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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

Craig M. Scott

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Abstract: The present paper takes the form of presentation made on February 10, 2010, to the prorogued Canadian House of Commons Special Committee on the Canadian Mission in Afghanistan, with Members of Parliament from the Bloc Québécois, Liberal Party, and New Democratic Party in attendance. The subject of the presentation is a report and commentary on an all-day event organized by the Nathanson Centre on Transnational Human Rights, Crime and Security at York University's Osgoode Hall Law School. The event, held in Toronto on February 8, 2010, was called the Special Forum on the Canadian Mission in Afghanistan. The thematic title of the Special Forum was "Moral and Legal Responsibility with Respect to Alleged Mistreatment of Transferred Detainees in Afghanistan." In the wake of prorogation of Parliament at the end of December 2009 by Canada's Prime Minister, the Special Forum sought to highlight the special importance of democratic scrutiny of, and debate over, conduct with respect to persons detained in Afghanistan by the Canadian Armed Forces – persons who, it has been alleged, were either mistreated or risked being mistreated after their transfer to Afghan authorities. Because prorogation prevented the Special Committee from continuing in February 2010 the official examination of witnesses and evidence that it had begun in 2009, the Nathanson Centre and Osgoode decided to invite experts on various aspects of the issue of detainee transfer to give presentations – and to respond to questions by a panel – so that ongoing reflection by Canadians on the morality and legality of conduct related to Afghan detainees might be facilitated, and also so as to assist the future work of this Special Committee when it reconvenes after prorogation. Nine experts presented and answered questions over a six-hour period: Alex Neve, William Schabas, Paul Champ, Willem de Lint, David Schneiderman, Michael Mandel, Christopher Waters, Kent Roach, and Michael Byers. A panel of questioners consisted of Craig Scott as Chair (the author), the Honourable Bob Rae (MP for Toronto Centre and a member of this Special Committee), and Retired Colonel Michel Drapeau. The agenda of the Special Forum is attached to the 11-page presentation as Appendix 1. A submission was requested and received by the Special Forum from Retired Commander William Fenrick; entitled "Observations Concerning the Canadian Mission in Afghanistan and the Treatment of Detainees", it is attached as Appendix 2.

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Professor Craig Scott (Osgoode Hall Law School, York University, Toronto). Presentation to (prorogued) meeting of the House of Commons Special Committee on the Canadian Mission in Afghanistan, February 10, 2010, Parliament of Canada, Ottawa [*]

Thank you, Mr. Chair, and thank you to the committee for holding sessions, starting last week, notwithstanding the prorogation of Parliament.

I have been asked to report and comment on an all-day event that I organized and chaired in my capacity as Professor of Law at York University's Osgoode Hall Law School and Director of the Nathanson Centre on Transnational Human Rights, Crime and Security. The event, held in Toronto this past Monday, February 8, was called the SPECIAL FORUM ON THE CANADIAN MISSION IN AFGHANISTAN. The thematic title of the Special Forum was "Moral and Legal Responsibility with Respect to Alleged Mistreatment of Transferred Detainees in Afghanistan."

By organizing the Special Forum two days ago, we sought to do two things. Firstly, we sought to highlight the special importance of democratic scrutiny of, and debate over, conduct with respect to persons detained in Afghanistan by the Canadian Armed Forces -- persons who, it has been alleged, were either mistreated or risked being mistreated after their transfer to Afghan authorities.

[*] Except for correction of punctuation and capitalization, as well as a clarifying substitution of "Canada's obligation not to transfer" for the earlier "the obligation not to transfer" under point 8, the present document is identical to the written presentation circulated to attending members of the House of Commons Special Committee on the Canadian Mission in Afghanistan at the time of the author's oral presentation – at the invitation of the Special Committee through the initiative of the Bloc Québécois – to the Bloc Québécois, Liberal Party and New Democratic Party MP's who were present at the session convened during the period of prorogation on Wednesday, February 10, 2010, 9:00-11:00 am, in Central Block Room 237C of the Parliament Buildings.

Secondly, because prorogation has prevented the Special Committee from continuing the official examination of witnesses and evidence that it had begun in 2009, the Nathanson Centre and Osgoode decided to invite experts on various aspects of the issue of detainee transfer to give presentations – and to respond to questions by a panel -- so that ongoing reflection by Canadians on the morality and legality of conduct related to Afghan detainees might be facilitated, and also so as to assist the future work of this Special Committee when it reconvenes after prorogation.

Nine experts presented and answered questions over a six-hour period. The list of presenters and the titles of their presentations can be found in the agenda for the event, which has been circulated to you.[1] While I will briefly outline some of the insights arising from the Special Forum, with a view to then answering any questions that you may have, I also encourage you to look at the title of the presentations and to feel free to ask me questions that seem to fall within the themes covered by any given presenter.

Joining me on the panel of questioners were the Honourable Bob Rae (MP for Toronto Centre and a member of this Special Committee) as well as Retired Colonel Michel Drapeau, who appeared as a witness before this committee last week. The Chair of the Special Committee, Mr. Rick Casson (MP for Lethbridge), was also invited to join us on the panel of questioners and, when he graciously declined due to another engagement, all members of the Conservative Party who are also members of this committee were invited to nominate one from their number to stand in for Mr. Casson. Members of civil society with perspectives different from the presenters were also invited to join the panel, including Professors David Bercuson and Tom Flanagan and retired General

[1] Appended to this document as Appendix 1.

Lewis MacKenzie; all responded with genuine and considerable interest but were already committed to travel plans or to other engagements.

Finally, I should mention that the Special Forum also invited the participation of Professor William Fenrick of Dalhousie University. Professor Fenrick was unable to attend, but did send a background note amounting to a sort of informal legal opinion, which he authorized to be circulated and quoted at will. This document has also been copied and provided to you today.[2] I will mention one of his conclusions in my summary.

The overview that follows necessarily is brief and, for the most part, quite general. To a significant extent, the purpose of the summary is to distill lines of inquiry that emerged from the presentations themselves or in the course of questioning and that I feel are important for this Special Committee to pursue -- or continue to pursue, as I am well aware, having read all transcripts, of the crucial information that questioning of witnesses by this Special Committee has already yielded. I have 18 points. None of these points should be understood as précis of the words of any given presenter. For the exact presentations and answers to questions, transcripts and audio-video files should be uploaded to the Nathanson Centre website (nathanson.osgoode.yorku.ca) by early next week.

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] Appended as Appendix 2.

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.

6. In this respect, oversight needs to include a more robust House of Commons committee structure than is currently the case. Comparative approaches to parliamentary accountability by our allies – such as the Armed Services Committee in the UK – must be seriously looked at in order to understand whether Canada appears to have lost sight of fundamental principles of democracy by embracing an approach to military

affairs that emphasizes near-total secrecy and that seems to actively disdain civilian oversight. In that respect, we might also consider whether the Judge Advocate General's office is sufficiently independent of the Department of National Defence and to consider the example of countries like Australia who appoint the Judge Advocate General from the ranks of the civilian judiciary.

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?

8. We need to know whether (and, if so, how) various departments, including DND and DFAIT, have generated legal opinions that have resulted in witnesses before the Special Committee correctly stating the "substantial risk of torture" test as the test for Canada's obligation not to transfer detainees but then persistently misapplying that test in the context of the available information in the Afghan detainee context. In this regard, we need to know whether the same interpretation of the "substantial risk of torture" test was presented to Canadian ministers and military officials as the basis on which to decide whether to transfer detainees in Afghanistan to the United States prior to Minister of Defence Graham stopping transfers to US forces.

9. We need Parliamentary as well as more general public access to legal opinions that have been central to the decision-making in relation to the detainees issue, and we need the government to waive solicitor-client privilege so as to provide a level of transparency no less than that provided by the Administration of George W. Bush when that Administration released the legal opinions that structured core dimensions of US government post-9/11 policy.

10. In view of Commander Fenrick's legal analysis in paras. 10 to 12 in the circulated document, "OBSERVATIONS CONCERNING THE CANADIAN MISSION IN AFGHANISTAN AND THE TREATMENT OF DETAINEES", we need to know why Canada's obligations under article 12(3) of Geneva Convention III (on protection of prisoners of war) did not result in the insertion of a monitoring clause in the December 18, 2005 Memorandum of Understanding between Canada and Afghanistan, and why the Department of National Defence so vigorously resisted the insertion of a monitoring clause in the 2005 MOU when, reportedly, requested by Minister Graham that this be done (Stein and Lang, *The Unexpected War*). Also, why does the "corrective action" clause (article 10) that appeared in the otherwise much-improved May 3, 2007, MOU between Canada and Afghanistan not go as far as article 12(3), in at least two respects? Firstly, article 10 of the 2007 MOU focuses on investigation and prosecution by Afghanistan if transferred detainees have been mistreated which is an approach inconsistent with Canada's article 12(3) obligation that Canada must "take effective measures to correct the situation" in cases where a receiving country has mistreated transferred detainees; and secondly, article 10 of the MOU fails to mention Canada's duty to "request the return of the prisoners of war" in the event the situation is not or cannot be corrected.

11. Especially in view of the lessons learned from the Somalia Inquiry about the culture within the Department of National Defence, we need to know whether officials, including military officers, within the DND have inappropriately resisted, manipulated or mislead successive Ministers of Defence since the advent of the war in Afghanistan. For example, how was it that Minister O'Connor was, in reliance on the advice of his officials, he says, under the misimpression for many months that the International Committee of the Red Cross (ICRC) would report to Canada if any detainees transferred to Afghanistan were mistreated, especially given that, to use Commander Fenrick's words (para 8 of his Observations document), "any lawyer involved in giving advice on IHL/LOAC knows (or should know)…the role of the ICRC and how it works…[as] part of IHL 101." For another example, how is it that Minister Graham did not appear to know of the progress of other NATO allies in negotiating MOUs in the 2005 period until he was informed about this in a debate in the House of Commons by the NDP and how is it that he learned that at least one other NATO ally had negotiated a monitoring mechanism only after reading the document once the NDP had drawn his attention to that document (see account in Stein and Lang, *The Unexpected War*)? Further, precisely why and how did the Chief of Defence Staff decide in December 2005 to sign the 2005 MOU with the Defence Minister of Afghanistan in the middle of a federal election campaign, and did the Chief of Defence Staff seek or receive any kind of permission from the then Defence Minister or did the Ambassador of Canada in Kabul seek or receive permission from DFAIT for signature of a treaty by an official with no treaty-signing powers? Finally, in light of conflicting accounts of whether it was DND or DFAIT that controlled the process of drafting and negotiating the 2005 MOU, where lies the truth?

12. Especially to the extent that the Special Committee's scrutiny to date generates *general* reasons for concern about the sort of legal advice and the sort of operational decision-making that has characterized Canada's mission in Afghanistan, we need to know, through heightened access to information and heightened Parliamentary scrutiny, whether there have been or whether there risk being practices or incidents beyond the detainee context that place Canada in danger of contravening IHL and/or IHRL.

13. Despite much progress in the ethical professionalization of the Canadian military since the Somalia inquiry, have there been erosions of the idea of a military accountable to both the rule of law and to civilian government that have manifested themselves during the Afghanistan conflict? For example, have there been any cultural shifts within the Canadian Armed Forces that may possibly be represented by comments from the top of the military about Afghan detainees as being murderers and scumbags and the detainee question as being a distraction and also not something to lose sleep over? Do such comments risk being misinterpreted by those lower down in the hierarchy or, as is hopefully the case, has the training on the laws of armed conflict within the CAF been sufficient for such comments not to have negative implications for conduct in the field?

14. Can we afford to be sanguine about the health of legal and political accountability in Canada not only in relation to the detainee question but more generally, given a range of contexts that must surely give us pause as to the health of our democracy? Contexts such as the following: (a) a context in which the government has successfully achieved a Federal

Court of Appeal judgment that the Charter does not apply to Canada's conduct in Afghanistan; (b) a context in which the Supreme Court of Canada sidestepped any responsibility to clarify the law on extraterritorial application of the Charter and the law on torture by refusing leave to appeal in this same case; (c) a context in which, after this same Supreme Court declined to issue a remedial order to the government in the *Khadr* case of 10 days ago, the government used this as its excuse not to remedy what the Court had also found to have been a violation of the Charter by the government; (d) a context in which the government used aggressive and questionable tactics to hobble efforts by the Military Police Complaints Commission to investigate a complaint filed by Amnesty and BCCLA; (e) a context in which the government seeks to invoke sweeping notions of Crown prerogative related to national security and foreign relations as a way to refuse requests for information from this committee and is aided by legal advice that erroneously invokes an Americanized concept of "separation of powers" between the legislature and executive; (f) a context in which the Prime Minister secures prorogation in the holiday period by phoning the Governor General rather than visiting her in person; and (g) a context in which the Prime Minister gives reasons for prorogation that do not square with the PM's former Chief of Staff's assertion on the CBC that everyone knows that prorogation was done to undermine this Special Committee's scrutiny of the detainee issue?

15. In the context of the vacuum in institutional protections revealed by the above list, we need a serious, fully resourced public inquiry presided over by a respected judge.

16. As part of the mandate of such a public inquiry, the inquiry needs to look at the practices of both documentation and non-documentation that

have characterized decision-making, field operations and reporting related to the detainee question. The state of record-keeping in relation to the detainees is an obvious area for inquiry, but it is not the only aspect of this issue. For example, previous testimony before this committee has presented conflicting notions of the relationship between accountability and various methods of conveying information, such as in relation to the distribution system for emails and in relation to the papering of communications versus oral communications. Concerns have also been raised about the politicization of reporting and documentation practices, including directions from Ottawa to the embassy in Kabul and including an allegation that a note-taker in a meeting in Ottawa stopped taking notes when a member of the meeting raised concerns about torture of detainees. As well, questioning by this committee of a Correctional Services Canada officer whose job it was to interview detainees revealed what appeared to be a standard operating procedure not to ask interviewed detainees questions about when and where their alleged torture had occurred and instead to seek this information by questioning those running the “facilities” in which they were currently detained: What was the questioning protocol employed by this CSC officer and how were decisions made to include or exclude certain questions?

17. We also need either the majority of MPs in this minority Parliament or the government following the next election to stand up for both the rights of Parliament and the values of transparency and democratic accountability by enacting legislation that circumscribes the Crown prerogative asserted by the government relating to information requested by Parliament and that also creates an appropriate mechanism for independent assessments by Parliament of sensitive information.

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"?

If there has been a sort of theme underlying many of my remarks it has been the notion, "We need to know…". Quite obviously, there is still much we don't know but need to know. Here I remind the committee that, in saying "we", I have been referring compendiously to Canadian society, Parliament and the people of Afghanistan. In this quest, my sincere hope is that, especially in the absence of any public inquiry, this Special Committee can continue to be an effective part of the process of both humanizing our approach to Afghan prisoners and democratizing accountability here in Canada.

APPENDIX 1

SPECIAL FORUM ON THE CANADIAN MISSION IN AFGHANISTAN
Session Theme: Moral and Legal Responsibility with Respect to Alleged Mistreatment of Transferred Detainees in Afghanistan

Date and Location: Monday, February 8, 2010, 10am – 4pm, Senate Chambers, 9th Floor Ross Building North, York University (Keele Campus)

Context and Purpose: The Prime Minister of Canada requested and was granted prorogation by the Governor-General at the end of December 2009. One of the effects of prorogation is that the House of Commons Special Committee on the Canadian Mission in Afghanistan, made up of Members of Parliament from all parties, cannot officially meet because Parliament's business is totally ended by the act of prorogation. In this context, The Nathanson Centre on Transnational Human Rights, Crime and Security of York University and Osgoode Hall Law School seek to highlight the special importance of democratic scrutiny of, and debate over, conduct with respect to persons detained in Afghanistan by the Canadian Armed Forces who, it has been alleged, were either mistreated or risked being mistreated after their transfer to Afghan authorities by the Canadian military. Were it not for prorogation, the House of Commons Special Committee would be meeting again in February, following a January break for MPs. Because prorogation has prevented the Special Committee from continuing the examination of witnesses and evidence that it had begun in 2009, the Nathanson Centre and Osgoode is inviting experts on various aspects of the issue of detainee transfer to give presentations throughout the day on February 8, 2010, so that reflection by Canadians on the morality and legality of conduct related to the Afghan detainee is facilitated.

Experts will make presentations (at the below-indicated times) on various issues related to the detainee-transfer issue. Questioning will be carried out by a panel consisting of:

•**Professor Craig Scott,** Chairperson of the Special Forum (Professor of Law, Osgoode Hall Law School; Director, Nathanson Centre);
•**The Honourable Bob Rae**, Member of Parliament (Toronto Centre - Lib.);
•**Colonel (Ret'd) Michel W. Drapeau,** Michael Drapeau Law Offices and Professor of Law, University of Ottawa

10:00 am **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

10:30 am **(by video-conference) William Schabas**, Dir. Irish Centre for Human Rights, NUI Galway
Individual Criminal Responsibility under International Law and in Canadian Law: From Field-level to Cabinet-level Conduct

11:00 am **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

11:30 am **Willem de Lint**, Head of the Dept. of Sociology, Anthropology, & Criminology, U. Windsor
Situating the Colvin Testimony Within the (Non-) Documentation Practices of the Department of Foreign Affairs and Other Government Agencies

12:00 am **David Schneiderman,** Professor of Law and Political Science, U of T
The Law , Ethics and Politics of Invoking the Executive Prerogative Power against Parliamentary Efforts to Access Documents on Detainee Policy and Practice

1:00 pm **Michael Mandel,** Professor of Law, Osgoode Hall Law School
What Right Do We Have to Be in Afghanistan in the First Place? Why the Prisoner Transfer Issue Cannot be Detached from the Legality and Legitimacy of the War Itself

1:30 pm **Christopher Waters,** Associate Dean, Faculty of Law, U. Windsor
The Erosion of Civilian Oversight Mechanisms: How the Transfer of Afghan Detainees Represents a Betrayal of the Somalia Legacy

2:00 pm **Kent Roach**, Prichard-Wilson Chair of Law and Public Policy at the U of T Faculty of Law
Linking Government Refusal to Implement the Arar Commission's Recommendations on Review Mechanisms to Judicial Abstention on the Detainee Transfer Issue: How Should the Military and the Government's Conduct be Overseen?

2:30 pm Frédéric Mégret, CRC in the Law of Human Rights and Legal Pluralism at McGill (*Professor Mégret was unable to attend due to illness*.)
Does or Will the International Criminal Court Have Jurisdiction to Investigate and Prosecute Canadian Government Officials?

3:15 pm 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?

Bob Rae - The Honourable Robert K. Rae is Member of Parliament for Toronto Centre and a former Premier of Ontario. He is a member of the House of Commons Special Committee on the Canadian Mission in Afghanistan. He has a B.A. and an LL.B. from the University of Toronto and was a Rhodes Scholar in 1969. He obtained a B.Phil. degree from Oxford University in 1971, was named a Queen's Counsel in 1984, and has received numerous honorary degrees and awards from Canadian and foreign universities, colleges, and organizations. Bob was appointed to Her Majesty's Privy Council for Canada in 1998, was appointed an Officer of the Order of Canada in 2000, and was appointed an Officer of the Order of Ontario in 2004. In the period between serving as Premier of Ontario and being elected in 2008 as MP for Toronto Centre, he initiated discussions to form the Forum of Federations, which he served as Chair for seven years, and has advised and worked on federalism and constitutional matters in Sri Lanka, Sudan and Iraq.

Craig Scott - Craig Scott is Professor of Law at Osgoode Hall Law School (York University, Toronto) where he is also Director of the Nathanson Centre on Transnational Human Rights, Crime and Security. He is editor of *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (Hart, Oxford, 2001) and the Convening Editor of the jounal *Transnational Legal Theory*. Prior to joining Osgoode, he was on faculty at the Faculty of Law, University of Toronto, 1989-2000, and a Jean Monnet Fellow at the European University Institute in 2000. He has just been awarded a 2010 Ikerbasque Fellowship for knowledge innovation by the Basque Government. Prior to starting his academic career, Professor Scott served as law clerk to the former Chief Justice of Canada, Brian Dickson.

Michel William Drapeau -- Michel Drapeau is a Professor of Law, University of Ottawa where he teaches military law and freedom of information law. He serves on the Board of Governors of the Royal Military College (St Jean) and is a member of the

International Society for Military Law and the Law of War. He has written extensively on the subject of military law as well as freedom of information law and is the co-author of two authoritative and comprehensive legal texts: Canadian Military Law Annotated (2006) and Federal Access to Information and Privacy Legislation Annotated - 9th Edition - (2010) published by Thomson-Carswell. A member of the Bar of Ontario, his law practice focuses on military law matters. Prior to his legal career, he served for 34 years in the Canadian Forces (Army). On retirement, he was the executive secretary of National Defence Headquarters and the Secretary, Armed Forces Council. He is an officer of the Order of Military Merit.

Alex Neve, OC – Alex Neve has served as Secretary General of Amnesty International Canada's English branch since 2000. In that role he has carried out numerous human rights research missions throughout Africa and Latin America as well as within Canada. He speaks to audiences across the country, appears regularly before parliamentary committees and is a frequent commentator in the media. Alex has held other positions with Amnesty International as well, both nationally and internationally. Alex Neve is a lawyer, with a Masters Degree in International Human Rights Law from the University of Essex in the United Kingdom. He has served as a member of the Immigration and Refugee Board, taught at Osgoode Hall Law School, been affiliated with York University's Centre for Refugee Studies, and worked as a refugee lawyer in private practice and in a community legal aid clinic. He is an Officer of the Order of Canada and has been awarded an Honorary Doctorate of Laws Degree from the University of New Brunswick.

William Schabas, OC, MRIA - William Schabas is Director of the Irish Centre for Human Rights, National University of Ireland, Galway, where he is professor of human rights law. He is the author of more than 20 books and 250 articles on capital punishment, genocide and international criminal tribunals, and has been a visiting professor at universities around the world. Professor Schabas was a member of the Sierra Leone Truth and Reconciliation Commission, and sits on the Board of Trustees of the United Nations Voluntary Fund for Technical Assistance in Human Rights. He is an Officer of the Order of Canada and Member of the Royal Irish Academy.

Paul Champ – Paul Champ is a litigation lawyer with Champ & Associates in Ottawa. He studied law at the University of British Columbia (LLB) and McGill University, and holds a journalism degree from Carleton University (B.J.). He started his legal career with the Saskatchewan Department of Justice. Mr. Champ was counsel in Abdelrazik v. Minister of Foreign Affairs, was involved in the Iacobucci Inquiry into the torture of three

Canadians abroad, and appeared before the Supreme Court of Canada in Canada v. Khadr. In a case seeking application of the Canadian Charter of Rights and Freedoms to detainees in the custody of the Canadian military in Afghanistan, he represented Amnesty International and the B.C. Civil Liberties Association in Amnesty International and BCCLA v. Minister of Defence (Canada), which was denied leave to appeal by the Supreme Court of Canada.

Willem de Lint – Willem de Lint is Department Head, Sociology, Anthropology, and Criminology, University of Windsor. Recent publications include the co-edited Security in Everyday Life (Routledge, forthcoming) and the co-authored Intelligent Control: Developments in Public Order Policing in Canada (University of Toronto Press, 2009). His current research focuses on the flow of information between various security agencies, public order policing, and more generally politicization and power relations in security. A current focus in relation to Afghanistan is the intersection of intelligence, law, national security with particular respect to the practice of non-documentation by Canada's Department of Foreign Affairs and other agencies.

David Schneiderman - David Schneiderman is Professor of Law and Political Science at the University of Toronto where he teaches Canadian and US constitutional law. He has authored numerous articles and edited several books on Canadian federalism, the Charter of Rights, Canadian constitutional history, and constitutionalism and globalization. He most recently authored Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise (Cambridge University Press, 2008) and co-authored The Last Word: Media Coverage of the Supreme Court of Canada (UBC Press, 2006). Professor Schneiderman has been Visiting Professor of Law at Georgetown University Law Center and Fulbright Visiting Scholar at the New School for Social Research and the School of Law, Columbia University.

Michael Mandel – Michael Mandel is Professor of Law at Osgoode Hall Law School of York University, where his courses include Criminal Law, The Law of War, and Legal Politics. His primary scholarly interests are in international criminal law and constitutional law and politics. Among his many published works are The Charter of Rights and the Legalization of Politics in Canada (Thompson Education Publishers, 1989, 1994; French edition, Editions Boreal, 1996) and How America Gets Away With Murder: Illegal Wars, Collateral Damage and Crimes Against Humanity (Pluto Press, 2004; Italian edition Edizioni Gruppo Abele Editore, 2005; German edition Zweitausendeins, 2005). A member of Osgoode's faculty since 1974, Professor Mandel has also taught and lectured at several of Italy's major universities: Bologna (where he ran an exchange program for law students from 1995-2001), Torino, Trento, Padova,

Napoli, Calabria, and the European University Institute in Florence where he was honoured with a Jean Monnet Fellowship in 1990-91. In 1998 he was a Visiting Professor at the Faculty of Law of the Hebrew University of Jerusalem

Christopher Waters –Christopher Waters is the Associate Dean of the Faculty of Law, University of Windsor. His previous academic post, from 2002-2007, was at the University of Reading in the United Kingdom. In the 2006-2007 academic year he was also a Visiting Research Fellow in the Changing Character of War Programme at Oxford University. Dr. Waters has addressed military audiences on international human rights and humanitarian law in both Canada and the United Kingdom. He also has extensive field experience in the Caucasus and Balkans, including with the Organization for Security and Cooperation in Europe's Kosovo Mission in 1999-2000. Dr. Waters has published four books as well as articles in journals including the American Journal of International Law and International Peacekeeping. He has been interviewed on international issues by domestic and international media including CTV, National Public Radio, The New York Times and Agence France Presse.

Kent Roach – Kent Roach is Prichard-Wilson Chair of Law and Public Policy at the University of Toronto Faculty of Law, with cross-appointments in criminology and political science, and a Fellow of the Royal Society of Canada. He is a graduate of the University of Toronto and of Yale, and a former law clerk to Justice Bertha Wilson of the Supreme Court of Canada. Professor Roach has written over 110 articles and chapters published in Australia, Hong Kong, Israel, Italy, Singapore, South Africa, the United Kingdom and the United States, as well as in Canada. In recent years, Professor Roach has specialized in anti-terrorism law and policy and is the co-editor of The Security of Freedom: Essays on Canada's Anti-Terrorism Bill (2001) and Global Anti-Terrorism Law and Policy (2005). His September 11: Consequences for Canada was named one of the five most significant books of 2003 by the Literary Review of Canada. Professor Roach also served on the research advisory committee for the Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar and was Director of Research (Legal Studies) for the Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182. His current research involves the comparative study of miscarriages of justice, comparative judicial review and comparative anti-terrorism law and policy.

Frédéric Mégret – Frédéric Mégret is Assistant Professor, Faculty of Law, McGill University, and the Canada Research Chair in the Law of Human Rights and Legal Pluralism. He holds a PhD from the Sorbonne and the University of Geneva and an LLB from King's College London, and is an alumnum of Sciences Po (Paris). His research

focuses on the plural dimensions of international law, international human rights law and international criminal law.

Michael Byers - Michael Byers holds the Canada Research Chair in Global Politics and International Law at the University of British Columbia. His work focuses on issues of human rights, the laws of war,
sovereignty and Canada-U.S. relations. Dr. Byers has been a Fellow of Jesus College, Oxford (1996-1999) and a Professor of Law at Duke University (1999-2004). He has also taught as a visiting professor at the universities of Cape Town and Tel Aviv. Dr. Byers is the author of Custom, Power and the Power of Rules (1999), War Law (2005), Intent for a Nation (2007) and Who Owns the Arctic? (2009). In 1998, he advised a coalition of London-based human rights organizations in the Pinochet Case.

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Videos of the Special Forum will be uploaded after the Special Forum on the Nathanson Centre website at:
http://nathanson.osgoode.yorku.ca/events/special-forum-on-canadian-mission-in-afghanistan/

APPENDIX 2

A note from the Chairperson of the Special Forum on the Canadian Mission in Afghanistan, Professor Craig Scott, Osgoode Hall Law School: William Fenrick is unable to attend the February 8, 2010, Special Forum on the Canadian Mission in Afghanistan, but, at the request of the Special Forum, submitted this background note on February 4, 2010. It may be circulated and quoted at will. Please cite as William J. Fenrick, "Observations on the Canadian Mission in Afghanistan and the Treatment of Detainees", Written Submission to the Special Forum on the Canadian Mission in Afghanistan (Nathanson Centre on Transnational Human Rights, Crime and Security of Osgoode Hall Law School, Toronto, February 3, 2010).

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OBSERVATIONS CONCERNING THE CANADIAN MISSION IN AFGHANISTAN AND THE TREATMENT OF DETAINEES

William J. Fenrick[3]

1. I believe the deployment of Canadian troops to Afghanistan in a combat role is legally and morally defensible. I also have the greatest respect and admiration for the courage, professionalism, and integrity of the members of the Canadian Forces (CF) in Afghanistan who are carrying out the mission in difficult and dangerous circumstances. In brief, I support the troops and I support the mission.

2. I retired from the CF in 1994. I have had access to no classified information concerning the mission and my friends and former colleagues in the CF have been particularly reticent concerning the detainee issue. I had an excellent understanding of how the CF implemented Canada's International Humanitarian Law/Law of Armed Conflict (IHL/LOAC) obligations while I was a member of the CF. In particular: (i) I established the initial formal IHL/LOAC training program in the CF when I was Director of Legal Training and I was actively involved in such training throughout my career; (ii) I wrote an earlier draft of the current CF LOAC Manual; (iii) I was the senior IHL/LOAC adviser at National Defence Headquarters (NDHQ) during the 1990-91 Gulf Conflict; and (iv) I was the first Director of Law for Operations from 1991 to 1994. I have had some peripheral involvement with IHL/LOAC training in the CF since my retirement and I believe I have a good understanding of how IHL/LOAC issues have been treated in the CF since my retirement.

[3] I teach International Humanitarian Law at the Schulich School of Law at Dalhousie University. I was a Senior Legal Adviser in the Office of the Prosecutor at the International Criminal Tribunal for the Former Yugoslavia from 1994 to 2004 and as such I was the senior adviser on all international law matters. I was a legal officer in the Canadian Forces from 1974 to 1994. As a legal officer, I was, at various times, Director of International Law (1979-82, 1985-91), Director of Legal Training (1983-85), and Director of Law for Operations and Training (1991-94).

3. The CF has as good an IHL/LOAC training program as any other country's armed forces and a better program than the vast majority of armed forces. There are ample training materials available. The major materials are a Joint Doctrine Manual, Law of Armed Conflict at the Operational and Tactical Levels, which is a basic legal text book, and a Collection of Documents on the Law of Armed Conflict which contains the texts of all relevant treaties and Canadian legislation. Both of these are accessible by the public. There is also a Code of Conduct for CF personnel which includes the following provisions: "4. Treat all civilians humanely and respect civilian property. 5. Do not attack those who surrender. Disarm and detain them. 6. Treat all detained persons humanely in accordance with the standard set by the Third Geneva Convention. Any form of abuse, including torture, is prohibited." All members of the CF receive training in the Code of Conduct. It too is accessible to the public. As a well informed educated guess, I would think all members of the CF who are deployed on operations such as Afghanistan would receive additional training in IHL/LOAC, including the Code of Conduct.

4. The CF also complies with Art 82 of Additional Protocol I (AP I) which requires that Canada "in time of armed conflict, shall ensure that legal advisers are available, when necessary, to advise military commanders at the appropriate level on the application of (IHL/LOAC) and on the appropriate instruction to be given to the armed forces on the subject." All CF legal officers, beyond those at the most junior level, will have received one or more short courses on IHL/LOAC and, more recently, on Operations Law. Several legal officers at the intermediate and senior level have post graduate legal degrees in international law, including IHL/LOAC. There are legal officers at the NDHQ level who work full time on international law issues, including IHL/LOAC, and who have a great deal of expertise in this area. In addition, legal officers are deployed on operations and some or all their time is devoted to advising on IHL/LOAC. Some legal officers in DFAIT also possess a high level of expertise in IHL/LOAC.

5. I do not have first hand knowledge of how detainees, including those transferred to other authorities, have been treated in Afghanistan. I read and listened to the testimony of Richard Colvin. To me, he appears to be an honourable man and a credible witness without an axe to grind. At the very least, his testimony indicates that Canadian record keeping concerning transferred detainees was unbelievably sloppy and that some transferred detainees may have been mistreated or even tortured. CF members have been deployed in Afghanistan in varying numbers and roles since 2001. When, to whom, and how many detainees have been turned over by the CF since 2001 I do not know.

6. It is not a simple task to determine the status of persons initially detained by the CF in Afghanistan. One can argue about the nature of the conflict, is it international or non-international, and one can argue about whether the detainees should be regarded as civilians, civilians taking a direct part in hostilities, combatants (lawful or unlawful) or prisoners of war. One can not argue about torture. No detainee should be tortured or mistreated either by members of the CF or by authorities to whom detainees have been transferred by the CF. That is a legal line in the sand which simply must be drawn. Bearing in mind the provisions of the CF Code of Conduct quoted in para 3 above, I will presume that all CF members are aware of their own obligation not to torture or mistreat any detainee and that CF authorities will do their best to ensure such actions do not occur and will take appropriate corrective action if CF members do torture or mistreat detainees.

7. Although it is reasonable to assume all CF members are aware of their individual obligation not to torture or mistreat detainees in their custody, one might query whether or not one can make a similar assumption about their state of knowledge concerning continuing obligations after transfer.

8. In my view, any lawyer involved in giving advice on IHL/LOAC knows (or should know): (i) the role of the ICRC and how it works; and (ii) Art 12 of the 3rd Geneva Convention (Prisoners of War). Both of these are part of IHL 101.

9. The ICRC does not report to third parties. It reports on what happened during its detainee visits to the power which actually has custody of the detainees and also up its own (ICRC) chain of command.

10. Art 12 of the Third Convention states in part: " Prisoners of war may only be transferred by the Detaining Power (Canada) to a Power which is a party to the Convention (Afghanistan) 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 shall be complied with."

11. Bearing in mind the facts: (i) that there is no Protecting Power in Afghanistan; (ii) that the ICRC would/could not report to Canada on the treatment of detainees in Afghan custody; and (iii) that Canada had/has a continuing responsibility to ensure proper treatment of such detainees under the 3rd Convention, Canada should have taken certain measures. These include: (i) establishing an effective record keeping system concerning transferred detainees commencing when the first detainee was transferred; and (ii) establishing an effective Canadian monitoring system to ensure transferred detainees were properly treated and to protest if problems occurred. One might argue that such detainees were not really prisoners of war and therefore Art 12 of the 3rd Convention did not really apply. It is suggested such an approach is inappropriate. If the CF is going to treat all of its detainees as if they are prisoners of war, as required by its own Code of Conduct, it should ensure similar treatment for detainees it transfers.

12. We do not know if detainees were transferred by the CF prior to 2005 or to whom and we do not know if detainees have been transferred to anyone other than Afghan authorities since 2005. On 18 Dec 2005 an Arrangement for the Transfer of Detainees Between the Canadian Forces and the Ministry of Defence of the Islamic Republic of Afghanistan was concluded by the Canadian Chief of Defence Staff on behalf of the Minister of Defence and the Afghan Minister of Defence. This Arrangement, which in my view was prepared with, at the least, legal input from the Canadian Forces, provided that: (i) detainees would be treated in accordance with standards set out in the 3rd Geneva Convention; (ii) both parties would establish an effective record keeping system; (iii) the ICRC would be able to visit detainees, and (iv) the Afghan Independent Human Rights Commission would have a “legitimate role”. Unfortunately, this Arrangement was flawed by the absence of any provision for an effective Canadian monitoring role. On 3 May 2007, the 2005 Arrangement was supplemented by an Arrangement between the Government of Canada and the Government of the Islamic Republic of Afghanistan which did provide for effective monitoring by Canadian Government personnel. From a strictly legal perspective, the 2007 supplement does make possible Canadian compliance with all of its IHL/LOAC obligations.

13. Unless it can be adequately established that no detainees transferred by Canada have been tortured or mistreated subsequently, and this appears to be very difficult to do, the Afghan detainee process will bring considerable discredit on Canada even if, as is my view, it is unlikely a prosecution case with a reasonable likelihood of conviction can be brought against any Canadian officials.

14. Even if one disregards the risk of potential prosecution, it is essential that Canada occupy the moral and legal high ground when Canadian soldiers go into combat for several reasons: (i) it is just the right thing to do; (ii) failure to do so will lose popular support in Canada; (iii) failure to do so will lose hearts and

minds in Afghanistan; (iv) we aren't good at being villains (fortunately); and (v) we are even worse at covering up our villainy (also fortunately).