December 3, 2009

Mr. Luis Moreno-Ocampo
Prosecutor
International Criminal Court
Maanweg, 174
2516 AB, The Hague
The Netherlands

— By courier —

Dear Sir,

Re. War crimes and the transfer of detainees from Canadian custody in Afghanistan

1. Our letter of April 25, 2007 -- and your initiation of a preliminary examination

We wrote to you on April 25, 2007 to draw your attention to possible violations of the Rome Statute committed with respect to the transfer of detainees from Canadian custody in Afghanistan. In particular, we requested that you open a "preliminary examination" under Article 15 of the Rome Statute of the International Criminal Court to determine whether there were reasonable bases to investigate Mr. Gordon O'Connor, who was then Canadian Minister of National Defence, and General Rick Hillier, who was then Canadian Chief of the Defence Staff. You replied soon afterwards, thanking us for the letter and telling us that your staff would stay appraised of the matter.

On September 9, 2009, you told journalists that your staff is now looking into accusations of war crimes and crimes against humanity in Afghanistan to determine whether there is cause to open a formal investigation.[1] You confirmed the initiation of a preliminary examination in an interview with the Wall Street Journal on November 26, 2009.[2]

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[1] Joe Lauria, "Court Orders Probe of Afghan Attacks," Wall Street Journal, September 10, 2009, available at: < http://online.wsj.com/article/SB125253962307797635.html >.

[2] Daniel Schwammenthal, "Prosecuting American 'War Crimes'," Wall Street Journal, November 26, 2009, available at: < http://online.wsj.com/article/SB10001424052748704013004574519253095440312.html >.

2. Grounds for expanding the scope of the preliminary investigation

We write to you now to draw your attention to seemingly important new information, and to ask that you expand the scope of your examination to include additional Canadian senior military officers and diplomats.

The new information in question -- including specific names -- is found in the testimony of Richard Colvin, First Secretary, Canadian Embassy to the United States of America, who spent 17 months in Afghanistan in 2006-2007, first as a senior Canadian Department of Foreign Affairs and International Trade (DFAIT) representative for the Canadian provincial reconstruction team in Kandahar, and then at the Canadian Embassy in Kabul as the head of the political section and *chargé d'affaires*, i.e. acting ambassador.

We attach a copy of Mr. Colvin's testimony to the House of Commons Special Committee on the Canadian Mission in Afghanistan from November 18, 2009, which is also available at: http://www2.parl.gc.ca/content/hoc/Committee/402/AFGH/Evidence/EV4236267/AFGHEV15-E.PDF

Specifically, we draw your attention to his testimony that:

"According to our information, the likelihood is that all the Afghans we handed over were tortured."

That:

"To recap, Canada took far more detainees than the British and Dutch. Unlike our NATO allies, we conducted no monitoring. Instead of hours, we took days, weeks, or months to notify the Red Cross, which meant that nobody else could monitor. We kept hopeless records, and, apparently to prevent any scrutiny, the Canadian Forces leadership concealed all this behind walls of secrecy."

That:

"Starting in May 2006, as we in the field became aware of the scope and severity of these problems, we began informing Ottawa about them. We used the means available to us—that is, written reports and verbal briefings—to alert senior officials in both DFAIT and the Canadian Forces about the grave deficiencies of our detainee practices and their grave consequences."

And that:

"Senior officials in DFAIT and the Canadian Forces did not welcome our reports or advice. At first we were mostly ignored. However, by April 2007 we were receiving written messages from the senior Canadian government coordinator for Afghanistan to the effect that we should be quiet and do what we were told. There was a phone message from the DFAIT assistant deputy minister

suggesting that in future we should not put things on paper but instead use the telephone. In May 2007 a new ambassador arrived. Immediately thereafter, the paper trail on detainees was reduced. Written reporting from the field was restricted to a very limited circle of officials, which shrank further over time. Reports on detainees began sometimes to be censored, with crucial information removed."

Mr. Colvin concluded that, *"for a year and a half after they [senior officials in the Canadian Forces and Department of Foreign Affairs] knew about the very high risk of torture, they continued to order military police in the field to hand our detainees to the NDS [Afghan National Directorate of Security]."*

Mr. Colvin's testimony was subsequently contradicted by some of the very same senior officials who he alleges knew of the risk of torture, continued to order the transfer of detainees, and sought to eliminate the paper trail of these actions.

Obviously, we are not in a position to determine the veracity of any of this testimony. However, it significantly augments our concern that Mr. O'Connor, General Hillier and others:

1. Chose to allow detainees to be transferred to the custody of Afghan authorities despite an apparent risk of torture and other forms of abuse;

2. Chose *not* to take reasonable and readily apparent steps to protect detainees against torture and other forms of abuse—for instance, by expeditiously seeking a re-negotiation of the December 2005 Canada-Afghanistan Detainee Transfer Arrangement to bring it into line with pre-existing Denmark-Afghanistan, UK-Afghanistan and Netherlands-Afghanistan agreements, *and, following repeated, credible reports of the torture of transferred detainees, by ceasing any further transfers on a permanent basis*.

As a result, we are concerned that Mr. O'Connor, General Hillier and others might wilfully have placed detainees at well-documented risk of torture, cruel treatment and outrages upon personal dignity. If so, they would appear to have violated Articles 8 and 25 (and perhaps Article 7) of the Rome Statute of the International Criminal Court (ICC).

Any such violations would clearly fall within the jurisdiction of the ICC, since Canada has ratified the Rome Statute, Mr. O'Connor, General Hillier and the others are Canadian citizens, and the possible offences in question were committed after the coming into force of the Statute (as well as Canada's ratification of it). Moreover, such acts were committed on the territory of a State Party.

But first, we will summarise the circumstances that originally gave rise to our concerns.

3. The factual circumstances

(a) Canada-Afghanistan detainee transfer arrangement

The Arrangement for the Transfer of Detainees between the Canadian Forces and the Ministry of Defence of the Islamic Republic of Afghanistan ("Arrangement") was signed by General Hillier and the Afghan Defence Minister, Abdul Raheem Wardak, on December 18, 2005.

The Arrangement "establishes procedures in the event of a transfer" of any detainee from Canadian to Afghan custody. It commits both countries to treat detainees "in accordance with the standards set out in the Third Geneva Convention" and stipulates that the International Committee of the Red Cross "will have a right to visit detainees at any time while they are in custody, whether held by the Canadian Forces or by Afghanistan." It does *not* provide the Canadian government with a right to visit and verify—for itself—the location, condition and status of any transferred detainee.

The Arrangement states that Canada and Afghanistan "will be responsible for maintaining accurate written records accounting for all detainees that have passed through their custody" and that "[c]opies of all records relating to the detainees will be transferred to any subsequent Accepting Power should the detainee be subsequently transferred."

Significantly, the latter sentence explicitly envisages that some detainees will be transferred onwards to the custody of third countries. Yet the Arrangement fails to guard against the possibility that Afghanistan might transfer a detainee onwards to the custody of a third country where he or she would be at risk of torture or other forms of abuse. This failure is all the more striking because Bill Graham, the Canadian defence minister at the time the Arrangement was negotiated and signed, has said that the Arrangement was established because of concerns that "it wouldn't be appropriate to hand them [the detainees] over to the Americans."[3]

Mr. Graham was rightly concerned about the legality of transferring detainees to U.S. custody, given credible reports of torture and other abuse at places such as Abu Ghraib and Guantanamo Bay, and of internal U.S. government legal opinions seeking to justify torture.[4] Some of the reports concerned mistreatment, torture and even murder at U.S. bases in Afghanistan;[5] others indicated that at least some detainees captured by Western forces in Afghanistan were transferred

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[3] Paul Koring, "Handover deal lacks key detainee protections," Globe and Mail, March 30, 2006, A1.

[4] See, e.g.: Dana Priest & R. Jeffrey Smith, "Memo Offered Justification for Use of Torture; Justice Dept. Gave Advice in 2002," Washington Post, June 8, 2004, A1; Neil A. Lewis & Eric Schmitt, "Lawyers Decided Bans on Torture Didn't Bind Bush," New York Times, June 8, 2004, A1; Karen J. Greenberg & Joshua L. Dratel, *The Torture Papers: The Road to Abu Ghraib* (Cambridge: Cambridge University Press, 2005).

[5] Dana Priest & Barton Gellman, "U.S. Decries Abuse but Defends Interrogations; 'Stress and Duress' Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities," Washington Post, December 26, 2002, A1; Don Van Natta Jr., "Questioning Terror Suspects In a Dark and Surreal World," New York Times, March 9, 2003, p. 1; Carlotta Gall, "U.S. Military Investigating Death of Afghan in Custody," New York Times, March 4, 2003, A14.

from U.S. custody to Uzbekistan, which is notorious for particular severe forms of interrogation —including boiling prisoners alive.[6]

In short, there is a reasonable basis to believe that torture, cruel treatment and outrages upon personal dignity were being committed in countries to which detainees transferred from Canadian custody in Afghanistan might subsequently be transferred.

There was also substantial reason for concern with respect to the treatment of transferred detainees who remained within Afghan custody.

In March 2006, Louise Arbour, the UN High Commissioner for Human Rights, reported on the activities of the Afghanistan National Security Directorate (NSD) in the following terms:

> The NSD, responsible for both civil and military intelligence, operates in relative secrecy without adequate judicial oversight and there have been reports of prolonged detention without trial, extortion, torture, and systematic due process violations. Multiple security institutions managed by the NSD, the Ministry of the Interior and the Ministry of Defence, function in an uncoordinated manner, and lack central control. Complaints of serious human rights violations committed by representatives of these institutions, including arbitrary arrest, illegal detention and torture, are common. Thorough, transparent and public investigations are absent and trials regularly occur without adhering to the due process rights enshrined in the Constitution. Serious concerns remain over the capacity and commitment of these security institutions to comply with international standards.[7]

In June 2006, the Canadian Press reported that the Afghanistan Independent Human Rights Commission office in Kandahar (where most of the Canadian soldiers in Afghanistan are based) had estimated that "about one in three prisoners handed over by Canadians are beaten or even tortured in local jails."[8]

In March 2007, the annual U.S. State Department Country Report on Human Rights Practice in Afghanistan reported that: "Complaints of serious human rights violations committed by representatives of national security institutions, including arbitrary arrest, unconfirmed reports of torture, and illegal detention were numerous."[9]

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[6] Stephen Grey, *Ghost Plane: The True Story of the CIA Torture Program* (St. Martin's Press: New York, 2006) 181-2 & 187.

[7] "Report of the High Commissioner for Human Rights on the situation of human rights in Afghanistan and on the achievements of technical assistance in the field of human rights, Advanced edited version," , UN doc. E/CN. 4/2006/108, para. 68.

[8] Sue Bailey and Bob Weber, "Canada's top general defends handling of Afghan prisoners as torture reported," Canadian Press, June 4, 2006.

[9] See: < http://www.state.gov/g/drl/rls/hrrpt/2006/78868.htm >.

On April 23, 2007, the *Globe and Mail* reported on 30 face-to-face interviews with men recently captured by Canadian soldiers in Kandahar province and transferred to Afghan custody. According to the *Globe and Mail*, the interviews:

> [U]ncovered a litany of gruesome stories and a clear pattern of abuse by the Afghan authorities who work closely with Canadian troops, despite Canada's assurances that the rights of detainees are protected.[10]

The abuse included "savage beatings, electrocution, whipping and extreme cold."[11] Although Canadian soldiers were reported not to have engaged directly in the beatings, one of the detainees insisted that they would have heard his screams.[12] As Mahmad Gul, 33, reportedly said: "The Canadians told me, 'Give them real information, or they will do more bad things to you.'"[13]

As the *Globe and Mail* concluded on its editorial page:

> Canada is hardly in a position to claim it did not know what was going on. At best, it tried not to know; at worst, it knew and said nothing.[14]

In short, there is a reasonable basis to believe that detainees in Afghan custody were subject to torture, cruel treatment and outrages upon personal dignity subsequent to being transferred by Canada, and subsequent to the conclusion of the Canada-Afghanistan Detainee Transfer Arrangement in December 2005. This conclusion is significantly augmented by Richard Colvin's testimony from November 18, 2009.

(b) Wilfully ignoring best practice

When General Hillier signed the Canada-Afghanistan Detainee Transfer Arrangement, he had at least two (and probably three) models of best practice available to him—in the form of detainee transfer agreements concluded with Afghanistan by close NATO allies of Canada.

On June 8, 2005, Denmark and Afghanistan finalized a "memorandum of understanding" concerning detainee transfers. The memorandum provides a right of full access to any transferred detainee, not just to the ICRC but also, crucially, to the Danish military. The Danish

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[10] Graham Smith, "From Canadian custody into cruel hands," Globe and Mail, April 23, 2007, A1.

[11] *Ibid.*

[12] *Ibid.*

[13] *Ibid.*

[14] "The truth Canada did not wish to see," Globe and Mail, April 23, 2007, A18.

memorandum requires not only that the Afghan authorities maintain "accurate accountability" of any transferred detainees, but that they make the records available on request. It also requires that the Afghan authorities notify the Danish military prior to the initiation of legal proceedings, transfer to third parties or release of detainees, "or if other significant changes concerning such persons occur."

On September 30, 2005, the United Kingdom and Afghanistan finalized a "memorandum of understanding" concerning detainee transfers. The memorandum provides a right of full access to any transferred detainee, not just to the ICRC but also, crucially, to the British authorities. A similar right of access is provided to "relevant human rights institutions within the UN system"—a category which would include the UN Special Rapporteur on Torture.

The UK-Afghanistan memorandum also requires, not only that the Afghan authorities keep accurate records concerning the location, condition and status of any transferred detainees, but that they make the records available on request. It requires that the Afghan authorities notify the British authorities of "any material change of circumstance regarding the detainee including any instance of alleged improper treatment." And, significantly, it provides the British authorities with a right of veto over any onward transfer of a detainee.

Sometime in late 2005, the Netherlands also finalized a "memorandum of understanding" with Afghanistan. Like the British memorandum, the Dutch memorandum ensures that its own authorities and "relevant human rights institutions within the UN system" have full access to any transferred detainees. Dutch authorities must also be notified before a detainee is transferred onwards to a third country, or before any other relevant changes occur.

This best practice confirms that the Canada-Afghanistan detainee transfer arrangement was flawed in at least two respects:

(1) It failed to provide Canadian authorities with the right to visit and verify—for themselves—the location, condition and status of any transferred detainee.

(2) It failed to guard against the possibility that Afghanistan might transfer a detainee onwards to the custody of a third country where he or she would be at risk of torture, cruel treatment and outrages upon personal dignity.

Again, this best practice by close NATO allies would have been readily available to General Hillier during the negotiation and signature of the Canada-Afghanistan Detainee Transfer Arrangement. It is reasonable to believe, therefore, that the failure to follow this best practice was the result of a wilful decision at the highest level of command.

(c) Wilfully refusing to seek a re-negotiated arrangement

General Hillier, Mr. O'Conner (after becoming defence minister in February 2006) and others chose not to seek a re-negotiation of the Canada-Afghanistan Detainee Transfer Arrangement to bring it into line with readily available best practice and the ongoing requirements of international humanitarian law, even after its flaws were clearly and publicly identified. Instead, it seems that they sought to conceal and play down the Arrangement's shortcomings.

For example, the Arrangement relied primarily on the International Committee of the Red Cross to monitor the treatment of transferred detainees, with a subsidiary and unspecified role accorded to the Afghan Independent Human Rights Commission. On repeated occasions, Mr. O'Connor told the Canadian House of Commons that the ICRC would inform the Canadian government if it had any concern about the treatment of detainees.[15] He maintained this position despite his officials having been told otherwise by the ICRC[16] and non-governmental experts.[17] It was only when the ICRC publicly contradicted him in February 2007 that Mr. O'Connor corrected this misrepresentation and apologized to his fellow Parliamentarians.

Also in February 2007, the Canadian government concluded an agreement with the Afghan Independent Human Rights Commission to clarify and bolster its role in monitoring the condition of transferred detainees. The efficacy of this new mechanism was immediately questioned, because the Commission acknowledged lacking the staff to monitor all the transferred detainees, and because Canada had not provided any funding to the Commission since 2002.[18]

In any event, for many months no attempt was made to re-negotiate the Canada-Afghanistan Arrangement itself to introduce rights of notification, visit and verification for Canadian authorities, or to secure a right of veto over onward transfers. This despite repeated calls for a re-negotiation from opposition Parliamentarians, non-governmental experts, and two of Canada's leading newspapers: the *Globe and Mail* and *Toronto Star*.[19] And despite, according to Richard Colvin's testimony, repeated communications from senior DFAIT officials in Afghanistan concerning the flaws in Canada's detainee policies and procedures there.

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[15] Paul Koring, "Red Cross contradicts Ottawa on detainees; Aid agency confirms it does not monitor Canada-Afghan deal on prisoner treatment," Globe and Mail, March 8, 2007, A1.

[16] Bruce Campion-Smith, "Defence minister facing a new battle," Toronto Star, March 17, 2007, F04.

[17] See, e.g.: Standing Committee on National Defence, No. 28, 1st Session, 39th Parliament, Evidence, Monday, December 11, 2006, pp. 11 & 13, available at: < http://cmte.parl.gc.ca/Content/HOC/Committee/391/NDDN/Evidence/EV2598745/NDDNEV28-E.PDF >.

[18] Paul Koring, "CIDA contradicts Ottawa on funding Afghan monitor," Globe and Mail, March 23, 2007, A1.

[19] Editorial, "O'Connor's untruth on the Afghan pact," Globe and Mail, March 9, 2007, A16; Editorial, "Ottawa's Afghan Duty," Toronto Star, March 13, 2007, A16.

One would think that Mr. O'Connor, General Hillier and others would have recognized, not just the need for an improved arrangement, but also the considerable likelihood that a re-negotiation would succeed—since the Afghan government had already accepted the terms of the Danish, British and Dutch memoranda. Instead, they have sought to defend the existing Arrangement. For example, General Hillier was quoted by the *Toronto Star* as saying that "It [Afghanistan] is their country, under their laws and their government. We hand the prisoners to them, the detainees to them. It's the right thing to do."[20]

The failure to re-negotiate changes to the Arrangement has had real consequences for individual detainees. In February 2007, the *Globe and Mail* reported that when the Canadian government was asked to account for the location and condition of 40 detainees captured prior to April 2006 and several dozen taken since then, it refused "to say what has happened to them or even if it knows whether any have been tried, charged, or released, or how they are treated."[21] In March 2007, Canadian military investigators admitted to the *Globe and Mail* that they were unable to find three men who Canadian troops had handed over to the Afghan National Police on April 8, 2006, and who it is now alleged—on the basis of official military documents released under the Access to Information Act—were physically abused before being transferred.[22]

In short, there is manifestly well-founded information concerning the inability of the Canadian government to account for the location, condition or status of individual detainees transferred to Afghan custody—in circumstances where there were reasonable bases for believing that they might be subject to torture, cruel treatment and outrages upon personal dignity.

There is also manifestly well-founded information concerning the choice, by Mr. O'Connor, General Hillier and others, not to seek re-negotiation of the detainee transfer arrangement to bring it into line with best practice and the requirements of international humanitarian law. In short, they deliberately avoided taking reasonable and readily available measures to ensure that they were not facilitating clearly foreseeable torture, cruel treatment and outrages upon personal dignity. Our concern in this respect has, again, only been augmented by Richard Colvin's testimony.

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[20] Tonda MacCharles, "Prisoner hand-off policy in Afghanistan defended," Toronto Star, June 9, 2006, A19.

[21] Paul Koring, "Ottawa silent on fate of captured terror suspects; No accounting for scores of detainees that have been handed to Americans, Afghans," Globe and Mail, February 6, 2007, A15.

[22] Paul Koring, "Canada loses track of Afghan detainees; Military investigators unable to locate three men allegedly abused by troops," Globe and Mail, March 2, 2007, A1.

(d) Wilfully refusing to cease the transfer of detainees

As explained above, on April 23, 2007, an extensive *Globe and Mail* report "uncovered a litany of gruesome stories and a clear pattern of abuse by the Afghan authorities who work closely with Canadian troops, despite Canada's assurances that the rights of detainees are protected."[23] The abuse included "savage beatings, electrocution, whipping and extreme cold." The *Globe and Mail* concluded on its editorial page that "Canada is hardly in a position to claim it did not know what was going on. At best, it tried not to know; at worst, it knew and said nothing."[24]

Faced with these extremely serious allegations by a widely respected newspaper, Mr. O'Connor (and Prime Minister Stephen Harper) told the House of Commons that Canada would continue transferring detainees to the Afghan authorities.[25] They repeatedly insisted that the February 2007 agreement with the Afghan Independent Human Rights Commission was sufficient to protect the rights of transferred detainees.[26] The next day, the *Globe and Mail* reported that Amir Mohammed Ansari, the chief investigator for the AIHRC in Kandahar, had "conceded in a recent interview that his staff are being prevented from visiting detainees in the National Directorate of Security's detention cells in Kandahar."[27] The *Globe and Mail* quoted Mr. Ansari as saying: "We have an agreement with the Canadians, but we can't monitor these people."[28]

All three opposition parties (collectively representing the majority of Members of Parliament) called for the immediate cessation of detainee transfers—a call that Mr. O'Connor (and Prime Minister Stephen Harper) refused to heed.[29]

In the circumstances, there are reasonable bases to believe that Mr. O'Connor (and General Hillier and others) were engaged in a policy of wilfully transferring detainees to a significant, known risk of torture. Again, Richard Colvin's testimony significantly augments this concern.

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[23] Graham Smith, "From Canadian custody into cruel hands," Globe and Mail, April 23, 2007, A1.

[24] "The truth Canada did not wish to see," Globe and Mail, April 23, 2007, A18.

[25] Daniel Leblanc, "PM defends policy on detainees," Globe and Mail, April 24, 2007, A16.

[26] *Ibid.*

[27] Graeme Smith, "Watchdog: 'We can't monitor these people'," Globe and Mail, April 24, 2007, A1.

[28] *Ibid.*

[29] Daniel Leblanc, "PM defends policy on detainees," Globe and Mail, April 24, 2007, A16.

4. Temporal and personal jurisdiction and the absence of immunity

(a) Temporal jurisdiction

As Article 11 of the Rome Statute indicates, the Court has jurisdiction over crimes committed after the entry into force of the Statute. Since the Statute entered into force on July 1, 2002, and our concerns arise out of activities occurring after that date, temporal jurisdiction exists in this instance.

(b) Personal jurisdiction

As Article 12(b) of the Rome Statute indicates, the Court has personal jurisdiction over the national of any State which has ratified the Statute. This jurisdiction exists regardless of the location of the alleged violation.

Canada ratified the Rome Statute on July 7, 2000. And the individuals who took the decisions at issue here are Canadian citizens. As a result, personal jurisdiction exists in this instance.

There is also a basis for territorial jurisdiction, since Afghanistan acceded to the Rome Statute on February 10, 2003.

(c) The absence of immunity

As Article 27 of the Rome Statute indicates, elected representatives and government officials do *not* benefit from immunity from investigation and prosecution by the International Criminal Court—regardless of any immunities or special procedural rules which might otherwise attach to their official capacity under national or international law.

5. Subject matter jurisdiction

(a) Torture, cruel treatment and outrages upon personal dignity in non-international armed conflicts

The situation in Afghanistan today is properly characterized as "an armed conflict not of an international character", since Canadian and other NATO forces are operating against non-state actors with the consent of a sovereign Afghan government. This characterization is accepted by the Canadian government.[30]

Article 8(2)(c) of the Rome Statute concerns war crimes committed in the context of "an armed conflict not of an international character." And it accords the status of "war crimes" to certain specified acts "committed against persons taking no active part in the hostilities, including

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[30] See: Paul Koring, "Troops told Geneva rules don't apply to Taliban," Globe and Mail, May 31, 2006, A1.

members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other causes."

Detainees in Canadian custody constitute "persons taking no active part in hostilities"—as the specific inclusion of the word "detention" confirms.

The acts constituting "war crimes" under Article 8(2)(c) include:

> (i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
> (ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment.

Given the information summarized above, there are reasonable bases to believe that war crimes have been committed against detainees in Afghan custody as well as in the custody of third countries.

It is also possible that torture and other forms of abuse conducted by Afghanistan and third countries may be part of a widespread or systematic attack on a civilian population, in which case they would amount to crimes against humanity as well—under Article 7 of the Rome Statute.

But it is the transfer of detainees from Canadian custody that concerns us here and, in particular, the choice not to seek expeditiously to re-negotiate the Canada-Afghanistan Detainee Transfer Arrangement to include reasonable and readily available measures that would help to prevent such crimes from occurring, and later, the choice—in the face of serious and credible accusations of torture—not to cease immediately the practice of transferring detainees on a permanent basis.

(b) Aiding and abetting crimes committed by the officials of another country

Article 25(3) of the Rome Statute indicates that individual persons, including Canadian soldiers, could be criminally responsible if they transferred a detainee into a situation where they knew he or she would be at risk of torture, cruel treatment or outrages upon personal dignity, and such violence or outrages occurred. Article 25(3) reads:

> 3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person …
>
> (c) For the purposes of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;

(d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
    (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission or a crime within the jurisdiction of the Court; or
    (ii) Be made in the knowledge of the intention of the group to commit the crime.

Transferring a detainee contributes to—indeed, it provides the means for—the commission of torture, cruel treatment or outrages upon his or her personal dignity. And, in the circumstances, the intent to contribute to the crime could well be implied. There was, in 2006 and 2007, a growing body of information concerning torture and other abuses in Afghan custody (*including against detainees transferred by Canada*), as well as in the custody of other countries to which detainees from Afghanistan were known to have been transferred. There was also a growing body of information concerning the shortcomings in the Canada Afghanistan Detainee Transfer Arrangement—shortcomings that could have had the consequence of rendering any detainee transfer a possible war crime (and perhaps a crime against humanity) if the detainee was subsequently abused.

However, more than the possible criminal responsibility of individual Canadian soldiers is at issue. Our principal concern arises with respect to the political and military decision-makers who have chosen not to cease the practice of transferring detainees on a permanent basis, and who for more than a year refused to re-negotiate the Canada Afghanistan Detainee Transfer Arrangement to secure rights of notification, visit and verification for Canadian authorities. In short, the policies decisions taken by Mr. O'Conner, General Hillier and others caused detainees to be transferred into a situation of significant, known risk. It follows that, if and when any of the transferred detainees were in fact tortured or otherwise abused, Mr. O'Connor, General Hillier and others may have aided, abetted or otherwise assisted the commission of war crimes or crimes against humanity—which, of course, are themselves war crimes or crimes against humanity.

6. The absence of "complementarity"

Under Article 17 of the Rome Statute, a case that is "being investigated or prosecuted by a State which has jurisdiction over it" may be declared inadmissible "unless the State is unwilling or unable genuinely to carry out the investigation or prosecution." Assessing admissibility is of course relevant to the determination that you, as Prosecutor, need to make before seeking authorization to initiate an investigation.

There is no evidence that Canadian officials are investigating their former Defence Minister, former Chief of the Defence Staff and senior military officials and diplomats—especially when the decisions in question have received the support of the Canadian prime minister and his cabinet. Indeed, under the Canadian implementing legislation for the Rome Statute—the War

Crimes and Crimes Against Humanity Act—it is member of the federal cabinet, namely the Attorney General of Canada, who has the exclusive power to determine whether proceedings are initiated.

It is even possible that the failure to investigate extends to an attempted coverup, as Richard Colvin's testimony about efforts to eliminate the paper trail suggests.

7. An investigation would serve the interests of justice

Article 8(2)(c) (and Article 7(1)(f) & (k)) of the Rome Statute concerns some of the most fundamental rules of international humanitarian law. In particular, the prohibition on torture (including complicity in torture) is widely regarded as having achieved the status of a peremptory, *jus cogens* rule.

Since September 11, 2001, there has been considerable concern about the practice of "extraordinary rendition" and other legally questionable transfers of detainees, and about dubious practices of interrogation and treatment—including on the part of countries traditionally supportive of international human rights and international humanitarian law. Such practices appear to have been widespread, potentially involving dozens of countries and thousands of detainees.

The covert nature of the crimes—and especially the fact that many detainees remain in custody indefinitely or simply "disappear"—often makes the determination of specific violations difficult. Yet such crimes could successfully be investigated by an institution, such as the International Criminal Court, having sufficient expertise, resources, objectivity and legitimacy. The fact that the International Criminal Court is uniquely positioned to get to the bottom of this difficult-to-investigate matter strengthens the argument in favour of conducting an investigation.

Additionally, thanks to reports from credible news sources, we are able to identify specific individuals who have allegedly been tortured or otherwise abused. They include: Mohammed Ashraf, 37, who reportedly claims to have been "beaten for eight hours at a U.S. base", then "thrashed with bundles of electrical cables in NDS custody"[31]; Tila Mohammed, 18, who reportedly claims to have "suffered beatings and electrical shocks that were so painful that he blacked out for several hours"[32]; and Isa Mhammed, 32, who reportedly claims to have been "beaten with a length of black cable" and electrocuted "with a hand cranked generator" so that he "was flopping like a fish on dry earth."[33]

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[31] Graeme Smith, "Don't bleed on the carpet," Globe and Mail, April 24, 2007, A17.

[32] *Ibid.*

[33] *Ibid.*

Moreover, intent—at least in terms of wilful inaction or blindness—might be relatively easy to establish in this instance. For it seems clear that the Canadian Defence Minister, Chief of the Defence Staff and others consciously chose not to take reasonable and readily apparent measures to prevent torture, cruel treatment and outrages upon personal dignity—despite being fully aware of the risks of detainee abuse, the requirements of international law *and* the ready availability of a more legally consistent approach.

There is also the sensitive issue of avoiding the appearance of double standards. At the moment, the International Criminal Court is focused almost exclusively on situations in Africa. Although the situations there are very deserving of attention, over the long term the legitimacy of the Court could suffer if it came to be seen as directed solely at crimes committed within one particular region of the world, or solely within or by developing countries.

In its decision on issuance of an arrest warrant in the *Lubanga* case, Pre-Trial Chamber One focussed on the issue of "gravity" in determining admissibility. Responding to your request for a warrant in a case involving enlistment and conscription of child soldiers, the Pre-Trial Chamber said this was justified because of the "social alarm" surrounding the phenomenon of child soldiers. The issue of detainee transfers to jurisdictions where they are at apparent risk of torture and other forms of abuse would seem to meet this test. Indeed, "social alarm" about the practice of transfers to torture has been manifested, not just in Canada, but in international fora such as the institutions of the Council of Europe and the European Union, as well as in various components of global civil society.

Finally, it bear repeating that the possible crimes at issue here extend well beyond individual acts of torture or abuse, to include policy decisions taken at the highest levels of military command and political responsibility. In such a situation, it is not the number of possible crimes that should matter, but rather that an entire military and political apparatus has been put in the service of possible war crimes and crimes against humanity. For this reason, above all, we request that you continue your preliminary examination under Article 15 of the Rome Statute of the International Criminal Court, and expand it to include the senior military officials and diplomats named in Richard Colvin's testimony.

8. Conclusions

This letter is intended to update our letter of April 25, 2007, in which we drew your attention to possible war crimes and crimes against humanity committed with respect to the transfer of detainees from Canadian custody in Afghanistan. At that time, we requested that you open a preliminary examination under Article 15 of the Rome Statute of the International Criminal Court to determine whether there were reasonable bases to investigate Mr. Gordon O'Connor, the Canadian Minister of National Defence, and General Rick Hillier, the Canadian Chief of the Defence Staff.

We were concerned that Mr. O'Connor and General Hillier had refused to cease immediately the practice of transferring detainees—in the face of serious and credible accusations of torture—

and, before that, refused to seek to re-negotiate the December 2005 Canada-Afghanistan Detainee Transfer Arrangement in order to bring it into line with pre-existing Denmark-Afghanistan, UK-Afghanistan and Netherlands-Afghanistan agreements. As a result, they would seem to have wilfully been placing detainees at well-documented risk of torture, cruel treatment and outrages upon personal dignity. If so, they would appear to have been committing war crimes in violation of Articles 8 and 25 (and perhaps crimes against humanity in violation of Articles 7 and 25) of the Rome Statute of the International Criminal Court—in circumstances that clearly fall within the Court's jurisdiction.

You are now engaged in the preliminary examination that we requested in April 2007. We write today to draw to your attention the testimony of Richard Colvin, First Secretary at the Canadian Embassy to the United States of America, which includes allegations that suggest the ambit of your examination should be expanded to include other senior military officers and diplomats -- some of whom he names.

With thanks for your attention to this matter, we are,

Yours respectfully,

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