Date: 20080312

Docket: T-324-07

Citation: 2008 FC 336

Ottawa, Ontario, March 12, 2008

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

AMNESTY INTERNATIONAL CANADA and
BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

Applicants

and

CHIEF OF THE DEFENCE STAFF
FOR THE CANADIAN FORCES,
MINISTER OF NATIONAL DEFENCE and
ATTORNEY GENERAL OF CANADA

Respondents

REASONS FOR ORDER AND ORDER
MOTION PURSUANT TO RULE 107

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[1] The issue to be determined on this motion is whether the *Canadian Charter of Rights and Freedoms* applies to the conduct of Canadian Forces personnel in relation to individuals detained by the Canadian Forces in Afghanistan, and the transfer of those individuals to the custody of Afghan authorities.

[2] For the reasons that follow, I have concluded that while detainees held by the Canadian Forces in Afghanistan have the rights accorded to them under the Afghan Constitution and by international law, and, in particular, by international humanitarian law, they do not have rights under the *Canadian Charter of Rights and Freedoms*.

[3] Furthermore, although the actions of the Canadian Forces in Afghanistan in relation to the detention of non-Canadian individuals are governed by numerous international legal instruments, and may also be governed by Canadian law in certain clearly defined circumstances, the *Canadian Charter of Rights and Freedoms* does not apply to the conduct in issue in this case.

[4] As the application for judicial review rests exclusively on the Charter for its legal foundation, it follows that the application must be dismissed.

I. INTRODUCTION

[5] Amnesty International Canada and the British Columbia Civil Liberties Association ("the applicants") have brought an application for judicial review with respect to "the transfers, or

potential transfers, of individuals detained by the Canadian Forces deployed in the Islamic Republic of Afghanistan".

[6] Although the applicants are not directly affected by the transfers, the Court has previously found that they satisfy all three components of the test for public interest standing established by the Supreme Court of Canada in cases such as *Chaouilli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791, 2005 SCC 35 and *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607. As a consequence, the applicants were granted public interest standing to pursue this matter: see *Amnesty International Canada et al. v. Canada (Canadian Forces)*, [2007] F.C.J. No. 1460, 2007 FC 1147, at &34-52 (*Amnesty #1)*.

[7] The applicants allege that the formal arrangements which have been entered into by Canada and Afghanistan do not provide adequate substantive or procedural safeguards to ensure that individuals transferred into the custody of the Afghan authorities, as well as those who may be transferred on to the custody of third countries, are not exposed to a substantial risk of torture.

[8] The applicants ask for a declaration that sections 7, 10 and 12 of the *Canadian Charter of Rights and Freedoms* apply to individuals detained by the Canadian Forces in Afghanistan. They further seek various forms of declaratory relief relating to the alleged breaches of detainees' Charter rights.

[9] The applicants also seek a writ of prohibition preventing the transfer of detainees captured by the Canadian Forces to Afghan authorities, or to the custody of any other country, until such time as adequate substantive and procedural safeguards have been put into place.

[10] Finally, the applicants ask for a writ of *mandamus* compelling the respondents to enquire into the status of detainees previously transferred to Afghan authorities, and requiring the respondents to demand the return of these individuals.

[11] Named as a respondent to this application is General Rick J. Hillier - the Chief of the Defence Staff for the Canadian Forces. The other respondents are the Minister of National Defence and the Attorney General of Canada.

[12] As was noted above, the applicants' application for judicial review relies entirely on the *Canadian Charter of Rights and Freedoms* for its legal foundation. The parties thus agree that if the Charter does not apply to the conduct of the Canadian Forces in issue in this case, it necessarily follows that the application for judicial review must be dismissed.

[13] To assist in resolving this dispute in a timely and efficient manner, the parties have jointly agreed to have the issue of whether the Charter applies in the context Canada's military involvement in the armed conflict in Afghanistan determined on the basis of the following questions, pursuant to Rule 107(1) of the *Federal Courts Rules*:

> 1. Does the *Canadian Charter of Rights and Freedoms* apply during the armed conflict in

> Afghanistan to the detention of non-Canadians by the Canadian Forces or their transfer to Afghan authorities to be dealt with by those authorities?
>
> 2. If the answer to the above question is "NO" then would the Charter nonetheless apply if the Applicants were ultimately able to establish that the transfer of the detainees in question would expose them to a substantial risk of torture?

[14] The parties further agree that not only is it in the interests of justice to proceed in this manner, but that all of the evidence necessary to determine the answers to the questions identified above is currently available to the Court, notwithstanding that access to certain information sought by the applicants has been refused by the respondents on the grounds of national security and international relations. These requests for disclosure are currently the subject of proceedings under section 38 of the *Canada Evidence Act*.

[15] Finally, the parties agree that for the purposes of this motion, the Court is to limit its consideration to the jurisdictional questions identified above. No consideration is to be given at this stage in the proceedings as to whether any of the sections of the Charter relied upon by the applicants are actually engaged on the facts of this case.

[16] For the reasons that follow, I have determined that the answer to both of the questions posed by the motion is “No”. As a result, the applicants’ application for judicial review must therefore be dismissed.

II. BACKGROUND

[17] In order to address the parties' arguments, it is first necessary to have an understanding of the mandate and role of the Canadian Forces in Afghanistan in relation to the non-international armed conflict currently taking place in that country.

[18] It is also necessary to have an understanding of the arrangements that have been entered into between Canada and Afghanistan with respect to the treatment of detainees, and the role and responsibilities of each of the two countries in this regard.

[19] Each of these issues will be addressed in turn, starting with a consideration of the authority for Canada's military presence in Afghanistan.

a) The Authority for Canada's Military Presence in Afghanistan

[20] The legal authority for Canada's military presence in Afghanistan has evolved over time, but currently rests upon three distinct, but interrelated, legal bases.

[21] These are the principles individual and collective self-defence, United Nations Security Council Resolutions, and the consent of the sovereign state of Afghanistan. The emergence and development of each of these bases will be discussed below.

i) ***Individual and Collective Self-Defence***

[22] Canada's initial military involvement in Afghanistan took place in the context of an international armed conflict in that country. The original legal basis for Canada's participation in the conflict in Afghanistan was the exercise by Canada of this country's right of self-defence.

[23] Immediately following the tragic events in New York, Washington and Pennsylvania on September 11, 2001, the United Nations Security Council issued Security Council Resolutions 1368 and 1373 which "recognized" and "reaffirmed" the inherent right of individual and collective self-defence, in accordance with the provisions of the United Nations Charter.

[24] The North Atlantic Treaty Organization also recognized that an armed attack against one or more member States was to be viewed as an attack against all NATO members.

[25] In this context, on October 24, 2001, Canada informed the United Nations Security Council that it would be joining with the United States in deploying military forces into Afghanistan in the exercise of its inherent right of self defence. Canada's military involvement in Afghanistan was originally as a participant in the American-led Operation Enduring Freedom ("OEF").

[26] Some Canadian military personnel remain in Afghanistan as part of OEF, in part in the continued exercise of Canada's right of self defence. However, since the emergence of the democratically-elected Afghan government as a coalition partner in 2003, OEF is also now in Afghanistan with the consent of that government.

ii) ***The United Nations Mandate***

[27] On December 20, 2001, after the defeat of the Taliban regime in Afghanistan, United Nations Security Council Resolution 1386 was passed authorizing the creation of an International Security and Assistance Force ("ISAF") for Afghanistan.

[28] ISAF is a multinational force under NATO command, which has been deployed to assist the Government of Afghanistan in restoring peace and security in that country.

[29] ISAF was originally established for a period of six months, and was intended to assist the Afghan Interim Authority in the maintenance of security in Kabul and surrounding areas. However, successive United Nations Security Council resolutions have extended the mandate of ISAF, both geographically and temporally, on the basis that the situation in Afghanistan constitutes an on-going threat to international peace and security.

[30] ISAF currently operates under the mandate conferred upon it by Security Council Resolution 1776, which has extended the ISAF mandate until October of 2008. There are currently some 37 countries contributing to ISAF.

[31] At this point, Canada has approximately 2,500 Canadian Forces personnel in Afghanistan, primarily as part of the ISAF mission. The majority of Canadian Forces personnel are deployed in

Kandahar province. Other Canadian government personnel are also currently stationed in Afghanistan, including employees of the Department of Foreign Affairs and International Trade.

[32] The respondents' position is that while Canada retains operational *command* over Canadian Forces personnel within ISAF, it is NATO, not Canada, that has operational *control* over ISAF Forces. That said, it appears that Canadian operational command ultimately takes precedence over NATO's operational control.

[33] In this regard, Colonel Stephen P. Noonan, the head of the Canadian Forces' Operations Branch (J3) of the Canadian Expeditionary Force Command Headquarters testified that:

> Operational command is retained by national authorities and operational control is given to ISAF … As we place our forces under operational control of NATO, we have come to an agreement with NATO that the mission in Afghanistan is congruent with Canadian aims and that NATO can assign tasks to our forces in the attainment of that mission, however, *that national command overrides that and therefore the duties that are assigned to the Canadian Forces ISAF personnel in Afghanistan need to remain consistent with our direction, Canadian direction, so therefore we always hold the ability to say no to military tasks*. [transcript of the cross-examination of Col. Noonan, at question 46, emphasis added]

[34] In furtherance of this reporting structure, the Canadian Commander of Joint Task Force-Afghanistan reports both to the Commander of ISAF through Commander Regional Command South, and nationally to the Commander of the Canadian Forces, Expeditionary Forces Command ("CEFCOM").

[35] Member States participating in ISAF, including Canada, have been authorized to take "all necessary measures" to fulfil ISAF's mandate: see United Nations Security Council Resolution 1386, at ¶3, and Resolution 1776, at ¶2.

[36] These Resolutions thus authorize ISAF military personnel to use all necessary force in carrying out their mission.

[37] The United Nations Security Council has, however, expressly recognized that the primary responsibility for maintaining security and law and order in Afghanistan rests with the government of Afghanistan established after the overthrow of the Taliban regime. ISAF is in Afghanistan to assist the Government of Afghanistan in that task.

[38] The mandate conferred by the Security Council Resolutions referred to above does not apply to those members of the Canadian Forces currently deployed in Afghanistan, outside the framework of ISAF, including those members of the Canadian Forces deployed as part of OEF.

[39] That said, the parties agree that for the purposes of analysis required by this motion, there is no difference between the circumstances and status of Canadian Forces deployed as part of OEF, and those deployed as part of ISAF.

iii) ***The Consent of the Government of Afghanistan***

[40] While Canada initially went into Afghanistan with the goal of overthrowing the Taliban regime then in power in that country, Canada and its NATO partners are now in Afghanistan with the consent of that country's democratically-elected government. This government has been recognized by the international community as the legitimate government of Afghanistan.

[41] This consent is reflected in documents such as the *Afghan Compact*, an agreement reached between the Islamic Republic of Afghanistan and the international community on February 1, 2006.

[42] Amongst other things, the *Afghan Compact* provides that:

> Genuine security remains a fundamental prerequisite for achieving stability and development in Afghanistan. Security cannot be provided by military means alone. It requires good governance, justice and the rule of law, reinforced by reconstruction and development. With the support of the international community, the Afghan Government will consolidate peace by disbanding all illegal armed groups. The Afghan Government and the international community will create a secure environment by strengthening Afghan institutions to meet the security needs of the country in a fiscally sustainable manner.
>
> To that end, the NATO-led International Security Assistance Force (ISAF), the US-led Operation Enduring Freedom (OEF) and partner nations involved in security sector reform will continue to provide strong support to the Afghan Government in establishing and sustaining security and stability in Afghanistan, subject to participating states' national approval procedures. They will continue to strengthen and develop the capacity of the national security forces to ensure that they become fully functional. All OEF counter-terrorism operations will be conducted

> in close coordination with the Afghan Government and ISAF. ISAF will continue to expand its presence throughout Afghanistan, including through Provincial Reconstruction Teams (PRTs), and will continue to promote stability and support security sector reforms in its areas of operation.
>
> Full respect for Afghanistan's sovereignty and strengthening dialogue and cooperation between Afghanistan and its neighbors constitute an essential guarantee of stability in Afghanistan and the region. The international community will support concrete confidence-building measures to this end. [at p. 3]

[43] The *Afghan Compact* has been endorsed by the United Nations Security Council through Resolutions 1659 and 1707. Resolution 1707 described the *Compact* as providing "the framework for the partnership between the Afghan government and the international community".

[44] Even before the *Afghan Compact* was concluded, the governments of Canada and Afghanistan had signed a document outlining the nature of Canada's involvement and powers within Afghanistan: see the "*Technical Arrangements between the Government of Canada and the Government of the Islamic Republic of Afghanistan*", dated December 18, 2005.

[45] The *Technical Arrangements* are intended to cover Canadian activities in Afghanistan including, amongst other things, assistance in the armed conflict, stabilization, training of the Afghan military, and assistance to law enforcement authorities.

[46] It is clearly recognized in the *Technical Arrangements* that, in light of the credible threat to Canadian personnel, such personnel may take "such measures as are considered necessary to ensure the accomplishment of their operational objectives": at ¶11.

[47] The *Technical Arrangements* further provide that:

> Canadian personnel may need to use force (including deadly force) to ensure the accomplishment of their operational objectives, the safety of the deployed force, including designated persons, designated property, and designated locations. Such measures could include the use of close air support, firearms or other weapons; *the detention of persons*; and the seizure of arms and other materiel. *Detainees would be afforded the same treatment as Prisoners of War. Detainees would be transferred to Afghan authorities in a manner consistent with international law and subject to negotiated assurances regarding their treatment and transfer*. [emphasis added, at ¶12]

[48] Under the *Technical Arrangements*, the final authority to interpret the *Arrangements* is expressly reserved to the Canadian military Commander in Afghanistan.

[49] Canada has also signed a "*Status of Forces Arrangement*", which forms an annex to the *Technical Arrangements*. Article 1.1 of this document provides that Canadian personnel are subject to the exclusive jurisdiction of Canadian authorities in relation to any criminal or disciplinary offences which may be committed by them in Afghanistan.

[50] Article 1.2 of the *Status of Forces Arrangement* further provides that the Government of Canada will take measures to ensure that all Canadian personnel "will respect international law and will refrain from activities not compatible with the nature of their operations or their status in Afghanistan".

[51] After reiterating that Canadian personnel are immune from personal arrest or detention, unless the senior Canadian military Commander consents to such treatment, the *Status of Forces Arrangement* states that "[i]n giving effect to the Arrangements, the Participants will at all times act in a manner consistent with their obligations under international law": see Article 1.4.

[52] The *Technical Arrangements* and the two Arrangements entered into by Canada and Afghanistan with respect to the transfer of detainees (which will be discussed below), reflect the consent of the Government of Afghanistan to the operation of the Canadian Forces on Afghan territory for the purposes identified in the documents.

b) The Canadian Forces' Detention of Individuals in Afghanistan

[53] As part of Canada's military operations in Afghanistan, Canadian Forces are from time to time required to capture and detain insurgents, or those assisting the insurgents, who may pose a threat to the safety of Afghan nationals, as well as to members of the Canadian military and allied forces.

[54] The Canadian Forces possess a broad discretion to detain Afghan civilians, including individuals who may have no active role in hostilities.

[55] That is, Canadian Task Force Afghanistan's *Theatre Standing Order 321A* regarding the "*Detention of Afghan Nationals and Other Persons*" provides that the Canadian Forces may detain any person on a "reasonable belief" (defined as "neither mere speculation nor absolute certainty") that he or she is adverse in interest. This includes "persons who are themselves not taking a direct part in hostilities, but who are reasonably believed to be providing support in respect of acts harmful to the CF / Coalition Forces".

[56] Under *Theatre Standing Order 321A*, the decision as to whether individual detainees should be retained in Canadian custody, released, or transferred to the custody of a third country, is within the sole discretion of the Commander of Joint Task Force Afghanistan, a position currently occupied by General Laroche.

[57] Following capture by the Canadian Forces, detainees are held in a Canadian Forces temporary detention facility at Kandahar Airfield. Kandahar Airfield is a NATO base, and is the location of the Canadian Forces' base of operations in Kandahar province.

[58] Kandahar Airfield is not under the control of either the Afghan or Canadian governments, but is a facility shared by Canada and several other ISAF countries participating in security and

infrastructure operations in Afghanistan. Canada does, however, have command and control over the Canadian Forces' detention facilities at the Kandahar Airfield.

[59] *Theatre Standing Order 321A* further provides that while in Canadian custody, detainees are to be "treated fairly and humanely" in accordance with "applicable international law and CF Doctrine".

[60] Canada informs the International Committee of the Red Cross when the Canadian Forces detain an individual in Afghanistan, but does not notify the Afghan government that one of its citizens has been detained, unless and until the detainee is to be transferred to Afghan custody.

[61] It is both NATO and Canadian Forces' policy to transfer or release detainees within 96 hours of their capture. However, the Canadian Forces has the ability to hold detainees for longer periods, and has done so for a variety of reasons.

[62] While in Canadian custody, detainees are interrogated, searched, photographed and fingerprinted. Detainees are not provided with access to legal counsel during their detention by the Canadian Forces, nor are they afforded any opportunity to make representations prior to being handed over to the Afghan authorities.

[63] The Canadian Forces have the sole discretion to determine whether a detainee "shall be retained in custody, transferred to [the Afghan National Security Forces] or released." These

determinations are made on a case-by-case basis by the Canadian Commander of Task Force Afghanistan at regular review meetings.

[64] Before transferring a detainee into Afghan custody, General Laroche must be satisfied that there are no substantial grounds for believing that there exists a real risk that the detainee would be in danger of being subjected to torture or other forms of mistreatment at the hands of Afghan authorities.

[65] It is the position of the respondents that if this standard is not met, detainee transfers will not take place.

[66] On December 19, 2005, the Afghan Minister of Defence and the Chief of the Defence Staff for the Canadian Forces signed an agreement entitled "*Arrangement for the Transfer of Detainees between the Canadian Forces and the Ministry of Defence of the Islamic Republic of Afghanistan*" (the "first Detainee Arrangement").

[67] The first Detainee Arrangement was intended to establish procedures to be followed in the event that a detainee was to be transferred from the custody of the Canadian Forces to a detention facility operated by Afghan authorities. The Arrangement reflects Canada's commitment to work with the Afghan government to ensure the humane treatment of detainees, while recognizing that Afghanistan has the primary responsibility to maintain and safeguard detainees in their custody.

[68] Amongst other things, the first Detainee Arrangement provides that the International Committee of the Red Cross has the right to visit detainees at any time, while the detainees are being held in either Canadian or Afghan custody.

[69] In February of 2007, the Canadian Forces signed an exchange of letters with the Afghan Independent Human Rights Commission, which letters emphasize the role of the AIHRC in monitoring detainees. These letters further provide that the AIHRC is to provide immediate notice to the Canadian Forces, should it become aware of the mistreatment of a detainee who has been transferred from Canadian custody.

[70] On May 3, 2007, Canada and Afghanistan concluded a second Arrangement governing the transfer of detainees held by the Canadian Forces (the "second Detainee Arrangement"). This Arrangement supplements the first Detainee Arrangement, which continues to remain in effect.

[71] The second Detainee Arrangement requires that detainees transferred by the Canadian Forces be held in a limited number of detention facilities, to assist in keeping track of the individual detainees. The designated institutions are the National Directorate of Security detention facility in Kandahar, Kandahar central prison (Sarpoza), National Directorate of Security detention facility No. 17 in Kabul, and Pul-e-Charki prison, also in Kabul.

[72] This Arrangement further provides that members of the Afghan Independent Human Rights Commission, the International Committee of the Red Cross, and Canadian Government personnel all have access to persons transferred from Canadian to Afghan custody.

[73] The second Detainee Arrangement also requires that approval be given by Canadian officials before any detainee who had previously been transferred from Canadian to Afghan custody is transferred on to a third country.

[74] Finally, the second Detainee Arrangement provides that any allegations of the abuse or mistreatment of detainees held in Afghan custody are to be investigated by the Government of Afghanistan, and that individuals responsible for mistreating prisoners are to be prosecuted in accordance with Afghan law and internationally applicable legal standards.

[75] On January 22, 2008, the applicants were advised by the respondents that the Canadian Forces had suspended detainee transfers until such time as transfers could be resumed “in accordance with Canada’s international obligations”.

[76] The decision to suspend detainee transfers came about as a result of a “credible allegation of mistreatment” having been received on November 5, 2007 by Canadian personnel monitoring the condition of detainees transferred to Afghan authorities.

[77] The decision to suspend transfers was made by Colonel Christian Juneau, the Deputy Commander of Task Force Afghanistan. The decision was made by Colonel Juneau, in the absence of General Laroche who was on leave at the time.

[78] On January 24, 2008, Brigadier General Joseph Paul André Deschamps testified before the Court with respect to the suspension of detainee transfers, advising that no such transfers had taken place since November 5, 2007.

[79] Brigadier General Deschamps works with the Canadian Expeditionary Forces Command in Ottawa, and is the Chief of Staff responsible for overseeing operations for the Canadian Forces deployed outside of Canada, including those deployed in Afghanistan.

[80] According to Brigadier General Deschamps, the suspension of transfers was temporary in nature, and the Canadian Forces remained committed to the ISAF policy of transferring Afghan detainees to the custody of Afghan authorities. He further testified that the resumption of detainee transfers was a real possibility, but would not occur until such time as Canada was satisfied it could do so “in accordance with its international legal obligations”.

[81] Indeed, while the decision in this matter was under reserve, the Court was advised that as of February 26, 2008, the Canadian Forces had resumed transferring detainees to Afghan custody.

[82] As the Court noted in its decision dismissing the applicants' motion for an interlocutory injunction, the evidence adduced by the applicants clearly established the existence of very real and serious concerns as to the effectiveness of the steps that had been taken prior to November 5, 2007 to ensure that detainees transferred by the Canadian Forces to the custody of Afghan authorities are not mistreated: see *Amnesty International Canada et al. v. Canada (Canadian Forces)*, 2008 FC 162, at ¶111 ("*Amnesty #2)*.

[83] While the Canadian Forces have implemented additional measures designed to reduce the risk to detainees transferred into the custody of Afghan authorities since November 5, 2007, it is not necessary for the purposes of this motion to pass judgment on the efficacy or sufficiency of these additional protective measures.

[84] The respondents have refused to provide any information with respect to the identity or whereabouts of specific individuals who have been detained by the Canadian Forces, on the grounds of national security.

[85] The respondents do maintain, however, that Canada has no legal authority to establish or run a long-term detention facility in Afghanistan. That is, according to the respondents, the Canadian Forces have not been authorized to detain for the long term, either by the Government of Canada or by ISAF commanders, who have operational control over Canadian Forces. Nor has the Government of Afghanistan authorized such an encroachment on their sovereignty.

[86] With this understanding of the factual underpinning of this case, and before turning to consider the first of the questions stated by the Court, it is appropriate to consider whether the Court should proceed to answer the questions posed by this motion. This issue will be considered first.

III. SHOULD THE COURT ANSWER THE QUESTIONS POSED?

[87] Two issues arise at this juncture, both of which require the Court to consider whether it is appropriate for the Court to answer the questions posed by the motion. These are whether the subject-matter of the application is justiciable, and secondly, whether there is still a live issue between the parties that requires resolution by the Court.

[88] Insofar as the issue of justiciability is concerned, the respondents have previously questioned whether the conduct in issue in this application involves the exercise of prerogative powers and matters of "high policy" that are generally not justiciable.

[89] That is, the respondents argued several months ago that this application for judicial review should be struck on the grounds that it requires the Court to express an opinion on the wisdom of the exercise of defence powers by the Executive Branch of government, which is not the role of the judiciary: see *Amnesty #1* at &121-125*)*.

[90] However, the respondents also conceded that to the extent that the applicants' Notice of Application is framed in *Charter* terms, the matter is justiciable, based upon the comments of the

Supreme Court of Canada in *Operation Dismantle,* [1985] 1 S.C.R. 441, at ¶63: see *Amnesty #1,* at &123.

[91] Given that the application for judicial review is framed entirely in terms of the Charter, the Court refused to strike the application on the basis of non-justiciability: *Amnesty #1,* at &125. No appeal has been taken from that decision, and the respondents have not raised the issue of justiciability in relation to this motion. Accordingly, the Court will proceed on the basis that the matter is justiciable.

[92] Insofar as the second issue is concerned, as a general rule, when dealing with constitutional litigation, Courts should avoid making pronouncements of law, unless compelled to do so by the facts of the case: see, for example, *R. v. Hape,* 2007 SCC 26, per Justice Binnie, at ¶184.

[93] This cautionary note should be of particular concern in a case such as this, which involves novel and important questions that will undoubtedly have significant implications for the exercise of Canadian military power, and may, as well, have potential consequences for cases well beyond the facts of this one.

[94] With this in mind, at the hearing of this matter, an issue arose as to whether the Court should answer the questions posed, given that, at that point, detainee transfers had been suspended, and it was not clear when, and indeed, if, such transfers would ever resume.

[95] The parties all agreed that the questions posed by this motion were not moot, but were raised in the context of a live controversy – one grounded on a common understanding of the facts - the resolution of which is essential to the disposition of this application.

[96] A review of the amended Notice of Application confirms that the application for judicial review seeks more by way of relief than just simply to enjoin future transfers of detainees. The application also seeks declarations that sections 7, 10 and 12 of the Charter apply to individuals captured and detained by the Canadian Forces, and that the respondents have breached these sections by their conduct.

[97] The amended Notice of Application also seeks both declaratory relief, and an order of *mandamus*, requiring the respondents to inquire into the status of detainees already transferred to the custody of other countries, and demand their return to Canadian custody.

[98] These latter matters were not addressed or otherwise affected by what the respondents described as the “temporary suspension” of transfers.

[99] Furthermore, as was previously noted, while the matter was under reserve, the Court was advised that the Canadian Forces had resumed detainee transfers. Given that a live controversy clearly continues to exist between the parties, the Court is satisfied that it is appropriate to answer the questions raised by this motion, and will now turn to consider the first of these questions.

IV. DOES THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS* APPLY DURING THE ARMED CONFLICT IN AFGHANISTAN TO THE DETENTION OF NON-CANADIANS BY THE CANADIAN FORCES OR THEIR TRANSFER TO AFGHAN AUTHORITIES TO BE DEALT WITH BY THOSE AUTHORITIES?

[100] The search for an answer to this question must begin with a review of the wording of the Charter itself, followed by careful consideration of recent jurisprudence from the Supreme Court of Canada as to the extraterritorial application of the Charter.

a) Section 32(1) of the Charter

[101] Section 32(1) of the Charter provides that:

This Charter applies *a*) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and *b*) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.	La présente charte s'applique : *a*) au Parlement et au gouvernement du Canada, pour tous les domaines relevant du Parlement, y compris ceux qui concernent le territoire du Yukon et les territoires du Nord-Ouest; *b*) à la législature et au gouvernement de chaque province, pour tous les domaines relevant de cette législature.

[102] As the Supreme Court of Canada has noted, section 32(1) determines who is bound by the Charter, and what powers, functions or activities of those bodies and their agents are subject to the Charter: *Hape*, at ¶32.

[103] In identifying who is bound by the Charter, section 32(1) makes it clear that the Charter is intended to regulate the conduct of "state actors": see *Hape* at &81.

[104] The respondents have previously questioned whether the Canadian Forces in Afghanistan are acting as Canadian state actors in this case: see *Amnesty #1*, at ¶73.

[105] However, for the purposes of this motion, the respondents have accepted that in carrying out their duties in Afghanistan, as part of both OEF and ISAF, the Canadian Forces are indeed functioning as Canadian state actors.

[106] It is noteworthy that section 32(1) does not expressly impose any territorial limits on the application of the Charter. As a consequence, it falls to the courts to interpret the jurisdictional reach and limits of the Charter: see *Hape*, at ¶33.

[107] The Supreme Court of Canada has recently pronounced on precisely this question in *R. v. Hape*, albeit in a different factual context. As the Supreme Court's view of this issue must obviously be of central importance to the Court's analysis in this case, it is important to have a clear understanding of precisely what the Supreme Court had to say in *Hape*. This will be addressed next.

b) R. v. Hape

[108] *R. v. Hape* involved a question as to the admissibility of evidence obtained outside of Canada at a criminal trial in this country.

[109] The accused was a Canadian businessman suspected of money laundering, contrary to the Canadian *Controlled Drugs and Substances Act*, S.C. 1996, c. 19. At his Canadian criminal trial, evidence was admitted that had been obtained by the Royal Canadian Mounted Police in the course of investigations carried out in the Turks and Caicos Islands.

[110] The R.C.M.P. had sought the permission of police authorities in the Turks and Caicos to continue their investigation in that country, and to carry out a search of the accused's investment company. Permission was granted to the R.C.M.P., on the basis that they were to work under the authority of a member of the Turks and Caicos' police force.

[111] Without first obtaining a warrant, a procedure that was evidently unavailable in the Turks and Caicos, R.C.M.P. officers searched the investment company. In the course of this search, the officers seized records which were subsequently entered as evidence at the accused's criminal trial.

[112] The issue in *Hape* was thus whether the documentary evidence obtained through the search was admissible at the accused's trial in Canada, in light of his section 8 Charter right to be secure from unreasonable search and seizure.

[113] More precisely, the question for the Supreme Court of Canada was whether the Charter applied to extraterritorial law enforcement activities carried out by Canadian police officers.

[114] The Supreme Court of Canada was unanimous in concluding that the accused's appeal from his conviction should be dismissed, although three different sets of reasons were provided by the Court for arriving at this conclusion.

[115] Writing for the majority, Justice LeBel found that the Charter would not generally apply to searches and seizures carried out in other countries, and did not apply to the extraterritorial searches and seizures at issue in *Hape*. In his opinion, the law of the state in which the search occurred should apply, subject to the safeguards protecting the fairness of trials in Canada.

[116] In coming to this conclusion, Justice LeBel based his analysis on international law principles governing extraterritorial jurisdiction, and the various bases on which such extraterritorial jurisdiction can be exercised.

[117] Justice LeBel started by observing that "jurisdiction" refers to "a state's power to exercise authority over individuals, conduct and events, and to discharge public functions that affect them". This exercise of state power can take several forms: *Hape* at ¶57-8.

[118] The first of these is prescriptive jurisdiction, whereby a state enacts legislation with extraterritorial effect. This can be done where there is a real and substantial connection between the legislating country and the matter that it is attempting to address through legislation. Such a connection could be established, for example, by having the legislation apply to citizens of the legislating country who are outside the country, based upon the nationality principle.

[119] The second category of extraterritorial jurisdiction is enforcement jurisdiction, which refers to:

> [T]he power to use coercive means to ensure that rules are followed, commands are executed or entitlements are upheld… "Enforcement or executive jurisdiction refers to the state's ability to act in such a manner as to give effect to its laws (including the ability of police or other government actors to investigate a matter, which might be referred to as investigative jurisdiction)" [*Hape* at ¶58, citations omitted]

The ability of a state to enforce its laws on the territory of another sovereign state is much more limited.

[120] The last type of extraterritorial jurisdiction is adjudicative jurisdiction, which refers to the power of a state's courts to "resolve disputes or interpret the law through decisions that carry binding force": *Hape* at ¶58.

[121] In determining whether the Charter has extraterritorial effect, the Supreme Court observed that "the powers of prescription and enforcement are both necessary to application of the Charter". While the Charter prescribes what state agents may and may not do in exercising the state's powers, the Charter cannot be applied if compliance with its legal requirements cannot be enforced: *Hape* at ¶85.

[122] Extraterritorial jurisdiction is governed by international law, rather than being at the absolute discretion of individual states: see *Hape* at ¶65, and see *The Case of the S.S. "Lotus" (France v. Turkey)* (1927), P.C.I.J., Ser. A, No. 10.

[123] Moreover, Justice LeBel noted that the Permanent Court of International Justice stated in the *S.S Lotus* case that jurisdiction "cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention": see *Hape* at ¶65, citing *S.S. "Lotus"*, at pp. 18-19.

[124] Justice LeBel then went on to note that:

> While extraterritorial jurisdiction -- prescriptive, enforcement or adjudicative -- exists under international law, it is subject to strict limits under international law that are based on sovereign equality, non-intervention and the territoriality principle. According to the principle of non-intervention, states must refrain from exercising extraterritorial enforcement jurisdiction over matters in respect of which another state has, by virtue of territorial sovereignty, the authority to decide freely and autonomously [citation omitted]. Consequently, *it is a well-established principle that a state cannot act to enforce its laws within the territory of another state absent either the consent of the other state or, in exceptional cases, some other basis under international law*. [at &65, emphasis added]

[125] Justice LeBel observed that the principle of comity, which requires each state to respect the independence and dignity of other sovereign states, bears on the interpretation of Canadian law, where such laws could have an impact on the laws of other states: *Hape*, at ¶47-48.

[126] Justice LeBel further noted that the choice of legal system is within the authority of each state, in the exercise of its territorial sovereignty. As states are sovereign and equal at international law, it follows that one state cannot exercise its jurisdiction in a way that interferes with the exclusive territorial rights of other states.

[127] Were Charter standards to be applied in another state's territory without its consent, there would by that very fact always be interference with the other state's sovereignty: *Hape* at ¶84. As a consequence, the majority of the Supreme Court was of the view that Canadian law, including the Charter, could only be enforced in another state with the consent of the other state.

[128] In this regard, Justice LeBel stated that:

> Simply put, Canadian law, whether statutory or constitutional, cannot be enforced in another state's territory without the other state's consent. This conclusion, which is consistent with the principles of international law, is also dictated by the words of the Charter itself. The Charter's territorial limitations are provided for in s. 32, which states that the Charter applies only to matters that are within the authority of Parliament or the provincial legislatures. In the absence of consent, Canada cannot exercise its enforcement jurisdiction over a matter situated outside Canadian territory. Since effect cannot be given to Canadian law in the circumstances, the matter falls outside the authority of Parliament and the provincial legislatures. [at ¶69]

[129] Thus the criminal investigation which had been undertaken outside of Canada was not, in the view of the majority, a matter "within the authority of Parliament", as Canada's Parliament did not have jurisdiction to authorize the enforcement of Canadian law in the Turks and Caicos, without the consent of that state. No such consent had been given.

[130] Justice LeBel noted, however, that even in cases where the consent of the host state had not been obtained, evidence gathered abroad could still be excluded from a trial in Canada. Moreover, the majority was of the view that the principle of comity could not be used to permit Canadian authorities to engage in off-shore investigations that violated Canada's international human rights obligations.

[131] In determining whether the Charter applied to a foreign investigation, the majority in *Hape* articulated the following test:

> [113] The methodology for determining whether the Charter applies to a foreign investigation can be summarized as follows. The first stage is to determine whether the activity in question falls under s. 32(1) such that the Charter applies to it. At this stage, two questions reflecting the two components of s. 32(1) must be asked. First, is the conduct at issue that of a Canadian state actor? Second, if the answer is yes, it may be necessary, depending on the facts of the case, to determine whether there is an exception to the principle of sovereignty that would justify the application of the Charter to the extraterritorial activities of the state actor. In most cases, there will be no such exception and the Charter will not apply. The inquiry would then move to the second stage, at which the court must determine whether evidence obtained through the foreign investigation ought to be

> excluded at trial because its admission would render the trial unfair.

[132] Writing for two of his colleagues, Justice Bastarache expressed the view that the Charter could apply extraterritorially, although he agreed with the majority that there had been no section 8 violation on the facts of the *Hape* case.

[133] Justice Bastarache was, however, of the opinion that consent was not a useful criterion in determining the extraterritorial application of the Charter, as in his view, the consent of the host state would always be present when Canadian officials operated in a foreign state.

[134] Instead, Justice Bastarache suggested that there should be a rebuttable presumption that extraterritorial activities carried out by Canadian law enforcement personnel, in accordance with the laws and procedures of democratic countries, accord with the basic principles of the Charter.

[135] Thus, in cases where the host state subjects Canadian law enforcement officials to its own laws, the Charter should still apply to the actions of the Canadian officers. However, in Justice Bastarache's view, no violation of the Charter would be found where the officers' actions were consistent with the laws of the host state, and with the Charter's fundamental principles.

[136] Justice Bastarache was also of the view that the Charter should apply to the actions of Canadian officials operating outside of Canada, in circumstances where the host state takes no part in an investigation, and does not subject the officers to its own domestic laws.

[137] In a third set of reasons, Justice Binnie agreed that the Charter did not apply to the actions of the R.C.M.P. in issue in *Hape*, as the evidence was seized under the authority of local police officials, in accordance with local law. He further agreed that to apply the Charter to the conduct of Canadian police officials in the Turks and Caicos would result in an "objectionable extraterritorial effect", interfering with the sovereignty of that country.

[138] While concurring in the result, Justice Binnie did caution against the Court making sweeping pronouncements as to the lack of extraterritorial effect of the Charter. In this regard, he observed that "serious questions of the utmost importance have arisen respecting the extent to which, if at all, a constitutional bill of rights follows the flag when state security and police authorities operate outside their home territory": *Hape*, at ¶184.

[139] Justice Binnie then discussed this very case, describing it as raising "the sort of issues that may eventually wind up before us and on which we can expect to hear extensive and scholarly argument in relation to the extraterritorial application of the Charter": *Hape*, at ¶184.

[140] Justice Binnie further noted that cases such as this one may not ultimately result in prosecutions in Canada, and would not therefore engage "the remedial potential of s. 24(2) of the Charter under which evidence may, in certain circumstances, be excluded from a Canadian trial": *Hape*, at ¶185.

[141] However, Justice Binnie specifically left open the question as to whether *Canadians* harmed by the extraterritorial conduct of Canadian authorities should be denied Charter relief in situations where they did not face trial in Canada: *Hape*, at ¶187.

[142] It should be noted at this juncture that it is common ground between the parties that there are no Canadians amongst the detainees at issue in this case.

[143] As was noted above, the test articulated by the majority in *Hape* requires the Court to consider whether the activity in question falls under s. 32(1) such that the Charter applies to it. In answering this question, the conduct in issue must be that of a Canadian state actor. The respondents now concede that Canadian Forces personnel fall within the definition of state actors for the purposes of this motion

[144] The second part of the *Hape* test requires the Court to determine whether there is an exception to the principle of sovereignty that would justify the application of the Charter to the extraterritorial activities of the Canadian state actor. Based upon international law principle of state sovereignty, the majority was of the view that Canadian law, including the Charter, could ordinarily only be enforced in another state with the consent of the other state: *Hape*, at ¶69.

[145] As a consequence, in order to answer the first question identified by this motion, the Court must determine whether the Government of Afghanistan has consented to the application of

Canadian law, including the Charter, to the conduct of Canadian Forces personnel in relation to the detention of individuals on Afghan soil.

[146] Before addressing the issue of consent, however, it should be noted that the applicants argue that Parliament has the authority to pass laws governing the Canadian Forces, and has in fact done so with the *National Defence Act*, R.S., 1985, c. N-5. As a result, the applicants submit that the conduct of the Canadian Forces in Afghanistan is self-evidently a matter "within the authority of Parliament", as contemplated by section 32 of the Charter.

[147] The difficulty with the applicants' position is that the same point could equally have been made with respect to the R.C.M.P. in *Hape*, in light of the enactment of the *Royal Canadian Mounted Police Act*, R.S., 1985, c. R-10.

[148] Nevertheless, in the view of the majority in *Hape*, the criminal investigation which had been undertaken outside of Canada was not a matter "within the authority of Parliament", as Parliament did not have jurisdiction to authorize the enforcement of Canadian law in the Turks and Caicos, without the consent of that state.

[149] Similarly, in this case, as a foreign state, Canada would not ordinarily have the power to detain non-Canadians, including Afghan citizens, on Afghan soil, without the consent of Afghanistan.

[150] It is thus necessary to determine whether the Government of Afghanistan has consented to the application of Canadian law, including the Charter, to Canadian Forces personnel in relation to the detention of non-Canadians in Afghanistan. This will be considered next.

c) Has the Government of Afghanistan Consented to the Application of Canadian law, Including the Charter?

[151] The Supreme Court of Canada found it unnecessary in *Hape* to consider when and how the consent of a host state might be established, as consent was neither demonstrated nor argued in that case: see ¶106.

[152] In this case, the applicants argue that the Government of Afghanistan has implicitly consented to an extension of Canadian jurisdiction to its soil. As evidence of this, the applicants point to the fact that Afghanistan has surrendered significant powers to Canada, including, most importantly, the usual state monopoly over the use of coercive power within its territory.

[153] In particular, the applicants rely on the fact that Afghanistan has given Canadian Forces personnel the authority to exercise force, including deadly force, over Afghan nationals, as well as the power to detain Afghan citizens anywhere within its territory.

[154] Moreover, the applicants observe that the Government of Afghanistan has conferred total discretion on the Canadian Forces to decide when, and indeed if, detainees in Canadian custody will be transferred to the custody of Afghanistan or any other country.

[155] The applicants argue that the "broad and open-ended language" of the *Technical Arrangements*, as well as that contained in the first and second Detainee Arrangements, all suggest that Afghanistan has indeed consented to detainees in Canadian custody being afforded Charter rights and protections.

[156] As was noted earlier in this decision, there is no question that Canada is now conducting military operations in Afghanistan with the consent of the Afghan government. It does not, however, necessarily follow that in consenting to the presence of Canadian troops on its soil as part of ISAF and OEF, the Government of Afghanistan has consented to the full panoply of Canadian laws applying within its territory.

[157] Moreover, a review of the documentary evidence delineating the nature and ambit of the involvement of the international community, including Canada, in Afghanistan, discloses that in consenting to the presence of foreign troops on its soil, the Government of Afghanistan has not agreed to the wholesale forfeiture of its sovereignty.

[158] A key document in this regard is the *Afghan Compact*. A review of the *Compact* makes it clear that rather than having Afghanistan cede its jurisdiction to states operating within its borders, the international community has pledged to support Afghan sovereignty over its entire territory, and to ensure respect for that sovereignty, even in the context of military operations within that country.

[159] Nothing in the *Afghan Compact* suggests that Afghanistan has consented to the application of Canadian law - or any other foreign law for that matter - within Afghanistan.

[160] Indeed, the *Afghan Compact* specifically addresses the question of the protection of human rights within Afghan territory, providing that both the Afghan Government and the international community:

> [R]eaffirm their commitment to the protection and promotion of *rights provided for in the Afghan constitution and under applicable international law, including the international human rights covenants and other instruments to which Afghanistan is a party*. [Emphasis added]

[161] This provision certainly suggests that insofar as the Government of Afghanistan is concerned, the human rights regime governing the activities of the international community within Afghanistan is that provided for in the constitution of Afghanistan, along with the applicable international law.

[162] Insofar as the relationship between the Governments of Afghanistan and Canada is concerned, the two countries have expressly identified international law, including international humanitarian law, as the law governing the treatment of detainees in Canadian custody.

[163] The first document manifesting this intent is the *Technical Arrangements between the Government of Canada and the Government of the Islamic Republic of Afghanistan*. Article 1.1 of this document states that it is intended to cover:

> Canadian activities in Afghanistan, including assistance to the ongoing armed conflict, stabilization and development assistance in the form of PRT, assistance to the Government of Afghanistan in the form of a Strategic Advisory Team, training of the Afghan military, and assistance to law enforcement authorities. [at p. 2]

[164] Article 1.4 of the *Technical Arrangements* then states that "In giving effect to these Arrangements, the Participants will at all times act in a manner consistent with their obligations under *international law*". [Emphasis added]

[165] Amongst other things, the *Technical Arrangements* deal with the status of Canadian personnel within Afghanistan. In this regard, Article 1.2 of the Annex to the *Technical Arrangements* reflects the undertaking of the Canadian government to "take measures to ensure that all Canadian personnel … will respect *international law* and will refrain from activities not compatible with the nature of their operations or their status in Afghanistan". [Emphasis added]

[166] Finally, in relation to the treatment of detainees, Article 1.2 of the *Technical Arrangements* provides that detainees are to be afforded "the same treatment as Prisoners of War", and are to be transferred to Afghan authorities "in a manner consistent with *international law* and subject to negotiated assurances regarding their treatment and transfer". [Emphasis added]

[167] Moreover, the use of the term "Prisoners of War" in the *Technical Arrangements* is significant. That is, the phrase "Prisoners of War" describes a legal status recognized in, and

defined by the branch of international law governing armed conflict, namely international humanitarian law. International humanitarian law has numerous sources, including instruments such as the *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, Can. T.S. 1965 No. 20. The rights of individuals detained during armed conflicts are clearly spelled out by international humanitarian law.

[168] There is one area in which the Government of Afghanistan has expressly consented to the application of Canadian law within its territory in certain clearly defined circumstances. That is, Article 1.1 of the Annex to the *Technical Arrangements* provides that "All Canadian personnel will, under all circumstances and at all times, be subject to the exclusive jurisdiction of their national authorities in respect of any criminal or disciplinary offences which may be committed by them".

[169] However, Article 7(1)(b) of the Annex expressly excludes Afghan nationals from the definition of the "Canadian Personnel" over whom Canadian criminal and disciplinary jurisdiction can be extended.

[170] Having expressly consented to the application of Canadian law in the limited circumstances described in Article 1.1 of the Annex to the *Technical Arrangements*, it follows logically that the Government of Afghanistan has not consented to the application of Canadian law, including the *Canadian Charter of Rights and Freedoms*, in other situations.

[171] Moreover, having expressly stipulated that detainees are to be accorded the same treatment and protections as are accorded to Prisoners of War by international law, it cannot reasonably be inferred that Afghanistan has consented to the application of Canadian laws, including the Charter, to those detainees.

[172] In particular, there has been no consent by the Government of Afghanistan to having Canadian Charter rights conferred on its citizens, within its territory.

[173] This conclusion is reinforced by a review of the wording of the detainee transfer Arrangements agreed to by both Canada and Afghanistan.

[174] There is no suggestion in the first Detainee Arrangement that the standards to be applied to the treatment of detainees held in Canadian custody on Afghan soil are those prescribed by Canadian law, or that the detainees are to be accorded Charter rights. Indeed, the express wording of the first Detainee Arrangement suggests otherwise.

[175] In this regard, Article 3 of the first Detainee Arrangement provides that "The Participants will treat detainees *in accordance with the standards set out in the Third Geneva Convention*". [Emphasis added]

[176] Article 10 of the first Detainee Arrangement further provides that:

> Recognizing their obligations *pursuant to international law* to assure that detainees continue to

> receive humane treatment and *protections to the standards set out in the Third Geneva Convention*, the participants, upon transferring a detainee will notify the International Committee of the Red Cross through appropriate national channels. [Emphasis added]

[177] Nothing in the second Detainee Arrangement affects the aforementioned provisions.

[178] It is thus clear that the intention of the contracting states, and, in particular, the intent of Afghanistan, was that the rights to be afforded to detainees in Canadian custody in Afghanistan were those accorded by the Afghan Constitution and by international law, including international humanitarian law, and not those guaranteed by the *Canadian Charter of Rights and Freedoms*.

[179] The understanding between the Governments of Afghanistan and Canada that Afghan and international law are the legal regimes to be applied to the detainees in Canadian custody is also reflected in Canadian documents dealing with the treatment of detainees.

[180] In particular, Task Force Afghanistan's *Theatre Standing Order 321A* recognizes international law as the appropriate standard governing the treatment of detainees. In this regard, Article 3 states that it is Canadian Forces policy that all detainees be treated to the standard required for prisoners of war, which it describes as being the highest standard required under international law.

[181] Moreover, Article 18 of *TSO 321A* provides that while in Canadian custody, detainees are to be "treated fairly and humanely" in accordance with "*applicable international law* and CF Doctrine". [Emphasis added]

[182] In light of the foregoing, it is clear that while Afghanistan has consented to its citizens being detained by the Canadian Forces for the purposes described by the *Afghan Compact*, it cannot be said that Afghanistan has consented to the application or enforcement of Canadian law, including the *Canadian Charter of Rights and Freedoms*, to constrain the actions of the Canadian Forces in relation to detainees held by the Canadian Forces on Afghan soil.

[183] Furthermore, the Government of Afghanistan has not consented to having Canadian Charter rights conferred on non-Canadians, within its territorial limits.

[184] As a result, based upon the Supreme Court of Canada's ruling in *Hape*, it would thus appear that the Charter does not apply to the conduct of the Canadian Forces in issue in this case.

[185] This is not the end of the matter, however, as the applicants argue that a rigid application of the general test set out by the Supreme Court of Canada in *Hape* is inappropriate in the military context, and that a determination as to the application of the Charter to Canadian military activities on foreign soil should not turn on the issue of consent alone.

[186] Moreover, the applicants observe that the Supreme Court of Canada specifically left open the possibility that, in exceptional cases, the Charter could have extraterritorial effect, notwithstanding a lack of consent by the host state. According to the applicants, this is just such an exceptional case. This issue will be addressed next.

d) "Effective Military Control of the Person" as a Test for Charter Jurisdiction

[187] According to the applicants, the general principle articulated by the Supreme Court of Canada in *Hape* – namely that Canadian enforcement jurisdiction on foreign soil will not be extended out of respect for the sovereignty of other states, without the consent of the foreign state – was articulated in the law enforcement context, and should not be applied in the case of military activities on foreign soil.

[188] In this regard, the applicants submit that not only is the factual situation giving rise to the *Hape* decision readily distinguishable from that in the present case, in addition, the Supreme Court of Canada has expressly recognized that there may be exceptional situations where the consent of the host state to the application of Canadian laws on its territory may not be required, and that there may be some other basis for extending Canadian jurisdiction: see *Hape* at ¶65.

[189] Moreover, the applicants argue that using consent as the test for establishing the extraterritorial reach of the Charter does not translate well, if at all, to the Canadian Forces exercising military functions. This is because military activities are inherently different than other functions performed by state actors.

[190] That is, the applicants say that the notion that the Canadian Forces should, in all circumstances, have to respect sovereign equality and proceed only with the consent of the host state, as would investigating police officers, is fundamentally misguided. Unlike police functions, military functions will at times necessarily include the use of force, including deadly force, on foreign soil. This will of necessity impair the sovereignty of the other state.

[191] Consequently, the applicants submit that the consent of the affected sovereign state should play no part in determining whether the Canadian military can exercise governmental functions in the territory of a foreign state, such that the Charter should apply.

[192] In support of their argument that consent is not a proper consideration in the military context, the applicants point to specific cases where Canada has deployed military personnel in the past, in circumstances where obtaining the consent of the host state was not possible. One such example was Canada's military involvement in Somalia, where there was no recognizable government in place to give consent.

[193] Similarly, the applicants point out that the Canadian Forces were deployed in the Former Yugoslavia, where sovereignty over territory was contested, and it was not clear which state would have been in a position to legally provide consent.

[194] Indeed, the applicants argue that there are situations involving the exercise of military force - as was originally the case in Afghanistan - where the Canadian Forces actually invade the territory of another state for the express purpose of overthrowing the sovereign government. In such cases, the consent of the state being invaded would obviously never be forthcoming.

[195] The applicants therefore contend that consent is a "fraught criterion" upon which to base the reach of the Charter when military action is involved.

[196] Instead, the applicants posit that the appropriate test to be used in determining whether or not the Charter should apply in the context of military activities on foreign soil is that of "effective military control of the person". That is, the applicants say that the Charter should apply as soon as the Canadian Forces bring an individual within their effective control, whether by detention or transfer.

[197] The applicants point out that in the present case, once detainees are taken into Canadian custody, the Canadian Forces have complete control over these individuals, and cannot be compelled to turn them over to the hands of the Afghan authorities, or to the custody of any other country. In such circumstances, the applicants say that the Charter should apply.

[198] In support of this argument, the applicants point to the fact that the rationale given by the majority in *Hape* for finding that the Charter should not apply extraterritorially was because the

relevant state actors did not have the power or ability to comply with its requirements: see *Hape* at ¶97.

[199] The corollary to this, the applicants say, is that when members of the Canadian Forces have complete control over those in their custody, the Charter should apply.

[200] Thus the applicants submit that once an individual is arrested by Canadian Forces personnel, is detained at a facility controlled by the Canadian Forces, and is subject to ongoing detention or release at the sole discretion of the Canadian Forces, that individual is within the effective control of Canada and should enjoy the protections of the Charter and of Canadian courts.

[201] In support of their argument that "effective military control of the person" should be the appropriate test to be applied in cases of the exercise of military force, the applicants rely on jurisprudence from the House of Lords, from the United States Supreme Court, and from the Court of Appeal for the District of Columbia, which the applicants submit has held that domestic human rights legislation applies to individuals detained by military forces in Iraq and at Guantanamo Bay: see *Al Skeini et al. v. Secretary of State for Defence*, [2007] UKHL 26, *Rasul v. Bush*, 542 U.S. 466 (2004), and *Omar et al. v. Secretary of the United States Army et al.*, 479 F. 3d 1 (D.C. Cir. 2007).

[202] The applicants also rely on jurisprudence of the European Court of Human Rights, including the decisions in *Banković v. Belgium*, (2001) 11 BHRC 435, 2001–XII Eur. Ct. H.R. 333 (GC) and *Issa v. Turkey* (2004) 41 EHRR 567.

[203] Finally, the applicants cite recent commentaries of the United Nations Human Rights Committee (*General Commentary No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant* (26/05/2004, CCPR/C/21/Rev/1/Add.13)) and of the United Nations Committee Against Torture (*General Commentary No. 2: Implementation of Article 2 by States Parties* (23/11/2007, CAT/C/GC/2/CRP.1/Rev.4)), both advocating the use of a test of *de facto* or *de jure* control over persons in detention as a basis for exerting extraterritorial human rights jurisdiction.

[204] While a test for extraterritorial Charter jurisdiction based on effective military control of the person holds some appeal, there are a number of difficulties with the applicants' arguments as to why such a test should be applied in this case.

[205] Firstly, the historical scenarios cited by the applicants as examples as to why the consent test articulated by the Supreme Court of Canada in *Hape* should not apply in the case of the military context are quite distinguishable from the factual matrix underlying this application.

[206] That is, unlike the situation that confronted the Canadian Forces in Somalia, there is an internationally-recognized, democratically elected government in place in Afghanistan to give consent to the application of foreign law to activities taking place on its soil, if it should see fit to do so.

[207] Similarly, unlike the situation that confronted the Canadian Forces in the Former Yugoslavia, and despite the best efforts of the insurgents in Afghanistan, there is no question in the eyes of the international community as to who is legally entitled to give consent in this case.

[208] While it is true that Canada originally went into Afghanistan in 2001 with the express intent of overthrowing the Taliban regime then in power in that country, Canada is not presently in Afghanistan as an occupying force. Canada remains in Afghanistan to assist in securing and rebuilding that country, with the support of the international community, the approval of the United Nations, and the consent of the Government of Afghanistan.

[209] It is neither necessary nor appropriate to decide whether the consent test articulated by the Supreme Court of Canada in *Hape* should be applied in every instance where Canadian military power is exercised on foreign soil, including in circumstances such as those that may have existed in Somalia or in the Former Yugoslavia.

[210] However, in the case of Canada's current involvement in Afghanistan, there is a legitimate government in place which could have consented to the application of a full range of Canadian laws on Afghan soil, but has not.

[211] The Supreme Court of Canada made it clear in *Hape* that international law requires that where there is a legitimate government in place, Canadian law can only be enforced in the territory of that state with its consent, in all but the most exceptional cases.

[212] In such circumstances, based on the reasoning of the majority in *Hape*, to hold that the *Canadian Charter of Rights and Freedoms* nonetheless applied to the actions of the Canadian Forces in relation to the detention and transfer of detainees in Afghanistan would result in an impermissible encroachment on the sovereignty of that country, in a manner that would be contrary to international law.

[213] The applicants also rely on international jurisprudence to argue that this is an exceptional case of the sort contemplated by the Supreme Court of Canada in *Hape*. However, there are important differences between the facts in this case, and the facts underlying the decisions cited by the applicants.

[214] Moreover, a close reading of the cases and commentaries relied upon by the applicants suggests that the current state of international jurisprudence in this area is somewhat uncertain, and that the weight of authority does not support a different result with respect to the application of the Charter in this case than that espoused by the Supreme Court of Canada in *Hape*.

[215] In considering the international jurisprudence cited by the applicants, the starting point for the analysis must be the *Banković* decision of the European Court of Human Rights, which has been recognized as a pre-eminent authority on the issue of the extraterritorial application of human rights legislation and conventions: see *Al Skeini* at ¶68.

[216] *Banković* involved proceedings brought by relatives of people killed in a missile attack by a NATO aircraft on the Serbian Radio and Television headquarters in Belgrade. A person injured in the air strike was also an applicant. The applicants' claim was based upon the alleged violation of various articles of the European Convention on Human Rights. The respondents were the NATO powers involved.

[217] Prior to there being an adjudication of the case on its merits, the case was referred to the Grand Chamber of the European Court of Human Rights for a ruling on the question of jurisdiction.

[218] In seeking to extend the protection of the European Convention to the victims of the attack, it was argued on behalf of the applicants that the ability of the respondents to strike the building where the victims were injured or killed demonstrated that the respondents had sufficient control over the victims as to bring them within the jurisdiction of the respondent countries.

[219] In determining whether, as a result of the respondents' extraterritorial acts, the victims fell within the jurisdiction of the respondent states, the Grand Chamber noted that jurisdiction is primarily territorial. A state may not exercise jurisdiction in the territory of another state without the consent, invitation or acquiescence of the host State, unless the first state is an occupying power: *Banković*, at ¶60 and 63.

[220] The Grand Chamber further found that there was no jurisdictional link between the victims of the air strike and the respondents. As a result, the victims and their relatives were not brought

within the jurisdiction of the respondents by virtue of the act committed outside the territory of those states: *Banković*, at ¶82.

[221] In coming to this conclusion, the Grand Chamber noted that:

> [71] In sum, the case-law of the Court demonstrates that its recognition of the exercise of extra-territorial jurisdiction by a Contracting State is exceptional: it has done so when the respondent State, through *the effective control of the relevant territory and its inhabitants abroad, as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory exercises all or some of the public powers normally to be exercised by that Government*. [Emphasis added]

[222] Three years after its decision in *Banković*, the European Court of Human Rights had occasion to revisit the question of extraterritorial jurisdiction in *Issa v. Turkey*, previously cited. *Issa* involved claims made as a result of the deaths of several shepherds in Northern Iraq. The applicants in *Issa* alleged that the shepherds had been killed by Turkish troops who had been operating in that area. Turkey resisted the claim, asserting that the shepherds had never come within its jurisdiction.

[223] In relation to the jurisdictional issue, the European Court stated in *Issa* that:

> [71] … [A] state may also be held accountable for violation of the Convention rights and freedoms of persons *who are in the territory of another state but who are found to be under the former state's authority and control through its agents operating - whether lawfully or unlawfully in the latter state*…. Accountability in such situations stems from the fact that article 1 of the Convention cannot be interpreted so as to allow a state party to perpetrate violations of

> the Convention on the territory of another state, which it could not perpetrate on its own territory. [emphasis added]

[224] In considering whether the shepherds had been within the authority or effective control of Turkey at the time of their deaths, and thus within the jurisdiction of that country, the European Court did not exclude the possibility that, as a result of Turkey's military action, it could be considered to have "exercised, temporarily, effective overall control of a particular portion of the territory of northern Iraq": *Issa*, at ¶74

[225] In the view of the European Court, if it could have been established that Turkey exercised effective overall control of the area of Iraq in issue, and that if the victims were in that area of Iraq at the time of their deaths, it would follow logically that they were within the jurisdiction of Turkey: *Issa*, at ¶74.

[226] The claim was, however, dismissed on the basis of the Court's finding that Turkey did not exercise effective overall control over northern Iraq at the material time: *Issa*, at ¶75.

[227] Much of the analysis in *Issa* is framed in terms of the "effective control of the territory" test as being the applicable test for extraterritorial jurisdiction: see, for example, paragraph 69. To this extent, the decision is consistent with the European Court of Human Rights' earlier pronouncement in *Banković*.

[228] However, the quote from paragraph 71 of the *Issa* decision cited above seemingly suggests that extraterritorial jurisdiction may be found to exist, not only where a state has effective control over the *territory* of another state, but also where an *individual* comes within the "authority and control" of a foreign state through the activities of agents of the foreign state operating in the first state.

[229] It appears therefore that in *Issa*, the European Court may have expanded its view of the bases for extending extraterritorial human rights jurisdiction beyond that which it had previously espoused in *Banković*.

[230] This seeming divergence in the jurisprudence of the European Court was given careful consideration in the reasons of several of the Law Lords in *Al Skeini*. In this regard, Lord Rodger of Earlsferry noted that it was difficult to reconcile the decision in *Issa* with the existing jurisprudence from the European Court, and, in particular, with the decision in *Banković*: see *Al Skeini*, at ¶75.

[231] Lord Rodger further observed that in *Issa*, the focus of the Court appeared to be on "the activity of the contracting state, rather than on the requirement that the victim should be within its jurisdiction": *Al Skeini*, at ¶75.

[232] As a consequence, Lord Rodger concluded that " [i]n these circumstances, although *Issa* concerned Turkish troops in Iraq, I do not consider that this aspect of the decision provides reasoned

guidance on which the House can rely when resolving the question of jurisdiction in the present case".

[233] A similar sentiment was expressed by Baroness Hale, at paragraph 91 of her decision where she found that "there is more to be learned from the decision of the Grand Chamber in *Banković …* than there is from the observations of the Chamber in *Issa*…".

[234] In the same vein, Lord Brown of Eaton-Under-Heywood agreed that to the extent that *Issa* could be interpreted as supporting wider notions of jurisdiction than did *Banković*, *Banković* was better law: see paragraphs 125-132 of his reasons. In support of this finding, Lord Brown also observed *Banković* was a judgment of the Grand Chamber or the European Court, whereas *Issa* was not.

[235] For the reasons articulated by the House of Lords in *Al Skeini*, I agree that the decision in *Banković* is better law than the decision in *Issa*.

[236] Before turning to consider the merits of the House of Lords' decision in *Al Skeini*, I will deal briefly with the American authorities relied upon by the applicants, as well as the Commentaries of the United Nations bodies cited by the applicants.

[237] *Rasul v. Bush* is readily distinguishable from the present case. Although American courts have found that U.S. jurisdiction extends to govern individuals held in military custody at the

American military prison at Guantánamo Bay, this jurisdiction rests on the fact that, in accordance with the lease entered into between the Government of the United States and the Republic of Cuba, the United States can "exercise complete jurisdiction and control" over and within the area of the military base: see *Rasul*, Part I, per Stevens J.

[238] In *Omar et al v. Secretary of the United States Army et al*., the United States Court of Appeal did find that an individual detained by the American military in Iraq was subject to the jurisdiction of the U.S. courts because he was "in custody under or by color of authority of the United States." However, this jurisdiction was seemingly conferred by the express wording of the applicable American *habeas corpus* legislation: 28 U.S.C. § 2241. It also bears mentioning that Mr. Omar was an American citizen.

[239] Insofar as the commentaries of the United Nations Committees are concerned, as the respondents observed, these are recommendations made by groups with advocacy responsibilities. While they clearly reflect the views of knowledgeable individuals, they do not reflect the current state of international law, but more the direction that those groups believe the law should take in the future.

[240] It should also be noted that the comments of the United Nations Human Rights Committee relied upon by the applicants as supporting a more expansive approach to extraterritorial human rights jurisdiction are made in the context of an examination of the scope of the legal obligations on

States Parties imposed by Article 2 of the *International Covenant on Civil and Political Rights*. The comments do not address the extraterritorial reach of the domestic laws of States Parties.

[241] This then leaves the decision of the House of Lords in *Al Skeini* to be considered.

[242] *Al Skeini* involved claims brought in England, pursuant to the British *Human Rights Act*. The claims arose from the deaths of six Iraqi citizens, allegedly killed by members of the British military in Iraq, while the United Kingdom was an occupying power in the south-eastern portion of that country.

[243] Five of the victims were killed by gunfire, at different times, and in different locations. The sixth claim was brought by the family of Baha Mousa, who was beaten to death by British soldiers while he was detained at the British military base in Basra.

[244] To succeed, the claimants had to show that the complaints fell within the scope of the *European Convention on Human Rights*, thus raising the same type of jurisdictional question as had previously arisen in *Banković* and *Issa*, albeit in a different forum.

[245] One of the principle issues in *Al Skeini* was the relationship between the British *Human Rights Act* and the *European Convention on Human Rights* – a relationship that is not relevant for the purposes of this discussion.

[246] Moreover, much of the House of Lords' analysis in *Al Skeini* was taken up with a consideration of the claims of the five shooting victims, as, by the time that the case reached the House of Lords, the British Government had conceded that as Mr. Mousa's death took place in a British detention unit, he died "within the jurisdiction of the United Kingdom for purposes of article 1 of the Convention": see *Al Skeini* at ¶61.

[247] As a result of this concession, there is relatively little analysis carried out by the House of Lords in *Al Skeini* with respect to the jurisdictional basis for the claim brought by members of Mr. Mousa's family. Perhaps the fullest discussion of this issue appears at paragraph 132 of the reasons of Lord Brown, where he stated that:

> As for the sixth case, I for my part would recognise the UK's jurisdiction over Mr Mousa only on the narrow basis found established by the Divisional Court, essentially by analogy with the extra-territorial exception made for embassies …

[248] The only other express consideration of the basis for extending the jurisdiction of the British *Human Rights Act* to cover Mr. Mousa's case appears in the concurring decision of Baroness Hale. She based her finding that the British *Human Rights Act* applied to Mr. Mousa's case on the fact that the victim's family would have a remedy against the United Kingdom in the European Court of Human Rights, and that it would be consistent with the purpose of the Act to give his father a remedy in the British courts: see ¶88.

[249] A review of the decision of the Divisional Court in *Al-Skeini* ([2004] E.W.H.C. 2911) confirms that the finding of exceptional extraterritorial jurisdiction with respect to Mr. Mousa's claim was made by analogy to the recognized exceptions to territorially-based jurisdiction relating to embassies, consulates, foreign-registered aircraft and vessels.

[250] In this regard the Divisional Court observed that:

> [287] In the circumstances [of Mr. Mousa's death] the burden lies on the British military prison authorities to explain how he came to lose his life while in British custody. It seems to us that it is not at all straining the examples of extra-territorial jurisdiction discussed in the jurisprudence considered above to hold that a British military prison, operating in Iraq with the consent of the Iraqi sovereign authorities, and containing arrested suspects, falls within even a narrowly limited exception exemplified by embassies, consulates, vessels and aircraft, and in the case of *Hess v. United Kingdom*, a prison.

[251] In coming to this conclusion, the Divisional Court also relied on some of the jurisprudence discussed earlier in this decision, including the decision of the Supreme Court of Canada in *Cook*, and of the Supreme Court of the United States in *Rasul v. Bush*.

[252] With respect, several concerns arise with respect to this reasoning.

[253] Firstly, as was noted earlier, the Supreme Court of Canada has since distanced itself in *Hape* from its earlier decision in *Cook*. The implications of the Supreme Court's rethinking of its decision

in *Cook* as it relates to the proposed test of "effective military control of the person" will be discussed below.

[254] Secondly, unlike the situation here, there was a clear statutory foundation for the extension of extraterritorial jurisdiction in *Rasul v. Bush*.

[255] Thirdly, the decision in *Hess v. United Kingdom*, (1975) 2 D&R 72, is of limited assistance. *Hess* involved a prisoner held at Spandau prison, which was located within the British zone in West Berlin. The available extract of the decision of the European Commission on Human Rights is very brief, and contains little discussion of the jurisdictional issue, beyond the statement that "there is, in principle, from a legal point of view, no reason why acts of the British authorities in Berlin should not entail the liability of the United Kingdom under the Convention".

[256] Moreover, in *Hess*, the European Commission on Human Rights cited its earlier decision in *X. v. The Federal Republic of Germany*, (decision of 25 September, 1965 on the admissibility of the application, Yearbook 8 at p. 158) as authority for the proposition that "a State is under certain circumstances responsible under the Convention for the actions of its authorities outside its territory".

[257] However a review of the Commission's decision in the *X. v. Germany* case reveals that what the Commission actually said was that "in certain respects, *the nationals* of a Contracting State are within its 'jurisdiction' even when domiciled abroad" [emphasis added]. This is an entirely

different question that the one faced by the House of Lords in *Al Skeini*, or the question before the Court in this case, as the nationality principle was thus engaged in *X.*.

[258] The *X. v. Germany* case also dealt with the duties of consular officials acting outside their home country, which again engaged entirely different jurisdictional considerations than those in issue in either *Al Skeini* or in this case.

[259] Indeed, there is a specific basis at international law for the exceptional extraterritorial jurisdiction accorded to states in relation to their embassies, consulates, vessels and aircraft.

[260] As was noted at paragraph 73 of *Banković*, international law specifically recognizes instances of extraterritorial jurisdiction in cases involving embassies and consulates. Their special status originates in customary international law, based on the consent of the host state to the foreign diplomatic presence in its territory.

[261] In more recent times, the rules relating to embassies and consulates have been codified in two multinational treaties: the *Vienna Convention on Diplomatic Relations* and the *Vienna Convention on Consular Relations*. These Conventions confer an extensive range of privileges and immunities on diplomatic personnel while abroad.

[262] Similarly, international law recognizes extraterritorial jurisdiction with respect to aircraft and vessels registered in, or flying the flag of a state: see *Banković* at &73, and *Illich Sanchez Ramirez v. France*, (1996) 86-A DR 155.

[263] Indeed, this appears to have been the basis for the jurisdictional finding in *Öcalan v Turkey*, (2005) 41 EHRR 985, a case cited by the House of Lords in *Al Skeini*. In *Öcalan*, the applicant was arrested by members of the Turkish security forces inside an aircraft registered in Turkey in the international zone of Nairobi Airport: see &91.

[264] There is no similar principle of customary international law or treaty law that was cited by either the Divisional Court or the House of Lords in *Al Skeini* (or in the jurisprudence relied upon in those decisions) as a legal basis for extending the jurisdiction of the United Kingdom to cover the situation of Mr. Mousa. As a consequence, the analogy drawn to the embassy exception as a basis on which to found extraterritorial jurisdiction was not, with respect, entirely apt.

[265] Nor have the applicants in this case identified a legal basis at international law for extending the jurisdiction of Canada to the detention facility on the Kandahar airfield.

[266] As a consequence, and having given the matter careful consideration, I am of the view that the decision of the House of Lords in *Al Skeini* is of limited assistance in the case at hand.

[267] All of that having been said, as was noted earlier in these reasons, the “effective military control of the person” test advocated by the applicants does hold some considerable appeal, particularly when one considers that it is the activities of Canadian military personnel that are sought to be restrained in this case, and not the activities of foreign nationals.

[268] In this regard, the Supreme Court stated in *Hape* that it is the primary role of the Charter to limit the exercise of the government authority, in advance, so that breaches of the Charter are prevented: *Hape* at ¶91.

[269] It is also noteworthy that Canada can, and has, exercised prescriptive jurisdiction over members of the Canadian Forces acting outside of this country, based upon the nationality principle.

[270] Indeed, Canada has prosecuted members of the Canadian Forces for mistreating foreign nationals detained by Canadian military personnel on foreign soil: see for example, *R. v. Brown*, [1995] C.M.A.J. No. 1 and *R. v. Seward*, [1996] C.M.A.J. No. 5.

[271] The applicants therefore ask why, if Canada can prosecute members of the Canadian Forces, after the fact, for mistreating detainees held by military personnel on foreign soil, can the Charter not apply in advance to restrain those same military personnel from acting in a manner that may result in injury to those same detainees?

[272] One short answer to this is that Canada has exercised specific extraterritorial prescriptive jurisdiction through the *Military Code of Service Discipline* under Part III of the *National Defence Act,* the *Crimes Against Humanity and War Crimes Act*, S.C. 2000 c. 24 and the *Criminal Code*, R.S.C. c. C-46, allowing it to prosecute members of the Canadian Forces for crimes committed outside of Canada.

[273] That said, I note that there has been academic commentary, albeit in the law enforcement context, suggesting that when Canadian officials act independently of the authorities in the host country, the Charter should surely apply: see, for example, Kent Roach, *"*R. v. Hape Creates Charter-free Zones for Canadian Officials Abroad*"*, 53 Crim. L. Q., at pp. 3-4.

[274] Whatever its appeal may be, however, the practical result of applying such a 'control of the person' based test would be problematic in the context of a multinational military effort such as the one in which Canada is currently involved in Afghanistan. Indeed, it would result in a patchwork of different national legal norms applying in relation to detained Afghan citizens in different parts of Afghanistan, on a purely random-chance basis.

[275] That is, an Afghan insurgent detained by members of the Canadian Forces in Kandahar province could end up having entirely different rights than would Afghan insurgents detained by soldiers from other NATO partner countries, in other parts of Afghanistan. The result would be a hodgepodge of different foreign legal systems being imposed within the territory of a state whose sovereignty the international community has pledged to uphold.

[276] This would be a most unsatisfactory result, in the context of a United Nations-sanctioned multinational military effort, further suggesting that the appropriate legal regime to govern the military activities currently underway in Afghanistan is the law governing armed conflict – namely international humanitarian law.

[277] Indeed, international humanitarian law is a highly developed branch of international law comprised of both customary international law and treaties "that regulates the conduct of military operations and operated to protect civilians and other persons not actively participating in hostilities, and to mitigate harm to combatants themselves": see Christopher K. Penny, "Domestic Reception and Application of International Humanitarian Law: Coming Challenges for Canadian Courts in the 'Campaign Against Terror", (Paper presented to the International Conference on the Administration of Justice and National Security in Democracies, June 2007) [unpublished], at p. 3.

[278] In particular, international humanitarian law prohibits the mistreatment of captured combatants: see Penny, cited above, at p. 3.

[279] Moreover, international humanitarian law applies not only during times of war, but applies as well, albeit with some modifications, to non-international armed conflicts within the territory of High Contracting Parties: Penny, at p. 5.

[280] The application of international humanitarian law to the situation of detainees in Afghanistan would not only give certainty to the situation, but would also provide a coherent legal regime governing the actions of the international community in Afghanistan.

[281] More fundamentally, it is difficult to reconcile the espousal of an "effective military control of the person" test with the teachings of the majority of the Supreme Court of Canada in *Hape*. This is especially so when *Hape* is read in conjunction with the Supreme Court's previous pronouncement as to the extraterritorial application of the Charter in *R. v. Cook*, [1998] 2 S.C.R. 597.

[282] That is, the majority decision of the Supreme Court of Canada in *Hape* specifically rejected the control-based test that had been advocated by Justice Bastarache in *Cook* as a means of grounding the extraterritorial application of the Charter.

[283] Like *Hape*, *Cook* involved an off-shore criminal investigation by Canadian police officials. The accused was an American arrested in the United States by American authorities, on a warrant issued in connection with a Canadian extradition request. While he was detained in the United States, Canadian police officers interrogated the accused. He was not properly advised of his right to counsel as required by subsection 10(b) of the Charter, and an issue subsequently arose as to the admissibility of a statement made by the accused at his trial in Canada.

[284] The majority in *Cook* held that the Charter could apply beyond Canada's territorial boundaries in certain rare and limited circumstances. In finding that the Charter did have extraterritorial effect in that case, the majority identified two factors as critical to its conclusion. The first of these was that the impugned act fell within subsection 32(1) of the Charter. The second was the Court's finding that to apply the Charter to the actions of the Canadian detectives in the United States did not, on the facts before the Court, interfere with the sovereign authority of the United States and thereby generate an objectionable extraterritorial effect: *Cook*, at ¶25.

[285] According to the majority decision in *Cook*, there was a fundamental difference between applying the Charter to American officials acting as agents of - or at the request of - Canadian law enforcement authorities, and applying the Charter to the Canadian authorities themselves: see ¶41.

[286] In the view of the majority in *Cook*, jurisdictional competence under international law to apply the Charter to the actions of Canadian law enforcement authorities gathering evidence abroad could rest on the Canadian nationality of the police officers in question, rather than principles of territoriality: see ¶46.

[287] In his concurring decision, Justice Bastarache (writing for himself and Justice Gonthier) found that there was no conflict between an interpretation of subsection 32(1) of the Charter which favoured its application to activities of Canadian officials conducting investigations off-shore, and international law principles of territorial jurisdiction: see *Cook*, at ¶117.

[288] For Justice Bastarache, in considering the application of the Charter to cooperative off-shore investigations involving Canadian officials and foreign officials, the key was to determine who was in control of the specific feature of the investigation which allegedly resulted in the Charter breach: see *Cook* at ¶126.

[289] In Justice Bastarache's view, if it was the foreign authority that was responsible for the circumstances giving rise to the Charter breach, then the Charter would not apply. However, if it was the Canadian officials who were primarily responsible for obtaining the disputed evidence in a manner which violated the Charter, then, in Justice Bastarache's opinion, the Charter should apply: see *Cook* at ¶127.

[290] Again writing for a concurring minority in *Hape*, Justice Bastarache proposed refinements to his earlier opinion in *Cook*. However, he remained firmly of the view that Canadian authorities must abide by Charter standards when they act independently during foreign investigations.

[291] Justice Bastarache was of the view that in situations such as that which arose in *Hape*, where the host state took part in the investigation by subjecting the Canadian police authorities to its laws, the Charter should still apply to the Canadian officers.

[292] However, in Justice Bastarache's view, there would be no Charter violation where the Canadian officers abide by the laws of the host state, unless those procedures are so fundamentally

inconsistent with fundamental human rights that it was unreasonable for Canadian officers to have participated: *Hape* at &171 and 178.

[293] It is in this context that the majority reasoning in *Hape* must then be revisited. It would have been open to the majority in *Hape* to base their finding that the Charter did not apply to the police search in the Turks and Caicos on the fact that the Canadian police authorities did not have control over the situation. Indeed, this would have been a very simple and straightforward basis for defining the extraterritorial reach of the Charter, as had been suggested by Justice Bastarache in *Cook*. However, the majority chose not to endorse this approach, relying instead on the "consent" test discussed previously.

[294] Thus in *Hape*, the Supreme Court of Canada seemingly rejected Canadian control over activities taking place on foreign soil as a basis for extending Canadian Charter jurisdiction to protect individuals affected by those activities, in favour of its consent-based test.

[295] While there are substantial factual distinctions between the police activities in issue in *Cook* and *Hape,* and the military activities in issue here, the international law analysis provided by the majority in *Hape* to support its endorsement of the "consent" test has equal application to this case.

[296] Moreover, both military detentions and police searches and seizures involve the invasion of "the private sphere of persons", which invasion is "paradigmatic of state sovereignty": *Hape* at ¶87. According to the Supreme Court, such actions can only be authorized by the host state.

[297] In this case, the scope of the authority given to Canada by the Government of Afghanistan to detain individuals on its soil is limited, and specifically contemplates that Canadian actions in this regard be governed by international law. In addition, it is clear from a review of the documentation governing the relationship between Afghanistan and Canada that the rights to be accorded to detainees are those guaranteed by the Afghan constitution, and by international law.

[298] As a consequence, I cannot accept the applicants' argument that the Charter applies to the conduct of members of the Canadian Forces in relation to detainees held by Canadian military personnel on Afghan soil, based upon the degree of control that the Canadian Forces exert over the detainees.

e) Conclusion with Respect to the First Question

[299] In summary, and for the foregoing reasons, the Court finds that the "effective military control of the person" test advocated by the applicants as the proper basis for establishing Charter jurisdiction is not appropriate in the context of a multinational military operation such as that which is currently under way in Afghanistan. Moreover, the use of such a control-based test as a legal basis on which to found Charter jurisdiction has been specifically rejected by the Supreme Court of Canada in *R. v. Hape*.

[300] Furthermore, the Government of Afghanistan has not consented to the application of the full range of Canadian laws, including the Charter, to individuals held in detention by Canadian Forces

personnel on Afghan soil. In particular, the Government of Afghanistan has not consented to having Canadian Charter rights conferred on its citizens, within its territorial limits.

[301] As a consequence, the answer to the first question is “No”.

[302] This conclusion thus mandates that the Court address the second question posed by the motion.

V. IF THE ANSWER TO THE ABOVE QUESTION IS "NO" THEN WOULD THE CHARTER NONETHELESS APPLY IF THE APPLICANTS WERE ULTIMATELY ABLE TO ESTABLISH THAT THE TRANSFER OF THE DETAINEES IN QUESTION WOULD EXPOSE THEM TO A SUBSTANTIAL RISK OF TORTURE?

[303] The applicants submit that even if the Government of Afghanistan has not consented to detainees in the custody of the Canadian Forces in Afghanistan being granted Charter rights, the Charter must nevertheless apply if the fundamental human rights of the detainees are at stake.

[304] In support of this contention, the applicants observe that the right to be free from torture is a fundamental human right. It is not only codified in international conventions, but it is also a *jus cogens* rule of international law that is non-derogable, even in times of war: see the *Geneva Conventions Act*, R.S.C. 1985, c. G-3, Schedules I-IV, Common Article 3; the *International Covenant on Civil and Political Rights*, Can T.S. 1976 No. 47, Art. 7; the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Can T.S. 1987 No. 36, Art. 2(2); and *Suresh v. Canada*, [2002] 1 S.C.R. 3 at paras. 61-65.

[305] Moreover, the applicants cite the majority decision of the Supreme Court of Canada in *Hape*, where, they say, Justice LeBel specifically left open the possibility that the Charter could have extraterritorial application in cases where fundamental human rights are at stake.

[306] In this regard, the applicants point to the following statement in the majority decision in *Hape*:

> [52] In an era characterized by transnational criminal activity and by the ease and speed with which people and goods now cross borders, the principle of comity encourages states to cooperate with one another in the investigation of transborder crimes even where no treaty legally compels them to do so. At the same time, states seeking assistance must approach such requests with comity and respect for sovereignty. Mutuality of legal assistance stands on these two pillars. Comity means that when one state looks to another for help in criminal matters, it must respect the way in which the other state chooses to provide the assistance within its borders. *That deference ends where clear violations of international law and fundamental human rights begin.* If no such violations are in issue, courts in Canada should interpret Canadian law, and approach assertions of foreign law, in a manner respectful of the spirit of international cooperation and the comity of nations. [emphasis added]

[307] Moreover, the applicants note that this sentiment was echoed later in the majority decision, with Justice LeBel stating that:

> [101] Moreover, there is an argument that comity cannot be invoked to allow Canadian authorities to participate in activities that violate Canada's

> international obligations. As a general rule, Canadian officers can participate in investigations abroad, but must do so under the laws of the foreign state. The permissive rule that allows Canadian officers to participate even when there is no obligation to do so derives from the principle of comity; the rule that foreign law governs derives from the principles of sovereign equality and non-intervention. *But the principle of comity may give way where the participation of Canadian officers in investigative activities sanctioned by foreign law would place Canada in violation of its international obligations in respect of human rights***.** In such circumstances, the permissive rule might no longer apply and Canadian officers might be prohibited from participating. *I would leave open the possibility that, in a future case, participation by Canadian officers in activities in another country that would violate Canada's international human rights obligations might justify a remedy under s. 24(1) of the* Charter *because of the impact of those activities on* Charter *rights in Canada.* [emphasis added]

[308] Given that this case involves the detainees' right to freedom from torture, the applicants say that fundamental human rights norms are at stake. This, the applicants argue, gives rise to the "fundamental human rights exception" to the general rule against the extraterritorial application of the Charter, an exception that the applicants submit was explicitly recognized by the majority decision in *Hape*.

[309] There are several difficulties with the applicants' position in this regard.

[310] Surely Canadian law, including the *Canadian Charter of Rights and Freedoms*, either applies in relation to the detention of individuals by the Canadian Forces in Afghanistan, or it does

not. It cannot be that the Charter will not apply where the breach of a detainee's purported Charter rights is of a minor or technical nature, but will apply where the breach puts the detainee's fundamental human rights at risk.

[311] That is, it cannot be that it is the nature or quality of the Charter breach that creates extraterritorial jurisdiction, where it does not otherwise exist. That would be a completely unprincipled approach to the exercise of extraterritorial jurisdiction.

[312] I agree with the respondents that to find that the Charter applies, where Charter jurisdiction does not otherwise exist, as a result of the gravity of the impugned actions or their effects, conflates the question of the existence of Charter jurisdiction with the question of whether a fundamental right has been infringed.

[313] Indeed, this sort of "cause and effect" approach to extraterritorial jurisdiction was specifically rejected by the European Court of Human Rights in *Banković*, precisely because it conflated the question of jurisdiction with the question of whether an individual's rights had been violated: at ¶75.

[314] Moreover, to assert extraterritorial Charter jurisdiction based on a qualitative analysis of the nature or gravity of the breach would surely lead to tremendous uncertainty on the part of Canadian state actors "on the ground" in foreign countries.

[315] Furthermore, a close reading of the majority decision in *Hape* does not support such a basis for asserting the extraterritorial reach of the Charter.

[316] That is, the majority in *Hape* is saying that Canadian officials operating outside of Canada cannot act in a way that violates Canada's international human rights obligations – quite independently of any obligations that they might otherwise have under the Charter.

[317] Such an interpretation of the majority decision in *Hape* is borne out by the Supreme Court's comments at paragraph 90 of the decision, where the majority stated that:

> The only reasonable approach is to apply the law of the state in which the activities occur, subject to the Charter's fair trial safeguards *and to the limits on comity that may prevent Canadian officers from participating in activities that, though authorized by the laws of another state, would cause Canada to be in violation of its international obligations in respect of human rights.*

[318] It does not follow from the fact that international human rights law obligations may operate to constrain the off-shore activities of Canadian state actors that the Charter therefore applies to those activities.

[319] Moreover, my interpretation of the majority decision in *Hape* is borne out by a review of the concurring opinions in that case.

[320] That is, it is clear from Justice Binnie's decision that he does not read the reasons of the majority as suggesting that the fact that fundamental human rights may be at stake in a given case would create Charter jurisdiction where it would not otherwise exist. Indeed, his concern is with the majority's conclusion that it is Canada's international human rights obligations that would govern the conduct of Canadian state actors in such circumstances, and not the Charter.

[321] This is evidenced by the fact that, at paragraph 186 of his decision, Justice Binnie criticizes the majority decision, noting that in endeavouring to "fill the gap" created by the majority's rejection of extraterritorial Charter jurisdiction, Justice LeBel "would substitute Canada's 'international human rights obligations', as a source of limitation on state power".

[322] In Justice Binnie's view, the substitution of Canada's international human rights obligations as the applicable extraterritorial standard, in lieu of Charter guarantees, is wholly unsatisfactory, as "the content of such obligations is weaker and their scope is more debatable than Charter guarantees".

[323] Justice Bastarache's reasons also interpret the majority decision as substituting international human rights law for Charter guarantees as the legal regime to be applied in striking a balance between Canada's ability to conduct its extraterritorial activities, and fundamental human rights: see *Hape* at ¶125.

[324] As a consequence, it is clear that the majority decision in *Hape* did not create a "fundamental human rights exception" justifying the extraterritorial assertion of Charter jurisdiction where such jurisdiction would not otherwise exist.

[325] The majority decision in *Hape* did leave open the possibility that the participation by Canadian officials operating overseas in activities that would breach Canada's international obligations might justify a remedy under s. 24(1) of the Charter, because of the impact of those activities on Charter rights in Canada: see *Hape* at ¶101.

[326] It is, however, difficult to see how the conduct of the Canadian Forces in Afghanistan that is in issue in this case would have an impact on Charter rights in Canada.

[327] Moreover, for the reasons given earlier in this decision, I have found that detainees do not possess rights under the Canadian Charter, but rather enjoy the rights conferred on them by the Afghan Constitution and by international law, including, in particular, international humanitarian law.

[328] As a consequence, the Charter would not apply to restrain the conduct of the Canadian Forces in Afghanistan, even if the applicants were ultimately able to establish that the transfer of the detainees in question would expose them to a substantial risk of torture. The answer to the second question is, therefore, "NO".

VI. CONCLUSION

[329] In *Hape*, Justice Binnie cautioned the majority against issuing far-reaching pronouncements limiting the extraterritorial reach of the Charter. As he observed, other cases, including this one, raise "serious questions of the utmost importance have arisen respecting the extent to which, if at all, a constitutional bill of rights follows the flag when state security and police authorities operate outside their home territory": *Hape* at ¶184.

[330] It is not for this Court to second-guess the choices made by the Supreme Court of Canada. Rather, it is the Court's duty to follow the Supreme Court's teachings, insofar as they apply to the facts of the case at hand.

[331] The majority of the Supreme Court of Canada has stated clearly and categorically in *Hape* that the *Canadian Charter of Rights and Freedoms* will not ordinarily have extraterritorial effect except where the consent of the host state has been given to its application. No such consent has been provided by the Government of Afghanistan in this case.

[332] Moreover, the "effective military control" test advocated by the applicants as a basis for extending the extraterritorial reach of the Charter has not been generally accepted in international law. In addition, one cannot reconcile the use of such a "control of the person" based test with the reasoning of the majority in *Hape*.

[333] Finally, the majority decision of the Supreme Court of Canada in *R. v. Hape* does not create an exceptional basis for asserting the extraterritorial reach of the Charter where fundamental human rights are at stake.

[334] The problems that would result from a finding that the Charter did apply to the conduct of the Canadian Forces in relation to the multinational military operation in Afghanistan have been discussed earlier in this decision. One is the patchwork of different national legal norms that would apply with respect to detained Afghan citizens in different parts of Afghanistan, depending on the nationality of the military forces who detained them, and the human rights protections afforded by the domestic laws of the detaining country.

[335] A second concern is that a finding that the *Charter* applies to the actions of the Canadian Forces, in circumstances where the Government of Afghanistan has not consented to its application would, according to the Supreme Court, necessarily result in an impermissible encroachment on the sovereignty of Afghanistan.

[336] At the same time, a number of concerns also flow from the Court's finding that the Charter does not apply in the circumstances of this case.

[337] As was noted by Justice Binnie in *Hape*, the content of human rights protections provided by international law is weaker, and their scope more debatable than Charter guarantees: see *Hape* at ¶187.

[338] Moreover, the enforcement mechanisms for those standards may not be as robust as those available under the Charter, and have even been described as "rather gentle": see Roach, *"R. v. Hape Creates Charter-free Zones for Canadian Officials Abroad"*, previously cited, at p. 2.

[339] The potential weaknesses in these enforcement mechanisms is particularly troubling, in light of the serious concerns that have been raised by the applicants with respect to the efficacy of the safeguards that have been put into place to protect detainees transferred into the custody of Afghan prison officials by the Canadian Forces: see *Amnesty #2*, at ¶111.

[340] It is also troubling that while Canada can prosecute members of its military after the fact for mistreating detainees under their control, a constitutional instrument whose primary purpose is, according to the Supreme Court, to limit the exercise of the authority of state actors so that breaches of the Charter are prevented, will not apply to prevent that mistreatment in the first place.

[341] It must also be observed that this case does not involve 'human rights imperialism', with the applicants endeavouring to have Canadian standards imposed on government officials and citizens of another country, in that country's territory. Rather, what the applicants seek to restrain is the conduct of Canada's own military forces, in relation to decisions and individuals entirely within their control.

[342] That said, the Supreme Court of Canada has carefully considered the scope of the Charter's extraterritorial reach in *R. v. Hape*, and has concluded that its reach is indeed very limited. Applying the Supreme Court's reasoning in *Hape* to the facts of this case leads to the conclusion that the Charter does not apply to the actions of the Canadian Forces in Afghanistan in issue here.

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

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

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

[346] For the foregoing reasons, the questions posed by this motion should be answered as follows:

> 1. Does the *Canadian* Charter *of Rights and Freedoms* apply during the armed conflict in Afghanistan to the detention of non-Canadians by the Canadian Forces or their transfer to Afghan authorities to be dealt with by those authorities?
>
> NO
>
> 2. If the answer to the above question is "NO" then would the Charter nonetheless apply if the Applicants were ultimately able to establish that the transfer of the detainees in question would expose them to a substantial risk of torture?
>
> NO

[347] As was noted at the outset of this decision, the parties are in agreement that if the Court were to answer both questions in the negative, it follows that the application for judicial review must necessarily be dismissed, as the application rests entirely on the Charter for its legal foundation. As a consequence, the application for judicial review is dismissed.

[348] Given that the application for judicial review has been dismissed, no decision will be rendered with respect to the applicants' recent motion seeking an interim injunction restraining future detainee transfers.

[349] Finally, given the importance of the issues raised by this case, and the significant public interest in having this matter litigated, no order will be made as to costs.

VII.

ORDER

THIS COURT ORDERS that:

1. The questions posed by this motion are answered as follows:

> 1. Does the *Canadian* Charter *of Rights and Freedoms* apply during the armed conflict in Afghanistan to the detention of non-Canadians by the Canadian Forces or their transfer to Afghan authorities to be dealt with by those authorities?
>
> NO
>
> 2. If the answer to the above question is "NO" then would the Charter nonetheless apply if the Applicants were ultimately able to establish that the transfer of the detainees in question would expose them to a substantial risk of torture?
>
> NO

2. This application for judicial review is dismissed, without costs.

"Anne Mactavish"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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