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## **Legal Aspects of Canada's Actions in Afghanistan Deeply Troubling: Canadian Forces Violate UN Mandate and International Law**

**John McNamer** - After being appointed Canada's Chief of the Defence Staff last year, Gen. Rick Hillier bluntly enunciated his vision of the shaping of Canada's startling new military ideology: The military's job is to be able to "kill people," he said, and those responsible for terrorism in Afghanistan and elsewhere are "detestable murderers and scumbags."

Legal Aspects of Canada's Actions in Afghanistan Deeply Troubling: Canadian Forces Violate UN Mandate and International Law

John McNamer

Revised Research Brief  
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Thanks to Gail Davidson (Lawyers Against the War) for passing on this article. Please find enclosed a legal brief related to: Legal Aspects of Canada's Actions in Afghanistan, and  
Deeply Troubling: Canadian Forces Violate UN Mandate and International Law

With recent announcements of the commitment of more than 2,000 Canadian troops to southern Afghanistan, most being part of the U.S.-led Operation Enduring Freedom, Canada is following through on Hillier's "kill" concept, undertaking a dangerous new mission that is placing most troops in a direct combat role replacing and supporting U.S. forces. It will also place Canadian troops in harm's way for an indefinite period. Canadian Gen. Ray Henault, chairman of NATO's military committee said in late February 2006 that:

"We're saying to nations that this will be a task for NATO for 10 years or so," adding that he was confident NATO nations providing troops knew what they were getting into.

Gen. Hillier told a newspaper editorial board recently that there is no need to discuss an exit strategy for Canadian forces from Afghanistan, that NATO looks at it as a 10-year mission "minimum. There's going to be a huge demand for Canada to contribute over the longer period."

The new stance is deeply troubling because it places Canadian troops and political leaders squarely in the position of acting in ways that are legally indefensible and leaves them open to charges of violations of international and domestic law being laid against them. With this

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sea-change move away from its more traditional role of striving to act as a peacekeeper, Canada is clearly deepening a subservient role, with some troops reporting directly to U.S. forces in an aggressive war that was seen by many as illegal to begin with.

Gen. Hillier's aggressive posture quickly reverberated through the ranks of Canadian forces, with one soldier publicly glad to be rid of "this wishy-washy UN stuff" -- and it has already begun to bear unwanted fruits with the shooting death of an innocent Afghan taxi driver who ventured too close to a Canadian convoy parked at a traffic circle, and the shooting death of a teenager who attacked a Canadian soldier with an axe. (Contrary to the Canadian military's claim that it was a man associated with the Taliban, a village elder said the attacker was a 16-year-old boy with no Taliban connection who may have been angry at Coalition operations involving searches and occupation of villagers' homes. The elder said a man, a girl and a boy were injured in the ensuing barrage of gunfire, casualties that were not mentioned by the Canadian forces.)

### Launching of UN Mandate

These fatal events, coupled with Gen. Hillier's remarks on the new nature of the Afghan mission, are significant as they vividly demonstrate that Canada has breached international law and its mandate authorized by the UN Security Council. In fact, many of Canadian forces actions are no longer being carried out in accordance with international human rights and humanitarian law, which require generally that actions be solely for the purpose of keeping the peace and in doing so scrupulously avoid violating the rights of Afghan people -- including the rights of people suspected of criminal activity. In particular, the conduct of Canadian troops in Afghanistan is governed by the provisions of both Canadian and international law that forbid summary executions, arbitrary detentions, intentionally causing injury to civilians, and subjecting people to conditions of detention that may expose them to torture or unfair trials or indefinite detention.

And -- equally disturbing -- it appears that Gen. Hillier's new "kill" mission itself contravenes the same UN Security Council mandate, which authorizes the International Security Assistance Force (ISAF) under which Canada operates. Canadian, British and Dutch forces who have recently chosen to help American-led forces to fight in southern Afghanistan found it necessary to create a command structure separate from ISAF because France, Germany and Spain and other nations have objected to integrating NATO/ISAF with U.S. operations.

### NATO's mandate to stabilize

German Defense Minister Peter Struck told reporters he opposed a proposal to integrate the NATO peacekeeping force in Afghanistan with the U.S.-led combat mission fighting remnants of the Taliban and al Qaeda. NATO's mandate in Afghanistan is to stabilize the country, not to

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fight international terrorism, he said. "The German government sees its mandate as protecting and helping, not fighting," Struck said.

Combat operations "wholly illegal?"

Co-chair of Lawyers Against the War (LAW,) Gail Davidson, says of the German minister's position: "German Defense Minister Struck is right: Canadian and other ISAF troops are not authorized to conduct war "on terrorism or otherwise. I think we can assume that Germany's legal advisors are of the opinion that combat operations are not covered by the UN Security Council resolutions and are therefore wholly illegal." LAW is an international group of lawyers and others who advocate for enforcement of international humanitarian law, with members in 14 nations.

Canadians think forces are peacekeeping

Gen. Hillier's "kill" mission also flies in the face of mainstream Canadian values. A national poll in late February 2006 " about one month ago -- found that 62 per cent of Canadians were against even sending troops to Afghanistan, while only 27 per cent were in favour. Even though support seemed to go up in a poll taken about two weeks later after Canadian troop casualties were in the news, with 55 per cent said to support the decision to send troops to Afghanistan, a deeper reading of the poll results reveals that about 70 per cent of respondents said they think the Canadian troops' main role is peacekeeping.

Osgoode Hall professor of international law Michael Mandel recently told Vancouver's Georgia Straight newspaper that "the sad thing is the Canadian forces are there working for the Americans"who, as we all know, are making terrorism worse and not solving the problems. We could be helping the people of Afghanistan reconcile themselves and make peace, but instead we're just helping the Americans."

Criminal Actions of Coalition

By becoming enmeshed with the U.S.-led Coalition under Operation Enduring Freedom, Canada becomes vulnerable to charges of being an accomplice to, and a participant in, well-documented allegations of international war crimes and crimes against humanity that are being produced as a result of established ongoing Coalition procedures and actions.

These documented criminal actions include:

I. ILLEGAL ABUSES -- Arbitrary arrests and detentions above and beyond the reach of law

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under conditions commonly described as constituting gross violations of human rights law and grave breaches of international humanitarian law as documented in 2005 by the Report of the Independent Expert on the Situation of Human Rights in Afghanistan to the UN Commission on Human Rights (Independent Expert). Documented reports of serious violations by Coalition forces from victims, the Afghan Independent Human Rights Commission, NGOs and others include: Forced entry into homes; arrest and detention of nationals and foreigners without legal authority or judicial review -- sometimes for extended periods of time; forced nudity; hooding and sensory deprivation; sleep and food deprivation; forced squatting and standing for long periods of time in stress conditions; sexual abuse; beatings; torture, and use of force resulting in death. There are at least 8 cases of prisoners who have died while in United States custody in Afghanistan.

### Ongoing civilian deaths

No one knows for sure how many Afghan civilians have been killed by indiscriminate use of lethal force and bombing of civilians. U.S. Coalition Commanding General Tommy Franks said in 2002, "We don't do body counts." Credible independent research conservatively estimated in 2002 that initial bombing attacks killed between 3,700 and 5,000 civilians -- surpassing the death toll of the September 11 attacks on the United States.

And persistent reports of ongoing civilian deaths indicate a pattern of disregard by Coalition forces for the lives of civilians in attempts to kill suspected insurgents. An American air strike in a village in the eastern mountains of Afghanistan last summer killed 17 civilians, including women and children. As villagers gathered to look at the damage to a house from the initial strike, a U.S. warplane dropped a second bomb on the same target, Kunar provincial Gov. Asadullah Wafa told the Associated Press.

The U.S. military refused to apologize in July 2002 following the mistaken bombing of a wedding party north of Kandahar which Afghan Foreign Minister Abdullah Abdullah said killed 40 people, all civilians, with a further 100 wounded. Afghans said the wedding party had been firing into the air -- an Afghan wedding tradition, while the U.S. claimed its aircraft flying overhead had come under sustained hostile fire, forcing them to drop seven 2,000-pound bombs. U.S. forces killed 15 people earlier that year in the same area in a firefight which they later admitted was "ill-advised."

Coalition forces are also killing civilians in Pakistan with apparently illegal air strikes across the Pakistan border. In January 2006, Pakistani officials angrily condemned a U.S. air strike on a Pakistani village near the Afghan border that killed at least 17 "innocent civilians" -- women, children and men -- while apparently trying to hit alleged al-Qaeda operatives purported to be in the village. The attack was the third suspected U.S. strike in less than two months inside Pakistan, which says it does not allow American forces based in Afghanistan to cross the border to hunt for members of the Taliban or al-Qaeda. The Pakistani government previously issued a

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protest after tribal leaders said U.S. helicopters opened fire on a cleric's home in North Waziristan in early January, killing eight people.

II. ILLEGAL DETAINMENT -- Coalition forces detain individuals at American bases at Bagram, Kandahar and outposts, and are believed to hold individuals at a number of additional undisclosed locations. International NGOs estimate that over 1,000 individuals have been detained, often after being arrested with excessive or indiscriminate force, according to the Independent Expert. Detention conditions are reported as below human rights standards set by the Geneva Conventions and the United Nations.

III. TORTURE -- Coalition forces are engaged in the use of torture, in violation of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention). The Independent Expert noted and gave examples of reported actions by Coalition forces that fall under the internationally accepted definition of torture. The report also noted that while there is a published news story in the U.S. revealing a classified U.S. Criminal Investigation Command report recommending that 28 personnel be prosecuted in connection with the deaths of detainees, prosecutions have been limited, "raising the question about the interest of United States officials in investigating and prosecuting these cases." The Independent Expert also expresses serious concerns about the alleged transfer of some prisoners from Guantanamo Bay to Afghanistan as well as the process of informal rendition, whereby detainees are transferred to third-party countries where they are subjected to abuse and torture in clear violation of international human rights and humanitarian law.

IV. COLLUSION WITH ILLEGAL RENDITIONS -- Coalition forces act in support of and collusion with the internationally widespread and systematic U.S. practice of extraordinary rendition -- the covert practice of kidnapping suspects and their subsequent rendering to countries known to use torture to extract information. Again, the Independent Expert expressed serious concern about involvement in the practice of renditions by Coalition forces in Afghanistan in his March 2005 report. Since that report, it has been widely reported in worldwide media that there is a large-scale international covert rendition system facilitated by the U.S. Central Intelligence Agency (CIA). Amnesty International reported in December 2005 that six planes used by the CIA for renditions have made some 800 flights in and out of European airspace, and recently an Amnesty International representative said in a letter to The Guardian that these reports relate to only six of the CIA's reported fleet of 30 leased aircraft, "so this is only the tip of a potentially very big iceberg." Human Rights Watch says there are reportedly 100 to 150 cases of such extraordinary renditions, including that of Syrian-born Canadian Maher Arar. The Washington Post says the estimate of 100 detainees sent by the CIA into the covert system does not include prisoners picked up in Iraq.

Detainees rendered to Afghanistan

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International detainees are known to have been taken to Afghanistan in the rendition process, including Mamdouh Habib, an Egyptian-born Australian in American custody who was transported from Pakistan to Afghanistan to Egypt to Guantanamo Bay and German Khaled el-Masri, who says in a lawsuit against the CIA that he was kidnapped while on vacation in Macedonia, beaten, drugged and transported to a secret CIA facility in Afghanistan. While being held at the CIA prison, el-Masri says, he was subjected to inhumane conditions and coercive interrogation.

Accounts from detainees at Guantanamo reveal that the United States as recently as a year ago operated a secret prison in Afghanistan where detainees were subjected to torture and other mistreatment. The largest CIA prison in Afghanistan was code-named the "Salt Pit." In November 2002 a CIA case officer reportedly ordered guards to strip naked an uncooperative young detainee, chain him to the concrete floor and leave him there overnight without blankets. He froze to death, according to four U.S. government officials. The CIA officer has not been charged in the death.

"Bagram Worse than Guantanamo?"

Eight detainees now held at Guantanamo told their attorneys they were held at a facility near Kabul at various times between 2002 and 2004. They called the prison a "dark prison," with guards not wearing uniforms, where they were chained to walls, deprived of food and drinking water and kept in total darkness with loud rap, heavy metal music or other sounds blared for weeks at a time. Most of the detainees said they were arrested in other countries in Asia and the Middle East and then flown to Afghanistan. Some detainees who were kept at the facility were transferred at times to and from another secret facility near Kabul and they said they were later transferred to the main U.S. military detention facility near Bagram. A Pentagon official was recently quoted in the Telegraph asserting that "Anyone who has been to Bagram would tell you it is worse (than Guantanamo.)"

10,000 hidden from public view

Human rights groups estimate that some ten thousand foreign terrorist suspects are being held in U.S. detention facilities in Afghanistan, Iraq, Cuba and other countries, almost entirely hidden from public view, with an unknown portion of this population in the custody of the CIA.

"Crimes Against Humanity?"

A 1503 complaint from experts in international humanitarian law was recently filed with the UN Commission on Human Rights charging that the extraordinary renditions violate the Torture

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Convention and other Geneva Conventions and due to their frequency and widespread nature meet the legal definition of 'Crimes Against Humanity.' A recently leaked note from the British Foreign Secretary's office to Prime Minister Tony Blair's office shows that UK officials are privately admitting knowledge of CIA 'torture flights' and that people captured by British forces in Afghanistan or Iraq could have been illegally sent by the U.S. to CIA interrogation centres. 'We have no mechanism for establishing this?' the document notes. This contradicts repeated statements of UK ministers that they were unaware of CIA rendition flights passing through Britain or of secret interrogation centres 'and calls into question similar assertions by Canadian officials. The document also says that in the most common use of the term 'namely involving real risk of torture' rendition could never be legal. It says the U.S. emphasized torture but not 'cruel, inhuman and degrading treatment,' the definition which binds Britain under the European convention on human rights.

V. ILLEGAL DETAINEE HANDOVERS -- Canada has been breaching international human rights laws by handing over Afghan prisoners to American authorities 'and into the shadowy world of torture and denied justice. The recently-leaked UK document mentioned above clearly establishes that even the most-trusted Coalition partners have no idea whether or not such prisoners are being transferred to secret CIA prisons for torture. This calls into question recent assurances from Canadian military authorities that detainees handed over by Canadians to the U.S. in Afghanistan are being treated in accordance with international law. The issue first arose in 2002, when deep concern was expressed by high-ranking Canadian officials about whether the United States was fully complying with international law in its handling of prisoners captured in Afghanistan. The U.S. designates many captives as 'unlawful combatants' and not 'Prisoners of War,' denying them POW protection under the Geneva Conventions, all the while maintaining the captives are being treated humanely.

Canada happy with U.S. assurances

Canadian military officers were saying until recently they were happy with U.S. assurances that detainees would be treated humanely, and at the same time refused to say how many detainees have been turned over. Canadian Brig.-Gen. Mike Ward has said detainees have been turned over only after conditions of transfer have been accepted and the International Committee of the Red Cross is informed. The detainee authority in the American-led Coalition has been the U.S., he said, and Washington has accepted Canada's conditions, including requirements of humane treatment and third-party monitoring. Brig.-Gen. Ward also said 'Unlawful combatants are still entitled to humane treatment. It's the fact of the treatment that we specifically get into detail about, not whether in fact their status is identified as 'prisoner of war' or 'unlawful combatant.?' Deputy Prime Minister John Manley stated in 2002, however, that the process of determining the status of captives must comply with the Geneva Conventions.

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The Conventions say "should any doubts arise" as to captives' status, they are entitled to POW status until a competent tribunal determines otherwise. University of Ottawa Law Professor Nicole Laviolette said in a 2002 interview that Canadian Forces in Afghanistan have an obligation to refuse to turn over prisoners to the U.S. until they "are sure that the conventions are being complied with." The issue still has not been resolved, according to Alex Neve, secretary-general for Amnesty International Canada. Concerns have deepened in the wake of revelations of prisoner abuse at U.S.-operated detention centres in Guantanamo Bay and in Iraq. "Canada can't turn a blind eye to that," Neve said in September 2005. "Canada needs clear, unequivocal" assurances from the United States that they are going to apply and abide by relevant international law which includes the Geneva Convention." Neve said that the definition of prisoners as unlawful combatants does not go far enough to protect them.

### Clear Violation of Geneva Conventions

Dr. Michael Byers, who holds the Canada Research Chair in Global Politics and International Law at the University of British Columbia, came straight to the point in a recent Toronto Star article: "For four years, Canadian soldiers in Afghanistan have violated international law by transferring suspected Taliban and al Qaeda fighters into the custody of the United States," he said.

Apparently recognizing the impending legal jeopardy from this clear violation of Geneva Conventions, Prime Minister Paul Martin's government signed without fanfare on Dec.18, 2005, an agreement to no longer turn over detainees to the U.S., but rather to begin turning them over to the Afghan government. The Afghans reportedly have agreed to comply with the Geneva Conventions in the document, which has not been released to the public, but there appears to be nothing to prevent them from turning prisoners over to the U.S. Knowledgeable sources say it is unrealistic to assume some won't find their way into U.S. custody. "We are kidding ourselves if we think someone important won't be in the front door and out the back," says a source directly involved with framing the agreement. "They wouldn't hold Osama bin Laden very long."

Of interest is a profile of Guantanamo detainees prepared by Professor Mark Benbeaux of Seton Hall University School of Law and Joshua Denbeaux which says that 86% of the detainees held prisoner at Guantanamo Bay were arrested by either Afghan or Pakistan forces and then turned over to U.S. custody. Only 5% of the detainees were captured by United States forces. The two authors are counsel for several detainees in Guantanamo.

Canada's official position is that Afghanistan is a sovereign state committed to humane treatment of prisoners. Privately, a senior Canadian political source speaking to the Toronto Star is blunt about the agreement's limited scope, purpose and enforcement power. "It's public relations," he says.

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As well, the Afghan government is hardly a model of perfect compliance with international rights, says Professor Michael Byers. "According to the UN-funded Afghanistan Research and Evaluation Unit, 19 of Afghanistan's newly elected MPs are suspected war criminals," he said. "And earlier this month, Assadullah Sarwari, who headed the Afghan intelligence agency during the communist regime of the late 1970s, was denied legal representation and convicted and sentenced to death in a one-day trial."

Under international law, Canada's obligations do not end when a detainee leaves its soldiers' hands. If any detainee who was captured by Canada ends up being tortured, Canada will be complicit.

How many sent to death or torture?

Even though Canada has taken some steps to achieve "plausible deniability" around the detainee issue, the question must still be asked: How many detainees has Canada sent to their torture and possible death at the hands of U.S. agents doing their infamous work in illegal prisons operating with the cooperation of, and under the protection of, Coalition forces in Afghanistan?

A request to the Department of National Defence (DND) for information related to this question for purposes of this research brief has yet to be answered with requested details. The DND was specifically asked how many detainees Canadian forces have turned over to the U.S. since October 2001, and whether detainees or any people are being turned over to the U.S. in the current situation. DND was also asked if Canadian forces have fulfilled their obligation under international law to continue to be responsible for detainees who have been turned over to other authorities, and for details of visits to and reports about such detainees since 2001. A copy of the Dec. 18, 2005, arrangement with the Afghan authorities was also requested, but this document has not been produced and remains secret to this date.

VI. CANADA AND EXTRAORDINARY RENDITIONS ? The Canadian government is in a position of legal liability from actively participating in or facilitating by default the illegal CIA "extraordinary rendition" process by allowing private CIA aircraft used for this purpose to utilize Canadian airspace and to land for maintenance and refuelling at Canadian airports. A St.

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John's Newfoundland airport has been publicly identified as a 'hub' for covert American air operations and a DeHavilland DHC-6-300 aircraft owned by a reported CIA front in the U.S. landed at Bar River airport near Sault Ste. Marie, Ontario, in early October, 2005, after taking off from Michigan. The Bar River airport is home to a company that specializes in work on DeHavilland aircraft. An airport official who asked not to be named said 'I have no knowledge of any CIA aircraft,' and told an inquiring reporter 'I suggest you don't pursue this any further.' Montreal's La Presse newspaper has reported at least 55 flights operated by the CIA have passed through Canada in the last several years, and Deputy Prime Minister Anne McLellan acknowledged in an article December 7, 2005, that she had ordered officials to track down details of 55 flights. However,

a spokesman for the Canadian government said in a story published the next day that the government has no intention of questioning the U.S. about the flights, saying a preliminary review has turned up no evidence of illegal U.S. activity. Newly declassified memos obtained under the Access to Information Act reveal government knowledge of at least 20 planes with alleged CIA ties having made 74 flights to Canada. Considerable portions of the memos obtained were blacked out for secrecy reasons.

No Canadian outrage?

Steven Watt, a New York-based spokesman for Amnesty International, said 'I don't know why there isn't the same outrage in Canada as there is in Europe just now over the possibility that Canadian air space is being used in the CIA rendition program.' That passive attitude is surprising considering Ottawa's public inquiry of the U.S. rendition of Ottawa engineer Maher Arar to Syria in 2002, according to Watt. 'There should be the same outrage as there was over the potential Canadian involvement in Maher's removal to Syria. It's the same issue here.' Watt is a former member of Arar's U.S. legal team.

An EU investigator said in his initial official report in mid-December that CIA prisoners were apparently abducted and moved between countries illegally, possibly with the aid of national secret services who did not tell their governments. Jack Straw, British Foreign Minister, in December wrote U.S. Secretary of State Condoleezza Rice a letter on behalf of the EU asking for information about rendition reports. If true, the activities could be 'violations of international law' and the EU would therefore be grateful for clarification,' Straw said in the letter.

A UK newspaper reported in mid-December that recently uncovered minutes of an EU/U.S. meeting from 2003 show that the EU secretly agreed to allow the U.S. to use transit facilities on European soil to transport 'criminals', which contradicts repeated EU denials that it knew of rendition flights by the CIA. The original minutes show the EU agreed to give America access to facilities 'presumably airports' in the confidential talks in Athens, during which the war on terror was discussed. But all references to the agreement were deleted from the record before it

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was published. The section including the agreement for 'increased use of European transit facilities to support the return of criminal/inadmissible aliens?', and others referring to U.S. policy, were deleted ' as a 'courtesy' to Washington, according to recent comments by a spokesman for the EU Council of Ministers.

### Legal Relevance for Canada

Does the EU situation have relevance for Canada in terms of international law? The UK All Party Group on Extraordinary Rendition in a December 2005 briefing paper said in the forward: 'This paper shows that there is a real and clear legal imperative to find out what is going on, and to ensure that no state engages in Extraordinary Rendition. This applies to the UK as much as it does to the U.S. ' as the authors state plainly: 'seemingly innocuous acts (e.g. allowing refuelling at airports of aircraft of another State) can become wrongful under international law if those acts facilitate Extraordinary Rendition.??

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