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Legal Opinion on the December 18, 2005 "Arrangement for the Transfer of Detainees between the Canadian Forces and the Ministry of Defence of the Islamic Republic of Afghanistan"

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The Canada-Afghanistan "Arrangement"

On December 18, 2005, Chief of Defence Staff General Rick Hillier signed an "Arrangement for the Transfer of Detainees between the Canadian Forces and the Ministry of Defence of the Islamic Republic of Afghanistan." See: < http://www.forces.gc.ca/site/operations/archer/agreement_e.asp >.

The Arrangement "establishes procedures in the event of a transfer" of any detainee from Canadian to Afghan custody.

It commits Canada and Afghanistan to treat detainees "in accordance with the standards set out in the Third Geneva Convention" and stipulates that the International Committee of the Red Cross "will have a right to visit detainees at any time while they are in custody, whether held by the Canadian Forces or by Afghanistan."

The Arrangement states that Canada and Afghanistan "will be responsible for maintaining accurate written records accounting for all detainees that have passed through their custody" and that "[c]opies of all records relating to the detainees will be transferred to any subsequent Accepting Power should the detainee be subsequently transferred." This last sentence thus explicitly envisages that some detainees will be transferred onwards to the custody of third countries.

Most importantly, the Arrangement does nothing to guard against the possibility that Afghanistan might transfer a detainee received from Canada onwards to the custody of a third country where he or she would be at risk of being tortured or otherwise abused.

This is a serious problem because the Arrangement was established, at least in part, because of concerns that Canada could not legally transfer detainees to the United States—given numerous reports of torture and other abuse of detainees in U.S. custody in recent years.

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The Netherlands-Afghanistan "Memorandum of Understanding"

According to former-Defence Minister Bill Graham, the Canadian-Afghanistan Arrangement was modelled on a "Memorandum of Understanding" concluded earlier between The Netherlands and Afghanistan. Yet the Dutch memorandum provides much more rigorous protections.

For example, the Dutch memorandum sets the standard of treatment at the "relevant provisions of international law", which would include the four 1949 Geneva Conventions, the 1984 Torture Convention, the 1998 Rome Statute of the International Criminal Court, and international human rights and rules of international humanitarian law which have acquired the status of customary international law. The Canadian arrangement confines itself to the Third Geneva Convention.

The Dutch memorandum provides representatives of the Dutch government with a right to full access to any detainee transferred from Dutch custody. The Canadian arrangement fails to provide this. It relies solely on the International Committee of the Red Cross, an organization which normally does not inform other countries when any particular country denies it access to detainees.

The Dutch memorandum also provides for a right to full access, not only on the part of the Dutch government and the International Committee of the Red Cross, but also on the part of "relevant human rights institutions within the UN system"—a category which would include the UN Special Rapporteur on Torture. The Canadian arrangement fails to provide this.

Finally, the Dutch memorandum requires that The Netherlands be notified before a detainee is transferred onwards to a third country, or before any other relevant changes occur. The Canadian arrangement fails to require, in similar circumstances, that Canada be notified.

International law issues concerning the Canadian-Afghanistan Arrangement

THE ARRANGMENT IS AN INTERNATIONAL TREATY

The Department of National Defence has stated that the Canada-Afghanistan Arrangement is not a legally binding treaty. However, according to Article 2 of the 1969 Vienna Convention on the Law of Treaties, a "treaty" is "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation."

Consequently, the Canada-Afghanistan Arrangement (as well as The Netherlands-Afghanistan Memorandum of Understanding) is an international treaty that creates binding obligations under international law—as indeed it should, if it is to provide meaningful protections.

THE ARRANGEMENT DOES NOT PROVIDE ADEQUATE PROTECTIONS AGAINST VIOLATIONS OF THE 1949 GENEVA CONVENTIONS

Common Article 3, which is found in all four of the 1949 Geneva Conventions, applies to non-international (i.e. internal) conflicts of precisely the kind that now exists in Afghanistan.

Common Article 3 protects "persons taking no active part in the hostilities, including members of armed forces who have laid down their arms," and therefore any detainees captured by Canada. It specifies that, with respect to such persons, a number of acts "are and shall remain absolutely prohibited at any time and in any place whatsoever." Among the prohibited acts are "cruel treatment and torture" and "outrages upon personal dignity, in particular, humiliating and degrading treatment."

The absolute, territorially-unlimited and time-unlimited character of Common Article 3 imposes obligations on Canada that would be violated if a detainee transferred to Afghanistan was tortured or otherwise mistreated in the custody of either Afghanistan or a third country.

This conclusion is buttressed by Article 16 of 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.

Canada, by transferring detainees to Afghanistan in circumstances where they might well end up being transferred onwards to face torture or other mistreatment at the hands of a third country, risks violating Common Article 3 of the Geneva Conventions. The Arrangement, by failing to guard against this possibility, is seriously inadequate.

THE ARRANGEMENT DOES NOT PROVIDE ADEQUATE PROTECTIONS AGAINST VIOLATIONS OF THE 1984 TORTURE CONVENTION

Article 3 of the UN Torture Convention specifies that "no state party shall expel, return or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture."

The UN Committee on Torture has indicated that the term "another state" in Article 3 encompasses any additional country to which a prisoner might subsequently be transferred. For this reason, Canada's obligation extends to ensuring that any detainee is protected against torture, not just when transferred to the custody of Afghanistan, but also if transferred onwards into the custody of a third country.

The Arrangement, by failing to guard against this possibility, does not adequately guard against violations of Canada's legal obligations.

THE ARRANGEMENT DOES NOT PROVIDE ADEQUATE PROTECTIONS AGAINST VIOLATIONS OF THE 1998 ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

The Arrangement fails to guard against possible violations of the 1998 Rome Statute of the International Criminal Court and, therefore, Canadian soldiers transferring detainees to Afghan custody could—one day—face trial in The Hague for war crimes.

Article 8 of the Rome Statute identifies those acts which, under international law, constitute "war crimes". In particular, Article 8(c) identifies:

> In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause:
>
> (i) Violation to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
>
> (ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;

Article 25 of the Rome Statute identifies the circumstances in which "a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court". In particular, Article 25(c) specifies that these circumstances include when that person:

> (c) For the purposes of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including by providing the means for its commission.

Canada ratified the Rome Statute on July 7, 2000. Consequently, any torture, cruel treatment, or other outrages upon personal dignity that are aided, abetted or otherwise assisted by Canadian soldiers in Afghanistan are subject to the jurisdiction of the International Criminal Court.

The Arrangement, by allowing the onward transfer of detainees into the custody of a third country where they might be tortured or otherwise abused, fails to prevent the possibility that Canadian soldiers might transfer detainees to Afghanistan knowing or suspecting that this would in fact happen. It thus fails to protect against possible violations of the Rome Statute, and thus the possibility that Canadian soldiers—including commanders who order transfers—might one day face charges of war crimes in The Hague.

The fact that such a possibility has been allowed to persist—because of a failure to include sufficient protections in the Canada-Afghanistan Arrangement—is intolerable, especially since Canada is the country most prominently associated with the creation of the International Criminal Court.

CONCLUSIONS

The Canada-Afghanistan Arrangement, by failing to safeguard Canada's obligations under the 1949 Geneva Conventions, the 1984 UN Torture Convention and the 1998 Rome Statute of the International Criminal Court, is an inadequate basis for the transfer of detainees to the custody of Afghanistan.

In these circumstances, Canada should, at a minimum, renegotiate the Arrangement to include all the protections found in The Netherlands-Afghanistan Memorandum. A better approach would be for Canada to build its own detention facility in Afghanistan, perhaps in conjunction with The Netherlands or some other country which wishes to maintain its soldiers in Afghanistan while adhering to the requirements of international law.

My qualifications

I write in my individual capacity as an expert in international law and a concerned Canadian citizen. I am a tenured full professor and Tier 1 Canada Research Chair at the University of British Columbia. Until 2004, I was a tenured full professor at Duke University School of Law. From 1996-1999, I was a Fellow of Jesus College, Oxford University. I have written about the international law governing military force in a number of peer-reviewed international journals, as well as a book entitled *War Law: Understanding International Law and Armed Conflict*, initially published in Britain (Atlantic Books, March 2005) and since published in Canada, Germany and the United States.