁴

The Court also writes of a visit by Canadian officials to an Afghan prison on November 5, 2007. In the course of an interview, a detainee told Canadian officials that "he had been held to the ground and beaten with electrical wires and a rubber hose."⁵ The Court also found that, upon further investigation, the Canadian officials observed physical marks confirming the beating and "then located a large piece of braided electrical wire and a rubber hose" in exactly the location where the detainee alleged these torture implements would be found.⁶

Thus the new evidence suffices to establish: (i) that detainee operations continued after the instances in 2006 which were the subject matter of the original complaint; and (ii) that the risk of torture faced by detainees upon transfer was regrettably confirmed by first-hand accounts and physical evidence. The Applicants accordingly request the Chair to update and expand the scope of their original complaint, to cover detainee transfers up to the present date. Should it be argued that such a request is time-barred, the Applicants ask the Chairman to exercise his discretion under s. 250.2 of the *National Defence Act* to extend the time, having regard to the fact that all the evidence cited herein only became available to the Applicants less than six months ago. More importantly, these issues are serious matters of legitimate public concern, and that the public interest would be served by an expanded inquiry.

The New Complaint – Failure to Investigate

Amnesty International Canada and the B.C. Civil Liberties Association hereby file a new, discrete conduct complaint pursuant to section 250.18 of the *National Defence Act*, concerning the failure of certain members of the Military Police to investigate crimes or potential crimes committed by senior officers in command of Task Force Afghanistan, from May 3, 2007, to the present.

Specifically, members of the National Investigation Service (NIS) in Kandahar and the Task Force Provost Marshall (TFPM) have been aware that former Canadian Forces (CF) detainees were likely tortured by Afghan authorities, yet they failed to investigate whether any members of the CF should be charged for their role in facilitating these crimes. In particular, senior officers

⁴ *Afghan Detainees I*, para. 85. The Court record indicates that at least eight complaints of abuse were received during that period, and possibly more. The original "torture reports" by officials from the Department of Foreign Affairs can also be found on the BCCLA's website: www.bccla.org.

⁵ *Afghan Detainees I*, para. 96.

⁶ *Afghan Detainees I*, paras. 97-98. Detainee transfers were temporary halted owing to this discovery, but as noted above, transfers were resumed again as of February 26, 2008.

occupying the position of Commander of Task Force Afghanistan ordered the transfer of detainees to the custody of the Afghan secret police during the relevant period, despite compelling first-hand reports that previous CF detainees were tortured by those authorities.

In our submission, when officers in the chain of command order a detainee to be transferred to the custody of Afghan authorities, in full knowledge that the Afghan authorities are predisposed to torture these persons, a number of possible criminal offences warrant investigation. Sections 269.1, 265, and 219 of the *Criminal Code* define the offences of torture, assault, and criminal negligence, respectively. Further, ss. 21-23 of the *Criminal Code* broaden all these offences, so that criminal culpability is not limited to the perpetrator, but also extends to those who aid or abet (s. 21), who counsel (s. 22), or who are accessories after the fact (s. 23) to the commission of the offences. By virtue of s. 130(1) of the *National Defence Act*, it is immaterial if these offences are committed outside Canada, and criminal culpability exists for acts committed by members of the Canadian Forces in Afghanistan. CF officers may also be criminally liable under ss. 6 and 8 of the *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24, which expressly apply to Canadian soldiers acting abroad. Further, a number of service offences in the *National Defence Act*, such as cruel or disgraceful conduct (s. 93), negligent performance of a military duty (s. 124), or conduct to the prejudice of good order and discipline (s. 129) might in some cases overlap with the *Criminal Code* offences.

In addition to the above, the CF are participating in an armed conflict in Afghanistan, and as such are governed by the 1949 Geneva Conventions.⁷ Parliament has chosen to incorporate these international treaties into domestic law by passing the *Geneva Conventions Act*. R.S.C. 1985, c. G-3. Section 3 of that Act makes it a crime to commit a "grave breach" of the Geneva Conventions. The Applicants submit that the CF role in handing over detainees to another state party, where those individuals are subsequently tortured, may violate the prohibition against inhumane treatment under Common Article 3. Such violations would constitute grave breaches under Article 147 of Schedule IV of the *Geneva Conventions Act*, and thus warranted a Military Police investigation of the responsible officers.

Following May 3, 2007, when Canada signed a new detainee agreement with Afghanistan that permitted Canadian officials to visit and inspect detainees in Afghan custody, a large number of highly credible allegations of torture became known to the chain of command of the Canadian Forces. The Federal Court found in *Afghan Detainees I* that "complaints of prisoner abuse were received by Canadian personnel conducting site visits in Afghan detention facilities between May 3, 2007 and November 5, 2007".⁸ The Court also found that "the methods of torture described by detainees are consistent with the type of torture practices that are employed in Afghan

⁷ In particular, it is evident that Common Article 3 applies to the Afghan conflict, as well as the Fourth Geneva Convention, the *Geneva Convention Relative to the Protection of Civilians in Time of War*, 75 U.N.T.S. 287, Can. T.S. 1965 No. 20, art. 3.

⁸ *Afghan Detainees I*, para. 85.

prisons, as recorded in independent country condition reports, including those emanating from DFAIT.⁹ As such, the allegations of torture were unlikely to be fabricated, and should have been taken with the utmost seriousness by officers in the chain of command.

On or about November 6, 2007, the acting Commander of Task Force Afghanistan did issue a temporary moratorium on detainee transfers. This followed a report by Canadian officials who interviewed a detainee held by the Afghan secret police (the National Directorate of Security or NDS) on November 5, 2007. This disturbing report relates in part:

[The detainee] indicated that he could not recall the [***] interrogation in any details as he was allegedly knocked unconscious early on. He alleged that during the [***] interrogation, [*] individuals held him to the ground while the other [***] beating him with electrical wires and rubber hose. He indicated a spot on the ground in the room we were interviewing in as the place where he was held down. He then pointed to a chair and stated the implements he had been struck with were underneath it. Under the chair, we found a large piece of braided electrical wire as well as a rubber hose. He then showed us a bruise (approx. 4 inches long) on his back that could possibly be the result of a blow.¹⁰

While the Applicants were obviously relieved to learn that the Canadian Forces ceased transfers following this report, there is no reasonable explanation why the Commander did not halt transfers much sooner when earlier direct reports of torture were disclosed to Canadian officials. In short, officers in the chain of command ignored much evidence of a substantial risk of torture, and ceased detainee transfers only when confronted with evidence of the *implements* of torture. The use of such a high threshold is not lawful, and at the very least shows wanton or reckless disregard for the lives or safety of other persons.¹¹

⁹ *Afghan Detainees I*, para. 86.

¹⁰ This document forms part of the Court Record in Court File T-324-07. It can also be found in the Appeal Book filed with the Federal Court of Appeal in Court File A149-08. It is also easily accessible on the BCCLA website:
www.bccla.org/antiterrorissue/DFAIT%20Torture%20Reports.pdf All references in brackets with an asterisk – [*] – reflect information withheld by the Attorney General of Canada under the *Canada Evidence Act*.

¹¹ It should be noted that under ss. 217.1 and 219 of the *Criminal Code*, an officer in the chain of command who showed wanton or reckless disregard for the lives or safety of other persons while omitting to respect the following duty would have committed the offence of criminal negligence: "Every one who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task."

Had the responsible CF officers heeded the widely available public reports on torture in Afghan custody, would any of these individuals been transferred and tortured? The answer, in our submission, is no. Even if one argues that these public reports alone did not meet the standard of substantial risk of torture, the CF later received highly credible, direct, first-hand reports from Canadian officials that indicated former CF detainees were likely being tortured. The responsible CF officers nevertheless continued to order the transfer of detainees, despite the overwhelming evidence those individuals faced a serious risk of torture in Afghan custody.

The Applicants believe this conduct merited investigation by the NIS for the range of offences cited above. Certainly the NIS officers in Kandahar and the Task Force Provost Marshall (all of whom are Military Police) should have investigated the officers in the chain of command who failed to intervene at an earlier stage to halt detainee transfers. It is thought that the Commander of Task Force Afghanistan, who decides on a case by case basis to approve detainee transfers, and the Task Force Provost Marshall, who arranges individual detainee transfers, play especially pivotal roles in the chain of command, although other officers above or below them could as well.¹² Yet there seems to be no evidence that the NIS or the TFPM investigated any officer. The fact that the TFPM was likely involved in these suspect transfer decisions may have been a factor in the reluctance of other Military Police to investigate the matter, particularly given that the NIS officers in Kandahar report to the TFPM as part of the policing chain of command.

Based on all the foregoing, the Applicants request the Chair to initiate this new complaint in respect of the NIS's failure to conduct investigations regarding the acts and potential offences described herein, for the timeframe of May 3, 2007 to the present.

The Applicants further request that this complaint be referred directly to a public hearing pursuant to s. 250.38 of the *National Defence Act*, in view of the serious nature of the allegations, the significant public interest in the subject matter, and the fact that the Commission has already encountered difficulties obtaining information on related issues in complaint file number MPCC-2007-006. To the extent it is expedient to do so, the Applicants also request that the two complaints be heard together given the overlap in factual and legal issues.

To conclude, the public importance and urgency of this matter cannot be over-emphasized. The Federal Court ruled in *Afghan Detainees II* that individuals held by the Canadian Forces in Afghanistan are not protected by the *Canadian Charter of Rights and Freedoms*. However, the Court stated that Canadian law did offer indirect protection to detainees because CF members could be prosecuted for their actions.¹³ This limited protection may be illusory if there is no

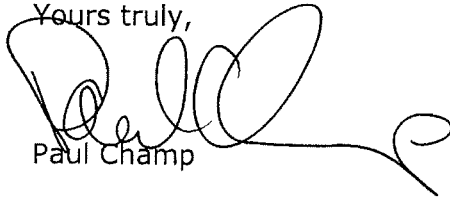
¹² See the Affidavit of Major Jeffrey Allan Harvey, dated May 16, 2008, in Federal Court file T-581-08.

¹³ *Afghan Detainees II*, supra, para. 344. The Court also ominously warns at para. 345 that Canadian soldiers could be prosecuted by the International Criminal Court.

realistic chance that CF members will be investigated for their knowledge of or role in the torture of detainees by Afghan authorities. In the present case, there is clear evidence that, for at least eight individuals, the chain of custody which started with the Canadian Forces ended in torture. This is surely a matter that warranted investigation by the Military Police. For the same reasons, the failure of the NIS and TFPM to investigate is a matter that demands scrutiny by the MPCC

All of which is respectfully submitted.

Yours truly,

A handwritten signature in black ink, appearing to read 'Paul Champ', with a stylized flourish extending to the right.

c: General Rick J. Hillier, Chief of Defence Staff for the Canadian Forces
Alex Neve, Secretary General, Amnesty International Canada
Rob Holmes, President, B.C. Civil Liberties Association