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Letter to Prime Minister Justin Trudeau on a Commission of Inquiry on Afghan Detainees, with Appendices

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The Right Hon. Justin Trudeau,
Prime Minister of Canada,
Office of the Prime Minister
80 Wellington St,
Ottawa, ON
K1A 0A2

September 19, 2016

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Dear Prime Minister,

RE: Commission of Inquiry on Afghan Detainees

As you are likely aware, Minister of Defence Sajjan, on behalf of the Government of Canada, rejected the request in House of Commons E-Petition E-70 for a commission of inquiry on various aspects of Canada's policy and practice with respect to the treatment of detainees in Afghanistan. For your ease of reference, I attach E-70 and Minister of Sajjan's response (Appendices 1 and 2). I write to ask you to review, and reverse, the decision of your Minister of Defence.

Coincidentally, I write, as the new Parliamentary sitting begins, on the same day that CBC has begun detailed reporting on the complicity of the RCMP, CSIS and the Department of (then) Foreign Affairs in torture overseas of three Canadians during the previous Liberal government's tenure. The documentation revealed by civil litigation has produced incontrovertible evidence of the willingness of officials under the previous government to arrange for the detention and interrogation of Canadians by a government that our officials knew would torture those Canadians.

Today's revelations are directly relevant to the Afghan-detainee question. If officials serving within a Liberal administration are capable of deliberate violation of both Canadian and international criminal law (whether with or without the sanction of 'legal advice' of government lawyers), why would anyone think that the same mindsets and willingness would not exist and be given room to act within the government of Mr. Harper in relation to Afghanistan? Only a commission of inquiry on the Afghan detainees will be able to examine all the relevant paper trails – including the many documents withheld from a 2010-2011 ad hoc parliamentary process on the basis of solicitor-client privilege – to determine exactly why and with what knowledge Canadian decision-makers persisted in sending hundreds and hundreds of people to brutalization at the hands of Afghanistan's National Directorate of Security, Afghan National Army, Afghan National Police, affiliated paramilitaries and quite possibly US actors as well.

To return specifically to Minister Sajjan's negative decision, he opens and closes his response with virtually the same emphatic claim. The penultimate sentence in the response 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." No serious legal scholar or close



observer of this issue believes this to be true, in view of all the facts that are known despite much effort by the previous government. Nor, I imagine, would most Liberal MPs, while in opposition, have dreamed a member of a new Liberal Cabinet would make such a sweeping and inaccurate statement.

I also attach the statement I released immediately following Minister Sajjan's response to E-70 (Appendix 3). In that statement, I make an observation that I believe to be fully accurate which, to the extent it is indeed accurate, may help you realize that this whole file does need a second look by you personally. I reproduce it below:

[Minister Sajjan's response to E-70] is full of gaps, elisions, and misdirection. ...An analysis of those problems will come later. For the moment, I will limit myself to [the] truly shocking blanket claim that ends the government's response.... These words could have been penned, word for word, by the previous Conservative government. ...[T]he fact is they may well have been written by some of the same officials and lawyers who ran the Harper-era messaging strategy. It is deeply disappointing that the Liberal government has chosen to add another link to a chain of complicity that for over a decade has seen non-stop efforts on the part of various Canadian government actors to hide the truth and block any form of accountability. I had expected far more from this government.

Apart from one major matter addressed below, it continues not to be my purpose to lay bare, at the moment, the considerable number of "gaps, elisions and misdirection" in Minister Sajjan's response. That day will come soon enough if your government does indeed choose to endorse the Harper legacy and continue to reject a commission of inquiry.

As already noted, the reason I am now writing is to urge your direct intervention on this file. I respectfully request that you inform yourself of what information the Government of Canada already has at its disposal that points to the compelling need for a commission of inquiry – and to then ensure that Minister Sajjan's decision is reversed by Cabinet. As part of such an intervention, I respectfully suggest that you specifically consult with your Minister of Foreign Affairs, Stéphane Dion, as to whether or not he has reason to believe a commission would be beneficial for our democracy, the rule of law and Canada's reputation in the world, given information at his disposal and any briefings he or his staff have sought and received since he became Minister of Foreign Affairs.

Not only did Mr. Dion, as Member of Parliament in the then Official Opposition, have some exposure – although by no means full exposure – to some relevant documentation when an ad hoc parliamentary working group was set up in 2010 in response to the Speaker's ruling against Mr. Harper's government, but also he may well now have had the opportunity to acquire further information from any of a number of civil servants in his department with knowledge of what went on under the previous government. The

institutional knowledge of these civil servants may possibly include what may have taken place by way of a cover-up across various departments and the PMO. In this regard, do recall that Minister Dion stated, when a batch of redacted documents were released in 2011 by the Harper government as an outcome of the compromise parliamentary process in which he participated, that “[w]hen you read these documents, you will have questions to ask to your Prime Minister and your Ministers.” Keep in mind that Minister Dion would have seen the text behind some of the redactions – alongside generally appreciating what gaps and elisions of the overall documentary record placed before the committee – and formed a view about the kinds of unanswered questions and still-hidden facts that were still outstanding.

I mentioned above that there is one major matter I did want to address arising from Minister Sajjan’s response to E-70. As part of your consultation, I would ask that you specifically ask both Minister Dion and Minister Sajjan whether or not either of them or their officials have information about a system used by the last government and the Canadian military to avoid registering persons taken captive by Canadian troops in Afghanistan – and to thereby facilitate Canada’s ability to transfer detainees to Afghanistan government agencies (and possibly even to the US) without informing the International Committee of the Red Cross or the then Department of Foreign Affairs, such that neither the ICRC nor DFAIT would know to undertake any monitoring of such persons and such that these off-the-books detainees effectively disappeared.

As the consequence of over three years of making inquiries and investigating while Member of Parliament for Toronto-Danforth (2011-2015) along with considerable further digging since my defeat in the October 19, 2015, election, I have multiple reasons for believing that the Canadian Department of National Defence replicated, at least in part, an American parallel detainee system that treated detainees ‘off the books’ by labelling some detainees as “Persons Under Control” (or PUCs) with possible terminological variations like “persons under custody” (also producing PUCs as an acronym). One hint of such a system arose from failure of the military to redact part of an (otherwise heavily redacted) CAF Board of Inquiry report that referred briefly and obliquely to “PUCs.”

Other evidence exists. At least one Canadian soldier has revealed that, in some contexts, soldiers were told to desist from calling persons in their custody “detainees.” Also, there is evidence Canadian Special Forces spoke amongst themselves of “PUC kits” (which I am assuming included things like wrist restraints and so on). And, disturbing conclusions arise from scrutiny of various published contemporary histories and memoirs in which the numbers of prisoners taken by Canadian forces in certain engagements and operations are reported. When these accounts are compared to official records of detainees that came out through the ad hoc parliamentary process, there appears to be evidence of many dozens, possibly into the hundreds, of Afghan prisoners who were detained ‘off the books’ (as they do not figure in the official detainee numbers), with an unknown number of them transferred on to various Afghan authorities.

There may have been many more PUC'ed than that, because these comparisons are subject to the hit-and-miss coverage of incidents and missions in published accounts. In this respect, whereas we all became used to the detainee issue being one involving transfer to the substantial risk of torture (and actual resulting torture) at the hands of the National Directorate of Security, I am greatly concerned that some, if not many, of these PUC'ed detainees were passed to the Afghan National Police, Afghan National Army, and/or paramilitary units not 'just' to subsequent abuse but also quite probably to extrajudicial execution.

It is apparent that the military has wanted to keep this PUC category secret. One confirmation of this came when I filed an Order Paper Question Q-1117 (41st Parliament) while MP for Toronto Danforth, the fourth or fifth I filed on the detainee issue. A number of the sub-questions in Q-1117 were aimed at getting an answer from the government whether there was a category beyond official "detainees." I reproduce the sub-questions intended to elicit answers related to PUC'ed detainees and related transfers (omitting sub-questions [a] to [l] and [u] onward, which concern other matters):

...

(m) in relation to the May 25, 2006, capture of "11 suspected Taliban fighters" referenced at page 96 of Ian Hope, Dancing with the Dushman: Command Imperatives for the Counter-Insurgency Fight in Afghanistan (Canadian Defence Agency Press, 2008), could the government set out the manner in which each of these 11 persons controlled by Canadian forces were processed, including what is known about each's subsequent trajectory after passing from the control of Canada until the point at which the government may have lost track of their whereabouts;

(n) at any period and, if so, which periods, did the Canadian government consider that there were one or more categories of persons who Canada passed on to either Afghan or American authorities but who were not categorized as detainees, and did such categories have a designation, whether formal or informal;

(o) were there persons under the control of Canadian forces who were transferred to Afghanistan, but who were not treated by Canada as covered by the provisions of the 2005 and 2007 Canada-Afghanistan Memorandums of Understanding on detainee transfer and, if so, on what basis were transfers of such persons not deemed covered by the agreements;

(p) were there persons under the control of Canadian forces who were transferred to Afghanistan but whose existence and transfer was not made known to the International Committee of the Red Cross and, if so, on what basis was the Red Cross not informed;

(q) during the 2011 Parliamentary process in which a Panel of Arbiters decided what information could be released to Parliament, were documents withheld from this process by the government if they concerned the transfer of persons that were not treated by Canada as covered by the provisions of the 2005 and 2007 Canada-Afghanistan Memorandums of Understanding on detainee transfer;

(r) between September 12, 2001, and the entry into effect of the 2005 detainee-transfer Memorandum of Understanding, (i) how many detainees were transferred to US authorities, (ii) to which US authorities, (iii) how many detainees were transferred to Afghan authorities, (iv) to which Afghan authorities, (v) how many persons under the control of Canada, but not considered as detainees by Canada, were transferred to US authorities, (vi) to which US authorities, (vii) how many persons under the control of Canada, but not considered as detainees by Canada, were transferred to Afghan authorities, (viii) to which Afghan authorities;

(s) between the entry into effect of the 2005 detainee-transfer Memorandum of Understanding and the entry into effect of the 2007 detainee-transfer Memorandum of Understanding, (i) how many detainees were transferred to US authorities, (ii) to which US authorities, (iii) how many detainees were transferred to Afghan authorities, (iv) to which Afghan authorities, (v) how many persons under the control of Canada, but not considered as detainees by Canada, were transferred to US authorities, (vi) to which US authorities, (vii) how many persons under the control of Canada, but not considered as detainees by Canada, were transferred to Afghan authorities, (viii) to which Afghan authorities;

(t) between the entry into effect of the 2007 detainee-transfer Memorandum of Understanding and the present date, (i) how many detainees were transferred to US authorities, (ii) to which US authorities, (iii) how many detainees were transferred to Afghan authorities, (iv) to which Afghan authorities, (v) how many persons under the control of Canada, but not considered as detainees by Canada, were transferred to US authorities, (vi) to which US authorities, (vii) how many persons under the control of Canada, but not considered as detainees by Canada, were transferred to Afghan authorities, (viii) to which Afghan authorities...

It is clear that the government understood what I was asking, and that I was giving them the opportunity to reveal the existence of a category called “Persons Under Control” or a like category such as “persons under custody.” This the government did not do, although it did acknowledge in general terms something significant, namely that Canada did use other terms for persons “detained” other than “detainees” – while also seeming to indicate persons not formally called

“detainees” could also be transferred no differently than persons formally treated as “detainees.” This alone is very significant information. I reproduce a passage that is used as part of the answers to four of the sub-questions (specifically sub-questions [n], [r], [s], and [t]):

Since the start of their operations in Afghanistan, the Canadian Armed Forces have, as a matter of policy, treated all persons in Canadian care, custody or control, humanely, in accordance with the same established Government of Canada process for handling, release, transfer or post-transfer monitoring, and in accordance with our obligations under international law. Several terms were used to refer to persons detained by the Canadian Armed Forces, including "detainees". The use of these terms did not in any way affect the Canadian Armed Forces' appreciation of their obligations towards these individuals. Whether or not the term "detainee" was applied in a particular case has never been a factor in determining Canada's processes for handling, release, transfer or post-transfer monitoring of persons under Canadian Armed Forces care, custody or control. [my emphasis]

The overall impression the government (through Defence Minister Peter MacKay) wants to leave is that categorization did not make any difference because all “persons in Canadian care, custody or control” were treated humanely, legally and according to processes no less legal or humane according to the category used. However, careful reading of the language in these identical passages reveals lawyerly hedging on exactly what the government was indeed saying. Apart from a circumlocution in sentence structure that creates interesting challenges in determining exactly what is being claimed, there are also potentially significant gaps in the list of things Canada is said to do regardless of the label of the person in custody; note that registration/record-keeping of captives is not necessarily included in “handling” and note that there is no specific statement that notification of the International Committee of the Red Cross is one of the always-present practices.

But most significant is that, although Minister MacKay and its drafters uses this exact above-quoted formula as part of answering four sub-questions (“n” and then “r”, “s” and “t”), for some reason they decided not to employ this language for “o” and “p” when the formula would appear to be no less relevant. What were “o” and “p” about? Recall that they asked whether some persons in Canadian custody or control were, first of all, deemed not to be covered by the transfer agreements signed with Afghanistan and, secondly, deemed not to require notification to the International Committee of the Red Cross. Why, when this formula proved so relevant for other answers, was it not called in aid for these questions? From my experience with many Order Paper Questions while an MP, the government was never shy to write exactly the same answer for every sub-question they deemed applicable. I believe there is a good chance that their omission of this formula in “o” and “p” could easily be because the answer to each of these crucial questions was “Yes”, but the Department of National Defence wanted to avoid saying that at all cost.

Then, when one reads what the answer to sub-question “o” was, one immediately notices that it does not actually answer the question asked. Rather, it gives one solitary example of a transfer not done according to MOU terms, and then conspicuously fails to say anything like “and this is the only instance.” So that you can understand the ‘style’ of the government answer along the above-described lines, the answer to sub-question “o” is reproduced below:

On one occasion, the Canadian Armed Forces took custody of an individual who, on the basis of credible grounds, was suspected of having committed a criminal act when employed at a Canadian Armed Forces facility in Afghanistan. The individual was not an insurgent, and was not arrested for a reason related to the Canadian Armed Forces mission in Afghanistan.

Consistent with standard Canadian Armed Forces procedures for addressing crimes committed or purportedly committed by local nationals at Canadian Armed Forces facilities outside of Canada, the Canadian Armed Forces transferred this individual to the custody of an appropriate Afghan authority for investigation. The individual was visited periodically by Canadian staff while in Afghan custody to confirm that he had not been mistreated.

As for the answer to sub-question (p), what is striking is that, here, Minister MacKay’s answer reverts to referring only to “detainees” when specifying who the ICRC had been notified about. The answer reads as follows:

Prior to June 2007, the Department of National Defence and the Canadian Armed Forces followed standard procedures which included providing the International Committee of the Red Cross with detailed information on each detainee captured by the Canadian Armed Forces, and notification of their release or transfer to Afghan custody. [my emphasis]

On June 26, 2006, the Department of Foreign Affairs and International Trade started to also provide similar notifications to the International Committee of the Red Cross, in parallel with the Department of National Defence and the Canadian Armed Forces. On June 2, 2007, the responsibility for notifying the International Committee of the Red Cross was formally transferred from the Department of National Defence and the Canadian Armed Forces to the Department of Foreign Affairs and International Trade.

If you revert to the formula (reproduced earlier) that the government used in answers to four other sub-questions, you will see the government is careful to structure the passage so that “persons detained” is not the same thing as “detainees”, which makes it potentially significant that, here, in the response to sub-question (p), they take care to use only the narrower “detainee.” I believe it

is more than possible that the ICRC were only notified of “detainees” and not of “persons detained” (including PUC’s) more broadly. And I believe it to be likely that the Department of National Defence crafted its answer to Order Paper Question Q1117 in order to avoid revealing this.

Since being defeated as MP, I have done some further digging and have traced the likely origin of a PUC system to its invention in the winter/spring of 2002 by the American military in Afghanistan. One account (from a former US military interrogator) of the origin of the term suggests that a somewhat benign reason for the new PUC category may have been to allow captured Afghans to be more easily released after interrogation if interrogation led to the conclusion they were not combatants; this account notes that, in this first year after 9/11, the US military found it difficult to secure the release of some prisoners once their names had been formally entered into the record system. Whether this rationale was or was not at the heart of the origin of PUC’ing by the US, what seems highly probable from my research is that the system then morphed (“metastasized” is probably a better term) in Iraq into a full-blown system of off-the-record detention and disappearance carried out by multiple American actors in Iraq after the invasion of that country in 2003.

Whether and how PUC’ing was adopted by Canada alongside an official detention system in Afghanistan would undoubtedly be one of the central tasks of a commission of inquiry to determine. But, if there was such a PUC system, several pathways seem possible (there may be others):

(a) In Iraq from January 2004 to January 2005, Canada had at least one senior officer on the ground. Walter Natynczyk was seconded to play a major role commanding 35,000 US forces in Iraq during Operation Iraqi Freedom. Indeed, he received a prestigious military medal from Canada for commanding combat operations in this war that Canada had deliberately not taken part in qua country. As you will know, Natynczyk was later appointed Vice-Chief of Defence Staff under General Hillier in 2006, and came to play a key role in Afghanistan. Between his role in Iraq and his elevation to Vice-Chief status, he assumed a role that would have given him an extra exposure to detention and transfer issues as head of the Land Force Doctrine and Training system.

(b) It could be that learning about the US PUC system took place at desk level versus in the field -- namely, back in North America. In the relevant period, there would have been regular close exchanges between our military and intelligence agencies and the Pentagon and CIA, whether at the very top (e.g. via General Hillier, when Chief of Defence Staff) or at a more functional level. As for the latter, Lt-General Michel Gauthier headed DND’s military intelligence for a couple years, a role which would have involved close collaboration with the US on intelligence-oriented practices and policies in the ‘war on terror’. Indeed, Washington, DC, sources of mine suggest that it is also worth asking whether a meeting between Gauthier and Defence Secretary Rumsfeld’s most valued advisor, Under-Secretary of Defence for Intelligence Steve Cambone, led to expectations that Canada would closely align its

Kandahar-related policy and practices with US' 'war on terror' imperatives and methods in exchange for Canada being handed Kandahar (in preference to the UK, which wanted it instead of Helmand). Subsequently, for key periods, Lt-Gen. Gauthier was a (if not, the) central decision-maker on when, whether and how Canada would transfer Afghan prisoners to Afghanistan. As his mini-bio also says on The Governance Network's website, Gauthier "[l]ed Canadian Expeditionary Force Command, responsible for all CF operational missions abroad, the Canadian mission in southern Afghanistan."

(c) It could be that Canadian forces were (or, were also) directly schooled in PUC'ing by American forces in Afghanistan itself, either at the time of the handover to Canada in Kandahar in early 2006 or through more longstanding relations arising from the joint operations of US and Canadian special forces.

All three of these could well have played a role in the evolution of a Canadian PUC'ing system in Afghanistan.

I have a good number of other reasons that lead me to believe that a commission of inquiry is as warranted and indispensable now as it was when opposition parties called for it on multiple occasions in the 2007-2011 period. They include troubling questions about the role of government lawyers across a number of ministries. However, I am highlighting the issue of PUC's both because this is information that has remained largely hidden from view. Also, if true, an accountability-avoiding PUC system would take the matter to another plane of wrongdoing and would also demonstrably disprove many of the claims of the Harper government, the Canadian military, and now Minister Sajjan that Canada under the Conservatives took care not to be complicit in torture of persons we transferred from our custody.

If the possible existence of a PUC system and its consequences are news to you, then I trust that you will appreciate how a commission of inquiry is the minimum necessary response. In this regard, please note that I raise this with you directly as Prime Minister as a last resort. Allow me to elaborate.

My work as MP on this issue was intended to lead to a plan of action should the NDP have formed government or been part of a government. When that went by the wayside, I initiated e-petition E-70 shortly after my October 2015 defeat (in December 2015). Well before the response to E-70 was due, I made sure to remind the government that the Q-1117 questions had not come from nowhere, and that my suspicions about a PUC policy/practice had not gone away. I did this by giving an interview that resulted in the possibility Canada had a PUC system being published in an article written by Canadian Press journalist, Murray Brewster.

While my preference would have been for concerns about a PUC system to be raised once a commission of inquiry was in place, I felt I needed to go public in relation to E-70 so that there would be no excuse for various government departments not to start to do the necessary legwork to look into this PUC

matter ahead of making the decision on E-70's request for a commission of inquiry. Despite some of my cynicism that developed after four years of being an MP and watching how government worked under the Harper government, I allowed myself to be hopeful that this new information, aired publicly in the national press, would help spur your government to make good on your expressed desire to lead a government that would be much more attentive to democratic values, the rule of law, human rights and our reputation in the world.

You can thus imagine my disappointment when the response from Minister Sajjan was published.

This letter, accordingly, is my good faith effort to ask one last time that your government, and that you as a Prime Minister of a very different stripe from your predecessor, do the right thing on this file. After consulting your Minister of Foreign Affairs and more widely as needed, I would accordingly ask you to request that your Cabinet exercise its authority under the Inquiries Act to establish a royal commission with a mandate along the lines of what E-70 was requesting

I should say something further. I regret that I feel I have no choice but to appeal directly to you as Prime Minister and make what would ordinarily be a redundant request that the Minister of Foreign Affairs be brought into a file of this sort. However, all indications are that the Department of Global Affairs was cut out of the decision-making chain on e-petition E-70. Just for example, journalists who sought Minister Dion's views on E-70 (and his explanation for why he was not leading the file) were told by Department of Global Affairs officials to contact the Department of National Defence.

This management of the file deliberately sidelined the Minister who should, along with the Prime Minister, have had charge of this file. There are two reasons for this, which are set out in a posting I placed online on June 10, ahead of Minister Sajjan's response (attached as Appendix 4). One is that Minister Sajjan is in a conflict of interest in ruling on this file; not only should he not have assumed what appears to be virtually sole carriage of the file, he should have recused himself from any part in the decision. The second is that this file should involve the entire Cabinet, not just due to the importance of the issues but also given how many different ministries were part of detainee policy and were also part of the previous Government's obstructionist and untruthful responses to revelations about the treatment of detainees transferred by Canada.

From the beginning, it probably should have been you as Prime Minister, supported by the Privy Council office and in consultation with Cabinet, who should have issued the response to E-70 – or, if not, Foreign Minister Dion after consultation with you and Cabinet. As it stands, you do have the opportunity to take a close second look at this because, as far as I know, you have yet to reply to the June 7, 2016, open letter written to you by a number of prominent Canadians including one of Canada's most respected elder statespersons, the Right Hon. Joe Clark, in which you were asked to call a commission of inquiry.

I end by reiterating my request that you review this matter and personally decide whether you support Minister Sajjan's decision or whether, upon reflection and wider consultation, you believe the decision was too hasty and in error. I hope you choose the honourable path, which I trust you will recognize is also the wise path. We need – at minimum – an independent judicial commission of inquiry.

Yours most respectfully,



Craig Scott,
Professor of Law, Osgoode Hall Law School;
former MP for Toronto-Danforth

cc: The Hon. Stéphane Dion, Minister of Foreign Affairs
The Hon. Harjit Sajjan, Minister of National Defence
The Hon. Thomas Mulcair, MP & Leader of the NDP
Hélène Laverdière, MP & NDP Foreign Affairs Critics
Randall Garrison, MP & NDP National Defence Critic
Elizabeth May, MP & Leader of the Green Party

**Appendices to
Letter to Prime Minister Trudeau of September 19, 2016
from Professor Craig Scott**

Appendix 1

E-petition e-70 (Afghanistan)

42ND PARLIAMENT

Initiated by Craig Scott from Toronto, Ontario, on December 17, 2015, at 10:08 a.m. (EDT)

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; and
- 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.

Appendix 2

Response to E-70 by the Government of Canada, Tabled June 16, 2016

RESPONSE TO PETITION

Prepare in English and French marking 'Original Text' or 'Translation'

PETITION NO.: **421-00217**

BY: MR. STEWART (BURNABY SOUTH)

DATE: **MAY 3, 2016**

PRINT NAME OF SIGNATORY: **HONOURABLE HARJIT S. SAJJAN**

Response by the Minister of National Defence

SIGNATURE

Minister or Parliamentary Secretary

SUBJECT

Afghanistan

ORIGINAL TEXT REPLY

Throughout Canada's military operations in Afghanistan, which began in October 2001 and ended in March 2014, the Government of Canada was committed to ensuring that individuals detained by the Canadian Armed Forces (CAF) were handled and transferred or released in accordance with our obligations under international law. The CAF treated all detainees humanely. The standards of protection afforded by the Third Geneva Convention were applied as a matter of policy. Protections included providing detainees with food, shelter and necessary medical attention. In addition, specific pre-deployment training for Canadian Armed Forces members involving the handling and transfer of detainees was provided.

After more than three decades of civil conflict, the capacity of the Afghan justice and correctional system was seriously eroded. Canada and our allies understood the need to support law and order in Afghanistan by building the capacity of the police, judicial and corrections sectors through targeted capacity-building efforts.

We worked with and trained the Afghan National Defence and Security Forces (ANDSF) to increase the Afghan Government's capacity to handle detainees appropriately. Canada made significant investments to help build capacity in rule of law functions, including police, judicial and correctional services. Canada funded and worked closely with independent organizations, including the Afghanistan Independent Human

Rights Commission (AIHRC), to strengthen their abilities to monitor, investigate, report and act on issues involving the treatment of detainees.

In the early stages of Canada's engagement in Afghanistan, the CAF transferred Afghan detainees to United States (US) authorities, and while on joint operations supporting capacity building of the ANDSF, transferred detainees to Afghan authorities.

In 2005, Canada established the Canada-Afghanistan arrangement for the Transfer of Detainees with the Government of Afghanistan, which outlined roles and responsibilities with regard to the transfer of Canadian-taken detainees to Afghan authorities. In particular, the Afghan government's sovereign responsibility for all issues related to the rule of law and justice in its territory underpinned the 2005 arrangement.

In addition to setting the framework for transfers, this arrangement reinforced the commitments of both parties to treating detainees humanely and in accordance with the standards of the Third Geneva Convention. This arrangement also specifically prohibited the application of the death penalty to any Canadian-transferred detainee.

In 2007, Canada signed a Supplementary Arrangement that clarified Canada's expectations and the Government of Afghanistan's responsibilities. This arrangement provided Canadian officials with unrestricted and private access to Canadian transferred detainees, and committed Afghan authorities to notify Canada when a detainee was transferred, sentenced or released from custody, or had his status changed in any other way. Canada retained the right to refuse follow-on transfers to a third party. In the case of allegations of mistreatment, the Afghan Government committed, through this arrangement, to investigate and, when appropriate, bring to justice suspected offenders in accordance with Afghan law and applicable international legal standards.

In 2008, the Federal Court and Federal Court of Appeal examined Canada's detainee policies and procedures in *Amnesty International Canada v. Canada (Minister of National Defence)*, 2008 FAC 336, affirmed by 2008 FACA 401, leave to appeal to Supreme Court of Canada denied. In this decision, the Courts set out that International Law, including the Law of Armed Conflict, provided the legal basis upon which the CAF conducts its operations and detainee handling.

In 2010, the Vice Chief of Defence Staff convened a Board of Inquiry (BOI) in order to gain a clear understanding of the specific details of an incident of 14 June 2006, in Afghanistan, during which a person in CAF custody was handed over to Afghan authorities and then taken back by CAF personnel. Although the mandate of the BOI did not include undertaking *a broad examination of Canada's detainee management system*, the BOI did review the CAF Theatre Standing Order (TSO) on detainees and determined that the subsequent amendments and improvements incorporated substantive differences compared to the TSO that was in place in 2006. The appropriate changes were implemented in subsequent rotations.

On November 18, 2011, with Canada's combat mission in Afghanistan coming to a close, Canada signed an arrangement with the US to facilitate the transfer of individuals detained by the CAF in Afghanistan to US Forces custody. The Canada- US arrangement built on and operated in parallel with the 2005 and 2007 arrangements signed between the Government of Canada and the Government of Afghanistan. Together, these arrangements allowed Canadian officials to monitor detention facilities, conduct interviews, and assess detainees' conditions of detention and treatment. Global Affairs Canada officials monitored the treatment of Canadian-transferred detainees in US or Afghan detention facilities up to the point where detainees were sentenced by an Afghan court, or were released from custody. Canada's monitoring responsibilities ended in 2014 after the last Canadian-transferred detainee held in Afghan custody was sentenced by an Afghan court.

When a detainee was taken, any decision to transfer was made by the Canadian Task Force Commander as an operational matter. The Commander took into consideration the facts on the ground and input from a variety of Canadian, international and Afghan sources. The Canadian Task Force Commander made every effort to hold detainees no longer than 96 hours, during which time the CAF reviewed all available information and assessed whether further detention, transfer or release was the appropriate course of action. Any transfers to facilities managed by Afghanistan or other nations were assessed on a case-by-case basis and in accordance with applicable domestic and international law, consistent with the terms set out in our arrangements with those nations.

Operational decisions to hold detainees longer than ISAF guidelines may have occurred for a variety of reasons from medical to administrative to security. These decisions were made by the Commander of Canadian Expeditionary Force Command based on a recommendation from the Commander in Theatre and took into consideration the facts on the ground and input from other government departments, particularly Global Affairs Canada.

In the event of an allegation of abuse, Canada notified Afghan or US authorities, the International Committee of the Red Cross (ICRC) and the AIHRC as appropriate, Canadian officials followed approved protocols, which could include focused interviews with the detainee alleging abuse; follow up with the detaining authority; requests for investigations; an enhanced frequency of follow-up visits; and demarches with relevant authorities. If Canada had any concerns that our partners were not abiding by the arrangements, the CAF Commander in Afghanistan could decide to pause or suspend further transfers.

In 2012, the Military Police Complaints Commission (MPCC) completed a Public Interest Hearing into a complaint that certain Military Police (MP) wrongly failed to investigate CAF Commanders for allegedly ordering the transfer of Afghan detainees to a known risk of torture at the hands of Afghan security forces. The Commission's investigation and hearing process spanned nearly four years. During this time, it heard testimony from 40 witnesses, including the eight subjects of the complaint, and held 47 days of public hearings from 2008

to 2011. The Commission also reviewed thousands of documents throughout its investigation. The Commission found the complaints against the eight individual MPs were unsubstantiated.

In 2015, the Commission Chairperson made a decision to conduct a Public Interest Investigation into an anonymous complaint relating to the investigation of alleged mistreatment of detainees by the Military Police in Afghanistan in 2010-11. The complaint made allegations about the conduct of Military Police members involved in ordering and/or conducting exercises where the mistreatment was alleged to have occurred. The complaint also challenges the failure to lay charges or take any other action following investigations conducted by the Canadian Forces National Investigation Service (CFNIS) and the MP Chain of Command in 2011 and 2012. The MPCC is currently awaiting disclosure of relevant material from the Canadian Forces Provost Marshal (CFPM). Once disclosure is received, the Commission will determine the scope of the investigation, identify the individual subjects of the complaint and notify them. It will then begin to interview witnesses and review materials.

Canada is proud of the honourable work of the men and women in uniform and civilian officials who served in Afghanistan. Canada remains the leading donor supporting the work of the AIHRC to strengthen its capacity to fulfill its constitutional mandate to monitor human rights in Afghanistan. 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. Therefore the Government of Canada does not believe an independent judicial commission of inquiry is necessary.

Appendix 3

June 17, 2016

Statement by Craig Scott on the Government of Canada's Response to the Request in E-Petition E-70 to Establish a Commission of Inquiry on the Treatment of Afghan Detainees

The government of Prime Minister Trudeau has just responded to e-petition E-70, which calls for a commission of inquiry into the treatment of Afghan detainees by Canada.

Notwithstanding that the Liberal Party, while in opposition, voted for a motion in the House of Commons calling for just such a commission of inquiry (a motion which passed), the Liberal government has now rejected this call.

The text of E-70 and the government response can be found here:

<https://petitions.parl.gc.ca/en/Petition/Details?Petition=e-70> (Scroll down page to the section called "Government response" and click on the embedded PDF link.) The text is also copied below as an appendix to this statement, for ease of reference.

I thank the government for what appears to be an earnestly long answer (a full three pages). However, it is full of gaps, elisions, and misdirection. I have already noted a full dozen such problems, and others with knowledge of this issue will undoubtedly see even more. An analysis of those problems will come later. For the moment, I will limit myself to an analysis of a truly shocking blanket claim that ends the government's response:

"Canada is proud of the honourable work of the men and women in uniform and civilian officials who served in Afghanistan. Canada remains the leading donor supporting the work of the AIHRC to strengthen its capacity to fulfill its constitutional mandate to monitor human rights in Afghanistan. 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. Therefore the Government of Canada does not believe an independent judicial commission of inquiry is necessary."

These words could have been penned, word for word, by the previous Conservative government. To the extent they were penned by others and not directly by the Minister signing off on the response (Defence Minister Harjit Sajjan), the fact is they may well have been written by some of the same officials and lawyers who ran the Harper-era messaging strategy.

It is deeply disappointing that the Liberal government has chosen to add another link to a chain of complicity that for over a decade has seen non-stop efforts on the part of various Canadian government actors to hide the truth and block any form of accountability.

I had expected far more from this government, perhaps mostly because the Hon. Stéphane Dion is now Minister of Foreign Affairs and Minister Dion had been very clear when in opposition that Canadians still needed to know answers to questions that had still not been

answered by the time the Harper government shut down all parliamentary scrutiny after winning the May 2011 election. I was further encouraged when it was Minister Dion who announced on May 2 of this year that Canada would finally be ratifying a protocol to the UN Convention against Torture that allows for international on-site inspection of detention centres in order to help prevent torture.

Unfortunately, the handling of this E-70 file, alongside the recent Open Letter (attached) calling for a commission of inquiry, has been driven by the Prime Minister's Office in coordination with the Department of Defence. It seems the Minister of Foreign Affairs has been frozen out of the process. I wish to be clear that it is wholly inappropriate that Minister Sajjan has headed this decision process, given the possibility he may have relevant general knowledge (and possibly also specific knowledge) arising from his command and military intelligence roles in Afghanistan at relevant times. Minister Sajjan should have recused himself from this decision.

It is all the more disappointing the government is rejecting a commission of inquiry given recent revelations this week (reported in La Presse) from military police officers concerning events in 2010-2011, on top of everything already revealed by journalists and diplomat Richard Colvin about 2006-2007. This seems to have done nothing to persuade the present government of its moral responsibility to act differently on this file from the previous Harper Government.

I do not believe Canada can seriously promote human rights and rule of law values, let alone try to project a "Canada is back" sunny virtue, around the world when we are not prepared to account for Canadians' concern about our own complicity in torture, disappearances and extra-judicial killings – by way of our policies and practices of transferring captives to Afghan agencies known to engage in frequent and/or systematic perpetration of these violations – and our own alleged direct involvement in abusive treatment of detainees while simultaneously setting up a system to hide the fact those detainees were in our custody (as just revealed in the La Presse reports).

And I don't believe that these practices will not repeat themselves in future simply because a Defence Minister stands several times in the House of Commons in Question Period and talks about the great international humanitarian law training the Canadian military receives and also imparts to others.

It is impossible to be confident that such a future will miraculously emerge when too many institutions failed to get to the truth about Afghan detainees even as too many other governmental actors were actively corrupting our democracy through disdain for accountability, through lies and through deniability mechanisms and cover-ups. Even as the Defence Minister has stood in the House making such blithe pronouncements, military police officers are stating their belief that the government – this government – has not been cooperating with the Military Police Complaints Commission and have set out details to substantiate their conviction that aspects of Canada's military culture regressed to replicate some of the problems that emerged at the time of the Somalia mission. Make no mistake, here I am talking about the culture within the military hierarchy and not about the brave and honourable men and women who worked within the policies, practices and direct orders decided upon by the hierarchy.

And I am far from alone in these beliefs. For example, alongside over 40 others from diverse public service backgrounds, from the human rights advocacy community and from the academy, former Prime Minister Joe Clark had the following to say to the current Prime Minister in the above-mentioned Open Letter of June 7:

“Mr. Prime Minister, [t]his 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.”

The entire letter can be found here: http://www.rideauinstitute.ca/wp-content/uploads/2016/06/Afghan_OpenLetter-Jun7-2016_EN.pdf

Despite the decision by the current Liberal government to act as almost a clone of the previous Conservative government on this issue, I have faith that there will come a day when the truth does come out. When it does, I very much hope that it will not be too late for that truth to then be followed by proper accountability.

To that end, I will continue to do everything I can to ensure the full truth come to light, even as this government has now demonstrated that a culture of complacency is so entrenched that justice is very unlikely to be secured through Canadian processes alone. This likely means that it is with the International Criminal Court that I, and others, will now have to concentrate our efforts (although it remains open for independently minded Liberal MPs on the House of Commons’ Standing Committees for Foreign Affairs or National Defence to allow this issue to be placed back on the parliamentary agenda).

Should the Prosecutor of the ICC be exposed to even some of the evidence that would have come to light if the Trudeau government had called a Commission of Inquiry here, and then choose to act on that evidence, Canadians – and this government – should be prepared to be jolted out of a current mix of apathy and complacency when faced squarely with the question of what justice requires for what was done in our name.

Appendix 4

Posting of June 10 on why Minister Sajjan should not be deciding on the establishment of a commission of inquiry

Published by [Craig Scott](#) · [June 10 at 12:31am](#) ·

On Wednesday, June 8, an Open Letter to PM Trudeau was released that calls for the establishment of a commission of inquiry to investigate and report on Canada's policies and practices concerning the transfer of detainees to Afghan agencies during the war in Afghanistan. Signatories include the former Prime Minister of Canada Joe Clark, the inaugural Chair of the Security Intelligence Review Committee Ron Atkey, Ed Broadbent, Stephen Lewis, Canadian diplomats posted to Afghanistan during the war, the Secretary-General of Amnesty International Canada, and around 40 leading scholars and representatives of human rights, foreign policy, and lawyers' organizations.

You can read the Open Letter here: http://www.rideauinstitute.ca/.../Afghan_OpenLetter-Jun7-2016...

By Thursday, June 16, the government must respond to e-petition (e-70), which I initiated in December 2015 in order to require the government to provide a written response to the call for a commission of inquiry. You can read it here: <https://petitions.parl.gc.ca/en/Petition/Details...>

What can we expect from the Liberal government? The signs are not good. Indeed, the signs are that the Liberals may be preparing to go back on their own demand when in opposition for a commission of inquiry. Not to put too fine a point on it, initial comments suggest they are willing to continue the complicity of the Canadian government – first under Harper and now under Trudeau – in ensuring there will be no accounting let alone accountability for what some of Canada's most senior military officers, top civil servants, and ministers of the Crown did in our name.

Right now, the Department of National Defence appears to have appropriated this matter. It is the tail that is wagging the dog. I say this because Minister Sajjan and his office are the ones making initial comments on both the Open Letter and, about six weeks ago, also on e-petition e-70, and the Department of Global Affairs is directing all journalists to DND for comments on e-70 and on Open Letter.

This is totally inappropriate.

The Minister of Defence was in theatre in a command role at crucial periods when prisoners were taken and transferred. He may even have had roles liaising on intelligence matters with some of the Afghan authorities that are implicated in the human rights abuses that an inquiry

would be looking at. Keep in mind it was the transfer to intelligence authorities at the National Directorate of Security that has been at the core of the detainee scandal, as it has been understood to date. But also, when it comes to unrecorded transfers by Canada of captives qua "persons under control" (PUCs) to Afghan authorities, some of those transfers were to the Afghan National Police and Minister Sajjan may have had to liaise with them, according to some biographical accounts. Some accounts have the Afghan police as at least as problematic an actor in their treatment of received prisoners as NDS.

None of this is to say that Minister Sajjan had anything to do either with transfers or transfer policy. I do not know if he did or did not. Nor does it deny that he served our country honourably and bravely. By all accounts, he very much did.

But it is to say that, at the very least, Minister Sajjan could be called to testify at an inquiry about his knowledge of the practices of Afghan agencies towards persons in their custody and also about what others (military and civilian) in the command structure should reasonably have known about the penchant for torture by the NDS and/or extrajudicial killing by the Afghan National Police. There are other matters on which he could be called as witness such as the general nature of intelligence sharing between Canada and Afghanistan, battlefield transfers of prisoners, the role of Defence Intelligence, cooperation with the US and other allies in relation to both detainees and intelligence, and coordination between the Canadian military and the Department of Foreign Affairs.

More generally, this detainee file is in no way just a defence matter. It goes to the heart of Canada's foreign affairs -- and always involved multiple agencies from DND to DFAIT to Justice to the PMO and the PCO. It also involves how our parliamentary, justice and legal systems do and do not implement international law. As such, the decision on a commission of inquiry properly belongs with the Foreign Affairs Minister and the PM -- or Cabinet as a whole on their advice. In either case, Minister Sajjan should recuse himself from the decision on E-70's and the Open Letter's calls for a commission of inquiry.