Contexualizing Torture in Afghanistan: Indifferent Attitudes, Identity, Norms and Space

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Abstract

In this thesis, I use the Ottawa Federal Court's judgment in *Amnesty International Canada v. Canada (Chief of Defense Staff)* (2008) as a window through which to examine the events surrounding the Afghan detainee controversy. How can Canada's indifferences to the torture of Afghans in this instance be explained? I contend that, in the case of Afghanistan, the incidences of torture and Canada's indifference to them cannot be understood without contextualizing the events and actors involved. We can have a more nuanced understanding of torture in Afghanistan only by referring to the multi-dimensional context surrounding the allegations. The divergent responses of the human rights groups, the Court, and the military to torture in Afghanistan can thus be explained by examining how each of these groups articulate three interrelated factors: 1) Canadian identity/citizenship 2) the legal norms on torture 3) Afghanistan as a space in relation to norms and identities.

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INTRODUCTION

"[...] the paradigm of saving the Other nevertheless precludes an examination of how we have contributed to their crises and where our responsibility lies."[1]

"I was on the beach in the Dominican Republic. I had a little break, and I heard about [it] and —can I say this without everybody beating up on me across Canada?— I was on my third rum and Coke, and I really didn't give a damn."

Former Commander of the Canadian Forces, Rick Hillier, talking to reporters about the torture of Afghan detainees. [2]

On April 23 2007, the *Globe and Mail* published an article reporting that several individuals detained by the Canadian Forces (CF) stationed in Afghanistan who had been transferred into the custody of Afghan security forces, who allegedly tortured them.[3] Following the media release of this and other articles on the subject, both the Canadian military and the Department of Foreign Affairs and International Trade (DFAIT) launched investigations into the torture allegations and Canada's role in these events.[4] In 2009, *The Globe and Mail* reported that, three years earlier, two reports warned senior Canadian military officials of the likelihood that Afghan detainees would be tortured if Canadians handed them over to security forces. These reports were circulated widely throughout the Canadian foreign affairs and Defence departments, according to the newspaper. However, both Prime Minister Steven Harper and Peter MacKay, Canada's

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[1] Sherene H. Razack, *Dark Threats and White Knights: The Somalia Affair, Peacekeeping and the New Imperialism* (Toronto: University of Toronto Press, 2004) at 155

[2] General Rick Hillier, "The Essential Rick Hillier: Facts and Quotes" CTV News Online: (1 February 2008) online: http://www.ctv.ca/CTVNews/Specials/20080415/hillier_in_brief_080415/ . The General was actually commenting on a statement by Communications Director of the Prime Minister's Office at the time, which concerned the transfers to torture.

[3] Graeme Smith, "From Canadian Custody into Cruel Hands", *The Globe and Mail* (23 April 2007) online: http://www3.thestar.com/static/PDF/afghandocs/SCA%200854.pdf

[4]British Columbia Civil Liberties Association, The Canadian Expeditionary Force Command, "Fact-Check on Detainee-Related Media Coverage:23-27 April 2007, "Summary Torture Clips from Monitoring Visits by Canadian Officials to Detainees in Afghan Prisons, 2007," 1-4, DFAIT, "Summary of DFAIT visits to Afghan Detention Facilities in June 2007," 1-6 online: at http://www.bccla.org/antiterrorissue/DFAIT%20Torture%20Reports.pdf

foreign affairs Minister at the time, claim that they did not know anything about these reports or the possibility of detainee torture.[5]

In November 2009, Richard Colvin, a senior diplomat with the Afghan, mission testified before a House of Commons committee, saying that Afghan prisoners who were transferred into the custody of Afghan police were likely tortured.[6] In March 2010, Colvin testified again before the Military Police Complaints Commission (MPCC) claiming that Canadian officials did not want to deal with the "high risk" possibility that detainees might be tortured. A month later, after the Conservative government released a single copy of 2500 pages of redacted documents for review by the House, .the Speaker of the House ruled that the Conservative government's refusal to produce uncensored documents concerning the Afghans detained constituted a breach of parliamentary[7]

In a 2008 case before the Federal Court, which considered the torture allegations (referred to as *Amnesty* throughout), the judge dismissed the claims concerning the applicability of the *Charter of Rights and Freedoms* to Afghan detainees. The Court ruled that the *Charter* did not apply to the detained Afghans because they were not Canadian citizens and that they only have rights accorded to them under the Afghan constitution and international law.[8] I argue that the Court and government's indifferent attitude towards torture cannot be understood without contextualizing the events and actors involved in the Afghan detainee controversy as a whole. More specifically, the

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[5] Murray Brewster, "MacKay denies seeing torture warnings", *The Globe and Mail* (15 October 2009) online: http://www.theglobeandmail.com/news/politics/mackay-denies-seeing-afghan-torture-warnings/article1325490/.

[6] CBC News, "All Afghan Detainees Likely Tortured: Diplomat." (18 November 2009) online: http://www.cbc.ca/news/canada/story/2009/11/18/diplomat-afghan-detainees.html

[7] CBC News, "Canada and the Afghan Detainee Transfers"(29 April 2010) online: http://www.cbc.ca/news/politics/story/2009/11/20/f-afghan-detainees-timeline.html

[8] *Amnesty International Canada v. Canada (Chief of Defense Staff)*, 2008 FC 336, [2008] 4 F.C.R. 546 at para 5, 292 D.L.R. (4th) 127 [*Amnesty]*.

indifference to torture can by understood by examining the multi-dimensional context surrounding torture. I do this by tracing the connections between three inter-related factors: Canadian identity/citizenship, the norms on torture, and Afghanistan as space.

The Federal Court Case

Shortly after media reports of the possible torture of detainees by Afghan police, two human rights organizations, Amnesty International Canada (AIC) and the British Columbia Civil Liberties Association (BCCLA), brought an application for judicial review before the Ottawa Federal Court concerning the transfer of detainees into Afghan custody.[9] They called the Canadian government— specifically the Chief of Defence Staff of the Canadian Forces, the Minister of National Defence and the Attorney General of Canada— to task for their responsibility for the transfers and argued that the agreements entered into between the Afghan and Canadian governments did not provide enough procedural and substantive safeguards to protect detainees from being tortured by Afghan authorities. They requested an order from the Court to stop the transfer of detainees into Afghan custody or into the custody of any other country until sufficient provisions were implemented to ensure those transferred would not be tortured. They also asked for an order requiring the government to inquire into the status of those detained and to return these individuals.[10]

The human rights groups began their application for review by asking the Court to determine whether Sections 7, 10 and 12 of the *Canadian Charter of Rights and Freedoms* applied to those detained in Afghanistan. They also asked for assurances that

[9] *Ibid.*
[10] *Ibid* at para 7-10.

any breaches of the rights of those detained would be addressed under the *Charter*.[11] Not only are *Charter* rights of concern to the applicants; so is their connection to torture. The military and government representatives argued that the applicants misunderstood the legal bases for Canada's presence in Afghanistan, the significance of Afghanistan's sovereignty over its own territory and the effectiveness of the detention and transfer procedures undertaken by the military in their dealings with detained Afghans,[12] which in turn meant that the arguments the applicants presented had no legal basis.

After the Court considered the applicants' request along with all relevant factums and affidavits submitted by the military and the human rights representatives in support of each of their claims, presiding Judge Mactavish determined that the *Charter* did not apply to those detained by Afghan police because they only had the rights accorded to them under the Afghan constitution. The judge also ruled that the actions of the CF stationed in Afghanistan were governed by international legal instruments, including international humanitarian law, and by Canadian law in "certain, clearly defined circumstances", but that the *Charter* did not apply in this case.[13] The human rights organizations appealed the Federal Court decision. The Judge of the Federal Court of Appeal agreed with Mactavish's reasoning and dismissed the appeal.[14] The Court dismissed the Afghan detainees. It considered them foreigners with no connection to Canada.[15] The case then came before the Supreme Court and was also dismissed.[16]

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h[11] *Ibid* at para 8.
[12] Affidavit of Christopher Greenwood, ("Greenwood Affidavit") sworn August 14 2007, Report Record of the Respondents to the Main Application [hereinafter RR] Vol 1, Tab 4 par 3.
[13] *Amnesty supra* note 8 at para 2-3.A
[14] *Amnesty International Canada v. Canada (Chief of the Defence Staff),* 2008 FCA 401, [2009] 4 F.C.R. 149. 305 D.L.R. (4th) 741.
[15] Kent Roach, "The Supreme Court at the Bar of Politics":The Afghan Detainee and Omar Khadr Cases.' (2010) 28 NJCL 123.

A year before the Federal Court case proceedings, AIC *et al* sent a letter to the Chairman of the MCPC outlining their grounds for complaint against the Provost Marshall and other unidentified members of the military police for their role in facilitating the transfers of detainees to torture The organizations also asked the chairman to launch an investigation into the military's complicity in the transfers [17] In late February 2007, the Commission Chair initiated an investigation into the conduct of military personnel and later authorized holding a hearing in support of the investigation [18] The government then sought a court order to block the inquiry and prevent the public hearing,[19] a request which was denied by the Federal Court [20] In November 2010, the Commission heard the testimony of two military officials who decided not to launch an investigation into the torture allegations when claims of torture first made news headlines [21] The Commission will release its findings in 2012 [22]

After hearings with the two military officials concluded in November 2010, a representative of the BCCLA commented on the testimony from the inquiry, noting that the overwhelming amount of evidence uncovered through these processes was proof that the government knew of the transfers of detainees to torture at the time and did not take

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[16] *Amnesty International Canada v Canada Minister of National Defence* [Application, Notice of Appeal] *Canada*, S C C 2009 S C C [2009]

[17] Military Police Complaints Commission, "Re Transfer of Detainees to a Substantial Risk of Torture by the Military Police in Afghanistan" Afghan Public Interest Hearings, (2007) online http //www mpcc-cppm gc ca/300/afghan/2007-02-21-eng aspx#footnote1

[18] *Ibid*

[19] *Ibid* , News Release, "Complaints Commission "Surprised" by Government Law Suit" (2008), online http //www mpcc-cppm gc ca/400/nr-cp/2008-04-14-1-eng aspx

[20] *Ibid*

[21] Amnesty International Canada, News Release, "Military Police Commission to Hear Key Witnesses in Torture Hearings" (26 November 2010) online http //www amnesty ca/resource_centre/news/view php?load=arcview&article=5735&c=Resource+Centre +News

[22] Grace Pastine, personal communication, February 22, 2011

steps to prevent them.[23] This argument has sparked public debate about the transfers and the Canadian government's role in them. Here, I want to move away from public concerns about the transfers and consider how each of the actors involved in AIC *et al.*'s case conceptualized torture, the legal norms governing it and what it means to be Canadian in the context of the transfers more generally. This focus helps to explain how a decision about the torture of detainees comes to be a decision about the *Charter* and not about either torture or those subjected to it.

Both the case and the transfers came about as part of the larger Canadian intervention in Afghanistan, specifically as a result of the actions of the military deployed with the Afghan mission. Therefore, any examination of either the case or the events leading up to the transfers must be considered in the context of the intervention and the role Canada presently plays in Afghanistan. This thesis attempts to explain the indifferent attitude towards torture, specifically with reference to the Federal Court decision to dismiss AIC's application for judicial review as well as the government's inaction when there were indications that it knew that Afghans transferred by Canadians might be tortured. I contend that, in the case of Afghanistan, the incidences of torture of Afghan detainees and Canada's role in them are complex and cannot be understood without contextualizing the events, individuals and organizations involved in the torture allegations. We can have a fuller, more comprehensive grasp of the circumstances leading up to the torture of detainees only by referring to the multi-dimensional context surrounding the allegations. Accordingly, I focus on the *Amnesty International* Federal Court case (cited as *Amnesty*)and argue that the Court's avoidance of the question of

[23] *Ibid.*

torture and the divergent responses to it from the different actors can be explained by examining how each of these groups articulates three interrelated factors apparent in the language of the case and the associated documents: 1) Canadian identity and citizenship—specifically the role Canada plays in Afghanistan 2) the applicability of legal norms concerning torture 3) Afghanistan as a space in relation to norms and identities. This thesis is organized into three different chapters, which correspond to the three themes highlighted above.

Literature Review

I situate my thesis in three separate fields of research. I consulted literature on representation and identity construction, scholarly criticisms of the conceptual bases of torture, human rights and the international legal norms governing their application during humanitarian interventions; and theoretical works on law and space, and law and geography. I have chosen to use literature in these three fields because it will enable me to explain the indifferent attitude towards torture and expand on the different responses to it which are unique to the Afghan detainee controversy. I rely on cultural studies of international law and intervention, post-colonial theory, legal and theoretical conceptualizations of torture as a practice, and discussions of space and geography to make my argument about the relevance of torture to the AIC case.

In her analysis of humanitarian intervention, Anne Orford points to the racial character of intervention stories. She argues that audience identification with the "heroic"

status of the groups and individuals who engage in interventions[24] is only possible because of the existence of racialized and feminized characters who serve as foils for the heroes of intervention.[25] The racialized character of intervention is also highlighted in Sherene Razack's work on the Somalia Affair.[26] In this text, she critically examines the role the CF played in Somalia in the early 1990s and shows how their actions reflected how Canadians saw themselves compared to racialized others they were sent to help.[27] Razack reflects on how Canadian identity was understood and reformulated as a result of the CF's actions in that country.[28] Both texts are relevant to this research because of their grounding in post-colonial theory and their focus on race in intervention projects. Razack's book is especially important because she focuses on the actions of the Canadian military and Canada's identity particularly. My research adds to this body of work because it highlights a pattern of continuity between the military's actions and articulations of identity in Somalia and its actions in Afghanistan today; this institution remains responsible for preventing violence against racialized others in both Somalia and Afghanistan.

Derek Gregory's *The Colonial Present* provides a post-colonial analysis of the intervention in Afghanistan. Although he does not focus on the Canadian mission (as I hope to do), Gregory contextualizes the 2001 invasion of Afghanistan by chronicling the Soviet and American presence there beginning in the late 1980s and ending with the

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[24] Anne Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (Cambridge, Cambridge University Press, 2003) at 170.
[25] *Ibid* at 171.
[26] Razack, *supra* note 1.
[27] *Ibid* at 4-13.
[28] *Ibid.*

outbreak of war in Afghanistan as part of Bush's War on Terror.[29] Gregory's text is also relevant because he analyzes the ways in which certain places and spaces, like Afghanistan, can be thought about and understood using imagined geographies.[30]

The focus on geography and space is important for analyses of the colonial character of international law[31] as well as for understandings of the interdisciplinary focus on law and space and law and geography.[32] This literature suggests that we need to pay attention to the ways in which different actors in the case conceptualize Afghanistan as a particular geographic "space" and as a "place" where certain norms (like the principle of state sovereignty or the prohibition of torture, for example) can be applied (or not) depending on each actor's identity and view of torture and its applicability there. This kind of analysis contributes to reading the decision and other associated documents as cultural texts, which are written and based on particular ideas the judge, the human rights groups and the military have about Afghanistan and its people.

Human rights scholars who are mindful of the role that international law, lawyers and Western humanitarian organizations play abroad have criticized the human rights movement by suggesting that these organizations and their representatives need to be prudent with their objectives internationally, most especially with regard to the "risks, costs and unanticipated consequences of human rights activism."[33] Researchers have also

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[29] Derek Gregory, *The Colonial Present: Afghanistan, Palestine, Iraq* (Malden, MA: Blackwell Publishing Ltd, 2004) at 30-46.
[30] *Ibid* at 17-29.
[31] Vasuki Nesiah, "Placing International Law: White Spaces on a Map" (2003) 16 LJIL 1.
[32] *Ibid*, Mariana Valverde, "Analyzing the Governance of Security: Jurisdiction and Scale" (2008) 1 Behemoth 3-15, and Mariana Valverde, (2009) "Jurisdiction and Scale: Legal 'Technicalities' as Resources for Theory" 18 S & LS 139, Annelise Riles, "The View from the international Plane: Perspective and Scale in the Architecture of Colonial International Law"(2005) 6 L&C 39.
[33] David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton, Princeton University Press, 2005) at 3.

highlighted countries' international legal responsibilities with respect to detainee transfers in particular.[34] My research adds to this literature in the context of Canada's intervention in Afghanistan because I use the detainee transfers and court decision as case studies to analyze how human rights groups represent themselves and their actions as part of the human rights movement as a whole with respect to the ways they represent those detained as "clients" before federal courts and abroad.

The literature on torture is extensive, because of the resurgence of apologies for torture after 9/11. Following that event, scholars and government officials have come to think more seriously about and reconsider "the definitions and boundaries of torture [...]especially as legitimized or prohibited by the law."[35] Talal Asad, an anthropologist who studies the practice of torture, has critically analyzed the "universalistic discourses that have been generated around it."[36] He points out that our understanding of the phrase "torture or cruel, inhuman or degrading treatment" is used today to make "moral and legal claims about pain and suffering" but that understanding something to be "torture or inhuman treatment" has generally had historical and cultural bases as well.[37] Other theoretical works on torture include Darius Rejali's book examining the practice in modern Iran, in which he traces the disciplinary and other practices that have led to the modernization of torture in societies today.[38] These two theoretical works provide a

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[34] Cordula Droege, "Transfer of Detainees: Legal Framework, Non-Refoulement and Contemporary Challenges" (September 2008) 90 IRRC 669-701.
[35] Tal Kastner, "The Language of Law and the Tortured Body: *The Public Committee Against Torture in Israel v. The State of Israeli,"* (unpublished).
[36] Talal Asad, "On Torture or Cruel and Inhuman, and Degrading Treatment" *Social Research* 62 no. 4 (Winter 1996) 1081 at 1082.
[37] *Ibid.*
[38] Darius Rejali, *Torture and Modernity: Self, Society and State in Modern Iran* (Boulder, CO: Westview Press, 1994).

conceptual basis explaining the prohibition of torture internationally but also its prevalence in the modern world today.

Some scholars of torture have also discussed portrayals of the practice and its victims in popular culture[39] and in the War on Terror,[40] while others have been critical of the monitoring practices of international legal bodies like the UN's Committee Against Torture.[41] This scholarship on representations of torture in different contexts as well the bureaucratic management of monitoring, are good resources for analyzing the ways torture and its (invisible) victims are seen and represented by different actors in the Federal Court case. I focus on the responsibility for torture in each chapter, by using each of the three factors, to trace Canada's reactions to torture allegations, the human rights activism against the practice and the Court's response— all in the context of the Canadian intervention in Afghanistan.

My research will address a gap in the literature on identity, space and torture. While there have been separate works concerned with manifestations of Canadian identity in Somalia,[42] in discourses on Afghanistan as space in the context of the War on Terror and in discussions of the theoretical bases of anti-torture arguments, I group these three fields together and use them to discover the ways in which Canadian identity is articulated in Afghanistan and in terms of its relationship to torture. How do the Canadian Forces, the human rights groups and the Court articulate both their own and Canadian

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[39] Jinee Lokaneeta, "A Rose by Another Name: Legal Definitions, Sanitized Terms and Imagery of Torture in *24*" (2010) 6 Law, Culture and the Humanities 245.
[40] Jinee Lokaneeta, "Countering the State: Narratives on Torture at Abu Ghraib and Guantamano: Gender, Culture and Religion in Imperial Encounters", [forthcoming in *Undoing Leviathan: Multidisciplinary Readings of the State,* Roopali Mukherjee and Priya Jaikumar, eds.] Liz Philipose, "The Politics of Pain and the Uses of Torture." 32 (2007) Signs: Journal of Women in Culture and Society 1047.
[41] Tobias Kelly, "The UN Committee Against Torture: Human Rights Monitoring and the Legal Recognition of Cruelty."(2009) 31 Hum. Rts. Q. 777-800.
[42] Razack, *supra* note 1.

identity in Afghanistan? What is this identity's relationship to the Canadian and international intervention there and to Afghanistan as space? How do these articulations of identity contribute to the prevalence of torture in Afghanistan and the Canadian government's responses to it?

Identity and Citizenship

In order to expand on the relationship between identity and citizenship, I focus on the politics of representation in the case: I examine who is representing whom, how and why. I also consider how each of the actors involved articulates their own identity and the identities of the Afghan detainees.

The Federal Court judge dismissed AIC's application for review, claiming that not having Canadian citizenship meant that rights under the *Charter* did not apply to the Afghan detainees.[43] By making this argument, the Court identified the groups to whom the *Charter* applies (i.e. Canadian citizens) and the individuals to whom it does not (i.e. Afghan detainees transferred to torture) and inadvertently connected citizenship to Canadian identity. The transfer of Afghans to mistreatment by the Canadian military in Afghanistan reveals something about Canadian identity: it requires understanding what it means to be Canadian for members of the military as well as for anti-torture activists with AIC *et al.* It also entails determining how they situate themselves relative to the other actors involved in the case and how they articulate their views about those detained and the norms prohibiting the torture of detainees in a space like Afghanistan.

[43] *Amnesty, supra* note 8 at 3.

My research on identity is informed by post-colonial theory; I read the intervention as a narrative involving different "actors", all of whom have different conceptions of torture, rights and space in Afghanistan and of Canada's role in torture. The assumption that the institutions involved are "actors" stems from the assumption that "intervention stories" are populated by characters such as states and humanitarian organizations, with which readers of international legal texts identify.[44] As part of this, post-colonial, feminist and Marxist theories on subjectivity can be used to explain "the force of identification stories."[45] Scholars who use these theories argue that one's sense of self and identity is always in construction; this means that identity formation is a process that is constantly changing because of the interactions of a group or organization with other groups.[46] This enables us to deconstruct certain identities and determine how they are formed through and because of the interactions of a group or organization (like the military or AIC) with other people in other places (like Afghanistan).

Identity construction is related to representation. Edward Said expands on this connection in *Orientalism*. In this text, he examines the ways in which Orientals (he is concerned principally with inhabitants of the Near-Orient and Middle East) and Muslims have traditionally been represented by Westerners. He argues that Orientalists (i.e. those who study and write about that region of the world) have traditionally represented the

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[44] Orford, *supra* note 23 at 160-161

[45] *Ibid* at 160

[46] I realize that Canadian identity is contested and fluid I do not mean to imply that it is fixed or monolithic in any way On the contrary, I was motivated to start this project precisely because I was interested in the ways Canadians interact with others and I wanted to think about how Canadian identity is affected by these interactions especially in Afghanistan Razack's research on manifestations of Canadian identity throughout the Somalia Affair highlights it racial character, especially because she notes the complexities of Canadians identifying with racialized Aboriginals who engage in violence as members of the Canadian Forces *Supra* note 1 at 87 For the intersections between race and class, ethnicity and gender and their effects on Canadian identity see Himani Bannerji *The Dark Side of the Nation Essays on Multiculturalism and Gender* (Toronto Canadian Scholars' Press, 2000)

Orient without ever allowing it to represent itself.[47] Here, it is important to distinguish between two kinds of representations Said discusses in *Orientalism*. In the book, he is concerned with how Westerners have politically represented[48]the Orient as well as how they have articulated figurative representations[49] of it in scholarly writings of the nineteenth and the twentieth centuries.

Said is careful to point out the power dynamics established through the constructed discourse of Orientalism itself, which have always privileged the superiority of the West and its culture over non-European cultures and peoples,[50] in both imperial policies and practices and literary depictions of the East and Orientals. In terms of the representations of the self and other in *Amnesty*, I am concerned with political rather than figurative representations of the detainees, and the ways the applicants' advocacy on their behalf inadvertently parallels and reinforces traditionally Orientalist ideas about Afghans. I also highlight ideas about Afghanistan as a particular place/space with a unique relationship to the norms against torture. My thesis is less concerned with the tropes, metaphors, idioms and stereotypes associated with representations of the East in literature. The human rights groups know very little about those detained and because of this constraint, I focus on the existent relationships of power and the politics of (legal) representation in the case (which might manifest themselves through neo-colonial language and legal practices that work to exclude those detained from the protections of the law, for example) that I contend characterize Canada's involvement in Afghanistan.

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[47] Edward W. Said, *Orientalism*. (New York: Vintage Books, 1979) at 21.
[48] Gyatri Chakravorty Spivak, "Can the Subaltern Speak?" *Marxism and the Interpretation of Culture* by C. Nelsen & L Grossberg, eds,(Macmillan Education: Basingstock 1988) at 72-73 online: http://www.mcgill.ca/files/crclaw-discourse/Can_the_subaltern_speak.pdf
[49] *Ibid.*
[50] Said, *supra* note 44 at 7.

How do the actors involved in the case represent themselves? How do they represent and perceive those detained and how do these representations relate to each actor's articulation of their own identity and Canadian identity more generally? These are some questions a focus on the political and legal representations of different actors in *Amnesty* might enable us to investigate.

View of Applicable Legal Norms

Torture is a practice traditionally prohibited by international law treaties like the *Third Geneva Convention*,[51] the *Covenant on Civil and Political Rights* (*CCPR*)[52] and the *Torture Convention*.[53] The Canadian Supreme Court has also ruled that, while it is generally unconstitutional to deport someone to be tortured under Section 7 of the *Charter*, deportation is possible if it is consistent with the principles of fundamental justice.[54] Deporting someone to torture constitutes a violation of Section 7 if there is a sufficient causal connection between Canadian government actions and the deportation. This includes deportations allowed for reasons of national security.[55] Deporting someone to face torture is arguably analogous to transferring someone to a government that may torture him or her.[56] In line with this argument, how can the Court's avoidance of the question of torture be explained in the AIC case? I answer this question by examining

[51] The International Committee of the Red Cross, "Convention (III) Relative to the Treatment of Prisoners of War," Article 3(1)(a) Geneva 12 August 1949 online: http://www.icrc.org/ihl.nsf/FULL/375?OpenDocument

[52] The United Nations, "International Covenant on Civil and Political Rights," Article 7 online: http://www.hrweb.org/legal/cpr.html

[53] The United Nations, "Convention Against Torture and Other Cruel and Inhumane Treatment and Punishment," online: http://www.hrweb.org/legal/cat.html

[54] *Manickavasagam Suresh v. The Minister of Citizenship and Immigration and the Attorney General of Canada* 2002 SCC 1, [2002] 1 S.C.R. 3, at para 129 208 D.L.R. (4th) 1 [*Suresh v. Canada]*.

[52] *Ibid* at para 54.

[56] *Amnesty International Canada and Chief of Defence Staff)*, 2007 FC 1147 C.R.R. 162 [2007] at 108 87 D.L.R. (4th) 35.

how each actor views torture generally and with reference to the Afghan transfers in particular. I examine how the judge, AIC and government lawyers view torture and how they present their *Charter* arguments in the case and the factums before the Court.

Space

In order to determine the relationship between Afghanistan, Canadian identity and torture, I examine how each actor understands Afghanistan as a space subject to Canadian intervention. More specifically, I determine how each actor conceptualizes sovereignty in and over Afghanistan. I relate this back to Canadian identity and Canada's mission there. A theoretical concept I use to develop my arguments about how the space of Afghanistan is understood in this case is Said's "imaginative." This term refers to a categorization process which enables one to classify familiar spaces as "ours" and unfamiliar ones as "theirs".[57] An imaginative is a category through which "something patently foreign and distant acquires, for one reason or another, a status more rather than less familiar. One tends to stop judging things either as completely novel or as completely known. A new category emerges that allows one to see new things, things seen for the first time, as versions of a previously known thing."[58] Imaginative geographies work because they are "constructions that fold distance into difference...they are fabrications..." that combine things that are real and things that are fictional.[59] These categories function by enabling us to understand things new to us because we can relate them to things we already know. I use this concept to elucidate how the Court and other actors conceive of Afghanistan as a space, how they relate to it, and the role they each understand Canada to play there.

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[57]Said, *supra* note 44 at 54.
[58] *Ibid* at 58.
[59] Gregory, *supra* note 28 at 17.

How does each actor understand Afghanistan as a space subject to Canadian intervention? This is the question I answer as I link each actor's ideas about Afghanistan as a space to norms about torture there. I determine how each actor conceptualizes Afghanistan, "as an effect produced by the operations [e.g. of the military and more legalistically, the Court more legalistically] that orient it, situate it, temporalize it, and make it function."[60] In other words, I try to understand not only the ideas they have about the country, but also how they act in Afghanistan and in what ways they affect it, so that it becomes (for them) what they conceive it to be.

I draw attention to each actor's ideas about sovereignty over Afghanistan because they are related to how each participant understands Canada's role in Afghanistan generally, as well as to how they construct it as a particular kind of space where certain norms apply. For example, it can be thought of as occupied, requiring Canadian assistance to become a certain kind of country. It might also be seen as a sovereign state capable of maintaining its own security and borders, or an Orientalized[61] space/place so foreign and distant, "with its own "national, cultural[...] boundaries and principles of internal cohesion"[62] that it is not possible to imagine that norms prohibiting torture apply there. Canadian claims to Afghanistan as a space can also be articulated in the stories each of the groups involved tells about it. This is illustrative of the argument that national identities and nations are formulated and contested through narratives. They are

[60] Michel de Certeau, *The Practice of Everyday Life* (Berkeley, CA: University of California Press, 1984) at 117.
[61] Said, *supra* note 44 at 67.
[62] *Ibid* at 40.

"narrations" which privilege certain groups over others and ultimately determine the future of disputed land and inform its history.[63]

Method

The approach I use to make my argument about the unresponsiveness of the different actors to torture is broadly grounded in cultural studies. This orientation allows me to draw on a variety of sources to make my own argument about the responses to torture in the AIC case. I read the AIC court case and the submissions of both the human rights organizations and the military as cultural texts providing me with a window into how each of the three dimensions I am interested in is articulated by the three participants. Specifically, I examine the applicants' and respondents' Memoranda of Fact and Law,[64] as well as those documents concerned with the Application of the *Charter*[65] and international law.[66] I also reference the Court judgment itself[67] along with affidavits by some of the organizations' representatives.[68] All of these documents are available on the BCCLA's website.[69] In my examination of each document, I concentrate on how the arguments presented reflect each actor's identities and perceived roles in the world, the

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[63] Said, *Culture and Imperialism* (New York, Vintage Books, 1993) at xiii.
[64] *Amnesty International Canada v. Canada (Chief of Defense Staff)*, 2008 FC 336, [2008] 4 F.C.R. 546, 292 D.L.R. (4th) 127*]*. "Applicants' Memorandum of Fact and Law Opposing the Motion to Strike." [AMFL].
[65] *Amnesty International Canada v. Canada (Minister of National Defence)*, 2008 FC 336, [2008] 4 F.C.R. 546, 292 D.L.R. (4th) 127*]*. "Applicants' Memorandum of Fact and Law: Re Motion to Determine the Application of the *Charter* to the Canadian Forces in Afghanistan,"[AMFL Re *Charter*].
[66] Greenwood Affidavit, *supra* note 12.
[67] *Amnesty supra* note 8.
[68] *Ibid* and Affidavit of Col. Stephen Noonan ("Noonan Affidavit"), sworn May 1 2007 RR at Tab 26, Affidavit of Yavar Hameed ("Hameed Affidavit") sworn March 7 2007 , Applicants' Motion Record, [henceforth AMR] Vol 1 Tab 4, Affidavit of Prof. Michael Byers, ("Byers Affidavit") sworn February 2007, AMR Vol 1.
[69] The British Columbia Civil Liberties Association, *Amnesty International Canada and British Columbia Civil Liberties Association v. Chief of Defence Staff for the Canadian Armed Forces, et al*, "Case Documents, " online: http://www.bccla.org/antiterrorissue/afghan.htm

strategies they adopt in their representations of the detainees and the narratives they rely on in their submissions before the Court.

The methodology I adopt as I make my arguments is in keeping with Binder and Weisberg's suggestion that legal texts can be read as literature.[70] Their research highlights the ways in which law can be viewed as a literary or cultural activity. They argue that law can be represented "as a practice of making various kinds of literary artifacts: interpretations, narratives, characters, rhetorical performances [....] and representations of the social world."[71] Their work contributes to the interdisciplinary field of law and literature, which is a movement focusing on the ways in which literary representations of law are analyzed (law in literature) as well as on understanding how literary criticisms and tropes can be used to "evaluate laws, legal institutions and legal processes.[...]" (law as literature).[72]

This approach to analyses of law highlights the breadth of sources I use, which makes it possible to think of the groups involved in the Afghan detainee case as actors with their own motivations for making certain claims about torture and the individuals detained. It relies on the insight that the body of law—(here this refers to the AIC case itself and the related documents)— cannot be divorced from narratives, because the narratives articulated in law inform it and give meaning to the world we live in.[73] This is why I borrow terms from literature and literary criticism to evaluate the *Amnesty*

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[70] Guyora Binder and Robert Weisberg, *Literary Criticisms of Law* (Princeton: Princeton University Press, 2000), ix.
[71] *Ibid.*
[72] *Ibid.*
[73] Robert Cover, "Violence and the Word" in *Narrative, Violence, and the Law*, ed. Martha Minow, Michael Ryan, and Austin Sarat (Ann Arbor: University of Michigan Press, 1995), 203-238.

International and related factums[74] and affidavits[75] to determine what a careful reading of them reveals about the acceptability of torture and the intervention in Afghanistan in general.

As part of this methodology, a major technique I take from law and literature is "misreading". This is a term Anne Orford borrows from Terry Threadgold, who argues that when legal scholars intentionally read "judgments...in ways that these texts were generally never meant to be read, they are making the genres 'mean' differently, that is, making the genres tell a different story."[76] Neither of these authors uses the technique to analyze a case, because Threadgold only briefly discusses it in a critical essay[77] and Orford only uses it to critique international legal texts on intervention.[78] By way of filling this methodological gap, I intend to "misread" the AIC case (and related documents) to show that they should be read as texts about identity, space and rights that demonstrate the mechanisms whereby legal and political indifference to torture is made possible and sustained.

As I misread these documents, I look for manifestations of the different factors and focus on what the language of the case and documents reveals about each of them. In terms of identity, I look for representations of each institution's own identity. For the human rights groups, I am interested in explanations about why they are advocates in the case and references to their own history and advocacy against torture in particular. I note

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[74]"AMFL, *supra* note 62.
[75] Affidavits, *supra* note 65.
[76] Terry Threadgold, Book Review of *Law and Literature Revised and Enlarged Edition* by Richard Posner." 23 *Melbourne University Law Journal* (1999) online: http://www.austlii.edu.au/au/journals/MULR/1999/32.html
[77] *Ibid.*
[78] Orford, *supra* note 23.

references to the military's mission in Afghanistan, their mandate and duties there. In my examination of the Court judgment, I analyze the processes the judge uses to limit the application of the *Charter* to those detained as manifestations of the Court's own identity as a legal institution. I also consider each actor's view of the detainees. What kinds of characteristics are these individuals accorded by each of the actors? Are they enemies, strangers, citizens, or victims of human rights abuses? How do these conceptualizations relate to each actor's understanding of their own mandate in Canada and in Afghanistan and towards Canadians and Afghans respectively?

As for norms concerning torture, I look for references to the international treaties (e.g. the *Convention Against Torture* and the *Geneva Conventions*) and Canada's international obligations under them, as well as its obligations under the *Charter*. What arguments does each actor use to pinpoint or detract from Canada's responsibility towards the detainees, the Afghan government and Canadians in general? Which norms are highlighted? How are they tied to the actors' identities?

Concerning Afghanistan as space, I analyze references to Afghan sovereignty, independence, democracy, and responsibility for torture and how each actor articulates all of these factors. In addition, I take note of how each actor understands Canadian identity and its relationship to Canada's mission in Afghanistan and of the language they use to describe both of these concepts. How do these actors describe the space and geography of Afghanistan? How do they connect these concepts to torture and its prevalence there? Do they hold either Canada or Afghanistan responsible for the torture of detainees? How is responsibility (both for Afghanistan and for torture) articulated by each of the actors involved? These questions highlight the concepts I will be looking for as indicators of the

arguments each actor makes about their own and the Canadian responsibility for torture abroad. Relying on a broad range of legal sources and concepts enables me to examine each of the three factors I am interested in at once. I do this to deconstruct each actor's position in the case and associated documents. I then interpret their positions by emphasizing their response to the mistreatment of detainees with reference to the three factors.

Chapter Breakdown

This thesis is divided into three chapters that are in turn classified according to each of the concepts I have chosen to examine. In chapter 1, I examine each actor's articulations of identity. In chapter 2, I discuss the applicable norms on torture while in chapter 3 I consider the actors' ideas concerning Afghanistan as a particular kind of space. I conclude this thesis by discussing the interconnectedness of the three factors and highlighting some aspects of the detainee controversy that each of the actors involved left unaddressed.

CHAPTER 1: IDENTITY AND THE AFGHAN DETAINEE CONTROVERSY

Introduction

The Afghan detainee controversy and the Canadian government's inadequate response to it can be understood by examining how each of the actors involved in the *Amnesty* case articulate their own identity relative to the identity of those detained. In this chapter, I analyze the claims about the transfer of detainees to torture as they are made by the three different actors involved: Amnesty International Canada, the Canadian government and military and the Federal Court. I focus on how each actor expresses their identity and the identity of the detainees. I show that each of the groups engaged in the Afghan detainee controversy approaches the detention and transfer of these individuals from a perspective informed by their own identity, their ideology and worldview and the roles their representatives argue they are playing in the context of the detainee controversy. I investigate how each actor builds and reinforces their own identity through their representation of themselves and of the detainees whose treatment is at issue.

The first two sections of this chapter focus on how the human rights groups and Canadian government and military represent themselves before the Federal Court. In Section I, I discuss how AIC *et al.*'s identities as human rights groups help to explain their focus on their own activism concerning torture and the torture of detainees in particular. In Section II, I explore the ways in which the government and military's arguments about the transfer and detention of Afghans reflect their perceived role in

Afghanistan, specifically in terms of their argument that the war in Afghanistan represents an act of individual and collective self-defence for Canada As part of this, I emphasize how the CF's presence in Afghanistan is also predicated upon providing that country with security and assisting it in reconstruction and development, both of which are justifications the government and military representatives give for Canadian intervention there.

In Section III, I present an analysis of the Court case, demonstrating how the Court uses the detainees' Afghan citizenship to exclude them from rights under the *Charter*. In all three sections, I discuss each actor's particular relationship to the detainees in general by highlighting how the prisoners are represented. I conclude by reflecting on each actor's understanding of their own and the detainees' identities and end by alluding to how some actors conceive of the responsibilityfor torture, a theme I elaborate on more thoroughly in the second chapter.

I) The Applicants—Human Rights Activism and Identity in *Amnesty*

"Identities are [...] constituted within, not outside, representation."[1]

In February 2007, Amnesty International Canada (AIC) and the British Columbia Civil Liberties Association (BCCLA) published a news release about the application for judicial review they had filed before the Federal Court concerning the transfer of Afghan detainees to Afghan security forces at the behest of Canadian military personnel stationed

[1] Stuart Hall and Paul du Gay eds, *Questions of Cultural Identity* (London: Sage Publications Ltd, 1996) at 4.

in Afghanistan. In this document, they provide reasons why they argue the *Charter of Rights and Freedoms* should apply to those detained in Afghanistan. According to the applicants, the CF are bound by the *Charter* and international human rights,[2] and the Arrangement entered into between Canada and Afghanistan does not offer detainees sufficient protection from risks of torture.[3] This is the same argument the applicants make in their submissions before the Court.[4]

From 2007 onwards, the groups periodically published news releases summarizing the latest developments in *Amnesty International Canada v. Canada (Minister of National Defence)* On December 18 2008, Amnesty International released a statement concerning the Federal Court of Appeal decision earlier that March deciding that the *Charter* does not apply to Afghan detainees imprisoned by Afghan police.[5] A year later, it reported that the Supreme Court dismissed the applicants' leave to appeal the case, which represented a "setback to protections of prisoners everywhere."[6] In September 2010, the human rights groups reported on the resumption of the inquiry into the detainee controversy by the MPCC[7] and another update notified the public of the end

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[2]British Columbia Civil Liberties Association, News Release, "Detainees in Afghanistan Must Not Face Torture say rights groups in a call for judicial review" (21 February 2007) online: http://www.bccla.org/othercontent/07Afghandetainees.pdf

[3] *Ibid.*

[4] *Amnesty International Canada v. Canada (Chief of the Defence Staff) (F.C.)*, 2008 FC 336, [2008] 4 F.C.R. 546 at at *para* 7-10.

[5]British Columbia Civil Liberties Association (BCCLA), News Release, "A Set-Back for Human Rights Protection: Federal Court of Appeal Rules in Afghan Prison Case,"(18 December 2008) online: http://www.bccla.org/pressreleases/08afghan_prisoner.pdf

[6]BCCLA, News Release, "Decision by the Supreme Court to dismiss leave to appeal Afghanistan prisoners' case puts protection in limbo" (21 May 2009) online: http://www.bccla.org/pressreleases/09Afghan_Supremee_Court.pdf.

[7] BCCLA, News Release, ("Commission to Resume Inquiry into Transfer to Torture", (7 September 2010) online: http://www.bccla.org/pressreleases/10MPCC_release.pdf http://www.amnesty.ca/resource_centre/news/view.php?load=arcview&article=5735&c=Resource+Centre+News

of witness testimony concerning the transfers.[8] In addition to keeping the Canadian public updated on the developments of the detainee transfer controversy, these media releases provide some indication of both Amnesty *et al.*'s argument in the case as well as their image of themselves and Canada that they present before the Canadian public.

The human rights groups represent an image of Canada that corresponds to their view of the country's role in the world. In his commentary on the Federal Court of Appeal's ruling on the case, Alex Neve, AIC's Secretary General, states: "Canada has long stood for global leadership in human rights protection. But with the government's position on this crucial human rights issue, endorsed yesterday by the Court of Appeal, Canada is no longer a champion and increasingly a laggard."[9] This depiction employs an image of Canada as a defender of human rights and uses it strategically to suggest that the Supreme Court decision has harmed Canada's world image as a country concerned with the preservation of rights. These claims reinforce the human rights groups' identity as organizations with an ideological focus on the defence of human rights, particularly those related to torture.

The Application

In a decision preceding the applicants' memorandum analyzed here, the Federal Court ruled in favour of granting the human rights organizations standing to bring the application before the Court.[10] Whether or not a group has public interest standing with

[8] Amnesty International Canada, News Release, "Military Police Commission to Hear Key Witnesses in Torture Hearings,"(26 November 2010) online: http://www.bccla.org/pressreleases/10MPCC.pdf.
[9] British Columbia Civil Liberties Association, *supra* note 5.
[10] *Amnesty International Canada and Chief of Defence Staff)*, 2007 FC 1147 C.R.R. 162 [2007] 87 D.L.R. (4th) 35.

respect to a legal issue is determined by *The Federal Courts Act*, which necessitates that any applications for judicial review must be submitted "by anyone directly affected" by the matter for which they ask relief.[11] Both the military and the human rights groups agree that the applicants are not directly affected by the CF's actions in Afghanistan. However, AIC *et al.* contend that they easily satisfy the tripartite test for public interest standing because they address 1) whether there is a serious issue to be tried 2) whether they have a genuine interest in the matter and 3) whether there is another reasonable and effective way to bring the issue before the Court.[12] The Court notes that the respondents agree that the applicants do have a genuine interest in resolving the issue in question.[13] Because of these legal stipulations therefore, the applicants must necessarily provide an account of their own identity and interest in torture in order to meet the requirements for standing.

AIC *et al.* submitted a memorandum presenting the arguments that are the basis of their application before the Court, which concerns the actions of the Canadian Forces in Afghanistan—specifically Canada's treatment of captured Afghan detainees and their transfer to torture by Afghan authorities. They present the reasons why they believe the Court should apply the protections of the *Canadian Charter of Rights and Freedoms* to the individuals detained by Afghan police in Afghanistan.[14]

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[11] *Ibid* at para 38.
[12] *Amnesty International Canada v. Canada (Minister of National Defence)*, 2008 FC 336, [2008] 4 F.C.R. 546, 292 D.L.R. (4th) 127]. "Applicants' Memorandum of Fact and Law Opposing the Motion to Strike"at para 36 [AMFL].
[13] *Ibid* at para 39-41.
[14] *Ibid* at paras 1-6.

AIC *et al.* begin by giving a brief overview of the actions of the Canadian mission in Afghanistan,[15] the detention of individuals there at the behest of the military[16] and the risks of torture and abuse in Afghan custody.[17] They present their account of the military's arguments, which consist of the claim that "any risk of torture is irrelevant because it is plain and obvious that Canadian law cannot apply to the CF acting abroad."[18] AIC *et al.* argue that Canadian courts should have jurisdiction in situations where fundamental human rights are at risk. Deploying the CF in Afghanistan and allowing them to "exercise coercive power in depriving individuals of their liberty" effectively brings the detainees under Canadian control and within Canadian jurisdiction.[19] Based on this, the applicants ask for *Charter* relief in respect of "unnamed individuals in Afghanistan who are detained by the CF."[20] They claim that "[t]he detainees are unknown because the Respondents keep their names secret,"[21] and that requests by Canadian lawyers for information about and instructions from the detainees were denied by the Commander of the Armed Forces.[22] Those detained are allegedly being tortured[23] as a "consequence of [the Canadian government's] actions".[24] The human rights organizations are concerned with the fact that the military denies the detainees rights such as access to legal counsel while they are in detention.[25]

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[15] *Ibid* at para 13-17.
[16] *Ibid* at para 19-22.
[17] *Ibid* at para 23-27.
[18] *Ibid* at para 2.
[19] *Ibid* at para 3.
[20] *Ibid* at para 11.
[21] *Ibid.*
[22] *Ibid.*
[23] *Ibid* at para 83.
[24] *Ibid* at para 71.
[25] *Ibid* at para 79-81.

Identity, Human Rights and Claims about Torture

The rights organizations' concern with detainee transfers in this instance is especially related to their identities as human rights groups that advocate against torture and promote the preservation of human rights. AIC *et al.* acknowledge that although their own *Charter* rights are not violated, they "seek standing in the interests of those whose rights are directly affected and who, denied legal counsel, have no foreseeable means of accessing the Court"[26] because their detention makes it impossible for them to seek *Charter* redress on their own.[27] This implies that the applicants inadvertently make themselves the direct advocates on behalf of those detained, representing them because they are unable to represent themselves, they are held incommunicado, their identities are unknown and they have no access to legal counsel.[28] The applicants claim *Charter* rights for those detained based on what they argue are circumstances similar to jurisprudence involving the writ of *habeas corpus*, which has historically been granted to individuals who are detained and cannot seek legal relief for themselves because their detention prohibits them from personally accessing the courts.[29] The applicants rely on this argument in an attempt to convince the Court to allow them to advocate on behalf of those detained.

The claims the rights groups make about those detained are reflective of these organizations' own identities. As noted above, the organizations are not to blame for the lack of information about the detainees. However, the fact that they advocate on behalf of

[26] *Ibid* at para 45.
[27] *Ibid* at para 35.
[28] *Ibid* at para 41.
[29] *Ibid* at para 48.

unknown individuals affects the structure of their arguments and means they have to engage in necessary representational processes which rely on representation techniques similar to those employed by traditional Orientalists. This unintentionally but necessarily undermines their claims on behalf of those detained.

Said elaborates on the relationship between identity and cultural representations of the Other in *Orientalism.* In this text, he argues that Orientalists rely on representations of the Orient, since they make it speak, describe it and render its mysteries plain for their audiences. "[Orientalists are] never concerned with the Orient except as the first cause of what [they] sa[y]." This is possible because of the assumption that "if the Orient could represent itself, it would; since it cannot, the representation does the job for the West."[30] Orientalism is not only a discourse concerned with ideas about, and representations of the Orient, its regions and its people. It is also about Europe and how "European culture gained its strength and identity by setting itself off against the Orient as a sort of surrogate and underground self."[31] In addition to being about representations of the Orient, Orientalism, therefore, is also about the West and its ideas of itself as compared to an Other that is its "complementary opposite".[32]

The inadvertent structure of AIC's arguments about the torture of detainees in Afghanistan that the applicants have to rely on in the case is partly due to the fact that they are litigants taking part in the Canadian legal system. As a result of this, they have to make advocacy claims while at the same time negotiating the constraints associated with the fact that they do not have any information or access to those detained. The set up of

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[30]Edward W. Said, *Orientalism.* (New York: Vintage Books, 1979) at 21.
[31] *Ibid* at 3.
[32]*Ibid* at 58.

their arguments inevitably rely on representation techniques suggestive of those Orientalists traditionally make about the Orient because in both cases, "Others" are viewed against the backdrop of the authors' own identities. The structure and organization of Amnesty's contentions about the detainees in this instance are comparable to Orientalist depictions of the East because the claims Amnesty *et al.* make about those detained reflect and bolster their own identity as human rights organizations.

In the judgment, the detainees cannot represent themselves since the military "holds them incommunicado [and] without access to legal counsel."[33] The applicants therefore are not to blame for the detainees' absence from the proceedings of their own cases, advocating on their behalf and for their rights falls on Amnesty *et al* because of the organization's own interest in torture. Examining both the legal and symbolic representation of detainees is necessary in this instance, not only because the human rights groups advocate on behalf of others before the Court, but also because doing so reveals how representation is connected to the human rights organizations' identities. The structure of the case itself, the fact that they are forced to advocate on behalf of the detainees in a certain way using certain conventional ideas about human rights advocacy and Afghanistan specifically and their—unintentional—appeal to specific (power) relationships between themselves as human rights advocates, Canada and Afghanistan, are all reminiscent of typical Orientalist representational strategies of the East.

The applicants begin their memo on the facts of the case by introducing themselves to the Court. AIC describes itself as an organization that is "part of a worldwide movement for human rights" and goes on to state that "[o]ne of its foremost

[33] AMFL, *supra* note 12.

goals is the eradication of torture."[34] Similarly, the BCCLA has as its primary goal the preservation of democratic values and civil liberties. This organization has lobbied for the creation of a *Prevention of Torture Act*, which is a document designed "[...] to keep Canadians and foreign nationals free from torture in any matter in which Canada has jurisdiction or influence."[35] Both groups have also been advocating for the humane treatment of Afghan detainees since Canada's deployment in Afghanistan.[36]

This brief introduction would not have been necessary if the case had been brought forward by an individual claiming *Charter* rights. However, here, it is expected because, as an introduction, it reinforces the organizations' credibility as human rights groups with particular expertise in the human rights field, especially concerning torture. This shows they are legally competent enough to advocate on behalf of the detainees; it bolsters their claim to standing by highlighting their experiences advocating for the rights they argue are violated. The claims AIC *et al.* make about themselves by way of

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[34] *Ibid* at para 7
[35] *Ibid* at para 8
[36] *Ibid* at para 9 It should be noted that the majority of the arguments I make in this section are only focused on and limited to Amnesty International and its own advocacy in the case I examined Alex Neve's affidavit before the Court rather than the testimonies of BCCLA representatives even though this organization is a principle party in the case as well. I note that that organization's Executive Director, Murray Mollard also testified in the case, however, I did not consider the substance and arguments presented in his Affidavit because of the limited scope of my research There are simply too many documents to consider in an examination of the *Amnesty* case, including the Federal Court case itself and the numerous affidavits presented by each side, along with both the human rights' groups and the military's own facta and memoranda This is in addition to the sources I had to rely on to ground my project in theory and method. I simply had to limit the number of documents I had to consider in a way that I felt was manageable and fair enough as to allow me a comprehensive view of the variations of each side's own arguments This is why I elected to consider Alex Neve's affidavit over Murray's Furthermore, I chose to focus on the affidavits of Hameed and Byers because they referenced the international norms on torture specifically, which I argue are factors detrimental to understanding torture in Afghanistan In this sense therefore, my examination of the relevant documents is limited to the conceptual focus I chose to use here. I am indebted to The BCCLA's Grace Pastine especially for providing me with many of the government's own investigative reports released throughout the controversy and I am thankful for the talk she presented at Carleton on February 3rd, 2011 on government accountability and torture, the points she made at the time enabled me to think more critically and insightfully about the controversy and the constraints of human rights advocacy in general

introduction also allow them to continue being the groups they were meant to be and to carry on in their defence of and advocacy for human rights.

The applicants also submitted an affidavit by Secretary General of Amnesty International Canada, Alex Neve. The Secretary General introduces himself to the Court by describing his professional expertise and human rights work with AI and AIC.[37] He describes AIC's view of torture[38] and its advocacy against it at the policy level, which includes its yearly evaluations of Canada's compliance with the UN's *Convention Against Torture* (*CAT*) and the *International Covenant on Civil and Political Rights* (*ICCPR*).[39] The document also addresses AIC's work against the practice judicially[40] and at the grassroots level.[41]

Neve also spends part of his affidavit describing his own advocacy as a representative of AIC against the transfer of detainees to Afghan authorities. He sent letters to the Minister of National Defence when news of the transfers first made headlines, expressing his concern about CF practices in Afghanistan, including the arrest and detention of Afghans and their transfer into the custody of American, Afghan or other forces, who were likely to torture them.[42] He ends his affidavit by stating that AIC's commitment, advocacy and research on torture make it especially well-suited to bring this issue before a Canadian court.[43]

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[37] Affidavit of Alex Neve ("Neve Affidavit") sworn August 29 2007 at *para* 8-10 Applicants' Motion Record ("AMR") Vol 1, Tab 1.
[38] *Ibid* at para 11-12.
[39] *Ibid* at para 13.
[40] *Ibid* at para 14-16.
[41] *Ibid* at para 17.
[42] *Ibid* at para 19-24.
n[43] *Ibid* at para 48.

These examples demonstrate that the group's history and the work of its human rights representatives matter here because they enable it to make a credible claim for standing on behalf of those detained. They also highlight that what is of interest to Amnesty and its representatives is the torture of detainees in particular. Amnesty's focus on the right to be free from torture means that it campaigns chiefly against civil and political rights violations rather than infringements of socio-economic rights like the right to health care or education. This is illustrative of the narrow and arguably restrictive conception of rights Amnesty adopts, which means that its arguments are based primarily in first-generation rights claims. Arguably, AIC would be less interested in this case if it involved third-generation rights, which include claims to the right to national self-determination or second-generation claims for food, water or housing for example, which might be particularly applicable to Afghanistan in light of Canada's intervention there.

The detainees unintentionally become hypothetical characters for the organization representing them precisely because they are being represented and are not actual parties in their own case. Amnesty *et al.* can use this case to bring attention to the issue of torture, and its prevalence in different contexts today and to highlight government complicity in it worldwide. The claims that AIC make on behalf of those detained become about what is happening to them and the violations they are suffering. Their ordeal thus justifies the human rights groups' advocacy on their behalf. The rights groups representation techniques parallel typical Orientalist claims about the East, because the human rights groups' arguments reinforce their own identities and justify their advocacy

[43] *Ibid* at para 48-49.

against torture, rather than being concerned exclusively with the detainees and their articulations of their own suffering.

The focus on torture in this instance also explains why the human rights groups insist that it cannot be that Canadian courts have no supervisory powers over the actions of the military abroad.[44] The military is culpable because"[t]he CF possess a wide discretion" [45] over what happens to detainees: it can detain[46] or interrogate them.[47] The Canadian Commander of Task Force Afghanistan is responsible for deciding whether the detainees should be transferred or released.[48] Holding military officials like the Commander accountable is also part of AIC's mandate as a human rights organization. One of its goals is exposing human rights violations by governments and others and pressuring them to stop human rights abuses[49] and the applicants' arguments in the *Amnesty* case are consistent with this objective.

The applicants point to the fact that the Technical Arrangements signed between Canada and Afghanistan do not include provisions "that would require Canada to leave Afghanistan in the event it was invited to do so[....]"[50] and argue that the Canadian military has invaded the country in order to overthrow the Taliban government.[51] However, despite this, AIC does not challenge the Canadian government's political decision to deploy troops and intervene in Afghanistan. In fact, in the document

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[44] AMFL, *supra* note 12 at *para* 3.
[45] *Ibid* at para 20.
[46] *Ibid.*
[47] *Ibid* at para 22.
[48] *Ibid.*
[49] Amnesty International Canada. "What We Are, "online: Amnesty International Canada http://www.amnesty.ca/about/amnestys_mission/
[50] AMFL, *supra* note 12 at para 17.
[51] "Applicants' Memorandum of Fact and Law: Re Motion to Determine the Application of the *Charter* to the Canadian Forces in Afghanistan," at para 33 [AMFL Re *Charter*].

summarizing the Court's reasoning for allowing the application to proceed, the judge notes that the applicants themselves have argued that "the application for judicial review does not challenge any matter of "high policy" such as Canada's decision to deploy in Afghanistan."[52] Rather, they contend that Canadian courts can decide on this issue because the application concerns individuals whose liberty and security of person are affected.[53] Although they do not intend it, and are largely adopting these techniques because of the circumstances of the detainees' own detention, which are imposed by the military, the human rights groups are engaging in what I call self-serving, identity-reinforcing advocacy techniques, which are aimed at convincing the Court of the arguments they make concerning the detainees.

Detainee Identity and Claims for Human Rights

While Amnesty's own identity as a human rights group is central to its arguments about torture, the identity of the detainees as Afghans remains secondary to the rights claims undertaken on their behalf. AIC *et al* disagree with the respondents' interpretation of Supreme Court's judgment in *R. v. Hape*, in which, according to the applicants, the majority opinion ruled that the international legal principle of the comity of nations, which includes the respect for another country's sovereign equality, ends when there are clear violations of international law and human rights.[54] Amnesty argues that Afghanistan

[52] *Amnesty International Canada v. Canada (Minister of National Defence) supra* note 10 at *para* 124.
[53] *Ibid* at para 124.
[54] AMFL, *supra* note 12 at para 59.

has "effectively consented to the operation of Canadian jurisdiction within its territory, including [...] the state monopoly on the use of coercive power within its territory."[55]

This claim counters the military's argument that the *Charter* cannot apply to the CF's actions abroad[56] and implies that Canadian *Charter* rights should apply to Afghan citizens. This is consistent with two of Amnesty's core values, namely, its insistence on defending the human rights of everyone everywhere, regardless of "race, sex, sexual orientation, religion, ethnicity, political or other opinions, or national or social origin[...] and the universality of human right".[57]

Stressing that human rights are universal reinforces the idea that it does not matter who the detainees are. Their humanity alone is enough to claim that they should be granted rights and should not be subjected to torture. The universal vocabulary of rights used here is part of a secular concept concerned with what it means to be truly human,[58] which "promotes an unduly abstract idea about [those detained]".[59] This language of rights "exacts a cost, a loss of awareness of the unprecedented and plastic nature of [the detainees'] experience[s]."[60] It generalizes claims about them to the extent that it becomes unnecessary to know them as complex individuals with identities, names, personal histories and reasons for being in Afghanistan and for being captured and detained there. Framing the issue in terms of the universal rights the detainees should

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[55] *Ibid* at para 62.
[56] *Ibid* at para 2.
[57] Amnesty International Canada. "Core Values "online: http://www.amnesty.ca/about/amnestys_mission/core_values/
[58] Talal Asad. "On Torture or Cruel and Inhuman, and Degrading Treatment" *Social Research* 62 (Winter 1996) at 1082.
[59] David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism*. (Princeton: Princeton University Press, 2005) at 13.
[60] David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism*. (Princeton: Princeton University Press, 2005) at 14.

have is strategic but it also means that the specific claims the individuals detained would make on their own behalf if they could represent themselves are less important in this instance. In order to claim rights for them, it suffices to know that they are humans suffering cruel treatment. This is another way in which the human rights groups' identification processes become part of the self-serving identity-reinforcing identification strategies that they have to resort to because of the particular circumstances surrounding the claims they make.

The rights groups demand rights on behalf of those detained by employing an abstract understanding of the rights in question, which means that they can claim them without referring to the circumstances that require them in the first place. The torture practices that are contested in *Amnesty* serve as "cross-cultural [criteria] for making moral and legal judgments about pain and suffering [but are] given much of [their] operative sense historically and culturally."[61]Here, it is not enough to claim—as the human rights groups do— that Afghans are denied civil and political rights and tortured. These arguments must be made with reference to the context giving rise to the rights being claimed on behalf of the Afghan detainees in this instance. For example, asking why Afghans are being denied rights in this case and who stands to gain from the inapplicability of rights to them might lead to answers that might provide some insight into the detainee controversy. This may not only enable us to think about and assign responsibility for the violence inflicted on those detained, but also to go beyond the necessarily limited advocacy frameworks human rights activists adopt in our attempts to understand how and why the nonchalant attitude to torture presists.

[61] Asad *supra* note 58 at 1082.

AIC and the Constraints of Human Rights Advocacy

To reiterate, the applicants are faced with a number of constraints in terms of the advocacy strategies they adopt, especially those concerned with representing detained Afghans. It is very difficult to advocate on behalf of individuals who are unknown and disappeared in the same way the Afghan detainees are in this case. As a result, I do not think that they could have approached the *Amnesty* case without relying on at least some the representational strategies that they did, simply because they had to advocate within the constraints of the adversarial legal system, which necessitates representations before Courts. The fact that these detainees are invisible is because the government insists that the information concerning their detention remains secret. The applicants have to advocate on behalf of those detained, otherwise they would not have a case to bring before the Court to begin with. In addition, *Amnesty* itself is a case based on impact litigation, which is a process that typically targets a particular issue in order to raise public awareness about it. It is therefore in their benefit to pursue this case because it is concerns the issue of torture.[62] Importantly, their advocacy on behalf of the detainees has opened up and allowed for public debate concerning Canada's role in the transfers to torture and the military's intervention there.

That the particularities concerning the detainees own detention end up being lost in the litigation process is in large part a consequence of the fact that Amnesty *et al* are forced to present the case within the confines of the adversarial legal system currently in place in Canada. One of the disadvantages of such a system remains the fact that even

[62] *Supra* note 38, Grace Pastine's Talk on Accountability and Torture, 3 February 2011.

individuals who can represent themselves are ultimately marginalized in the claims they bring before the courts.[63]

II) The Respondents— Canadian Military Identity and the Intervention in Afghanistan

Government and CF representatives counter the human rights' groups' arguments, which implicate them in the transfer of detainees to torture. The military's own claims reinforce its identity as a security-oriented institution created to protect Canada against external threats. In particular, the military documents focus on Canadian security as well as the security of Afghanistan, which in turn highlights Canada's defensive role as part of the United States' war on terrorism. This war is especially important, not only because Canada's intervention in the war on Afghanistan began as a result of it, but also because the War on Terror affects the way the Canadian military handles and treats detainees. The military and government officials who represent these institutions before the Court and the Canadian public are unfamiliar with those detained and treat them as threats. This explains the dearth of information known about them both to the media and the human rights groups who defend their rights before the Court.

The military's press releases concerning the Afghan detainee controversy are few. Reports of detainee abuse begin in February, 2007, with an announcement that the Canadian Forces National Investigation Service (CFNIS) had begun investigating

[63] Nils Christie. "Conflicts as Property," (January 1977) BJ Crim 1.

allegations that Afghan detainees were physically abused by members of the CF in the spring of 2006. This came after a complaint was lodged with the MPCC concerning the possible mistreatment of unidentified Afghans.[64] A few weeks later, the government announced names of the members of the Board of Inquiry responsible for the investigation.[65]

In April 2007, Gordon O'Connor, the Minister of National Defense at the time, announced that a second Arrangement had been signed between the governments of Canada and Afghanistan according to which Afghan officials— the National Directorate of Security (NDS) in particular—would allow Canadian government officials full access to Afghan detention facilities so that they would be able to assess the conditions of those detained by the Afghan security forces. This release came as a response to allegations of detainee mistreatment in the media earlier that month.[66]

Following this, in a release published at the beginning of May 2007, Lieutenant-General W.J. Natynczyk, Vice Chief of the Defence Staff, denied allegations that an unnamed Afghan was captured by CF personnel and transferred into the custody of the Afghan National Police (ANP) and subsequently tortured. According to the Lieutenant-General, members of the CF did capture this individual but let him go after questioning him and determining that he was not a threat. The ANP arrested him after his release. However, CF members visited the local police station later and secured his transfer to

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[64] Department of National Defence (DND), News Release, "Investigation Into Allegations of Detainee Abuse in Afghanistan," (2007) online: http://www.forces.gc.ca/site/news-nouvelles/news-nouvelles-eng.asp?cat=00&id=2189>

[65] *Ibid,* News Release, "Board of Inquiry members confirmed to investigate the treatment and processing of certain detainees," (2007) online: http://www.forces.gc.ca/site/news-nouvelles/news-nouvelles-eng.asp?cat=00&id=2199

[66] Department of National Defence, News Release, "Statement by the Minister of National Defense," (2007) online: http://www.forces.gc.ca/site/news-nouvelles/news-nouvelles-eng.asp?cat=00&id=2264

another branch of the ANP upon noticing injuries that had not been there before.[67] It is notable that the captured individual is unnamed and that despite the high possibility of his having been abused by the ANP, the military did not keep him in their own custody and transferred him to another branch of the same institution that in all likelihood abused him the first time and gave the CF reason to transfer him to begin with.

After the 2007 news releases, there are no press releases concerning possible detainee abuse and the government's response to it. This dearth of information on the issue is significant because it suggests that, aside from journalistic reports about the controversy in national papers, the government does not intend to keep the public informed on what might be important developments regarding its role in the Afghan detainee controversy. The government is only prepared to assure Canadians that it is careful of the information it releases to the public because it intends to keep both its own and international troops safe from being exposed to insurgents that might threaten them and their objectives in Afghanistan.

The CF and Articulations of Canadian Identity

After introducing herself to the Court and giving a brief summary of the conditions in Afghanistan, Colleen Swords, Assistant to the Deputy Minister at DFAIT, begins describing Canada's role in the country, noting that "Canada is bringing real changes in a society long ravaged by strife" and that "[t]he role of Canada and its allies is

[67]Department of National Defence, News Release, "Statement by Lieutenant-General W.J. Natynczyk, Vice Chief of the Defence Staff," Lieutenant-General W.J. Natynczyk,(2007) online:, http://www.forces.gc.ca/site/news-nouvelles/news-nouvelles-eng.asp?cat=00&id=2273

critical to addressing such security threats and thus enabling the economic development of Afghan society."[68] Afghanistan's security and economic development[69] are the reasons Canadian and other international troops are there. From a brief history of the international presence in the country, it becomes clear that the UN Security Council has been concerned with Afghanistan, most especially with regard to its government's support for terrorism as it has traditionally been espoused by the Taliban.[70]

Swords notes that the *Afghan Compact*, an agreement signed between the Afghan government and all other members of the international community, aims to accomplish goals in three different areas: security, governance (including human rights and the maintenance of the rule of law) and reconstruction and development.[71] Security is especially important to the *Compact* because the United Nations Security Council (the UNSC) is particularly concerned with "the violent and terrorist activities by the Taliban and Al Qaida..."[72] Swords follows this up with citations from a NATO statement affirming that "[t]here can be no security in Afghanistan without development and no development without security."[73]

Drawing attention to Canada's commitment to Afghan security is consistent with the Canadian military's objectives and the resources and expertise Canada has decided to commit to Afghanistan and the mission there; the Canadian government has set out six main priorities it intends to focus on as part of the Canadian military's mission in

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[68] Affidavit of Colleen Swords ("Swords Affidavit") at para 4 sworn May 1 2007, Motion Records of the Respondents to the Main Application ('RR') Tab 25.
[69] *Ibid* at paras 13-18
[70] *Ibid* at para 4.
[71] *Ibid* at para 9.
[72] *Ibid* at para 10.
[73] *Ibid*, Riga Summit Declaration at para 12.

Afghanistan and the first of these is security [74] Canada's military intends "to help the Afghan government strengthen the Afghan National Army (ANA)'s ability to conduct operations and sustain a more secure environment, and increase the ANP's ability to promote law and order in the province of Kandahar "[75] In addition, linking development to security and vice versa reaffirms that neither can exist without the other, such that military operations become indispensable to development This means that military presence in Afghanistan is a requirement for anything else that has to do with reconstruction efforts Swords' testimony also indicates that Afghan security forces themselves are incapable of maintaining law and order in their own territory

Using the security argument enables the international community to establish a particular relationship between itself, Afghanistan and the Afghan people, which is not a political relationship characterized by a formal relationship of representation or control [76] The discourse on security in this instance allows for the creation of a "more hierarchical order" according to which institutions and more powerful states (here NATO or Canada, for example) can act on behalf of other states and intervene in their affairs more freely As a result the people of Afghanistan ultimately have little control over the agents whose aim is their own empowerment [77] Claiming that Afghanistan has sovereignty in this instance is a strategic and selective exercise that does little besides reaffirming the international community's aims and commitments to the country because the degree to

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[74] Canada's Engagement in Afghanistan "Training and Monitoring the Afghan National Security Forces" (2008-2011) online http //www afghanistan gc ca/canada-afghanistan/priorities-priorites/index aspx?lang=eng>

[75] *Ibid*

[76] Tara MacCormack, "Power and agency in the human security framework," *Cambridge Review of International Studies*, (2008) 21 124

[77] *Ibid*

which Afghanistan is sovereign is debatable in this context. I elaborate on these arguments more thoroughly in the third chapter.

The reasons the military gives for intervening in Afghanistan compete against those the human rights groups hint at that, justify the need for the *Charter* there. The CF justify their presence in the country by arguing that their operations maintain Afghan security and assist Afghanistan in establishing its own security apparatuses. The human rights groups, on the other hand, require the applicability of the *Charter* because they assume that human rights guarantees are lacking in Afghanistan. Both of these claims form part of each group's self-serving identity-reinforcing strategies because they bolster the identity claims of their authors. They provide two different reasons for Canadian intervention in Afghanistan, which are in tension, but are nevertheless based on particular appeals to virtue that ultimately justify and necessitate both the military and the human rights groups' presence either as protectors of Afghans or as human rights defenders.

CF Identity and Canadian Security

Canada's presence in Afghanistan is predicated on its right to self-defence as it is recognized in Article 51 of the *UN Charter.* Two relevant United Nations documents, Resolutions 1368 and 1373—signed by member states following the attacks on the American World Trade Centre on September 11, 2001— both reaffirmed and recognized "the inherent right of individual and collective self-defense" of the affected states.[78] In another Resolution drafted in December 2001, "[t]he Security Council called for the establishment of an International Security Assistance Force (ISAF) to assist the Afghan

[78] Swords Affidavit *supra* note 66 at para 20.

Interim authority in the maintenance of security in Kabul and the surrounding areas." [79] ISAF member states have also been "authorized to take all necessary measures to fulfill its mandate, thereby authorizing the use of all necessary force by the ISAF military forces to carry out their mission."[80]

Accordingly, ISAF member states have been permitted to use force to assist Afghanistan in maintaining its own security. The passage above demonstrates that international security is also at stake. Afghanistan constitutes a threat to this security which in turn explains deploying an international armed force composed of various national militaries to deal with the threat that exists there.

As part of a NATO-formation, operating under the authority of the United Nations,[81] the International Security Assistance Force (ISAF) itself conforms to the Canadian mission's mandate in Afghanistan; "[i]ts primary objective is to help the Afghan government establish a stable and secure environment that will allow sustainable reconstruction, development, and good governance to take root and flourish."[82] ISAF's mandate therefore clearly includes maintaining Afghan security.

ISAF is considered part of the Canadian military, an institution whose purpose has traditionally been defending Canada from external threats. Canadian troops operating as part of ISAF are playing a defensive role, since their existence there depends on the fact that the country of Afghanistan represents a threat to international peace and security.[83] Designating the country a threat requires in turn the presence of international

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[79] *Ibid* at para 22.
[80] *Ibid.*
[81] *Amnesty supra* note 4 at 27.
[82] Canada's Engagement in Afghanistan "Canadian Forces Operations" (2008-2010) online: http://www.afghanistan.gc.ca/canada-afghanistan/approach-approche/cfo-ofc.aspx
[83] Swords Affidavit *supra* note 66 at para 22.

troops, because without these forces, Afghanistan itself is incapable of establishing "a safe and secure environment"[84]that would facilitate reconstruction.

The centrality of the security argument to the military's position and presence in Afghanistan points to the importance of that institution's own identity within the war in Afghanistan. Consequently, the military's claims about Afghan security reinforce its own security-oriented character and justify its presence in Afghanistan, regardless of the fact that Afghanistan might become more secure at the end of Canada's mission there.

The CF's mandate in Afghanistan also includes mounting security-related operations under the authority of the UN,[85] which are aimed at "establishing the level of security necessary to promote development," [including] "assisting local law enforcement authorities, training the Afghan military, participating in the stabilization and reconstruction activities of provincial reconstruction teams" and conducting combat operations when necessary.[86] This demonstrates that maintaining Afghan security (through both military operations and reconstruction efforts) and by extension, the security of other states and the troops deployed on their behalf, is one of the main concerns for both the Canadian government and the military. The military not only represents itself outside Canadian borders; it is also a representative of the Canadian government and its policies abroad, as well as the international community's commitments in Afghanistan. It is expected that Canada's military objectives for Afghanistan are in line with those established by DFAIT, since the Canadian government authorizes Canadian military conduct and decides where, how and under what circumstances the military will be deployed. The decision to deploy there is also

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[84] "Canadian Forces Operations" *supra* note 80.
[85] Affidavit of Col. Stephen Noonan ("Noonan Affidavit") at para 15, sworn May 1 2007 RR at Tab 26.
[86] *Ibid* at 16.

premised on the assumption that Canada is bringing order and security to an inherently chaotic place. The third chapter of this analysis addresses some of these assumptions in more detail. For now, it is enough to point out that the military's reconstruction projects in the country allude to a particular shift in Canadian military identity; Canada's defensive role and its involvement in the War on Terror are illustrative of a change in Canadian military objectives, which have traditionally been conceptualized in terms of the "classic middle power activity" of peacekeeping.[87] In Afghanistan, Canada's role is more masculine and its military is more assertive there, in its attempts at identifying and eliminating threats.

The CF and their View of the Afghan Detainees

The distinction is existent. It is based on a difference in methods of waging war and on different doctrines of decency in war. When combatants and non-combatants are practically identical among a people and savage or semi-savage peoples take advantage of this identity to effect ruses, surprises and massacres on the "regular" enemies, commanders must attack their problems in entrirely different ways from those in which they proceed against Western peoples. When a war is between "regular" troops and what are termed "irregular" troops, the mind must approach differently all matters of strategy and tactices, and necessarily also, matters of rules of war.[88]

How can the CF's detention policies pertaining to Afghans be explained? What do these policies reveal about how the military perceives those it detains? The CF are unfamiliar with the Afghans they capture and detain and this unfamiliarity is based upon

[87] Sherene H. Razack, Dark Threats and White Knights: The Somalia Affair, Peacekeeping and the New Imperialism (Toronto: University of Toronto Press, 2004) at 32.
[88] Elbridge Colby. "How to Fight Savage Tribes." (1927) 21 AJIL 279.

four constructed enemy identifiers, which are in turn established according to differences in ways these individuals fight in war compared to the military as an institution. The first of these indicators has to do with the ways in which these enemies are organized.[89] These groups' patterns of organization are different from the military's allegiance to a state-actor, like Canada.

In a section of his affidavit entitled "the Threat in Afghanistan," CF Colonel Steven Noonan points to the activities of those detained and immediately associates them with the threat the military is facing there, stating that "the activities of members and supporters of al- Qaeda and Taliban constitute the greatest threat to reconstruction and development of the economy and institutions of the democratically-elected government of Afghanistan."[90] Noonan follows this up by identifying these supporters by stating:"These individuals (referred to as the enemy)"[91]Identifying the groups the CF are fighting in Afghanistan as the enemy is possible because "[Afghan detainees] are defined by their membership in [...] collectivities,"[92] which in this case include the Taliban and other terrorist groups.

An organization like "al-Qaeda is part of a distributed network of loosely-articulated groups [...] operating in over forty countries, a network of networks with neither capital nor centre."[93] Accordingly, its members can exist anywhere, which makes it difficult to determine where they are and to anticipate what they will do. Understood from this perspective, this identifier explains why Noonan claims that these enemies "do

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[89] Christiane Wilke "Law's Enemies: Enemy Concepts in US Supreme Court Decisions" (2007) 40 Stud Law Polit Soc at 43.
[90] Noonan Affidavit at *supra* note 83 at para 12.
[91] *Ibid*
[92] Wilke *supra* note 87 at 44.
[93] Derek Gregory, *The Colonial Present: Afghanistan, Palestine, Iraq* (Malden, MA: Blackwell Publishing Ltd, 2004) at 50.

not conduct themselves as conventional military forces do."[94] According to the Canadian "statist view of warfare"[95] the CF are composed of armies belonging to their respective states. This assumption is premised on a "mutual recognition" of the enemy according to "organizational similarity and normative equality among belligerents." Comparatively, the terrorist groups the military identifies as its enemy are groups and have no allegiances to states.

Another indicator of enmity in this context is based on identifying detained Afghans with a particular shared ideology,[96] which in the case would correspond to Islamic fundamentalism. This ideology is characterized by engaging in the concept of jihad, which in the context of Afghanistan, can be understood "as an armed struggle to protect and defend the lands of Islam."[97] Jihad is associated with Afghanistan in particular because of the prevalence of groups of fighters there known as the mujahedeen there, since the Soviet invasion of the country in the late 1970s. Al-Qaeda was established to "carry forward an avowedly Islamist project,"[98] and the Taliban sought the removal of Afghanistan's conflicting warlords in the 1990s and the imposition of what they believed to be "radically purified Islam" to establish law and order in Afghanistan.[99] Both of these groups constitute a "threat" to the CF's initiatives in Afghanistan[100] because of their fundamentalist Islamist leanings. The military has no comparable fundamentalist ideological focus, except that which characterizes its allegiance to the Canadian state. This enables the military's representatives before the Court to argue that

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[94] Noonan Affidavit *supra* note 82 at 12.
[95] Wilke, *supra* note 87 at 45.
[96] *Ibid.*
[97] Gregory *supra* note 91 at 34.
[98] *Ibid* at 36.
[99] *Ibid.*
[100] Noonan Affidavit, *supra* note 83 at para 12.

international law does not apply to the Afghan detainees because they "do not meet the condition of conducting their operations in accordance with the laws and customs of war."[101] Both their organizational structure and their ideological inclinations have no organizational equivalents in the military because they adhere to a "statist" rather than an ideological "structuring mechanism of organized violence."[102]

Another identifier the CF employ to distinguish detained Afghans as enemies is the fact that they violate the laws of war. Christopher Greenwood, the military's expert on international law of armed conflict, states that the individuals the CF are fighting against are required to wear "a fixed distinctive sign"' such as would distinguish them from the civilian population.'[103] They do so because they wear no "distinctive uniform [and] blend[...] into Afghan society".[104]

The fourth criterion the CF use to identify the Afghans in question as enemies is based on their tendency to commit unpredictable, extremely violent acts.[105] The enemies Noonan describes engage in "bombings, executions, extortion and other activities"[106] that are so indiscriminate that they lead to civilian casualties.[107] These "enemies" have violated the conditions of war[108] because they operate in formations "that are incapable of conforming to such rules."[109]

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[101] Affidavit of Christopher Greenwood, ("Greenwood Affidavit") sworn August 14 2007, at para 40 Report Record of the Respondents to the Main Application [hereinafter RR] Vol 1, Tab 4.
[102] Wilke, *supra* note 87 at 45.
[103] Greenwood Affidavit *supra* note 98 at para 40.
[104] Noonan Affidavit, *supra* note 83 at para 27.
[105] Wilke *supra* note 87 at 45.
[106] *Ibid.*
[107] Noonan Affidavit *supra* note 83 at para 26.
[108] Greenwood Affidavit, *supra* note 98 at 40.
[109] Wilke, *supra* note 87 at 47.

Using these criteria, the CF is able to "produce the specific form of enmity"[110]it is fighting against in Afghanistan. Suspected individuals are thus "made to stand apart"[111] from CF members. These distinctions delineate these enemies as "different" from members of the armed forces, and mark them as "other" than CF members. This serves to "reveal the face of the other as other" because it brings them into relief[112] for the soldiers involved. Members of al-Qaeda become the military's "complementary opposite"[113] and are thus given "a mentality, a genealogy, an atmosphere [...] which allow [the military] to deal with and even see [them] as possessing regular characteristics."[114] This is a method that enables Canadian soldiers to control "what seems to be a threat to [their] established view of things,"[115] which in this case corresponds to conducing wars with other typical armed forces. However, the ideas CF members have about those detained are ultimately representations rather than "natural depictions"[116] of these individuals since the members of these threatening groups cannot represent themselves.

The military's national security logic explains the dearth of information about those detained, which works to absolve the government and military from their culpability in the detention and possible torture of Afghans. Those detained are held in places away from Canadian soil; no transparent, accessible records documenting their detention and abuse are available in Canada, either which makes it difficult for human rights groups, let alone those detained, to launch rights claims. The Canadian government is engaged in what I call intentional non-information; this is a process that obscures facts

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[110] *Ibid* at 43.
[111] Ibid.
[112] Gregory, *supra* note 91 at 50.
[113] Edward W. Said, *Orientalism* (New York: Vintage Books, 1979) at 58.
[114] *Ibid* at 42.
[115] Ibid at 59.
[116] Edward W. Said, *Orientalism* (New York: Vintage Books, 1979) at 21

by keeping government actions non-transparent and unaccounted for. This lack of information also prevents the Canadian public from holding its own government accountable for possible crimes being committed in the name of Canadians in a conflict zone abroad.

III) The Federal Court Judgment— Canadian Identity and the Extra-Territorial Application of the *Charter* to Afghan Detainees

> But law gives a vision depth of field, by placing one part of it in the highlight of insistent and immediate demand while casting another part in the shadow of the millenium. Law is that which licenses in blood certain transformations while authorizing others only by unanimous consent. Law is a force, like gravity, through which our worlds exercise an influence upon one another, a force that affects the courses of these worlds through normative space.[117]

In *Amnesty*, the Ottawa Federal Court determines if the *Charter* applies to the transfer and subsequent detention of Afghans by the CF. The judge decides on this issue by considering whether the *Charter* applies extraterritorially to the CF's conduct abroad— namely whether CF members can be held accountable under the *Charter* for transferring Afghans to be tortured. Mactavish J. adjudicates the matter by breaking it up into two questions. The first concerns whether or not the *Charter* applies to the detention of "non-Canadians" and their transfer to Afghan authorities.[118] The second question considers whether the *Charter* would nonetheless apply to the detainees if AIC *et al.*

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[117] Minow, Martha et al., eds., Robert Cover, "Nomos and Narrative," in Narrative, *Violence and the Law: The Essays of Robert Cover* at 207

[118] *Amnesty supra* note 4 at para 13 (1).

were capable of establishing that those detained would be subject to a substantial risk of torture if transferred into Afghan custody.[119]

Deciding to adjudicate on the CF's transfer policies only with reference to the applicability of the *Charter* has two main consequences in this instance. First, the detainees are marginalized in the judgment because their non-Canadian citizenship is used to place them outside the purview of (Canadian) law. Paradoxically, CF members' own Canadian citizenship has no bearing on whether or not the *Charter* applies to their conduct in Afghanistan. The second effect this has is that the judge avoids any serious deliberation on the question of the torture those detained are reportedly subjected to. Ultimately, the detainees are marginalized in a case concerning their own mistreatment.

(Non)Canadian Citizenship

By the end of the *Amnesty* judgment, the Court concludes "that while detainees held by the Canadian Forces in Afghanistan have the rights accorded to them under the Afghan Constitution and by international law [...] they do not have rights under the [*Charter*]."[120] Judge Mactavish arrives at this decision because she frames the issues under consideration in terms of the applicability of the *Charter*. At the beginning of her deliberation, Mactavish notes that "for the purposes of this motion, the Court is to limit consideration to the two jurisdictional questions[121] (discussed above). As a result of this limitation; her court can adjudicate the case because the application for review is "framed entirely in terms of the *Charter*."[122]

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[119] *Ibid* at para 13(2).
[120] *Ibid* at para 91.
[121] *Ibid* at para 15.
[122] *Ibid* at para 91.

The *Charter* framework the Court adopts here serves to limit the extent of its analysis and allows Mactavish J. to adjudicate the issues at hand only with reference to the *Charter*'s jurisdiction. To that end, she notes that the language of the *Charter* does not address its own territorial limits[123] and moves on to consider its extra-territorial jurisdiction in according with an earlier Supreme Court decision, *R. v. Hape.*[124] In this case, the higher court considered whether or not the actions of RCMP officers in the Turks and Caicos Islands violated Hape's rights under Section 8 of the *Charter*. Hape concerns "whether the *Charter* applied to extraterritorial law enforcement activities carried out by Canadian Police."[125]

According to Mactavish's reading of *Hape*, the Supreme Court "based [its] analysis on international law principles governing extra-territorial jurisdiction."[126] This explains why she notes that "[e]xtraterritorial jurisdiction is governed by international law, rather than being at the absolute discretion of individual states."[127] The reference to international law here enables the judge to use international jurisprudence to argue that jurisdiction "cannot be excised by a State outside its territory."[128] By referring to *Hape*, the judge understands jurisdiction to be administered by international law to the exclusion of the laws of particular states. This implies that the *Charter* does not apply in Afghanistan because it is not international law.

As for the applicable international legal principles, the judge observes that the *Hape* judgment determined that "Canadian law, including the *Charter* could only be

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[123] *Ibid* at para 106.
[124] *Ibid* at 113-116.
[125] *Ibid* at 112-113.
[126] *Ibid* at para 116.
[127] *Ibid* at para 122.
[128] *SS Lotus*, as cited in *Amnesty supra* note 5 at para 123.

enforced in another state with the consent of the other state."[129] The Court notes that "Canada is now conducting military operations with the consent of the Afghan government." Furthermore, the *Afghan Compact* (signed by Canada and Afghanistan) does not suggest that the country "has consented to the application of Canadian law[...] within Afghanistan."[130]

This argument enables the judge to contend that both Canada and Afghanistan have "identified international law[...] as the law governing the treatment of detainees in Canadian custody,"[131] which in turn implies that the *Charter* does not apply in Afghanistan. The judge goes even further, noting that the government of Afghanistan has not consented "to having Canadian *Charter Rights* conferred on its citizens, within its territory."[132] The judge does not differentiate between the applicability of laws (Canadian or otherwise) to the territory of Afghanistan and their application to Afghan detainees. This ties the application of laws to the territory of Afghanistan and employs the presence of the detainees on its soil to justify the inapplicability of *Charter* rights to them.

The only exception where Canadian laws apply to Afghans themselves and not to the country of Afghanistan is summarized in an Annex to the Technical Arrangements between Canada and Afghanistan. According to this document, all Canadian personnel will "be subject to the exclusive jurisdiction of their national authorities in respect of any criminal or disciplinary offences which may be committed by them."[133] Article 7 of the Annex "[...] excludes Afghan nationals from the definition of the "Canadian Personnel"

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[129] *Ibid* at para 127.
[130] *Ibid* at para 159.
[131] *Ibid* at para 162.
[132] *Ibid* at para 172.
[133] "Article 1.1 of Annex to the Technical Agreement", as cited in *Amnesty* at 168.

over whom Canadian criminal and disciplinary jurisdiction can be extended."[134] This means that Afghan citizens have no access to *Charter* protections because they are not Canadian personnel. Their citizenship thus determines the laws the judge believes apply to them because it serves to exclude them from rights protects under the *Charter*. While she clarifies here the laws that apply to Canadians in Afghanistan, Mactavish J. only mentions criminal proceedings without elaborating on how the *Charter* itself could or would apply. Her decision also remains unclear as to how Canadian laws can apply to the conduct of Canadian personnel, while the constitutionally-entrenched *Charter* cannot.

Her judgment further suggests that while "non-Canadian" citizens, like Afghan detainees are "accorded rights under their own constitution,"[135] Canadian military personnel are not subject to the *Charter*—and by extension their own constitution—because it does not apply to them.

Commentators on the case have noted that requiring an individual to be a Canadian citizen before granting him or her rights under the *Charter* would be in tension with the language of Section 7 of the *Charter* This Section is theoretically supposed to apply to everyone; it would also contravene Canada's commitments under international law, which remain in effect despite an individual's Canadian citizenship.[136] In this instance, the judge ignores the applicable laws; restricting the applicability of the *Charter* to Canadian personnel in Canada and prohibiting its application to Afghans abroad enables the judge to avoid considering and adjudicating on Canada's complicity in torture.

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[134] Article 7.1(b) of Annex to the Technical Agreement", as cited in *Amnesty* at *para* 169.
[135] *Amnesty* at para 2.
[136] Kent Roach, "The Supreme Court at the Bar of Politics": The Afghan Detainee and Omar Khadr Cases." (2010) 28 NJCL 115 *at* 134.

Torture and the *Charter* in *Amnesty:*

The judge's consideration of the possibility of torture in Afghanistan at the behest of the CF's actions there is limited in *Amnesty*. Before deliberating on anything, Mactavish J. states that "the Court is to limit its consideration to the jurisdictional questions identified [earlier in this section], no consideration is to be given[...]as to whether any of the *Charter* sections are actually engaged on the facts of the case".[137] This restriction enables the judge to circumscribe her judgment, limiting it to only determining the reach of *Charter* jurisdiction and the applicability of rights generally. Referring to the actual rights engaged might require her to decide on the possibility of torture in Afghanistan, which has occurred in the context of the CF's deployment there.

The respondents had previously argued that the Court could not make pronouncements on the Canadian government's conduct because "the exercise of prerogative power and matters of "high policy" [...] are generally not justiciable."[138] The Supreme Court had previously ruled that the *Charter* would apply to all decisions made by cabinet, including foreign policy and prerogative powers.[139] This argument implies that matters of high policy have suddenly become beyond the jurisdictional reach of the *Charter*, a move that relegates the transfer of detainees to torture to the realm of politics and makes it outside the purview of the Court.

The judge, for her part, decides that her Court can adjudicate the case because the issue is framed in terms of the extra-territorial jurisdiction of the *Charter*[140] and since her

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[137] *Amnesty supra* note 119 at para 14.
[138] *Ibid* at para 88.
[139] Roach, *supra* note 133 at 121.
[140] *Amnesty supra* note 4 at para 106.

reasoning is based almost entirely on the Supreme Court's decision concerning extra-territorial jurisdiction in *R. v. Hape*.[141] This focus ensures that her judgment only considers the applicability of the *Charter* to Afghan detainees and the reach of Canadian laws. By framing the case in these terms, Mactavish J. avoids addressing the issue of torture, which is the reason the applicants brought the case to court in the first place. In deferring to the Supreme Court's *Hape* judgment, Mactavish is acting within her capacity as a Canadian Federal Court judge because she only decides the case by referring to the appropriate legal decision. In this way, she circumscribes her decision within legal boundaries allowed her as Federal Court judge and avoids making pronouncements on the Canadian government's political decision to deploy in Afghanistan, which itself led to the torture allegations here. By deciding the case in this manner, the judge exercises judicial restraint and avoids commenting on the government's culpability in torture. Her decision relies on the separation of powers between the judiciary and the executive, which necessitates that one branch does not encroach on the conduct and duties of the other.

IV) Conclusions on Articulation of Identity

The themes discussed in this chapter all interact to produce different articulations of each actor's identity and their relationship to the detainees and to each other. For the human rights groups, the detainees are perceived as abstract human beings whose rights are violated. They are incapable of contesting these violations themselves in light of their detention; this is why advocating for their rights falls on the applicants themselves. The structure of the human rights claims in this instance and the fact that they are claims

[141] *Amnesty supra* note 4 at 27-38.

about torture in particular, means that the human rights advocates' own identities and reputations as anti-torture organizations are implicated in the claims they make about those detained.

In a similar vein, the CFs' preoccupation with defending Canada against threatening enemies in Afghanistan in the context of the War on Terror is reflective of their identity as a militarized defensive institution. As a result, the Canadian government's Afghan mission is less about bringing security and development to Afghanistan and more about securing Canada from the perceived threat of terrorism. This argument is reinforced by the logics of security, enmity and processes of enemy construction that permeate the military's descriptions of the detainees. Ultimately, both the military and the human rights groups engage in self-serving, identity-reinforcing strategies that sustain them as the institutions they are meant to be by allowing them to play the roles they are intended to assume in the world.

The Court's perspective on those detained and the rights that apply to them is premised on a particular logic of exclusion from (Canadian) law because of their Afghan identity. The *Charter of Rights* does not automatically apply to those detained simply because they are human, as the applicants argue. For the Court, the *Charter* does not apply to Afghans because they are not Canadian and cannot therefore be subject to any laws outside the constitution of Afghanistan and international law. In addition, Canada's own constitution cannot be used to govern the conduct of Canadian soldiers because the Afghan government has not consented to the application of any laws besides its own over its own territory.

Each actor's conceptualization of those detained is intimately related to and affected by their own identity, ideology and role in the world. The Canadian military is intended to defend Canada against any perceived threats. Those detained might or might not constitute actual threats; not enough is known about them to ascertain this, because the military insists that keeping information on the detainees secret will enable it to preserve its national security. However, CF and government representatives exacerbate and contribute to the construction of those detained as threats because of particular ideas they have about them. This logic, in turn, justifies the military's actions in Afghanistan and ensures that it conforms to the role it is meant to play both in Canada and abroad.

The human rights groups are particularly interested in the detainees because these individuals are being tortured and suffer serious human rights violations as a result. AIC *et al.*'s arguments about those detained reflect their particular interest in torture and their understanding of rights in abstract terms. Consequently, the fact that identifiable rights are being infringed and that the Canadian government must be held responsible for its role in their infringement is more important to the human rights groups than the context and circumstances leading to the rights violations themselves.

The Court's decision is problematic because the judge only addresses the applicably of the *Charter* to Afghans. Mactavish J. is therefore able to decide on the case only with reference to her identity and capacity as a Canadian Federal Court judge, and limited in her ability to consider it with reference to the political decision to deploy in Afghanistan, which has arguably contributed to the capture and detention of Afghan detainees themselves. This is an example of the judge's reliance on judicial restraint, which functions in this instance to keep the work of the judiciary separate from the

responsibility of the legislature and the executive. The Federal Court decision is especially revealing about how the judge conceives of the responsibility for torture in this case, an issue she barely addresses, but that remains pertinent to the human rights and *Charter*-based arguments and counterarguments the applicants and respondents both put forward in *Amnesty*. I discuss the responsibility for torture and link it to each actor's conceptualization of the international and domestic laws that apply to the case in the next chapter.

CHAPTER 2: THE NORMS ON TORTURE

Introduction

In this chapter, I determine how the groups involved each articulate the legal norms (both national and international) that apply to the treatment of Afghan detainees. I assess how the human rights groups, Federal Court judge and military representatives view the torture of those detained. I draw out each actor's attitude towards torture and link it to how they assign and conceive of the responsibility for the treatment of detainees.

In Section I, I discuss the applicants' position on torture and the rights they argue are applicable in this case. I also consider the "effective control of the person" argument that they bring before the judge in order to show how and why they hold the military accountable for the alleged torture of those detained. In Section II of this chapter, I focus on the military's response to allegations of torture. I highlight some aspects of the government's arguments about the legal bases for Canada's presence in Afghanistan to show how the government absolves itself from any responsibility for torture Section III concludes by relating the arguments on the applicable legal norms to the claims on identity in the previous chapter as well as to each actor's view of the conceptualization of Afghanistan as a particular kind of space, an argument I expand on in the last chapter of this thesis.

I) AIC *et al.*, Torture and International Legal Norms

The applicants highlight the universality of the right to be free from torture before Federal Court. Alex Neve summarizes AIC's position on the practice by stating that its eradication is one of the organization's long-standing priorities, and that Amnesty has historically advocated against it. The organization "believes that torture is unacceptable, at any time, in any place, for any reason and that the legal prohibition against torture is absolute."[1] Article 2.2 of the UN *Convention Against Torture* reaffirms the practice's absolute interdiction regardless of circumstances.[2] The right to be free from torture is a fundamental human right and is codified in the *Geneva Conventions,* the *International Covenant on Civil and Political Rights* (*ICCPR*) and the *Convention Against Torture (CAT)*. Its prohibition is therefore considered a *jus cogens* rule of international law.[3]

AIC *et al.* link their arguments about the applicability of the *Charter* to the actions of the CF in Afghanistan to torture and international legal treaties. The applicants contend that the detainees' Section 7 right to life liberty and security of the person is violated if they are transferred into the custody of Afghan police, who torture them.[4] They argue that the transfers to torture in this case are analogous to deportation or extradition procedures.[5] As for Section 10 rights on arrest and detention, the applicants claim that international legal instruments guarantee this right in war. They note that

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[1] Affidavit of Alex Neve ("Neve Affidavit") at para 11 sworn August 29 2007 Applicants' Motion Record Vol 1, Tab 1.
[2] *Ibid.*
[3] *Amnesty International Canada v. Canada (Minister of National Defence)*, 2008 FC 336, [2008] 4 F.C.R. 546, 292 D.L.R. (4th) 127. "Applicants' Memorandum of Fact and Law Opposing the Motion to Strike." at para 60. [AMFL]
[4] *Ibid* at para 71-78
[5] *Ibid* at para 71.

Canada's own *Prisoner of War Status Determination Regulations* provide for the right. [6] Section 12 rights to be free from cruel treatment and punishment are also violated because the military gathers evidence leading to the detention and transfer of detainees to Afghan security services, who torture them.[7] Even when national rights claims are made and grounded in the *Charter*, the applicants rely on international legal instruments to demonstrate their applicability and connection to the transfer to torture.

Amnesty *et al.*'s arguments about the relevance of international law to this case are in accordance with Professor Michael Byers' statement before the Court. He argues that the Arrangement entered into between the governments of Afghanistan and Canada constitutes an international treaty because its stipulations are consistent with the provisions of the *Third Geneva Conventions*.[8] Common Article 3 of the *Conventions*[9] "prohibits *inter alia* "cruel treatment and torture";[10] accordingly, the "absolute, territorially-unlimited and time-unlimited character" of the Article is violated if Canada transfers detainees to be tortured by other states.[11] The Arrangement also violates the *Torture Convention*, which "declares that there is never a justification for torture, including states of emergency, external threats, or orders from a superior officer or authority."[12] This argument confirms the universal *jus cogens* character of the prohibition against torture: no reasons or excuses can be given that would justify its violation.

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[6] *Ibid* at para 79-81.
[7] *Ibid* at para 82-83.
[8] Affidavit of Prof. Michael Byers, ("Byers Affidavit") sworn February 2007, Applicants' Motion Record, at para 6-11 Vol 1.
[9] *Ibid.*
[10] *Ibid* at para 13.
[11] *Ibid* at para 14.
[12] *Ibid* at para 22.

Discussing human rights in this way means that AIC *et al.* can use the case to call attention to torture and rights violations; it also points to the fact that labelling the military's handling of detainees as "cruel or inhumane treatment or punishment" can be employed to make "moral and legal judgments about pain and suffering [...]"[13] which can then be used instrumentally and strategically to bring attention to torture and human rights violations as contemporary phenomena today. The argument for the relevance of torture in this instance is made without challenging or questioning the power inequalities that exist between Canada and Afghanistan, or the Canadian and international decisions to deploy there, that have ultimately led to a foreign occupation of the country, regardless of the reasons the international community gives for its presence in Afghanistan.

In his testimony supporting the applicants' case, Yavar Hameed notes that CF policy necessitates that persons captured during international armed conflict be treated as prisoners of war— even if those captured do not fit this legal definition under the *Geneva Conventions*[14]— and that they be treated humanely, in a manner that avoids subjecting them to humiliating and degrading acts contrary to human dignity.[15] He cites military documents that highlight capture, detention and detainee transfer procedures the CF are supposed to follow.[16] However, he notes that, although the respondents concede that the treatment of detainees is governed by both Canadian and international law, neither the Department of Defense nor the CF have cited any specific provisions that apply.[17] There is no record of any detainees coming before status review tribunals, which would

[13] Talal Asad. "On Torture or Cruel and Inhuman, and Degrading Treatment," *Social Research* 62 no. 4 (Winter 1996) at 1082.
[14] Affidavit of Yavar Hameed ("Hameed Affidavit") sworn March 7 2007 Applicants' Motion Record, (AMR) para 25 Vol 1 Tab 4.
[15] *Ibid* at para 26.
[16] *Ibid* at para 27-32.
[17] *Ibid.*

determine their legal rights under the *Geneva Conventions*.[18] It is possible that detainees in the custody of Canadian officials are transferred over to American authorities, who could allegedly subject them to torture without guaranteeing them rights or protections.[19]

Amnesty's arguments about the relevance of international law in this instance are not only grounded in international law itself, but also in arguments concerning *Charter* jurisdiction abroad. In the document concerning the applicability of the *Charter*, the applicants reiterate that freedom from torture is a fundamental human right, guaranteed under international law like the *Geneva Conventions,* the *Torture Convention* and the *ICCPR*. Freedom from torture remains a *jus cogens* rule of international law, even in wartime.[20] The applicants claim that regardless of jurisdiction, the *Charter* must apply to the use of coercive force by the CF to detain individuals, particularly "when fundamental human rights are at stake."[21] Accordingly, the human rights lawyers read the *Charter* as a document that provides another rendering of the universal norm prohibiting torture. They reference international legal reports prepared by the UN[22] to argue that Canada is in breach of international law when it assists Afghanistan by transferring detainees to its authorities for torture. These actions mean that Canada remains in violation of international law, in the same way that it would be if it tortured those detained itself.[23]

AIC makes their arguments about the breach of international law and human rights with reference to the *Hape* decision. They claim that the majority judgment in that

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[18] *Ibid* at para 33.
[19] *Ibid* at paras 46-76.
[20] *Amnesty International Canada v. Canada (Minister of National Defence)*, 2008 FC 336, [2008] 4 F.C.R. 546, 292 D.L.R. (4th) 127*]*. "Applicants' Memorandum of Fact and Law: Re Motion to Determine the Application of the *Charter* to the Canadian Forces in Afghanistan," at *para* 64. [AMFL Re *Charter*].
[21] *Ibid* at para 65.
[22] *Ibid* at para 66-69.
[23] *Ibid* at para 66-67.

case ruled that one state's deference to comity and the sovereign equality of another state should always be respected, except in situations when violations of international law occur and fundamental human rights are at stake. Therefore, they are asking the *Court* to determine whether an exception to the *Hape* judgment exists if human rights violations occur. [24] In this instance, the applicants' arguments for the relevance of human rights and their violation in Afghanistan are linked not only to the *Charter* itself, but also to international laws and the norms prohibiting torture more generally.

Focusing only on human rights and the international norms that govern their application in this instance is characteristic of human rights advocacy and international law in general, both of which tend "to treat only the tips of icebergs."[25] The human rights groups can extend their arguments about *Charter* applicability only as far as their mandate as rights advocates enables them to. However, their focus on the relevant international norms "makes it seem natural to isolate aspects of the problem which [...] 'shock the conscience of mankind' for special handling at the international level"[26] instead of dealing with the social and political contexts surrounding rights claims. I argue that the rights that Afghan detainees lack in this instance are not one-dimensional and, as a result, cannot be understood only with reference to human rights treaties, guarantees or obligations; they cannot be abstracted and divorced from the context requiring them to begin with, which simultaneously results in their inapplicability. Instead, I suggest that the rights the applicants claim here—on behalf of those detained— are connected to the detainees' own identities as Afghans, their presence in the war-torn territory of

[24] *Ibid* at para 72.
[25] David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism.* (Princeton: Princeton University Press, 2005) at 32.
[26] *Ibid.*

Afghanistan itself and the responsibilities each actor believes they have towards them. The rights claims being made are therefore more complex and extend beyond those typically allowed by human rights litigation and other processes traditionally associated with human rights advocacy.

The applicants in *Amnesty* construct this case as a constitutional challenge contesting the extra-territorial reach of the *Charter;* this line of argument demonstrates that human rights groups "concern themselves with constitutional questions about the structure of the legal regime itself",[27] which in turn reaffirms the human rights community's "routine polemical denunciation of [Afghan] sovereignty".[28] Claiming that international legal principles prohibiting torture apply in the *Amnesty* case also illustrates one way in which international law can be used as a tool "fashioned, interpreted and applied to moderate the use of military force."[29]

II) The Norms on Torture in *Amnesty*

"Effective Military Control of the Person as a Test for *Charter* Jurisdiction"[30]

The applicants hold the military accountable for its culpability in the violations of rights detainees suffer while in Afghan or American custody. They argue that the *Charter* should apply extraterritorially whenever the military have effective control of the person; in this instance, AIC *et al.* contend that the CF do have sole control of captured Afghans

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[27] *Ibid* at 32.
[28] *Ibid.*
[29] David Kennedy, *supra* note 25 at 235.
[30] *Amnesty International Canada v. Canada (Chief of Defense Staff)*, 2008 FC 336, [2008] 4 F.C.R. 546, at 2 292 D.L.R. (4th) 127 *[Amnesty]*.

by virtue of their ability to transfer, release or detain them after these individuals are arrested.[31] In support of this, they claim that the Respondent Chief of Staff issues orders including directions to detain, transfer or release detainees.[32]

Considering circumstantial differences between the *Amnesty* and *Hape* cases, AIC *et al.* argue that there is a fundamental difference between military and RCMP (police) functions as they are discussed in *Hape* because the military resorts to the use of force, and the RCMP do not. This ultimately means that the sovereignty of the consenting state is necessarily violated.[33] The consent of Afghanistan in this instance, therefore, has no bearing on whether the Canadian military can authorize Canadian government actions on foreign soil.[34] Consent is a problematic criterion for *Charter* application in this case because Canada has invaded Afghanistan as part of an international effort specifically to overthrow the country's sovereign government.[35]

When the CF resort to the coercive use of force (i.e. by detaining and transferring detainees), they are doing so as an extension of the Canadian state, which means that they fall under the jurisdiction of the *Charter*.[36] Consequently, the CF's ability to use coercion to deprive a person of liberty falls under *Charter* jurisdiction.[37] By focusing on the military's role and its use of force abroad as well as the international community's decision to go into Afghanistan, the applicants simultaneously highlight the derogation of

[31] [AMFL Re *Charter*].para 46.
[32] *Ibid* at para 48.
[33] *Ibid* at para 32.
[34] *Ibid* at *para* 33.
[35] *Ibid.*
[36] *Ibid* at para 38.
[37] *Ibid.*

Afghanistan's consent and the responsibility of the Canadian government and military for the detention and transfer of detainees to Afghan authorities.

In its examination of the applicants' submission, the Federal Court notes that the human rights groups base their "Effective Military Control of the Person" argument on other international cases, such as the US Supreme Court's decision in *Rasul v. Bush* and the UK House of Lords' *Al Skeini et al v. Secretary of State for Defence* as well as two other European Court of Human Rights cases.[38] These decisions are relevant because the judge proceeds to give detailed analyses of them all, only to decide that the circumstances and judicial interpretations of each have no bearing on the *Amnesty* case itself. Consequently, Mactavish J. finds that the applicants have ultimately not identified any legal basis for extending international law to Afghanistan.[39] The Court's deliberation on the cases discussed before it is lengthy and examining its opinion on each case is beyond the scope of this thesis. However, I reference the Court's commentary on the applicability of the US Supreme Court's *Rasul v. Bush* in relation to *Amnesty* to demonstrate that the judge's understanding of this case in particular is especially narrow. Her arguments are structured in such a way as to ensure that no gaps exist that can be used to argue that the *Charter* does apply to the CF's actions in Afghanistan or abroad. The Canadian government cannot be held liable for the violence the detainees suffer as a result.

In its deliberations in *Rasul*, the American Supreme Court does not make any distinctions between the rights of citizens and non-citizens, but its judgment does raise the possibility that these individuals' rights might have been infringed while they were

[38] *Amnesty supra* note 30 at para 201-202.
[39] *Ibid* at paras 201-265.

held at Guantánamo.[40] Accordingly, it grants them the right to contest the basis for their detention under the American constitution.[41] The *Rasul* judgment cannot therefore be used to argue that the US Court deprived those detained of rights or that the Guantánamo detainees are ultimately outside the purview of the Supreme Court. Although Mactavish admits that this case does extend US jurisdiction to apply at the military base, she states that the US's sovereign control over Guantánamo is grounded in the lease agreement between the American government and Cuba.[42]

The agreement that Mactavish J. takes at face-value guarantees that the Cuban government will agree to lease its bases and coaling stations to the US in order to enable the Americans to maintain and protect Cuba's own independence.[43] The US has also extended the lease into perpetuity— in such a way that it remains in effect until either both parties agree to cancel it or the United States decides to abandon its bases there.[44] The language of the lease agreement ensures that the US remains in the position of an active agent, capable of leaving or staying, while at once casting Cuba in the passive position, forced to accept either its own occupation or abandonment. The Cuban government clearly views the US's presence in its territory as occupation; this explains why Fidel Castro attempted to revoke the lease in 1959 and why the Cuban government refuses to cash the cheque the United States sends it every year.[45] Mactavish misinterpreted the judges' reasoning in *Rasul* because the US Supreme Court itself acknowledged that the language of the lease meant that Cuba, not the United States, had

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[40] *Rasul v. Bush* 2004 542 U.S. 466 at para 483-84.
[41] Amy Kaplan, "Where is Guantanamo?" (2005) 57American Quarterly at 846.
[42] *Amnesty supra* note 30 at para 237.
[43] Kaplan *supra* note 41 at 385-386.
[44] *Ibid* at 386.
[45] *Ibid.*

sovereignty over the base, even though the US could exercise executive or plenary jurisdiction over Guantánamo.[46] According to *Rasul*, therefore, having rights under the US constitution does not require full sovereignty.

International Legal Norms on Torture in *Amnesty*

Through its narrow interpretation of *Rasul* and other cases, the Court ultimately decides that there exists no international jurisprudence, besides Canada's own *Hape*, that can determine the extra-territorial application of the *Charter*. Mactavish J. also argues that codified international law itself has no bearing on *Amnesty*. The judge's summary of the *Afghan Compact* highlights the Afghan government's commitment to protecting the rights of its citizens as they are guaranteed under its own constitution and in international law.[47] Furthermore, the judge admits that both Canada and Afghanistan have agreed that international law—specifically international humanitarian law— would regulate detainee treatment. The *Arrangements* entered into between Canada and Afghanistan "provid[e] that detainees are to be afforded 'the same treatment as Prisoners of War'.[48] This ensures "that the Participants will treat detainees in accordance with the standards set out in the *Third Geneva Convention*".[49]

In the example highlighted above, the judge merely demonstrates that the *Arrangements* include guarantees that conform to international humanitarian law and that the norms governing military conduct in armed conflict are mentioned in them. The judge

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[46] *Rasul v. Bush* 2004 542 U.S. 466 at para 483-484.
[47] *Amnesty supra* note 30 at para 160.
[48] *Ibid* at para 166.
[49] *Ibid* at para 175-6.

lists all the legal norms that apply[50] without thoroughly deliberating on their applicability. She never actively discusses how these international laws should apply and what obligations their application would confer on the Canadian military with regard to the transfer and detention of Afghans in particular.

An example of one such obligation would require the Government of Canada to cease the transfer of detainees to a substantial risk of torture, under the principle of *non-refoulement*, which is codified in international human rights law, including the *Torture Convention*. This principle prohibits the transfer of individuals to another state if there is a possibility that some of their fundamental rights might be at risk.[51] The Court's unconcern with either the applicable international law or the appropriate case law (e.g. the *Rasul* case) is characteristic of what I call intentional politico-legal negligence, on the judge's part. Through this process, Mactavish J. purposefully ignores the applicable laws and decides that they do not apply, in an effort to circumvent judicial responsibility and political commentary on other matters, such as the CF's culpability in the torture of Afghans.

The military's representatives, like the Court, list these requirements[52] without providing any concrete examples to demonstrate that CF members have at least attempted to meet these stipulations. Colleen Swords notes that the Arrangement entered into between Canada and Afghanistan "provide[s] commanders on the ground with clarity on what to do in the event of a transfer."[53] Following this, she provides a list of CF

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[50] *Ibid* at para 160-67,175.
[51] Cordula Droege."Transfer of Detainees: Legal Framework, Non-Refoulement and Contemporary Challenges." 90 (2008) IRRC at 670.
[52] Affidavit of Col. Stephen Noonan ("Noonan Affidavit"), at para 30-31 sworn May 1 2007 RR at Tab *26,* Affidavit of Colleen Swords ("Swords Affidavit") at para 28-33 sworn May 1 2007, Motion Records of the Respondents to the Main Application at Tab 25.
[53] Swords Affidavit, at para 28.

members' duties towards the detainees including "a commitment to treat detainees humanely," "an acknowledgement of the right of the International Committee for the Red Cross [ICRC] to visit detainees at any time during their custody," and "an obligation for both participants to notify the ICRC upon transfer."[54] According to the military testimonies, "officials are in regular contact with them in Ottawa, Geneva and the field."[55] Military representatives also include an excerpt from the ICRC's website describing the group's mandate.[56]

These guarantees do not demonstrate that Canada follows through on the obligations it identifies as the appropriate international law. For example, although Swords maintains that "Canada [has] notified the ICRC each time [the CF] transferred or released a detainee."However, the military representatives do not include a list of these detainees' names in their submissions before the Court. This indicates that they do not have an accurate, chronological or detailed idea of how many detainees have been transferred at different times during the conflict.

In *Amnesty,* international law is invoked in a formal way, to ward off the *Charter* and create the appearance of rights protections in a context where no adequate protections are available. The judge insists that "the rights to be afforded to detainees in Canadian custody in Afghanistan [are] those accorded by the Afghan constitution and international law[....] and not those guaranteed by the *Canadian Charter of Rights and Freedoms*." In this example, Mactavish J offsets the inapplicability of *Charter* rights by pointing to the guarantees under international law, which are intended to counteract that fact that those

[54] *Ibid.*
[55] *Ibid,* at 30.
[56] *Ibid.*

detained do not have *Charter* rights. To that end, she states that "having expressly stipulated that detainees are to be accorded the same treatment and protections as are accorded to Prisoners of War by international law, it cannot be inferred that Afghanistan has consented to the application of Canadian laws, including the *Charter* to those detainees."[57] Here, international law is invoked compensate for the inapplicability of *Charter* rights, It is used instrumentally to ward off the *Charter* and create the appearance of rights and ensure that the detainees still have some rights protections. Mactavish J. is uneasy about the possibility that her judgment might leave detainees with no rights guarantees and is quick to reiterate that her decision does not render them rightless.: "it must be noted that the finding that the Charter does not apply does not leave detainees in a legal no-man's land, with no legal rights or protections.[...]the detainees also have the rights conferred to them by international law[...]."[58]

As for the Canadian government representatives, their superficial invocation of rights is indicative of bureaucratic mismanagement on the part of government officials and is part of the process of intentional non information, a process that obscures facts by keeping government actions non-transparent and unaccountable. It is designed to keep the public unaware of the specific details of the detainee transfer procedures, the conditions of the detention, and detainees' fates and whereabouts. This demonstrates that Afghan lives are cheap, as far as government civil servants are concerned, because no concerted effort is invested in keeping track of them or in documenting what has happened to these individuals. This, I argue, is because of the fact that these individuals are Afghan and enemies separated from Canadians by a process of distancing. This distance that exists in

[57] *Amnesty supra* note 30 at 171.
[58] *Amnesty supra* note 30 at 343.

this case, manifests in terms of nationality and geography. It works by separating them from ordinary Canadians in the minds of the particular civil servants sent to monitor their condition while in Afghan custody. The process of geographic and nationalistic distancing that occurs in the mind makes it easier to ignore what happens to Afghans; they are separated from us by distance and nationalistic ties (i.e they are Afghan not Canadian), regardless of Canada's interests in Afghan sovereignty and security.

In addition to international humanitarian law, human rights jurisprudence has also recognized that the principle of *non-refoulement* is integral to the prohibition of torture;[59] the central criterion for its applicability is a state power's ability to establish that it has effective control of the person being transferred.[60] This is the same argument the human rights groups make in their submissions before the Court.[61] The judge's arguments in the case ultimately turn on abstract considerations of Canadian and international laws, which contribute to her contention that only international law and not Canadian laws apply to those detained. In these arguments, By making these arguments, the judge she practices politico-legal negligence because she would rather not deal with the complicated consequences of her decision, especially where the responsibly for torture is concerned.

III) The Military and the Responsibility for Torture

In *Amnesty,* the Federal Court judge insists that her ruling is consistent with the Supreme Court's "clear" and "categorical" rejection of the extraterritorial application of the *Charter* in *Hape.*[62] The respondents themselves make this argument when they claim

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[59] Droege *supra* note 51 at 672.
[60] Ibid at 671.
[61] AMLF Re Charter supra note 20 at para 46.
[62] *Amnesty supra* note 20 at para 331.

that the Canadian Supreme Court "fully forecloses" the extra-territorial application of the *Charter* in the *Hape* judgment.[63]

Christopher Greenwood, the CF's expert on the application of international law, testifies before Federal Court. His affidavit comes as a direct response to the applicants' own arguments because the human rights groups themselves submitted the application for review. This means that it falls on the government and military representatives to respond to these claims and defend themselves against them, since they are the ones being brought to court on allegations of misconduct, including their role in facilitating torture and human rights violations.

Greenwood claims that all three experts wrongly construe the legal bases for Canada's presence in Afghanistan;[64] he refutes their arguments about the applicability of the prohibition of torture in the country by contending that "this principle fails to apply in the context of the operations in Afghanistan."[65] The applicants disregard the significance of the UN Security Council Resolutions, they are mistaken about the international rules (including those based in IHL) that apply in this instance, and they ignore the effectiveness of the detention procedures the military adopts in its attempts to comply with international obligations.[66] All of his arguments concerning international norms on torture, transfer and detention, have the effect of absolving the Canadian government and military of any responsibility for the torture of Afghan detainees and relocate it with the encumbered government of Afghanistan.

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[63] *Amnesty International Canada v. Canada (Chief of Defense Staff)*, 2008 FC 336, [2008] 4 F.C.R. 546, at para 4 292 D.L.R. (4th) 127. "Respondents' Factum Re: Determination of Two Questions: Regarding the Application of the *Charter* of Rights and Freedoms, " Opposing the Motion to Strike." [RF Re *Charter*].
[64] Affidavit of Christopher Greenwood, ("Greenwood Affidavit") at *para* 2.sworn August 14 2007, Report Record of the Respondents to the Main Application [hereinafter RR] Vol 1, Tab 4.
[65] *Ibid.*
[66] *Ibid* at para 3 a-d.

The Authority of UN Security Council Resolutions

According to Greenwood, Canada's presence in Afghanistan is grounded in the authority of the UN's mandate for intervention in Afghanistan, Canada's right to individual and collective self-defence and Afghanistan's consent.[67] This third criterion will be discussed more thoroughly in the third chapter, as I consider the two other bases for international and Canadian intervention in the next few paragraphs. Concerning the UN mandate, Greenwood claims that although ISAF operates under NATO, its presence in Afghanistan has been authorized by three specific Security Council Resolutions ratified between 2001 and 2006, which are legally binding on all states, including Canada and Afghanistan under Chapter VII of the UN Charter.[68] The language of the UNSC resolutions allows NATO member states to detain individuals captured during military operations because it would be "illogical" to assume that the use of force does not extend to the ability to detain captured individuals.[69]

This argument implies that responsibility for the conduct of Canadian soldiers in this instance rests with the United Nations, or at the very least, that the capture, detention and transfer of detainees to Afghanistan is permissible because the UN authorizes the troops' presence there. This claim allows the military to shift the burden of responsibility concerning the treatment and torture of detainees from Canada to other international organizations and implies that the CF's detention and transfer of detainees is legally permitted, so long as Canada operates under the auspices of either NATO or the United Nations.

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[67] *Ibid* at para 8.
[68] *Ibid* at para 11.
[69] *Ibid* at para 18.

The respondents claims that international law treaties like the *Geneva Conventions* and particular aspects of military doctrine (as they are outlined in the *Arrangements* between Canada and Afghanistan)[70] apply to the treatment of Afghans in this instance, but would not ordinarily be enough to guarantee a detainee's well-being while imprisoned, and by extension, relieve Canada of its obligations under international law.[71] Here, the military's arguments are in line with those adopted by the Court in *Amnesty*, because both the respondents and the judge list the applicable norms[72] without engaging in any deliberation on how they apply or on the concrete practices that Canada carries out to monitor their application.

Greenwood is careful to note that he is not suggesting that the CF treat Afghan detainees in a manner contrary to international law. After reviewing the applicable CF manuals, he states that there is no doubt that the CF have lived up to their obligations under international law, if they do in fact conform to their own standards of conduct.[73] He does not give any examples demonstrating that members of the CF have actually abided by the international legal obligations in their dealings with detained Afghans.

His argument is even more specific with regard to the situation of Afghan prisoners themselves. He contends that the conflict in Afghanistan is considered a non-international armed conflict, and that as a result of this, there are fewer rules governing the situation there than there would be in international conflicts, according to IHL. Consequently, while the full gamut of the *Geneva Conventions* would apply during

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[70] Affidavit of Col. Stephen Noonan ("Noonan Affidavit"), at para 31.33 sworn May 1 2007 RR at Tab 26 and Affidavit of Colleen Swords ("Swords Affidavit") at 26-33 sworn May 1 2007, Motion Records of the Respondents to the Main Application at Tab 25.
[71] Droege, *supra* note 51 at 694.
[72] *Ibid,* and *Amnesty supra* note 20 at para 160-67,175. Greenwood Affidavit *supra* note 70 at *para* 74-78.
[73] *Ibid* at para 55.

international conflicts, only Common Article 3 is applicable to CF conduct in Afghanistan because the Afghan war is considered a non-international conflict.[74] Article 3 necessitates the humane treatment of all those who do not take part in hostilities, including armed forces who lay down their arms during a conflict or are considered outside the ambit of war by virtue of their detention, sickness or wounds.[75]

According to Greenwood, those detained in Afghanistan are not considered Prisoners of War according to the requirements of the *Geneva Conventions*, because that war is not a non-international armed conflict and is therefore not subject to the laws enshrined in the *Conventions*.[76] Additionally, no POW status is available under non-international armed conflict.[77]Furthermore, even if such provisions existed, the detainees' membership in Taliban or al-Qaeda means they woukd fail to meet the POW test, which refers to whether or not they wear a distinctive uniform in battle,[78] a requirement that would enable CF members to identify them under Article 4A of the *Third Convention*.[79] Members of these groups also do not conduct themselves in accordance with the customs of war.[80]

By making this assertion, Greenwood does two things. First, distinguishing between the laws that apply in international and non-international conflicts allows him to argue that no applicable humanitarian laws exist that can be applied to the war the CF is fighting in Afghanistan to begin with, let alone the detainees. This suggests that the CF and the procedures they adopt are not actually in violation of the applicable international

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[74] *Ibid* para36.
[75] *Ibid* at para 43(1).
[76] *Ibid* at para 36.
[77] *Ibid* at para 39.
[78] *Ibid* at para 40.
[79] *Ibid.*
[80] *Ibid* at para 39-40.

legal norms. Importantly, the norms Greenwood identifies as international humanitarian laws are his rendition of the applicable international jurisprudence, which are in this instance used as rhetorical tools to justify the military's own actions and circumvent any responsibility for their torture.

Secondly, quite apart from demonstrating that no actual laws apply to the treatment of Afghans, these individuals' status as members of al Qaida and Taliban ultimately designates them as enemies, as far as Greenwood is concerned. In this example, they are markedly different from CF members, because they do not wear an identifiable uniform that distinguishes them from ordinary civilians[81] and do not conduct operations in a manner contrary to the customs of war.[82]

Although it remains unclear whether those detained are actually members of groups the military claims they belong to because the Canadian government insists on keeping their identities secret for reasons of national security,[83] it is their alleged membership in Taliban or al Qaida that allows Greenwood and others to understand them "as collectivities forged through ideology".[84] This refers to these terrorists' adherence to Islamic fundamentalism, as I noted earlier.

Greenwood's claims are reminiscent of those Noonan makes about the proliferation of "enemies" in Afghanistan proper. Greenwood intimates that Afghan detainees are designated as the "enemy" because their physical characteristics (i.e. in this case the uniform they do not wear) distinguish them from typical armed forces, but not from ordinary civilians. This means that members of the military and its representatives

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[81] *Ibid* at para 40.
[82] *ibid.*
[83] Swords, at *para* 25.
[84] Christiane Wilke "Law's Enemies: Enemy Concepts in US Supreme Court Decisions" (2007) 40 Stud Law Polit Soc 44.

can identify their enemies in Afghanistan as different precisely because they do not look like ordinary soldiers do on the battlefield. In this sense, then, they are enemies because they "are made to stand apart"[85] from members of the CF. They are differentiated because they do not conform to the egalitarian statist conception of the enemy, which has historically been based only on the legal recognition of states as "regular" enemies of each other during war.[86]

The two criteria Greenwood highlights as necessary to apply POW status to Afghan detainees here ultimately serve as reasons to exclude them from the applicable laws of war because they indicate that the detainees have "offended against key normative rules or operate in formations that are incapable of conforming to such rules[.]"[87] This reasoning contributes to a peculiar kind of circular logic at work here according to which Greenwood can argue in favour of excluding those detained and treating them outside the ambit of the laws of war: International law does not apply to those detained because they have broken the applicable laws by appearing different from "us"/traditional states. This difference itself ultimately justifies their exclusion from normative rules governing conduct between "us" because it serves as an indication that they have broken the applicable laws that govern our conventional conduct in war. Greenwood makes these claims in an effort to convince the Court that Canada bears no responsibility for the circumstances surrounding detainee imprisonment, transfer and possible torture in Afghanistan. However, his arguments also ensure that the identity of the Canadian military as a "civilized" and security-oriented institution remains intact

[85] *Ibid* at 43.
[86] *Ibid* at 54.
[87] *Ibid* at 47.

because it ensures that even international laws function to reinforce the exclusion of those detained and their construction as an imminent threat to Canada and Canadians.

Collective and Individual Self-Defence

While most of Greenwood's affidavit concerns the Canadian intervention in Afghanistan and the authorization for it under UNSC resolutions,[88] he also argues that Canada should be present in Afghanistan because of its right to collective and individual self-defence, which is based in international law.[89] He, like the government representative, therefore, also contends that Canada's presence in Afghanistan is justified on the basis of its right to collective and individual self-defence under Article 51 of the *UN Charter*. Canada had a right to self-defense following the 9/11 attacks and the UN formally recognized that the attacks triggered this right in Resolution 1368 (2001).[90] Significantly, this resolution was signed on September 12, 2001, a day after 9/11 and it does affirm a state's right to individual and collective self-defense,[91] it condemns the 9/11 attacks[92] and urges all nations to "work together" to bring the perpetrators to justice.[93]

However, the resolution never mentions Canada specifically, nor authorizes it to pursue military action in Afghanistan. The wording of the document is more general than this, addressing the international community as a whole. Intervention in Afghanistan continues today as a direct result of the war on that country that was started in reaction and retaliation to the 9/11 attacks, in particular, as the citations above demonstrate.

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[88] *Ibid* at para 8-12, 18-35.
[89] *Ibid* at para 8.
[90] *Ibid* at para 16.
[91] *"United Nations Resolution 1368, Preamble" (September 12 2001)* online: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N01/533/82/PDF/N0153382.pdf?OpenElement. Return here at para 2.
[92] *Ibid* at at para 1
[93] *Ibid* at para 3.

Furthermore, the war in Afghanistan began because the United States perceived and dealt with the attacks on the World Trade Centre and the Pentagon as though they constituted an act of war against it rather than serious international crimes.

NATO's collective security agreement (discussed in the previous chapter) might explain the US's response as well as the responses of other NATO member states like Canada, all of whom decided to go to war in Afghanistan in support of the US. Those who flew the planes into the towers and the Pentagon were Saudi, not Afghan citizens.[94] Besides leading to the unfortunate and tragic deaths of Canadians who were in the New York buildings at the time, the attacks themselves bore no actual connection to Canada itself, and, aside from Canada's commitment to collective-self defence as a NATO member, do not altogether warrant that it wage its own individual war on Afghanistan. However, Canada's identity in this instance is constituted in such a way that makes it identical to the United States, since it is willing to go to war for the same reasons. Here, deploying troops in Afghanistan in response to the attacks on the United States constitutes part of Canada's national and international security strategy,[95] which in this case conceived of security on three different levels all at once: the local—by focusing on security in Afghanistan proper, the national —Canada went to war to protect its own security, and the global—other members of the international community also participated in this initiative, making Afghan security an international concern.[96]

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[94] Derek Gregory, *The Colonial Present: Iraq, Palestine, Afghanistan* Malden, Blackwell Publishing, 2004 at 47.

[95]Mariana. Valverde, "Analyzing the Governance of Security: Jurisdiction and Scale." *Behemoth* 1 (2008) at 4.

[96] *Ibid.*

IV) Conclusion: The Military, the Human Rights Groups and the Norms on Torture

"These are detestable murderers and scumbags. They detest our freedoms, they detest our society, they detest our liberties."[97]

The military's arguments counter the human rights organizations' claims about Canada's obligations in terms of the torture those detained. While the rights groups insist that Canada remains guilty of violating the international laws on torture, including the *CAT* and *the Geneva Conventions*, because its transferring detainees to torture is synonymous with engaging in the torture itself, the military presents its own rendition of international humanitarian law. These norms are used to argue that Canada is not in violation of said laws, because those detained are actually outside their purview. This claim, and the arguments concerning the authority of the UNSC resolutions, are all intended to relieve Canada of its responsibilities towards detained Afghans. The responsibility for torture is ultimately eschewed and left with the Afghan government itself. The Court also tacitly agrees with this shift and reinforces it, by adopting the same arguments about the inapplicability of the *Charter* to Afghanistan that the military representatives insist on.

Aside from the fact that its arguments attempt to circumvent the Canadian responsibility towards the torture of Afghans, the CF's adherence to NATO's collective security agreement relies on a particular image of Canada as a country that conforms to the international consensus to hold Afghanistan accountable for 9/11, wage war on it and at the same time intervenes to restructure it for the purpose of enabling it to establish international peace and security. In this sense, therefore, the military projects reinforce an image of Canada that is quite different than that espoused by the human rights groups in

[97] The Essential Rick Hillier, CBC News online: http://www.ctv.ca/CTVNews/Specials/20080415/hillier_in_brief_080415/

their focus on the country's traditional role as a champion of rights.[98] Pointing to Canada's willingness to go to war for defensive purposes not only underscores a facet of Canadian identity most Canadians are perhaps unfamiliar with— the last time Canadian troops were officially at war prior to the war in Afghanistan was in the 1950s, during the Korean War— it also draws attention to the decision to engage in war for defensive purposes, a move that is arguably intended to shift the public's identification away from the *Charter* and the focus on torture (i.e. the basis of the image the human rights groups emphasize) to other nationalist groups like the military[99] and its militarized masculinist and nationalist view of the world.

Significantly, the Federal Court accepts Greenwood's argument about the authority of UNSC resolutions and Canada's right to collective and individual self-defence as justifiable legal bases for Canada's presence in Afghanistan. In her background summary of the events leading up to the case, Mactavish J. cites both the self-defence argument and the authority of the UNSC resolutions as legitimate claims that justify the CF's deployment there,[100] seeming to take them at face-value, without challenging either of these bases. In this way, she also indirectly accepts the arguments they use to avoid the responsibility for torture.

By calling attention to Canada's defensive role towards its own people as well as its role as a contributing member of the international community through its commitments to ISAF under the UN mandate, the military's arguments in this instance

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[98] British Columbia Civil Liberties Association *News Release*, "A Set-Back for Human Rights Protection: Federal Court of Appeal Rules in Afghan Prison Case," (18 December 2008) online: http://www.bccla.org/pressreleases/08afghan_prisoner.pdf

[99] Erna Paris, "The New Solitudes" *The Walrus* (March 2011), 2 online: http://www.walrusmagazine.com/articles/2011.03-politics-the-new-solitudes/3/

[100] *Amnesty supra* note 30 at 8-15.

underscore a different portrayal of the international community as a whole, when compared to the international community the human rights groups depict in their arguments. For the CF, the community of states was shocked at the September 11 attacks, which force it to collectively adopt a different approach to terrorist acts that target peaceful, generally democratic and (international) law-abiding nations like Canada and the US. The World Trade Centre attacks threaten the peace, democracy and freedom people living in those countries are entitled to, which are in turn espoused by this international community. It follows then, that the international community should work together and put all of its resources into fighting the terrorist enemy facing it in order to protect itself from the encroaching threat of terrorism.

For AIC *et al.*, the community of nations and its institutions (e.g. the UN and other affiliate organizations) privilege human rights, abhor their violation and have, since WWII, consistently attempted to codify non-derogable norms (like the prohibition on torture) into legally binding treaties (e.g. the *Torture Convention*). This was done to ensure that states and individuals who violate human rights are persecuted, held accountable or at the very least, prevented from violating rights in the first place. These images contrast with one another and are established because of each organization's (i.e. either the CF's or the human rights groups') perception of its own identity, the role it performs and the ideology (i.e. national self-defence or human rights protection) informing its perspective on the world.

CHAPTER 3: AFGHANISTAN AS SPACE

Introduction

While it is true that Canada originally went into Afghanistan in 2001 with the express interest of overthrowing the Taliban regime then in power in that country, Canada is not presently in Afghanistan as an occupying force. Canada remains in Afghanistan to assist in securing and rebuilding the country, with the support of the international community, the approval of the United Nations and the consent of the Government of Afghanistan.[1]

Geography [has] its phase of circumstantially extravagant speculation which [has] nothing to do with the pursuit of truth, but has given us a curious glimpse of the medieval mind playing in its ponderous, childish way with the problems of our earth's shape, its size, its character, its products, its inhabitants...."[2]

The responsibility for torture in the *Amnesty* case can be understood by exploring how each actor understands Afghanistan as a particular kind of space, where particular acts of violence occur and specific norms concerning the practice of torture apply. Each actor's spatial conceptualizations about Afghanistan explain their own allocation of responsibility for the violence at issue in the Afghan detainee controversy. In Section I of this chapter, I discuss how Amnesty *et al.,* conceive of Afghanistan as a space and link these understandings of the country to the permissibility of torture in Afghanistan, Canada's intervention there and the government's responsibility for torture, as the human rights groups articulate it.

In Section II, I highlight the ways in which the territory of Afghanistan is linked to the terrorist threat in the arguments made by the military's representatives. In Section

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[1] *Amnesty International Canada v. Canada (Chief of Defense Staff)*, 2008 FC 336, [2008] 4 F.C.R. 546, at para 208. 292 D.L.R. (4th) 127 [*Amnesty*].

[2] Joseph Conrad, "Geography and Some Explorers," *National Geographic*, (March 1924) online <http://www.ric.edu/faculty/rpotter/temp/geog_and_some.html>.

III, I draw out the similarities between the military's and the Federal Court's claims about Afghanistan's consent and sovereignty in *Amnesty* to demonstrate how both of these arguments are used to ultimately exonerate the Canadian government of any responsibility for torture there. I use the concept of "imaginative" to highlight how the territory of Afghanistan is constructed as a particular kind of threatening place/space across whose territory the CF's enemies are spread. I argue that by using these geographical imaginings of the country, the military and the Court remain uncritical of both the international and Canadian interventions in Afghanistan because they never contextualize these events. These claims ultimately perpetuate the occupation of Afghanistan while at the same time justifying the Canadian and international presence in that country. Section IV concludes by reflecting on the connections between the three actors' conceptualizations of Afghanistan as space.

I) Amnesty International, Legal Norms and Afghanistan as Space

In response to the military's argument that the section 7 rights should not apply to Afghan detainees because they "have to do with the administration of justice in Canada, and regulate relationships between individuals and the Canadian government," the applicants contend that Section 7 rights are "not territorially limited."[3] This is consistent with Professor Byers' affidavit on the applicable international law, in which he argues

[3] *Amnesty International Canada v. Canada (Minister of National Defence)*, 2008 FC 336, [2008] 4 F.C.R. 546, 292 at para 72 D.L.R. (4th) 127. "Applicants' Memorandum of Fact and Law Opposing the Motion to Strike." [AMFL]

that the *Geneva Conventions* and their guarantees against torture and detention are "territorially-unlimited."[4]

According to Amnesty *et al.*'s legal representatives, the contested rights and the international legal protections apply to individuals no matter where they are in the world. This is consistent with the spirit of universal human rights, which are theoretically supposed to apply to everyone everywhere.[5] The human rights groups adopt this position throughout their memo. They contend that Canadian *Charter* rights should apply not only to the conduct of Canadian soldiers abroad[6] but also to Afghan citizens. As a consequence, evidence of violations occurring against specific individuals is unnecessary.[7] However, the human rights groups' appeal to the universality of human rights remains in tension with the actual arguments they make about Afghanistan. Their claims about the country imply that rights cannot and do not exist there because it is a particularly chaotic place, whose government cannot be expected to adhere to the laws governing human rights. This contention in turn, justifies bringing the *Charter* (i.e. "our laws") to them.

AIC *et al.* state that Afghanistan is uniquely part of a group of "countries with [...] a serious record of torture,"[8] and that "[it] has effectively consented to the operation of Canadian jurisdiction within its territory[....] Afghanistan has surrendered significant powers to Canada, including [...]the state monopoly over the use of coercive power."[9] In

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[4] Affidavit of Prof. Michael Byers, at para 14 sworn February 2007, Applicants' Motion Record, Vol 1.
[5] Amnesty International Canada, "Core Values" Amnesty International Canada online < http://www.amnesty.ca/about/amnestys_mission/core_values/>.
[6] *Amnesty supra* note 3 at para 3.
[7] *Ibid* at para 67.
[8] *Ibid* at para 68.
[9] *Ibid* at para 62.

their factum on the applicability of the *Charter*, moreover, they argue that not only has Canada invaded Afghanistan as part of the international initiative to attack the country; it has done so with the intent of overthrowing the Taliban government in power there at the time of the invasion.[10] Both of these arguments are used to convince the Court that Canada has jurisdiction in Afghanistan and that the *Charter* should apply to the conduct of the CF there. These arguments also highlight the fact that Afghanistan is not sovereign over its own territory, to a certain extent, and that Canada is at least partly responsible for any human rights violations that occur there.

These contentions about Afghan and Canadian sovereignty demonstrate the importance of the Canadian occupation of Afghanistan to the applicants' claim, because without it, AIC *et al.* would presumably have a weaker argument for the application of the *Charter* outside of Canada. The discussion of Afghan sovereignty and AIC's indirect allusions to the occupation of the country in the memo are also an indication of a paternalistic, colonial attitude towards Afghanistan because they imply (even if unintentionally) that Canada's presence there means Canadians become responsible for the conduct of Afghans and for administering the appropriate laws there since Afghanistan is not all together sovereign itself.

According to these claims, Afghanistan is also a place where torture is routine practice and where individuals face substantial risks of being subjected to it.[11] As proof of this, the applicants cite numerous reports of torture in Afghanistan, especially those highlighting torture of detainees while they are in Afghan custody. These include

[10] *Amnesty International Canada v. Canada (Minister of National Defence)*, 2008 FC 336, [2008] 4 F.C.R. 546, 292 D.L.R. (4th) 127]. "Applicants' Memorandum of Fact and Law: Re Motion to Determine the Application of the *Charter* to the Canadian Forces in Afghanistan, at para 6"[AMFL Re *Charter*].
[11] AMFL *supra* note 3 at para 24.

accounts compiled by the United Nations High Commissioner for Human Rights,[12] the Afghan Independent Human Rights Commission (AIHRC),[13]the US State Department,[14] and Canada's own Department of Foreign Affairs and International Trade (DFAIT).[15]

As part of their arguments against the military's claim that detained Afghan individuals can sue the Canadian government for redress of *Charter* violations, AIC *et al.* note that the detainees cannot bring forward such claims against the Canadian government because they are held incommunicado: "[t]hey are held in detention in a desperately poor country on the other side of the world" where there is little infrastructure, and the individuals do not speak the language of those detaining them. They continue on to say that it is difficult to imagine that people so disadvantaged can have the logistical, financial and technological abilities to bring an application forward in Canada. [16]

The applicants' argument that Afghanistan does not have sovereignty over its own territory, the descriptions they rely on of the incidences of torture in Afghanistan and their contention against the possibility of launching a case against the CF from Afghanistan all contribute to the construction of a specific 'imaginative geography" around it as a particular kind of space and place, where torture is perceived as a practice intrinsic to Afghan culture. To reiterate, imaginative geographies are categorizations "that designate in the mind a familiar space as ours and an unfamiliar space beyond ours which

[12] *Ibid* at para 19.
[13] *Ibid* at para 21.
[14] *Ibid.*
[15] *Ibid* at para 25.
[16] *Ibid* at para 42.

is theirs".[17] "They are constructions that fold distance into difference through a series of spatializations [that work] by multiplying partitions and enclosures that serve to demarcate 'the same' from the 'other' at once constructing and calibrating a gap between the two. "[18] Here, Afghanistan is imagined as a particular kind of place where specific norms— such as international treaties prohibiting torture— (do not) apply; ideas about it are not merely abstract contentions the human rights groups have and reiterate about it. However, basing their claims in the *Charter*, while a strategic tactic possibly employed because AIC is a Canadian organization suing the Canadian government for its conduct abroad, paradoxically suggests that the universal rights at issue do not exist there; they must therefore be brought over with the Canadian soldiers stationed in the country. This argument is based on a tension that implies that the rights in question are universal but are all at once inapplicable in Afghanistan because of the kind of space/place it is.

The applicants make a *Charter* claim partly to bring the Canadian government to account over the torture of detainees. However, the fact that they do not do so on the basis of Afghan laws or constitution implies something not only about the Afghan legal system, but also about Afghanistan as a particular kind of space with a particular relationship to legal norms preserving rights and prohibiting torture. In the memo, Afghanistan is perceived to be a faraway space, unlike and different from Canada and other Western nations, because it is a place where torture occurs frequently and where individuals' rights are consistently violated. In fact, these claims perpetuate the idea that

[17] Edward W. Said, *Orientalism* New York: Vintage Books, 1979, at 54.
[18] Derek Gregory, *The Colonial Present: Iraq, Palestine, Afghanistan* (Malden, Blackwell Publishing, 2004) at 17.

torture is inherent to Afghanistan and that it was practiced there even before the war on that country began in 2001.

This discourse on torture contributes to an imaginative geography of the country because it creates a distinction between Canada (us) and Afghanistan (them) based on the assumption that torture and human rights violations happen there, not here. This folds the geographical distance between Canada and Afghanistan into difference[19] and creates and reinforces a gap between the two by emphasizing that Afghanistan is so unlike us, that its people have a "different but thoroughly organized world of [their] own, a world with its own national, cultural and epistemological boundaries and principles of internal coherence,"[20] that it is impossible to imagine that we may be guilty of the same kinds of questionable behaviors.

This understanding ultimately produces Afghanistan as other[21] because it is based on a conceptualization of the country as a space that is the inverse of ours, a negative space (where torture happens and rights are violated) that might develop into something like "ours", but that is presently lacking the positive characteristics (i.e. human rights, prohibitions on torture and legal institutions) that distinguish us.[22] Consequently, AIC's claims about the applicability of Canadian laws there become about bringing "our laws" to "them" because it is assumed that torture is inherent to Afghanistan and that it has always occurred there. These assumptions are based on constructed differences between Canada and Afghanistan, which do not hold true when held up to scrutiny, but

[19] Gregory, *supra* note 18 at 17.
[20] Said, *supra* note 17 at 40.
[21] *Ibid* at 4.
[22] *Ibid*, *supra* note 19.

nevertheless contribute to the gap that exists between the two places in terms of human rights norms.

Canada is perceived as civilized and non-violent in this sense, because its people are governed by national and international norms prohibiting torture (e.g. the *Charter*) and its officials are held to account if they are complicit in human rights violations.[23] The gap that is created as a result of this also indirectly obscures any similarities between Canada and Afghanistan because it presumes that human rights violations do not happen in Canada but always somewhere else and that if they do, Canadians, at least, have recourse to the legal institutions and laws necessary to hold the government accountable. These assumptions are not entirely true, because the Canadian government has used controversial security certificate legislation to detain individuals in Canada without allowing them due process rights or access to evidence against them.[24] The Canadian government has also been complicit in the extradition of Canadian citizens to torture in other countries.[25] Canada is therefore also culpable when it comes to human rights abuses.

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[23] CBC News, "The cases of Almalki, Nureddin and El Maati,"online: http://www.cbc.ca/news/background/arar/torture-claims.html >and "CBC News: "Federal Officials Contributed Indirectly to Torture of Canadians," online: http://www.cbc.ca/news/canada/story/2008/10/21/inquiry-iacobucci.html. As an example of this, Almalki, Nureddin and El Maati have all attempted to hold the Canadian government to account for its complicity in their transfer to torture abroad. While they have not been as successful in their attempts as Maher Arar for example, they have always had recourse to the law and to holding Canadian officials accountable for the rights violations and torture they have suffered. Arguably, the three men and Arar have all had some level of success in bringing their cases to the attention of Canadian courts. This is irrespective of the fact that the findings of Almalki *et al*'s inquiry remain contested. My contention here is that the legal avenues for contesting torture are available to the four other torture victims because they are in Canada but that these same legal redress remain unavailable to those detained in Afghanistan.

[24] CBC News, "Harkat Deportation Process Underway," (2011) online: http://www.cbc.ca/news/canada/ottawa/story/2011/01/21/ottawa-harkat-deportation.html.

[25] CBC News, "The Arar Inquiry: Frequently Asked Questions," online: http://www.cbc.ca/news/background/arar/arar_faq.html and "CBC News: "Federal Officials Contributed

Torture in Afghanistan

I do not argue that torture did not occur in Afghanistan prior to 2001. In fact, torture and human rights violations have occurred and still occur in Afghanistan. The rule of law is weak in the country and abuses of power happen there as a result of a culture of impunity and as a result of weak judicial system.[26] Reports of human rights violations and torture are comprehensive in their documentation of these incidences. Yet, the reasons for the prevalence of torture in Afghanistan are more complex, intertwined with and exacerbated by the occupation of the country and the ongoing campaign against the War on Terror there. The human rights groups' claims never consider any of these nuances.[27]

For example, in 2004, the Afghan Independent Human Rights Commission (AIHRC)[28] reported that torture routinely occurred as part of police procedures at the

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Indirectly to Torture of Canadians," online: http://www.cbc.ca/news/canada/story/2008/10/21/inquiry-iacobucci.html

[26] The Afghan Human Rights Commission, "Annual Report 2009", at 7 online http://aihrc.org.af/Content/Media/Documents/Annual2009211201118844l3.pdf..

[27] Here, I am not arguing that the human rights representatives of AIC favour the occupation or that they themselves de-contexualize any of the events surrounding the torture of Afghans at the behest of the CF. In fact, in her talk on government accountability for torture that was held at Carleton University in February 2011, the BCCLA's Grace Pastine began by contexualizing the events of the controversy, and tracing their occurrence by referring to the Canadian intervention and deployment there. However, the applicants' arguments before the Court do not thoroughly address this point besides using the Canadian presence there to argue that the Canadian state has jurisdiction there, as I noted earlier. In addition, they do not discuss the role of Coalition Forces besides pointing out that transferring detainees into American custody may lead to their torture. For example, see the Affidavit of Alex Neve, at para 25.

[28] Arguably, the AIHRC reports I use here just as credible and the same as the ones the human rights groups themselves cite. However, in terms of misreading the *Amnesty* case documents, these reports are useful because they provide a more thorough background in terms of the human abuses that occur in Afghanistan. I am especially interested in the reports' focus on the actions of Coalition Forces and not just those carried out by the CF, which is an aspect of the intervention in Afghanistan the human rights groups do not sufficiently elaborate on in their submissions before the Court. They are also more current in terms of the most recent changes to detention policies by Coalition Forces in Afghanistan.

investigative stage especially because it was used to extract information from detainees.[29] They also reported that lack of access to legal aid including the right to counsel was one of the main reasons why people were detained.[30] The Commission paid particular attention to the actions of Coalition Forces in Afghanistan at the time and noted that they had been aware of torture committed by the American military against Afghans, even before the incident at Abu Ghraib Prison in Iraq. The AIHRC cites one situation where an Afghan police Colonel complained about being beaten, deprived of sleep, sexually abused and taunted while in US custody.[31] Furthermore, US Coalition Forces have reportedly tortured detainees in secret Afghan prisons and detention centres, some of whom reported that they had been flown there from other countries in Asia.[32] This is in addition to allegations about the existence of "ghost detainees"allegedly held in secret at CIA-run facilities in Afghanistan. [33]

In 2006, the AIHRC reported that although the number of cases of torture had declined throughout that year, incidences of torture and detention were still high.[34] Human rights reports have also affirmed that rights violations that have occurred there have included torture, due process violations, including arbitrary arrest, and prolonged and illegal detention. This is especially with reference to individuals held by Afghanistan's National Directorate of Security (NSD), the branch of government

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[29] The Afghan Human Rights Commission, "Annual Report 2004-2005", at 18 online http://aihrc.org.af/Content/Media/Documents/Annual20042212011151834343.pdf.
[30] *Ibid* at 19.
[31] *Ibid* at 20, online: http://aihrc.org.af/Content/Media/Documents/Annual20042212011151834343.pdf
[32] Carlotta Gall, *The New Yorker* "Rights Group Reports Afghan Torture." Online: http://www.nytimes.com/2005/12/19/international/asia/19prisons.html.
[33] *Ibid.*
[34] The Afghan Human Rights Commission, "Annual Report 2006", at para 53 onlinehttp://aihrc.org.af/Content/Media/Documents/Annual20062212011158418 38.pdf.

responsible for civil and military intelligence.[35] The 2006 High Commissioner's report also raised concern about the detention of Afghans by American Coalition Forces because there was no Status of Forces Agreement between the US and Afghanistan guaranteeing adherence to international law and due process rights for those detained. The legal status of many detainees held in US custody, including those held at Bagram detention facility, was in question at the time because many detainees were held incommunicado and were unable to challenge the basis of their detention.[36]

More recently, the Commission's 2011 report indicates that the US military has implemented revised detainee review procedures and broader detention reforms. Detainees at Bagram have all been transferred to another detention facility in Parwan and new procedures were introduced, which include providing those detained with personal representatives who help them with their cases, as well as the possibility to call "reasonably available" witnesses to testify. The new changes also include the establishment of a Detainee Review Board (DRB), which determines whether a detainee will be transferred or released.[37] Despite this, however, there are concerns that detainees still do not have access to a lawyer, but rather to the expertise of a military officer who acts as their representative. There are only nine representatives available to process over

[35] "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." March 3 2006 at para 72 online: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/116/91/PDF/G0611691.pdf?OpenElement

[36] *Ibid* at para 72.

[37] "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." January 19 2011online: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/103/31/PDF/G1110331.pdf?OpenElement at 16 (para 72).

1000 cases. This is in addition to the fact that the detainees' access to information held against them still remains very limited.[38]

These reports indicate that there are many incidences of detention administered by Coalition Forces or undertaken on their behalf. Neve notes that transferring detainees to either US or Afghan custody is inadvisable from a human rights perspective, because those detained are still subject to the risk of torture. He suggests that only halting the transfers all together would ensure that no transfers to torture occur. Neve goes on to recommend that Canada establish its own detention facilities with the help of other Coalition Forces who also have contributed to the International Security Assistance Force (ISAF).[39]

While this recommendation acknowledges that detainees remain at risk in the custody of both the US and Afghanistan, suggesting that, barring a halt in transfers, Canada should establish its own detention bases,ignores the ways in which the presence of Coalition Forces in Afghanistan perpetuates both the occupation of the country and the risk of torture there. Setting up detention centres in Afghanistan is another way for Canada to establish itself as an occupying power in the country. The base, if established, would become a physical manifestation of the occupation of Afghanistan and encroach on its physical territory because it would have to stretch across the physical geography of the land. Canadians would be able to claim part of the country's physical territory as a

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[38] *Ibid.*
[38] *Ibid* at 48.
[39] Affidavit of Alex Neve ("Neve Affidavit") at para 24-25. sworn August 29 2007 Applicants' Motion Record Vol 1, Tab 1.

space of their own if they built a detention facility there. In this instance, AIC's recommendation evokes a "benevolent" rather than militarized occupation of the country.

Neve's suggestion also assumes that Canadian soldiers will not torture detainees if they establish a detention base in Afghanistan. This implies that their identity as Canadian—and its association with civilization and modernity—precludes them from resorting to torture. Torture and other human rights abuses still occurred at Abu Ghraib Prison in Iraq after the US took over the prison and there is no guarantee that Canadians will not do the same. Coalition Forces' tendency towards detention, and their paranoia about the existence of "invisible enemies", coupled with the detainees' unclear legal status, and the country's poor legal infrastructure, contribute to the prevalence of torture in Afghanistan and the likelihood that Coalition Forces might resort to it because they are pressured to obtain results as part of their role in the War on Terror. This environment also explains why the Canadian military might be pressured to hand over detainees to Afghan police.

Documenting incidences of abuse is an important aspect of human rights advocacy in this instance. However, it is also necessary to acknowledge that Coalition Forces contributed to the occurrence and frequency of torture in Afghanistan because intelligence-gathering is necessary for the continuation of the War on Terror. In this context, it is supposedly impossible for Coalition Forces to apprehend members of the Afghan insurgency unless their names are disclosed to them by other detained affiliates, since these individuals are members of a far-reaching network spread around the world.

Seymour Hersh's journalistic investigations into US military operations in Iraq shortly after the Abu Ghraib photos came to media attention in 2003, reveal that the logic behind using torture against Iraqi detainees at the time had its roots in Afghanistan. According to Hersh, in 2001, the Bush administration's attempts at finding al Qaida terrorists in the country came up against some legal obstacles. Combat officers who found al Qaida members had to have legal clearances signed by lawyers before they shot at the targeted individuals. Sometimes, lawyers refused to sign the documents authorizing this, which meant that the targets became out of reach or changed their locations before US forces were able to intercept them.[40] This argument justified using torture in Afghanistan because the practice is theoretically supposed to enable Coalition Forces to torture suspected members of the insurgency in Afghanistan, make them confess the locations and plans of their organizations' members and apprehend the terrorists before they carry out operations. This example demonstrates that the presence of Coalition Forces exacerbated the occupation of Afghanistan and increased the likelihood of torture there both by US and other troops as well as by Afghan Police. The occupation of Afghanistan, a reliance on particular enemy constructions in this instance, and the use of torture there make up one example of the complex link between torture and modern politics today.[41] Consequently, although it most likely occurred before 2001, torture is not actually inherent to the space of Afghanistan; its existence there has other purposes and is affected by various other factors, that a general focus on the prevalence of the phenomenon of torture in Afghanistan proper generally ignores.

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[40] Seymour M. Hersh, "The Grey Zone," *The New Yorker*, (May 24, 2004) online: http://www.newyorker.com/archive/2004/05/10/040510fa_fact

[41] Darius Rejali. *Torture and Modernity: Self, Society and State in Modern Iran* (Boulder: Westview Press, 1994 at 6.

Amnesty *et al.* and Canada's Responsibility for Torture in Afghanistan

I have argued above that the human rights organizations have specific presumptions about Afghanistan and the likelihood of torture there that inform their ideas about the country as a particular kind of space. These ideas also contribute to how the human rights groups understand the Canadian government's responsibility for torture. For Amnesty, *et al.*, Canada remains primarily responsible for the torture of Afghans because its military representatives decide to transfer detainees to Afghan authorities who themselves engage in torture. As far as Amnesty is concerned, transferring detainees into Afghan custody is tantamount to aiding and assisting Afghanistan in the torture of those detained.[42] Considering that AIC is a Canadian organization and the improbability of bringing the Afghan Police to court in this instance, Amnesty *et al.* can only hold the government of Canada responsible for the torture (or assistance in torture) of Afghan detainees, although the applicants still imply that that government of Afghanistan remains responsible for the physical violence the detainees are reportedly subjected to.

AIC's distinction between those responsible for the physical torture and those responsible for the transfer to it suggests that although Afghan authorities are causally responsible for the instances of actual torture (because they physically inflict its violence on the detainees), they cannot be expected to be held legally responsible for it. Canada must therefore be held responsible for it instead. Although there are strategic and practical reasons circumscribing Amnesty's ability to hold the government of

[42] *Amnesty International* "Applicants' Memorandum of Fact and Law: Re Motion to Determine the Application of the *Charter* to the Canadian Forces in Afghanistan," at *para* 66-67.

Afghanistan accountable for the violence it incurs in its own territory against its own citizens, attempting to bring the *Charter* to the country employs a paternalistic logic, which assumes that the government of Afghanistan is not mature enough to be responsible for its own actions. The Canadian government and state can be held responsible, however, because they have reached a particular state of development, that enables them to govern themselves in accordance with acceptable laws (here, the *Geneva Conventions*, the *CAT* and the *Charter*). The country of Afghanistan meanwhile, is childlike, requiring "a form of tutelage or a disinterested project" intended to bring it to maturity,[43] which in this instance takes the form of introducing and bringing "our rights" to Afghanistan. Canadian institutions like AIC rely on a colonialist logic that treats Afghanistan as adult parents would a disobedient child, reprimand it for acting inappropriately (i.e. for torturing its own people) and intervene (by introducing Canadian laws) to fix the mess incurred as a result of Afghanistan's inappropriate behaviour.

Conclusions on the Applicants' Spatial Conceptualizations of Afghanistan

The examples discussed in this section demonstrate that Western powers are just as capable of human rights violations as Afghan officials and that the phenomenon of torture does not only occur in countries unlike "ours", where the rule of law is weak and impunity is an everyday practice. They also shed light on how a discourse of othering works to erase the similarities between Western and non-Western cultures concerning the practice of torture and the legal norms that prohibit it. In this instance, rather than

[43] Leela Gandhi, *Post-Colonial Theory: a Critical Introduction*, (St, Leonards;, 1998) at 32 cited in Orford at 54.

deliberating on the causes and consequences of violence in Afghanistan (as far as the well-being of detainees and the circumstances leading to their torture are concerned), the human rights groups focus on the systems that are in place to monitor cruel and inhuman treatment,[44] which include the legal mechanisms established to prohibit torture.

The human rights representatives assume that torture is a barbaric and morally-reprehensible act: therefore, it follows that the appropriate response to it lies in ensuring that "states have correct technical policies"[45] which might include having bureaucratic institutions to ensure compliance with documents like the *Torture Convention* as well as adherence to these laws themselves. These suggestions are intended to simply monitor torture and ensure that it does not occur. Doing this might be in accordance with the human rights organizations objectives and identities; however, relying on bureaucratic mechanisms and laws is insufficient when considering the torture of Afghans because these incidences of violence are intimately related to the conflict in Afghanistan, to Afghanistan's history and politics and to other actors' responses towards the possibility of torture.

II) The Military, Threat and the Space of Afghanistan

In an earlier chapter, I argued that the military is fearful of those it detains and perceives them as a particular kind of enemy that can potentially jeopardize the CF's mission in Afghanistan. I demonstrated that the Canadian government is concerned with

[44] Tobias Kelly, "The UN Committee Against Torture: Human Rights Monitoring and the Legal Recognition of Cruelty." *Human Rights Quarterly* 31 no.3 (August 2009) at 779.
[45] *Ibid.*

providing the country with security and restructuring it. Related to both these points, I now contend that representatives of the CF who come before the Court associate the violence they face in the country with the geographical space of Afghanistan itself, which contributes to the construction of the country proper as a serious threat that the international community (including the Canadian military) has to defend itself against. This geographical understanding of Afghanistan as a threat explains how the responsibility for torture is articulated in the military's documents.

In his affidavit, CF Colonel Noonan provides a brief background summary of the conditions of Afghanistan that make it hard to sustain humanitarian or military operations in the country.[46] He describes the physical geography of the land there: the country is "landlocked[...]bordering on China, Iran, Pakistan[...] is quite rugged and mountainous. A large mountain range[...] runs northeast to southwest across [it] dividing its northwest provinces from the rest of the country."[47]Describing the geography of the land itself as "rugged and mountainous", run through with mountains that are seemingly hard to scale, contributes to an imaginary of Afghanistan as an unmanageable, disordered place, which implies that the CF need to be there to make it less chaotic and bring order to it. Here, Noonan articulates a geographical conceptualization of the threat to the CF that can be mapped out from North to South. Most contact with the "enemy" occurs in the southern region of the country where most of the Forces conduct operations.[48] Therefore, it is clear that there is a geographical component to the nature of the threat in Afghanistan.

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[46] Affidavit of Col. Stephen Noonan ("Noonan Affidavit"), at para 6sworn May 1 2007 RR at Tab 26.
[47] *Ibid* at para 7-10.
[48] *Ibid* at para 24.

The country's geography and its relevance to military strategy on the ground are not the only indicators of the geographic dimension of the conflict; however, Afghanistan itself constitutes a threat to international security. In her testimony, DFAIT's Assistant Deputy Minister Colleen Swords points out that the situation in Afghanistan has persistently concerned the UNSC since 1998 and that the organization has ratified numerous resolutions on Afghanistan since then,[49] all of which are meant to counter the country's persistent backing of the Taliban regime.[50] The presence of the Taliban and al Qaida in particular, justifies the international community's projects of reconstruction and development, which aim to rebuild Afghan institutions, infrastructure and security apparatuses.[51] Terrorist operations carried out by members of these organizations cause indiscriminate civilian causalities and interfere with civilian lives and with the work humanitarian groups do there.[52]

In making these arguments, the government's and military's representatives connect the physical space that is Afghanistan to terrorism because of the alleged presence of terrorist bases and activity there. The link between terrorism and Afghanistan and the idea of Afghanistan as a hub for terrorism, therefore, contribute to a particular "imaginative" of the country similar and connected to the one the human rights organizations construct about the place. In fact, both the military's and the human rights' groups' conceptions of Afghanistan are complementary because each contributes to the benign intervention projects both actors espouse in Afghanistan proper.

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[49] Affidavit of Colleen Swords ("Swords Affidavit") at para 5 sworn May 1 2007, Motion Records of the Respondents to the Main Application at Tab 25.
[50] *Ibid.*
[51] *Ibid.*
[52] Noonan Affidavit, *supra* note 44 at para 12.

Afghanistan is one of the world's poorest countries, and has "suffered from its recent history of civil war, Soviet occupation, mujahedeen resistance, fragmentation of power and the rise of Islamic extremism."[53] It is also "a country emerging from more than two decades of instability, human rights abuses, terror, insurgency, drought and poverty."[54] This indicates that Afghanistan is developing, moving on its way towards a better, more hopeful future; however, these statements also associate the space of Afghanistan with terrorist threats, because they are premised on the assumption that terrorism, at least, is indigenous to Afghanistan. This supposition, in turn works to exonerate Coalition and other international armed forces presently operating there from any responsibility for the ongoing civil war, which itself exacerbates the human rights abuses that occur. It also contributes to the lack of legal infrastructure and insecurity, and perpetuates abuses of power by government officials.

American, Western and other powers have had a prolonged (if sometimes covert) and convoluted engagement in Afghanistan's recent history and politics. Western imperial ambitions for the country extend as far back as the early nineteenth and into the beginning of the twentieth century, when British imperial officials viewed Afghanistan and its people strategically and sought to use them to further their own geopolitical and imperial ambitions in the region.[55] Aside from Britain's interests in the country in nineteenth century,[56] two significant powers whose influence had a markedly significant effect on the development and propagation of the civil war situation in Afghanistan today are the USSR and the United States. Both the US and the former Soviet Union

[53] Swords Affidavit, *supra* note 47 at para 3.
[54] *Ibid*, at para 3.
[55] Gregory, *supra* note 18 at 30-31.
[56] Tariq Ali, *The Clash of Fundamentalisms* (*Verso:* London 2002) at 203.

contributed significant funds towards Afghan military and economic aid in an effort to counter each other as part of the Cold War. The USSR heavily exerted its influence in Afghanistan in the 1980s in reaction to the Iranian Revolution and its fears that Islamism would spill over into the country. It sought to install a client government there, and began bringing troops into Kabul to that end. This, coupled with the client regime's own repressive and secular policies, ultimately encouraged the development of an Islamist resistance movement in the country, aimed at fighting Soviet occupation. [57] While movement's adherence to Islam constituted the moral basis according to which they took up arms against the Soviets, the impetus for the struggle against Soviet occupation lay in their desires for Afghanistan's independence and their own personal autonomy.[58]

Members of this extensive group included men from Pakistan, Saudi Arabia and other Arab countries, all of whom attempted to pursue a form of armed struggle (called "jihad") against the Soviet invasion of the country; these groups eventually became known as the "mujahedeen"[59] The Americans, meanwhile, suspicious of the possibility of Soviet intervention in the country, had begun secretly funding the mujahedeen six months prior to the USSR's invasion. Pakistan and Saudi Arabia were also involved in the escalating conflict as they attempted to direct and curtail the offensives of the mujahedeen in order to further their own strategic domestic and transnational interests in the country.[60] For example, Pakistan opposed the Afghan governments in power, prior to the Soviet invasion primarily because of their support of

[57] Gregory *supra* note 18 at 33.
[58] William Maley, *The Afghanistan Wars* (Palgrave Macmillan: New York) at 60.
[59] Gregory *supra* note 18 at 34.
[60] *Ibid* at 35.

an independent Pashtunistan, an ethnic group that opposed Pakistani identity. Pakistan also interfered in Afghanistan as a result of its own antagonistic relationship with India.[61]

As a result of its fear of the spread of communism in Asia, the United States Central Intelligence Agency (the CIA) unofficially supported the mujahedeen resistance effort by funding them, supplying them with arms and providing them with training through Pakistani government offices like the InterServices Intelligence Directorate (ISI).[62] The funds the mujahedeen accrued over the years were matched by such states as Saudi Arabia through official sources or otherwise[63] and even by Egypt.[64] Furthermore, the external aid received via Pakistan and intended for the resistance effort ultimately funded extremist and Islamist factions of the resistance rather than supporting indigenous nationalist groups.[65]

Another consequence of external powers' interference in Afghan internal politics was that Osama Bin Laden ended up being one of the young radicals recruited through the Pakistani and CIA initiatives to fight the Soviet invasion. His contacts in Saudi Arabia enabled him to support the resistance financially and logistically, flying in engineers to help reconstruct and build the war-torn country. In 1988, he established al-Qaeda to monitor all those who volunteered as part of the Islamist resistance movement underway in Afghanistan.[66] The Islamist guerrilla efforts were so successful that the USSR pulled out all of its troops from the country in 1989. The United States also

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[61] Maley, *supra* note 56 at 68-9.
[62] John Cooley, *Unholy Wars: Afghanistan, America and International Terrorism* (Pluto Press: London 2002) at 64-85.
[63] *Ibid.*
[64] Ali, *supra* note 54 at 208.
[65] Gregory, *supra* note 18 at 35-36.
[66] *Ibid.*

stopped supporting radical factions in Afghanistan after the USSR pull-out and no concerted effort was made to rebuild the country's war-ravaged economy or infrastructure.[67]

This summary of Western and other powers' involvement in Afghanistan demonstrates that each of these countries had its own interests in the country that justified its involvement in the Afghan civil war; it is also obvious that the resistance movement was manipulated to meet US and other interests, particularly with respect to restoring the balance of power between the Soviet Union and the United States characteristic of Cold War politics for strategic control between the Soviet Union and the United States. Importantly, this history demonstrates that the existence of al-Qaeda and other extremist elements that the Canadian Forces presently consider a threat to their operations in the war on Afghanistan today can partially be attributed to the US's training, funding and manipulation of the Islamic resistance movement in Afghanistan.[68] While the USSR remains guilty for the destruction and instability caused by the war it led against the resistance movement, the United States and other regional powers like Saudi Arabia remain partially responsible for the extremism engendered in Afghanistan at the time, because the radicalism it produced influenced the hijackers who flew planes into the World Trade Centre in 2001. These examples demonstrate that terrorism is engendered in Afghanistan, rather than being indigenous to it.

Canadian military representatives do not highlight this recent history of Afghanistan or discuss the role that Western powers like the United States have

[67] Gregory, *The Colonial Present* at 35-37.
[68] Ali *supra* note 54 at 209.

historically played there, which ultimately only served to aggravate the situation in that country. Their arguments concerning the threat posed by terrorist organizations there imply that these groups are indigenous to the space of Afghanistan and that the kinds of violence they perpetrate against civilians have always existed there. While it is true that violence had existed in the country prior to the deployment of Coalition Forces there, it is disingenuous to assume that Western powers contributed little to the Afghan conflict before the US-led intervention in 2001.

Associating terrorism with Afghanistan in this way forms part of the imaginative geography of Afghanistan which ultimately contributes to making the country the target of Coalition Forces' operations there. The military's arguments about the nature of the threat of terrorism in Afghanistan hold sway because terrorist groups like al-Qaeda and Taliban are identified with Afghanistan in such a way that one into the other.[69] This is coupled with a "performance of territory, through which the fluid networks of al Qaeda would be fixed to a bounded space [i.e. Afghanistan]"[70] so that going to war with Afghanistan becomes synonymous with going to war against al Qaeda and terrorism at the same time. This folding of the space of Afghanistan into one harboring al Qaeda members is the result of the military's strategic obfuscation of Afghanistan's territory with terrorism. This works because it enables Coalition Forces to make the country the target of standard military operations[71] and legitimizes fighting a war on terrorism against Afghanistan and the CF's deployment there.

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[69] Gregory *supra* note 18 at 49.
[70] *Ibid* at 50.
[71] *Ibid* at 49..

Detention Facilities and Afghan Space

The military's concern with Afghan space is also evident in its arguments against the establishment of a detention facility in the country. Both Noonan and the military's international law expert, Christopher Greenwood, present counter-arguments to the applicants' recommendation that the military set up a detention base in Afghanistan. They claim that Canada is incapable of building and managing a long-term detention facility there[72] and that in any event, there is no basis in international humanitarian law for establishing such a base because those detained do not qualify for POW status under international law.[73] Accordingly, the best approach for the international community in this instance is to recognize the Afghan government's responsibility for the treatment of detainees rather than for Canada to build its own detention base there.[74]

This argument implies that Canada will not occupy Afghanistan by building a base symbolizing its physical presence in the country; however, military representatives resort to this option in order to avoid addressing any responsibilities they have concerning the detention, treatment and torture of detainees. This explains why they argue that the ISAF mission is better served if, rather than building a base there, Canadian troops assist Afghans in improving their own democratic and law-making institution and recognizing that Afghan authorities are responsible for the treatment of those detained.[75]

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[72] Noonan Affidavit, *supra* note 44 at para 37.
[73] Affidavit of Christopher Greenwood, ("Greenwood Affidavit") at para 59 sworn August 14 2007, Report Record of the Respondents to the Main Application [hereinafter RR] Vol 1, Tab 4.
[74] Noonan Affidavit, *supra* note 44 at para 38.
[75] *Ibid* at para 37-8.

The military's arguments against halting transfers are framed in terms of respecting the sovereignty of Afghanistan. The Technical Agreement between Canada and Afghanistan authorizes Canada's presence in Afghan territory; it is based on Afghanistan's consent.[76] This means that Canada must respect Afghanistan's territorial sovereignty, even if the argument were made that a document like the *Charter* or other international treaties could apply outside of Canadian borders.[77] This explains why only Afghanistan's laws should apply in Afghanistan according to the military, even when the conduct of CF members is in question.[78] This claim is, like the previous one concerning the establishment of the detention base, used to convince the Court that the government of Afghanistan should itself be responsible for how it treats those detained (including their detention and torture while in Afghan custody). They should be prosecuted under Afghanistan's its own laws, because Canada has no jurisdiction there. As a consequence of this, therefore, Canada is only able to exercise its sovereignty in Afghanistan according to the ISAF mandate and its objectives, foremost among which is respect for the sovereignty of the state of Afghanistan.[79] This objective maintains that a "state" like Afghanistan is autonomous and that the international community's intervention consists of overt acts like military intervention or economic coercion.[80] The military and Court both imagine Afghanistan as having "selective sovereignty" over its own territory; its control over its own territory is conditional and accorded to the country whenever the

[76] Greenwood Affidavit, *supra* note 70 at para 15.
[77] *Ibid* at para 48.
[78] *Ibid.*
[79] *Ibid* at para 61.
[80] Anne Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (Cambridge, Cambridge University Press, 2003) at 41.

respondents or the Court find it convenient and in a manner ultimately designed to exonerate them of all responsibilities towards the Afghan detainees.

In Afghanistan's case, while the international community's intervention involves engaging in the violence associated with military deployment, the rest of its efforts there appear benign, intended only to "help" rebuild Afghan infrastructure and institutions,[81] including assisting it in establishing and running its own policing and security apparatuses[82] and supporting other economic and social development initiatives, including those aimed at reducing hunger, poverty and unemployment.[83] The international community assumes that these projects are perfectly legitimate, all meant to put Afghanistan on its way towards a smooth transition to democracy. The goals and conditions of democratization are determined and delegated by Coalition member-states. This, in turn, establishes a particular power dynamic between the government of Afghanistan and the international community, which implies that it can achieve the same economic and political strength characteristic of Western states.[84] The argument here is that Afghanistan can develop into a space like "ours" and acquire positive characteristics (here, democracy, the rule of law, human rights, security, etc.) that distinguish "us"[85] if it follows "our" prescriptions to do so.

If it is understood according to the description above, Afghanistan's sovereignty becomes contingent on the Western presence on its soil, especially because it is a particular kind of sovereignty that is guaranteed and circumscribed by the same Coalition

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[81] Swords Affidavit, *supra* note 47 at para 6.
[82] *Ibid* at para10-12, Noonan Affidavit, *supra* note 44 at para 16.
[83] Swords, *supra* note 47 para 16-17.
[84] Orford, *supra* note 77 at 41.
[85] Gregory *supra* note 18 at 17.

Forces involved in the intervention. The sovereignty promoted by the intervening governments and troops is arguably "selective" rather than "true" sovereignty, because ordinary Afghans might not actually consent to the international presence in their country, regardless of the supposed benefits they might accrue as a result of it. The sovereignty argument the intervening states rely on ultimately allows them to describe and understand their intervention as providing aid and assistance to Afghanistan rather than occupying it. This logic in turn, reinforces the West's position of strength relative to Afghanistan because the latter's civil war situation, its deteriorated infrastructure, etc., all necessitate the international community's presence there. Without reflecting critically on the historical developments that have contributed to the Afghanistan's current situation and the Western interference there to begin with, it is implied that Afghanistan needs Canada, NATO, ISAF and the UNSC to be present on its soil, otherwise its military and police officers will not be able to secure its own streets and borders, its activists will not be able to advocate for human rights and promote them, and so on and so forth. This contributes to the logic of a colonial civilizing mission,[86] which is based in a rhetoric premised on the colonialist assumption that colonized people (like Afghans in this case) should "be educated in the operations of the state machinery [...] created to enable the governance and exploitation of colonial territories so that a smooth transition from colony to decolonized state can be made."[87]

The "colonizing mission" argument described above works as part of the military's own self-serving identity reinforcing strategies to justify the international presence in Afghanistan. It perpetuates the occupation of the country in a manner that

[86] Orford *supra* note 77 at 45.
[87] *Ibid*, at 55.

privileges the international community's efforts there. This prevents Afghans from cultivating their own reconstruction projects and developing their own nationalist objectives independent of Western influences and assistance. In this way, the military's justification for going to Afghanistan becomes more about bringing that country the progress and democracy it lacks, for example, without addressing the possibility that Afghanistan remains dependent on the international community and occupied by it at the same time.

III) Afghan Sovereignty, Intervention and Afghanistan as Space in *Amnesty*

The military's argument concerning the importance of respecting Afghanistan's sovereignty is the same one the judge relies on in her deliberation on the case itself. In fact, the judge's background summary of the conflict provides the same bases for Canada's presence in Afghanistan[88] that the military's representatives build their arguments on.[89] The judge spends much of her deliberation on the case determining whether or not Afghanistan has consented to the application of the *Charter* over its territory.

Mactavish notes that there is no question that Canada is presently conducting military operations in Afghanistan with the Afghan government's consent[90]and argues that a review of the nature of the international community's presence in Afghanistan reveals that, while Afghanistan has consented to the CF's presence on its soil, the

[88] *Amnesty supra* note 1, at para 20-40
[89] Greenwood Affidavit, *supra* note 70 at 13-15.
[90] *Amnesty supra* note 1 at para 157.

government of Afghanistan has not consented to "the wholesale forfeiture of its sovereignty."[91] She cites the *Afghan Compact* to show that Afghanistan has not agreed to cede its jurisdiction to states operating in its territory; the international community has instead agreed to support its attempts at maintaining its own sovereignty.[92] By focusing on the discourse of sovereignty and its relevance to the territory of Afghanistan, "the Court engages with and produces [a] territorial relationship [...] in ways that empower a statist model as the predominant model of territorial sovereignty[....]."[93]

Accordingly, these arguments demonstrate that both the Court and the military assume that Afghanistan is its own sovereign territory, capable of democratically determining its own fate and the fate of its people. [94] This is a curious claim, because it can be argued that Afghanistan is not actually sovereign so long as Coalition troops remain on its soil. Even if one claims that Afghanistan has consented to the international community's presence there, maintaining that Afghanistan is its own independent state in this instance "relies on a performance of sovereignty through which the ruptured space of Afghanistan [can] be simulated as a coherent state."[95] This, in turn, facilitates the creation of an allegedly stable state with its own defined borders, against which the amorphous war on terror can be fought. In fact, without binding al-Qaeda to the territory of Afghanistan,[96] the Bush administration and its allies would have had to face a "fluid" enemy, characterized by a "radical non-territoriality", and operating in a series of networks in more than one country that is difficult to fight militarily.[97]

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[91] *Ibid.*
[92] *Ibid* at para 158.
[93] VasukiNesiah, "Placing International Law: White Spaces on a Map" (2003) 16 LJIL 18
[94] Noonan *supra* note 44, at para 37.
[95] Gregory, *supra* note 18 at 50.
[96] *Ibid.*
[97] *Ibid* at 50.

Thus, it was necessary to "fold" al Qaeda into the "fractural but no less bounded space of Afghanistan" in order to construct it as a bounded space of international terrorism.[98] In this way, the threat posed by the flexible terrorist networks is linked to and contained within the physical territory that is Afghanistan; this enables Coalition Forces to construct a stable, knowable, territorially-bounded enemy they can visualize and fight against in reaction to the September 11 attacks. In a parallel move, the territory of Afghanistan itself is caught between being the Coalition's "enemy" and requiring their help to actualize its own independence. This justifies the Court's claims that Afghan detainees should be subject to Afghanistan's own separate laws[99] and by extension, jurisdiction. Invoking Afghan sovereignty is also problematic because it puts the international community in a place of "positional superiority"[100] relative to Afghanistan. This establishes a particular power relationship between the international community and Afghanistan that leaves the country dependent on the assistance of Coalition Forces.

The fact that the military's and the Court's arguments mirror each other indicates that the judgment in *Amnesty* is consistent with the military's claims. Both actors use the consent and sovereignty arguments to avoid placing the responsibility for the torture of detainees with the Canadian government and instead relegate it to the government of Afghanistan. However, rather than approaching the issue from the military standpoint of the necessity of securing Canada from a threatening enemy—an argument consistent with the military's own security-oriented role— the Court approaches Afghan sovereignty from a legal perspective, informed by its role as a Canadian judicial institution.

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[98] *Ibid.*
[99] *Amnesty surpa* note 1 at para 161.
[100] Said *supra* note 17, at 7.

According to the Court, the *Afghan Compact* "reaffirms [both Canada and Afghanistan's] commitment to the protection and promotion of rights provided for in the Afghan constitution and under applicable international law" [101] By pointing to each government's obligations under the *Compact*, the judge delineates the legal boundaries of international law, Afghan constitutional law and, by extension, Canadian law Separating the three kinds of law in this instance ensures that the *Charter* only applies to Canadians in Canada and that it does not impose on Afghan sovereignty Thus, the territory of Afghanistan is taken for granted, as its own state, with defined physical boundaries, it is "treated as simply the abstract ground onto which law [in this case Afghan law and international law] is applied"[102] This conceptualization also contributes to the imaginative of Afghanistan the Court itself articulates because its demarcations concerning the kinds of laws that apply there affect the ways in which Afghanistan is legally produced as a particular geographical space[103] where certain laws apply over others In this instance, determining the *Charter's* reach serves to allocate jurisdiction,[104] which in turn enables the Court to organize legal governance by sorting and separating[105] where the *Charter* applies and to whom This sorting out of the applicable laws forms "[ ]the routine work of jurisdiction [according to which] territories and sovereigns tend to be seen as part of the same package, such that sorting out territories simultaneously sorts out government authorities"[106] Separating jurisdictions out like this ensures that the *Charter* stays in Canada and that Canadians are not imposing their laws on Afghans in

[101] *Ibid* at para 160
[102] Nesiah, *supra* note 91 at 91
[103] *Ibid*
[104] Mariana Valverde, "Jurisdiction and Scale Legal 'Technicalities' as Resources for Theory "*Social and Legal Studies* 18 no 2 (2009) *at* 142
[105] *Ibid*
[106] *Ibid* at 144

Afghanistan and influencing the ways they govern their affairs, which in this case, extends to the ways Afghanistan treats Afghans detained by their own police.

The Federal Court and Allocating the Responsibility for Torture

By categorizing the application of the *Charter* with reference to the boundaries each set of laws is meant to govern, the judge is defining both the kinds of actions the Canadian military will be responsible for under the law as well as the CF conduct the Court itself is able to adjudicate when it makes certain pronouncements and avoids others. In this case, the Federal Court ruled that the *Charter* does not apply to CF operations in Afghanistan. By making this decision, the judge avoids addressing the possibility of torture that those detained are reportedly subjected to and prevents the issue from coming before this and other courts in the future.

In her discussion of the possible flow of answers to questions of jurisdiction, Valverde lists four different questions that are answered simultaneously once the issue of jurisdiction is addressed. First, determining where certain jurisdiction applies leads to answers concerning who is being governed. This leads to questions about the objects of governance (i.e. what is being governed). Thinking about the objects of governance leads to considerations of "how" the objects are governed. The answer to the "how" question usually determines the governing capacities of jurisdiction and the rationalities of governance.[107]

[107] Mariana Valverde, "Jurisdiction and Scale: Legal 'Technicalities' as Resources for Theory."*Social and Legal Studies* 18 no. 2 (2009) at 145.

Applying this set of questions to the Court's deliberations on the space of Afghanistan is particularly revealing about how the responsibly for torture is understood in the case. Determining *Charter* jurisdiction meant that the *Charter* does not apply in Afghanistan (the territory), which led the judge to conclude that it did not apply to the Afghan detainees. This also led the Court to rule that the rights being claimed on their behalf have their basis in the Afghan constitution and that they should consequently be governed by Afghan authorities and under international law rather than be subject to Canadian laws like the *Charter*.[108] Thus, the Court can argue that the wording of the First Detainee Arrangement between Canada and Afghanistan does not suggest that Canadian laws can be applied to the treatment of detainees by Afghan authorities; only international laws and the Afghan constitution apply in this instance.[109] This reasoning exonerates the military from any responsibility for the torture of those detained. It also enables the Court to avoid addressing the question of torture, and engaging in any detailed deliberations on its political ramifications. The Court ultimately addresses the issue by referring to the legal aspects of it.

IV) Conclusions on the Conceptualization of Afghanistan as Space

There are commonalities among all of the actors' approaches to Afghanistan as a space. One obvious similarity in this case concerns how each actor articulates a particular imaginative geography of Afghanistan. Each of the actors involved has their own perspective on the geography and the space of Afghanistan specifically. The military and

[108] *Amnesty supra* note 1 at para 170-172.
[109] *Ibid* at para 174-179.

the Federal Courboth perceive Afghanistan as a sovereign space/state. However, Afghanistan's sovereignty in this instance remains limited and selective, which perpetuates unequal power relationships between the international community and Afghanistan. These dynamics of power ultimately reinforce the fact that Afghanistan cannot itself be sovereign or achieve its own goals towards nationalist self-determination without the assistance (military or otherwise) of Western powers. This remains true despite the fact that other countries have always interfered in Afghan politics.

All three actors construct their own imaginative of Afghanistan, which is based on ideas of it as a simultaneously lawless but nevertheless sovereign space—according to both the military's and the Court's arguments— requiring international and other laws, human rights (according to the human rights groups), and democracy and reconstruction (according to the military). This imagining constructs the country as a geographical "region that can be pulled into international law [or more accurately the international community] ironically by determining [it] as "other".[110] These ideas justify Western humanitarian intervention—both military and otherwise— in the country, and enable the international community to engage in "missionary labours" there,[111] all of which are allegedly intended to make Afghanistan into a "sovereign" state similar to other developed countries.

The intervention there as it is understood by each of the three actors involved, has a specifically colonial character that works contrary to the goals of national self-determination, which are premised on "underlying notions that peoples are not mere

[110] Nesiah *supra* note 91, at 19.
[111] Orford *supra* note 71.

pawns in the hands of sovereign states but conglomerates of individuals whose wishes and aspirations must be taken into account and given legal force as much as possible."[112] Thus, the Court and military's claims regarding the necessity of safeguarding and respecting Afghan sovereignty remain superficial because arguments about Afghanistan's sovereignty are always manipulated in such a way that they appear benevolent but nevertheless justify the persistent occupation of Afghanistan and its continued dependence on Western powers. This is also relatively true when considering the arguments made by the human rights groups.

These claims also enable the military and the Court in particular to avoid addressing their responsibilities (both under international and Canadian laws) concerning the torture and detention of Afghans. Their contentions are somewhat different than those presented by the human rights organizations about Canada's responsibility for torture. *Amnesty et al.* view the torture of detainees (primarily) as the responsibility of the Canadian military and government despite the fact that Afghanistan remains the state causally responsible for the torture of those detained because its officials actually engage in these violent acts. Ultimately however, all three actors involved manage to assign responsibility for the torture of detainees at least partially, if not wholly, with the already-beleaguered and fledgling government of Afghanistan. This, in turn, contributes to the notion that Afghans and the rights they may have, remain trivial in the Court and the military's considerations of their situation, in spite of the fact that both of the Court and the Canadian military reaffirm time and time again that Afghans are the people their government is sent to assist.

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[112] Antonio Cassese, qutd in Nesiah, *supra* note 91 at 13.

CONCLUSION: CANADIAN COMPLICITY IN TORTURE - THE INTERCONNECTIONS BETWEEN IDENTITY, THE NORMS ON TORTURE AND AFGHANISTAN AS SPACE

"I think Canadians believe in this mission. I think they believe that we have a responsibility as the rich and luxurious and caring nation that we are to help in other places around the world where the populations don't have any of those benefits or advantages or rights."

General Rick Hillier, Former Chief of Defense Staff of the Canadian Forces[1]

In the above quote, Former Chief of Staff of the Canadian Forces, Rick Hillier, points to the responsibility he believes Canadians in general have towards other states and peoples. Although he does not mention it directly, his title as the previous Commander of the CF in Afghanistan suggests that his commentary is also geared towards the men and woman who serve in Canada's, armed forces, most of whom were at one point or another deployed in Afghanistan. This quotation also demonstrates that Hillier believes Canada's commitments to other countries (like Afghanistan, for example) are obligations conferred upon it by particular "advantages", "benefits" or "rights" unique to Canadians that other peoples unfortunately do not enjoy. I have tried to explain in the preceding chapters why CF representatives like Hillier and others feel that they are particularly responsible for other states and are justified in intervening in their politics.

However, the analysis I have presented here is primarily concerned with a different kind of responsibility than the one Hillier seems so confident about, a

[1] General Rick Hillier Afghanistan Oct. 1, 2006, "The Essential Rick Hillier: Facts and Quotes" CBC News online: <http://www.ctv.ca/CTVNews/Specials/20080415/hillier_in_brief_080415/.

responsibility that is far more serious and that has already had, and might still have, critical ramifications for Canada, Canadians and Afghans alike, particularly in light of the CF's campaign in that country. In fact, the claims concerning Canadian responsibility for the transfers and resultant torture of Afghan detainees who are the subject of this thesis are those Hillier and other representatives of the Armed Forces and the Canadian government have historically denied and ignored.[2] This is a characteristic response that persists today, even as the Conservative government vacillates in its decisions about whether or not to release the first set of DFAIT reports concerning the transfer controversy. [3]

I have argued that Canada's attitudes towards torture or Afghanistan are more nuanced and complicated and cannot be understood as one-dimensional processes or as a sequence of events, which only relate back to Canada's responsibilities towards Afghans. I have used the Afghan detainee controversy and the Federal Court's *Amnesty* case as windows through which to investigate how the responsibility for the torture of Afghan prisoners is framed, negotiated and understood by the three actors in the Court decision: the human rights groups, the Canadian government and military representatives and the Federal Court itself. Specifically, I attempted to explain the indifferent attitude towards torture that has characterized the government's response as well as the Court's standpoint on Canada's complicity in the transfer to torture of detained Afghans. In the process, I have tried to discover how a case about torture, ultimately becomes one concerned with the applicability of *Charter* rights abroad.

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[2] Murray Brewster, "MacKay denies seeing torture warnings," *The Globe and Mail*, 16 October 2009, A6.
[2] CBC News: "All Afghan Detainees Likely Tortured: Diplomat."online: < http://www.cbc.ca/news/canada/story/2009/11/18/diplomat-afghan-detainees.html>.
[3]CBC News: "Afghan Detainee Documents Set for Release, 22 June, 2011 online:< http://www.cbc.ca/news/canada/story/2011/06/22/afghan-detainee-documents.html?ref=rss

In order to examine the case and associated documents, I borrowed a methodological technique from the field of law and literature: I "misread" the arguments presented by each of the human rights groups, the government and military representatives and the Federal Court. This method has enabled me to deconstruct the actors' claims and show that each of them has their own perspective on the responsibility in question, which can be understood by examining how they articulate three inter-related factors: their own identity—and the identity of those detained— the norms on torture in Afghanistan and Afghanistan itself as a specific space/place requiring Canadian intervention.

Understanding the Canadian Complicity in Torture

The analysis undertaken here reveals that both Canada's complicity in, and its responsibility for the torture of Afghan detainees by Afghanistan's own police services cannot be understood only with reference to the ways in which the actions of Canadian officials violate international and domestic laws such as the *Convention Against Torture* and the *Charter of Rights*[4] as the human rights groups contend. Nor can responsibility in this context be rationalized by appealing to arguments about the necessity of respecting Afghan sovereignty as both the Canadian government experts and the Federal Court judge argue. As far as the latter two actors are concerned, Afghan sovereignty exonerates both of them from any responsibility towards those detained because Afghanistan has not

[4]*Amnesty International Canada v. Canada (Minister of National Defence)*, 2008 FC 336, [2008] 4 F.C.R. 546, 292 D.L.R. (4th) 127*]*. "Applicants' Memorandum of Fact and Law: Re Motion to Determine the Application of the *Charter* to the Canadian Forces in Afghanistan," at paras 72-64[AMFL Re *Charter*] at paras 72-64.

consented to the application of Canadian constitutional laws such as the *Charter* on its soil.[5]

Explaining and understanding the attitudes of the human rights groups, the Canadian government and the Federal Court towards the violence Afghan detainees have reportedly suffered requires an examination and conceptualization of the events and actors involved in the case and controversy that go beyond simply isolating one particular factor for analysis. Discussing Canada's complicity in the violence perpetrated against Afghans only with reference to the human rights violations and incomprehensible cruelty those detained suffer merely approaches the controversy from the human rights viewpoint of an actor like AIC. This is an inadequate perspective to adopt in this instance because it prevents us from thinking about questions that are just as interesting but more pertinent in terms of the context and which ultimately broaden our view of the controversy as a whole. Thinking of things only in terms of the rights detainees have and the Canadian state's obligations towards them, does not necessarily tell us who these detainees are and why they came to be in Afghanistan, the place where these violations are occurring. It also does not allow us to ask how the human rights groups came to represent those detained in Court, even though they were not the ones being tortured.

Such claims about torture make it seem as though "the human rights regime were composed only of rights and of institutions which bear on the incidences of torture", when in actuality the rules governing the practice of torture include "rules of sovereignty,

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[5] Affidavit of Christopher Greenwood, ("Greenwood Affidavit")at paras 13-15 sworn August 14 2007, Report Record of the Respondents to the Main ApplicationVol 1, Tab 4, and *Amnesty International Canada v. Canada (Minister of National Defence)*, 2008 FC 336, [2008] 4 F.C.R. 546, at paras 40-52. 292 D.L.R. (4th) 127 [*Amnesty*].

institutional competence, agency, property and contract"[6] to name only a few. Inquiring solely into the human rights ramifications is also a limited approach because of the constraints of human rights advocacy itself, which often tends to ignore the "perils of representation"; speaking "for others" can be both effective and damaging to those on whose behalf claims are made,[7] as I argued in chapter 1. The focus on the abstract universality of human rights claims is also a disadvantage in this case because it takes the rights in question out of the contexts that require them and shape their meaning in the first place.[8]

Examining how the three different concepts are articulated by each of the actors involved in the case allows for a fuller, contextual and more nuanced investigation of the government and Court's unresponsiveness towards the allegations of torture.

Identity

The Afghan detainees are ultimately marginalized in *Amnesty*, a case concerning their mistreatment by others involved in claims about their torture. The human rights advocates representing them view them as abstract individuals lacking rights that are supposed to be granted to everyone, anywhere without exception. The military and government representatives persist in keeping the detainees' identities unknown for national security reasons. CF members are unfamiliar with those they detain and consider them enemies who threaten their operations in Afghanistan. The Court also denies the detainees' rights under the *Charter* because they are not Canadians. Ultimately, the

[6] David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism*. (Princeton: Princeton University Press, 2005) at 26.

[7] *Ibid* at 29.
[8] *Ibid* at 12.

claims being made about those detained reinforce the identities of each of the three actors concerned in the case.

Norms and the Responsibility for Torture

The human rights groups persist in advocating on behalf of those detained, arguing that they should be granted rights under the *Charter*. They substantiate their arguments by referring to international treaties prohibiting torture. They also contend that the Canadian government is at least partially responsible for those detained, even though the Afghan government is causally responsible for the physical torture of detainees. The military's arguments about the applicable norms in Afghanistan all exclude the detained Afghans from international legal protections, because the CF constructs them as threatening enemies they are fighting in Afghanistan. CF representatives therefore invoke international law only superficially, in order to show that it does not apply to those detained, and consequently absolve the Canadian government from any legal responsibilities in Afghanistan. The Court adopts the same approach to the norms on torture, insisting that the *Charter* cannot apply to the detainees because they are Afghan rather than Canadian. Mactavish J. invokes international law only formally, without any deliberations on the CF's actual responsibilities towards those detained under any of the international law treaties she cites. International law is only relevant because it ensures that the detainees are not left without any rights, as a result of the judge's decision.

Space

The human rights organizations contend that the *Charter* should apply in Afghanistan, because they imagine the country as a lawless, chaotic place, whose people have not reached the developmental stages Western countries have, and who require human rights to modernize. In addition, the applicants in the case ultimately advocate a benign occupation of the country. The imagined geographies that inform both the military and the Court's portrayals of Afghanistan in the case are similar to those the human rights groups envision. They are all based on constructions of Afghanistan as lawless space, whose people require Western intervention to reach the standards of development common to the states that contribute to Coalition Forces. The Court and the military also view Afghan sovereignty only selectively and resort to arguments affirming it only when it authorizes their intervention.

Humanitarian Intervention in Afghanistan

None of the actors involved challenges the government's political decision to intervene in Afghanistan (an occurrence that has arguably contributed to the incidences of torture there), even though the applicants do bring the government to Court over the torture allegations there. All of them engage in discussions about the applicability of Canadian rights or international law there without considering the possibility that Afghans might not want their assistance or presence. Ultimately, the actors' discourse about humanitarian intervention there (either benign or militarized) never engages in a discussion of Afghanistan's potential for nationalist self-determination, and instead perpetuates its dependence on the presence of Western Coalition Forces.

Grim Conclusions: What about Torture?

The conceptual framework I have adopted here explains why the Canadian government did very little to stop the torture of Afghans at the behest of Canadian troops even when it had knowledge of the violence in question, besides halting transfers twice and suspending them on one occasion.[9] Conservative MPs have persistently denied that any Canadians— be they government civil servants or military personnel—are complicit in the torture of Afghans. Even the most recent media reports suggest that the government remains reluctant to release over 40.000 pages of DFAIT reports concerning Canadian officials conduct in the events in question.[10]

Despite this recent development, documents concerning the government's attempts at making amends insofar as the torture of Afghans is concerned become fewer and less frequent the farther in time we are from the commencement of the controversy in 2006. This suggests that the government has little if no inclination to do anything (if at all) about the torture allegations, especially since its arguments in the case are intended to erase its complicity in torture, as I have shown. This may change slightly, however, because the applicants made their final submissions to the Military Commission on February 2nd 2011 and expect to hear back in six-months' to a year's time[11]In January 2011, moreover, local Canadian news papers reported that the International Criminal

[9] Department of Foreign Affairs and International Trade, "Canadian Forces Release Statistics on Afghan Detainees." (2010) online: http://www.afghanistan.gc.ca/canada-afghanistan/news-nouvelles/2010/2010_09_22b.aspx?lang=eng.
[10] CBC News: "Afghan Detainee Documents Set for Release, 22 June, 2011 online: http://www.cbc.ca/news/canada/story/2011/06/22/afghan-detainee-documents.html?ref=rss
[11] Grace Pastine, Personal Communication, February 2011.

Court has hinted that it might launch an investigation into the Canadian government's conduct, if no case is presently under deliberation in a Canadian Court.[12]

Taking the government's nonchalant attitude towards its complicity in torture in the past into account, it is likely that the Commission's report will garner significant media and parliamentary attention for a while with no remarkable changes occurring in the way the Canadian government and military have traditionally responded to the allegations, besides perhaps forcing the government to release more (most likely redacted) documents, similar to the ones already released and obtained by lawyers and activists through Access to Information requests. The detainees' identities remain unknown and are likely to remain so both to those who advocate on their behalf and to the rest of the Canadian public because the Canadian government has claimed persistent concerns for national security. The Afghan detainees, unlike Arar and Canada's other notorious torture victims,[13] are also unlikely to seek redress themselves or receive any kind of reparations from Canada to compensate for what they have allegedly suffered, because it is presently impossible to ascertain their fate, let alone their existence, on an individual basis. Prospects remain grim with respect to existence of any physical evidence (besides DFAIT's own redacted reports) that would enable human rights lawyers and other concerned advocates, including the detainees themselves, to seek redress for the violations.

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[12] *Macleans*, "ICC may investigate Canada's handling of Afghan Detainees," (29 April, 2011) online: http://www2.macleans.ca/2011/04/29/icc-may-investigate-canada%E2%80%99s-handling-of-afghan-detainees/

[13] CBC News, "The Arar Inquiry: Frequently Asked Questions," online: http://www.cbc.ca/news/background/arar/arar_faq.html, "Federal Officials Contributed Indirectly to Torture of Canadians," online: http://www.cbc.ca/news/canada/story/2008/10/21/inquiry-iacobucci.html

The lack of information about the detainees in Canada reinforces the above point because no accurate documentation of the abuses the detainees have suffered exists in this country. Canadians' proximity to the torture allegations in question is important because it affects how responsible individual civil servants, government officials and Canadian institutions (like the military for example) believe themselves to be. Arguably, the fate of the Afghan detainees matters less to Canadian government officials because these detainees are not actually held in Canadian prisons in Canada: they are detained far away, in Afghanistan, and tortured by Afghan police, not by Canadian officials.

Their geographical distance from Canadians in this instance is turned into "difference"[14] because torture becomes associated with Afghanistan rather than with "us", which in turn justifies distinguishing "them" as people prone to particular behaviours (like torture) from "us", who would most likely have recourse to the law. This discussion of torture has something in common with military intervention not only because the latter has historically been used to justify the Canadian presence in Afghanistan, but also because having both of these conversations enables us "to keep a distance between those we wish to save and our own community [because] through intervention [and our ideas about torture in Afghanistan] we seek to locate the other elsewhere."[15] The fact that those detained are not present in a case concerning their own torture is also a testament to the legal processes (characteristic of an adversarial legal system) which result in the disappearance of individuals from cases concerning their own

[14] Derek Gregory, *The Colonial Present: Afghanistan, Palestine, Iraq* (Malden, MA: Blackwell Publishing Ltd, 2004) at 17.
[15] Anne Orford, Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law (Cambridge, Cambridge University Press, 2003) at 123.

lives and well-being.[16] This also suggests that litigating the case before the Federal Court might not be the most appropriate avenue for pursuing reparations or accountability for the violence in Afghanistan.

In this sense, the discourse concerning the torture of Afghans serves as an indicator of a certain standard of "civilization" and development, both of which are intimately tied to modernity and liberal democracies.[17] The more liberal a state is, the more likely it is to conform to the universal interdictions on torture. The distinction between developed and undeveloped states is therefore "based on assumptions about the particular legal and institutional frameworks as a path to eradicate torture."[18] These assumptions, while instructive about what it takes for a state to be "liberal" or "modern", only exacerbate the perceived cultural differences (themselves conceptualized in terms of difference) between Afghanistan and Canada. They maintain that one cannot ever be like the other. Engaging with the implications of this discourse on civilization and barbarism and perpetuating discussions on the appropriate legal exceptions that should apply to our interactions with "enemies", obscures the responsibility both Afghanistan and Canada owe the detainees, one for actually torturing them, the other for transferring them to torture.

I have shown that such a discourse on torture and cruel and inhumane treatment is rooted in practices like human rights advocacy that are implicated in these discourses. Despite this, the applicants faced unavoidable constraints in terms of their representation strategies because they were forced to advocate on behalf of people who are unknown as

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[16] Nils Christie "Conflict as Property," (January 1977) BJ Crim 1.
[17] Kelly, Tobias. "The UN Committee Against Torture: Human Rights Monitoring and the Legal Recognition of Cruelty."(2009) 31 Hum. Rts. Q, at 796-799.
[18] *Ibid* at 795.

a result of the government's own policies. The detainee transfers would not have become public were it not for the campaigning of Amnesty *et al,* and their efforts in launching and preparing this case in particular. There was no news or information about detainee transfers or torture before the *Globe and Mail* articles were published in 2007, so the applicants would have had to build the case up with no arguments or evidence other than whatever they themselves could research, find and present.

Human rights advocacy remains one of the most effective ways to hold governments to account for human rights violations, including torture. Critiquing Amnesty *et al.*'s approach in this case is only intended to explain the organizations' response to torture in this instance, rather than to undermine any of the efforts and reasons the human rights advocates have for bringing the case before the Court. The analysis here is only meant to be critical of the human rights discourses they typically employ as part of their activism, especially because these discussions reflect particular conceptions about other cultures and people and shed light on the ways the human rights groups are themselves implicated in these conversations.

Canada in Afghanistan 10 Years Later: What Now?

On July 5, 2011, the Canadian mission in Afghanistan officially ended with the hand-over of command operations to the American Forces currently deployed there.[19] The pull-out of troops means that Parliament met the July 2011 deadline it set in 2008.[20] A few days later, Col. Peter Dawe, deputy commander of the Canadian contingent

[19] CBC News, "'No guarantees' Afghan training mission will succeed,"(11 July 2011) online: http://www.cbc.ca/news/world/story/2011/07/10/afghan-canadian-training-mission.html?ref=rss.
[20] *Ibid.*

training mission, told the CBC that there is no guarantee that a NATO-trained army will be successful in efforts to train the Afghan Army so that it is capable of stabilizing its own security by itself.[21] Such a claim implies that without NATO and the international community's support, Afghanistan can do little for itself by way of maintaining its own security and that Afghanistan has actually been "secure" and "stable" because of the international troops' presence there. This logic reinforces the dependent relationship the Canadian military and the international community have both fostered between Afghanistan and the predominantly Western Coalition Forces. It also ignores the argument that Afghanistan might not want or have wanted the international interference to begin with.

Imaginary Constructions of Canada and Afghanistan

In this thesis, I have attempted to map out how both Afghanistan and Canada have been imagined and constructed in each of the actors' claims about torture. The human rights groups advocate on behalf of detained Afghans because their identities as organizations require them to do so. Their advocacy on behalf of those detained in Afghanistan ultimately reinforces a particular idea of torture as a serious, far-reaching and anti-modern human rights violation, so AIC *et al.*'s reputations as anti-torture advocacy groups are at stake because of how intimately their identities are related to the practice at issue.

However, the language they use to describe Afghanistan (as a place lacking legal and other infrastructure, for example) enables the human rights groups to construct an

[21] CBC, " NATO Makes First Handover in Afghanistan," (17 July 2011) online: http://www.cbc.ca/news/world/story/2011/07/17/afghanistan-military-handover-nato.html?ref=rss

imaginative geography of the country according to which Afghanistan is imagined as a lawless, barbaric space, where torture is inherent and no legal anti-torture guarantees exist to protect those subjected to it. This imagining, along with grounding the human rights claimed here in the *Charter*, together contribute to constructing Canadian identity and Canadians in a certain way. The arguments the human rights groups make about the appropriateness of the *Charter* in Afghanistan are illustrative of how invested Canadians are in Afghanistan and how profoundly Canada's intervention there has affected its identity as a particular kind of state.

Although the human rights groups do not intend it, the fact that they imply that the *Charter* should travel with the CF is a colonial argument that takes for granted Canada's history in Afghanistan since 2001 and its presence there until very recently. Their argument has colonial undertones because, it constructs the human rights groups as saviours sent to "barbaric" and "far away" places/spaces like Afghanistan to save its people from the brutality of its own police forces. The Afghan state and its police apparatuses are perceived as "barbaric savages" that inhabit an "evil state" characterized by an "illiberal, anti-democratic or other authoritarian culture" (here this refers to the prevalence of torture in the country). [22] This metaphor reveals that human rights advocacy and intervention are actually more complicated than the simplistic designations of savages, victims and saviours imply. The saviours—Canadians —specifically the military—are partially responsible for the torture violations.

[22] Makua Matua, "Savages, Victims, Saviours: The Metaphor of Human Rights," (Winter 2001) 42 HLR (Winter 2001) at 202-203.

The "prism"[23] of Afghanistan–as-savage-perpetrator/Afghans-as-victim/s and Canada/Canadians-as saviour/s (SVS)[24] also manifests itself in the arguments the military and government rely on in their articulations of Canada's responsibility in torture. However, instead of the benign, well-meaning advocacy of human rights, the military relies on its defensive and militarized capabilities and rhetoric, which enable it to deploy in Afghanistan, efficiently neutralize the terrorist threat there and begin reconstruction and development efforts. Throughout this discourse, the Canadian military is imagined as the saviour of two countries, in different but nevertheless complimentary ways. The CF use their militarized expertise to simultaneously "save" the Afghan people from the threat posed by terrorist groups and to "save" Canadians at home from the encroaching threat of terrorism. However, I have shown that in both of these cases, the threat of terrorism is constructed in such a way that it appears indigenous to the territory of Afghanistan proper. In this way, going to fight a war on the territory of Afghanistan becomes synonymous with fighting a war on terrorism at the same time. The military is also a saviour of Afghans in the colonial sense, because its programs are intended to show them how to become a proper, developed democracy, capable of securing their country's borders.

The military and the Court imagine Afghanistan to be sovereign only instrumentally. Rather than genuine sovereignty, Afghanistan only has "selective sovereignty," which is accorded to it because it enables both the Court and the military's representatives to avoid their responsibilities towards those detained. The Court, for its part, chooses to remain on the sidelines in its judgment because the judge's ruling affirms

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[23] *Ibid* at 202.
[24] *Ibid* at 201.

law's inadequacy and its inability to arbitrate on the Canadian government's political decisions, not only to intervene in Afghanistan more generally, but to halt the transfer of Afghans to torture. This highlights the failure of the legal system in this regard and suggests that approaching the issue with references to legal litisgation might not be the most effective method of accounting for responsibility in this context.

Canada's military identity has shifted considerably with the CF's intervention in Afghanistan, when compared to the peacekeeping role its soldiers have traditionally played in places like Somalia and Rwanda. In fact, indifference to violence also characterized these intervention projects so this attitude is not new dimension of Canada's relations to racialized peoples. However, unlike the situation in Somalia, the CF now go out into the world to fight defensive wars such as the War on Terror, for themselves and on behalf of their own people and others. The civilizing discourse remains prominent and integral both to the ways the Canadian military imagines other places and peoples, even in light of the marked change in the role it is now playing in the world.

As for Afghanistan, all of the actors involved imagine it as beleaguered and requiring their assistance, on different fronts and in different ways, an argument that itself justifies Canadian intervention in faraway places. The Canadian intervention in Afghanistan meanwhile, retains its "humanitarian" character according to the military representatives, the Court and the human rights advocates. This is because it serves to elevate Canadians in the world as saviours of others, while at once obscuring their responsibilities towards the same people they are sent to assist. The irony, of course, is

that as far as torture and human rights violations are concerned, neither Canadians nor Afghans are all that different.

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