

2-2010

Special Forum on the Canadian Mission in Afghanistan (February 2010): Letter of March 13, 2010, to Special Committee on the Canadian Mission in Afghanistan

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(PRE-PROROGATION) MEMBERS,
SPECIAL COMMITTEE ON THE CANADIAN MISSION IN AFGHANISTAN
c/o, Clerk of the Committee, Carmen DePape,
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House of Commons
Ottawa ON K1A 0A6
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FAX: 613-992-7974

And under individual cover to all Members of the Committee,

Former Chair: Rick Casson
Former Vice-Chair: Hon. Bryon Wilfert

Members:

Hon. Jim Abbott
Hon. Denis Coderre
Paul Crête
Hon Ujjal Dosanjh
Francine Lalonde
Hon. Bob Rae
Claude Bachand
Laurie Hawn
Dave MacKenzie
Hon. Maxime Bernier
Paul Dewar
Greg Kerr
Deepak Obhrai

March 13, 2010

Dear Members of the (pre-prorogation) House of Commons
Special Committee on the Canadian Mission in Afghanistan,

You will be aware that Osgoode Hall Law School and the Nathanson Centre on Transnational, Human Rights, Crime and Security held a Special Forum on the Canadian Mission in Afghanistan during the prorogation period (February 8). Various materials plus audio/video and full verbatim transcripts for all nine sessions are available on the Special Forum's website at:
<http://nathanson.osgoode.yorku.ca/events/canadian-mission-in-afghanistan/>

Some of you were in attendance two days later, on February 10, on Parliament Hill for my presentation, at the invitation of the (prorogued) Special Committee, on the results of the Osgoode Hall / Nathanson Centre Special Forum.

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My written submission (which was digested for the 10-minute oral presentation) can be found on the following web page: <http://nathanson.osgoode.yorku.ca/events/canadian-mission-in-afghanistan/craig-scott-presentation-to-parliament/> On that page you can also click to a page where a PDF can be downloaded of this document, “Moral and Legal Responsibility with Respect to Alleged Mistreatment of Transferred Detainees in Afghanistan: Presentation to the House of Commons Special Committee on the Canadian Mission in Afghanistan.” Also, audio of the Special Committee February 10 session will shortly be uploaded on the same page.

In light of recent revelations at the end of February (February 25) and this past week (March 8), you may wish to consider segments of the Special Forum dealing specifically with two issues:

Issue 1: Has Canada been sending Afghan detainees to the Afghan authorities (notably, to Afghanistan’s National Directorate of Security in Kandahar) in order for intelligence to be obtained, while knowing that torture is amongst the methods used by the NDS?

As you will know, Murray Brewster and Jim Bronskill of the Canadian Press reported on March 8 on the interrogation activities of CSIS officials (“Canadian Spies Interrogated Afghan Prisoners, Insiders Reveal” at (<http://www.theglobeandmail.com/news/politics/canadian-spies-interrogated-afghan-prisoners-insiders-reveal/article1492713>) It is important that scrutiny continue on the question of whether Canada ever received – and indeed systematically received and indeed possibly continues to receive – intelligence from NDS that has been extracted from interrogations of detainees transferred to NDS by Canada, whether or not CSIS (or any other Canadian intelligence officials) were themselves conducting or part of the interrogations.

This issue was flagged in the above-mentioned February 10 presentation to the Special Committee (point 7 of the presentation, led up to by points 1-5) and also discussed in the question and answer session:

Point 7:

7. We need to know whether the collection and dissemination of intelligence is, in any significant respect, relevant to the detainee transfer issue. In particular, does Ottawa or do Canadian intelligence agents in the field (whether military intelligence or CSIS or other) receive information from NDS, notably NDS Kandahar, and, if so, is any of this information the product of interrogations of prisoners by NDS? Do we not only receive but analyze and make use of this information? Do we know – or do we ask – how the interrogations were conducted that produced the information?

Points 1-5:

1. Canadian society, Parliament, and the people of Afghanistan – in future I will simply say “we” – need to understand better why successive Canadian governments did not plan for Canada’s own long-term detention capacity in Afghanistan or, once in Afghanistan, did not respond favourably to proposals that Canada might cooperate with other NATO forces to create a joint detention facility that would be under Afghanistan sovereignty but co-run by NATO forces.
2. We need to know why Canada selected Afghanistan’s National Directorate of Security (NDS), a lead intelligence agency in Afghanistan, as the first place in the

transfer chain for Afghans detained by Canada and, even more importantly, we need to know why Canada continued to transfer detainees to NDS Kandahar despite a wealth of credible reports from credible actors on the propensity of NDS to torture those in its hands either as a regular habit or a standard operating procedure.

3. We need to know whether, as asserted by Mr Richard Colvin in his December 16, 2009, public letter, proposals were received from Canada's own embassy in Kabul to cut NDS Kandahar out of the transfer chain and whether these proposals were rejected by the military and/or ministers – and, if so, why?

4. We need to know whether NDS Kandahar remains to this day the first port of call for all, most, many or some of the detainees transferred by Canada.

5. More generally, we need to be careful not to limit our concern to the period that has so far received the most scrutiny, namely, 2005-2007. Our practice in 2008, 2009 and now 2010 has also to be subject to appropriate oversight.

This issue was raised at the February 9 Osgoode Hall /Nathanson Centre Special Forum in two of the nine sessions. The session-by-session transcripts on this issue are found under each person's session at <http://nathanson.osgoode.yorku.ca/events/canadian-mission-in-afghanistan/>. For ease of reference, consider:

- *Session 1 - Alex Neve, Secretary General of Amnesty International (Canada), English branch, "Responsibility of the Canadian State under International Law and in Canadian Law: Charter Review, Public Inquiries, and Civil Liability Lawsuits"*

Alex Neve: "Between late 2005 and early 2007, we again wrote several letters to the Canadian government. It was becoming apparent that, with an increased Canadian deployment focused on the conflict-ridden Kandahar region, the number of prisoners taken into custody by Canadian soldiers was rising. Even more alarming, it became apparent that prisoners were being handed over to Afghanistan's notorious National Directorate of Security (NDS), an intelligence agency dating back to the era of the Soviet occupation of Afghanistan in the 1980's.

The NDS was well known for its abysmal human rights record, including extensive torture. In many respects, Canada could not have chosen a worse partner for handling prisoners.

We continued to press Canada to take a different approach. We urged exploration of the possibility of working jointly with other NATO governments, collaboratively with the Afghans, to retain responsibility for the captured prisoners, but also to do so in a manner that would assist with training, capacity building, reform, and improvements in the Afghan prison system."

- *Session 3 -- Paul Champ, Barrister, Champ & Associates, Ottawa, "Proving Facts and Seeking Evidence in the Charter Litigation by Amnesty International against the Minister of Defence: Shadow Boxing with Ottawa"*

Craig Scott (directed to Paul Champ): "So, the second thing is, ...in all of the interactions, have any concerns been raised, and have you sought any evidence of the following, which is: is there intelligence sharing going on between the National Director[ate] of Security and Canadian Forces or Canadian intelligence agencies? If there were, does that deepen the reasons why we would think that the government is so reluctant to stop the system of transferring directly to that particular body?"

So it's, let's say, entirely speculative[ly]—I hope it's not the case—but we have lots of experience with what intelligence sharing can result in. And, also, Canada's military's behaviour in the last eight years shows how incredibly focused they are on the war effort. And if intel coming out of National Director[ate] of Security in Kandahar is deemed to be actually very useful to the Department of Defence, are they using it? So I'm just wondering if any of that has ever come up in any of the search for information?"

I attach transcripts for each of the Neve and Champ sessions.

Issue 2: Is there a basis for investigating whether any Canadian officials – members of the executive or members of the command structure of the military – bear criminal responsibility for knowingly creating and continuing a policy and practice of sending Afghan detainees to the National Directorate of Security in Kandahar given both the purpose of such transfers and knowledge related to the methods of NDS?

As you will also know, Richard Brennan (with files from Allan Woods) reported in The Toronto Star on February 25 on a leaked 2007 legal opinion from the Judge Advocate General (Brig.-Gen. Ken Watkin) dealing with the possible criminal responsibility of Canadian military officials for a policy and practice of sending Afghan detainees to known risk of torture (see “Military Told to Heed Abuse Claims” at <http://www.thestar.com/news/canada/afghanmission/article/771198--military-told-to-heed-abuse-claims>).

This too was specifically presented to the Special Committee in my February 10 presentation:

18. Finally, we need to know whether there is a real possibility that, if certain facts are clarified and are provable in a court of law, one or more Canadian officials could be investigated and possibly charged by the International Criminal Court Prosecutor, under the ICC Rome Statute's article 8 – that is, charged with war crimes stemming from “grave breaches” of the Geneva Conventions' prohibitions on torture, inhuman treatment and willfully causing great suffering or serious injury to body or health. Could the standards for individual criminal responsibility set out in article 25 of the Rome Statute be applicable, possibly article 25(3)(c)'s provision on aiding, abetting or otherwise assisting a war crime committed by another but more likely under article 25(3)(d)'s provision that says a person shall be criminally responsible “if that person...contributes to the commission or attempted commission of [a] [war] crime by a group of persons acting with a common purpose ...[where] [s]uch contribution is intentional and...made in the knowledge of the intention of the group to commit the crime”?

To this I would add that criminal responsibility under the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and corresponding Canadian Criminal Code sections must also be considered. This issue was extensively discussed in two of the nine sessions at the February 8 Osgoode Hall / Nathanson Centre Special Forum:

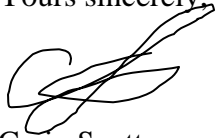
- *Session 2 – Williams Schabas, Director of the Irish Centre for Human Rights, NUI Galway. “Individual Criminal Responsibility under International Law and in Canadian Law: From Field-level to Cabinet-level Conduct”*

- *Session 9 - Michael Byers, Canada Research Chair in Global Politics and International Law at the University of British Columbia Faculty of Law, "Canada's Moral Standing in the World: Does Our Detainee Transfer Record Matter?"*

I attach the transcript for each of the Schabas and Byers sessions.

In closing, I reiterate the sentiment at the end of my February 10 presentation to the Special Committee: my sincere hope is that, especially in the absence of any public inquiry, this Special Committee – or you in your individual capacities as MPs – can continue to be an effective part of the process of both humanizing our approach to Afghan prisoners and democratizing accountability here in Canada.

Yours sincerely,



Craig Scott,
Professor of Law, Osgoode Hall Law School;
Director, Nathanson Centre on Transnational Human Rights, Crime and Security

Cc:

The Right Honourable Stephen Harper, Prime Minister of Canada
Michael Ignatieff, M.P., Leader of the Official Opposition
Gilles Duceppe, M.P., Leader of the Bloc Québécois
Jack Layton, M.P., Leader of the New Democratic Party of Canada