

# Public Statement



amnesty international  
canada



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## Document first issued on the Amnesty International and BCCLA Federal Court case on Afghanistan detainees in advance of the appeal on 10 December 2009

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On December 10, 2008 the Federal Court of Appeal will hear an appeal brought by Amnesty International and the British Columbia Civil Liberties Association as part of the court challenge the two organizations launched in February 2007, seeking an end to the Canadian Forces' practice of transferring detainees apprehended in Afghanistan into the custody of Afghan officials.

Notably, the Court will hear the appeal on International Human Rights Day, which this year marks the 60th Anniversary of the adoption by the United Nations of the Universal Declaration of Human Rights. On a day governments around the world should be renewing and redoubling their commitment to universal human rights protection Canadian government lawyers will argue that Canada's most important human rights standards, those enshrined in the Charter of Rights and Freedoms, should be given narrow interpretation.

There are a number of crucial issues at stake in the appeal. How far do the human rights obligations of Canadian soldiers reach? Do they stop at the Canadian border? Or do those obligations extend to the actions of Canadian soldiers carrying out operations outside Canada? Will Canadian courts step in and require Canadian troops abroad to obey the Charter, and through the Charter to comply with international human rights treaties ratified by Canada?

.../2

### CANADIAN SECTION

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AMNESTY INTERNATIONAL (AI) is a worldwide movement of people who campaign for internationally recognized human rights

AI's vision is of a world in which every person enjoys all of the human rights enshrined in the Universal Declaration of Human Rights and other international human rights standards.

In pursuit of this vision, AI's mission is to undertake research and action focused on preventing and ending grave abuses of the rights to physical and mental integrity, freedom of conscience and expression, and freedom from discrimination, within the context of its work to promote all human rights.

AMNESTY INTERNATIONAL has consultative status with the United Nations (ECOSOC), UNESCO and the Council of Europe, and has cooperative relations with the Inter-American Commission on Human Rights of the Organization of American States.

AI and the BCCLA turned to the courts because of concern that prisoners transferred into Afghan custody faced the risk of torture and other human rights violations, particularly at the hands of the country's intelligence agency, the National Directorate for Security (NDS). The use of torture in Afghan prisons has been documented by the office of the UN High Commissioner for Human Rights, the US Department of State, the Afghan Independent Human Rights Commission and the Canadian government. The human rights groups want prisoner transfers to stop unless and until it becomes clear that transferred prisoners will not face a serious risk of being tortured.

In March 2008 Federal Court Justice Anne Mactavish ruled that the court challenge could not go ahead because the Charter did not apply to the actions of Canadian soldiers outside Canada. Yet in earlier preliminary rulings Justice Mactavish had signaled disquiet and concern with Canada's approach to prisoner transfers in Afghanistan. However, unless her March 2008 judgment is overturned, there will be no further court decision dealing with the actual substance of these very serious human rights concerns.

AI and the BCCLA are pursuing this appeal for two fundamentally important reasons:

- First, with the exception of a temporary suspension of transfers between November 2007 and February 2008, Canadian soldiers have been handing an undisclosed number of prisoners over to Afghan authorities for close to three years. Credible reports have emerged indicating that some of these prisoners have suffered torture and abuse.

Despite May 2007 improvements to the agreement governing the transfer of prisoners between Canada and Afghanistan, allowing greater levels of prison monitoring by Canadian officials, the risk of torture remains high, particularly in those instances where the NDS is involved. AI and the BCCLA have argued that handing prisoners over in the face of a serious risk of torture constitutes a clear violation of Canada's international human rights obligations as well as the Canadian Charter of Rights and Freedoms. The organizations are looking to the Federal Court of Appeal to recognize that Canadian courts have the power to bring this practice to an end.

- Second, the precedent set in Justice Mactavish's ruling is a worrying one for human rights protection. Canadian officials operate outside of Canada in a wide variety of contexts including offensive military operations, peacekeeping operations, law enforcement activities and national security investigations. These officials operate pursuant to Canadian law, further to policies and decisions of Canadian parliament, Cabinet ministers and senior officials. When their operations directly or indirectly cause or contribute to human rights violations it is vital that there be accountability. As Canada's supreme law and primary instrument for the protection of human rights, the Charter cannot be interpreted so as to allow Canadian officials to commit serious human rights violations on the territory of another state which they could not perpetrate within Canada's borders.

.../3

Courts in other countries are also grappling with the question of how far their reach should

extend in ensuring that military personnel and other officials acting abroad live up to national and international human rights obligations. In the context of a growing number of joint military and security operations in a number of parts of the world, it is increasingly important that courts play that enforcement role. When national courts shirk this responsibility there is often no other effective means of ensuring human rights oversight. The Federal Court of Appeal has a valuable opportunity to demonstrate leadership in this area.

### **Background**

Amnesty International and the British Columbia Civil Liberties Association have called on Canada to develop a different approach to the handling of prisoners in Afghanistan since early 2002. Between 2002 and 2005 Canadian officials handed prisoners apprehended in the course of fighting in Afghanistan over to US officials, despite concerns about torture and ill-treatment in US detention facilities in Afghanistan and Guantánamo Bay. Since December 2005 prisoners have been handed over to Afghan officials.

AI and the BCCLA have urged Canada to work closely with the Afghan government and governments of other countries with forces in the country to develop a system for the handling of battlefield prisoners that meets international human rights standards. Through collaboration, training and capacity building, a new approach to dealing with battlefield prisoners could assist in wider efforts to improve and reform the penal and justice systems in Afghanistan.

Both organizations firmly believe that the present case stands for the principle that, whenever Canada is engaged in military operations abroad, such operations must be carried out in a manner that complies with fundamental human rights protections.

Amnesty International has issued a number of reports and public statements documenting a range of serious violations of international human rights and humanitarian law -particularly those standards meant to protect civilians in armed conflict - committed by international forces in Afghanistan. AI and the BCCLA continue to press Canadian and international forces to take steps to ensure that civilians are not subject to indiscriminate and disproportionate attacks.

Amnesty International has also documented grave human rights abuses and violations of humanitarian law committed by Taliban forces. The number of civilians, including women and children, who have been directly and intentionally targeted by these attacks continues to grow and has reached alarming levels. AI and the BCCLA have urged international forces presently in Afghanistan to work closely with Afghan forces to ensure the security and human rights of Afghan civilians are protected.

AI and BCCLA are neutral on the issue of Canada's deployment of military forces in Afghanistan. At the present time, those forces are in Afghanistan at the invitation of the government of President Hamid Karzai and pursuant to authorization from the United Nations Security Council.

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