June 17, 2016

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

The government of Prime Minister Trudeau has just responded to e-petition E-70, which calls for a commission of inquiry into the treatment of Afghan detainees by Canada. Notwithstanding that the Liberal Party, while in opposition, voted for a motion in the House of Commons calling for just such a commission of inquiry (a motion which passed), the Liberal government has now rejected this call.

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

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

"Canada is proud of the honourable work of the men and women in uniform and civilian officials who served in Afghanistan. Canada remains the leading donor supporting the work of the AIHRC to strengthen its capacity to fulfill its constitutional mandate to monitor human rights in Afghanistan. Throughout Canada's military operations in Afghanistan, the Government of Canada ensured individuals detained by the CAF were treated humanely and handled, transferred or released in accordance with our obligations under international law. Therefore the Government of Canada does not believe an independent judicial commission of inquiry is necessary."

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

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

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

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

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

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

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

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

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

honourable men and women who worked within the policies, practices and direct orders decided upon by the hierarchy.

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

"Mr. Prime Minister, [t]his is unfinished business of the most serious kind: accountability for alleged serious violations of Canadian and international laws prohibiting perpetration of, and complicity in, the crime of torture. As a result of the previous government's stonewalling, there were no lessons learned, and no accountability. In a future military deployment, the same practices could reoccur. A public inquiry would serve to authoritatively investigate and report on the actions of all Canadian officials in relation to Afghan detainees, and to review the legal and policy framework that attempted to justify these actions. Based on this review, the Commission would issue recommendations with a view to ensuring that Canadian officials never again engage in practices that violate the universal prohibition of torture."

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

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

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

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

(Appendices follow)

Appendices

E-petition e-70 (Afghanistan)

42ND PARLIAMENT
Initiated by Craig Scott from Toronto, Ontario, on December 17, 2015, at 10:08 a.m. (EDT)

Petition to the Government of Canada

Whereas:

- many Canadians remain ashamed by Canada's approach to Afghan detainees in relation to both treatment in Canadian custody, notably transfer to other states despite the risk of torture, and torture, other inhuman or degrading treatment, disappearance and/or extrajudicial killing to which some of them fell victim after their transfer to other states; and
- many also are disappointed by the poor record of Canadian justice and parliamentary institutions in bringing the relevant facts to light and in securing proper accountability.

We, the undersigned, **citizens of Canada**, request (or call upon) the **Government of Canada** to establish an independent judicial commission of inquiry to:

1. investigate the facts with respect to policies, practices, legal and other opinions, decisions, and conduct of Canadian government actors, including Ministers and senior officials, concerning Afghan detainees throughout Canada's involvements in Afghanistan from 2001;

2. investigate also the success and/or failure of Canada's justice and parliamentary systems in achieving transparency, democratic accountability, and compliance with applicable laws; and

3. issue a thorough, comprehensive and public report on the facts as found and on the commission's assessment of those facts in order: (a) to determine whether state or governmental responsibility arose under international and/or Canadian law; (b) to assess whether any Canadian government officials engaged in misconduct in relation to respect for law, legal process, or parliamentary procedure; and (c) to recommend policy changes as well as law reform and parliamentary reform aimed at preventing violations or misconduct occurring again.

****

Response by the Government of Canada, Tabled June 16, 2016

RESPONSE TO PETITION

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

PETITION NO.: **421-00217**

BY: **MR. STEWART (BURNABY SOUTH)**

DATE: **MAY 3, 2016**

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

Response by the Minister of National Defence

SIGNATURE

Minister or Parliamentary Secretary

SUBJECT

Afghanistan

ORIGINAL TEXT

REPLY

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

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

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

independent organizations, including the Afghanistan Independent Human Rights Commission (AIHRC), to strengthen their abilities to monitor, investigate, report and act on issues involving the treatment of detainees.

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

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

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

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

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

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

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

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

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

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

In 2012, the Military Police Complaints Commission (MPCC) completed a Public Interest Hearing into a complaint that certain Military Police (MP) wrongly failed to investigate CAF Commanders for allegedly ordering the transfer of Afghan detainees to a known risk of torture at the hands of Afghan security forces. The Commission's investigation and hearing process spanned nearly four years. During this time, it heard testimony from 40 witnesses, including the eight subjects of the complaint, and held 47 days of public hearings from 2008 to 2011. The Commission also reviewed thousands of documents throughout its investigation. The Commission found the complaints against the eight individual MPs were unsubstantiated.

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

Canada is proud of the honourable work of the men and women in uniform and civilian officials who served in Afghanistan. Canada remains the leading donor supporting the work of the AIHRC to strengthen its capacity to fulfill its constitutional mandate to monitor human rights in Afghanistan. Throughout Canada's military operations in Afghanistan, the Government of Canada ensured individuals detained by the CAF were treated humanely and handled, transferred or released in accordance with our obligations under international law. Therefore the Government of Canada does not believe an independent judicial commission of inquiry is necessary.

****

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

Published by Craig Scott · June 10 at 12:31am ·

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

You can read the Open Letter here: http://www.rideauinstitute.ca/wp-content/uploads/2016/06/Afghan_OpenLetter-Jun7-2016_EN.pdf

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

What can we expect from the Liberal government? The signs are not good. Indeed, the signs are that the Liberals may be preparing to go back on their own demand when in opposition for a commission of inquiry. Not to put too fine a point on it, initial

comments suggest they are willing to continue the complicity of the Canadian government – first under Harper and now under Trudeau – in ensuring there will be no accounting let alone accountability for what some of Canada's most senior military officers, top civil servants, and ministers of the Crown did in our name.

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

This is totally inappropriate.

The Minister of Defence was in theatre in a command role at crucial periods when prisoners were taken and transferred. He may even have had roles liaising on intelligence matters with some of the Afghan authorities that are implicated in the human rights abuses that an inquiry would be looking at. Keep in mind it was the transfer to intelligence authorities at the National Directorate of Security that has been at the core of the detainee scandal, as it has been understood to date. But also, when it comes to unrecorded transfers by Canada of captives qua "persons under control" (PUCs) to Afghan authorities, some of those transfers were to the Afghan National Police and Minister Sajjan may have had to liaise with them, according to some biographical accounts. Some accounts have the Afghan police as at least as problematic an actor in their treatment of received prisoners as NDS.

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

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

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

-30-