

**BRIEF ON THE INVESTIGATION OF CANADIAN NATIONALS
FOR WAR CRIMES AND CRIMES AGAINST HUMANITY
IN AFGHANISTAN**

Submitted to

The Prosecutor of the International Criminal Court

by

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INTRODUCTION AND OVERVIEW

1. *General Remarks*

I write in my capacity as a professor of law in Canada and as a former Member of Parliament. In each context, I have paid close attention to the possibility that war crimes were committed by Canadians in Afghanistan and on Canadian territory in relation to the Afghanistan situation.

This brief has been prepared in the context of both the November 3, 2017, statement by International Criminal Court (ICC) Prosecutor Bensouda [online [here](#)] in which Prosecutor Bensouda announced that she will seek authorization from an ICC Pre-Trial Chambers under Article 15(3) of the Rome Statute to pursue a full investigation of the war crimes and crimes against humanity situation in Afghanistan since the date Afghanistan became party to the Statute of the ICC on May 1, 2003, and, with further respect to the nationals of other states party to the Statute, since the day of entry into force for that state if earlier than May 1, 2003 (in the case of Canada, July 1, 2002). It has been updated in the context of the subsequent application (numbered ICC-02/17) for authorization to investigate that the Prosecutor filed with Pre-Trial Chambers III on November 20, 2017 [online [here](#)].

The purpose of the brief is to provide some (but by no means comprehensive and exhaustive) reasons the Prosecutor of the International Criminal Court (ICC) should include Canada/Canadians within the scope of the “situation in Afghanistan” – including reasons why ICC should not indulge Canada if Canada now tries to fend off an ICC investigation by saying Canada will conduct an investigation.

On the evidentiary side, this brief addresses, broadly speaking, three general aspects of Canada’s policies and practices of transferring captives to other states despite the propensity of the receiving states to commit war crimes and/or crimes against humanity of cruel treatment, torture, and disappearances presumptively leading to extrajudicial execution:

- Canadian Special Forces transfers tied into United States strategy and operations
- Transfers of persons not always designated as “detainees”, in regular Canadian Forces’ forward-operations contexts or battlefield contexts
- Official “detainee” transfers by Canadian Forces with notice to the ICRC

These aspects will be elaborated in more detail (albeit still in general outline only) in the second sub-section of Part 1 (Evidence and Evidentiary Pathways) of this brief. That

sub-section, as well as other sub-sections of Part 1, will be the subject of one or more separate confidential communications to the Prosecutor subsequent to this brief.

As a general matter, with respect to all discussions of evidence, this brief does not assert all fact situations as undisputed truth but rather as fact situations that I have a reasonable suspicion – backed up by considerable evidence – could turn out to be provable as a forensic matter upon a thorough professional investigation by the ICC Office of the Prosecutor (OTP). Should an investigation produce such results, there would be obvious attendant consequences for the over-all concern expressed in this brief that some Canadian officials, both civilian and military, may have committed crimes as set out in the Rome Statute of the International Criminal Court.

I emphasize that any factual errors are unintentional, but remain my responsibility.

2. The 2007 and 2009 Byers-Schabas letters

Public awareness of the potential for criminality in Canadians' conduct in relation to the Afghanistan situation essentially began with a letter by Professors Michael Byers and William Schabas to then-ICC Prosecutor Luis Moreno Ocampo on April 25, 2007 [[online here](#)], followed by a second letter from them on December 3, 2009 [[online here](#)].

I note that both are respected scholars whose expertise includes the intersection of international criminal law and international humanitarian law that constitutes part of the ICC Statute's war crimes subject-matter jurisdiction; note for example Professor Schabas' *The International Criminal Court: A Commentary on the Rome Statute* (2016) and Professor Byers' *War Law: Understanding International Law and Armed Conflict* (2007).

The Byers-Schabas letters are in substance briefs that make the case, in the first letter of 13 pages, as to why the International Criminal Court Office of the Prosecutor (ICC OTP) should conduct a preliminary examination into the situation in Afghanistan under Article 15 of the Rome Statute and, in the second letter of 16 pages, as to why the preliminary examination being conducted by the ICC OTP preliminary examination (which Prosecutor Ocampo revealed in 2009 was underway) should be expanded to go beyond the individuals named in the first letter – namely, expansion from the Minister of Defence and the Chief of Defence Staff to include senior military officers and civil servants such as those named in important testimony by Canadian diplomat Richard Colvin before the House of Commons Special Committee on the Mission in Afghanistan on November 18, 2009.

The combined Byers-Schabas letters address evidentiary, complementarity and gravity / interests of justice issues, as they stood as of December 3, 2009, and the following sections will reference some of their points on complementarity and gravity / interests of justice. I will not repeat evidentiary developments that Byers-Schabas letters reference, but am linking to both the November 2009 testimony of diplomat Richard Colvin before the House of Commons Special Committee on the Canadian Mission in Afghanistan narrated in the second Byers-Schabas letter [online [here](#)] and a supplement to his testimony sent by Colvin to the Special Committee on December 18, 2007, [online [here](#)] in response to testimony of *inter alia* Generals Hillier, Gauthier, and Fraser that followed his own; the second Byers-Schabas letter to the ICC OTP, being sent on December 3, did not reference this additional Colvin evidence. I also link to the generals' testimony in order for the Colvin letter to be better understood [online: Fraser [here](#); Hillier [here](#); Gauthier [here](#)]. Finally, I note testimony from Mr. Colvin in 2010 to another process – a public interest hearing conducted by the Military Police Complaints Commission (MPCC) – so as full a public record of Mr. Colvin's concerns and evidence to date can be incorporated by reference into this brief. Such incorporation by reference is intended to signal our view that it is the knowledge and insights of Mr. Colvin into whole-of-government dynamics around the Afghan detainee-transfer issue in the 2005-2007 period that remain the starting point for any fulsome investigation such as I hope the ICC OTP will undertake as soon as possible.

Each Byers-Schabas letter also addresses the substantive law framework under the Rome Statute – both the applicable crimes and the relevant principles of individual responsibility. This brief proceeds on the premise that the following understanding about the substantive law, digested below from the December 3, 2009, letter is substantially shared by the OTP. I reproduce these passages here less for the ease of reference of the OTP than for the information of a wider readership, from the press to the general public to Canadian parliamentarians, for whom these legal principles will be less familiar:

4. Temporal and personal jurisdiction and the absence of immunity

(a) Temporal jurisdiction

As Article 11 of the Rome Statute indicates, the Court has jurisdiction over crimes committed after the entry into force of the Statute. Since the Statute entered into force on July 1, 2002, and our concerns arise out of activities occurring after that date, temporal jurisdiction exists in this instance.

(b) Personal jurisdiction

As Article 12(b) of the Rome Statute indicates, the Court has personal jurisdiction over the national of any State that has ratified the Statute. This jurisdiction exists regardless of the location of the alleged violation.

Canada ratified the Rome Statute on July 7, 2000. In addition, the individuals who took the decisions at issue here are Canadian citizens. As a result, personal jurisdiction exists in this instance.

There is also a basis for territorial jurisdiction, since Afghanistan acceded to the Rome Statute on February 10, 2003.

(c) The absence of immunity

As Article 27 of the Rome Statute indicates, elected representatives and government officials do *not* benefit from immunity from investigation and prosecution by the International Criminal Court—regardless of any immunities or special procedural rules which might otherwise attach to their official capacity under national or international law.

5. Subject matter jurisdiction

(a) Torture, cruel treatment and outrages upon personal dignity in non-international armed conflicts

The situation in Afghanistan today is properly characterized as “an armed conflict not of an international character”, since Canadian and other NATO forces are operating against non-state actors with the consent of a sovereign Afghan government. This characterization is accepted by the Canadian government.

Article 8(2)(c) of the Rome Statute concerns war crimes committed in the context of “an armed conflict not of an international character.” And it accords the status of “war crimes” to certain specified 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 causes.”

Detainees in Canadian custody constitute “persons taking no active part in hostilities” — as the specific inclusion of the word “detention” confirms.

The acts constituting “war crimes” under Article 8(2)(c) include:

- (i) Violence 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.

Given the information summarized above, there are reasonable bases to believe that war crimes have been committed against detainees in Afghan custody as well as in the custody of third countries.

It is also possible that torture and other forms of abuse conducted by Afghanistan and third countries may be part of a widespread or systematic attack on a civilian population, in which case they would amount to crimes against humanity as well—under Article 7 of the Rome Statute.

But it is the transfer of detainees from Canadian custody that concerns us here and, in particular, the choice not to seek expeditiously to re-negotiate the Canada-Afghanistan Detainee Transfer Arrangement to include reasonable and readily available measures that would help to prevent such crimes from occurring, and later, the choice—in the face of serious and credible accusations of torture—not to cease immediately the practice of transferring detainees on a permanent basis.

(b) Aiding and abetting crimes committed by the officials of another country

Article 25(3) of the Rome Statute indicates that individual persons, including Canadian soldiers, could be criminally responsible if they transferred a detainee into a situation where they knew he or she would be at risk of torture, cruel treatment or outrages upon personal dignity, and such violence or outrages occurred. Article 25(3) reads:

3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if 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 providing the means for its commission;

(d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose

involves the commission or a crime within the jurisdiction of the Court; or
(ii) Be made in the knowledge of the intention of the group to commit the crime.

Transferring a detainee contributes to—indeed, it provides the means for—the commission of torture, cruel treatment or outrages upon his or her personal dignity. And, in the circumstances, the intent to contribute to the crime could well be implied. There was, in 2006 and 2007, a growing body of information concerning torture and other abuses in Afghan custody (*including against detainees transferred by Canada*), as well as in the custody of other countries to which detainees from Afghanistan were known to have been transferred. There was also a growing body of information concerning the shortcomings in the Canada Afghanistan Detainee Transfer Arrangement—shortcomings that could have had the consequence of rendering any detainee transfer a possible war crime (and perhaps a crime against humanity) if the detainee was subsequently abused.

However, more than the possible criminal responsibility of individual Canadian soldiers is at issue. Our principal concern arises with respect to the political and military decision-makers who have chosen not to cease the practice of transferring detainees on a permanent basis, and who for more than a year refused to re-negotiate the Canada Afghanistan Detainee Transfer Arrangement to secure rights of notification, visit and verification for Canadian authorities. In short, the policies decisions taken by Mr. O’Conner, General Hillier and others caused detainees to be transferred into a situation of significant, known risk. It follows that, if and when any of the transferred detainees were in fact tortured or otherwise abused, Mr. O’Connor, General Hillier and others may have aided, abetted or otherwise assisted the commission of war crimes or crimes against humanity—which, of course, are themselves war crimes or crimes against humanity.

Please note the following. The foregoing Byers-Schabas statement of the substantive law uses some facts as known at the time (as of late 2009) as context for brief comments on the applicability. The citation of the passage is for substantive-law purposes is not intended to limit the factual contexts and consequently applicable law to those cited above. For example, since 2009, there is now reason to be concerned that many (perhaps many hundreds) ‘off the books’ detainees were transferred by Canada to the Afghan National Security Forces (ANSF) – primarily to the Afghan National Police (ANP) – and thus to a generally known risk not only of cruel treatment (beatings and the like) but also of extrajudicial execution. By way of further example, the passage of time has permitted the emergence of more evidence after 2009 including evidence from

within the United States and from elsewhere about disappearances, torture, and executions at the hands of US state agents, notably the CIA – evidence that we note the Prosecutor noted extensively in her November 21 s. 15(3) application. As a consequence of further exploration of that evidence and further evidence it may in turn generate, the question may arise in any ICC OTP investigation as to whether Canada continued to transfer captives to the United States past the time when key Canadian officials knew, had to have known, or should reasonably have known of the fate that such transfer risked.

3. Torture of Afghan Detainees: September 2015 Report

I also draw attention to a careful, detailed 95-page report released two years ago, in September 2015, by the Canadian Centre for Policy Alternatives (CCPA) and the Rideau Institute on International Affairs entitled *Torture of Afghan Detainees: Canada's Alleged Complicity and the Need for a Public Inquiry*. Written by Omar Sabry, *Torture of Afghan Detainees* does an admirable job of distilling, presenting and analyzing the publicly available evidence of “complicity” as a matter of morality and law (both international and Canadian law) and as a matter of both state and individual responsibility. The title of the report reveals its immediate purpose of seeking a commission of inquiry under the federal Inquiries Act, such as has in the past proved valuable in getting at the truth in such matters as the involvement of Canada in the rendition to torture of Maher Arar and the investigative failures in relation to the massacre by bombing of 329 people, including 268 Canadian citizens, on Air India Flight 182 in 1985.

Such a commission of inquiry as called for in *Torture of Afghan Detainees* would serve functions that criminal investigations and prosecutions cannot, including analyzing the ways in which Canadian political and legal institutions have not been up to the task of preventing and responding to concerns about war crimes and crimes against humanity in Afghanistan and including focusing on policy, legal and parliamentary-democratic reform recommendations for the future. However, the cited evidence and the discussion in *Torture of Afghan Detainees* are simultaneously relevant to the question of individual criminal responsibility. For that reason, I assume that the Office of the Prosecutor has already secured a copy and may have already studied it as part of its preliminary examination. That being said, on the small chance the Office has not yet had the benefit of this report, I wish formally to bring it to the Prosecutor's attention in the present brief; I direct the ICC OTP's attention not only to the text of the report but also the

citations to many key pieces of documentary evidence in the endnotes of *Torture of Afghan Detainees*. The report can be accessed as a PDF online [here](#).

4. Evidence file of John McNamer: 2013-2017

I also note that another Canadian, Mr. John McNamer, took the initiative starting in 2013 to provide the Office of the Prosecutor with a chain of evidence related to Canada's complicity in torture in Afghanistan from the date of Canada being bound to the Rome Statute (July 1, 2002) to present. Mr. McNamer's first communication to the OTP was dated November 9, 2013, and was a 28-page brief accompanied by 272 supporting documents. In that brief, Mr. McNamer summarized the claims that he believed the supporting documents helped demonstrate, with the purpose of asking the Prosecutor to seek authorization for an investigation into Canadian officials:

- i.) Canadian government officials and military personnel have since 2 July 2002 until the present time actively and intentionally failed to comply with legal obligations under The Convention against Torture and the Rome Statute, which strictly prohibit the transfer of detainees into danger of torture at the hands of authorities from other States, and which prohibit complicity in the wrongful practice of "extraordinary rendition" of detainees into the danger of torture.
- ii.) This large scale commission of alleged war crimes is the result of plans and policies conceived of and enacted by responsible Canadian government and military officials with knowledge of and contemptuous disregard for legal obligations of the Rome Statute and related domestic laws. There is significant evidence presented in this document to clearly demonstrate that responsible Canadian officials have had full knowledge that detainees transferred to the U.S. and Afghanistan during the period of temporal jurisdiction were in danger of rendition and in extreme danger of torture, including being tortured to death. Yet Canada's officials acted with callous disregard for the fate of these detainees, and for legal obligations of the Rome Statute. Canadian officials since 2002 have actively and intentionally failed to comply with Canada's specific legal obligations under the Convention against Torture and the Rome Statute and related domestic law.
- iii.) There is a genuine unwillingness by responsible Canadian authorities to investigate and prosecute these alleged war crimes.

iv.) It is indisputable that Canada has during the period of temporal jurisdiction transferred detainees into the control of authorities of the United States and Afghanistan. It is also indisputable that detainees have been tortured by official agents of the United States and of Afghanistan during the period of temporal jurisdiction.

v.) It is indisputable that Canada has been an active collaborator during the period of temporal jurisdiction in the worldwide U.S. "extraordinary rendition" program, and that this collaboration is wrongful under the Rome Statute.

vi.) Responsible Canadian officials have for years engaged in a conscious cover-up of criminal actions regarding complicity in torture and extraordinary rendition, abusing political and legal powers and using the guise of "national security" and "national secrets" to cover up wrongful activity under the Rome Statute and related domestic law, and to prevent any legitimate inquiry into alleged war crimes from proceeding.

Since then, the document file provided by Mr. McNamer to the OTP has grown to 321 documents as of November 21, 2017; your file reference is OTP-CR-171/14. The evidence ranges from official (e.g. UN) documents on torture and extrajudicial executions in Afghanistan to letters or emails sent to Mr. McNamer by various Ministers and other government officials in response to the concerns he expressed about Canadians' participation in war crimes, and updates on developments in the form of media reports relating to this matter. The very first document (part of Document #1, OTP-CR-171/14) is a March 13, 2006, response on behalf of Prime Minister Stephen Harper to a February 28, 2006, letter that Mr. McNamer sent to the just-elected Prime Minister. Mr. McNamer's letter to the new Prime Minister includes the following passages:

Please allow me as well to bring to your attention some very deep concerns I and many others have about Canada's current military role in Afghanistan. I have done extensive research on the matter, as you will see, and feel I must speak out in this way. I am motivated to seek the truth, and speak it, partly as a result of my past service with the U.S. Army's 4th Infantry Division in Vietnam, where I was awarded a Bronze Star Medal and other military decorations.

I'm quite sure you are looking at and reevaluating all of Canada's undertakings in your new capacity as leader. I ask you to take a hard look at Canada's military role in Afghanistan in this process - after having done this myself, I have come to believe the legal aspects of that role are deeply troubling. The situation is such that Canadian troops and political leaders are now squarely in the position of acting in ways that are legally indefensible, leaving them and you open to charges of violating international and

domestic laws.

I do not make these statements lightly and I am not going to argue the case in this letter. I simply ask you to examine the attached 5-page research brief, as I am confident the documented factual evidence speaks for itself. I believe that if you look openly and honestly at the true situation our troops are in, you cannot help but become deeply troubled by the situation yourself.

In light of this belief, I respectfully call on you to immediately pull all Canadian troops out of the Afghanistan war zone and return them to Canadian soil. This is the most obvious way to immediately end the risk of Canadian military personnel - and/or political leaders - possibly having to face future criminal charges in an international or domestic court. ...

The emailed response from the Prime Minister noted:

On behalf of the Right Honourable Stephen Harper, I would like to acknowledge receipt of your e-mail correspondence regarding Canada's role in Afghanistan.

Please be assured that your comments have been carefully noted. Copies of your e-mail have been forwarded to the Honourable Gordon O'Connor, Minister of National Defence, and the Honourable Peter MacKay, Minister of Foreign Affairs, for their review. I am certain that the Ministers will wish to give your views every consideration.

This email was copied to the two Ministers as identified in the "Cc" line as "Gordon O'Connor, P.C., M.P." <dnd_mdn@forces.gc.ca>; "Peter MacKay, P.C., M.P." <mina10@dfait-maeci.gc.ca>. Given that a key part of understanding criminal culpability in international criminal law relates to the extent of knowledge and the timing of knowledge and also relates to evidence as to what steps were or were not taken when relevant knowledge came to the attention of relevant actors, it is thus of some consequence to note that by virtue of Mr. McNamer's efforts as a citizen, from virtually Day 1 of coming Mr. Harper's government coming into office in early 2006, the three most relevant Ministers in the new government were formally put on notice of the international criminal law jeopardy of Canada's involvement in Afghanistan. I observe that the Prime Minister (more precisely, persons conveying his response) claimed that the concerns had been "carefully noted" and that he also was making clear in a communication to his Defence and Foreign Affairs ministers that he wished them to review Mr. McNamer's email and, one presumes, accompanying 5-page research brief; I are not currently aware of whether such communication ever occurred separately from the Cc-ing of the Prime Minister's email to Mr. McNamer.

I wish to acknowledge the early and continuing work of Mr. McNamer and very much hope that the documentation and argumentation provided to you in the 321-document file can be of assistance to the OTP during the formal investigations phase of the situation in Afghanistan, assuming that the investigation is authorized by the Pre-Trial Chambers.

5. Military Police Complaints Commission 'Failure to Investigate' Proceedings: 2011 Final Submissions by Amnesty International and BC Civil Liberties Association and 2012 Final Report

Finally, I urge the ICC OTP to note that, subsequent to the second Byers-Schabas letter of December 2009, the main elements of a public interest hearing by the MPCC (MPCC) took place wherein the issue was whether specified members of the Military Police system in Canada had had sufficient and timely knowledge to have breached their professional duties by failing to investigate the Canadian Forces chain of command on the question of whether the system within which orders were given to transfer detainees to ANSF authorities was illegal and whether individual acts related to that system (its creation, maintenance, modification and operation) were criminal. Much of the testimonial evidence was given in 2010; final submissions to the MPCC were in 2011; and the final report was in 2012. The MPCC concluded that for the specific period that its proceedings were limited to and for the specific individuals within the Military Police system at that time, evidence of torture by Afghan authorities and evidence that Canada's transfer system did not safeguard against such torture was insufficient to conclude these individuals had breached professional and legal duties by a 'failure to investigate.' However, as will be noted in the "Evidence and Evidentiary Pathways" section below, the record of the MPCC proceedings, evidence referenced in the submissions, and factual conclusions (both about what the MPCC had concluded and about what the MPCC says it was prohibited from looking into by virtue of its narrow jurisdiction) are important and rich sources of evidentiary pathways that merit fulsome exploration by competent investigators such as those in the ICC OTP. I acknowledge the major contribution of Amnesty International Canada (AI) and the British Columbia Civil Liberties Association (BCCLA), and their lawyers, to the evidentiary record in the 2007-2012 period of these MPCC proceedings. The following are the links to the MPCC Final Report of 2012 – online [here](#) – and to the Final Submissions of AI and BCCLA of 2011 – online [here](#).

I also believe that a summary of a key aspect of the relevant law (relevant to multiples branches of Canadian and international law, including the international criminal law of the Rome Statute) in the AI/BCCLA 2011 submission merits reproduction not only as a reminder to the ICC OTP of what it already knows but also for its [informational](#) value for wider audiences. The following supplements the general outline of applicable law by Byers and Schabas, reproduced above:

96. In determining whether the transferee power is willing and able to apply the GPW [Geneva Convention on Prisoners of War], the International Committee of the Red Cross has indicated that “[t]he Power wishing to transfer prisoners can only satisfy itself of the ability of the receiving Power to accept the prisoners through prior investigation.”

97. It is clear from the evidence of Professors Marco Sassoli and Craig Forcese, the international law experts testifying before this [Military Police Complaints] Commission, that Afghanistan’s bare undertaking to not torture or to abide by the two transfer agreements is insufficient to satisfy this requirement of Article 12 [of the GPW]. International human rights bodies have repeatedly rejected assurances to not engage in torture as conclusive evidence that no risk of torture or abuse exists, and instead, “have requested that the transferring State evaluate whether these assurances correspond to reality.” While the international law experts acknowledged that assurances, coupled with an adequately robust monitoring regime, may be sufficient in discharging Canada’s duties as required by Article 12, they nonetheless agreed that where, as here, the monitoring regime found that abuse was taking place, little weight should be given to the transferee’s assurances. Indeed, “once findings of violations arose, [...] whatever virtue the assurance had prior to that date is much abased.”

108. Risk of torture cannot be vitiated simply because a state offers assurances of compliance with the anti-torture prohibition. Indeed, the Federal Court [of Canada] has found that assurances are inappropriate where there is an “overall pattern” of human rights violations, such as the systematic practice of torture. Nor is the mere promise of post-transfer monitoring meaningful in considering the risk of torture, particularly where human rights monitors are denied access to the facilities, or monitoring visits result in reports that torture and abuse have taken place. The U.N. Special Rapporteur on Torture once viewed monitoring as mitigating the risk of torture only where it is “prompt, regular and includes private interviews.” More recently, however, the Special Rapporteur and the U.N. High Commissioner for Human Rights have both rejected monitoring as ineffective in both safeguarding against torture and as a mechanism of accountability.

6. Structure of remainder of brief

On the foregoing bases, this brief proceeds on the understanding that successive Prosecutors have been well aware of the allegations that a Canadian military and, more broadly speaking, a Canadian government policy of transferring persons in Canada's custody to Afghan state authorities resulted in a practice of sending persons to those authorities despite a widely and reliably known use of torture and/or extrajudicial execution by those authorities. As time has passed since the initial Byers/Schabas letter, at least one other axis of potential individual criminal responsibility has clarified as more facts have seeped into the public record. Prior to the advent of the Canada-to-Afghanistan axis of transfer, Canada transferred persons in its custody to United States authorities that either engaged in detention, interrogation, and other practices that attract international criminal responsibility or handed over detainees to other US authorities who engaged in such practices.

I am furthermore confident that, independently of Canadians placing and keeping this matter on the radar of the Prosecutor, successive Prosecutors' "meticulous preliminary examination" (to quote Prosecutor Bensouda on November 3) for the better part of a decade has itself produced considerable awareness of the kinds of evidence that may yet be available to clarify Canada's – and thus Canadians' – participatory role in the crimes allegedly committed by both Afghan and American actors that are the specific focus in the November 20 application to Pre-Trial Chambers III.

As a consequence, the purpose of this brief is straightforward: respectfully to encourage the Prosecutor to make key Canadian actors as central to any investigation, should it be authorized by the Court, as all other key participants in creating, maintaining, and operating policies and practices of torture and other international criminal abuses of captives in and in close proximity to Afghanistan. I believe that an openness to such investigation is already the import of paragraph 254 in the November 20 application (in relation to six countries that were part of the International Security Assistance Force and that have transferred detainees to the ANSF at various points and subject to varying procedures and conditions) and indeed also of paragraph 260 (which mentions "allegations attributed to special forces of a number of international forces operating in Afghanistan", which may include special forces of Canada).

More particularly, the task I have set myself is to persuade the Office of the Prosecutor of the propriety of Canadian actors being included in the scope of any investigation of

the Afghanistan situation by paying attention to questions of complementarity and gravity /interests of justice. At some point in the process going forward, Canada will have the right to challenge ICC jurisdiction based on these two kinds of factors. Our immediate interest is to help ensure that the ICC OTP itself does not decide at some point to exclude the Canadian dimension from the investigation into the overall “situation in Afghanistan” (again, assuming the Pre-Trial Chambers authorizes the investigation).

The other goal of this brief is to signal that there is, I believe, considerable evidence that has not yet come to light in the public domain and/or that the ICC OTP may not yet be fully aware of. To accomplish this, I reference some new public evidence that post-dates the December 2009 Byers-Schabas letter, generally describe the general contours of some evidence that is to be conveyed confidentially to the ICC OTP, and finally describe what I might call the constricted ‘evidence environment’ that has been produced by generally successful Canadian government obstruction of a variety of attempts to make detainee-transfer policy, practice and effects more transparent.

A) Evidence and Evidentiary Pathways (section 1, below):

The purpose in the first section of the brief – fulfilling the secondary purpose describe above -- will be to point out just some pieces of evidence and bases for reasonable suspicion (that open up obvious evidentiary pathways for investigation) of which I believe an ICC investigation should be aware. I say “just some” for several reasons.

First, I am not able to commit some evidence to public record for fear of placing some witnesses and persons with relevant knowledge in a difficult or even dangerous position; evidence related to such situations will be conveyed through secure means to the ICC Office of the Prosecutor (OTP). Second, I am (a) taking for given the mass of evidence to which the ICC OTP’s attention has already been drawn by the above-mentioned correspondents, (b) assuming that a decade-long ICC OTP preliminary examination into war crimes and crimes against humanity in Afghanistan already far outdistances what I know on some fronts, and (c) relying on the 2011 Final Submissions to the MPCC by AI and BCCLA as well as the 2015 Sabry report on behalf of CCPA and the Rideau Institute as a review of much key evidence which I incorporate by reference (and urge the OTP to read, if not already done). Third, now that the Prosecutor has already said in the November 20 application that detainee transfer “can be subjected to proper investigation and analysis if an investigation of the Situation is authorized” (para 254), I believe it not now desirable to put the Canadian government and potentially culpable Canadian nationals on notice with respect to some key evidence

and evidentiary pathways that they may assume they have been successful in hiding or obscuring through a variety of information-limitation and information-denial efforts and techniques.

I further note that – beyond this brief and beyond what will be conveyed confidentially outside this brief – I may send on additional evidence, indications of possible evidentiary pathways, and/or analysis of evidence, if and when the situation in Afghanistan has moved from its present preliminary examination stage to the formal investigation stage.

I note one other thing about evidence. I am quite confident there are multiple persons across various departments in the Canadian federal civil service who know much but who are wary of coming forward until there is a credible investigative process that stands a chance of not being stymied in the way of every other process in Canada regarding detainees to date – and thus would be more likely to come forward to investigators within an ICC process they perceive as serious. Over the years, small bits of evidence have been leaked to some journalists from within a civil service noted for normally adhering very closely to the ethic of confidentiality; these include uncensored copies of some documents obtained by Access to Information Act requests but that the government has supplied with redactions of any mention of torture. Whether officials are still in government or whether they are now retired or elsewhere, I believe some of the same individuals will come forward if – and, at the same time, only if – they know that Canadians’ conduct is viewed by the ICC Prosecutor as clearly and actively within the remit of any authorized investigation into the Afghanistan situation.

Further, note that Canadian diplomat Richard Colvin whose testimony has so far entirely been given as a result of requests to appear by official bodies (notably the Military Police Complaints Commission and the House of Commons Special Committee on the Mission in Afghanistan) could well be prepared – given his past willingness to testify – to cooperate with an ICC Prosecutor’s investigation if requested by the Office of the Prosecutor and not prohibited by the Government of Canada of which he remains a loyal civil servant.

B) Complementarity (section 2, below):

The Rome Statute is structured so as to accord jurisdictional space to national authorities to investigate and prosecute Statute crimes in preference to the ICC but such jurisdictional priority is forfeited when, in the judgment of the relevant ICC institutions, the state in question is “unwilling or unable genuinely to carry out” these functions (art.

17). This brief seeks to demonstrate that there is clearly an institutional unwillingness in Canada to investigate let alone prosecute – and, remarkable as it may sound, also insufficient professional capacity within the military police system.

There is a plethora of indicators of the lack of willingness of Canada to meet its responsibilities under the Rome Statute, with the most recent proof having only been documented two months ago. In September 2017, the Canadian government confirmed in a written response to a Member of Parliament’s ‘Order Paper Question’ that neither of the two police institutions with parallel and overlapping jurisdiction to investigate high-ranking members of the military, civil service, and ministry –the Canadian Forces National Investigation Service (CFNIS) and the Royal Canadian Mounted Police (RCMP) – has conducted *any investigation at all* into the individual responsibility of any of these persons for war crimes or crimes against humanity that may arise from Canada’s policy and practice of sending persons to agencies known to engage in systematic torture. In our view, this piece of evidence is crucial – if not determinative – on the question of whether the Prosecutor should now defer to Canada, given that both the CFNIS and the RCMP have had a full decade of exposure to a constant stream of reliable publicly-disseminated evidence of possible war crimes and/or crimes against humanity but have nonetheless declined to engage in any criminal investigation of the key decision-makers.

In my submission, article 17(2)(b) of the ICC Statute is fully applicable to this state of affairs:

In order to determine unwillingness in a particular case, the Court shall consider ...whether one or more of the following exist, as applicable:... (b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice.

The conclusion that Canada has, to date, engaged in “an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice” is deepened when one notes that it is generally accepted that, under both international humanitarian law and international human rights law, there is a proactive duty on the relevant state policing authorities to investigate war crimes when information about the possibility of such crimes comes to the attention of the authorities. Although Canada may well try to justify the dereliction in this case by pleading they have received no specific complaint against high-ranking officials much less a formal complaint from direct victims of the alleged war crime, there is no basis in international law for passivity in the face of publicly available evidence that a war crime

may have been committed. On the contrary, international law places an affirmative duty on the state to investigate when there is a credible basis for believing that a war crime or a crime against humanity. As summarized in Darragh Murray, *Practitioners' Guide to Human Rights Law in Armed Conflict* (Oxford University Press and the Royal Institute of International Affairs, 2016):

Both **the law of armed conflict** and **international human rights law** require that once an incident giving rise to the obligation to investigate comes to the attention of the authorities they must act on their own motion to initiate an investigation. The authorities concerned 'cannot leave it to the initiative of the next of kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures'. This obligation applies 'active hostilities' and 'security operations.' (para 17.16 at p. 330; bold emphasis in original; underlined emphasis is mine)

For the sake of caution, do not mistake my reliance on the existence of the *proprio motu* rule for the state obligation to investigate for any assumption on my part that the same rules govern individual criminal responsibility for failure to investigate. While these areas of state responsibility and individual responsibility under international law necessarily cross-pollinate in some respects (notably with respect to command and superior responsibility), my sole focus here is on *states'* obligations.

The above-noted evidence of lack of institutional will to investigate caps off a dozen or so other instances in which successive Canadian governments have blocked transparency -- and thus hampered the basis for accountability -- with respect to transfer to torture of Afghan detainees. This decade-long obstruction strategy has taken a highly tenuous turn of late, with the present government misrepresenting previous failed efforts to get at the truth as having led to 'investigations' that have generated all the truth needed; this is the line the Prime Minister has himself conveyed during Question Period. In reality, apart from the general problem that many key facts remaining secret, hidden or obfuscated, not one of these contexts was a criminal law proceeding, let alone an investigation into the criminal responsibility of high-ranking officials responsible for the transfer-to-torture policy and practice.

In this respect, the cumulative effect of the pattern of obstruction by a variety of government actors in the non-criminal context has been analogous to the kind of "shielding" that article 17(2)(a) of the Rome Statute forbids when investigations are in fact a façade. This article lists as a reason to determine a state is unwilling to process: "In order to determine unwillingness in a particular case, the Court shall consider ...whether one or more of the following exist, as applicable:...(a) The proceedings were

or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court..." I say "analogous" because there has been no investigation of the relevant high-ranking officials and thus no shield in that literal sense. But I also note that, as will be presented in the "Complementarity" section, some investigations of persons in lower or non-command positions (with respect to detainee transfer policy and practice) do potentially raise the question of "shielding" – including "shielding" of higher-level persons from the knock-on consequences of lower-level persons being properly investigated as an initial investigative focus.

I believe that the Complementarity section of the brief will make clear that Canada's conduct has disentitled Canada to any deference at this stage of the ICC process. Notwithstanding the public commitment to cooperate with the ICC made by former Canadian Foreign Minister Stéphane Dion upon a visit to the ICC in autumn 2016 ("We are part of the ICC, so we'll work with the ICC. We have confidence in the ICC as an institution, and we'll not pick and choose." – Geoffrey York, "Canada could face investigation from international court it's fighting to save", *The Globe and Mail* [Nov. 10, 2016]), it is entirely possible Canada – with Dion no longer Foreign Minister – could well turn around and now try to insist that, despite having done no investigation for over 10 years, it should now be allowed to investigate and thereby to forestall investigation by the Prosecutor. I ask that such an effort be rejected: the record to date indicates that such an investigation would almost certainly be lacking in both sincerity and effectiveness.

I recognize that, in her November 3 public statement, the Prosecutor noted:

My Office will continue to fully respect the principle of complementarity, taking into account any relevant genuine national proceedings, including those that may be undertaken even after an investigation is authorized, within the Rome Statute framework. (My emphasis)

However, I respectfully submit that the conduct of Canada to date clearly indicates that any 'finding of religion' at this stage should be viewed with great skepticism and indeed rejected as lacking in the requisite sincerity to meet the Rome Statute requirement of "genuine national proceedings."

C) Gravity and the Interests of Justice (section 3, below):

The ICC Rome Statute regime and associated practice recognize a measure of discretion in the hands of the Prosecutor to prioritize its resources for situations of grave

violations of the Statute and, within such situations, for those individuals whose conduct makes them the most responsible for the policies and practices in question. Indeed, as part of her November 3 announcement, the Prosecutor commented that “those most responsible for the most serious crimes” would be the ultimate focus of an investigation once authorized. This is as it should be, not least because the preventive impact of the ICC regime will never be achieved unless the most powerful institutional decision-makers know that they will not be ignored at the expense of the ‘low hanging fruit’ of ground-level and low-in-the-hierarchy perpetrators of crimes.

Beyond prioritization of cases once an investigation is underway, the Rome Statute also permits the Prosecutor to treat a case as inadmissible if “[t]he case is not of sufficient gravity to justify further action by the Court” (art. 17(1)(d)) or if, despite being sufficiently grave not to be inadmissible, “there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice” (art 53(1)(c)). It is important to recall that declining to investigate a grave crime on an “interests of justice” basis is an exception, and indeed one that in some cases (those referred to the ICC by a state) a Pre-Trial Chambers has the power to overturn. Further, it is not a test that has to be met for an investigation to go ahead, but – to reiterate – the basis for an exceptional decision not to investigate. Thus, in the case of inclusion of Canadian nationals in the overall investigation of the Afghanistan situation, there would need to be special reasons to treat them differently from nationals of other countries, notably of Afghanistan and the United States.

In Section 3 of the brief, I will address why there are no such special reasons. Indeed, the situation is the opposite: the “interests of justice” actually point in the opposite direction – towards the imperative to include Canadian nationals in the investigation. An assessment of the “interests of justice” must give great weight to the fact that the persistent maintenance and operation of a system of transferring captives to the known substantial risk of torture or other cruel treatment certainly lies at the most serious end of the gravity spectrum – especially with the numbers of people who Canada was known to have transferred (let alone the number for which there are no or ambiguous records) and also given the active governmental effort to cover up key facts about the transfer system for a decade now. With respect to the interests of justice beyond the question of gravity, the brief will outline a number of reasons that the ICC would be severely weakening the ICC’s own system – and the future of not just crime prosecution but crime prevention – if the conduct of Canadians were sidelined in any investigation of the Afghanistan situation that is authorized the Pre-Trial Chambers.

SECTION 1: EVIDENCE AND EVIDENTIARY PATHWAYS

1. The detainee-transfer paragraph in the November 20, 2017, application to the Pre-Trial Chambers

The Prosecutor's November 20 application for authorization to investigate the Afghanistan situation contains the following paragraph:

254. In particular, it has been alleged that during the initial phase of the armed conflict in Afghanistan, international forces had transferred detainees in their custody to the ANSF without assuring themselves that the receiving authority was willing and able to apply principles of humane treatment and protection of detainees enshrined in the 1949 Geneva Conventions.⁴³⁰ The information available shows that at least six ISAF troop contributing countries subsequently concluded separate Memorandums of Understanding with the Afghan Government to govern the transfer of detainees, with varying levels of monitoring of transferred detainees.⁴³¹ In response to UNAMA's findings on the practice of torture against detainees in Afghan custody, ISAF further devised a six-phase remediation plan and inspection regime, which included suspending the transfer of detainees to facilities identified by UNAMA as practising torture and conducting a certification process of facilities where torture had been discovered (through inspection, training and review of allegations).⁴³² While the effectiveness of the monitoring programmes and inspection regimes appear to vary and credible allegations of torture in Afghan-led facilities have continued to be reported, the information available at this stage does not provide a reasonable basis to believe that members of international forces have knowingly placed detainees transferred into Afghan custody at risk of torture and other forms of cruel treatment or have failed to take effective measures to correct the situation or to request the return of the prisoners. Nonetheless, these and other allegations can be subjected to proper investigation and analysis if an investigation of the Situation is authorised.

The following footnote is also included:

⁴³¹ See Afghanistan Independent Human Rights Commission, "Torture, Transfers, and Denial of Due Process: The Treatment of Conflict-Related Detainees in Afghanistan", 17 March 2012, AFG-OTP-0003-3951 at 3980 ("AIHRC, Treatment of Conflict-Related Detainees"). The six countries are the United Kingdom, Canada, Australia, Denmark, Norway and the Netherlands. The MoU signed by Canada in 2005 initially did not include monitoring mechanism; under public pressure in 2007, Canada signed a new MoU that addressed this gap. See AIHRC, Treatment of Conflict-Related Detainees, AFG-OTP-0003-3951 at 3987

It would be regrettable if the Government of Canada tries to point to para. 254 as evidence that 'there is no there there.' While the government may try this tack, I believe that this is not the conclusion that should be drawn from paragraph 254.

First of all, I appreciate that the ICC OTP has not received or digested sufficient information for what I assume is a robust threshold for a "reasonable basis to believe" that ICC crimes of sufficient gravity to warrant ICC attention have been committed. Indeed, I would be somewhat surprised if, at this stage, the OTP had been come to a different preliminary view given how thoroughly successful Canadian government departments and lawyers have been at suppressing information and how the sheer volume of seriously redacted documents released actually works against finding needles in the haystack. I also assume that the OTP has concentrated its resources for the moment on what one might call the hands-on torture apparatus as opposed to those who were 'third party' facilitators of that apparatus; the sheer amount of work obvious in the November 20 application with respect to the ANSF bodies and the CIA makes clear to us that a similarly comprehensive and thorough outline of Canadians' knowing role in providing persons to authorities who engage in torture would be difficult to achieve using only the tools and information available from a preliminary investigation.

Secondly, I note that the ICC OTP has taken care to say that it does not have reason to believe "at this stage" and then to end the paragraph by indicating a clear openness to new or new understandings of evidence coming out in the course of the overall investigation into the situation in Afghanistan. Quite apart from what others and I may contribute to deepening the relevant evidence, I expect that detailed and comprehensive investigation into torture, cruel treatment and extrajudicial executions at the hands of ANSF agencies and/or the CIA will invariably shed more light on the extent and nature of knowledge and motivations of actors who handed persons over.

Thirdly, I note that the paragraph takes care to signal that different states' transfer regimes varied such that, just because six ISAF states are noted, this does not mean the individuals running each state's transfer system are equally situated with respect to potential criminal responsibility. You note "the effectiveness of the monitoring programmes and inspection regimes appear to vary" in the main paragraph and then footnote 431 identifies one country as having a more problematic transfer-regime framework than the others, namely, Canada: "The MoU signed by Canada in 2005 initially did not include monitoring mechanism; under public pressure in 2007, Canada signed a new MoU that addressed this gap." (my emphasis) These two facts, identified by the ICC OTP itself in this one sentence, loom large since it was under the 2005 MOU

regime when it appears that the largest single year of known transfers took place, in 2006 (129):

28. Until very recently, the CF had steadfastly refused to provide any information regarding the number of detainees transferred to Afghanistan authorities. However, the CF suddenly changed its position on this issue on September 22, 2010. Crown counsel furnished the Commission with this information on an annualized basis, indicating that 96 detainees were transferred to Afghan authorities in 2007 and 21 in 2008. The CF publicly confirmed that 129 detainees were transferred to Afghan authorities in 2006. (Final Submissions of AI/BCCLA to MPCC, 2011)

Note in this respect that some portion of the 2007 year would also have occurred when the 2005 MOU was operative. And note that 2006 appears to be the year when numbers – possibly large numbers – of captives were not treated as “detainees” and were transferred by Canada without even the safeguard of reporting to the ICRC: see the subsection below on “PUCS/Persons under control.”

With respect to the May 2007 MOU, it is very important that the ICC OTP has so clearly recognized already that Canada did not adopt a better (that is, better on paper) regime to supplement the 2005 regime out of the goodness of its heart. As the ICC OTP itself notes, the May 2007 MOU came as a result of “public pressure.” Such pressure may have included the first Byers-Schabas letter in February 27, but much evidence indicates that the main source of pressure was the publication on April 23, 2007, of a remarkable piece of investigative reporting in *The Globe and Mail* that identified some 30 Afghans who gave striking testimony of how they had been tortured by ANSF actors and at least some of whom had been transferred to those ANSF actors by Canada. In addition, there was another source of major public pressure: it is a matter of public record that government lawyers rushed into court on the very day the 2007 MOU was made public, and presented the document to a judge hearing an application for a preliminary injunction on further transfers (initiated by AI and BCCLA) as a basis for the judge to reject the application. The judge looked at the formal monitoring regime features – which of course had been absent for almost a year and half under the 2005 MOU – and felt that these tipped the balance of convenience under Canadian preliminary injunctions law towards the government.

I would finally note with respect to the 2007 MOU that footnote 431 describes it as “address[ing] th[e] gap” of no monitoring regime, but this is a formal description of what the text does. It does not say anything about the reality of the monitoring regime, about which I will provide below a narrative of what transpired in spring/summer 2007

to be followed under separate cover by confidential evidence of deliberate efforts and techniques to undermine the 2007 MOU monitoring regime for at least six months.

Fourthly and finally, I wish to emphasize that my interest is in a fulsome investigation and I am not assuming preordained results. If what I believe to be very reasonable and well-founded suspicions that Canada operated a system whereby persons were sent, with requisite knowledge, to the real risk of torture (or other crimes like cruel treatment or extra-judicial execution) cannot be corroborated by clear evidence, then I will be satisfied that justice will have been done in a least an international-rule-of-law sense. But, as the subsequent section on “Complementarity” will show, it is presently and for the foreseeable future *only* the ICC that is in a position to conduct such an investigation.

2. Three general contexts for investigation into Canada's captive-transfer policies and practices

As noted in the Introduction, I believe there are reasonable grounds to consider three contexts in which the precise facts, relevant motivations, and results may differ, even as the three contexts can overlap and interweave.

1. Canadian Special Forces transfers tied into United States strategy and operations

A) Starting as early as fall 2001 and up to the time Canadian special forces appear to have left Afghanistan at the end of 2002 and then resuming from mid-2005, I have good basis to believe that Canadian special forces transferred captives to the United States' Central Intelligence Agency (CIA) as well as to US special forces. Taken together, the US recipients likely engaged in serious war crimes with respect to persons in their custody, including the CIA's use of 'enhanced interrogation' torture techniques (as itemized in the Prosecutor's November 20 application) and including US special force use of 'interrogation' methods that may in some cases have been even more brutal. I use the word “captives” because it remains unclear how many were formally treated as “detainees” under the laws of war and related Canadian transfer agreements with Afghanistan, and how many may have been subject to one or more other designations (such as “PUCS”, about which see #2 below). I believe it to be likely that many if not most of our special forces' captives were high-value targets that, in parallel to, alongside of, or in place of US special forces, Canadian special forces specialized in tracking and capturing (or, of necessity, killing if there was armed resistance). If a given person captured was indeed the high-value target being sought (or a high-value target not the target of the operation but nonetheless caught in the operation), my belief is that the

central purpose was for the United States to reap intelligence value from interrogation once a captive was in US hands.

B) At a certain point, Canada stopped (or, at least, was supposed to have stopped) transfers to the United States as a consequence of public evidence of torture as a policy and practice of the United States in the 'global war on terror' and/or as a consequence of ICRC expressions of concern in early fall 2005 about transfers to the US by Canada in September 2005. Ironically, this resulted in Canada's transfers – in this context, our special forces' transfers – generally switching from the US to the Afghanistan security intelligence agency called National Directorate of Security (NDS). This is ironic because, as the Prosecutor's November 20 application sets out for Pre-Trial Chamber III, NDS also freely used torture in its interrogation and resulting intelligence-generating methods. There may have been transfers to NDS in lieu of to US agents even before the general ending of transfers to the US, but the immediate point is whether the NDS was a *de facto* surrogate recipient for the US once Canada was no longer directly transferring to the US. That is to say, one of the outcomes – and possibly one of the purposes – may have been for the captive to be passed on to the US as a third party (for the US to then interrogate, using its methods) and/or for NDS to engage in interrogation, using its widely known torture methods, with the resulting intelligence then flowing on to US. As the ICC will know, the NDS was to a significant extent created after the invasion of Afghanistan in 2001 by the CIA. Thus, the idea of passing on intelligence from NDS to the US could have been in some cases as simple as NDS passing the captive to CIA or CIA-affiliated persons located in the same or in an adjunct facility and/or as simple as the NDS generating intelligence even as such CIA agents were sitting in on the interrogation.

C) In situations in which special forces captured persons who were not the specific high-value persons being targeted, it could arise that the persons would be treated outside the intelligence-value loop described in (A) and (B), namely, in one of the two modes described in #2 and #3 below. This was the case for instance with respect to the three captives who were the subject of a public interest hearing of the Military Police Complaints Commission (MPCC) and its final report of April 23, 2009 (MPCC 2007-003) [online [here](#)]. These three captives were formally treated as "detainees" after they had been sent by special forces to Kandahar Air Force (KAF) Canadian Forces Military Police from the field, once the special forces noted they were not target persons and, it would seem, additionally took the view there was no intelligence value at least in the high-value-target sense. They were then categorized as "detainees" at KAF and transferred, without Canadian processing, to the Afghan National Police (ANP)

pursuant to a quick-transfer policy set by Ottawa. The ICC OTP may wish to determine if there is evidence that certain persons in Ottawa would have preferred the transfer to the ANP to have occurred in the field by the special forces and not to have been sent to KAF to be formally treated as detainees before transfer; if this was the preference, then this formal detainee transfer would have taken a form similar to that described in #2 below.

2. Transfers of persons not designated “detainees”, in regular Canadian Forces’ forward-operations contexts or battlefield contexts

At least in 2006 and on into 2007, Canada appears to have engaged in many, even some large-scale, transfers from forward operations and/or ‘the battlefield’ of captives, making little if any distinction between those known to be Taliban fighters (al Qaeda captives were largely non-existent by 2006) and those who ‘could be’ Taliban (and thus also ‘could be’ just as easily ordinary people like farmers who happened to be in the wrong place at the wrong time). Possibly the single leading context for such battlefield transfers was the fighting of Task Force Orion, including in its Operation Archer. There is reason to be concerned that significant numbers of those captured may never have been treated as “detainees” but rather as “PUCs” (“Persons under control”, or perhaps sometimes “persons under/in custody” or “persons in/under control”). There is also much public evidence that speaks to the expectations from National Defence Headquarters (NDHQ) in Ottawa that such captives would be passed on to closest units within the Afghan National Security Forces (ANSF) as immediately as possible. Where a captive was not a “detainee” but a “PUC”, Canadian Forces records of the capture and/or the identity of captives were either non-existent or poor. Perhaps more significantly, no report of PUCs would be sent to the International Committee of the Red Cross (ICRC) to say that Canada had taken a prisoner – let alone to say Canada had passed the captive on to an ANSF unit. Because of the areas of operations (forward and battlefield) where PUC’ing may turn out to have been a significant practice, the recipients within the ANSF were primarily if not entirely the ANA (Afghan National Army) and ANP (Afghan National Police) and not NDS. The *modus operandi* of the ANP and ANA was less likely to be intelligence extraction for subsequent use of international forces like those of Canada and the US, and more likely ‘simply’ to be purposeless cruel treatment (as the ICC Rome Statute terms beatings and the like — torture without the purpose) and/or, not infrequently, extrajudicial execution.

These PUC transfers, to the extent they took place to the extent I fear they did, can thus be approached as ‘official unofficial’ transfers where Canada’s own purpose was not

generally — as in case #1 — to feed an intelligence-generating interrogation system, but rather quite simply to get rid of the burden of the captives with total and callous disregard for what could happen once transferred.

Here I hasten to add that a lack of concern for the well-being of transferees need not have been — and likely usually was not — shared by the ground-level soldiers and military police who carried out the actual handovers. There is good reason to believe that many of those under orders from superiors to transfer did worry for the fate of transferees given rumours they had heard about treatment of prisoners in custody of various ANSF entities, even as they did not generally have access to the firm evidence that would prove such rumours (as would key command-level officials) and even as they may well have assumed that Canada had set up effective monitoring so that at least Canadian transferees were less likely to be abused.

3. Official “detainee” transfers by Canadian Forces with notice to the ICRC

The third category is chronologically the last one to take shape, and is also the one that has been the focus of most attention in Canada due to investigative news reports in 2007, court proceedings in 2007-2008, 2009-2011 parliamentary efforts, and 2010-2017 efforts to have the government establish a commission of inquiry. This category consists of transfer of captives who were formally designated “detainees” and who were thus treated as subject to the requirements of the laws of war on detainee handling and to whatever procedures were in a December 2005 Canada-Afghan agreement/arrangement (which had no provision for post-transfer monitoring by Canada) and then the subsequent May 2007 agreement/arrangement (which did have a monitoring regime—albeit one with respect to which there is solid evidence of deliberate undermining of the extent and efficacy of monitoring through strategies coordinated in Ottawa). It would appear that the bulk of those transfers were to NDS, widely and notoriously known as an agency that engaged systematically in torture in the course of interrogations at the relevant times.

All kinds of problems were part of transfers under both the 2005 and 2007 arrangements: poor records on the identity and related details of those who were transferred; inability to track many down detainees post-transfer, when news reports raised concerns about treatment; serious delays in informing the ICRC such that the ICRC had no notice to visit people in the key early hours and days when a prisoner is most likely to be tortured; prisoners being released (or, at least, claimed to have been released) by the Afghan recipient agency before a delayed ICRC had a chance to learn if

anything had happened to them in Afghan custody; and so on. With the foregoing flaws as important context, the core issue is whether Canadian officials transferred despite requisite knowledge (including constructive knowledge) of the real risk of torture. Here (using some Canadian criminal law terminology) “intention” blurs with “recklessness” and “willful blindness” and thus intentional transfer to torture blurs with “criminal negligence” resulting in torture. It may most easily be provable that Canada transferred with (criminally) callous disregard for the fate of transferees as compared to the more challenging effort to determine if some officials in Canada intentionally transferred detainees for a shared purpose – namely, that of ‘outsourced’ interrogation (by an agency known to use torture as a primary method for such interrogations) the objective of which was to receive back from NDS any intelligence relevant to the military operations of Canada (or the military and counter-terrorist operations of partners like the US).

What is clear is that information produced from NDS interrogations (from all captives, however those captives ended up with NDS) did flow through official and established channels to Canada and the US, at least in Kandahar. Even if evidence of advance intention to use NDS as an intelligence producer for Canada’s own detainees is not forthcoming, one key focus of investigation would still need to be the following: whether the uninterrupted flow of such intelligence was valued and prioritized by Canadian decision-makers to such an extent that this goal conditioned how Canadian officials structured their systems of information and knowledge about NDS and the fate of Canada’s own transferees. With such a goal, the obvious temptation would have been to want less rather than more information on these matters so as both to be able to claim lack of knowledge on the officials’ part and to place their partner NDS under less scrutiny and pressure so that it could continue to do its intelligence-support role on behalf of the international forces.

In any event and at minimum, there are reasonable grounds to suspect that certain Canadian officials ran a system of sending people to the real risk of torture despite knowing (or having the legally requisite basis to know) of the real risk of torture. At the same time, an intelligence-generating purpose for maintenance of the transfer system should be closely considered by an ICC investigation.

3. Evidence emerging from the MPCC proceeding (1): Final submissions of 2011 in relation to direct evidence of torture received by Canada and the failure of that evidence to result in cessation of transfers

Since the second Byers-Schabas letter, more information has become known and more processes have generated further insights. In this first evidentiary section, we focus on the evidence that emerged from the earlier-mentioned ‘failure to investigate’ proceeding started in 2007 before a federal body called the Military Police Complaints Commission (MPCC), which has certain oversight responsibilities for the Military Police (under the authority of the Provost General and including an investigative branch called Canadian Forces National Investigation Service or CFNIS). After all court challenges by the government were dealt with (extending to starving the MPCC in the failure to investigate proceeding of any documents for a full 18-21 months and including aggressive lawyering that the MPCC condemned in a 20-page section of its 2012 Final Report), the sole focus of the MPCC was essentially whether officers in the Military Police system had breached duties by failing to investigate any officers in the military command chain for illegality of ordering transfers where there was the real risk that torture would ensue. This was the scope of the case:

The Complaint alleges the Military Police (“MP”) failed to investigate “crimes or potential crimes committed by senior officers” who may have been aware that former CF detainees were likely tortured by Afghan authorities. The Complaint specifically states that members of the National Investigation Service in Kandahar and the Task Force Provost Marshal “have been aware that former Canadian Forces 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.

...The legal framework for this Complaint is the assertion that MPs have a duty to investigate criminal and service offences committed by members of the Canadian Forces. When officers order a detainee to be transferred to the custody of Afghan authorities, despite knowledge that the Afghan authorities are predisposed to torture these persons, a number of possible criminal and service offences warrant investigation. (AI-BCCLA 2011, para 5 and 7)

This MPCC focused only on the ‘failure to investigate’ issue because the government had successfully secured a ruling from the Federal Court shutting down a separate AI/BCCLA-initiated proceeding. The court prohibited the MPCC from considering responsibility for the Military Police’s own direct involvement in transferring detainees:

This was the second complaint filed by Amnesty/BCCLA. On February 21, 2007, Amnesty/BCCLA submitted a complaint to this Commission alleging that members of the Canadian Forces military police transferred detainees to Afghan authorities, or allowed them to be transferred, notwithstanding evidence that the detainees could be tortured (the “February 2007 Complaint”). In February, 2007 the Commission initiated a public interest investigation into the complaint. In March 2008 the Commission determined to hold public interest hearings. In April, 2008, before those hearings could begin, the Attorney General of Canada commenced an application in Federal Court seeking to prohibit the Commission from proceeding with hearings and the investigation into the February 2007 Complaint on jurisdictional grounds. The Court determined that the custody of detainees by members of the Military Police is not a “policing duty or function” over which the Commission has jurisdiction, essentially on the grounds that it is an aspect of “military operations” performed by military police acting under orders from the commander of the theatre of operations. (AI/BCCLA 2011, Page 1, note 1)

Within a constricted jurisdictional space, the MPCC process had to cope with the many obstacles being brought to bear by Canadian government lawyers against the smooth functioning of the MPCC proceeding, extending to aggressive withholding of evidence, interference with at least one witness, and even to the transparently political refusal of the Government to renew the mandate of MPCC Chairperson Peter Tinsley mid-way through the proceedings. Indeed, it was as a consequence of these efforts, made public by a stream of news reports, that the House of Commons decided to create a Special Committee in order to try to have a parallel effort to get at the truth behind Canada’s policy and practice of detainee transfers – only to be faced with similar blockading tactics that included the Governor General shutting down Parliament on the request of the Prime Minister (through a device known as prorogation) and the Government disobeying the House of Commons unfettered access to documents (which led to the Speaker of the House of Commons ruling that the Government had *prima facie* breached the privileges of the House).

After final submissions were received in 2011, the MPCC issued its final report in 2012 (Military Police Complaints Commission, *FINAL REPORT following a Public Interest Hearing Pursuant to Subsection 250.38(1) of the National Defence Act With Respect to a Complaint Concerning the Conduct of Captain (N) (ret’d) Steven Moore, Lieutenant-Colonel (ret’d) William H. Garrick, Major John Kirschner, Major Bernie Hudson, Major Michel Zybala, Major Ron Gribble, Chief Warrant Officer Barry Watson and Master Warrant Officer (ret’d) Jean-Yves Girard*, MPCC File: MPCC 2008-042, Ottawa, June 27, 2012 – download URL

earlier in this brief; hereinafter, MPCC 2012 Final Report). The MPCC found no breaches by these specific officers for failure to investigate the command chain in the specific period in question on the sole basis that the specific Military Police officers in question had been excluded from the relevant information distribution system and thus had insufficient knowledge about torture being conducted by Afghan agencies and any gaps in Canada's post-transfer attention to detainees to be under a legal duty to investigate senior military officers for operating the transfer system.

As will be noted further in a later sub-section, the present government has repeatedly invoked the MPCC proceedings as if it had been a process that investigated wrongdoing within the detainee transfer system writ large and had concluded there was none. In a later sub-section, I will summarize the several ways in which that claim misrepresents the scope of the proceedings and of its findings. In the present section, my purpose is first to reproduce some of the key arguments in the 2011 final submission of the complainant AI and BCCLA (*Final Submissions of Amnesty International and the B.C. Civil Liberties Association*, January 26, 2011) that contain evidence that remains highly relevant to any process that does not have the statutory and judicial constraints placed on the MPCC, notably an ICC OTP investigation. I will then set out some of the findings and observations by the MPCC that actually point to the distinct possibility of criminal wrongdoing by the officers who devised and operated the transfer system along with officials in the civilian hierarchy.

The central purpose of the evidence that I have extracted from the 110-page AI/BCCLA factum is to put firmly on the ICC OTP radar screen a narrative that reveals quite strikingly how the monitoring regime that Canada rushed into formal print in the May 2007 MOU was a paper tiger. AI/BCCLA succeed in showing that for *at least* six months (May-November 2007) monitoring took place sporadically with huge gaps between visits and with a telling focus on general prison conditions and not on whether individuals had been abused. They also bring to the surface two further crucial facts: (1) despite the limited monitoring, a significant percentage of contacted detainees appeared to have been tortured, yet (2) operators of the transfer system would use that as a fact simply to suspend transfers, only to restart transfers to exactly the same actors who were already generally known to engage in torture and who had just been shown to do so even with Canadian transferees. For unknown reasons that cry out for justifiable explanation (and thus cry out for serious investigation), Canadian decision-makers never used the repeated proof that they were sending people to torture as a reason to end the transfer system. Somehow, they either did not appreciate or did not care that renewed transfers would result in renewed findings of torture, even after such

renewed findings happened once, then again, then again, then again, then again (at least six times, as documented in the Sabry *Torture of Afghan Detainees* report).

Before moving now to the AI/BCCLA evidence, allow me to acknowledge that what is described above and what is narrated below could possibly – if one were of a very generous bent – be chalked up to serious incompetence, which would raise interesting legal questions of when incompetence becomes criminal negligence.

However, there is also considerable evidence that key centralized decision-makers in Ottawa, in CDN, in Global Affairs and in the PMO, devised manifold interconnecting ways deliberately to try to limit the negative information that monitoring could produce. One of the possible (I dare say, more likely) conclusions is that the operators of the system were so committed to the continuation of the transfer system regardless of what was known about the real risks to transferees that they knew that this could only remain the case if they minimized the likelihood of evidence of torture being produced by the monitoring system. Some of the evidence for this will be presented confidentially to the ICC OTP and not in this brief.

The following method is used in reproducing passages from the 2011 AI/BCCLA submissions. One, emphasis by underlining will occasionally be employed. Two, I will insert linking commentary to introduce a chain of paragraphs.

The first series of paragraphs discusses how the Canadian Forces reacted to an April 23, 2007, newspaper report about torture in Afghan custody and how that article led within two days to Canadian officials in Afghanistan themselves turning up reports of torture from prisoners transferred by Canada – after Canada decided (having no choice due to the *Globe and Mail* article) *for the first time since the 2005 MOU* to see if they could actually inspect prisoners.

63. Denying the risk that CF-transferred detainees would be tortured became considerably more difficult following the publication of a front-page newspaper story on April 23, 2007 by *The Globe and Mail*.... [The][r]eporter ...had carried out his own investigation into the treatment of individual CF-transferred detainees in Afghan custody. [He] tracked down 30 individuals who had been transferred by the CF and eventually released by Afghan authorities. [His] story, complete with photographs and names, provided riveting details of abuse:

Most of those held by the NDS for an extended time said they were whipped with electrical cables, usually a bundle of wires about the length of an arm. Some said the whipping was so painful that they fell unconscious.

Interrogators also jammed cloth between the teeth of some detainees, who described hearing the sound of a hand-crank generator and feeling the hot flush of electricity coursing through their muscles, seizing them with spasms. Another man said the police hung him by his ankles for eight days of beating. Still another said he panicked as interrogators put a plastic bag over his head and squeezed his windpipe. Torturers also used cold as a weapon, according to detainees who complained of being stripped half-naked and forced to stand through winter nights when temperatures in Kandahar drop below freezing.

64. Immediately following this newspaper story, Canadian officials took some steps to find out more information. Meetings were held with the AIHRC [Afghan Independent Human Rights Commission] to ask about comments in the story emanating from that body. DFAIT [Department of Foreign Affairs and International Trade] was advised by the AIHRC that it was often being denied access to detainees in NDS [National Directorate of Security] custody, including CF [Canadian Forces]-transferred detainees. Reportedly, Afghan President Hamid Karzai had intervened, but the access problems nonetheless continued. This information was a concern to Canadian officials because the AIHRC was seen as a means of monitoring the treatment of CF-transferred detainees. This report was transmitted to CEFCOM [Central Expeditionary Force Command] on April 24, 2007.

65. In response to the [*Globe and Mail*] Article and other media coverage of the torture issue around the same date, individuals at CEFCOM investigated whether any of the men Mr. Smith interviewed who reported being tortured had in fact been in the custody of the CF prior to being transferred, and whether their allegations were true. A document entitled, "Fact Check on Detainee Related Coverage 23-27 Apr 07," prepared by ...a civilian employed at CEFCOM headquarters, set out the allegations reported in the media, followed by comments concerning their veracity.

66. For example, the ...Article reported that Mahmad Gul, a 33 year-old farmer, had his teeth knocked out by an Afghan interrogator. He claimed that Canadians visited him between beatings, heard his screams, and urged him to provide his Afghan captors with intelligence. The CEFCOM document is highly redacted, but what little is unredacted indicates that CEFCOM verified that CF units were operating in the surrounding area during the relevant time period of Mr. Gul's incarceration. It further indicated that the CEFCOM Commander requested that the NIS [Canadian Forces National Investigation Service] investigate the alleged incident. The document also indicates that CEFCOM verified that the man identified as "Sherin" in the ...Article, who reported being taken to NDS headquarters and being beaten with bundles of electric cables, was verified as having been in CF custody.

67. Lt. Col. Garrick, Commander of the NIS, testified that CEFCOM never shared the “Fact Check” with him or any of his NIS investigators. He testified that the NIS investigation into whether the CF transferred Mr. Gul to torture was ultimately conducted under the auspices of GO 2008-6920.74. That investigation is discussed [later]...; for present purposes we merely highlight that the NIS investigator for GO 2008-6920 took no other investigative step other than to read the [Globe and Mail] Article and close the file on July 10, 2008, well over a year after the article was published. Lt. Col. Garrick further testified that no further investigations into the reports of torture in the article were ever conducted.

68. In light of the... Article and problems faced by the AIHRC, it was decided that Canadian officials should visit NDS detention facilities to confirm that access was indeed possible. A visit by DFAIT and Correctional Service of Canada (“CSC”) officials was arranged for April 25, 2007. The officials reported that they were surprised when two detainees complained about torture. One detainee said he had been “kicked and beaten while blindfolded” and that NDS interrogators “stepped on his belly.” Another detainee said he had been beaten and subjected to electric shocks. He also said he was bound by his feet and hands and made to stand for ten days.

69. Brig. Gen. Tim Grant was the JTF-A Commander at the time. He informed this Commission that all of these events contributed to a decision in the last week of April 2007 to suspend detainee transfers. Brig. Gen. Grant gave evidence that CEFCOM Commander Lt. Gen. Gauthier gave this direction and that transfer decisions were “effectively taken out of [his] hands and put in General Gauthier’s hands.”

At this point, AI/BCCLA describe how the Government scrambled to sign a new MOU and used it in court as the way to stop an injunctions motion to stop transfers. The passages indicate how quickly transfers were resumed after this, the first, suspension. Early evidence is also set out about how decision-makers in Ottawa resisted effective monitoring, rejecting the recommendation of the in-theatre commander, General Grant. Note that separate confidential evidence will be conveyed to the ICC OTP of how General Grant was further outflanked later that summer by Ottawa decision makers.

70. The Complainants reacted to the [Globe and Mail] Article by bringing an urgent motion to the Federal Court for an injunction prohibiting transfers. (It was not publicly known that the CF had already suspended transfers until it was disclosed in the course of these MPCC proceedings.) The motion was scheduled to be argued May 3, 2007, but the Governments of Canada and Afghanistan signed the May 2007 Detainee Agreement that same day and the document was revealed in the courtroom. Since the new

agreement allowed for regular monitoring by Canadian officials, the motion was adjourned indefinitely.

71. The CF resumed the transfer of prisoners on or about May 19, 2007, once the protocol for NDS site visits was established. DFAIT was tasked with carrying out visits to CF-transferred detainees in Afghan custody. Brig. Gen. Grant had expressed his opinion at the time that appropriate monitoring would involve a minimum of three visits to each detainee. His advice on the appropriate level of monitoring was not followed, however, and it was decided in Ottawa that even a single visit to every detainee was unnecessary.

The next set of passages show it took a full two weeks for the first post-transfer detainee visit after transfers had resumed. Immediately, on two successive days, horrific evidence of torture was turned up. Again (now the second time), Canada halted transfers. Once again, they were resumed two weeks later. Evidence then suggests an almost surreal order from the second-in-command in Ottawa to the in-theatre commander in Kandahar to be “proactive” in evaluating monitoring results – the very general who ordered transfers to resume two weeks after torture had been documented. Importantly, the head of CEFCOMM acknowledges there is a “risk of abuse”, but purports to fall back on monitoring keeping that risk “low.”

72. On June 4, 2007, DFAIT and CSC officials and the PRT Legal Advisor Lt. Cmdr. Gina Connor visited Saraposa prison in Kandahar to carry out the first detainee interviews. According to the “C4” report of the visit, one detainee divulged that he had been “beaten with electrical cables while blindfolded” while he was held at the NDS facility. (Detainees are initially transferred to the NDS for “investigation” before being handed over to Saraposa, a prison operated by the Afghan Ministry of Justice.)

73. The following day, other DFAIT officials visited an NDS detention facility in Kabul. The DFAIT officials heard disturbing claims of torture, which they summarized as follows:

Of the four detainees we interviewed, three said they had been whipped with cables, shocked with electricity and/or otherwise “hurt” while in NDS custody in Kandahar. This period of alleged abuse lasted from between two and seven days, and was carried out in both***** and Kandahar city. One of the detainees still had visible scars on his body, one seemed traumatized.

74. The DFAIT report documented additional claims of torture, including forced standing and pulling out of toenails. One detainee informed the monitoring team that he saw other detainees having their fingers cut and burned with a lighter.

75. Lt. Gen. Gauthier testified that transfers were suspended a second time as a result of these DFAIT reports. Since DFAIT monitoring had commenced, nearly half of the detainees interviewed had made complaints of torture and abuse. The AIHRC and ICRC [International Committee of the Red Cross] were informed of the allegations, and the Afghan authorities were asked to investigate. The Afghan investigations were hampered by the fact that none of the detainees wanted their names divulged. But importantly, DFAIT officials were also concerned about “how we ensure a meaningful investigation (given that it is likely the NDS will be investigating themselves).” There is no evidence that concern was ever addressed.

76. On June 22, 2007, Lt. Gen. Gauthier informed Brig. Gen. Grant that he was authorized to resume transfers again. The Chief of Defence Staff, Gen. Hillier, had also conveyed that he was “satisfied that the conditions for transfer have been met.” Nonetheless, Lt. Gen. Gauthier cautioned Brig. Gen. Grant that he should “proactively” evaluate the monitoring and follow-up by DFAIT to ensure “the risk of abuse after transfer remains low.”

77. Brig. Gen. Guy Laroche assumed command of Task Force Afghanistan from Brig. Gen. Grant on August 1, 2007. Brig. Gen. Laroche testified that he was aware that there had been certain allegations of abuse received by DFAIT, but he did not see the specific C4 reports from DFAIT. He acknowledged receiving the CEFCOM Commander Directive dated June 18, 2007 and the Amplifying Guidance dated September 12, 2007, regarding CF responsibilities for post-transfer follow-up, discussed at paragraphs 26 to 27, *supra*.

We insert paragraphs 26 and 27 here, for context.

26. On June 18, 2007, CEFCOM Commander Lt. Gen. Michel Gauthier provided incoming JTF-A [Joint Task Force-A] Commander Brig. Gen. Guy Laroche with the most detailed guidance yet regarding his responsibilities towards detainees transferred to Afghan authorities. After referring to TSO [Theatre Standing Order] 321A and the fact that a new monitoring and inspection regime was established, the CEFCOM Commander provided the following direction and caution:

The chain of command bears the potential liability should we become aware of torture or mistreatment following the transfer of detainees to Afghan authorities. It is for this reason that I am particularly concerned about the chain of command obligation to satisfy itself that the follow up of transferred detainees is sufficiently robust. I expect a proactive engagement with DFAIT at all levels, but particularly at your level, to ensure the monitoring occurs and reporting and

analysis is provided. *The monitoring, reporting and analysis must be sufficient to enable command decisions regarding the continuation of transfers.* (CEFCOM Commander Directive II), at paras. 23-24 [AI/BCCLA Exhibit P-76, Coll. Z, Vol. 1, Tab 20]; emphasis appears to be original)

27. CEFCOM Commander Lt. Gen. Gauthier provided more detailed directions in a policy issued September 12, 2007. Entitled “Amplifying Guidance On Detainees”, the document states that the CEFCOM Commander or CDS may intervene and assume responsibility for transfer decisions. It also articulates in writing, for the first time, the standard to be applied in assessing the risk of torture, and the information that should be considered. The Amplifying Guidance states:

The chain of command bears potential legal liability should we transfer a detainee into Afghan custody when we know, or can be reasonably expected to know, that substantial grounds exist for believing that the detainee faces a real risk of subsequent abuse or mistreatment.

It is for this reason that I am particularly concerned about the chain of command obligation to satisfy itself that all relevant information regarding the treatment of detainees while in Afghan custody is actively sought and considered. This information includes, but is not limited to, reports produced by DFAIT personnel following visits to Afghan detention facilities, periodic assessments from DFAIT on the Government of Afghanistan’s compliance with the Canada-Afghanistan Detainee Transfer Arrangements, any updates from Afghanistan’s own investigations into existing allegations of mistreatment, and updates or reports from the Afghan Independent Human Rights Commission. (Amplifying Guidance, at paras. 2 and 6 [AI/BCCLA Exhibit P-76, Vol. 1, Tab 46; Coll. Z, Vol. 1, Tab 46])

Note that, if the June 18, 2007, directive’s first sentence (below) was intended to set out a test for lawful (either non-criminal or criminal) transfer, it is an erroneous test with its after-the-fact, conditional future trigger (“*should we become aware...following the transfer*” – my emphasis). As a later, confidential submission will argue, it may not have been intended clearly to state a test but to fulfil other roles – and may possibly have been read by recipients, as a kind of extra-legal signal about the crucial role after-the-fact evidence would play if any questions of “chain of command...liability” were to arise.

Note further that the September 12, 2007, Amplifying Guidance states a test that is either very close to the correct test or arguably actually the correct test – but the key point to register is that this is the first time (as far as I know from records released to date) that Canada articulated the correct test for lawful transfer where the issue of torture at the receiving end comes up. That is, an entire summer had passed – a summer of further Globe and Mail articles and their aftermath in terms of societal outcry and, I have reason to believe, in terms of members of the military raising concerns about the policy of the commanders in Ottawa – and almost two years since the signing of Canada’s first weak MOU in December 2005.

The AI/BCCLA narrative now takes us to the period of the new in-theatre commander, General Laroche. It will be recalled that his predecessor General Grant requested at least three monitoring visits per detainee. The period of General Laroche appears to have been one that was lax on inspections, both in terms of number and assessments despite more abuse being reported from the few visits that there were. It must be borne in mind, however, that the Department of Foreign Affairs was conducting the inspections and that by this point in time the ‘detainee issue’ was being centrally managed in Ottawa out of Foreign Affairs. That said, it was General Laroche who decided not to request any suspensions of transfers when new abuse was discovered.

78. In August 2007, DFAIT and NDHQ [National Defence Headquarters] learned that the AIHRC was continuing to report difficulties in accessing detainees in NDS custody. In early August, it was reported that on several occasions, the AIHRC would arrive at the detention facility with a transfer notification record from DFAIT but the NDS would deny that the detainees were ever received into custody.⁸⁸ Later that month, the AIHRC reported that access was completely refused on some occasions. These problems persisted despite the specific terms of the May 2007 Detainee Agreement and the fact that Brig. Gen. Grant had personally brokered a deal between the local heads of the AIHRC and the NDS to resolve such issues.

79. In the first two months of Brig. Gen. Laroche’s command, DFAIT carried out only two monitoring visits. {Footnote 91: there was only one visit in July 2007 and no visits in August 2007} On the second of those visits, DFAIT officials attended the Kandahar NDS facility on September 11, 2007, where two detainees were interviewed. Before the monitoring team had asked any questions of the first detainee, he suddenly announced that he had not been beaten. The second detainee did complain of abuse, alleging he had been punched in the mouth and hit on the buttocks and upper thigh.

80. Despite this report of abuse, the next DFAIT visit did not occur until more than ten days later, on September 23, 2007. On a visit to Sarposa prison, a detainee described being beaten badly with a power cable or wire on his side and buttocks. He also said that during NDS interrogation he was forced to stay awake for three to four days with his hands raised above his head.⁹³

81. Brig. Gen. Laroche and his chain of command, however, did not deem it necessary to suspend transfers following the abuse allegations received on September 11 and 23, 2007.

The *Globe and Mail* article of April 23, 2007, was now followed by a *La Presse* article that made a similar impact, albeit six months later. It took conscientious and effective news reporting to start the (so-called) monitoring regime and half a year later, it again took conscientious and effective reporting to show how ineffective that monitoring regime was (and, as a corollary, how effective the transfer regime was in supplying people who could be tortured or treated inhumanely). Between the above-mentioned September 23, 2007, report of abuse and the *La Presse* article at the end of October, there has been only one monitoring visit by Canada for that entire month.

82. On October 29, 2007, an article... was published in *La Presse*. Like [The *Globe and Mail*] before..., [La *Presse*] interviewed individuals who had been transferred by Canada to the NDS. The men claimed they had been abused, describing methods of torture such as sleep deprivation, electric shocks, pulled out fingernails, beatings with electrical cables and bricks, and being suspended by their arms. According to the article, Canadian officials refused to speak to the reporter. (“C’est vous, Canadiens qui êtes responsables de la torture... », *La Presse* [October 29, 2007])

83. Brig. Gen. Laroche went on a short leave in early November 2007. As a result of national security objections, th[e] [Military Police Complaints] Commission heard no evidence about how many transfer decisions were made during that time period. By that time, there had been only one more DFAIT monitoring visit since the two allegations of abuse in September. Brig. Gen. Laroche and his deputy commander Col. Christian Juneau agreed to prepare a memo for CEFCOM Commander Lt. Gen. Gauthier, highlighting the JTF-A Commander’s concerns about the post-transfer monitoring regime. According to the memo, Brig. Gen. Laroche had become concerned about the frequency of DFAIT monitoring visits and the lack of any additional information from any other source. Among other issues, he had not received a periodic assessment from DFAIT, nor had he received any information on the outcome of Afghan investigations into previous allegations of abuse. The recent [La *Presse*] Article with new allegations of detainee abuse was also noted. The memo did not remark on whether AIHRC access

issues had been resolved. The memo stated that transfers were continuing but may have to be suspended until “the monitoring and reporting situation improves.” The memo described the “light” for permitting transfers to continue as “amber”, “not red but not green either.”

84. It is unsurprising that Brig. Gen. Laroche was concerned about this complete lack of information. The Amplifying Guidance he received on September 12, 2007 emphasized that he and the chain of command had “an obligation to satisfy itself that all relevant information regarding the treatment of detainees while in Afghan custody is actively sought and considered”, and specifically cited DFAIT monitoring reports, periodic assessments and updates on Afghan investigations as relevant sources of information.” Brig. Gen. Laroche had continued to make transfer decisions for several weeks in the absence of any such information, other than the September DFAIT reports that contained abuse allegations.

Despite the in-theatre concerns put on the record following the La Presse article of October 29, transfers continued and a full week elapsed before the next monitoring visit. In addition, on this visit there was a major discovery that this time came with a torture implement. In General Laroche’s absence while on short leave, his in-theatre deputy-commander ordered transfers suspended – without seeking approval from Ottawa; this is now the third known suspension.

85. On November 5, 2007, DFAIT officials Nicholas Gosselin and John Davison visited the NDS facility in Kandahar. Only one detainee was interviewed. The DFAIT officials made the following disturbing report about what they learned during the course of that interview:

When asked about his interrogation the detainee came forward with an allegation of abuse. He indicated that he has been interrogated on 2 occasions by a group of 4 individuals. He could not positively identify the individuals but provided a general description of two of them. He indicated that he could not recall the first interrogation in any detail as he was allegedly knocked unconscious early on. He alleged that during the second interrogation, 2 individuals held him to the ground with his shawl while the other 2 were 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.

86. Witnesses testifying before this Commission agreed that in all likelihood this man had been tortured. It was confirmed during the hearing that Brig. Gen. Laroche made the decision to transfer him to NDS custody. The DFAIT report led to an immediate suspension of transfers by the acting JTF-A Commander, Col. Juneau. ...

This suspension lasted three and a half months, during which time more evidence of torture was discovered. Nonetheless, Ottawa decision-makers deemed it lawful / non-criminal to resume transfers – for reasons the ICC OTP can assess for itself but that on their face are less persuasive in the context of recurrent proof that transfers result in torture even when the monitoring regime is not an extensive one. It may not be a coincidence that the resumption decision was made just after Canada’s Federal Court ruled – inconsistently with Supreme Court precedent and relevant background rules on jurisdiction and responsibility under international human rights law – that Canada’s constitutional bill of rights (Charter of Rights and Freedoms) did not apply extraterritorially to Canada’s alleged participation in torture in another country in an armed conflict. The court also failed to be aware that the central decision-making on transfers – both setting up the system, continuing the system, and confirming transfer orders – took place in NDHQ in Ottawa not in Afghanistan, and that the Supreme Court of Canada had long since ruled that principles of territorial jurisdiction include crimes where some element/s has or have a ‘real and substantial connection’ to Canada. For their part, the Government apparently took this jurisdictional victory as a greenlight despite the judge lacing her judgment with expressions of concern that the transfer system could not be operated without exposing transferees to the risk of torture.

88. DFAIT continued to carry out visits following the suspension and several more allegations of abuse came to light. On November 7, 2007, two detainees were interviewed at NDS Kandahar. Both alleged they had been abused, including being beaten with an electrical cable and being forced to stand for an extended period of time. One said he was threatened with execution if he did not co-operate with the interrogation. On November 10, 2007, and November 11, 2007, no detainees indicated they had been mistreated, but two individuals reported that other detainees had been abused with wires and sticks during interrogation by the NDS. On November 27, 2007, two more detainees alleged abuse by the NDS. One detainee said he had been slapped during interrogation, but another made a far more serious claim, stating he “was beaten several times with a cable and was told he would be killed or sexually assaulted.”

90. The CF authorized the resumption of transfers to Afghan authorities on or about February 27, 2008, approximately three weeks after the Federal Court’s judgment. The

JTF-A Commanders appearing before this Commission testified that enhanced safeguards were put in place, including human rights training for the NDS and increased frequency of DFAIT visits. As well, a single NDS officer associated with the November 5 allegation had been removed from NDS Kandahar. However, the detainee interviewed on November 5, 2007, alleged that four NDS officers were involved in his cruel beating. There was no indication that the remaining three torturers had been removed from the institution. And while document disclosures to this Commission suggest that DFAIT visits to Afghan detention facilities were more frequent in 2008-09, there was still no requirement that every single detainee be visited post-transfer, as was originally recommended by Brig. Gen. Grant and others. Indeed, on some occasions, no interviews were conducted at all, and cursory physical examinations were deemed sufficient.

Footnote 111: *See, e.g.*, Email from KANDH-PRT-C4R (KANDH0061) (March 5, 2008) at para. 5 (“During our visit, we visually assessed the condition of all Canadian-transferred detainees currently held at the facility. A cursory examination of their condition revealed nothing out of the ordinary.”); Email from KAND-PRT-C4R (KPRT0078) (March 25, 2008) at para. 5 (“KPRT DFAIT/Gosselin conducted a tour of the old and new detention facilities and visually assessed the condition of all Canadian-transferred detainees currently held at the facility.”).

In other sections of the AI/BCCLA submissions, there is one other key form of evidence directly generated by Canada itself that can be attributed to key decision-makers in Ottawa in the key 2006-2008 transfer period, the reports of Foreign Affairs diplomat Richard Colvin in spring 2006 and the efforts to warn Ottawa in person in a meeting in early 2007 very shortly after Ottawa had decided to resume transfers after they had been suspended in November 2006:

54. Canadian diplomat Richard Colvin provided evidence to this Commission indicating that there were red flags concerning treatment of CF-transferred detainees in 2006. Mr. Colvin was posted to Afghanistan in April 2006 until October 2007. From April to June 2006, he was the acting DFAIT representative in Kandahar. According to Mr. Colvin, he received information in May 2006 from “very credible” sources that CF-transferred detainees were being abused in Afghan custody. As Mr. Colvin told the Commission, “the information was conveyed that there was mistreatment of detainees, not just a risk, but the fact of mistreatment.”

55. Mr. Colvin produced several emails to the Commission which show that he communicated that CF-transferred detainees were at risk of being abused. In May 2006,

Mr. Colvin widely distributed [within and across government departments and up to the most senior levels] an email report that he says raised concerns about the mistreatment of detainees post-transfer. The primary issues raised in the email was a complaint by the ICRC that the CF was not providing timely information about detainee transfers. However, the email also noted that the ICRC suggested “a lot can happen in two months.” Mr. Colvin expanded on these issues in a second email report in early June 2006, where he added a whole section on “Treatment of detainees by Afghan authorities.” Mr. Colvin noted that his source was speaking “in code” with “roundabout answers.” The source spoke about “unsatisfactory conditions”, and stressed that Canada’s responsibility for detainees did not cease because they had been handed over to Afghan authorities.

56. Mr. Colvin testified that while it is true his email report was written in the “code” of his source, he nonetheless believed that recipients would have fully understood what it meant. He said that, in the context of Afghanistan, it would have been clear that concerns about treatment would not have meant inadequate food or bedding. Mr. Colvin testified that Major Erik Leibert of the CF understood and agreed with his concerns, as he was consulted on the report. Major Leibert was not called as a witness in this proceeding.

...

61. [O]n March 9, 2007, officials from DND [Department of National Defence], CF, DFAIT and other government departments held a meeting in Ottawa to discuss issues concerning the transfer of detainees to Afghan authorities, including the Court challenge by the Complainants. There were approximately 12 to 15 people present, including Richard Colvin and Gabrielle Duschner, the Policy Advisor to CEFCOM Commander Lt. Gen. Michel Gauthier. Both Mr. Colvin and Ms. Duschner testified that Mr. Colvin told the group, “The NDS tortures people, that is what they do, and if we don’t want detainees tortured, we shouldn’t give them to the NDS.”

62. Ms. Duschner testified that she took notes of the meeting, but chose not to record Mr. Colvin’s comments, aside from the notation, “NDS torture, do we know for certain?” Mr. Colvin testified that the CEFCOM representative conspicuously “put down her pen” while he was talking about the NDS and torture. Ms. Duschner indicated that it appeared that Mr. Colvin’s comments were merely “a matter of opinion”, and therefore she did not take them seriously enough to write more. She did not recall if she reported Mr. Colvin’s concerns to Lt. Gen. Gauthier.

Further on in the narrative, AI/BCCLA link the evidence as it had emerged in the MPCC proceedings – of the known risk of torture coupled with a willingness to keep sending

detainees when nothing material in relation to transferees' safety has changed – to the standard of “substantial grounds” that there is a real risk of torture. I note here that we are only in agreement that “substantial grounds” is a correct statement of the law in cases where the risk is of the most serious kinds of harm (like torture) only if it is ‘read down’ to something much closer to a good reason to believe. The “substantial grounds” standard is otherwise at risk of importing notions that lean too closely to high probability to be justifiable as a standard when the cost of getting it wrong is maiming, death and so on.

106. Accordingly, pursuant to principles articulated under international law and adopted by the Canadian Forces, it is clear that the Canadian military cannot transfer individuals to the jurisdiction of a foreign power if it is established that there are substantial grounds for believing that these individuals may be subjected to torture in the receiving state. As we have detailed in previous submissions to this Commission, the threshold for establishing “substantial grounds” is a low one; rather than repeating the argument here, we respectfully refer the Commission to paragraphs 50 through 64 of our March 2010 Submission.

...

107. The Complainants' position for what constitutes “substantial grounds” is supported by the evidence of the international law experts. “Substantial grounds” may be established by presenting generalized evidence showing that members of a particular class of persons are subjected to torture and mistreatment. Professor Sassòli informed this Commission that with respect to threat of torture, it is sufficient to show that the transferee “may simply belong to a category of people who, according to the information, are sometimes tortured.” Such generalized information can come from human rights reports, such as those discussed [earlier in the submissions]. Indeed, according to Professor Forcese, Article 3 of the CAT requires states to scrutinize such “authoritative documents” to determine whether there are substantial grounds to believe that there is a risk of torture upon transfer. The onus is on the transferring state to satisfy itself that transfers are permissible. This understanding of the international standard is made clear in Lt. Gen. Gauthier's directive, discussed in paragraph 105, *supra*, where he places the burden on Brig. Gen. Laroche to determine whether transfers satisfy international law requirements.

...

109. Future risk of torture or abuse can only be determined by examining historical evidence of torture and abuse. As Professor Sassòli observed: “Obviously you can never – you can never have evidence for a future fact. So you will never have evidence that

someone will become tortured, but that other people in the same situation were tortured.”

110. The record is replete with evidence that detainees were at risk of post-transfer torture during the relevant time period. In addition to reports from the United Nations, the AIHRC, the U.S. State Department, and the Canadian government, there were newspaper accounts detailing specific instances of abuse and, most seriously, compelling, first-hand reports from post-transfer monitoring visits that documented allegations of torture and abuse. On the other hand, there has been no evidence presented to this Commission contradicting these consistent reports of systematic abuse and torture carried out by the NDS in Afghan prisons. None of the government witnesses have been able to testify, for example, that they have ever seen an NDS report outlining the results of its investigations into allegations of torture at its facilities. Nor has the government ever produced any such reports to this Commission. In light of this paucity of evidence, we submit that it would have been simply unreasonable for Canada or any of its agents to assume – or to conclude – that conditions in NDS facilities would be any safer than these many and various reports have indicated.

4. Evidence emerging from the MPCC proceeding (2): Final submissions of 2011 in relation to the general information environment regarding torture

The previous section dealt with all the specific evidence that Canada itself had generated – by investigative journalists and by government inspectors. The section ended by indicating how, even absent such compelling and constant direct evidence, it can be culpable to transfer if authoritative third party reports make clear there is a systemic propensity to, and thus a real risk of, torture. I reproduce passages from the 2011 AI/BCCLA submissions that summarize such authoritative evidence, which Canada appears to have largely ignored.

45. There is considerable evidence in the public domain about the pervasive nature of torture in Afghanistan. The United Nations, the U.S. government, and the Afghan Independent Human Rights Commission all concur that detainees are routinely tortured and otherwise abused in Afghan custody, and have so stated in publicly-available materials.

46. In March 2006, the U.N. High Commissioner for Human Rights, Louise Arbour, described torture in NDS custody as “common”:

The NSD [sic], 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. Multiple security institutions managed by the NSD, the Ministry of the Interior and the Ministry of Defence, function in an uncoordinated manner, and lack central control. *Complaints of serious human rights violations committed by representatives of these institutions, including arbitrary arrest, illegal detention and torture, are common. ...*

47. The U.N. Secretary-General submitted two reports in 2007 to the U.N. General Assembly regarding the work of the United Nations Assistance Mission in Afghanistan (“UNAMA”). Both reports expressed the U.N.’s concern about torture and ill treatment in Afghan custody. Notably, the Secretary-General highlighted the fact that UNAMA continued to “receive and verify” complaints about torture in custody. These findings led the U.N. to emphasize that the Government of Afghanistan needs to investigate allegations of torture by authorities, “in particular by the National Directorate of Security”.

48. The U.S. State Department has repeatedly reported on “torture and abuse” in Afghan custody, and described some techniques in use such as “pulling out fingernails and toenails, burning with hot oil, beatings, sexual humiliation, and sodomy.” The U.S. State Department has also found that security forces are responsible for extrajudicial killings.

49. The Afghan Independent Human Rights Commission (“AIHRC”) is a branch of the Afghan government, established under Article 58 of the Afghan Constitution to monitor “the observation of human rights in Afghanistan”. For its 2004-2005 Annual Report, the AIHRC aggregated data on the number of complaints of torture and extra-judicial killing, and reported:

Torture continues to take place as a routine part of ANP [i.e. Afghan National Police] 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. High numbers of complaints of torture were received from all regional offices in the past year.

50. Canada’s Department of Foreign Affairs and International Trade (“DFAIT”) has long been aware of the perniciousness of torture in Afghanistan. DFAIT conducts annual reviews of the human rights situation in Afghanistan. For several years, these reports have affirmed the consensus that torture and other serious human rights abuses are prevalent.

51. In the DFAIT report for 2006, released in January 2007, the Department concluded, “Extrajudicial executions, disappearances, torture and detention without trial are *all too common*.” The 2006 report elaborated that “military, intelligence and police forces” have all been accused of torture and extrajudicial killing of suspects in detention. Similar to the U.N. Secretary-General and High Commissioner for Human Rights, DFAIT singled out the National Directorate of Security as an agency of particular concern for practising torture.

52. Previous annual DFAIT reports on Afghanistan have described human rights violations such as torture and killing as “*widespread*” and “*visible and flagrant*”. In the 2003 report, DFAIT provided details on the nature of 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.

5. Evidence emerging from the MPCC proceeding (3): Final Report of 2012 and the concerns it raises about the practices of government officials other than the Military Police

The MPCC ruled that none of the impleaded Military Police officers had sufficient access to the knowledge environment (generally speaking, related to detainee treatment post-transfer and related to the safeguards government claimed to have put into place to reduce risk of torture) in their specific position at the relevant time covered by the complaint to be deemed to have fallen below the professional standards of police officers’ duty to investigate in applicable Canadian law. Much of the reasoning of the MPCC on each officer revealed how many constraints there were on that officer, in his particular institutional location, to have put together the pieces to form a reasonable suspicion commanding officers may have been acting illegally in ordering transfer of detainees. For one or more officers, when information was adequate to prompt reflection on whether to investigate, there were mitigating circumstances in the form of a reasonable belief that investigation was being looked at by other actors in the MP system. For one or more others, they were no longer in their role when information may have gelled to the point that it could no longer be ignored with some expecting that their successor/s would be investigating. In other words, the MPCC interpreted the evidence in a way that was generous to the situation of the Military Police. While I do not necessarily agree with the conclusions with respect to all eight military police, I

respect the care taken by the MPCC in its assessment of the evidence and its appreciation for the multiple moving parts that affected the judgment of the military police as to whether they needed to investigate at the precise moments in question.

Hanging heavy over the entire Final Report is the implication and at times the near-explicit MPCC observation that it was others who had the information that would make their involvement in the transfer system unlawful. But the MPCC was severely hampered by the fact that, on the one hand, a Federal Court judge had ruled in one proceeding that the MPCC had to jurisdiction to enquire into the operational role of MPs in the transfer system and, on the other hand, by the same judge setting down inquiry parameters in the ‘failure to investigate’ proceedings that were virtually a warning to the MPCC not to look into what others in government knew but only to look into what the Military Police officers knew. The MPCC itself reported on the judge’s ruling:

Justice Harrington also held that in conducting its inquiry into the failure to investigate complaint, the Commission could inquire into what the MP knew or had the means of knowing:

Thus, while the Commission may legitimately inquire as to what any member of the MP *knew, or had the means of knowing*, it would be an excess of jurisdiction to investigate government policy and to inquire as to the state of knowledge of the Government of Canada at large, and more particularly the DF AIT, and to the extent, if any, it had relevant information to question why that information was not shared with the MP. [Emphasis added.]

After September 16, 2009, the Commission attempted to move forward with public interest hearings into the failure to investigate complaint dated June 12, 2008, and only that portion of the complaint.

It was within this stricture that the MPCC had to operate. But it was able to interpret its mandate with respect to the “means of knowing” in such a way as to allow it to look to some extent at what it called the “knowledge environment” of each MP. The MPCC may have been skirting close to what the Federal Court had warned it not to do, but it nonetheless managed here and there in its 500-page report to provide useful information about what other decision-makers may have known – and, perhaps more importantly, how other decision-makers acted in relation to such information. The entire report needs to be read by ICC OTP to discern the indicators that can provide investigative pathways with respect to such decision-makers, but several sections are worth drawing attention to here. The first is the military side of central decision-making on detainees in Ottawa. Again, as you read this, you must keep in mind that

government witnesses knew that they were not supposed to be probed beyond what was relevant to determining what the MPs knew (and accordingly they were often able to be very unforthcoming) and the MPCC knew that, if its report contained any speculation beyond reporting background knowledge-environment facts, the government would likely go to court to strike the report or have it heavily redacted.

The following (with my underlining of some passages for emphasis) provides a valuable overview of the sequestering and management of information at CEFCOMM, which may prove very useful as one starting point for understanding centralized decision-making within the military chain of command (even as the MPCC, per Judge Harrington's admonition, did not look at other facets of that central command – e.g. the PMO and DFAIT):

12.2 The CEFCOM Information Environment

In this section the Commission considers the information environment at CEFCOM, to determine whether the CEFCOM Provost Marshals, and through them, other MPs, were or could have been privy to information about the post-transfer treatment of detainees. First, we describe CEFCOM, the role of the CEFCOM PM, the different personnel at CEFCOM, and the information environment at CEFCOM with respect to detainees. Following this, we describe certain actions taken by two CEFCOM PMs, actions that could loosely be described as investigations of a non-policing nature, when those PMs were faced with information about post-transfer treatment and the stoppage of transfers.

This section also describes how, with the implementation of the new transfer arrangement in May 2007, the Provost Marshal at CEFCOM and the military police in general were purposefully removed from the information gathering process for transfer decisions and post-transfer treatment, in favour of a non-MP detainee officer. It was evident to the Commission that the CEFCOM Provost Marshal, post-May 2007, was not privy to the decision-making process of individuals such as LGen (ret'd) Gauthier and the Task Force Commanders in theatre, when it came to deciding whether to stop, start or pause detainee transfers in Afghanistan.

CEFCOM stands for Canadian Expeditionary Forces Command. It is the headquarters for all CF overseas operations.....

Certain key individuals must be mentioned, given their role at CEFCOM relative to detainees. One of them is LGen (ret' d) Michel Gauthier, who, during the timeframe of this complaint (May 2007 to June 12, 2008), was CEFCOM Commander. He held the post from February 1, 2006 to August 17, 2009. Another key figure was LGen Andre

Deschamps, who was Chief of Staff Operations from May 2006 to September 2008, again covering the whole timeframe for this complaint. Often referred to as the COS Ops, the Chief of Staff Operations was the head of operations at CEFCOM. His role was to manage the staff, and he described himself as the "chef d'orchestre". The Commander decided what to do, and the COS Ops worked with the staff to make it happen.

The only commanders with a say in whether to halt or start detainee transfers were the Task Force Commanders in theatre, LGen (ret'd) Gauthier, and the CDS, General Rick Hillier.

Another important position at CEFCOM with respect to this complaint is that of CEFCOM J9. The J9 was the section at CEFCOM dealing with political advice and political and policy affairs. Ms. Gabrielle Duschner held the J9 position at CEFCOM from December 2006 to November 2008. She was both part of the 19 staff and a policy adviser. As J9, she reported to the Chief of Staff Operations (LGen Deschamps), but in her role as policy adviser she reported to LGen (ret'd) Gauthier. In testimony, Ms. Duschner indicated, within CEFCOM, she worked closely with the Commander, the Chief of Staff Operations, the J3 (Operations), and the J5 (planning). Indeed, she had some type of a working relationship with almost everybody at CEFCOM, but did not have a close working relationship with the CEFCOM Provost Marshal. Ms. Duschner was the major conduit at CEFCOM between DND/CF and other government departments such as DFAIT. Ms. Duschner was the entry point at CEFCOM for post-transfer site visit reports on the treatment of Canadian-transferred detainees.

During the timeframe of this complaint, one military police member worked at CEFCOM – the CEFCOM Provost Marshal. Two individuals held that position at different times, LCol (then Major) Boot and Maj Laflamme, while a third, Maj (ret'd) Rowcliffe, held the CEFCOM PM position prior to LCol Boot. Maj (ret'd) Rowcliffe was the first CEFCOM PM after CEFCOM was created, holding the position from February 2006 to July 2006. He testified that he was a "branch of one", and a branch head. He reported to the CEFCOM Commander, but he would not deal with the Commander on a daily basis. ...

Maj (ret'd) Rowcliffe pointed out that, unlike all the other branch heads at CEFCOM, the Provost Marshal was a Major. This did not mean, in his opinion, that he was denied access to information because of his rank, but being only a Major was a limitation in the following sense: "Majors are usually staff officers in a headquarters of that size and magnitude, and so not having the rank of the other branch heads, at least Lieutenant-Colonel, was certainly one of those obstacles [...]."

According to Maj (ret'd) Rowcliffe, the CEFCOM PM would be consulted by the non-MP staff at CEFCOM on a number of issues, including planning and policing security for

new missions, serious and sensitive investigations in theatre, and detainee issues (including the length of transfers and situations where the detention and transfer process was not flowing properly)....

The pace was such that, by July 2006, Maj (ret'd) Rowcliffe felt he needed to leave in order to avoid burning out.⁵³² When he left, he said he was not sure if the staff at CEFCOM knew what the PM's role was, and when he should be engaged: "Now, unless the commander or some senior staff says, 'You know what, we need to engage the Provost Marshal on this', then the Provost Marshal wouldn't be engaged and wouldn't know about it."

...

[T]here is some evidence MP inquiries into the status of detainees and the detainee process would perhaps have been unwelcome at CEFCOM as being beyond the MP mandate. For example, MGen Mike Ward, who was the COS Ops at CEFCOM before LGen Deschamps, was asked about Maj (ret' d) Rowcliffe having raised concerns at CEFCOM about the lack of posttransfer follow-up on Canadian-transferred Afghan detainees:

Q. [...] So you don't remember this particular conversation about Major Rowcliffe and his concerns about post-transfer follow-up. That's fine. But if we accept that he raised it with you or with General Gauthier, do you see this as an MP stepping out of his role, going a little too far in terms of what he's advising you and his seniors at CEFCOM about the concerns he's raising?

A. You know, it's a good question. I'm not sure what he had in mind at that point in time. Certainly the MPs had a full plate of activity to look after, just those three or four functions I described for you earlier. Anybody might have had the same concerns, but, you know, I - I don't think they- yeah, I guess they were outside the lane.

...During his time at CEFCOM, Maj (ret'd) Rowcliffe stated he did not normally interact with the J9. LCol Boot described his interaction with the J9 during his time at CEFCOM as informal. He had "no visibility" on the information that came to her, and in particular did not have access to her C4 network- the internal, protected information network used by DFAIT. Maj Laflamme testified the J9 (Gabrielle Duschner) never transmitted information to him, not even during informal encounters.

...

This section addresses the information environment at CEFCOM with respect to detainee treatment post-transfer. It is followed by an examination of MP access to that same type of information.

One of the principal means of conveying information about detainees to a broader audience at CEFCOM was via the morning briefings to LGen (ret'd) Gauthier. Every day, 30 to 45 minute briefings occurred where an update was provided on all that was happening in the various theatres, including, of course, Afghanistan. However, sensitive information was not usually discussed at these morning briefings. Instead, with respect to detainees, only general information was conveyed about the number of captures, releases, etc. In his testimony, LGen Deschamps seemed to indicate, at first, that if a clear allegation of abuse post-transfer was made, it would be discussed at the operations group meeting. However, he also said the discussion would be political, and not military, so this type of information was not given to all the staff at CEFCOM for work purposes. Moreover, he said follow-up or discussion on the topic would be done with the Commander, within a more restricted group, which included the Commander, COS Ops, JAG and the POLAD. Indeed, Maj Laflamme confirmed this in his testimony, referring to the "groupe selectif", that is, the exclusive group of people that dealt with detainee affairs at CEFCOM, beyond the general discussions that occurred at the morning briefings. He, too, confirmed the composition of this group to be LGen Deschamps, the J9 Gabrielle Duschner, LGen (ret'd) Gauthier, and the JAG.

The point of entry for operational information (not including DFAIT and CSC information) about detainees at CEFCOM, from May 2007 to June 2008, was the detainee officer, who was not a military police member. As explained below, the detainee officer position had been created recently (May 2007) as a result of a deliberate reorganization of how information about detainees would be circulated. The Commission learned, prior to this reorganization, at least on the operational side, the CEFCOM PM was more involved as a repository for information on detainees.

The J9, Ms. Duschner's office, was another point of entry for information about detainees, from the political side. In particular, the DFAIT site visit reports that began to be created with the new transfer arrangement of May 2007 would arrive at CEFCOM through her. She viewed almost all of the significant incoming correspondence and material on detainee issues from other departments, including the C4 traffic with the site visits and other detainee related information from DFAIT. Ms. Duschner's practice regarding C4 information was to print it when it arrived, and make three copies: one for the COS Ops (LGen Deschamps), one for the Deputy Commander, and one for LGen (ret'd) Gauthier. If the C4 traffic related to post-transfer visits, including the DFAIT site visit reports, her practice was to provide it to the three generals mentioned, and then to the detainee officer, and the legal adviser from JAG. Ms. Duschner agreed the distribution of the site visit reports at CEFCOM was limited, and the reports usually had an instruction on them that they were "Not for forward distribution".

Gabrielle Duschner also viewed C4 traffic from Richard Colvin. She knew him to be charge d'affaires at the embassy in Kabul, Afghanistan. She knew this was a senior position, just below the ambassador. She met him in person at least once, at an interdepartmental meeting held on March 9, 2007, and took notes from that meeting. The meeting was held to explore various options for the creation of a new transfer regime. Interestingly, therefore, even before the *Globe and Mail* articles... on April 23 and 24, 2007, the Government was looking at changing the detainee transfer regime. At that March 9, 2007 meeting, Mr. Colvin spoke, and provided his views on transferring detainees to the NDS. He said something to the effect that Canada should not transfer detainees to the NDS if we did not want them tortured. Ms. Duschner specifically recalled Mr. Colvin's comment to this effect. At the time, she made a note saying: "NDS torture, do we know for certain?" Mr. Colvin's comment about the NDS torturing people was followed by what Ms. Duschner described as an "[u]ncomfortable silence or pregnant pause, I do not know."

Ms. Duschner's normal practice after a meeting like the interdepartmental meeting on March 9, 2007 would have been to go back to LGen Deschamps and give him a verbal debrief of what happened. She could not specifically recall if she did so this time. General Deschamps could recall no such discussion, but did say he recalled one of Mr. Colvin's themes or concerns, in his C4 reports, to be better follow-up post-transfer.

Ms. Duschner was asked whether, prior to the [Globe and Mail] article, detainee abuse post-transfer was a significant concern at CEFCOM, and replied it was a concern: "There had been discussions from a whole-of-government perspective." She was also asked whether, prior to the article, there was a general awareness that prisoners being transferred to Afghan authorities might be subject to abuse, to which she replied: "We were certainly aware that there were media reports and discussions along those lines, yes." Ms. Duschner stated allegations of detainee abuse became more of a subject of conversation after the release of ...*Globe and Mail* article. Allegations of detainee abuse also became a topic of discussion when reports arrived on her desk after the new transfer arrangement was put in place. She was referring to reports containing allegations of abuse, including the November 5, 2007 site visit report where allegations of torture were made and the implements of the torture were found at the same time.

LGen (ret'd) Gauthier testified reports relating to the treatment of detainees post-transfer in Afghanistan came to him by various means, in addition to the C4 traffic provided to him by Gabrielle Duschner:

Any number of means, as with just about anything else that was reported from the field. I had regular telephone conversations with the Task Force Commander

or his deputy, depending on who was in a position to make the phone calls at the time.

I had regular video teleconferences, face-to-face, so you are actually able to get more of a feel for the state-of-mind of the individual at the other end.

I received military reporting which, in certain circumstances, might have made reference to allegations.

Then, of course, there was the C-4 traffic which would have been disseminated through the system for which we had two or three terminals, I think, in CEFCOM.

By and large, either of the J9, my J9 PolAd, or my Operations Centre would ensure that those reports got to me if I happened to be in CEFCOM Headquarters at the time.

The Commission also heard evidence about a risk assessment matrix that was developed over time, to be used as a tool by the Commander in theatre when deciding whether it was appropriate, or too risky, to transfer detainees to the NDS. LGen Deschamps, for example, described how he viewed this document when it was being developed by Gen Laroche in theatre. LGen Deschamps said he never saw a completed version of the risk-assessment matrix, which he believed was retained by the detainee officer in the Afghan theatre.

Beyond these formal means of distribution of information, detainee abuse and the results of DFAIT site visits were not discussed openly and widely at CEFCOM. One of the more curious but more revealing comments received during testimony from CEFCOM witnesses was the comment from MGen Ward, who was asked (although not privy to DFAIT site visit reports in a direct sense) if he had heard water cooler conversation at CEFCOM that reports revealing abuse were coming back from Afghanistan. He answered "no" and stated that discussing detainees was the "conversation killer at the water cooler".

...

This section deals with the availability of information regarding the post-transfer treatment of Canadian-transferred detainees to the CEFCOM PM in particular, and, potentially, through him to other military police, such as the CFPM, the TFPM in Afghanistan, and the CFNIS (the investigative body within the MP structure that would have been responsible for investigating the legality of the detainee transfers if an investigation were to take place).

The Commission concludes the CEFCOM PM did not have ready access to information about the post-transfer treatment of Afghan detainees following the new May 2007 transfer arrangement and the resumption of transfers. Indeed, it appears he was not meant to have access to that information. A reorganization of the distribution of information about Canadian detainees was put into place at the same time as the May 2007 transfer arrangement and the start of site visits. This new arrangement created the position of the detainee officer, and also ensured that MPs would not be the repository for information about the post-transfer treatment of detainees and any reports or allegations of torture. That is not to say the CEFCOM PM was not privy to any information about allegations of detainee abuse post-transfer, but, for the most part, that information appears to have predated the new arrangement, the resumption of transfers, and the start of site visits by DFAIT.

In sub-section 2, mention was made of another MPCC public interest hearing and report (MPCC-2007-003, of April 23, 2009), which arose as the consequence of a complaint from Professor Amir Attaran who had received documents in an access to information request that suggested there may have been abuse of a detainee in Canadian custody. In the result, the MPCC and the Canadian Forces National Investigation Service (CFNIS) each concluded there had not been abuse, and that injuries had occurred in the context of subduing a person resisting capture.

However, in that final report in 2009, there is much parallel information on CEFCOM's approaches to detainees. Notably, the MPCC provides another telling example of CEFCOM's treatment of 'external interference' as very unwelcome beyond the above hints of such an attitude in the 2012 MPCC report:

139. In light of the foregoing [showing a lack of interest of in-theatre Military Police in Afghanistan to adopt a policing approach in relation to in-custody harm of a detainee], it is all the more ironic that the need for further enquiry or investigation regarding the injuries to D3 was flagged by a DFAIT official, with no background either in the military or in policing. The official had been one of twelve recipients of an email sent on April 10, 2006, from DND's Directorate of Peacekeeping Policy (D PK Pol). The purpose of this email was to forward information on the detainees and their transfer to those at DFAIT who had involvement or interest [THERE FOLLOWS FOUR LINE-INCHES OF REDACTION] of the capture and transfer to Afghan authorities of the detainees, such notification being a DFAIT responsibility. The email included the names of

the detainees, date of capture and date of transfer to Afghan authorities, and a brief description of each detainee's physical condition.

140. The email's description of D3's physical condition merely indicated "lacerations on face, swollen eyes, and contusions on arms, back and chest," struck DFAIT's Deputy Director for UN Human Rights and Humanitarian Law Section (UNHRHLS) as being atypical of battlefield injuries. After discussing the matter with her superior, this official sent a reply email on April 12, 2006, to D PK Pol at NDHQ and to all recipients of the April 10 message. The message would turn out to be rather prescient. It requested from DND further details as to:

[...] how and when specific injuries of the three detainees were received (e.g. were they resisting arrest)? We would like to be satisfied that no allegations of mistreatment will arise against the CF as a result of these arrests, detentions and transfers.

141. There was never a reply to the email of the DFAIT official. Nor does there appear to have been any follow-up within DND. DND's D PK Pol Director at the time felt that it was inappropriate for the DFAIT official to query and second-guess the CF chain of command on a military matter such as this. Indeed, it would appear that the only actions taken as a result of the April 22, 2006 email from the DFAIT official was an effort by D PK Pol to communicate indirectly, through a mutual DFAIT colleague, the unwelcome nature of the DFAIT official's intervention. For her part, the DFAIT Deputy Director for UNHRHLS advised the CFNIS during her interview that her purpose in sending the email was to ensure appropriate "due diligence" was demonstrated, rather than reflecting any personal belief that there had been abuse or mistreatment of the detainee by CF personnel. (my emphasis)

6. The strong possibility that some transfers or parts of the transfer system were fueled by a wish for intelligence generated through interrogation by the National Directorate of Security (NDS)

My assumption is that evidence may reveal that *some* of the key persons within the decision-making system regarding detainee transfers were 'only' knowingly "contributing" to cruel treatment and torture by a group with a common purpose and

thus individually responsible under Art 25(3)(d). This is clearly a war crime, indeed a serious one.

However, the most serious possibility is that there was, on the part of at least some other actors in the system, some Article 23(3)(c) knowing “facilitate[ing], aid[ing], abet[ting], or otherwise assist[ing]” in a shared purpose of extracting information through interrogation that included, when NDS decided it wished to, torture.

Evidence and evidentiary pathways with respect to this disturbing possibility will be conveyed separately. It will relate *inter alia* to:

- the role of NDS in military intelligence flows to Canada and the value placed by Canada on such flows;
- a posture of willful blindness to torture that has been reported as having been adopted by some Canadian military liaisons working in Afghanistan;
- a recent effort at the highest level of the current government to mislead about military structures in Kandahar that were conduits for NDS-derived information;
- intelligence dimensions of the decision by the United States to back Canada to take over in Kandahar Province in 2006;
- CIA-NDS interfaces; and
- animating rationales for the top levels of the Canadian military to prize and prioritize smooth and deep relations with the US military in the context of Afghanistan.

7. The significance of a category of captives labelled “PUCs” (or “Persons under control”) and the like

The existence of a category of “PUCs” was outlined in sub-section 2 above.

In 2007, as an interim outcome of litigation by AI and BCCLA to try to have transfers stopped by court order (using Canada’s Charter of Rights and Freedoms), the Government of Canada was forced to release a number of documents. The applicants in the case then merged the documents and made the overall document searchable. The resulting PDF has been archived here on a website established by lawyer for AI and BCCLA, Paul Champ, and professor of law Amir Attaran who was at the forefront of Access to Information Act efforts regarding detainees: online [here](#) (“Government Disclosure of November 14, 2007”). It is over 1000 pages long and massive in size (some 230 MB), so be aware that it may take some time to render while being downloaded.

Whole swathes and many separate portions were redacted before the release, making this just one of the document sets (alongside those released through Access to Information Act requests, and so on) to which, two and three years later, the House of Commons Special Committee sought uncensored access. However, those performing redactions did leave visible three references to some category/status of captive known as “PUCs” (which subsequent research reveals stands usually for “Persons under control” although sometimes also as “persons under care” or “persons under/in custody”): see pages 856 and 914. These references eventually helped lead journalists and parliamentarians to ask what had happened in one captive-transfer incident where the term “PUC” was used, albeit with little if any focus on why the term was being used.

It is the significance of the very use of the term “PUC” – and the possible reasons behind it – that I ask the OTP to consider. I also ask the OTP to recognize that only a fulsome investigation can determine (a) whether or not there was a kind of ‘official unofficial’ category for captives that Canada decided should not be labelled “detainees” such as not to attract obligations to keep internal detainee records or to report the capture (and thus any subsequent transfer) to the ICRC and (b) whether the fact of the transfer of possibly many “PUCs” under this guise is an additional war crime alongside the transfer of recorded and reported “detainees” primarily to the National Directorate of Security (NDS).

In the latter case, the transfers to the NDS were transfers to an agency widely known to systematically use torture including for purposes of intelligence extraction and for purposes of forcing confessions, with some concern that some who ended up with NDS also disappeared – either at the hands of NDS or at the hands of third parties to whom NDS passed them on (such as the US’ CIA). It is the Canada-to-NDS transfer that has received the most sustained attention, in Canada and globally, but I urge the OTP to investigate how the category of PUCs / Persons under custody was used – not just by Canada but by different actors, each of whom may have used the term in slightly different ways.

In the case of PUCs, it would appear that the transfers may mostly if not almost entirely have been to either the Afghan National Police (ANP) and Afghan National Army (ANA), with the resultant significant risk of cruel treatment (physical harm without the purposes attached to the torture definition in the Rome Statute’s Elements of Crimes) and of extrajudicial execution – and of disappearances presumptively meaning extrajudicial execution preceded in some cases by cruel treatment.

Under separate cover, I will provide the results of initial research into the origins and conflicting usages of the term “PUC” by both American forces and Canadian forces, and in Iraq as well as Afghanistan.

8. The potential significance of a provision in the December 2005 Canada-Afghanistan transfer agreement

The ICC OTP’s attention will have been drawn on multiple occasions to various features of the December 3, 2005, MoU/“arrangement” entered by Canada’s Chief of Defence Staff Hillier and Afghanistan’s Minister of Defence Wardak. The Prosecutor herself notes in footnote 431 of her November 20 application that this instrument contains no provision for Canada to monitor transferees after being transferred to Afghanistan, in contrast to what other states in ISAF made sure was part of their transfer agreements with Afghanistan.

There are a number of contextual factors related to this agreement that will, I believe, prove very relevant in understanding the understandings, intentions and motivations of key members in the military chain of command, which the ICC PTP has likely already noted (beyond the lack of a monitoring regime), such as:

- How the CDS was aware well ahead of the signing of the document that other states had entered into agreements that structured post-transfer monitoring by those states, yet he resisted inclusion of such provisions in Canada’s document on the basis of a claimed respect for Afghanistan’s “sovereignty” and despite the transferring state’s duties under Article 12 of the Third Geneva Convention on Prisoners of War to ensure the receiving state is willing and able to protect the transferee and to intervene on the transferred prisoner’s behalf when the transferring state learns of abuse in the hands of the receiving state.
- How the Canadian Chief of Defence Staff (CDS) proactively sought out the Afghan Defence Minister to sign this document while an election campaign was going on in Canada and the Defence Minister preoccupied with it, without (as revealed by an answer to an Order Paper Question that I submitted while an MP) making an effort to get the direct authorization of the Minister of Defence – let alone trying to arrange for the agreement to be entered into on a proper state-to-state basis.
- How the government in 2006 then sought to treat the December 3 “arrangement” as secret, invoking as part of its claimed right to do so that the arrangement was

not a treaty (quite possibly a line adopted because of the inappropriate role of the CDS in signing the instrument without, it may turn out, properly delegated powers to do so on Canada's behalf).

- How that claimed non-binding status never prevented the government from subsequently invoking the arrangement as part of its constant claim to have had assurances from Afghanistan that detainees would not be abused.

All of these dimensions are of importance, but one element of the agreement's text also needs close attention, article 8:

A Detaining Power, can be either a Transferring or Accepting Power, and will be a Power which detains the detainee for any period of time beyond that reasonably required between initial capture and transfer. The Detaining Power will be responsible for classification of detainee's legal status under international law. Should any doubt exist whether a detainee may be a Prisoner of War, the detainee will be treated humanely, at all times and under all circumstances, in a manner consistent with the rights and protections of the Third Geneva Convention, even if subsequently transferred to the custody of an Accepting Power.

The underlined sentence appears to be an effort to unilaterally (or bilaterally) re-define the generally applicable international law rules on when a state becomes a "Detaining Power" in such a way that a state like Canada can claim never to have been a detaining power if they held a captive no longer than a "time reasonably required" to pass on to the other state, here, Afghanistan. If this is the import of the underlined words, this appears to contrast to the general understanding of the meaning of "Detaining Power" under Article 12 of Geneva Convention III, which I reproduce below for convenience of reference:

Prisoners of war are in the hands of the enemy Power, but not of the individuals or military units who have captured them. Irrespective of the individual responsibilities that may exist, the Detaining Power is responsible for the treatment given them.

Prisoners of war may only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention. When prisoners of war are transferred under such circumstances, responsibility for the

application of the Convention rests on the Power accepting them while they are in its custody.

Nevertheless, if that Power fails to carry out the provisions of the Convention in any important respect, the Power by whom the prisoners of war were transferred shall, upon being notified by the Protecting Power, take effective measures to correct the situation or shall request the return of the prisoners of war. Such requests must be complied with.

According to the authoritative 1960 commentary on Article 12 by the ICRC, reading Article 12 text as a whole and in light of its purpose, “Detaining Power” is tied to the notion of capture and means “the Power to which ‘the individuals or military units who have captured them’ are responsible” and “the State which has captured prisoners of war and consequently is responsible for them.”

While the Afghanistan situation appears to be characterizable as a non-international armed conflict (at least following the creation of a post-Taliban government) such that Article 12 may not apply automatically, the question is whether a state or two states together can simply define away “Detaining Power” and thus “detainee” (such that the capturing power – Detaining Power in fact – can simply remove its responsibility under Article 12 or under analogous rules with the sweep of a pen).

Quite obviously, the ICC OTP will wish to look into the legality of this effort by Canada – keeping in mind the document was drafted entirely by Canada and presented to Defence Minister Wardak as a *fait accompli*. But just as importantly, I urge investigators to consider whether article 8 of the 2005 Canada-Afghanistan agreement may turn out to reflect a well-planned advance intention by Canada’s military chain of command to create a category of captives who would not be “detainees” (because Canada would supposedly not be “Detaining Power”) – thus explaining the existence of the category of PUCs or captives denominated anything but “detainee.” It very much appears there may be a direct link.

That this may turn out to be the case is reinforced by the multiple pieces of evidence now in the public domain that Canada’s military policy prior to the May 2007 revised agreement was one of rapid transfer – whether in relation to Special Forces transfers to the US or NDS, or regular forces transfers to different ANSF agencies including NDS. The MPCC in its 2009 report on the treatment and subsequent transfer of three “detainees” noted at a number of points this policy of snap release, the issue having arisen because Military Police testified that they scrambled in the early hours of the

morning to transfer the captives that had come in from the special forces in the field as immediately as possible. This had special import in the context of that MPCC hearing because the transfers on to Afghanistan went so far as to mean the Military Police transferred the quite seriously injured Detainee 3 even before there was sign-off that he was medically releasable; it also meant that they short-circuited information gathering and recording in order to transfer the detainees. At para 30, the MPCC writes:

In the case of D3 specifically, the notation of the MPs was that:

Detainee was not processed or interviewed due to his medical condition. Unable to process due to the wish from higher insisting on his transfer prior to being processed or undergoing a medical release. (my emphasis)

The *Globe and Mail* reported on a briefing note written by the in-theatre commander at the time, BGen David Fraser, on April 12, 2006, in which he said: “Detainee transfer went well, even though it was not as fast as we would have liked.” (my emphasis) (Paul Koring, “Detainee briefings routine in ‘05”, *The Globe and Mail* (February 9, 2007)).

Recall, as noted in sub-section 2, that these three captives may never have been designated “detainees” if they had not been sent in to KAF from the field. They might instead of fallen into the quick-release paradigm that article 8 of the Canada-Afghanistan agreement builds in the notion that a ‘Capturing Power’ can escape being a “Detaining Power” by transferring the captive in a “reasonabl[e]” time between “initial capture and transfer.”

It seems impossible to ignore the potential connections between what may turn out to be a large-scale Canadian practice of sending captives to Afghanistan while declining to designate them as “detainees” (but instead PUCs or the like) and the carefully drafted text of article 8.

9. The timing and nature of legal advice

In general, the public has not come to know the content of legal advice given by Canadian government lawyers to various actors in relation to the Afghanistan situation. Such opinions have been refused based on the invocation of solicitor-client privilege as an exception under the Access to Information Act. For example, when an *ad hoc* Committee of Parliamentarians was created to deflect a showdown between the House of Commons and the Harper government (discussed below), documents assessed by the government and a panel of arbiters as solicitor-client communications were completely

excluded from being seen by the six participating MPs; this was one of the key reasons that a fourth party, the New Democratic Party, refused to participate in the process.

One small exception is a glimpse at a legal opinion by then Judge Advocate General of the Canadian Forces, Ken Watkin – a glimpse in the form of a single paragraph quoted in a news report after a journalist had access to a copy. The news story indicates it was a five-page memo and was written on May 22, 2007. The legal memo's existence only became known a full three years after it was written when the *Toronto Star* reported on it as a leak and quoted a one-paragraph extract on February 25, 2010. To re-orient the reader of this brief, May 22, 2007, was a month after the first Byers-Schabas letter was sent to Prosecutor Ocampo (and made public) and similarly almost a month after the first *Globe and Mail* article was published that set out in great detail the testimony about torture of some 30 Afghans who appear to have passed through Canadian hands on their way their abuse.

One passage of the Watkin memo is reported to read as follows:

Military commanders who know, or are criminally negligent in failing to know, that a transferred detainee would be subjected to such abuse have the obligation to take all necessary and reasonable measures within their power to prevent or repress the commission of such abuse. They may also be subject to criminal liability for failing to submit the matter to competent authorities for investigation and prosecution.

The entire Watkin memo (or other parts of it) has not been released or published, although, obviously, the *Toronto Star* does appear to have at least seen a copy. It could be important for the ICC OTP to secure a copy of it.

This small leak to the press serves to underline that it will be crucial for an ICC investigation to follow the path of the role of lawyers and their legal advice – which may especially come up as an issue if and when individuals seek to plead legal advice as a shield or mitigating factor.

This includes understanding the cross-departmental role of lawyers meeting and coordinating legal responses on the multiple fronts the last government was fighting transparency in relation to Afghan detainee transfers.

A separate communication will be conveyed that discusses the progression from (the little that is currently known about) the Watkin memo of May 22, 2007, to the reference to a legal test in the earlier-reproduced passage from Lt. Gen. Gauthier's *Amplifying Guidance* of September 18, 2007.

10. Efforts to create plausible deniability through undercutting monitoring

Evidence in relation to the articulation and timing of legal tests mentioned in the preceding section will be connected to and accompanied by evidence related to what appear to be coordinated efforts to undercut the post-2007 MOU monitoring regime. If it functioned effectively, such a monitoring regime would create a “knowledge environment” that would make it all but impossible to continue with any transfers at all – a result (i.e. ending transfers) key decision-makers in Ottawa seem to have wanted to avoid. This includes what appear to be well-lawyered efforts in the summer of 2007 to limit the extent and impact of Department of Foreign Affairs and International Trade monitoring.

11. Wholesale resistance to transparency across governments: resistance, obstruction and possible cover-up

I also note, by way of preliminary comment, that this sub-section concerns evidence of government stone-walling, obstruction and misrepresentation that will find some echoes – and otherwise provide a frame of reference for interpreting Canada’s refusal to investigate higher officials – in the subsequent (“Complementarity”) section.

Government efforts to create obstacles to truth and accountability may itself be evidence of specific criminal conduct that these efforts wish to obscure. Some of those efforts may also involve some state officials not just doing their job zealously but knowingly engaging in a cover-up designed both to protect ‘the state’, the government and the military from criticism (and possible liability) and to shield specific individuals from investigation and prosecution for crimes under Canadian or international law. Whether or not such conduct is sufficient itself to constitute criminal conduct under the law of the Rome Statute (as it may well be as a matter of command and superior responsibility), at the very least it is highly relevant as evidence of whether underlying crimes are being covered up.

The 2015 Sabry report highlighted in the Introduction, *Torture of Afghan Detainees*, is an excellent source for an overview of some of the more noteworthy resistance and obstruction efforts during the time of the Harper governments (2006-2015). See especially the resistance and obstruction described by Sabry that occurred in relation to lawsuits by Amnesty International and the British Columbia Civil Liberties Association, proceedings before the Military Police Complaints Commission, and various investigatory efforts of the House of Commons (Sabry, pp. 44-55).

Less well known is that the present government of Prime Minister Trudeau has enthusiastically taken the baton from the previous government, and has shown no interest in greater transparency (with attendant positive impact on various forms of accountability, including the most primordial one of democratic accountability of governments to citizens). The following are some examples.

A) Open letter from former Prime Minister Clark et al.

Following up on the September 2015 Sabry report, on June 7, 2016, an open letter was sent to Prime Minister Trudeau calling for a commission of inquiry, spearheaded by Peggy Mason (a former Canadian ambassador) of the Rideau Institute. It had a formidable list of respected lead signatories that included: a former Prime Minister of Canada, the Right Hon. Joe Clark (who led a Progressive Conservative Party government); former long-time leader of Canada's New Democratic Party (Ed Broadbent); a former Ambassador to the United Nations (Stephen Lewis); the inaugural Chair of the Security Intelligence Review Committee and former Conservative Cabinet Minister (the late Ron Atkey); a former Deputy Head of Mission for Canada to Afghanistan (Eileen Olexiuk); and the current Leader of the Green Party of Canada and Member of Parliament (Elizabeth May).

Extracts from the letter follow:

RE: Need for Commission of Inquiry on Canada's Transfer of Afghan Detainees to Torture

Dear Prime Minister:

We write to you today to urge you to launch a Commission of Inquiry into Canada's policies and practices relating to the transfer of hundreds of detainees to Afghan authorities during Canada's military mission in that country.

There is overwhelming evidence that, during this mission, many of the detainees transferred – notwithstanding very clear and credible risks of torture – were indeed tortured.

No one knows exactly how many detainees who were in Canadian custody were tortured, disappeared or died under Afghan custody – partly due to the lack of a rigorous monitoring regime for the conditions of detainees, and partly due to the cloud of secrecy the previous government relentlessly maintained over this matter. ...

The previous government systematically blocked all efforts to investigate what happened. Citing operational security concerns, it refused to provide uncensored information to the public, Parliament, the Federal Court, and the Military Police Complaints Commission (MPCC). It also thwarted an investigation by the House of Commons Special Committee on Afghanistan, first by refusing to disclose documents and then by shutting down the committee when the Conservatives won a majority in 2011. The House approved a December 1, 2009 motion: “That, in the opinion of the House, the government should, in accordance with Part I of the *Inquiries Act*, call a Public Inquiry into the transfer of detainees in Canadian custody to Afghan authorities from 2001 to 2009.” This motion was ignored.

When some heavily censored documents were finally released, the Honourable Stéphane Dion [of the then Official Opposition Liberal Party and one of the MPs who had seen the documents uncensored] stated in a press conference: “[w]hen you read these documents, you will have questions to ask to your Prime Minister and your Ministers.” On another occasion, Mr. Dion asked in Parliament if the previous government was “opposing an inquiry because it is afraid of having to answer to Canadians.” And the Honourable Ralph Goodale [also a member then of the Official Opposition Liberal Party] lambasted the government for having “stonewalled all inquiries, judicial proceedings, parliamentary committees and requests for documents – as if they had something terrible to hide.” Mr. Prime Minister, we agree with Mr. Dion and Mr. Goodale. This is unfinished business of the most serious kind: accountability for alleged serious violations of Canadian and international laws prohibiting perpetration of, and complicity in, the crime of torture.

As a result of the previous government’s stonewalling, there were no lessons learned, and no accountability. In a future military deployment, the same practices could reoccur. A public inquiry would serve to authoritatively investigate and report on the actions of all Canadian officials in relation to Afghan detainees, and to review the legal and policy framework that attempted to justify these actions. Based on this review, the Commission would issue recommendations with a view to ensuring that Canadian officials never again engage in practices that violate the universal prohibition of torture.

Thank you in advance for your attention to, and consideration of, this grave matter. We look forward to receiving your response at your earliest convenience

I must report that Prime Minister Trudeau declined to reply to this letter – which, I remind, included a previous Prime Minister of Canada as a lead signatory. Another signatory, Ed Broadbent, reports to me that in the decades when he has been out of office and writing letters on occasion to Prime Ministers, he has never once not had the courtesy of a reply.

However, the ultimate point is not to lament discourtesy, but to ask why it is that the leader a new government – which in opposition had voted for a commission of inquiry – would act in this fashion.

B) Rejected e-petition e-70 calling for a Commission of Inquiry:

In late 2015, as former MP for Toronto-Danforth who had devoted some time as MP to researching the Afghan detainee-transfer matter, I initiated a petition under the new House of Commons e-petition procedure that requires 500 signatures to trigger a mandatory written government response that is posted publicly and notified to the signatories. E-petition e-70 read:

Petition to the Government of Canada

Whereas:

- many Canadians remain ashamed by Canada's approach to Afghan detainees in relation to both treatment in Canadian custody, notably transfer to other states despite the risk of torture, and torture, other inhuman or degrading treatment, disappearance and/or extrajudicial killing to which some of them fell victim after their transfer to other states;
- many also are disappointed by the poor record of Canadian justice and parliamentary institutions in bringing the relevant facts to light and in securing proper accountability.

We, the undersigned, citizens of Canada, request (or call upon) the Government of Canada to establish an independent judicial commission of inquiry to:

1. investigate the facts with respect to policies, practices, legal and other opinions, decisions, and conduct of Canadian government actors, including Ministers and senior officials, concerning Afghan detainees throughout Canada's involvements in Afghanistan from 2001;
2. investigate also the success and/or failure of Canada's justice and parliamentary systems in achieving transparency, democratic accountability, and compliance with applicable laws; and
3. issue a thorough, comprehensive and public report on the facts as found and on the commission's assessment of those facts in order: (a) to determine whether state or

governmental responsibility arose under international and/or Canadian law; (b) to assess whether any Canadian government officials engaged in misconduct in relation to respect for law, legal process, or parliamentary procedure; and (c) to recommend policy changes as well as law reform and parliamentary reform aimed at preventing violations or misconduct occurring again.

The response came from the Minister of National Defence, Harjit Sajjan. A commission of inquiry was rejected with a fairly long explanation that essentially amounted to: a) there was never any violation of law; and b) there have been so many investigations that no purpose would be served. The emphatic claim of legality reads:

Throughout Canada's military operations in Afghanistan, the Government of Canada ensured individuals detained by the CAF were treated humanely and handled, transferred or released in accordance with our obligations under international law.

C) Post e-70 Letter to the Prime Minister

Following the rejection of e-70, I wrote the Prime Minister on September 18, 2016, to ask him to re-consider the decision. There were two main points (apart from the desirability of a commission of inquiry for the kinds of reasons set out in the open letter from Peggy Mason, Joe Clark et al.).

First, the Minister of Defence should not have been the Minister to make the decision on this file as he had a conflict of interest due his military-intelligence role in Kandahar with the Canadian Forces in a key period made him a likely material witness for any inquiry; what he knew about the treatment of captives in the hands of Afghan intelligence and police at the time would be extremely relevant to understanding what others directly involved in the transfer system could or should have known as well.

Second, the letter presented some reasons to believe that there was a category of captives that Canada or at least some Canadian units called "PUCs" to distinguish them from "detainees", including an analysis of how the structure and content of a government response to an Order Paper Question (written question) that I had submitted to the previous government of Mr. Harper suggested a deliberate effort to avoid answering whether any category of captives not labelled as "detainees" were transferred without the capture or transfer being reported to the International Committee of the Red Cross.

The letter did not generate any reply from the Prime Minister.

D) Letter of concern to the House of Commons Conflict of Interest and Ethics Commissioner

I waited several months in the hope of a response from the Prime Minister. There being none, I wrote to the House of Commons Conflict of Interest and Ethics Commissioner, Mary Dawson, explaining concerns about the Minister of Defence having decided against a commission of inquiry as a conflict of interest and asking her to consider exercising her authority to open an investigation if she felt that the ethics rules applicable to a Minister could be breached in this kind of conflict of interest situation.

Commissioner Dawson replied with a report to say that, even as the ethics rules may not be applicable (she had not firmly decided that question), she was sufficiently troubled by the facts as alleged that she communicated with the Minister. The Commissioner reported:

I raised directly with Mr. Sajjan your allegation that, as a former intelligence liaison officer, he could reasonably be expected to have knowledge relevant to what others may have known about the fate that waited any transferred detainees.

At no time was he involved in the transfer of Afghan detainees, nor did he have any knowledge relating to this matter.

Mr. Sajjan informed me that he was deployed as a reservist to Afghanistan where he was responsible for capacity building with local police forces.

After having carefully reviewed the matter, ...I have found no information to suggest that Mr. Sajjan actually had any knowledge related to Afghan detainees, or that he had any involvement in the matter. Therefore, I am of the view that Mr. Sajjan's potential to be a witness at a possible commission of inquiry based on any such knowledge or involvement, remains too remote and too speculative.

I replied to the Commissioner to provide detailed information on the military-intelligence liaison role played by the Minister when a soldier in Kandahar and on how central that role was in terms of relations with the National Directorate of Security. It is possible that the Minister of Defence did not know, when talking to the Commissioner, that the information that I had secured was available from a public source. My letter to the Commissioner ended:

Knowing what you now know [from the additional information I supplied that showed the Minister had not merely been a “reservist” doing “capacity-building” with the “local police”], I trust that your opinion on Minister Sajjan’s importance as a witness at an inquiry might well be different than when you based it on what Minister Sajjan told you. His value as a witness at a potential commission of inquiry is anything but remote and speculative.

A formal complaint was also filed by Thomas Mulcair, Member of Parliament, based on what appeared to be a deliberate deception of an Officer of Parliament (the Commissioner) by the Minister and in which he asked for the conflict of interest matter to be re-opened.

The Commissioner indicated she would look into the significance of the new information on the Minister’s role in relation to what she had been told by him. This she did and then wrote me and, separately, Thomas Mulcair to say:

[T]he new information...suggests that Mr. Sajjan’s account of his time in Afghanistan may have been downplayed, both in respect of his role and in respect of his knowledge of the Afghan detainee situation.

However, despite what the Commissioner was clearly indicating had been an effort by the Minister to hide the truth from her, she decided to close the file because, in the result, she had concluded that no pecuniary interests were in play sufficient to trigger the ethics rules.

Apart from being another example of the present government wishing to thwart transparency on the Afghan detainee question, the bigger question is: why would the Minister of Defence seek to divert attention from his military-intelligence role in the way he had?

E) E-petition e-608 asking for the MPCC to be given broader information-access powers

During the 2007-2012 ‘failure to investigate’ proceedings of the MPCC, the government fought hard to prevent the Commission and its lawyers from seeing unredacted documents. It could do this in the name of national security because the MPCC, unlike a wide range of other bodies, had never been added to a statutory annex to the *Canada Evidence Act* which annex allows the listed bodies unfettered access to documents necessary for their proceedings. This had caused such delay and obstruction during the MPCC proceedings that the MPCC made it one of its four recommendations in its Final Report:

RECOMMENDATION #4: The Commission recommends that the Minister of National Defence take steps to cause the addition of the Commission by the Governor in Council to the schedule of designated entities as prescribed by section 38.01(8) of the *Canada Evidence Act*. This would allow the Commission to more effectively obtain information relevant to the discharge of its statutory mandate of providing independent oversight of military policing while at the same time maintaining strict control over any information the disclosure of which has the potential to negatively affect Canada's national security interests or international relations.

E-petition e-608 was intended to push the government to respect this recommendation:

PETITION TO THE GOVERNMENT OF CANADA

Whereas:

- Section 38 of the Canada Evidence Act governs access to documents concerning international relations, national security and/or national defence;
- Sub-section 38.01(8) empowers Cabinet to authorize entities to seek and receive documents in uncensored form in a schedule to the Canada Evidence Act;
- Scheduled entities currently include the Privacy, Public Sector Integrity, and Information Commissioners; the Civilian Review and Complaints Commission for the RCMP; military boards of inquiry under the National Defence Act; and the Security Intelligence Review Committee under the CSIS Act – to name only some;
- The Military Police Complaints Commission (MPCC) is not included in this schedule despite MPCC commissioners and lawyers having high-level security clearance no different from personnel of these other entities;
- Like these other entities, the role of the MPCC is crucial for democratic accountability and the rule of law; and
- In previous Parliaments, the government refused to provide the MPCC with some uncensored documents relevant to proceedings on the treatment of Afghan detainees and the Cabinet declined to exercise its authority under s.38.01(8) to allow the MPCC full access to information.

We, the undersigned, citizens and residents of Canada, call upon the Government of Canada to reject the approach of previous governments and, accordingly, to exercise its authority under section 38.01(8) of the Canada Evidence Act to designate the Military Police Complaints Commission as one of the bodies permitted unfettered access to documents.

The Minister of Justice rejected the request to add the MPCC to the access-to-information annex for reasons that ring hollow. The current Chairperson of the MPCC wrote me as the initiator of

e-607 to indicate that the MPCC continues to make the same request but has been stonewalled by the government.

One wonders whether one reason may not be that the MPCC is again conducting a proceeding related to detainees in Afghanistan. It does not relate to transfers but, *inter alia*, to the alleged use of Military Police to participate in Canadian Forces 'exercises' to storm prisoner cells at Kandahar Air Field in 2010-2011 with the effect and alleged purpose of terrorizing the prisoners; the complainants are themselves Military Police who wish to remain anonymous at present.

F) *Non-responses to Order Paper Questions from Member of Parliament, September 2017*

In June 2017, H el ene Laverdi ere, Member of Parliament, submitted four Order Paper Questions, three of them containing a series of sub-questions dealing with the matter of "PUCs" / "Persons under Control". In September, the Minister of National Defence replied non-responsively to each. His written reply began, for each:

The Government of Canada takes allegations of mistreatment of detainees very seriously. Canada's policies and procedures regarding detainees have already undergone significant scrutiny. Allegations of misconduct during military operations in Afghanistan have been investigated numerous times. These include a Board of Inquiry into a 2006 incident convened by the Vice Chief of Defence Staff in 2010; a Public Interest Hearing by the Military Police Complaints Commission in 2012; a litigation in the Federal Court of Canada brought by Amnesty International; and a Public Interest Investigation launched by the Military Police Complaints Commission in 2015.

He then proceeded to provide a general narrative about detainee policy and efforts in Afghanistan, which had no relationship whatsoever to the questions asked. In my experience as an MP who also asked a dozen or so Order Paper Questions in areas concerning war and national security, the previous government – the government of Mr. Harper – always answered every sub-question even if at times the answers were sometimes cagey or elusive. The cavalier disrespect for a Member of Parliament shown by this set of responses to Ms. Laverdi ere appears to be indicative of a 'we are above accountability' attitude of the current government.

It is important to be aware that ministries have units of civil servants who prepare answers to Order Paper Questions, which the responsible Minister must nonetheless be prepared to sign. It used to be – and hopefully is generally still the case – that a certain de-politicized professionalism characterized the work civil servants do on Order Paper Questions. In the present case, it is impossible to say whether it is the Minister giving

directions to be non-responsive to civil servants or Department of National Defence civil servants who decided that the questions cut too close to the bone – or a mix of the two.

12. Misrepresentation of a variety of proceedings and processes as vindication of the Canadian government's claim that all conduct in relation to detainees was in conformity with international law

The above-mentioned government's response to a series of Order Paper Questions in September 2017 contains the now-standard formulation that the government has settled on in response to any questions about Afghan detainees: see the passage reproduced in the previous sub-section. Versions of the same formulation have been used by both the Minister of Defence and the Prime Minister in Question Period (oral questions). Sometimes the activity of the House of Commons' Ad hoc Committee of Parliamentarians, which was struck as a compromise when the government refused to turn over documents to the House, is invoked in the list of investigations to date.

However, none of the invoked processes qualifies as having gotten to the bottom of anything remotely close to the truth. None of them vindicates the 'no wrongdoing' narrative of the government when it comes to senior officers and officials. And none of them was a criminal-law investigation.

I will take each of the five 'investigations' mentioned above in turn.

A) "A Board of Inquiry into a 2006 incident convened by the Vice Chief of Defence Staff in 2010"

This Board of Inquiry was convened because the then Chief of Defence Staff was caught out in a misrepresentation with respect to a newspaper report on a captive who had been transferred to Afghan National Police and suffered harm within sight of the Canadian soldiers who had transferred him, caused the soldiers (to act properly and) retrieve the transferee when they detected the abuse shortly after the transfer. The CDS testified to the House of Commons Special Committee on Canada's Mission in Afghanistan that there had been no detainee taken or transferred on the day/place in question. Later, the next day, he corrected himself to say there had indeed been a detainee transferred and retrieved as reported (contrary to what he had understood the day before). Because of the furor caused by the fact the head of the military had not

been properly briefed on a detainee transfer that involved post-transfer abuse, the CDS convened a Board of Inquiry to look into what happened in the incident.

The Board of Inquiry worked and reported quickly in early 2010. Suffice it to say that the report reveals the likely reason the Chief of Defence Staff had first said there had been no detainee taken and transferred, much less retrieved was that the detainee was not recorded as a “detainee” by the military but instead treated as a “PUC.”

Unredacted passages in the Board’s report reveal – possibly without the Board members even realizing the significance – that this captive had not been the only one in this period of 2006 to be categorized as a “PUC” rather than as a “detainee.” Also it is noted that at least one soldier testified that s/he had been instructed never to use the term “detainee” with respect to captives in the 2006 (Task Force Orion) operations context in question and instead to use “PUC.”

The focus of the report was on the fact a captive had been transferred and then had to be retrieved from abuse. A relatively limited amount of time was spent probing how it is that the person had been categorized in such a way that the CDS would later not have a record of a detainee. Instead, the Board – either puzzled or anxious to avoid opening a Pandora’s Box (or both) – offered the explanation that Canadian soldiers had picked up the term PUC as it was in use amongst American soldiers even though it was not an official term in the Canadian military and even though military lawyers were apparently trying to have its use as a term ended.

Suffice it to say that this Board of Inquiry report opens up questions about whether the employment of the term “PUC” was something not only more widespread in 2006 and perhaps also deliberately instilled by some in the chain of command as a way to avoid categorizing captives as detainees subject to the record-keeping and reporting obligations associated with the term “detainees.” As already noted in two sub-sections above, it may be that this term facilitated wholesale ‘battlefield transfers’ to Afghan National Security Forces, alongside the article 8 definition in the 2005 Canada-Afghanistan of “Detaining Power.” Along with other information on PUCS that will be provided to the ICC OTP, what is not fully revealed by this Board of Inquiry is an important avenue of further inquiry with respect to the PUC phenomenon. Note in this respect that the testimonies of the soldier-witnesses, including the one quoted as saying

s/he had been instructed to use the term “PUC”, have not, to my knowledge, been made public even in redacted form.

B) “A Public Interest Hearing by the Military Police Complaints Commission in 2012”

At several points earlier in this brief, the constrained jurisdiction of the MPCC in the failure-to-investigate case was described. It was further noted that the MPCC was specifically precluded from looking into the transfer policy or into the accountability of any others in the military or government apart from the impleaded Military Police. The clearing of the Military Police furthermore was accompanied by considerable narrative evidence that the MPCC was able to integrate into its judgment on the basis of needing to understand the “knowledge environment” in order to know what the Military Police reasonably should have been inspected to do; extracts were reproduced from the MPCC report on CEFCOMM structure and information-channeling practices with respect to detainees.

To drive home the point that the present government is not justified in invoking the MPCC proceeding as a way to deflect further investigation or inquiry, consider also the following section of the Executive Summary:

General Information about the Risk of Detainee Torture in Afghanistan

The Commission is of the view there was a great deal of reliable information available, from a variety of reputable sources, to document the risk of ill-treatment of detainees at the hands of the Afghan authorities, and especially the NDS. Much of it was publicly available at some point during the time period covered by this complaint. Some reports, while not publicly available during the time period of the complaint, were nonetheless being circulated within Government and military circles and formed part of the overall information environment which the Commission examined. The various sources of information about the risks to detainees posttransfer include:

- AIC/BCCLA Complaint Letter Regarding the Transfer of Detainees by Military Police (February 21, 2007): This complaint is a source of potential MP knowledge about the risk of detainee mistreatment post-transfer, as it calls into question the actions of the MP in conducting the transfers. The complaint sets out information believed to demonstrate a risk of torture of CF transferees, citing reports from the AIHRC, UN High Commissioner for Human Rights, and US State Department. The UN report states, for example, that the

NDS, to whom Canada transferred its detainees, "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."

- Publicly available reports from the AIHRC, United Nations, US State Department, and Amnesty International refer to reports of torture and mistreatment of detained individuals in Afghanistan. The 2006 US State Department Report said that "[...] [c]omplaints of serious human rights violations committed by representatives of national security institutions, including arbitrary arrest, unconfirmed reports of torture, and illegal detention were numerous." The torture and abuse were said to consist of "pulling out fingernails and toenails, burning with hot oil, beatings, sexual humiliation, and sodomy."
- A 2006 report from Canada's own Department of Foreign Affairs and International Trade (DFAIT) stated that, in Afghanistan, "[e]xtrajudicial executions, disappearances, torture, and detention without trial are all too common[...]" and called on the Government of Canada to "[e]nsure that Canadians deployed [...] [to Afghanistan] are thoroughl y briefed on the prevalence of human rights abuses[...]". The DFAIT reports for Afghanistan, normally not available to the public, became available publicly through the disclosure process in Federal Court proceedings initiated by the Complainants.
- The issue of post-transfer treatment of detainees received considerable media attention in Canada in 2007. In particular, articles by ...the *Globe and Mail* (April 23 and 24, 2007) and ... *La Presse* (October 29, 2007) attracted considerable attention because the authors reported on visiting former Canadian transferred detainees who recounted, often in gruesome detail, having been tortured by their NDS captors. These articles were often referred to during questioning of witnesses in these proceedings. The first paragraph of the [The *Globe and Mail*] article states that "Afghans detained by Canadian soldiers and sent to Kandahar's notorious jails say they were beaten, whipped, starved, frozen choked and subjected to electric shocks during interrogation." It was shortly after this article that there was a moratorium on transfers in April 2007 until the new transfer arrangement, with a provision for site visits by Canadian officials, could be put in place.
- Pursuant to the May 3, 2007 transfer arrangement, DFAIT visited Canadian transferred detainees and produced reports of those visits. The initial circulation and availability is discussed in this Report, but by early 2008 these reports, detailing allegations of torture and abuse, were made public during the Federal Court proceedings mentioned above. The report for the site visit on November 5, 2007 where implements of torture were observed caused, in conjunction with other factors, the suspension of Canadian detainee transfers in November 2007. The fact this information was or became available during the timeframe of this complaint did not necessarily mean the MP subjects of this

complaint were cognizant of this same information. An assessment of the scope and distribution of available information was necessary to assist the Commission in its assessment whether, in conjunction with other information, MPs should have formed a reasonable suspicion that detainee transfer orders were unlawful.

- On February 7, 2008, the Federal Court of Canada released its Order and Reasons for Order (CFN: T-324-07) relating to an application for an interlocutory injunction to prohibit transfers of detainees captured by Canadian Forces to Afghan authorities. In its reasons, the Court noted that eight complaints of prisoner abuse were received by Canadian personnel conducting site visits in Afghanistan detention facilities between May 3, 2007 and November 5, 2007, including complaints 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. The Court expressed concerns about the reliability of the findings by Afghan investigators that all of these complaints were unfounded. The Court described this evidence as "very troubling".
- Between May 2006 and October 2007, Mr. Richard Colvin (who served first at the Provincial Reconstruction Team and then at the Canadian Embassy in Kabul) sent email reports on detainee issues to a number of Government addresses, including addresses within CEFCOM. These email reports dealt with such subjects as concerns over the tracking of detainees after transfer, problems with gaining access to NDS facilities, concerns with the overall treatment of detainees transferred by the CF and reports of detainee complaints of mistreatment. Further, at a March 2007 interagency meeting in Ottawa, Mr. Colvin commented that if Canada did not want detainees tortured then they should not be transferred to the NDS. This meeting was attended by the CEFCOM J9, who confirmed these comments as having been made.

It should further be pointed out the Government and its lawyers engaged in tactics that drew detailed condemnation from the MPCC in a special 20-page addendum to its report. It should be read to acquire an appreciation for how seriously if not desperately the Government sought to prevent the proceedings from digging too far.

The 2012 MPCC proceeding is most decidedly not something that the government should be using as a flag.

C) "A litigation in the Federal Court of Canada brought by Amnesty International"

It borders on farce that the government would continue to cite this litigation as evidence of an investigation as a proceeding that substantively vindicated the Government. In

one part of the litigation, when a preliminary injunction was sought following the April 23, 2007, publication of the Globe and Mail article, the proceeding was ended because the Government came to court to say both that transfers had been suspended and a new MOU had been entered. The Government did not, it would appear, tell the court that within two weeks it would resume transfers.

In the second part of the litigation, the Government successfully challenged the entire case – which was being run as a constitutional rights challenge – by convincing two levels of the Federal Court both that ordering a stop to transfers would be an extraterritorial application of Canadian law and that the Charter of Rights did not extend extraterritorially. The Federal Court of Appeal went so far as to radically misinterpret a Supreme Court case (*Khadr*) as having decided that the Charter does not apply abroad in circumstances like those in *Khadr* if the victims are non-Canadian. The Supreme Court of Canada declined to grant leave to appeal from the Federal Court of Appeal, notwithstanding the unprincipled and doctrinally erroneous spin that court had given the Supreme Court’s extraterritorial-Charter-application jurisprudence.

So, the litigation cited by the government stands for nothing of what the Government invokes it for. Indeed, when one sets aside the procedural and jurisdictional victories of the Government and looks at the substance of what the first-instance Federal Court judge said about the underlying substance, this litigation stands in strong contrast to the Government’s ‘no illegality here’ line. As AI/BCCLA describe the matter in their 2011 MPCC submissions:

89. The Federal Court challenge by Amnesty International and the B.C. Civil Liberties Association was argued during this [November to February transfer] suspension in January 2008. The Federal Court reviewed much of the evidence discussed above, and described it as “very troubling”, adding that it “creates real and serious concerns as to the efficacy of the safeguards that have been put in place thus far to protect detainees transferred into the custody of Afghan prison officials”. The Court observed that the numerous allegations of abuse had indicia of credibility, and expressed reservations about the reliability and independence of investigations conducted by Afghan authorities into the abuse allegations. The Court did not issue an injunction because transfers were already suspended, but expressed the view that it was unknown whether transfers could ever resume given the circumstances. Implying that previous transfers may have violated the “substantial risk” standard, the Court added:

As a result of these concerns, the Canadian Forces will undoubtedly have to give very careful consideration as to whether it is indeed *possible* to resume such transfers in the future *without exposing detainees to a substantial risk of torture*. Careful consideration will also have to be given as to what, *if any*, safeguards can be put into place that will be sufficient to ensure that any detainees transferred by Canadian Forces personnel into the hands of Afghan authorities are not thereby exposed to a substantial risk of torture.

...

91. The Federal Court issued a second ruling on March 12, 2008, dismissing the Complainants' constitutional challenge on the grounds that the *Charter of Rights and Freedoms* could not be applied extraterritorially to protect the human rights of detainees in CF custody. The Court allowed that this was a "troubling" conclusion in light of the serious concerns raised about the safety of detainees, but offered the following observations:

[343] *Before concluding, it must be noted that the finding that the Charter does not apply does not leave detainees in a legal "no-man's land," with no legal rights or protections. The detainees have the rights conferred on them by the Afghan Constitution. In addition, whatever their limitations may be, the detainees also have the rights conferred on them by international law, and, in particular, by international humanitarian law.*

[344] *It must also be observed that members of the Canadian Forces cannot act with impunity with respect to the detainees in their custody. Not only can Canadian military personnel face disciplinary sanctions and criminal prosecution under Canadian law should their actions in Afghanistan violate international humanitarian law standards, in addition, they could potentially face sanctions or prosecutions under international law.*

[345] *Indeed, serious violations of the human rights of detainees could ultimately result in proceedings before the International Criminal Court, pursuant to the Rome Statute of the International Criminal Court, A/CONF. 183/9, 17 July 1998.112*

D) "A Public Interest Investigation launched by the Military Police Complaints Commission in 2015"

Invocation of this proceeding verges on bad faith. As mentioned above, the 2015 MPCC proceeding has nothing to do with transfer of detainees to the risk of torture. It concerns direct action by Canadian Forces personnel in Canada's own detention centre in Kandahar.

E) Ad hoc Committee of Parliamentarians

When the Speaker of the House of Commons ruled in 2010 that it was a *prima facie* breach of privilege that the government was refusing to disclose documents to the House, he urged a compromise. What resulted was a mechanism that involved two MPs from each of three parties (Liberals, Conservatives, Bloc Québécois) inspecting documents that the government handed over, and then having a panel of former judges (two of the Supreme Court justices) make the final decision between redactions wanted by the government before they could be made public and any difference of view of the MPs on the Ad hoc committee. For several reasons related to the structure of the mechanism and process, the New Democratic Party refused to participate – including, perhaps most importantly, because any documents that were classified as solicitor-client privileged by the government (and agreed to be correctly classified by the panel of ex-judge arbiters) would be excluded *ab initio* from being released..

In the result, the Ad hoc Committee of Parliamentarians process lasted about a year without any documents having yet been released by the time a May 2011 federal election was called. In that election, the Conservative Party went from minority government status to majority government. Using its parliamentary majority, it shut down the process. The government did permit the release of some 367 redacted documents, which was as far as the work of Ad hoc committee and panel of arbiters had got when Parliament was prorogued for the election. The ex-judges on the panel of arbiters made clear in a letter to a Government minister that the process had only been able to examine an "initial" cache of documents; the New Democratic Party estimated that only one-tenth of the documents subject to disclosure to the Ad hoc committee process had been examined. Given the sheer numbers of unexamined documents and given the exclusion of solicitor-client documents *ab initio*, there is reason to be concerned particularly compromising documents may not have been amongst the group of documents the parliamentarians and arbiters did see.

Finally, while the Conservative Government at the time pronounced that the shut-down process as having vindicated the government and while the current Liberal Prime Minister has now at least once invoked the process as one of the investigations that cumulatively mean no more investigation is needed, the lead Liberal member of the Ad hoc Committee of Parliamentarians, Stéphane Dion, had the following to say in the House of Commons:

Transfer of notifications to the Red Cross took up to a month. We lost track of hundreds of detainees. When the Afghan authorities claimed detainees were released, we did not verify. Our own monitoring was erratic and allegations of torture were numerous. (“Gov’t shut down detainee documents panel: judges’ letter”, The Canadian Press (June 24, 2011))

SECTION 2: COMPLEMENTARITY

1. Taking the cue from the Office of the Prosecutor on the focus of any complementarity analysis

The ICC OTP has itself made clear that the focus of its time and energy must be at the top – those “most responsible” as the Prosecutor framed the matter on November 3. In that light, it makes full sense that the complementarity analysis in the Prosecutor’s November 20, 2017, s. 15(3) application to the Pre-Trial Chambers was focused on the absence of investigation of the higher-ups. As the application’s text concludes at one point:

There appears to have been no criminal investigation or prosecution of any person who devised, authorised or bore oversight responsibility for the implementation by members of the CIA of the interrogation techniques constituting torture, cruel treatment or outrages upon personal dignity, whether in relation to those that were formally authorised by the OLC or those that went beyond the scope of the legal guidance.” (our emphasis)

With respect to Canada, where the policy that was implemented was a detainee-transfer system (with attendant formal rules but also likely with officially-sanctioned divergent realities), the conclusion that is currently applicable for Canada can be formulated using the structure of the ICC OTP’s view quoted above of the lack of investigation in the United States: There has been no criminal investigation or prosecution of any person who devised, authorized or bore oversight responsibility for the implementation by

members of the military of the transfer policy of the Canadian Forces and, more broadly, of the Canadian Government, which contributed to torture, cruel treatment or outrages upon personal dignity, whether in relation to those aspects of the transfer policy that were formally authorized by the chain of command or those that went beyond the scope of the formal policy.

The next section offers incontrovertible proof of such a conclusion.

2. Order Paper Question Q-1098 (June 15, 2017): Canada admits in September 2017 there were no investigations into higher officials

There are two police forces who could have investigated the possible criminal conduct of senior members of government in relation to the policy and practice of transferring detainees to torture, the Military Police, and more specifically a division therein called the Canadian Forces National Investigative Service (CFNIS), and the Royal Canadian Mounted Police (RCMP).

Although having no express mention in *the National Defence Act*, the CFNIS has been created within the statutory authority of the Canadian Forces Provost Marshall. As described overview by AI/BCCLA, the CFNIS is a specially formed unit of the Military Police whose members are mandated with the investigation of serious and sensitive offences. The CFNIS is similar to the Major Crimes unit of a municipal or provincial police force. The Canadian Forces Provost Marshall has a command and control relationship with the Commander of the CFNIS and all members of the CFNIS. He also controls the *modus operandi*, training, equipment and human resources of the CFNIS. “Members of the NIS receive advanced investigative training and are trained to conduct investigations in a deployed theatre of operations. Independent of the normal military chain of command, they receive direction and report directly to the Commander of the CFNIS.” (para)

The RCMP has overlapping jurisdiction to investigate breaches of criminal law by members of the military – notably in the present context, the *Criminal Code* and the *War Crimes and Crimes Against Humanity Act*. However, the general practice is to cede that space entirely to the Military Police – unless invited by the Military Police to do an investigation in lieu of the Military Police or alongside them. However, the RCMP would have exclusive jurisdiction to investigate non-military government officials and Ministers, including the Defence Minister. While the RCMP has authority to investigate

wherever relevant conduct occurs, including for extraterritorial conduct that is criminal, one would expect a special attention to conduct occurring in Canada, especially once it has become clear that the Military Police system has failed to conduct any investigations of its own. In this respect, we should not forget that the centre of gravity for key decision-making on transfer policy and practice was in Ottawa and not in Afghanistan – from National Defence Headquarters (NDHQ) to the Department of Foreign Affairs and International Trade to the Prime Minister’s Office (PMO).

Despite over a decade of publicly-available, reliable and compelling information related to torture of detainees and Canada’s practice of transferring into such a serious and widely known risk, neither police agency – whether the CFNIS or the RCMP – have opened a single investigation into senior state officials responsible for the operation and continuation of the detainee transfer system in Afghanistan.

I know this due to the Government’s answer to Order Paper Question No. Q-1098 submitted June 15, 2017, by Member of Parliament Murray Rankin, which read as follows:

Q-1098 – Mr. Rankin (Victoria) – In relation to Canada’s transfer of captives in Afghanistan to the authorities of other states, including the United States and Afghanistan, from 2001 onward: (a) have there been any investigations by any federal agency, including but not limited to the Royal Canadian Mounted Police or the Canadian Armed Forces National Investigation Service, of senior officers in the Canadian Forces up to and including the Chief of Defence Staff for possible criminal conduct in violation of one or more Canadian statutes and one or more international legal obligations; (b) if the answer in (a) is affirmative, (i) between what dates, (ii) with respect to what conduct, (iii) with what result were these investigations conducted; (c) have there been any investigations by any federal agency, including but not limited to the Royal Canadian Mounted Police or the Canadian Armed Forces National Investigation Service, of any Minister of the Crown including the Prime Minister for possible criminal conduct in violation of one or more Canadian statutes and one or more international legal obligations; (d) if the answer in (c) is affirmative, (i) between what dates, (ii) with respect to what conduct, (iii) with what result were these investigations conducted; (e) have there been any investigations by any federal agency, including but not limited to the Royal Canadian Mounted Police or the Canadian Armed Forces National Investigation Service, of any member of the public service for possible criminal conduct in violation of one or more Canadian statutes and one or more international legal obligations; (f) if the answer in (e) is affirmative, (i) between what dates, (ii) with respect to what conduct, (iii) with what result were these investigations conducted; and

(g) have there been any investigations by any federal agency, including but not limited to the Royal Canadian Mounted Police or the Canadian Armed Forces National Investigation Service, of any member of the a minister's political staff including any member of the Prime Minister's Office for possible criminal conduct in violation of one or more Canadian statutes and one or more international legal obligations; and (h) if the answer in (g) is affirmative, (i) between what dates, (ii) with respect to what conduct, (iii) with what result were these investigations conducted?

On September 18, 2017, the Government answered the question in writing (not available online but only on request from Library of Parliament as Sessional Paper No. 8555-421-1098). The Response from the Minister of Public Safety on behalf of the RCMP reads *in toto*:

At this time, the RCMP can confirm there have been no investigations of senior officers, senior officials including Ministers and the Prime Minister, public service members or political staff for possible criminal conduct in violation of one or more Canadian statutes and one or more international legal obligations in relation to the transfer of captives in Afghanistan. (my emphasis)

The entire response from the Minister of National Defence on behalf of CFNIS also dated September 18, 2017, reads:

The Government of Canada takes allegations of mistreatment of detainees very seriously. Canada's policies and procedures regarding detainees have already undergone significant scrutiny. Allegations of misconduct during military operations in Afghanistan have been investigated numerous times. These include a Board of Inquiry into a 2006 incident convened by the Vice Chief of Defence Staff in 2010; a Public Interest Hearing by the Military Police Complaints Commission in 2012; a litigation in the Federal Court of Canada brought by Amnesty International; and a Public Interest Investigation launched by the Military Police Complaints Commission in 2015.

The Canadian Forces National Investigation Service did not conduct any investigation into possible criminal conduct of senior military officers, Ministers of the Crown, public servants or ministerial exempt staff in relation to Canada's transfer of detainees in Afghanistan to the authorities of other states. (my emphasis)

Throughout our military operations in Afghanistan, Canada was committed to ensuring that individuals detained by the Canadian Armed Forces (CAF) were handled and transferred or released in accordance with Canada's applicable obligations. The CAF treated all persons in their care, custody or control humanely in accordance with the

established Government of Canada process for handling, release, transfer or post-transfer monitoring, and in a manner consistent with the rights and protections of the Third Geneva Convention. As such, detainees were provided with food, shelter and required medical attention. In addition, deploying CAF members received pre-deployment training regarding the handling and transfer of detainees.

There could not be clearer confirmation of the unwillingness of Canada to investigate potential crimes related to the issue of transfer of detainees. That issue and constant expressions of concern about criminality from within Parliament, via legal initiatives and in the media have been at the centre of Canadian debate since questions first arose in 2005 about how Canada would deal with detainees once it took over responsibility for Kandahar in 2006 – and, yet, higher-ups in the Canadian state have effectively been treated as immune.

I emphasize that it is not that Canadian police have investigated and concluded there is insufficient evidence to charge, but that they have not investigated at all.

3. A fortiori implications of non-investigation of some Criminal Code offences

Complementarity analysis asks whether an implicated state is willing and/or able to investigate and prosecute in the stead of the ICC. The focus is on crimes as framed in the Rome Statute, which in Canada's case generally means the *Crimes Against Humanity and War Crimes Act*, S.C. 2000, (as also incorporated as criminal law into the military law system by virtue of the *National Defence Act*).

However, separate provisions of the Criminal Code would also be relevant to much of the same underlying conduct. As the AI/BCCLA 2011 submissions noted:

[T]ransfers to risk of torture may also give rise to liability under the *Criminal Code*, which, by virtue of section 130(1) of the *National Defence Act*, has extraterritorial reach over members of the Canadian military. In particular, it was his opinion that criminal negligence, as set out in section 219 of the *Criminal Code*, would be a potential offence.

Beyond s. 219 criminal negligence, s.269.1 of the Criminal Code criminalizes torture and does so regardless of where it occurs in the world. As such, it clearly covers Canadian civilian officials who are not subject to the extraterritorialization provisions of the *National Defence Act*. As well, the s.219 criminal negligence provisions would also catch

civilian officials operating in Canada and not Afghanistan because the territoriality of the Canadian Criminal Code (except where extraterritoriality is expressly provided for) has long been interpreted since the judgment of the Supreme Court of Canada in *R. v. Libman* as including conduct in Canada that, while not constituting all elements of a crime, has a real and substantial connection to Canada. As such, because the detainee-transfer system involved many acts and decisions in Canada, there would be little difficulty in treating criminally negligent conduct in Canada that results in torture in Afghanistan as covered by s.219.

Once Criminal Code provisions are recognized as being in play, the principles of individual responsibility in the general part of the Criminal Code also become relevant. While they roughly parallel those in s.25 of the Rome Statute, they arguably are less strict in their requirements in several respects. To the extent that is so, it is relevant to the complementarity analysis to note that not only has Canada not investigated higher officials under the standards of the Rome Statute (as more or less implemented in the *Crimes Against Humanity and War Crimes Act*), but also Canada has not investigated Criminal Code crimes that may be less onerous to prove.

The reason that the foregoing is relevant is that it helps demonstrate a general unwillingness to investigate.

4. *The additional hurdle in the Crimes Against Humanity and War Crimes Act*

As noted by Byers and Schabas in their second letter of 2009, “it is a member of the federal cabinet, namely the Attorney General of Canada, who has the exclusive power to determine whether proceedings are initiated” under s. 9(3) of the *Crimes Against Humanity and War Crimes Act*. While one would expect and hope that the Attorney General would act with utmost independence, it remains a compromising structural fact that, in Canada, the same person is both chief law officer of the Crown (Attorney General) and a member of Cabinet (Minister of Justice).

In a context where successive governments have been fighting tooth and nail for a decade against every form of transparency and accountability on the Afghan detainee front and in a context when officials in the Department of Justice may also be involved as participants or witnesses (given the far-ranging roles of government lawyers on this file), there is reason to wonder whether this a contributory reason for the RCMP having done nothing.

5. *Botched investigations and non-investigations*

Further evidence that no deference is owed to Canada on the basis of complementary jurisdiction is that the lower-level investigations that have occurred have been botched and/or amounted to non-investigations, for reasons that appear to combine lack of motivation and lack of competence. Two such investigations were documented during the course of the MPCC litigation around the alleged failure to investigate by a number of named individuals in the Military Police system.

The course and outcome of the two investigations suggests strongly that the ICC should be very reluctant to conclude that the decade-long refusal by the CFNIS and RCMP to investigate the upper reaches (i.e. the military and civilian chains of command) can be rectified by a promise now to carry out a genuine investigation. Each of the two 'investigations' went nowhere for reasons that are hard to characterize as anything less than a sham.

With respect to CFNIS, the MPCC in its final report made clear in no uncertain terms that the CFNIS response to the *Globe and Mail* articles of April 23, 2007, and later was essentially a non-investigation:

...None of the NIS investigations dealt with the legality of the Task Force Commanders' transfer orders, with, perhaps, one small exception. Due to resource pressures, investigation of many of these allegations was delayed until 2008. All of the unresolved investigations were placed under one investigative umbrella called Operation Centipede on March 19, 2008....

One investigation within Operation Centipede had the potential to address whether the detainee transfer orders were illegal. The April 23, 2007 article by ...the *Globe and Mail* was scanned in its entirety into the Operation Centipede file. This was the article in which [The Globe] reported on interviews with a number of CF transferred detainees who alleged abuse and torture following transfer. The article contained the names and some details about these individuals, and mentioned the provisions of the *Third Geneva Convention*. This was the article that CEFCOM researched, concluding some of the detainees mentioned were confirmed Canadian transferees. It was also the article that immediately preceded a halt to detainee transfers.

The NIS *Globe and Mail* investigation concluded on November 19, 2008, after the time frame of this complaint, and after the retirement of LCol (ret'd) Garrick as Commanding Officer of the NIS. It is clear the NIS investigation consisted of nothing beyond reading the articles in question.

No attempt was made to confirm any of the allegations, or to contact the detainees or the journalist. The NIS was unaware of the CEFCOM fact-check that confirmed some of the detainees had been in Canadian custody. Not a single external source of information was considered or reviewed. Nevertheless, the Concluding Remarks included the following statement: "[...] considering the general rules of evidence, the inadmissibility of statements as they pertain to hearsay information, and the lack of any other credible evidence, there is no satisfactory justification to continue this investigation." It appears the investigators never considered whether the orders to transfer may have been illegal, and worked on the presumption that if anyone had behaved illegally, it was solely the Afghan authorities.

(My emphasis)

This is a clear indictment of the CFNIS institutional inability – or indeed unwillingness – to carry out a genuine investigation. Notwithstanding these trenchant observations, CFNIS, five years since the 2012 MPCC report, has never seen fit to investigate the illegality of the orders and maintenance of the transfer system – which points not just to institutional inability at the time but an ongoing and conscious institutional unwillingness.

With respect to the RCMP, as far as is known RCMP did one investigation – related to the use of MPs to transfer detainees. This was triggered by the AI/BCCLA complaint that the Federal Court dismissed because it involved a military-operational role for Military Police and not a policing role (with the MPCC only having jurisdiction when Military Police are wearing their “policing” hats). AI/BCCLA narrate what then happened:

187. Lt. Col. Garrick discussed the February 2007 Complaint with the CFPM Capt. (N) Steven Moore. It was decided that an outside police force should investigate given that the allegations were directed partly against the CFPM. The Royal Canadian Mounted Police (“RCMP”) was approached and asked to look into the allegations. Supt. Wayne Rideout and Supt. Wade Blizzard were the senior RCMP officers tasked with the investigation.

188. The RCMP started its investigation on March 13, 2007 and submitted a final report three months later. In its report, the RCMP stated that the CF request for an investigation “surrounds detainee handling and the transfer of detainees by Canadian Forces personnel” and “the torture and abuse of detainees, post handover.” The RCMP conducted numerous interviews to understand the scope of the CFPM’s role in detainee transfers, and to a certain extent, the concerns about abuse of detainees by Afghan

authorities. In considering the information they deemed important to examine, the RCMP investigators stated:

Finally, it was felt by investigators that the existence of any knowledge, information or intelligence of actual detainee abuse, post handover, known by the Military Police, or indeed DND would be *significant*.

189. The RCMP investigators elaborated that they were looking for any kind of information about post handover abuse “known by, or ought to have been known by the CFPM.” After numerous interviews with Military Police officers and other senior DND personnel posted in CEFCOM or Afghanistan, the RCMP reported that no information or evidence was received by these officials “with respect to any knowledge of post handover abuse.”

190. The RCMP investigators submitted their report at the end of June 2007, concluding that there was no evidence of an offence, in part based on their understanding that there was no “knowledge, information or intelligence” indicating post-transfer torture and abuse by Afghan authorities.

191. Unfortunately, the RCMP investigators concluded their investigation in the absence of critical information: namely, the graphic first-hand accounts of torture heard by DFAIT officials in Kabul and Kandahar only a few weeks earlier. From the RCMP report, it appears that all of their interviews were carried out before the DFAIT visits elicited the disturbing allegations on June 4 and 5, 2007. It is not known why this information was not shared with the RCMP before they submitted their report.

192. Lt. Col. Garrick met with the RCMP investigators after he read their conclusions. He was not in a position to share the DFAIT reports or the fact that transfers had been suspended in June 2007 because he did not have this information. However, this does not explain why Lt. Col. Garrick did not take further action once he learned about the allegations contained in the DFAIT reports. Supt. Rideout and Supt. Blizzard were experienced criminal investigators. They indicated that “knowledge, information or intelligence” suggesting post handover abuse would be “significant” for any such investigation.

(My emphasis)

Notwithstanding that information was missing and notwithstanding that the RCMP at some point became aware of that fact, there is no indication the RCMP ever reopened the investigation. In addition, whatever the results of this one investigation, it remains

that the RCMP has no more looked into the civilian 'chain of command' than the CFNIS has investigated the military chain of command.

6. The Military Police: systemic reluctance to investigate the chain of command for war crimes

To better understand the conclusion of the last section, it is instructive to consider the reasons given by several key individuals within the Military Police system for not investigating anyone in the chain of command (or, put differently, not investigating the legality of the orders to transfer detainees to the known risk of torture). The following is a narration by way of a selection from the final submissions of AI and BCCLA of their summaries and assessments of the testimony of the following: two in-theatre Task Force Provost Marshalls (TFPM) during the period covered by the MPCC inquiry, Major Bernie Hudson and Major Ron Gribble; the Commanding Officer of CFNIS, Lt. Col. Thomas Garrick; and head of the entire military police system, the Provost General, Captain (Navy) Steven Moore. Kindly excuse the method (extensive quotation over a number of pages) but I believe it is better to draw to the ICC OTP's attention highly relevant evidence of Canada's inability/unwillingness using a careful analysis presented in the Canadian proceeding that is the most relevant to the question of complementarity.

Major Bernie Hudson (TFPM)

158. Major Bernie Hudson has been a military police officer for 18 years.¹⁹⁰ He served as the JTF-A TFPM during Roto 3, from early February 2007 to mid-August 2007, under Brig. Gen. Grant and Brig. Gen. Laroche. In addition to his duties as the TFPM, Major Hudson also served as the Provost Marshal for the coalition forces at Kandahar Airfield.

159. Major Hudson was generally aware that there were allegations of post-transfer torture and abuse of detainees by the NDS. During his pre-deployment training, Major Hudson reviewed a human rights report from the U.S. State Department, outlining the use of torture in Afghan prisons. He was aware that there was a "historical" concern of detainee torture and abuse by Afghan authorities.

160. Major Hudson continued to be made aware of the risk of post-transfer abuse during his tenure as TFPM. For example, he was generally aware of the February 2007

Complaint because he was tasked with finding documents requested by the MPCC.¹⁹⁶ The February 2007 Complaint makes reference to human rights reports from the AIHRC, UNHCHR, and the U.S. Department of State, all documenting torture in Afghan prisons. He was also aware that there was a proceeding in Federal Court seeking to halt detainee transfers; it was a subject he discussed “at length” because an injunction, if granted, would directly affect detainee operations. He was aware of news accounts of detainee torture, such as the April 2007 articles in *The Globe and Mail*. Major Hudson was generally aware of news reports of detainee abuse, in part because he helped identify whether detainees alleging abuse were in fact transferred by the CF. He was aware that DFAIT monitoring visits yielded allegations of abuse. Shortly after the publication of the [Globe and Mail] Article, Major Hudson received a copy of a DFAIT site visit report documenting allegations of torture by the NDS. After returning from leave in June 2007, he also learned that another DFAIT monitoring visit had yielded reports of torture.

161. Major Hudson testified that there were concerns among the MPs in Afghanistan about potential liability stemming from their role in detainee transfers. His troops recognized that there were reports that transferred detainees were being tortured by Afghan authorities. To assuage these concerns, Major Hudson held an “open town hall type” meeting with his troops.

162. During Major Hudson’s tenure, the JTF-A Commander convened a detainee committee to provide him with advice concerning the decision to transfer. According to Major Hudson, however, there was limited discussion concerning post-transfer risk of torture at these meetings. It was not until the publication of the [Globe and Mail] Article that discussions concerning transfer decisions explicitly touched on post-transfer treatment. When the article was published, transfers were temporarily suspended. However, after receiving assurances from DFAIT that it would be conducting post-transfer monitoring visits, post-transfer risk assessments were again de-emphasized as being a part of the transfer decision-making process. Ultimately, Major Hudson saw the decision to transfer primarily one that focused on whether the detainee was a belligerent, and not on whether it was safe to transfer him.

163. In order to document the JTF-A Commander’s decisions to transfer, Major Hudson helped create a transfer decision matrix, which recorded the advice provided to the Commander when he made his decision to transfer, hold or release detainees. Unlike later versions of the transfer decision matrix, the one developed by Major Hudson did not contain any specific space for assessing post-transfer risk of torture and abuse.

164. Major Hudson was aware that Canadian Forces had responsibility for ensuring that detainees were not transferred to risk of torture. He testified:

My knowledge at the time, it was very clear in my mind that according to the Geneva Conventions, we are responsible for detainees post transfer. That's basic training for military police officers. That's part of the laws of armed conflict and that sort of stuff ... [A]ccording to the Geneva Conventions, the original capturing power is ultimately responsible for prisoners of war post transfer. If they transfer them to a third state, they are still responsible. If that third state abuses them in some way, they are supposed to reassert custody of them or fix that in some other way.

165. Major Hudson understood that if a CF member breached the laws of armed conflict or international law, then the MP should investigate because it would be a crime committed by a Canadian person under the MP's jurisdiction. He also understood that as TFPM, he needed to ensure that an investigation into such offences is initiated if there is a report of such conduct, or if he somehow learns of such conduct.

166. Nonetheless, despite his admitted awareness of reports and articles documenting torture of detainees, a general understanding that there were ongoing allegations of detainee abuse by the NDS, and his own MP detachment's concerns about personal liability for breaches of international law, Major Hudson made no efforts to inquire or investigate into whether past and ongoing orders to transfer detainees were legal. Moreover, he never sought any advice from the technical chain of command about whether ongoing transfers in the midst of allegations of torture required some sort of investigation.

Major Ron Gribble (TFPM)

176. Major Ron Gribble has been a military police officer since 1994. He served as JTF-A TFPM during Roto 5, from February 26, 2008 through September 2008, serving under Brig. Gen. Laroche and Brig. Gen. Denis Thompson. He performed his tactical reconnaissance in Afghanistan in November 2007. ...

181. Nonetheless, Major Gribble never turned his mind to whether illegal transfers took place during previous rotations, stating: "The previous rotation was not my responsibility." According to Major Gribble, he did not need to inquire into the legality of the transfer orders, or to consider whether the transfers had been ordered "in good faith" because he assumed that the JTF-A Commander had other advisors. Moreover, Major Gribble believed that it would have been "inappropriate" for him to investigate potential misconduct by the JTF-A Commander: "It would be inappropriate for me to investigate a man that I am under his chain of command. That's why we have the NIS there."

Lieutenant Colonel (Ret'd) William Garrick (Commanding Office of CFNIS)

183. Lieutenant Colonel William Garrick joined the Canadian Forces in 1981 as a military police officer. He was posted to the National Investigation Service (NIS) as an Operations Officer upon its creation in 1997. He was promoted to Lieutenant Colonel in 2006 and appointed as the Commanding Officer of the NIS. He retired from the Canadian Forces in the summer of 2008, relinquishing his command of the NIS on June 12, 2008. As the Commanding Officer of NIS, Lt. Col. Garrick reported directly to the CFFM and was responsible for overseeing all serious and/or sensitive criminal investigations by the CF Military Police. The NIS is vested with independence from the normal CF chain of command.

184. The NIS was the branch responsible for investigating allegations related to harm to detainees. Lt. Col. Garrick testified that issues concerning detainees were his top priority and occupied 75% of his time. He understood that the CF had an obligation to be satisfied that detainees would not be abused post-transfer, an issue of which he became acutely aware when the Complainants filed their first complaint with the MPCC in February 2007. Lt. Col. Garrick was aware of the international reports concerning the prevalence of torture in Afghanistan and had read the *Globe and Mail* stories by Graeme Smith.

185. Lt. Col. Garrick testified that he was aware that Canadian officials were monitoring detainees in Afghan custody. Although he did not specifically ask his NIS officers to seek out this information, he believed it was appropriate for the MPs to occasionally inquire into detainee treatment post-transfer. Lt. Col. Garrick indicated this kind of inquisitiveness was part of their job, stating, "I expected they would look outside their general parameters when they're doing their business."

186. According to Lt. Col. Garrick, he did not have to look into the DFAIT monitoring visits himself. He said there was "no reason" to follow up on these reports, although he later acknowledged that the information would have been "useful" to his investigators.

[Paras 187-192 discuss an RCMP investigation that Lt. Col. Garrick Co-decided would take place following the first AI/BCCLA complaint to MPCC that Military Police, from the Provost General down, had illegally participated in the transfer of detainees. Recall that this complaint was found to be beyond the MPCC jurisdiction by the Federal Court, leaving only the second 'failure to investigate' complaint.]

193. Clearly, Lt. Col. Garrick's views about the significance of the DFAIT reports were at variance with the senior RCMP officers. Lt. Col. Garrick testified that he was "comfortable" with the situation because the RCMP report provided some assurances and he understood a process was in place with "checks and balances" and "triggers." He also said there were other ongoing MP investigations considering the same issues.

194. It is true that a small number of other MP investigations connected to post-transfer abuse were initiated in 2007. The investigations were later brought together under one umbrella and referred to as "Operation Centipede," a "CFNIS investigative project which was created to address numerous allegations that CF personnel had illegally or improperly carried out their duties in the handling of Afghan detainees." As the Commanding Officer of the NIS, Lt. Col. Garrick had overall responsibility for these investigations. They included, variously, the following allegations:

- a detainee was executed by Afghan authorities post handover and tossed in a ditch (GO-6912);
- a soldier reported witnessing a detainee being beaten in the head by Afghan soldiers (GO-6913);
- a detainee transferred to an Afghan authority was subsequently taken behind a building and executed (GO-6917);
- CF personnel witnessed a detainee being abused post handover (GO-6918);
- a CF captain alluded in an email that Afghan authorities abused detainees in their custody (GO-6919); 284
- *The Globe and Mail* reported post-transfer abuse by Afghan authorities, and suggested CF personnel may have been aware (GO-6920285 and GO-6921286);
- an instructor providing MP training lecture alleged that Afghan authorities abused detainees (GO-23231); and
- a survey of CF personnel reported, among other things, that a certain percentage of CF respondents reported witnessing abuse against detainees (GO-3134).

195. Initial discussions about Operation Centipede began in the fall of 2007, but most of the Operation Centipede investigations were not concluded until 2008 and 2009. Lt. Col. Garrick testified that he faced significant resource issues and investigations were prioritized as necessary. However, this evidence is troubling given the weight that Lt. Col. Garrick appeared to place on the investigations in other contexts. In his testimony, Lt. Col. Garrick said repeatedly that one of the main reasons why he did not look into the subsequent allegations of detainee abuse was the fact that the Operation Centipede investigations were underway. In particular, he testified that he believed the *Globe and Mail* investigations would look into those issues. The Complainants submit that this explanation is wholly insufficient.

...

271. Lt. Col. Garrick admitted that he read the Federal Court judgment of February 7, 2008, which described the DFAIT reports in detail. Lt. Col. Garrick also acknowledged that the abuse allegations in the DFAIT reports should have triggered some further inquiry or investigation. However, it was his position that, as Commanding Officer of the NIS, he fulfilled his duty to investigate because the Operation Centipede and Operation Camel Spider investigations were ongoing and would look into those issues. The Complainants submit that this explanation is wholly insufficient.

272. Lt. Col. Garrick acknowledged that he was given the Federal Court judgment because his investigators were looking into the detainee transfer issue. Yet he conceded that he never gave the judgment to the investigators or spoke to them about its —obviously— troubling findings. He suggests that, if he had stayed on, he would have brought the Federal Court judgment to the attention of his investigators. This is not a tenable excuse, given that the ruling was released in February 2008 and he retired over four months later.

273. Most seriously, Lt. Col. Garrick clearly understood that the reports of abuse described by the Federal Court “raise concerns, obviously.” Yet he took almost no action while the relevant NIS investigations languished. Police are supposed to exercise their discretion with respect to investigative decisions based in part on the seriousness of the offence. Torture is not only a serious offence, it was possible that unlawful transfers were ongoing. A reasonable officer in Lt. Col. Garrick’s position would have been proactive in investigating these inherently serious issues.

274. Lt. Col. Garrick was taken through the DFAIT report of November 5, 2007. He agreed that the individual was likely tortured, and therefore the JTF-A Commander had made a transfer decision that resulted in a detainee being tortured. When asked whether these facts should have triggered an investigation as to the legality of the transfer decision, he said:

It should have and probably, you know, may have, you know, if it would have come through the other investigations, six or seven other investigations we had going on at that time into detainee issues.

275. In other words, Lt. Col. Garrick agreed that that the DFAIT reports “should have” led to further investigation. But those critical documents, which were the type of information that the RCMP said would have been “significant” for such an

investigation, were never sought out by Lt. Col. Garrick or the NIS detachment commanders who were under his command. Had the MPs sought those documents, they would have discovered that transfers continued despite the troubling pattern of abuse allegations reported by DFAIT in 2007.

276. As the Commander of the NIS, Lt. Col. Garrick was ultimately responsible for all the Operation Centipede investigations. Not one of the Operation Centipede investigations was conducted in a responsible or competent manner. The investigations were plagued by extraordinary delay and utterly failed to collect relevant documentary and testimonial evidence. For example, the investigators in charge of GO 08-6912 and GO 08-6913 never took any investigative steps to determine if the detainees in question had ever been in CF custody. On the basis of untested evidence, they concluded that they were not CF detainees and closed the files. By way of another example, GO 08-23231 concerned an allegation made by a CF member that Afghans abuse detainees. Warrant Officer London reported that a detainee was abused post-transfer; he told investigators that a Master Corporal who witnessed the abuse firsthand had told him about the incident. Once again, the allegation was dismissed as a fabrication. No attempt was made to locate or interview the Master Corporal, despite the fact that the investigators had been provided with his rank and knew the base he was located at and the date he returned from theatre.

277. In those rare instances where investigators collected evidence, if there was conflicting evidence, investigators reconciled the conflict by concluding that the allegations were unsubstantiated; but those conclusions were not based on objective facts. The most troubling of all the investigations were those into the *Globe and Mail* reports of post-handover abuse by Afghan authorities (GO-6920 and GO-6921). As previously discussed, those articles contained compelling and disturbing first-hand reports of torture suffered by CF-transferred detainees. Before the files were closed, the only investigative steps the investigators took were to read the articles at issue. The detainees' allegations were simply dismissed as "hearsay;" no attempts were made to contact the detainees who had been interviewed or to speak with the *Globe and Mail* reporter. The investigators evinced a complete misapprehension of the law, concluding that because the detainees were abused by Afghans, the CFNIS did not have jurisdiction to investigate.

278. Lt. Col. Garrick conceded that the *Globe and Mail* investigations were concluded in error, with no actual investigation and based on a misapprehension of the relevant issues. He presumed to deflect responsibility for these conclusions on the ground he was retired at the time. But this fails to recognize the fact that there was almost no activity on the investigations for a significant period of time, a delay for which he was responsible.

Further, he evidently failed to provide appropriate guidance to his investigators regarding this legally complex and sensitive issue. Indeed, those investigators may have interpreted his lack of interest as a signal that not much was expected or required. Lt. Col. Garrick failed to properly investigate information that suggested transfer decisions may have been made despite a substantial risk of torture.

...

301. The investigative steps taken by Lt. Col. Garrick and [Provost General] Capt. (N) Moore were cursory at best, and given the fundamental human rights at issue and the mission-critical circumstances, their actions were completely inadequate.

302. Lt. Col. Garrick had considerable awareness of ongoing reports of post-transfer torture of detainees, yet he allowed the relevant NIS investigations to languish. Lt. Col. Garrick had direct command over his investigators, and was ultimately responsible for all the Operation Centipede investigations, yet he failed to ensure that the investigations were conducted in a competent or responsible manner. The investigations were plagued by extraordinary delay and utterly failed to collect relevant documentary and testimonial evidence. In those rare instances where investigators collected any evidence at all, if there was conflicting evidence, investigators reconciled the conflict by concluding that the allegations were unsubstantiated; but those conclusions were not objective or evidence-based. As previously discussed, given the specialized mandate of the NIS to investigate only the most serious crimes, the specialized training given to its members, and the organizational emphasis on maintaining the highest degree of investigational integrity, the NIS onus to investigate is acute. By any measure, the conduct of the investigations under Lt. Col. Garrick's command neglected the duty to investigate crime in a reasonable and competent manner, and breached the standard of care expected of Military Police.

303. Lt. Col. Garrick conceded that the critical *Globe and Mail* investigations were concluded in error, with no actual investigation and based on a misapprehension of the relevant issues. He presumed to deflect responsibility for these conclusions on the ground he was retired at the time, but this testimony should be rejected as inadequate. The simple fact is that during his command, there was virtually no activity on the investigations for a significant period of time, a problem for which he was ultimately responsible.

...

305. It cannot be emphasized enough that one of the most glaring of Lt. Col. Garrick and Capt. (N) Moore's professional omissions was the failure to adequately train the MPs

under their direct and technical command. The legal training of the NIS commanders appeared to be severely lacking, and they all testified that they were never briefed by Lt. Col. Garrick nor by Capt. (N) Moore about reports of post-transfer risk of abuse. Further, although Capt. (N) Moore testified that he spoke to the TFPMs personally and was informed that there were no detainee issues requiring investigation, each of the TFPMs testified that they never spoke with the CFPM about issues concerning post-transfer torture. Capt. (N) Moore presented no evidence other than his own testimony on this issue. Lt. Col. Garrick and Capt. (N) Moore's failure to train and educate the MPs under their command about the potential legal issues in theatre concerning the post-transfer treatment of detainees was a failure of leadership.

Captain (Navy) (Ret'd) Steven Moore Canadian Forces Provost Marshal

225. Captain (Navy) (Ret'd) Steven Moore joined the Canadian Forces in 1983. He served as CF Provost Marshal from June 15, 2005 to approximately June 15, 2009.³⁸⁴ He retired from the Canadian Forces in August 2009.³⁸⁵ As the CFPM, Capt. (N) Moore was the most senior member of the Military Police, and had the —last word|| on policing issues in the Canadian Forces. ||386

226. Capt. (N) Moore was aware of allegations of detainee torture, and acknowledged that he had concerns about the treatment of detainees post-transfer. He testified that concerns about post-transfer treatment of detainees “crystallized” by the time he received the February 2007 Complaint. Prior to that time, he had simply assumed that the Government of Canada had “done their due diligence” in determining that detainees could safely be transferred to the NDS.³⁸⁹ Nonetheless, when he reviewed the specific allegations of post-transfer torture and abuse detailed in the February 2007 Complaint, he assumed that the Government of Canada was aware of this information and had already taken it into account when developing its detainee transfer policy.

227. According to Capt. (N) Moore, when he received the February 2007 Complaint, he ordered Lt. Col. Garrick to report it to the NIS and to request an investigation into the allegations. He also tasked Lt. Col. Garrick with reviewing the NIS investigations ongoing at that time to determine if there was any evidence that the JTF-A Commander had committed an offence by ordering the detainee transfers. He also instructed Lt. Col. Garrick to raise these issues with NIS investigators, and ask if they were aware of any information that would suggest an investigation into the transfer orders would be necessary. Capt. (N) Moore assumed responsibility for discussing his concerns with the TFPMs and the JTF-A Commanders, and to determine if they believed there were issues requiring investigation. Capt. (N) Moore testified that he was informed that there were

no concerns or issues requiring investigation. According to Capt. (N) Moore, he spoke with the TFPMs personally.

Footnote 384:....This testimony is directly contradicted by the evidence of each of the TFPMs. See Hudson Tr. at 9:12-10:18 (testifying that he never spoke to the CFPM while in theatre, and never about detainee issues); Zybala Tr. at 194:15-23 (testifying that he never spoke to the CFPM about detainee issues); and Gribble Tr. at 111:24-112:21 (testifying that he never spoke with the CFPM prior to deployment, and that he cannot recall any conversations with the CFPM concerning post-transfer abuse).

228. Even so, Capt. (N) Moore continued to be concerned about detainee transfers, and followed media reports on detainee issues. Nonetheless, he simply assumed that all parties involved in the detainee transfer process – from the Government of Canada which formulated the transfer policy, to DFAIT which was responsible for monitoring, to the JTF-A Commander who made the transfer order – had performed the necessary due diligence and were firmly satisfied that they were not transferring to risk of torture: “... the assumption off the bat was that they had done their due diligence and that policy was legal.”

229. He also expected soldiers to report potentially illegal transfers to the Military Police. He informed this Commission that: “... I find it incredulous if somebody is out there that honestly thinks this Commander knew that detainee was going to be tortured, transferred him anyway and hasn’t reported it to the police, I’d be amazed.” On the other hand, he also informed the Commission that very often, CF members do not think to call the Military Police, even when they suspect criminal conduct. He testified:

... these men and women are very competent, professional people and they’re taught that you need to look after your people and you need to handle what the issues are and if there’s a problem, then you investigate it and find out what it is and deal with it. But very often, when that problem translates into a criminal offence, the light doesn’t always come on right away that you need to call the police and what your action is is stepping aside and reporting it to the police. They will take action, but sometimes they will miss that step of calling the police.

230. Capt. (N) Moore ordered no other investigations into the legality of detainee transfer orders, even after learning about the allegations in the [Globe and Mail] Article or the fact that detainee transfers had been suspended in November 2007. He made no attempt to access the DFAIT site visit reports documenting detainee torture and abuse; he did not undertake any additional inquiries. As he explained to this Commission:

As I felt that with the amount of people and senior people, lawyers and that that were involved in the process, I felt that somebody inside the process, if they felt there were negligence or an offence, then they would have stuck up their hand and they would have reported it to us.

...

291. As detailed in paragraph 227, *supra*, Capt. (N) Moore tasked Lt. Col. Garrick with heading up an investigation into the allegations in the February 2007 Complaint, though he assumed responsibility for contacting the TFPMs and JTF-A Commanders to discuss concerns about the legality of transfers. And while he testified that he spoke to the TFPMs personally and was informed that there were no issues requiring investigation, each of the TFPMs testified that they never spoke with the CFPM about issues concerning post-transfer torture. If the TFPM's recollections are to be credited, it would tend to suggest that the MP investigation into the February 2007 Complaint was cursory, at best, notwithstanding the RCMP-led investigation into the narrow question of the CFPM's liability with respect to transfers undertaken by MPs under his *technical* command. With respect to the substantive allegations of the Complaint – that detainees were being transferred to risk of torture in violation of international law – there seemed to be almost no inquiry undertaken by the Military Police.

292. According to Capt. (N) Moore, learning that a detainee had been, in all likelihood, tortured or abused post-transfer should trigger at least a preliminary inquiry by a Military Police officer. He also agreed that if there were allegations that a detainee had been subjected to post-transfer abuse, the specific decision authorizing the transfer of the particular detainee claiming abuse should have been subject to review. And yet, none of the allegations of detainee abuse being documented throughout 2007 resulted in any review of the actual transfer order itself. And there is no evidence before this Commission suggesting that there was any sort of MP inquiry conducted following the allegations of torture leading to the November 2007 suspension of transfers, despite the fact that the detainee interviewed for the November 5, 2007 DFAIT report was very likely tortured by the NDS.

293. Capt. (N) Moore is the most senior member of the Military Police. He has the ability to marshal all of the resources of the MP, if necessary. He was aware of reports of NDS torture, and testified to his own concern. Yet this concern amounted to a narrow, cursory investigation, and when further reports of post-transfer torture and abuse emerged, he declined to devote any resources for further inquiry. In so doing, he failed to take necessary steps to ensure that Canadian commanders were fulfilling their legal obligations, and to ensure that those carrying out the Commander's orders to transfer –

members of the Military Police – were not placed in a position where they may be liable for violations of international and domestic law.

...

304. The evidence suggests that of all the subjects, Capt. (N) Moore had the most developed understanding of the detainee issue at the relevant time periods, yet his failure of leadership was the most pronounced. He readily admitted that he had concerns about the treatment of detainees post-transfer and he testified that he ordered Lt. Col. Garrick to determine whether there was any evidence that the JTF-A Commander had committed an offence by ordering the detainee transfers. As the Canadian Forces Provost Marshal, he had the ultimate power and authority to ensure that a thorough investigation into the legality of the transfer orders was conducted, yet he failed to do. His concern about the issue culminated in a narrow, cursory investigation, and when further reports of post-transfer torture and abuse emerged, he declined to devote any resources for further inquiry. Capt. (N) Moore had more than enough evidence to conclude that an investigation was necessary and mandatory. The facts that were at Capt. (N) Moore's disposal demanded competent investigation, and he alone had the power to marshal all of the resources of the MP, if necessary.

(my emphasis)

Amnesty International and BCCLA's submissions then went on to pull together the discussion of the foregoing testimony in a summary of what was at that time in question essentially an incompetent Military Police system, at least in relation to investigation of the chain of command in relation to participation in war crimes:

298. Disturbingly, the subject TFPMs and NIS detachment commanders testified that a number of irrelevant and inappropriate factors weighed in their decisions not to make preliminary inquiries or launch an investigation into the legality of the transfer order. Some of the subjects, for example, testified that to start an investigation, they would have to have some suspicion that the JTF-A Commander knowingly transferred detainees to risk of torture. These subjects essentially argued that they needed to know the mens rea of the Commander – an essential element of proof – before they could even make basic inquiries. This not only is a mistaken formulation of the mens rea element of many of the potential offences, it is also too high of an investigative threshold. As discussed at paragraphs 121 to 126, *supra*, the common law imposes no barriers to an MP's ability to question individuals and begin to assemble evidence. It is only at the end of an investigation that a police officer must determine if reasonable and probable grounds exist to believe that an offence has been committed and a particular person is the perpetrator.

299. Another irrelevant consideration expressed by the subjects was their faith and trust in their commanders. Many of the subjects defended their actions on the basis that they were “comfortable” with the JTF-A Commander’s conduct. It is commonplace that police officers are expected to weigh a decision whether to investigate in an evidence-based, explicable and objective manner. There were objective facts available to the subjects which gave rise to the simple duty to ask questions, gather information and make preliminary inquiries. The TFPMs and NIS commanders never even bothered to discover what information the JTF-A Commander was relying on, whether DFAIT was providing adequate information to him, or whether the Afghans were reliable partners. A blind faith in a commander is simply not an acceptable justification for failing to take investigative steps.

300. Finally, many of the subjects claimed they lacked the time or resources to conduct investigations into reports of post-transfer torture and abuse. To begin with, many of these same subjects testified that they never turned their mind to the issue, which would indicate that resources did not in fact play a significant role in their failure to investigate. Yet even if this justification is given little weight, it is relevant to note that the subjects are trained to conduct policing duties in the theatre of operations and are expected to maintain basic standards of policing even during times of war. Furthermore, Major Hudson’s testimony on the issue of resources was instructive:

Resource issues, I have found that historically, you may not have all kinds of resources at your disposal, but as soon as you raise a big enough complaint and you need to investigate something, resources get freed up. That has been my experience.

I have seen this in a number of theatres. I have seen us fly teams in from Canada into theatres. You saw this, it has happened – it happened in Somalia, it happened in umpteen other theatres. Something serious happens, there is not enough guys on the ground, guess what. We just open up the big government wallet and we start firing things and we beg forgiveness later. And generally no one comes after us for spending too much money to investigate a serious offence. So no, resources would not factor into my thinking at all.

It seems clear that had any of the subjects prioritized an investigation into the legality of the transfers, resources would have been forthcoming.

(my emphasis)

The most crucial points that emerge from this tragic litany is that the foregoing speaks not just to a dysfunctional military police system during the time period covered by the MPCC complaint – and thus to Canada’s institutional inability to investigate, much less prosecute, war crimes during that period -- but also to the subsequent and continuing unwillingness to investigate.

As noted at several points in the AI/BCCLA narrative, nothing prevented the post-2008 CFNIS or the Provost Generals who have succeeded Captain Moore – or the RCMP – to investigate as more and more evidence came out not only through the MPCC process but through a host of other processes like the testimony before the House of Commons Special Committee on the Canadian Mission in Afghanistan. And nothing prevented those organizations from learning via the MPCC process about all the mistakes made – including those admitted to by their predecessors (as when Lt. Col. Garrick acknowledged the Globe and Mail investigations should not have ended) – that better investigations could avoid. The unavoidable conclusion is that, even if most or all of the failures to investigate in the 2007-2008 period can be attributed (according to the MPCC) to insufficient information in the hands of the Military Police or to layers of institutional dynamics and incompetence (as revealed by the AI/BCCLA submissions), failure to conduct any investigation at all by autumn 2017 can be attributed to one thing and one thing only: institutional unwillingness. In that context, were the Canadian Government to now represent to the ICC OTP that the CFNIS will *now* investigate, the ICC OTP can only conclude that such an investigation will not be a genuine one given the record to date.

7. The Fynes Inquiry and Resistance to both Improvement and Civilian Oversight by Canada’s Military Police

The MPCC recently released a report on a (substantively) unrelated matter concerning the complaint of a soldier’s family about what the family felt was a poor and disrespectful investigation into the death of their soldier son (“The Fynes Inquiry” Final Report: MPCC 2011-004; March 10, 2015: online [here](#)). Notwithstanding concluding that some of the strongest claims about the police conduct had not been proven, the MPCC released a damning report about a myriad of shortcomings of the CFNIS investigative procedures and practices that had come to light as a consequence of the hearings. The MPCC issued over 50 recommended changes with a number of them necessarily implying a lack of professional institutional competence in the kind of investigations at issue in the inquiry (so-called “sudden death” investigations) and more generally.

Under the *National Defence Act*, the MPCC has no power to order changes. Rather, the system is structured around the beneficial interests of the Military Police, in this case CFNIS, by virtue of a mechanism requiring the Military Police to file a responding Notice of Action after the MPCC first issues an Interim Report of their investigation together with their findings and recommendations. The Notice of Action is to indicate which recommendations are accepted by the Provost Marshall and the action he plans to take to implement the accepted recommendation and to provide reasons for rejecting any given recommendation. Such a Notice of Action is intended to be a public document, not just for reasons of general transparency in government but also because public spotlighting produces pressures for compliance and allows for the MPCC, Parliament and civil society to hold the Military Police to account as action is (or is not) taken.

Following the report in the Fynes Inquiry, the CFNIS took the unprecedented step of insisting that the Notice of Action be kept secret. As a result, when the MPCC published its 1195-page report, it ‘included’ the Notice of Action as 40 pages of completely redacted pages (i.e. entirely blacked-out pages) at pp. 984-1023.

What follows are some key (albeit still somewhat lengthy) extracts from the MPCC’s final report on the implications of the Military Police’s obstructionism (underlining is our emphasis):

7.0 THE MILITARY POLICE RESPONSE

1. The Military Police has provided a 90-page Notice of Action in response to the Commission’s Interim Report. The Interim Report had been issued on May 1, 2014. The Notice of Action was received more than seven months later, on December 16, 2014.
3. Soon after the Notice of Action was issued, the Commission was advised the Military Police would not allow it to be included in the Commission’s Final Report or otherwise published. ... As a result, very little can be said here about the contents of the Notice of Action. The purpose of the statutory requirement for the Military Police to provide the Notice of Action therefore cannot be achieved.
4. The Notice of Action is part of a broader statutory scheme creating independent civilian oversight for the Military Police. Rather than mandating the Military Police to follow binding recommendations, this scheme operates by imposing an obligation on

the Military Police to explain to the parties in the case, to the Commission, to the Minister and, in the case of a Public Interest Hearing, to the public, what actions it will take to address the issues and the reasons for failing or refusing to take action, should it choose not to act on any of the Commission's findings or recommendations. This obligation is meant to achieve the twin goals of accountability and transparency, which are essential for meaningful independent oversight. The Notice of Action is the means by which the Military Police has to answer to the Commission, to the parties, and to elected officials for its decisions. In a public interest case, it is also the means by which the public can be reassured that the oversight regime operates as it is meant to, and that any concerns are being appropriately addressed, or at least that it can be informed as to what is or is not being done and why.

5. The decision to prevent the publication of the Notice of Action in this case frustrates the fundamental goals of independent civilian oversight. The actual content of the Notice of Action, which the Commission has reviewed, is also not consistent with the purpose of oversight, as the Notice of Action largely fails to provide meaningful responses to the Commission's findings and recommendations and, in many cases, provides no response at all.

6. ...[T]he Commission has taken the necessary legal action to ensure the Notice of Action can eventually be made public. In the meantime, the Commission can only publish the following general comments.

7. The Notice of Action rejects some 70% of the Commission's recommendations. A small number of the responses, amounting to less than 20% of the total, do so directly, by taking issue with the substance of the recommendations and indicating, albeit not always clearly or directly, that the recommendations will not be implemented. The recommendations that are rejected in this manner are:

- The Commission's main recommendations to have sudden death investigations on defence establishment property led by experienced civilian police investigators until CFNIS members acquire sufficient field experience in the conduct of such investigations through secondments with civilian police forces;

...

8. Many of the reasons provided for rejecting these recommendations, where reasons are provided at all, raise their own substantive concerns in terms of an apparent lack of understanding or acknowledgement of the findings made and underlying issues

identified in the recommendations. However, these concerns cannot be discussed without a more detailed review of the actual text of the responses. Since the Commission cannot engage in this discussion here, it can only state that it does not accept the reasons provided for rejecting many of its most important substantive recommendations.

9. Approximately 30% of the responses in the Notice of Action accept the Commission's recommendations. However, this acceptance is not always complete or unqualified, and many of these "positive" responses raise serious concerns in their failure to acknowledge the substantive deficiencies identified in the findings. ...

10. Of the recommendations that are fully accepted without qualification and without raising further issues, one relates to a very general principle that is being agreed to without an accompanying commitment in other responses to concrete actions by which this principle will be put into effect. The others relate to more minor or technical issues.

11. In addition, the more substantive recommendation related to the ATIP process and the Military Police's authority to make decisions about the disclosure of its information also appears to be accepted, at least in principle, but the language used in the Notice of Action remains somewhat non-committal.

12. All other responses in the Notice of Action provide no answer as to whether the recommendations will be implemented. More than half of the total number of responses to the recommendations amount to no more than a statement that the Military Police will research the issues and/or consider the recommendations. This failure to provide any information as to what will be done about the recommendations can only be taken as a rejection of those recommendations, since no commitment at all is provided to implementing them. If these responses were not taken as rejections, then there would be no obligation for the Military Police to explain the failure to implement the recommendations, and they would disappear from the oversight regime created by the *National Defence Act*.

13. Even the few responses that otherwise reject the recommendations more directly also often fail to provide meaningful answers. Those responses often sidestep some of the most important issues raised by the Commission or fail to provide information about what it is the Military Police plans to do instead of implementing the recommendations. Many are also expressed in language that avoids stating the rejection in clear and direct terms.

14. The responses to the Commission's findings also generally provide no indication as to the position of the Military Police with respect to the findings, or as to whether the deficiencies identified in the Interim Report are acknowledged as deficiencies. ...[T]his

non-committal approach is highly problematic, as a response to the findings was required, and the comments included in the Notice of Action fall short of providing one. In response to many of the findings related to deficiencies in the investigations, the Military Police proposes to have the investigations assessed by another police force.

15. A review of the responses to the recommendations and findings found in the Notice of Action leaves open to question whether the Military Police in fact sees there was anything seriously wrong in the investigations and events under review. ...

16. On the whole, the Notice of Action is, for the most part, not in fact a response to the Interim Report ...[c]ontrary to s. 250.51 of the *National Defence Act*...

19. The Act specifically stipulates that, where the CFPM decides not to act on any of the findings or recommendations included in the Commission's Interim Report, the Notice of Action must set out the reasons for not so acting. Hence, while the statute leaves the ultimate decision as to the actions to be taken in the hands of the Military Police, it also imposes a mechanism by which the Military Police must answer for its decisions, actions, or lack of action, to the Minister, to the Commission, and ultimately to the parties involved and to the public. This accountability is achieved by imposing an obligation on the Military Police to state what it will do and to explain why. Accountability cannot be achieved where what is being done is not revealed.

20. In that sense, the refusal to publish the Notice of Action can be seen as a rejection of the very principles of independent civilian oversight and as an attempt by the Military Police to avoid accountability and excuse itself from having to explain to anyone, except perhaps the military itself, whether it recognizes the failures identified in this Hearing and what, if anything, it plans to do to address their underlying causes.

21. The content of the Notice of Action itself also has the effect of circumventing the operation of the oversight regime, even for those – like the Commission and the Minister – who did receive the text of the Notice of Action.

22. The majority of the responses to the Commission's recommendations essentially state the Military Police will consider the recommendations. One would expect the Military Police would in every case consider all the recommendations arising from a Public Interest Hearing. The purpose of a Notice of Action is to report on the result of the recommendations and the findings having been considered, not to state that they will be considered at some indefinite future date.

23. In the present case, the Notice of Action generally does not provide any indication of the Military Police's position on the recommendations, even on more general principles,

let alone any intent to follow them. It is not the case that the Military Police provides substantive information about its views, but leaves the more detailed aspects to be determined after further research and consideration. There is for the most part simply no information. By not saying what will be done about practically all of the findings and most of the recommendations, the Military Police is failing to provide the basic information meant to be included in the Notice of Action.

24. The responses in the Notice of Action essentially push back the time when decisions will be made about the recommendations and, in that way, remove these decisions from the accountability provided for in the oversight regime. By not providing a clear answer one way or the other as to whether the recommendations and findings are accepted and what will be done about them, the Military Police is also effectively extracting itself from the obligation to provide explanations for not acting on the findings or recommendations. If and when the Military Police does make decisions about policies and training with respect to the matters raised in the Commission's recommendations and findings, there will be no process and certainly no requirement for the Commission or the Minister to be informed. There will be no requirement for the Military Police to provide explanations if some of the recommendations are not implemented or if some of the findings are not acted on. This is clearly contrary to the statute that created this oversight regime. The Military Police's decisions cannot be assessed by the Commission or the Minister because they are for the most part not revealed, and as a result not explained or justified.

25. The decisions clearly cannot be assessed at all by the complainants, the subjects of the complaint or the public, because the Military Police's position opposing the publication of the Notice of Action means the parties and the public are not even provided with a copy of the incomplete and unsatisfactory responses found in the Notice. The decision to prevent the publication of the Notice of Action effectively ensures that the complainants and the public will never be informed at all as to what will or will not be done. By definition, they are hence not being provided with any explanation or justification for the decisions made, as they are not even being told in any way what those decisions are. They are also prevented from being shown and from being able to assess how the words used in the Notice of Action amount to a rejection of oversight by the Military Police.

26. The responses in the Notice of Action indicating another police force will be consulted to assess the investigations operate in a similar manner to subvert the purpose of oversight. They transform what is meant to be an exercise of public accountability into a private consultation. The Military Police is in effect looking for a second opinion as to whether there were any deficiencies in its investigations. There is no plan to disclose this second opinion or to provide any further information about what may in fact be done with respect to the Commission's findings, not even to the Commission

itself or to the Minister, let alone to the parties or the public. As a result, no response is provided about the findings, and both the parties and the public (as well as, of course, the Commission) will be kept in the dark and will have no means of assessing what, if anything, may eventually be done about any of the deficiencies.

27. The lack of substantive answers in the Notice of Action is particularly disconcerting in light of the time it took to provide it. It is difficult to understand why, after taking more than seven months to review the Commission's Interim Report and to prepare its Notice of Action, the Military Police largely cannot provide answers beyond stating that it will consider the recommendations. The Military Police delayed issuing of the Notice of Action in order to brief the Senior Chain of Command of the CAF. Three full months elapsed between the time when the Military Police first advised the Commission the Notice of Action was ready and the time when it was finally provided. Yet, the Military Police apparently did not use this time to consider and to come to conclusions about the recommendations so as to provide meaningful answers.

28. This is particularly shocking when it comes to the responses to the policy recommendations relating to the disclosure of suicide notes....[T]he CFNIS began working on revising its procedures for the disclosure of suicide notes in June 2009. Yet, in December 2014, the Military Police was still not able to tell the Commission what those policies and procedures will be.

29. Many of the others recommendations and findings for which the Military Police provides no answer also relate to areas where, in the Commission's view, the deficiencies were serious, obvious and inexcusable. The Commission identified clear, often egregious deficiencies in the interactions by the Military Police with the Fynes throughout the investigations under review... Yet, years after the events and over seven months after receiving the Commission's Interim Report, the Military Police still cannot provide any information about what it plans to do about these issues, and has still yet to respond even to simple recommendations like providing substantive information during family briefings, or putting in place the necessary processes and resources at CFNIS Detachments to attend to the return of exhibits. There is still no response in the Notice of Action to some of the most serious factual findings on these matters. In particular, the Military Police provides no acknowledgement or answer to the serious finding of lack of professionalism on the part of those in supervisory and leadership positions who did not step forward, take responsibility, provide adequate explanations and apologies, or correct what needed to be corrected.

30. Throughout the events under review, the Commission often observed instances where the Military Police and its members had apparent difficulty in recognizing their own shortcomings and deficiencies and were unable to take timely action to address

them. Seemingly set on justifying their actions or to preserve a positive image in the eyes of the complainants or of the public at large, MP members often proceeded to make matters worse by failing to provide timely, accurate and straightforward answers to the family and to the public, and by failing or refusing to modify a misguided approach. The Military Police often made statements that appeared to respond to the concerns, while taking few if any steps to actually address them. ... The Military Police repeatedly sought to appease the Fynes by making what turned out to be empty promises and gestures and by providing vague explanations, but failed to take substantive steps to address the concerns.

31. The response to this report can be seen in the same light. The Military Police flatly refuses to allow the Fynes or the public at large to even see the response. The response itself says very little of substance about the actual issues identified. Even as it rejects the vast majority of the recommendations, the rejection is couched in language that avoids meeting the issues head on or providing direct answers. Responses may on the surface give an impression that issues are taken seriously and will be addressed, but they stop short of acknowledging the deficiencies identified in the Interim Report or of agreeing to specific remedial action capable of repairing the deficiencies.

32. Overall, the Military Police response demonstrates an unwillingness or inability by the Military Police to recognize and address its own shortcomings. If any further proof were necessary of the need for independent oversight, it would be provided by the apparent inability of the Military Police to deal effectively with its own shortcomings, both during the underlying events and in its response to the Commission's findings and recommendations arising from those events. This makes the Military Police's apparent reluctance substantively to accept external oversight all the more troubling.

Aided by the emphasized passages from the "Response of the Military Police" section of the MPCC Fynes Inquiry final report, I assume readers of the above have made a number of connections between the institutional, and associated professional and cultural, pathologies of the CFNIS and the lack of capacity and institutional will that resulted in a failure to investigate in the context of transfer of detainees. It does not overstate the matter, I believe, to say that, even if Canada's unwillingness to investigate war crimes of Canadian higher officials were not already clear from the refusal to do so for over a decade, Canada's key agency for such investigations – the CFNIS – suffers from attitudinal and organizational failings that disentitle any claim that the ICC should defer to it within the Rome Statute system when it comes to investigating possible war crimes committed by Canadian higher officials.

Given what we know about how the Military Police botched investigations into lower-level soldiers' role in Afghan detainee transfer while resolutely refusing to launch investigations into higher officials, is there any reasonable basis to think the ICC should now defer to an agency that "demonstrates an unwillingness or inability by the Military Police to recognize and address its own shortcomings," that needs "independent oversight", and that has an "apparent inability ... to deal effectively with its own shortcomings"? The answer is, I suggest, evident.

Long-time knowledgeable observers of both the Military Justice and the Military Police systems in Canada can attest to its intense resistance to serious change over the course of many decades. With respect to the Military Police, much of this resistance likely arises from the embeddedness of Canada's military police system in overarching military structures and mindsets that both undermine true independence and compromise professionalism. Canada is far away from those countries that have realized that serious crimes investigation in the military needs a truly professional and independent investigative agency with equivalent expertise to major civilian police forces and under the command of a police officer who is not (or, at least, no longer) a member of the military.

In such a military police culture as still prevails in Canada, the rule of law can too easily become 'our law rules.' It is a short step from such tendencies to a pronounced reluctance to act on – or even to consider – any suggestion that 'our' military and 'our' commanders can commit war crimes. Such tendencies were palpable in the testimony of the Military Police officers in the MPCC failure-to-investigate proceedings (2012 report) reproduced in the preceding sub-section as well as in the attitudes documented by on-the-ground Military Police in the MPCC proceedings on the injured detainee (2009 report).

To date, Canada has completely abdicated its Rome Statute responsibilities to investigate. Both the extent and nature of that abdication and the evidence of structural and cultural flaws of Canada's Military Police system mean Canada cannot now be trusted with second chances. I respectfully submit that, should the Pre-Trial Chamber authorize an investigation into the Afghanistan situation, the OTP should firmly reject any efforts by Canada to try to fend off the ICC by claiming it, Canada, can investigate its own. The truth is that it cannot do so genuinely.

SECTIONS 3: GRAVITY AND THE INTERESTS OF JUSTICE

Much of this brief was in preparation before the filing of the Prosecutor's application for authorization to investigate on November 20. Having now considered the "Gravity" and "Interests of Justice" sections in the application, my general view is that the reasons given therein apply as a general matter to Canadians whose conduct – if so evaluated following an ICC OTP investigation – rises to the level of participation in systemic and brutal torture through any of the modalities set out in Art 25(3)(c) and (d) of the Rome Statute or constitutes clear cases of commander and other superiors' responsibility in relation to the conduct of others, per Art. 28.

1. *Gravity*

I do not believe that there are meaningful distinctions to be made in the universe of "gravity" between those who knowingly contribute to torture and those who engage in the hands-on torture. As long as the focus is on the "most responsible" in the chain of command sense, those playing torture-system-sustaining roles must all be viewed as central participants in the torture.

By way of example, it took Germany's criminal law too many decades after World War II to come around to an understanding that the "desk murderers" who run systems while keeping distance from the immediate killing are at least as guilty as the immediate perpetrators. In 2017, it would be deeply disappointing if the international system followed a similarly long learning curve versus recognizing from the outset the full responsibility of "desk torturers" who ensure that victims reach the torturers without themselves ever seeing the victims. In this respect, I note the symbolic recognition of this in the Prosecutor's application when, in relation to the brutality of the NDS' torture practices, the Prosecutor cites the *Globe and Mail* article that focused on Canada's role in generating torture as much as it focused on the awful fate of the victims once in NDS' hands: "'From Canadian custody into cruel hands", *Globe and Mail*, 23 April 2007 (cited at footnote 581 in Prosecutor's application). It would be an unfortunate irony this key effort to turn up the truth about Afghan *and* Canadian co-perpetrators of torture were only to be invoked for bringing Afghans to justice.

In my view, the knowing continuation of a system of sending people to the real risk of torture is more than sufficient to cross any gravity threshold worthy of the ICC's attention. But I also believe that the seriousness of the conduct is deepened significantly

if and to the extent that investigation shows various forms of deceit, obstruction, and undermining of that to which one claims to be committed (e.g. the test for criminal responsibility; the monitoring regime the 2007 MOU initiated; etc.). If the evidence reveals deliberate and likely sophisticated efforts to create various layers of plausible deniability through information suppression and management, there is good reason to see this as an added layer of seriousness.

Of course, the gravity of the possible crimes committed by high-ranking members of the Canadian state would be unequivocally made out if investigations discover that transfer of captives to Afghan agencies, notably the National Directorate of Security (NDS), was a deliberate part of an intelligence-gathering system with a key purpose of transfers being that Canada and its allies would receive post-interrogation intelligence from the Afghan authorities. The scale of gravity is also at the top end if it were ever to turn out that Canada's intended detainee policy in Kandahar was one reason why the United States put its finger on the scale to 'give' Kandahar Province to Canada starting in 2006 in preference to its even closer ally, the United Kingdom, which also reportedly wanted to be assigned Kandahar.

Importantly, only an investigation can determine whether and how far the motivations of key actors in Canada's decision hierarchy may have gone beyond (still criminal and still grave) recklessness and willful blindness as to the fate of transferees and included, on the part of some Canadian actors, the direct intention that detainees be sent to American and Afghan partners whose standard methods, known to involve torture, would produce operational dividends for Canada and the US.

In that respect, an investigation is the only way to be certain that such reprehensible motivations did not animate some actors controlling the detainee transfer system. The converse, not investigating and thus not knowing whether this gravest of explanations for the maintenance of the transfer system is true in whole or in part, would serve the interests of impunity and not the interests of justice.

2. The interests of justice

As noted in the Introduction, the interests of justice analysis is ultimately about whether there is a compelling reason not to proceed with a case or category of case or category of actors despite the criminal conduct having already passed the gravity threshold.

With respect to Afghanistan, the November 20 application carefully goes through the extensive and conscientious consultations and surveying the ICC OTP did to assure itself that a significant preponderance of Afghans do wish to see criminal justice for war crimes and crimes against humanity. That having been established, what conceivable

reason would there be for Afghans to not want to see justice applied equally to all perpetrators?

However, I believe that the most important point with respect to the interests of justice is that there are affirmative reasons why it is extra-important that nationals of a country like Canada not be treated as privileged. One such reason is the moral imperative that the ICC must stand for an even-handed international rule of law – where all victims are equally worthy of justice and all perpetrators are equally called to account. It cannot be an institution that is perceived to give powerful or influential or indeed ‘nice’ countries – and through them their citizens – a pass. The ICC has already taken a giant step forward by naming the United States/CIA as a priority focus; to now exclude Canada/Canadians would be to take at least a half step back.

Another reason is that Canada was a key actor in creating the ICC and is now standing behind the Court. Indeed, it vaunts its support for the Court. It tries to persuade countries not to abandon the Court, as during former Foreign Minister Stéphane Dion’s visits to both The Hague and Africa in autumn 2006. Precisely such a country will be the test case for both the fortitude and integrity of the Rome Statute system. If Canada and Canadians are seen to be equally accountable, it will immeasurably enhance the long-term mission of the ICC.

From the wider perspective of the role of the ICC in generating both deterrence for future crimes and multiplier effects by virtue of its relatively few cases serving as persuasive precedents for domestic legal systems, the Rome Statute has to lead the way when it comes to tackling systems of criminality including those that involve information-suppression strategies and deniability methods to blur who knew what when. Canada’s policy and practices on detainee transfer operated within a system of complex interactions of institutional actors in an environment that is opaque to the external observer – and in which complexity and opaqueness may have been counted on in order to avoid both detection and accountability. The ICC has the opportunity to deploy its knowledge and skill sets at the investigative stage in an effort to connect systems to individual responsibility in a way that could yield many important lessons for the investigation of war crimes and crimes against humanity by the ICC, other international bodies and states themselves – whatever the outcome of this investigation, once begun.

The foregoing also speaks to another aspect of justice – which is the injustice of criminal law systems so often succeeding in identifying the lower-level actors within a criminal system and pursuing them as rough representatives of that system. In the Canadian context, what investigations there were by CFNIS were always with respect to those

whose job was the hands-on handling of detainees. Never – as we have seen – was the command investigated. Yet we can be reasonably sure that this chain of command put dozens if not hundreds of soldiers and military police in conscience-searching situations, if they had any suspicions at all that captives who they were instructed to transfer might end up abused, tortured or murdered. I urge the ICC OTP to consider that there is justice axis running between those front-line men and women and the higher-ups who had the power and inclination to use them as instruments of a policy of putting captives at risk of serious harm.

As well, there is a complementarity feed-in. The history of no investigations at all in Canada of the higher-ups in the military and civilian chains of command and the history of near-constant obstruction by government of efforts by Canadians to get to the truth must surely be factors that push the analysis beyond whether the ICC *may* take jurisdiction to an affirmative reason why the ICC *should* take jurisdiction.

Also overlapping with complementarity, a decade has passed in which there has been no investigative action with respect to the chains of military and civilian command – as admitted by the government with its reply in September of this year to Order Paper Question Q-1098. It is not just that this speaks to why Canada is owed no deference by the ICC but also that, at more primordial level, time is marching. If justice delayed can be justice denied, this is in part because memories fade and witnesses and documents cannot be found. As such, investigation itself is urgent so as not to have the passage of time take any further toll.

It is all the more in the interests of justice that the ICC would now take the baton from the Canadian constitutional system, which failed to see its way clear to applying its rights protections to Afghans. That said, one judge did contemplate the day when Canada and Canadians could receive their due in a jurisdiction that would treat Afghan victims of Canadians' conduct as warranting the full protection of law. Recall the earlier-quoted words of Justice McIntosh of the Canadian Federal Court in sounding a warning to the government (which had just 'won' in her court) when she ruled that Canada's Charter of Rights did not extend to transfer of detainees on Afghan soil:

[343] Before concluding, it must be noted that the finding that the Charter does not apply does not leave detainees in a legal "no-man's land," with no legal rights or protections. The detainees have the rights conferred on them by the Afghan Constitution. In addition, whatever their limitations may be, the detainees also have the rights conferred on them by international law, and, in particular, by international humanitarian law.

[344] It must also be observed that members of the Canadian Forces cannot act with impunity with respect to the detainees in their custody. Not only can Canadian military personnel face disciplinary sanctions and criminal prosecution under Canadian law should their actions in Afghanistan violate international humanitarian law standards, in addition, they could potentially face sanctions or prosecutions under international law.

[345] Indeed, serious violations of the human rights of detainees could ultimately result in proceedings before the International Criminal Court, pursuant to the Rome Statute of the International Criminal Court, A/CONF. 183/9, 17 July 1998.

(my emphasis)

Canada was given fair warning by a member of its own judiciary almost a decade ago. The time has arrived for the ICC to prove Judge McIntosh correct by showing that the Rome Statute is not a “legal ‘no-man’s land.’”