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Torture, Transfers, and Denial of Due Process: The Treatment of Conflict-Related Detainees in Afghanistan



Afghanistan Independent Human Rights Commission (AIHRC)

Open Society Foundations

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کمیسیون مستقل حقوق بشر افغانستان



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Torture, Transfers, and Denial of Due Process: The Treatment of Conflict-Related Detainees in Afghanistan

Executive Summary

In recent months, the Afghan intelligence service has come under increased scrutiny and criticism for its use of torture and other violations of detainees' rights. This report raises significant, new areas of concern, including previously undocumented facilities where torture is taking place and the abuse of detainees transferred by international forces. The report is based on long-term, regular detainee monitoring conducted by the Afghanistan Independent Human Rights Commission (AIHRC), as legally mandated under the Constitution of Afghanistan, as well as on interviews with more than 100 conflict-related detainees between February 2011 and January 2012 (Dalwa 1389-Jadi 1390), conducted with the assistance of the Open Society Foundations. AIHRC monitors interviewed detainees in the National Directorate of Security (NDS) and Ministry of Interior (MOI) facilities while Open Society researchers interviewed detainees who had been previously held by the NDS and had either been transferred to MOI facilities or released.

Researchers found credible evidence of torture at nine NDS facilities and several Afghan National Police (ANP) facilities, including beatings, suspension from the ceiling, electric shocks, threatened or actual sexual abuse, and other forms of mental and physical abuse, which were routinely used to obtain confessions or other information.¹ Four of the NDS facilities where torture was documented were also identified by a recent United Nations report as practicing torture. Monitors also found evidence of torture at five additional NDS facilities.

Several specific methods of torture that have been previously denied by the NDS, such as the use of electric shock, abuse of genitals, and threats of sexual abuse, were confirmed in interviews, providing even further evidence that these methods of torture have been used by NDS officials. Research also uncovered widespread and deliberate violations of detainees' fundamental due process rights, including the right to counsel, and family notification, which contributed to increasing the risk of torture and other abuse.

Researchers also examined the transfer of detainees from international forces to the Afghan government. In response to an October 2011 (Mizan 1390) UN report,

¹ Locations include NDS Kabul Department 90/124, NDS Herat, NDS Kandahar, NDS Laghman, NDS Badakhshan, NDS Helmand, NDS Kabul Department 17/40, NDS Nangarhar, and NDS Wardak, as well as ANP Kandahar headquarters and several ANP Kandahar checkpoints.

International Security Assistance Forces (ISAF) suspended all detainee transfers to facilities of concern, initiated a regime to address problems identified at these facilities, and proposed an ambitious monitoring program to cover all detainees transferred by ISAF. Efforts by ISAF and troop contributing nations with national monitoring programs are welcome and can have a positive impact. But concerns raised in this report, including evidence of off-site abuse, and detainees' fear of reprisals for disclosing abuse, suggest that a post-transfer monitoring system may not be sufficient to meet the obligations that ISAF nations have under international law.²

The largest remaining gap in detainee monitoring is the lack of monitoring of U.S. forces outside the ISAF chain of command. Despite the high number of detainees transferred by U.S. forces, particularly by the Combined Forces Special Operations Component Command–Afghanistan (CFSOCC–A), which are not subject to the recently initiated ISAF monitoring program, the United States has yet to adopt a mechanism to monitor detainees transferred to Afghan custody.³

Researchers found credible evidence that some U.S.-transferred detainees have been subjected to torture by Afghan officials, underscoring the need for such a monitoring program. Ten cases were documented of individuals detained by U.S. forces between May 2010 (Saur 1389) and January 2012 (Jadi 1390), and then transferred to NDS facilities where they alleged they were subsequently tortured. In four of these cases, individuals reported that they were held for some period of time at a detention facility located at or near Bagram Air Base, and in at least three cases individuals were transferred to NDS Kandahar *after* the suspension of transfers to the facility by all ISAF and U.S. forces. These cases raise serious concerns regarding U.S. policies on detainee transfers, particularly transfers by non-ISAF U.S. forces and U.S. special operations forces, and whether appropriate safeguards exist to protect detainees' rights and ensure that the United States is not complicit in torture.

The Afghan government has stated that it is committed to addressing concerns about the torture of detainees, and has largely responded positively to increased demands for access to facilities. The government has also recently established a human rights unit within the NDS to investigate allegations of abuse, all of which is strongly welcomed. However, research for this report indicates that the Afghan government has thus far largely failed to hold individuals responsible for detainee abuse accountable. In some cases, instead of dismissing and prosecuting responsible officials, the Afghan government has simply reassigned officials to other detention facilities. AIHRC monitors also continue to face challenges accessing some NDS facilities, including Department 90/124.

²It should be noted that most of the cases of torture and abuse in NDS detention facilities documented by the AIHRC and the Open Society Foundations pre-date implementation of ISAF's six-phase remediation plan and inspections regime.

³ CFSOCC-A, along with all USFOR-A forces are subject to the transfer prohibitions and other aspects of the ISAF six-phase plan. However, they are not subject to ISAF detainee monitoring, phase V of the ISAF six-phase plan.

While the Afghan government faces immense security and capacity challenges, this does not mean that torture is justifiable, or inevitable. The prohibition on torture is absolute under both Afghan and international law. The use of torture is a violation of fundamental human rights, and seriously damages the legitimacy of the Afghan government and its allies.

The Afghan government has long made clear its demand for sovereignty over the detention of conflict-related detainees in Afghanistan. As the Afghan government assumes greater responsibility for security as well as detentions, and the drawdown of U.S. and other ISAF nations' troops accelerates, the challenges associated with properly holding and prosecuting conflict-related detainees will only become more pressing for the government. Urgent action is required, and the Afghan government, with the support of its international partners, must take immediate, effective steps to address mistreatment and torture of conflict-related detainees.

Key Recommendations

Government of Afghanistan

- Investigate and hold to account all those who are responsible for torture, including commanding officers. End the practice of moving rather than removing officials responsible for torture and make public or provide to AIHRC the results of investigations and actions taken.
- Ensure AIHRC has full, unfettered, and confidential access to all NDS detainees and facilities, including NDS Kabul Department 90/124, as legally mandated under the Constitution of Afghanistan. Ensure NDS officials permit AIHRC monitors to conduct unannounced visits to all NDS facilities.
- Provide the NDS Human Rights Unit with the authority and resources necessary to effectively investigate allegations of abuse and ensure those responsible are held to account.
- Cease holding detainees incommunicado. Notify family members of detainee's arrest immediately or as soon as practicably possible, ensure access to legal counsel, and permit family members to visit detainees. Transfer all detainees to MOI custody within 72 hours, inform detainees of the reason for their arrest within 24 hours, and ensure all detentions beyond 72 hours are authorized by a prosecutor or judge.
- Ensure defense lawyers have access to detainees and all NDS detention facilities at all stages of detention as well as proper access to the findings of investigations and evidence against clients.

ISAF and Troop Contributing Nations

- Make use of ISAF suspension and remediation policies to work with the Afghan government to adopt measures that will protect all detainees from abuse, such as full, unfettered access by AIHRC, detainee access to defense counsel, and accountability for detainee abuse.
- Ensure no detainee is transferred into facilities where there is real risk of torture. Where detainee transfers have been suspended by ISAF due to credible allegations

of torture, ensure resumption of transfers to a facility occur only when there is sufficient information to determine that there is no real risk of torture at that facility..

United States

- Support the NDS and the Afghan government to ensure all detainees are free from torture. Work with the NDS to identify critical deficiencies in resources, and provide appropriate technical and financial assistance to help ensure detainee treatment and interrogations comply with Afghan and international law.
- Ensure all U.S. forces, including U.S. Special Operations Forces and intelligence agency personnel, comply with U.S. detainee transfer policies and international law and are covered by the AIHRC detainee monitoring program.

List of Abbreviations

ADF	Australian Defence Forces
AIHRC	Afghanistan Independent Human Rights Commission
ALP	Afghan Local Police
ANBP	Afghan National Border Police
ANP	Afghan National Police
ANSF	Afghan National Security Forces
BTIF	Bagram Theater Internment Facility
CAT	Convention Against Torture
CFSOCC-A	Combined Forces Special Operations Component Command-Afghanistan
CJIATF-435	Combined Joint Interagency Task Force-435, the unit responsible for overseeing detention operations at DFIP
COM-ISAF	Commander of ISAF; currently General John R. Allen
DFIP	Detention Facility In Parwan
DOT	Detainee Oversight Team, the unit responsible for implementing the UK's detainee monitoring program
DRB	Detainee Review Board
ICPC	Interim Criminal Procedure Code
ILF	International Law Foundation
ISAF	International Security Assistance Force
JCC	Juvenile Corrections Center
JSOC	United States Joint Special Operations Command
MOI	Ministry of the Interior
MOJ	Ministry of Justice
MoU	Memorandum of Understanding

NDS	National Directorate of Security
OEF	Operation Enduring Freedom
RC	Regional Command, ISAF's largest sub-national command units
SIT	Special Investigations Team, a division of the AIHRC
TCN	Troop Contributing Nation
UNAMA	United Nations Assistance Mission in Afghanistan
USFOR-A	United States Forces in Afghanistan

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I. Introduction

Every year throughout Afghanistan, thousands of individuals are detained by Afghan and international forces in connection with the armed conflict. As the conflict has intensified, the number of individuals detained on national security grounds has increased, with the vast majority ending up in the custody of the National Directorate of Security (NDS), Afghanistan's intelligence agency. Accused of sensitive, national security-related crimes and often held in prolonged, incommunicado detention by intelligence officials, these conflict-related detainees are particularly vulnerable to torture and mistreatment.

The Afghanistan Independent Human Rights Commission (AIHRC), has regularly monitored detainee treatment and detention conditions since 2002 (1380), and along with other national and international human rights groups, has raised concerns about detainee abuse, as well as the potential complicity of international forces. Following a United Nations Assistance Mission in Afghanistan (UNAMA) report in October 2011 (Mizan 1390), which exposed the depth and breadth of abuse, the Afghan government and its international partners have demonstrated a new level of engagement on this issue.⁴

This report is based on interviews conducted by the AIHRC between February 2011 and January 2012 (Dalwa 1389-Jadi 1390), with assistance from the Open Society Foundations. The report raises significant, new areas of concern, including torture at facilities not previously identified, and continued transfers by U.S. and other international military forces that put detainees at risk of torture. The report assesses recent steps taken by the Afghan government to end abuse and hold perpetrators accountable, raising concerns that assurances have not been matched by action. It also examines whether international forces are doing enough to ensure that the detainees they transfer to the Afghan government are not at risk of torture.

While comprehensive reform will take time, with sustained attention, the coming months represent a critical opportunity to maintain the momentum of reform and ensure implementation of policies and programs that will successfully address detainee abuse.

II. Background

National Directorate of Security (NDS)

The NDS is Afghanistan's principle intelligence organization, with primary responsibility for handling conflict-related detainees. The NDS also receives conflict-related detainees transferred from international military forces and other Afghan National Security Forces (ANSF). Though the NDS has primary responsibility for national security cases, other

⁴ United Nations Assistance Mission in Afghanistan, *Treatment of Conflict-Related Detainees in Afghan Custody*, October 2011, http://unama.unmissions.org/Portals/UNAMA/Documents/October10_%202011_UNAMA_Detention_Full-Report_ENG.pdf [hereinafter "UNAMA, *Conflict-Related Detainees in Afghan Custody*"].

Afghan security forces, like the Afghan National Police (ANP) and Afghan Local Police (ALP), also arrest and detain conflict-related detainees. While mistreatment is a problem for detainees throughout the Afghan justice system, research and experience have shown that conflict-related detainees are particularly vulnerable to abuse and torture.

International Military Forces

International Security Assistance Forces (ISAF) continue to regularly detain and transfer individuals to Afghan custody. Under ISAF's "96-hour rule," individuals detained during ISAF operations are generally released or transferred to Afghan authorities within 96 hours. There is significant diversity in detention policies and practices among ISAF nations. The United States detains thousands of individuals all across Afghanistan, with the majority held in the Detention Facility in Parwan (DFIP) as well as a number of "temporary" detention sites, including a secretive U.S. screening facility at Bagram Air Base run by the U.S. Joint Special Operations Command (JSOC).⁵ Meanwhile, nations with a much smaller troop presence like Denmark may detain only a handful of individuals in a given year, and transfer all of those detained to the Afghan authorities. Some nations, like Germany, claim that they don't take part in detentions themselves, yet nevertheless participate in military operations with Afghan forces in which individuals are arrested and detained.

III. Methodology

Afghanistan Independent Human Rights Commission (AIHRC) is a constitutionally-established, independent national human rights institution which is mandated under Afghan law to monitor the situation of human rights in the country, promote and protect human rights, investigate and verify cases of human rights violations, and take measures for the improvement and promotion of human rights in Afghanistan.

The Open Society Foundations is a nongovernmental organization that works throughout the world to build vibrant and tolerant democracies whose governments are accountable to their citizens. The Open Society's Regional Policy Initiative on Afghanistan and Pakistan, which partnered with the AIHRC on this report, works with national civil society organizations in Afghanistan and Pakistan to conduct research, reporting, and advocacy on conflict-related human rights and policy issues.

As part of its mandate, the AIHRC conducts regular monitoring of confinement conditions and detainee treatment in Afghan detention facilities. The AIHRC conducts

⁵ Open Society Foundations, *Confinement Conditions at a U.S. Screening Facility on Bagram Air Base*, October 14, 2010 (22 Mizan 1389), http://www.soros.org/resources/articles_publications/publications/confinement-conditions-20101014/confinement-conditions-20101014.pdf; [hereinafter "OSF, *Confinement Conditions at a U.S. Screening Facility*"]; Kimberly Dozier, "Terror Suspects Held for Weeks in Secret," *Associated Press*, April 8, 2011 (19 Hamal 1390), <http://abcnews.go.com/International/wireStory?id=13325716> [hereinafter "Dozier, 'Terror Suspects Held for Weeks'"].

visits to detention facilities where it inspects conditions of confinement and conducts interviews with detainees as well as officials responsible for overseeing detention facilities.

This report is based on interviews with detainees conducted by the AIHRC between February 2011 and January 2012 (Dalwa 1389-Jadi 1390). Interviews were conducted as part of AIHRC's regular monitoring of NDS and MOI facilities by provincial monitoring and investigation teams. The AIHRC Special Investigations Team (SIT) also conducted interviews with detainees over this time period through 10 monitoring missions to NDS and MOI detention facilities. Together, AIHRC monitoring visits covered 12 NDS and 11 MOI detention facilities during the research period. During this period, the AIHRC has been denied access to detainees in NDS Kabul Department 90/124 and in NDS Kunar.

In total, over 100 current or former NDS detainees were interviewed in the research period. 103 interviews were conducted by the AIHRC with detainees while in NDS custody or MOJ/MOI custody, and 15 interviews were conducted with recently released detainees by researchers.⁶ Interviews with detainees were conducted individually, confidentially, and in private, without the interference or presence of government officials in almost all cases. However, NDS officials prevented the AIHRC from conducting unannounced visits. AIHRC monitors were required to provide NDS officials with one or more days' notice before monitoring visits were conducted. Informed consent was provided to use information provided by interviewees in this report. For security reasons and to protect interviewees' identities, all the names of detainees featured in this report have been replaced with pseudonyms or numbers.

Interviews were also conducted with 20 defense lawyers and legal aid organization directors, 15 detention facility officials, as well as other Afghan and foreign government officials. Most defense lawyers and government officials asked not to be named in this report.

Researchers made efforts to verify the credibility of detainees' statements, though given the limitations of access and the need to protect the identities of interviewees, this was often challenging. In some cases interviewers observed scars or other physical signs of abuse. In other cases, where possible, the interviewers sought to verify and corroborate information through interviews with witnesses, lawyers, government officials, and doctors. Interviews were also conducted with multiple detainees at each facility, so that a picture of consistent and credible allegations could be built. These findings are also consistent with the general picture of detainee abuse that has been documented by the AIHRC from 2002 to 2011, prior to this specific research period. Detainees interviewed at different times and in different locations also provided accounts of torture and abuse that were largely consistent with each other. In many cases, detainees described near identical methods of abuse, for example the use of suspension and tools like electric cables for beatings, as well as similarities in substance and patterns of questioning.

⁶ On December 17, 2011 (26 Qaws 1390), President Karzai signed a decree that would transfer control of prisons from the Ministry of Justice to the Ministry of Interior, effective January 10, 2012 (20 Jadi 1390).

Evidence documented during interviews was also consistent with reports of torture received by UNAMA. Researchers verified that the detainees interviewed for this report were different than those interviewed by UNAMA—only four detainees interviewed for this report were also interviewed by UNAMA. Researchers found evidence of torture in many of the same locations as UNAMA, and methods of torture that were near identical to those documented by UNAMA, including suspension, beating, threats of sexual abuse, abuse of genitals, and electric shock.

IV. Torture and Mistreatment of Conflict-Related Detainees in Afghanistan

Between February 2011 and January 2012 (Dalwa 1389-Jadi 1390), researchers documented a significant number of cases of torture and other cruel, inhuman or degrading treatment of conflict-related detainees by NDS and ANP officials at 11 different detention facilities in Afghanistan. Several specific patterns and methods were identified, including electric shock, threats of sexual abuse, and abuse of detainees' genitals, as well as torture at undisclosed locations.

In recent years, the Afghan government has taken a number of positive steps to address general weaknesses in the justice sector. The Afghan government has also adopted several measures to improve detainee treatment within NDS, particularly after reports of abuse. These measures have included training of NDS staff and the creation of two new monitoring bodies—a government committee to investigate and assess concerns raised by the recent UNAMA detentions report, and a human rights unit, which will have access to and oversight of detainees under interrogation in NDS facilities.⁷

Though the Afghan government has made progress on reforms, and expressed a commitment to protecting detainees' rights, this report's findings indicate that torture continues to be a major problem in many facilities and requires further urgent action by the Afghan government and international partners to address the depth and breadth of detainee abuse.

Methods of Torture

Under international law, torture is defined as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind.”⁸ Torture occurs when such pain or suffering is inflicted by, at the

⁷UNAMA, *Conflict-Related Detainees in Afghan Custody*, *supra* note 3.

⁸Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture or CAT), adopted December 10, 1984 (19 Qaws 1363), G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987 (5

instigation of, or with the consent or acquiescence of a state official or other person acting in an official capacity.⁹ Torture is strictly prohibited by Afghan and international law.¹⁰

The individuals interviewed for this report were detained or convicted on conflict-related charges.¹¹ Based on interviews with 118 detainees, researchers found a significant number of cases in which NDS or ANP officials subjected detainees to treatment that constituted torture under international and Afghan law.

Detainees were subjected to a variety of abusive interrogative methods by state actors or officials that inflicted severe physical or mental pain and suffering, constituting torture, including:

- Beating (most often with kicks, punches, electric cables, wooden sticks, and plastic pipes, and rubber hoses)
- Suspension (being hung by the wrists or ankles from chains on the wall, fixtures, or the ceiling)
- Electric shock
- Threatened sexual abuse
- Twisting and wrenching of the genitals
- Forced prolonged standing
- Burning (with cigarettes)
- Biting (by interrogators)

Beating was the most frequently reported form of abuse. Beatings were typically administered multiple times and over periods of several days, using a variety of tools

Saratan 1366), art. 3, <http://www2.ohchr.org/english/law/cat.htm>, [hereinafter “CAT”]. Afghanistan ratified CAT on April 1, 1987 (12 Hamal 1366).

⁹*Id.*

¹⁰Constitution of Afghanistan, ratified January 26, 2004 (6 Dalwa 1382), Art. 29, <http://www.afghanembassy.com.pl/cms/uploads/images/Constitution/The%20Constitution.pdf>. [hereinafter “Constitution of Afghanistan”]. According to Article 29 of the Constitution of Afghanistan, “No one shall be allowed to order torture, even for discovering the truth from another individual who is under investigation, arrest, detention or has been convicted to be punished”; see also Afghan Penal Code, Gazette No. 347 (October 7, 1976; 15 Mizan 1355), Art. 275, <http://www.asianlii.org/af/legis/laws/clc1976ogn347p1976100613550715a429.txt/cgi-bin/download.cgi/download/af/legis/laws/clc1976ogn347p1976100613550715a429.pdf> [hereinafter “Afghan Penal Code”]. Art. 275 criminalizes torture and states that if public officials (including all NDS and ANP officials) torture an accused person for the purpose of obtaining a confession, they shall be sentenced to imprisonment between 5 and 15 years.

¹¹ Conflict-related detainees are most often charged with offenses codified in the Penal Code (1976), the Law on Crimes against Internal and External Security of the Democratic Republic of Afghanistan (1987), and the Law on Combat against Terrorist Offences (2008). The Law on Crimes against Internal and External Security lists the categories of the offenses NDS investigates, including but not limited to national treason, espionage, terrorism, sabotage, propaganda against the government, war propaganda, assisting enemy forces, and organized activity against internal and external security. See Art. 1-9, 23.

including electric cables, plastic pipes, and wooden sticks. Monitors also found that in many of the cases in which detainees were subjected to beating, they were also subjected to suspension by their arms or upside-down by their legs from walls, ceilings, or fixtures for durations lasting up to several hours, and in some cases repeatedly over periods of time lasting up to several weeks.¹²

Several of these methods have been specifically and emphatically denied by the NDS, including electric shock, threatened sexual abuse, and abuse of genitals. This report's findings contradict these denials by the NDS, and confirm that these methods of torture have been used by NDS officials to interrogate detainees.¹³

Monitors also found credible evidence of torture in NDS facilities in Herat, Kandahar, Laghman, and in NDS Kabul Department 90/124. Credible evidence of torture was found in NDS facilities in Kabul Department 17/40, Nangarhar, Badakhshan, Wardak, and Helmand; in ANP facilities in Kandahar, including the provincial ANP Headquarters; and in the Juvenile Corrections Center (JCC) in Helmand.

Electric Shock

Monitors received 14 credible allegations of NDS detainees being subjected to electric shocks, contradicting an official statement that the use of electric shock is “absolutely non-existent in the NDS.”¹⁴

Detainees reported that electric shocks were often administered through wires clipped to their toes. As one detainee held in NDS Department 90/124 explained, “They used to tie my hands and sit me in a chair. They put two clips on my toes then used this machine with electricity [that was] giving electric shock to me. It was very hard. They were laughing, smoking cigarettes, making fun of us. We were screaming, screaming in pain.”¹⁵ Another detainee said, “They tied some wires to my two second toes. Then they gave me electric shocks. It was very bad treatment. So much pain... They kept asking me questions and saying ‘confess, confess!’”¹⁶

Other detainees told monitors of the use of electric shocks on multiple areas of their bodies. According to one detainee, interrogators administered electric shocks “on my hands, temple, armpits, and testes. They would use around five minutes of electricity to get me to confess.”¹⁷ Another detainee said that his interrogators administered electric shocks three times, each time using “a kind of pistol like a gun for the shock. [It was]

¹²Many of these methods are consistent with and corroborate UNAMA's findings, including suspension, beating, electric shock, threatened sexual abuse, forced standing, and twisting and wrenching of the genitals. See UNAMA, *Conflict-Related Detainees in Afghan Custody*, *supra* note 3, p. 3.

¹³UNAMA, *Conflict-Related Detainees in Afghan Custody*, *supra* note 3, p. 61-62.

¹⁴UNAMA, *Conflict-Related Detainees in Afghan Custody*, *supra* note 3, p. 61-62.

¹⁵Interview with Detainee 99.

¹⁶Interview with Detainee 54.

¹⁷Interview with Detainee 46.

special electricity and would shock me all over the body...each time they used it, they placed it on different parts of my body.”¹⁸

Detainees described intense pain from the shocks: “It felt like I was half-dead,” said one detainee. “My entire body was trembling and shaking, and my heart was beating very quickly, but I wasn’t able to move or speak.”¹⁹ Another detainee described electric shock as “the worst punishment; it destroyed your manhood, your dignity.”²⁰ In some cases, the pain caused by the electric shocks would cause detainees to lose consciousness. “Every time I passed out from the pain,” said one detainee who was shocked 12 times in succession. “Every time I would go unconscious. Then I would wake up and they would shock me again.”²¹

Threats of Sexual Abuse

Monitors found 10 credible reports of NDS officials threatening to sexually abuse detainees. These findings contradict NDS claims that the practice is “absolutely non-existent” and that officials have never used threats of sexual abuse to interrogate and torture detainees.²²

Interviewers were told that interrogators used the threat of rape to force detainees to confess. One detainee held in NDS Kandahar stated, “They said they would rape me, and one time they took a stick and dipped it into chili powder and threatened to insert the stick into my anus. They tried to pull off my pants. When they did that, I confessed to everything they wanted.”²³ Other detainees experienced similar threats. One reported that, “They told me they will take off my shalwar [Afghan traditional dress] and rape me unless I confess.”²⁴ Another detainee told interviewers that the interrogators “threatened to stick a plastic bottle up my anus. They asked me how many children I had, and when I said that I had five children, they said, ‘five is enough for you.’ They would tell me, ‘If you do not tell us the truth, you will get the bottle.’ They pulled my trousers down.”²⁵

Researchers found that the specific threats reportedly used by interrogators were consistent with the findings of UNAMA, including near identical forms of abuse threatened. All three groups received reports from different detainees that interrogators threatened to sexually abuse detainees with sticks coated in chili powder in NDS Kandahar and with plastic bottles in NDS Department 90/124.

¹⁸Interview with Detainee 55.

¹⁹Interview with Detainee 101.

²⁰Interview with Detainee 99.

²¹Interview with Detainee 54.

²²UNAMA, *Conflict Related Detainees in Afghan Custody*, *supra* note 3, p. 61-62.

²³Interview with Detainee 46.

²⁴Interview with Detainee 51.

²⁵Interview with Detainee 6.

Abuse of Detainees' Genitals

Monitors received reports from eight detainees that their genitals were physically abused by NDS officials. Three detainees in Kandahar, three detainees in NDS Department 90/124, and one detainee in Herat reported that officials had twisted, wrenched, whipped, or otherwise abused their genitals in the course of their interrogations.²⁶ These reports directly contradict NDS's official statement that abuse such as the "twisting of sexual organs, etc." is "absolutely non-existent in the NDS."²⁷

One such detainee reported that over a period of seven days, "They whipped my testicles and my penis with a cable several times. There was blood in my urine after. I have no sexual feelings for women anymore. It hurts when I go to the bathroom."²⁸

Detainees also reported that interrogators hung weights from their testicles. One detainee described how while in NDS Kandahar, "I was freed and taken to my cell to have some sleep. They gave me a blanket then. But that night, they tortured me. They tied my testicles with a rope and hung an iron weight from the rope. I can't remember exactly how long this lasted, but it was for a long time. The torture made me confess everything...I confessed that I was involved with the Taliban."²⁹ Another detainee told the monitors that while in NDS Herat, "They took a weight and they tied it to my testicles so that it became very painful."³⁰

Detainee Confessions Obtained Using Torture

As noted above, international law defines torture as acts carried out by or with the consent or acquiescence of government officials where pain or suffering is inflicted for the purposes of "obtaining a confession," "punishment," or the "intimidation or coercion of an individual" or based on any "discriminatory" reasons. According to interviewees for this report, in the vast majority of cases of abuse Afghan state officials inflicted pain for the purpose of obtaining a confession or coercing detainees to provide information. The evidence collected indicates that state officials often utilized specific methods of abuse in conjunction with interrogations, clearly aimed at coercing confessions or information from detainees, constituting torture under international law. This finding is consistent with a past AIHRC report.³¹ In its 2009 report, *Causes of Torture in Law*

²⁶The findings of this report are also consistent with those of UNAMA, which documented several cases of wrenching or twisting detainees' genitals. Notably, both AIHRC and the Open Society Foundations and UNAMA received reports that interrogators had abused detainees' genitals in NDS Department 90/124 and NDS Kandahar.

²⁷ UNAMA, *Conflict-Related Detainees in Afghan Custody*, *supra* note 3, 61-62.

²⁸ Interview with Detainee 6.

²⁹ Interview with Detainee 47.

³⁰ Interview with Detainee 86.

³¹ Afghanistan Independent Human Rights Commission, *Causes of Torture in Law Enforcement Institutions*, AIHRC, April 2009 (Hamal 1388), p. 16, available at: <http://www.aihrc.org.af/english/> [hereinafter "AIHRC, *Causes of Torture in Law Enforcement Institutions*"].

Enforcement Institutions, the AIHRC stated that “one of the main causes of torture and other inhuman treatment is to obtain confessions and testimonies.”³²

Most detainees interviewed who confessed to crimes reported that they confessed only after being subjected to severe physical abuse. As one detainee described, “I was beaten with cables, and while I was being beaten, I confessed that I was associated with the Taliban...I was under such extreme pressure that I confessed. After it was finished I told them that I only confessed because of the beating.”³³ Another detainee reported that he confessed only after interrogators beat him with electric cables, subjected him to electric shocks, and threatened to “open [his] parts” if he didn’t admit to being a member of the Taliban.³⁴

Researchers also found that in most cases, interrogators would stop torturing the detainee after he confessed, indicating that the abuse was carried out for the purpose of obtaining a confession or information. As one detainee explained, “I couldn’t last longer than two days before I confessed. NDS just wants to send us to the central jail, and so they want my fingerprint [on the confession]. Once they have that, they will not torture anymore.”³⁵ The detainee was subjected to beatings with electric cables and physical abuse of his genitals before confessing.

Another detainee described how he was tortured by officials until he confessed at NDS Department 90/124. “For five days and nights I was hung upside down for long periods of time. They beat me with PVC plastic pipes—they beat me on the back of my legs and everywhere else on my body. I couldn’t suffer the beatings and the torture any longer, and I didn’t want them to beat me anymore, so I put my fingerprint on the paper. I was in Department 90[124] for 10 days, and after I gave them my fingerprint they stopped beating me and transferred me to Department 17[40].”³⁶ Detainees themselves identified a pattern in which abuse stopped once NDS officials obtained a confession: “I think that half of the prisoners are forced to confess like I was. When they arrest us, they torture at the beginning, but then they stop once they have a confession.”³⁷

Many detainees claimed that they were forced to provide false confessions.³⁸ One detainee told monitors that he falsely confessed after 25 days of torture including

³² See UNAMA, *Conflict- Related Detainees in Afghan Custody*, *supra* note 3, p. 3.

³³ Interview with Detainee 45.

³⁴ Interview with Detainee 7.

³⁵ Interview with Detainee 86.

³⁶ Interview with Detainee 12. Detainees are typically interrogated first in Department 90/124 before being transferred to Department 17/40.

³⁷ Interview with Detainee 80.

³⁸ There is ample evidence that the use of torture in interrogations can lead to false confessions and unreliable information. See Juan E. Méndez, *Report of the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, United Nations UN Human Rights Council, February 2011 (Dalwa 1389); Saul M. Kassin and Gisli H. Gudjonsson, “The Psychology of Confessions: A Review of the Literature and Issues,” *Psychological Science in the Public Interest*, Vol. 5, No. 2 (Nov. 2004; Aqrab 1383), pp. 33-67; Richard A. Leo and Richard J. Of she, “The Consequences of False Confessions:

suspension, severe beatings with pipes and cables on his feet, head, and genitals, and threats of sexual abuse. “They tortured me to confess...it was a forced confession. What I said was not true.”³⁹ Another detainee interrogated at NDS Kandahar stated, “I was interrogated three times in NDS. Each time, I was beaten with hands, fists, and cables. One time I was beaten with the cables, and while I was being beaten, I confessed that I was associated with the Taliban. They said, ‘pull off your pants,’ and they threatened to penetrate me with a stick [in my anus]. I was under such extreme pressure that I confessed.” But the detainee insisted his confession was coerced and false. “After [the torture] was finished I told them that I only confessed because of the beating. But they responded to that by beating me again,” he said. “I swear by God and by my children that I am innocent.”⁴⁰

Failure to Exclude Forced Confessions in Court

Under Afghan law, confessions extracted under torture are not admissible in court.⁴¹ However, interviews with detainees and defense lawyers (and based on the AIHRC’s long standing experience monitoring Afghan courts), suggest that Afghan judges often accept the confessions of detainees even if detainees have told the court that their confessions were forced through the use of torture.

During the research period for this report, several interviewees alleged that they were convicted of crimes based on forced confessions.⁴² According to one detainee, he was convicted and imprisoned based on a confession provided after a month and a half of torture by NDS officials. “They would come in and beat me two or three times a day and usually once a night. Every time they would beat me, they would also ask me questions. They put me down and tied my feet, and then they whipped my feet with the cables. The

Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation,” *The Journal of Criminal Law and Criminology*, Vol. 88, No. 2 (Winter 1998), pp. 429-496; Barrie Paskins, “What’s Wrong with Torture?” *British Journal of International Studies*, Vol. 2, No. 2 (July 1976; Saratan 1355), pp. 138-148; Christopher Kutz, “Torture, Necessity and Existential Politics,” *California Law Review*, Vol. 95, No. 1 (February 2007; Dalwa 1385), pp. 235-276; Peter Finn and Joby Warrick, “Detainee’s Harsh Treatment Foiled No Plots,” *Washington Post*, March 29, 2009 (9 Hamal 1388), <http://www.washingtonpost.com/wp-dyn/content/article/2009/03/28/AR2009032802066.html>; Dr. Marvin Zalman, *Criminal Procedure: Constitution and Society*, 2007; “France/Germany/United Kingdom ‘No Questions Asked’ Intelligence Cooperation with Countries that Torture,” Human Rights Watch, June 2010 (Jawza 1389), <http://www.hrw.org/sites/default/files/reports/ct0610webwcover.pdf>.

³⁹Interview with Detainee 6.

⁴⁰Interview with Detainee 45.

⁴¹ Art 30, Constitution of Afghanistan; Art 5.5 and Art 7, Interim Criminal Procedure Code.

⁴²The admission of forced confessions by Afghan judges has been documented by UNAMA as well, which found in its 2011 detentions report that “even in cases where defense lawyers raise the issue of forced confession through torture, courts usually dismiss the application and allow the confession to be used as evidence.” See UNAMA, *Conflict Related Detainees in Afghan Custody*, *supra* note 3, p. 7. The UN also observed in its 2009 report on arbitrary detentions that “judges did not necessarily investigate allegations of that evidence, including confessions, were elicited through coercion. The consequence [is] that a number of forced ‘confessions’ may have been accepted as evidence.” *Arbitrary Detention in Afghanistan: A Call for Action*, Vol. II, UNAMA, January 2009, [hereinafter UNAMA, *Arbitrary Detention in Afghanistan*, Vol. II], p. 65.

color of my feet was changed to the black of your shirt. One time...they took my trousers down. So of course after this I signed the confession, and I put my name on it and I stamped it,” he said. The court accepted the detainee’s confession and sentenced him to 16 years in prison.⁴³ A defense lawyer from Kandahar complained, “We are not happy with the courts. The confession comes from pressure through torture, beatings, etc, and we tell the court that the confession came through such illegal means, and according to the Constitution this is not right. But the judges do not listen to us.”⁴⁴

Locations

The researchers found credible evidence of torture at nine separate NDS facilities:⁴⁵

- NDS Kabul Department 90/124
- NDS Herat
- NDS Kandahar
- NDS Laghman
- NDS Badakhshan
- NDS LashkarGah
- NDS Kabul Department 17/40
- NDS Nangarhar
- NDS Wardak

NDS Kabul Department 90/124

Interviews with detainees indicate that torture is a particularly serious problem in NDS Counter-Terrorism Department 90/124 in Kabul.

In NDS Department 90/124, “high-value” terror suspects are detained, including those suspected of holding positions of authority in anti-government elements or being involved in high-profile attacks. Although the AIHRC repeatedly requested permission to interview detainees held in NDS Department 90/124, the NDS has refused to grant access.⁴⁶ However, monitors interviewed detainees who had been released or transferred from NDS Department 90/124 to other facilities. Out of the 12 detainees interviewed who had been detained in NDS Department 90/124, 11 reported being subjected to abusive interrogation techniques that constituted torture.⁴⁷

⁴³Interview with Detainee 6.

⁴⁴Interview with Defense Lawyer 16.

⁴⁵AIHRC and Open Society Foundations findings of torture in NDS Kabul (Department 90/124), NDS Herat, NDS Kandahar, and NDS Laghman are consistent with UNAMA’s findings that torture has been practiced at these specific facilities. Unless otherwise specified, NDS provincial facilities named in this report refer to provincial NDS headquarters facilities, located in the capital city of the province named.

⁴⁶ UNAMA also reported being denied access to Department 90/124. UNAMA, *Conflict-Related Detainees in Afghan Custody*, *supra* note 3, p. 18. Despite repeated requests, NDS has not granted the AIHRC access to NDS Kabul Department 90/124.

⁴⁷See UNAMA, *Conflict- Related Detainees in Afghan Custody*

Detainees in NDS Department 90/124 reported that they were subjected to a number of different forms of torture. A significant number of detainees reported being suspended and beaten, as well as threatened with sexual abuse. Other forms of abuse were also reported, including burning with cigarettes, and stretching detainees while lying on a wooden board.

Many detainees reported being subjected to repeated, severe beatings during interrogations in NDS Department 90/124. “During the questionings, I would be hit on the head and body with shoes and books, and they would pull my beard and bang my head against the wall. These beatings happened at least 10 times during my month of interrogation,” said one detainee.⁴⁸ Another detainee reported, “They would put me on my hands and knees and then hit me on the back with electric cables and one long, heavy pipe. I was only beaten during interrogation times—they wanted me to confess to being a Talib or a suicide bomber. These beatings would happen at least once a day and sometimes more. Once I was beaten four times in one night. I was in such bad shape that I couldn’t even walk to the bathroom. I had to crawl...Before I came here [to prison], I had a black beard. Now my beard is half white.”⁴⁹

According to detainees held in NDS Department 90/124, such beatings were a common practice in the facility. As one detainee explained, “Many people were being beaten. We were all brought down to the basement. The basement was the torture place. It was like a butcher shop—you could see blood everywhere...You could hear a lot of screaming. Screaming like it was animals screaming. When we would scream, the guards would put their fists under our chins to stop our voices.”⁵⁰

Detainees also reported being suspended from the wall or ceiling for several days at a time. One detainee described how he was suspended from the ceiling with his arms shackled and his feet “barely touching the ground” for 11 days: “I was only released from the restraints to eat, pray, go to the bathroom, and to be beaten. I begged the interrogators for rest.”⁵¹ Another detainee was suspended for seven days. “They kept me blindfolded, and they hung me from the wall so that my feet were not touching the ground,” he said. “They would take me down for meal times, and usually they would take me down for prayer time...I was out of my senses during this time—my feet were very swollen from the hanging. I didn’t know that it was my feet, they were so swollen and strange looking.”⁵²

Other detainees who had been detained in NDS Department 90/124 reported being beaten while they were suspended. One detainee reported that he was “hung upside down for a

⁴⁸Interview with Detainee 1.

⁴⁹Interview with Detainee 9.

⁵⁰Interview with Detainee 6.

⁵¹Interview with Detainee 9.

⁵²Interview with Detainee 6.

long period of time” and received multiple beatings while in this position. The detainee reported that as a result of this treatment, his foot and toe were broken.⁵³

Several additional forms of torture were also reported by detainees held in NDS Department 90/124. For instance, one detainee described how he was placed on a “long, wooden board and pulled in both directions.”⁵⁴ Another detainee reported that interrogators would burn his hands with cigarettes during questioning.⁵⁵

NDS Herat

Researchers also found evidence of torture in NDS Herat, although a monitoring visit on February 13, 2012 (24 Dalwa 1390), found evidence of improvements in detainee treatment. Seven individuals who had been detained at the Herat facility reported that they had been subjected to abuse during interrogations, including beating and suspension.⁵⁶

Though most cases occurred prior to the implementation of ISAF inspections in response to the UNAMA report, one case of abuse occurred after the ISAF inspection of NDS Herat. A 15 year-old detainee reported that he was arrested by ALP and then transferred to NDS Herat on or around November 5, 2011 (14 Aqrab 1390). The detainee reported being beaten by NDS officials at NDS Herat for multiple days from November 9, 2011 (18 Aqrab 1390), onwards. “I was beaten with a double twisted electric cable. They hit me on my head until I couldn’t feel anything and tears were coming from my eyes.”⁵⁷ The detainee stated that he was regularly beaten in a container located within the NDS facility. He also described being forced to lie down on his chest and being beaten on his back and backside for one to one and a half hours in a room within or adjacent to the same container. While abusing the detainee, NDS officials demanded that he name members of the Taliban at his school. The detainee stated that his confession was obtained by force after he “was too dazed from the beatings with the cable to know what [he] was saying.”⁵⁸

Evidence of Torture in Additional NDS Facilities⁵⁹

Two interviewees who were detained in NDS Wardak reported being subjected to torture, including suspension and beatings. One detainee stated, “They hung me and used many different forms of torture. It was very severe; they used electric cables, wooden sticks, metal rods, and hung us upside down. They asked questions [saying] tell us the links you have [and that] you are Talib...accept and confess these things. They kicked and slapped

⁵³Interview with Detainee 12.

⁵⁴Interview with Detainee 9.

⁵⁵Interview with Detainee 2.

⁵⁶ This finding is consistent with UNAMA’s finding of systematic torture at NDS Herat.

⁵⁷Interview with Detainee 91.

⁵⁸*Id.*

⁵⁹See UNAMA, *Conflict- Related Detainees in Afghan Custody*.

me...it was very, very bad treatment.”⁶⁰ Another detainee reported similar practices of beating and suspension, as well as forced standing. “They stood me in front of a wall, tied one leg to the wall and forced me to stand on the other leg. If I couldn’t stay up and balance they would beat me...They beat me a lot. They used a rubber hose, rope, and plastic around my feet. They took the binding on my feet and had a pulley attached to the ceiling and hung me upside down,” he said. The detainee reported that while he was upside down, the interrogators would “bounce me up and down and slam my head into the ground.”⁶¹

Researchers also found evidence of torture and mistreatment, including beatings, suspension, and biting, in seven cases in Department 17/40 in NDS Kabul, the most recent allegation dating to August 2011 (Asad 1390). One detainee reported beatings, suspensions, and beatings while suspended.⁶² Another detainee reported that he was subjected to severe beatings of his lower body during his detention in Department 17/40. He also reported being bitten by interrogators; two bite marks were visible to interviewers on his lower left calf and upper right leg.⁶³

Eight detainees in NDS Nangarhar provided credible allegations of torture, including one detainee who recounted how he was repeatedly beaten with a stick over the course of 11 days. After one beating, the detainee reported, he was made to stay outside in the rain, naked, for around 30 minutes. These beatings were so severe, he said, that “it was painful just to have the material of my prison uniform resting on my skin.”⁶⁴ One detainee also reported being beaten with sticks, and another with sticks and electrical wires.⁶⁵ Another detainee who had been detained in NDS Nangarhar reported that he was subjected to various forms of torture over a period of 20 days including suspension, electric shocks, and severe beatings with a piece of wood.⁶⁶

In NDS LashkarGah, monitors documented two credible allegations of torture, both including severe beatings. One detainee alleged that abuse occurred in January 2011 (Jadi 1389), while the other alleged that abuse occurred in October 2011 (Mezan 1390). An additional detainee reported being abused by NDS officials in an NDS facility in Nad Ali district. However, the large majority of detainees interviewed that were held at NDS LashkarGah reported no mistreatment. One detainee stated that while in custody in NDS LashkarGah, “They [the interrogators] hit me on the back and feet with a solid iron pipe...They also beat us with their fists. They gave us such beatings. They would not give up...they would beat you until you said that you have relations with the Taliban.”⁶⁷ The same detainee mentioned that detainees who had been tortured were moved to an

⁶⁰Interview with Detainee 98.

⁶¹Interview with Detainee 99.

⁶²Interview with Detainee 12.

⁶³Interview with Detainee 13.

⁶⁴Interview with Detainee 25.

⁶⁵Interview with Detainee 32, 33, and 30.

⁶⁶Interview with Detainee 24. It should be noted that this detainee was held in NDS Nangarhar two years ago, though his complaints of abuse are not inconsistent with complaints of more recent detainees.

⁶⁷Interview with Detainee 80.

isolated room when the facility was visited by outside monitors. “When the authorities came to the NDS, they would keep us—the ones who had been tortured—somewhere else so that we would not be seen. There was an underground room.”⁶⁸

Five victims of mistreatment and torture were also interviewed in NDS Badakhshan. One detainee was reportedly tied between two trees and beaten until he lost consciousness. After three days of detention and interrogation by the NDS, he was eventually released. Another detainee was abused at NDS Keshim District (in Badakhshan Province) through kicking, punching, and beatings from officials with the butts of their guns. He was then transferred to NDS Badakhshan, where the head of interrogation beat him with a stick. The head of NDS Keshim District and the head of interrogation of NDS Badakhshan both acknowledged to the AIHRC that they had abused the detainee, and monitors obtained photographic evidence of marks, bruises, and cuts on the detainee’s back, legs, and shoulders from the beatings.⁶⁹ Four allegations of abuse in NDS Laghman were reported during the research period; the most recent abuse was alleged to have taken place in July 2011(Saratan 1390).

AIHRC monitors also received a significant number of credible allegations of abuse in NDS Kandahar—a total of 20 over the course of the research period. AIHRC monitors most recently visited NDS Kandahar in January 2012(Jadi 1390), and documented 10 credible allegations of abuse.

Torture and Mistreatment at Non-NDS Facilities Holding Conflict-Related Detainees

Juvenile Corrections Center Helmand

Monitors also found credible evidence of mistreatment at the Juvenile Corrections Center (JCC) in Helmand. It is unclear, however, whether those who reported abuse were themselves conflict-related detainees as NDS LashkarGah regularly transfers juvenile conflict-related detainees to the facility.

Reports of abuse at the JCC Helmand included sexual abuse and routine beatings. One detainee reported that there were three juveniles who were regularly raped by the director and the director’s son: “They have been used many, many times. Whenever they want to use them they do...It will happen outside the center [pointing to the area behind the building where the detainees are held]. Even in this office they can do it.”⁷⁰

One detainee reported that he had been subjected to multiple beatings with fists and an iron pole: “One time the director made us stand up. After we stood for a long time he yelled, ‘Why are you standing,’ and he hit me...[W]e get hit very hard with the pipe. I have a scar on my back from one beating,” he said. A one-inch scar was visible to interviewers on the upper-right side of his back. He continued, “If you look at the

⁶⁸*Id.*

⁶⁹Interviews with Detainees 104, 105, 106, 107, and 108.

⁷⁰*Id.*

buttocks of the other boy prisoners, you will see that they have been hit with the pipe. You will see their scars.”⁷¹

AIHRC officials followed up on the report of sexual abuse, interviewing every detainee at the JCC in Helmand. Their investigation found that the allegations of abuse, including sexual abuse, were credible. AIHRC monitors also received reports that juvenile detainees had been threatened not to speak about mistreatment to AIHRC monitors, and that detainees had in the past been beaten for disclosing abuse to AIHRC monitors.

As a result of the AIHRC’s findings, the governor of Helmand removed the director of the JCC Helmand on or around July 21, 2011 (30 Saratan 1390). The director was removed from JCC Helmand within days of the AIHRC’s investigation—swift action that is welcome and speaks to the credibility and seriousness of the AIHRC’s findings. However, it remains unclear whether the individual was criminally prosecuted for alleged crimes.

Afghan National Police Facilities in Kandahar

Researchers interviewed multiple individuals detained by the Afghan National Police (ANP) in Kandahar who reported being mistreated and tortured while in ANP custody.

Detainees were reportedly tortured at a variety of official and unofficial locations including ANP check posts, ANP headquarters, and other ANP facilities in Kandahar. Multiple methods of torture were used and were broadly similar to those reportedly employed by some NDS officials, including beatings with kicks, fists, electric and wire cables; choking; electric shock; and squeezing of testicles.⁷² One detainee also reported that he was interrogated and tortured at an unofficial detention facility (see below).

Several detainees reported being tortured while detained at ANP Headquarters. One detainee reported that interrogators “would hold me from the neck until I became unconscious, and then they would kick me very hard. I had to pass urine in the cell, so I was forced to sleep in my own urine. The police [ANP] told me that I should never tell anything that happened there to anyone. They treated us like animals.”⁷³

Detainees also reported being tortured while in custody at ANP check posts. After being arrested, detainees reported being held at ANP check posts for substantial periods of time, between one and four days, and were not immediately transferred to the provincial headquarters of the ANP or the NDS. It was during this time that detainees were interrogated and subjected to mistreatment and torture. One detainee reported being subjected to beatings, stress positions, and abuse of his genitals while detained at the 9th

⁷¹Interview with Detainee 83.

⁷²These findings are also consistent with and corroborate UNAMA’s documentation of torture and mistreatment in ANP facilities in Kandahar. See UNAMA, *Conflict-Related Detainees in Afghan Custody*, *supra* note 3, p. 36-37.

⁷³Interview with Detainee 44.

district police check post. He told researchers that ANP officials “made me lie down on the ground on my stomach and one of the officials sat on my back and started pulling my hand and legs to join them together. [As a result] he broke my left arm. After this they started squeezing my testicles so that I couldn’t bear it. They did it so many times that blood came out of one side of my testicles.”⁷⁴ The detainee stated that ANP officials were torturing him in order to obtain a confession. “Repeatedly they were showing me some AK47s, a rocket launcher, and other explosive materials and saying that I should confess that they were mine, but I hadn’t ever seen them before and they were not mine.”⁷⁵

Researchers for this report have also received allegations that one detainee died in April 2011 (Hamal 1390) as a result of torture and mistreatment at an ANP check post. The AIHRC investigated this case at the time of the incident and the findings have also been previously reported by UNAMA.⁷⁶ According to interviews with family members, the individual was detained at an ANP check post for several days, where he was kicked and beaten with fists and wire cables. He was then transferred to NDS Kandahar. Around 15 days later, the individual died. At the time of death, the detainee’s abdomen was heavily bruised.⁷⁷

A doctor at Mirwais Hospital, the province’s main hospital, stated that they have treated a significant number of individuals for injuries sustained while in ANP custody. “Most injury cases we receive are from the police. Sticks, guns, cables, they use all these kinds of things to beat detainees. There is no controlling them—they can do anything and everything to people.”⁷⁸ The doctor described a recent case of a 60-year-old man who had been severely beaten in ANP custody. According to the doctor, the beatings suffered by the man had caused blood vessels in his leg to rupture, leaving his leg without sufficient blood supply. “He was here in the hospital for two nights, and we said we needed to amputate or he would die, but he decided to leave. [He] maybe went to Pakistan, probably Quetta or Peshawar, to get treatment.”⁷⁹

Another detainee reported being subjected to severe beatings and electric shock at a location that was not an official ANP detention facility. He stated that he was transferred from ANP headquarters to a provincial government building that was not an official detention facility, where he was detained and interrogated for two days. “They used an electric cable to beat me—30 times, 30 lashes with the cable. They beat me on both sides of my feet, usually on the soles of my feet. Then they beat me with the cables on my head, 27 times they beat me. [I] still [have] marks from this. [I was] bleeding from my hands, feet, and head very badly. Four other people I spoke to [at NDS Kandahar] were also beaten [there].” The detainee was also subjected to electric shocks. “It was so much

⁷⁴Interview with Detainee 48.

⁷⁵*Id.*

⁷⁶UNAMA Detentions Report

⁷⁷Interviews with family members of the deceased detainee and a doctor who treated the deceased detainee. See also, UNAMA, *Conflict -Related Detainees in Afghan Custody*, *supra* note 3, p. 25.

⁷⁸Interview with doctor at Mirwais Hospital.

⁷⁹*Id.*

pain; they said confess, confess, they kept asking me questions. Twelve times they shocked me. Every time I passed out from the pain, and they kept asking me questions and saying confess, confess. They took my thumbprint [upon confession].”⁸⁰ The detainee said he believes the Afghan Border Police (ABP) were responsible for detaining and abusing him at this location before transferring him to NDS Kandahar.

The ANP is playing a prominent role in counter-terrorism and national security cases in Kandahar, including working closely with U.S. and ISAF forces in major operations during 2010 and 2011(1389-1390).⁸¹ Consequently, the ANP appears to be involved in detaining and interrogating a significant number of conflict-related detainees in Kandahar. Researchers found evidence that ANP officials in Kandahar not only engage in torture of detainees but have done so at as many as five sites, one reportedly not an official ANP facility, in some cases for multiple days at a time.

Challenges to Effective Detainee Monitoring

In the course of conducting interviews for this report, researchers found that effective monitoring of NDS and other detention facilities was hindered by several factors, including holding or moving detainees to concealed or secret locations where AIHRC monitors have not been granted access, and detainees’ fears of reprisals for reporting torture and mistreatment. The impact of fear of reprisals acting as an impediment to effective detainee interviews, particularly while the detainees remain in custody, has impeded monitoring in Afghanistan and has been cited as a major obstacle by human rights monitors in other parts of the world.⁸²

Evidence of Efforts to Conceal Torture

Reports from several detainees indicate that NDS officials may have conducted interrogations and engaged in torture in locations within or close to detention facilities that may not be readily visible or made accessible to outside monitors, such as basements

⁸⁰Interview with Detainee 54.

⁸¹Matthieu Aikins, “Our Man in Kandahar,” *The Atlantic*, November 2011 (Aqrah 1390), <http://www.theatlantic.com/magazine/archive/2011/11/aikins/8653/>. Yaroslav Trofimov, “Surge Focus Is Roads, Police,” *The Wall Street Journal*, December 17, 2009 (26 Qaws 1388), <http://online.wsj.com/article/SB126085693657891775.html>. Forsberg, *Counterinsurgency in Kandahar: Evaluating the 2010 Hamkari Campaign*, Institute for the Study of War Studies, December 2010 (Qaws 1389), http://www.understandingwar.org/sites/default/files/Afghanistan%20Report%207_15Dec.pdf.

⁸² See for example the case of dual Canadian and Syrian citizen Maher Arar, who was tortured in Syrian custody in 2002 despite nine consular visits by Canadian consular officials as part of diplomatic assurance with the Syrian government. Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, http://www.sirc-csars.gc.ca/pdfs/cm_arar_rec-eng.pdf, p. 44. See also Human Rights Watch, “Diplomatic Assurances against Torture: Questions and Answers,” http://www.hrw.org/sites/default/files/related_material/ecaqna1106web.pdf.

and temporary containers. The reported use of such locations raises concerns that some officials are seeking to evade independent monitoring and conceal detainee abuse.

Monitors received reports of a basement facility in NDS Herat. Five detainees interviewed stated that they were brought to a basement or underground room in NDS Herat for interrogation.⁸³ One detainee stated that the underground room was in “the old NDS facility,” which lies behind the main white office building inside the NDS Herat compound. All five detainees who were taken to the basement were tortured there. Detainees reported that NDS officials used a variety of methods of torture, including suspension by the arms from steel bars and beatings. In one case, a detainee claimed that after being beaten he was immersed in a tub filled with salt water in order to increase the pain from his wounds.⁸⁴ The existence of an underground room within the former NDS Herat building was corroborated by another interviewee who stated that he was held in an underground room in the same facility during the Taliban regime.⁸⁵

Monitors also received several reports of NDS officials acting to conceal evidence of torture or mistreatment from monitoring organizations. One detainee from Kandahar told the AIHRC that one of his fellow detainees at NDS Kandahar, who had been “beaten hard,” was transferred “to some unknown place” the day before the AIHRC visited the facility; NDS Kandahar does not permit unannounced visits by AIHRC monitors and requires at least one day notice.⁸⁶ Similarly, a detainee in Helmand reported that “when the authorities came to the NDS, they would keep those of us who had been tortured somewhere else so that we would not be seen. There was an underground room, and there were three of us who were kept there.”⁸⁷

Detainees’ Fears of Reprisal for Revealing Evidence of Torture or Mistreatment

Several detainees reported that they feared being subjected to reprisals for discussing mistreatment with monitors. One detainee in NDS Herat, who had reported being subjected to severe beatings and abuse of his genitals, stated at the end of the interview, “I have nothing else to say. They will put me somewhere else after I talk to you. They will disappear me.”⁸⁸ A detainee at the Juvenile Corrections Center in Helmand reported to the AIHRC that he and his fellow detainees were severely beaten as a consequence of having reported mistreatment at the facility. “We wrote a complaint letter once, but the director found out, and then we got hit very hard with the pipe after that,” he said.⁸⁹

⁸³Interview with Detainees 87, 94, 95, 96, and 97. In addition, Detainee 93 said that he has relatives who were abused in a basement facility of NDS Herat, and Detainee 89 said that he knows other prisoners at the Herat central prison who were tortured in such a basement. Neither Detainee 89 nor Detainee 93 was taken to the basement himself, however.

⁸⁴Interview with Detainee 96.

⁸⁵Interview with anonymous, December 4, 2011 (13 Qaws 1390).

⁸⁶Interview with Detainee 59.

⁸⁷Interview with Detainee 80.

⁸⁸Interview with Detainee 86.

⁸⁹Interview with Detainee 83.

Some detainees' fears of reprisal had a direct impact on what they would disclose to monitors. In one case, an official in NDS Parwan repeatedly interrupted an interview conducted by two AIHRC monitors. When the detainee being interviewed began to talk about the conditions and treatment in NDS Parwan, the official repeatedly yelled at the detainee that he should "tell the truth!"⁹⁰ Another detainee interviewed by an AIHRC monitor in NDS Laghman indicated that he had been severely beaten by speaking quietly and making hand gestures, refusing to say any more because "[the official] will come back and I will be in trouble."⁹¹

V. International Detainee Transfers, Monitoring, and Joint Operations

Under the general international law principle of non-refoulement, which has a basis in international human rights, refugee, and humanitarian law, states are prohibited from transferring persons under their effective control to the custody of another state if there are substantial grounds to believe the individual would face a real risk of torture or cruel, inhuman or degrading treatment or punishment.⁹²

ISAF forces continue to regularly detain and transfer individuals to Afghan custody. Under ISAF's "96-hour rule," individuals detained during ISAF operations are generally

⁹⁰Interview with Detainee 109.

⁹¹Interview with Detainee 103.

⁹²The principle of non-refoulement is a general principle of international law with a basis in international human rights law, refugee law, and international humanitarian law. Sir Elihu Lauterpacht and Daniel Bethlehem, "The Scope and Content of the Principle of Non-Refoulement: Opinion," in Erika Feller, Volker Turk, and Frances Nicholson (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, Cambridge, UK: Cambridge University Press (2003), www.unhcr.org/publ/PUBL/419c75ce4.pdf. See also Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture or CAT), adopted December 10, 1984 (19 Qaws 1363), G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987 (5 Saratan 1366), art. 3, <http://www2.ohchr.org/english/law/cat.htm>; Nigel Rodley, *Treatment of Prisoners under International Law*, Oxford: Oxford University Press (2009), p. 172; Cordula Drogue, "Transfer of Detainees: Legal Framework, Non-Refoulement, and Contemporary Challenges," *International Review of the Red Cross*, Vol. 90 No. 871, September 2008 (Sunbola 1387); Emanuela-Chiara Gillar, "There's No Place Like Home: States' Obligations in Relation to Transfers of Persons," *International Review of the Red Cross*, Vol. 90, No. 871, September 2008 (Sunbola 1387), <http://www.icrc.org/eng/assets/files/other/irrc-871-gillard.pdf> [hereinafter "Gillar, 'There's No Place Like Home'"]. See also Center for Human Rights and Global Justice, New York University Law School, *Minimum Standards for Transfer: International Law Concerning Rendition in the Context of Counter-Terrorism*, June 2009 (Jawza 1388), <http://www.chrgj.org/projects/docs/legaladvisory.pdf>. The Committee Against Torture, the international expert body that monitors states' compliance with CAT, has repeatedly reaffirmed the prohibition on torture is absolute. See UN Committee Against Torture, "Consideration of Reports Submitted by State Parties under Article 19 of the Convention, Conclusions and Recommendations of the Committee Against Torture, France," CAT/C/FRA/CO/3, April 3, 2006 (14 Hamal 1385), [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CAT.C.FRA.CO.3.En](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CAT.C.FRA.CO.3.En), para. 6.

released or transferred to Afghan authorities within 96 hours. However, in the absence of more detailed, uniform standards and guidelines for detention transfers, in large part due to the multinational structure of ISAF, in which each nation may interpret legal obligations differently, there is significant diversity in detention policies and practices among ISAF nations.

ISAF nations also face very different circumstances and challenges when it comes to detentions. The United States detains thousands of individuals all across Afghanistan, with a majority held in the Detention Facility in Parwan (DFIP, formerly known as the Bagram Theater Internment Facility). Meanwhile, nations with much smaller troop presences, such as Denmark, may detain only a handful of individuals in a given year, with operations, detentions, and transfers confined to a single province. Other nations, such as Germany, claim that they don't take part in detentions themselves, yet nevertheless participate in military operations with Afghan forces in which individuals are arrested and detained.

It is important to note that some U.S. forces in Afghanistan operate as a part of Operation Enduring Freedom (OEF), a U.S. led counter-terrorism coalition that is separate from ISAF forces.⁹³ Known as U.S. Forces Afghanistan (USFOR-A), most of these non-ISAF U.S. forces are special operations forces and also referred to as Combined Forces Special Operations Component Command-Afghanistan (CFSOCC-A). CFSOCC-A forces frequently conduct operations in which individuals are detained. USFOR-A is under the command of General John Allen, who also serves as the commander of ISAF (COM-ISAF). There are also a number of U.S. military units that operate separately from ISAF and USFOR-A forces, and are not under the command of General Allen.

U.S. detention operations are run by the Combined Joint Interagency Task Force-435 (CJIATF-435). Officially, the United States runs one long-term detention facility, the Detention Facility in Parwan (DFIP), though previous work by the Open Society Foundations shows that a number of "temporary" detention sites are also maintained, including the secretive "Tor Jail" ("Black Jail") at Bagram Air Base, run by the U.S. Joint Special Operations Command (JSOC).⁹⁴ USFOR-A forces do not consider themselves to be bound by ISAF's 96-hour rule, and it is believed that they are permitted to hold and interrogate detainees at these temporary detention sites for up to nine weeks before releasing them or transferring them to the DFIP or to Afghan custody.⁹⁵

At least six ISAF troop contributing nations (TCNs) have negotiated separate Memorandums of Understanding (MoUs) with the Afghan government, which govern detention authority and transfers: the United Kingdom, Canada, Australia, Denmark,

⁹³U.S. Department of Defense, *Report on Progress towards Stability and Security in Afghanistan*,

⁹⁴Open Society Foundations, *Confinement Conditions at a U.S. Screening Facility*, *supra* n. 4; Dozier, "Terror Suspects Held for Weeks," *supra* note 4.

⁹⁵*Id.*

Norway, and the Netherlands.⁹⁶ These MoUs involve varying levels of monitoring of transferred detainees as part of the agreements. However, monitoring programs have varied in quality and suffered from some serious weaknesses, and have been shown in some cases to be insufficient to safeguard against abuse and torture of detainees transferred to Afghan custody.⁹⁷ For years, credible allegations of mistreatment and torture of detainees in Afghan custody have surfaced despite the existence of MoUs, including detainees transferred from international forces.⁹⁸

As discussed below, while monitoring by international forces of the detainees that they transfer is a welcome step, such measures alone do not necessarily meet the legal obligations of states to ensure that detainees transferred to Afghan custody do not face a real risk of torture.⁹⁹

⁹⁶ Amnesty International, *Afghanistan: Detainees Transferred to Torture: ISAF Complicity?*, November 2007 (Aqrab 1386), <http://www.amnesty.ca/amnestynews/upload/ASA110112007.pdf> [hereinafter “Amnesty International, *Afghanistan: Detainees Transferred to Torture*”]. See also, Stephen Smith, Minister for Defence, “Detainee Management in Afghanistan,” Australian Government, Department of Defence, December 14, 2010 (23 Qaws 1389), <http://www.defence.gov.au/minister/105tpl.cfm??CurrentId=11212> [hereinafter “Stephen Smith, Australian Minister for Defence, ‘Detainee Management in Afghanistan’”]; Memorandum of Understanding Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Islamic Republic of Afghanistan Concerning Transfer by the United Kingdom Armed Forces to Afghan Authorities of Persons Detained in Afghanistan, April 23, 2006 (3 Saur 1385), <http://www.publications.parliament.uk/pa/cm200607/cmselect/cmfa/44/4412.htm#n78>, [hereinafter “Transfer MoU between the UK and Afghanistan”]; Government of Canada, “Backgrounder: Canadian Forces Release Statistics on Afghanistan Detainees,” September 2, 2011 (11 Sunbola 1390), http://www.afghanistan.gc.ca/canada-afghanistan/news-nouvelles/2010/2010_09_22b.aspx?lang=eng&view=d [hereinafter “Government of Canada, ‘Canadian Forces Release Statistics’”].

⁹⁷ UNAMA, *Conflict- Related Detainees in Afghan Custody*, *supra* note 3. See also Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. 60/316, August 30, 2005 (5 Sunbola 1384), para. 46, <http://www.unhcr.org/refworld/pdfid/43f30fb40.pdf>; Human Rights Institute, Columbia Law School, *U.S. Monitoring of Detainee Transfers in Afghanistan: International Standards and Lessons from the U.K. and Canada*, December 2010 (Qaws 1389), http://www.law.columbia.edu/ipimages/Human_Rights_Institute/AfghanBriefingPaper%20FINAL.pdf [hereinafter “Human Rights Institute, *U.S. Monitoring of Detainee Transfers in Afghanistan*”]; Human Rights Institute, Columbia Law School, *Promises to Keep: Diplomatic Assurances against Torture in U.S. Terrorism Transfers*, December 2010 (Qaws 1389), http://www.law.columbia.edu/ipimages/Human_Rights_Institute/Promises%20to%20Keep.pdf [hereinafter “Human Rights Institute, *Promises to Keep*”].

⁹⁸ Amnesty International, *Afghanistan: Detainees Transferred to Torture: ISAF Complicity?*, November 2007 (Aqrab 1386), *supra* note 102; Andrea Prasow, “Afghan Torture is No Secret,” *National Post*, May 4, 2010 (14 Saur 1389), <http://fullcomment.nationalpost.com/2010/05/04/andrea-prasow-afghan-torture-is-no-secret/>.

⁹⁹ The United States ratified CAT subject to an understanding that the phrase “where there are substantial grounds for believing that he would be in danger of being subjected to torture” in Article 3 means “if it is more likely than not that he would be tortured.” Resolution of Advice and Consent to Ratification, S. Exec. Rep. No. 101-30, 1990, <http://thomas.loc.gov/cgi-bin/ntquery/z?trty:100TD00020>. The U. S. government has taken the view that Article 3 does not impose legal obligations on the United States with respect to

ISAF Six-Phase Response Plan

In response to the findings in the UNAMA detentions report, ISAF has begun implementing a six-phase plan to address torture and ill-treatment. The plan includes the suspension of detainee transfers to 16 facilities identified by UNAMA as practicing torture, combined with measures to allow for the resumption of transfers. It should be emphasized that the findings in this report on torture and abuse in NDS detention facilities in most cases pre-date implementation of ISAF's six-phase remediation plan and inspections regime. One allegation of torture in NDS Herat and 14 allegations in NDS Kandahar were received after the implementation of ISAF's response plan. Consequently, aside from these cases, this report's findings should not be used as a basis for judging the effectiveness of ISAF's response plan. More information is needed in coming months to properly assess whether ISAF's inspections, certifications, and other remedial measures have successfully addressed reports of torture and the risk of detainee abuse.¹⁰⁰

However, as discussed in section IV, research conducted for this report points to serious flaws in the ISAF plan, including abuse outside the 16 facilities identified by UNAMA, and reports of undisclosed locations of detention and interrogation. While the comprehensive monitoring scheme will greatly increase ISAF's awareness of abuses in other facilities, there is clearly a need for more proactive efforts to accurately assess the risk of torture faced by potential transfers. Furthermore, there are U.S. forces and personnel that remain unbound by ISAF remedial actions and proposed monitoring (see section VI below).

ISAF's six-phase plan includes a process of certification for the facilities where torture has been discovered. This involves inspections of implicated facilities, when detainees and staff are interviewed, followed by remedial training of all detention facility staff. An additional inspection is conducted to verify completion of training and review any evidence or allegations of abuse through interviews with detention facility staff and detainees. If there are any credible allegations of abuse, certification of the facility cannot proceed, and the inspections and certifications process is restarted.

individuals who are outside U.S. territory, although it has stated that, as a matter of policy, it will not transfer persons to countries where it is more likely than not that they will be tortured. See Second Periodic Report of the United States of America to the Committee Against Torture, May 6, 2005, para. 30, <http://www.state.gov/g/drl/rls/45738.htm>. See also Diplomatic Assurances and Rendition to Torture: The Perspective of the State Department's Legal Advisor: Hearing before the Subcomm. on Int'l Organizations, Human Rights, and Oversight, 110th Cong. 12 (2008), statement of John B. Bellinger, III, Legal Advisor, State Department, www.fas.org/irp/congress/2008_hr/rendition.pdf.

¹⁰⁰ Information on ISAF six-phase response plan based on interviews with several ISAF officials, Kabul city, Kabul Province, November 12, 2011 (21 Aqrab 1390); December 11, 2011 (20 Qaws 1390); January 12, 2012 (22 Jadi 1390).

After inspections, trainings, and follow up visits are completed, recommendations are made by relevant ISAF officials and field commanders to COM-ISAF, who makes a final determination as to whether to certify a facility for resumption of transfers. As of February 15, 2012 (26 Dalwa 1390), ISAF has certified 13 of 16 facilities, including NDS Herat, NDS Uruzgan, NDS Khost, NDS Takhar, NDS Kapisa, ANP Zhari, AUP Kunduz, AUP Dasht-e-Archi (a district of Kunduz province), and AUP Khost. Four of these certifications are "conditional," which means ISAF determined there was insufficient information to fully certify the facility for resumption of transfers. Given the smaller size of some facilities and the turnover in detainees, ISAF assessment teams found no detainees to interview at some facilities, and were consequently unable to gather the information necessary to fully certify those facilities for resumption of transfer. These conditionally certified facilities include ANP Arghandab (Kandahar province), ANP Daman (Kandahar province), ANP Kandahar City District 9, and NDS Laghman. This conditional status permits transfer of detainees subject to an immediate (within 72 hours) unannounced site visit to interview detainees regarding their treatment and confinement conditions. Three facilities remain prohibited for detainee transfers: NDS Kabul Department 90/124, NDS Kandahar, and ANP Kandahar City District 2.

Currently, when an individual is captured in a joint ISAF/ANSF operation, ISAF forces accompany the detainee to a facility not among the 16 facilities implicated in abuse by the UNAMA report. ISAF forces obtain assurances from the facility director or commander that the detainee will not be transferred to a detention facility implicated in abuse.

ISAF is also moving forward with a long-term detainee monitoring program that will include facility inspections and monitoring of every detainee captured in ISAF and joint ISAF/ANSF operations, including those transferred outside the 16 previously identified facilities of concern. The focus will be on tracking individual detainees rather than facilities, and commits ISAF to interviewing each transferred detainee on a monthly basis. Each Regional Command will have two officials employed on a full time basis for this purpose. ISAF has not responded to AIHRC and Open Society requests for the number of detainees expected to be covered by this monitoring regime.

Critically, ISAF has adopted a broad, inclusive definition of which detainees will eventually be covered by its protective measures, including its proposed monitoring program. ISAF's protective measures will apply not only to individuals captured and detained by ISAF forces, but to all detainees captured in any combined operation between ISAF forces and ANSF. This definition is broader than the "effective control" standard employed by many ISAF TCNs.

ISAF's swift response to UNAMA's report and decision to suspend transfers to all 16 facilities identified by UNAMA is a positive, welcome step. The adoption and implementation of a six-phase plan to address concerns raised by the UNAMA detentions report will help protect the rights of detainees transferred to Afghan custody and encourage Afghan officials to pursue improvements and reform.

However, additional information will be required to assess whether ISAF inspections, training, and certifications are in fact ensuring detainees are not subjected to a real risk of torture. ISAF must also work to finalize and clarify its plan for inspecting facilities beyond the 16 identified by UNAMA and its proposal for longer-term detainee monitoring program.

There is also significant concern that international monitoring programs such as ISAF's result in the creation of a "two-tier" system, where transferred detainees were free from abuse, while the wider detainee population continued to face mistreatment. Consequently, there should be a priority on ensuring the AIHRC, which is mandated to monitor all detainees in all detention facilities, has full, unfettered access to NDS facilities. It also necessary that the Afghan government and international officials ensure international monitoring programs, including monitoring conducted by ISAF, individual troop contributing nations, and international organizations never substitute or undermine an Afghan-led, national detainee monitoring mechanism, which has both the comprehensiveness of mandate and enduring institutional presence critical to long-term, sustainable improvements in detainee treatment and conditions.

Despite signs of genuine effort, there are also serious concerns as to whether ISAF's inspections regime has been able to adequately and accurately assess the risk of torture in 13 of the 16 facilities within such a short period of time. Experience from elsewhere in the world suggests that eliminating torture can be a slow process, not least because it often rests on changing assumptions within institutions and among officials that abusive methods are effective and necessary. It would be surprising if such attitudes within the NDS had been changed in a matter of months. Going forward, operational constraints, particularly those stemming from reduced troop numbers, must not lead to a lowering of the bar when it comes to meeting states' legal obligations or rigorously assessing the risk of torture detainees will face in Afghan detention facilities.

ISAF's six-phase response plan is a significant, positive effort to address detainee abuse; however, ISAF and TCNs must learn from past mistakes and ensure that whatever remedial actions are taken or monitoring conducted, nations must meet their legal obligations to never subject a detainee to a real risk of torture. Efforts should also be made to ensure the AIHRC, as the national detention monitoring mechanism with a mandate to monitor all detainees, is afforded full, unfettered access to detention facilities.

ISAF Troop Contributing Nations Transferring Detainees to Afghan Custody

United States

Number of transfers: Several thousand

Facilities transferring to: Many, nationally

Monitoring program: None

Though U.S. officials are either unwilling or unable to provide exact figures on detainee transfers, it is clear that the United States currently transfers far more detainees to the Afghan government than any other ISAF nation.¹⁰¹ The United States is also the only ISAF nation with a long-term detention facility, the Detention Facility in Parwan (DFIP).¹⁰²

According to a cable from the U.S. Embassy in Kabul, leaked by Wikileaks, in 2009 (1388) U.S. forces under ISAF detained 643 individuals and transferred 370 to Afghan custody.¹⁰³ Trends from night raids or “kill/capture” operations indicate that the number of individuals detained by the United States has increased sharply since then. ISAF and USFOR-A special operations forces together detained over 8,000 individuals between April 2010 and April 2011 (Hamal 1389-1390), a large proportion of which were likely detained by U.S. special operations forces, and marking a substantial increase in the number of detentions.¹⁰⁴ With the population of the United States’ only long-term detention facility, DFIP, currently at around 3,000, these and other figures indicate that the vast majority of those detained by U.S. forces are clearly being either released or handed over to Afghan authorities.¹⁰⁵

¹⁰¹U.S. Department of State, Cable, “Proposed Afghanistan Detainee Monitoring Strategy, U.S. Embassy Kabul, Afghanistan, February 24, 2010 (5 Hoot 1388), <http://www.cablegatesearch.net/cable.php?id=10KABUL688> [hereinafter “U.S. Department of State, ‘Proposed Afghanistan Detainee Monitoring Strategy’”]. In recent years, as the number of U.S. troops has surged and night raids have become an increasingly utilized tactic, the number of individuals detained and transferred to Afghan custody has significantly increased.

¹⁰² There have been significant improvements in treatment of detainees in U.S. custody over the past 10 years. While there are still denials of basic rights in terms of due process flaws, there have been very few allegations received regarding mistreatment at DFIP, particularly in recent years. This contrasts with serious reports of abuse and deaths in custody occurring in U.S. detention facilities in earlier days of U.S. detentions in Afghanistan, particularly at the Bagram Theater Internment Facility (BTIF) pre 2006. See Tim Golden, “In U.S. Report, Brutal Details of Two Afghan Inmates’ Deaths,” *The New York Times*, May 20, 2005 (30 Saur 1384), <http://www.nytimes.com/2005/05/20/international/asia/20abuse.html?pagewanted=all>; Hilary Andersson, “Afghans ‘Abused at Secret Prison’ at Bagram Airbase,” BBC News, April 15, 2010 (24 Hamal 1389). The AIHRC and the Open Society Foundations have welcomed the opportunity to conduct visits to DFIP and DRBs when the U.S. government has granted access and Open Society have engaged productively with U.S. officials on a range of detention issues. See Open Society Foundations, “New Detention Rules Show Promise and Problems,” April 20, 2010 (31 Hamal 1389), <http://blog.soros.org/2010/04/new-detention-rules-show-promise-and-problems/>; Open Society Foundations, *Confinement Conditions at a U.S. Screening Facility on Bagram Air Base*, *supra* note 4.

¹⁰³*Id.*

¹⁰⁴Katherine Tiedemann, “‘Kill Capture’: A live chat with PBS’ Frontline,” The Afpak Channel, May 10, 2011 (20 Saur 1390),

www.afpak.foreignpolicy.com/posts/2011/05/10/kill_capture_a_live_chat_with_pbs_frontline.

¹⁰⁵Interview with official from U.S. Combined Joint Inter-Agency Task Force 435, January 11, 2012 (21 Jadi 1390). There is also very little turnover in DFIP, which could have accounted for the low number of individuals at DFIP relative to the total number of individuals detained by U.S. forces. Between January 2010 (Jadi 1388) and January 2012 (Jadi 1390) approximately 79 percent of detainees transferred to DFIP remain in the facility, while only 21 percent have been transferred to JCIP or released. Interview with U.S. officials at DFIP, January 11, 2011 (21 Jadi 1389). Between January-October 2011 (Jadi 1389-Aqrab

However, the United States remains without a detainee monitoring program to ensure those individuals it transfers to Afghan custody are free from a real risk of torture. Going forward, while U.S. forces under ISAF will be covered by the proposed ISAF detainee monitoring program, transfers from non-ISAF U.S. forces will remain outside the scope of ISAF monitoring—a significant gap that is a serious cause for concern. (See section VI for additional information on U.S. detainee transfers and proposed monitoring program).

United Kingdom

Number of transfers: 20 per month, on average¹⁰⁶

Facilities transferring to: NDS LashkarGah, Helmand

Monitoring Program: Military-civilian Detention Oversight Team (DOT) monitors every transferee

The United Kingdom currently transfers on average 20 detainees per month, according to one U.K. official.¹⁰⁷ Transfers are ongoing, but following a U.K. High Court decision in June 2010 and subsequent policy decisions taken by the U.K. government, U.K. forces are now transferring only to NDS LashkarGah, in Helmand, where most of their forces operate, and to the Afghan Counter-Narcotics Police in Helmand.¹⁰⁸

The United Kingdom has had detainee monitoring program since 2006, implemented by a Detainee Oversight Team (DOT), comprising of a Royal Military Police officer and a military lawyer. All post-transfer U.K. captured detainees are visited regularly and interviews are conducted in private, although monitoring visits are not unannounced.¹⁰⁹ Detainees are interviewed within 30 days of their transfer to Afghan custody, and then every 30 days thereafter until first conviction; if allegations of abuse are received, follow-up visits are conducted every 15 days. Though the DOT says that it tries to conduct private interviews with detainees, this has not always been permitted by Afghan authorities.¹¹⁰

1390), the Detainee Review Board (DRB) completed 3,224 cases, including 506 in September (Sunbola 1390), and will reach an estimated 4,600 review boards by the end of the calendar year, with over 550 cases anticipated in October 2011 (Mizan 1390). See U.S. Department of Defense, *Report on Progress towards Stability and Security in Afghanistan*, *supra* note 4, October 2011 (Mizan 1390), p.

86, http://www.defense.gov/pubs/pdfs/October_2011_Section_1230_Report.pdf.

¹⁰⁶ Interview with UK Government official, Kabul city, Kabul Province, Afghanistan, October 9, 2011 (17 Mizan 1390).

¹⁰⁷ *Id.*

¹⁰⁸ BBC News, “Maya Evans: Peace Activist Wins Legal Aid Court Battle,” May 12, 2011 (22 Saur 1390), <http://www.bbc.co.uk/news/uk-13371880>.

¹⁰⁹ *Queen in re: Maya Evans v. Sec’y of State for Defence*, [2010] EWHC 1445 (Q.B.) (U.K.). See also Memorandum of Understanding between the United Kingdom of Great Britain and Northern Ireland and the Government of the Islamic Republic of Afghanistan, *supra* note 102. Concerning Transfer by the United Kingdom Armed Forces to Afghan Authorities of Persons Detained in Afghanistan, April 23, 2006 (3 Saur 1385), <http://www.publications.parliament.uk/pa/cm200607/cmselect/cmfaff/44/4412.htm#n78>.

¹¹⁰ Interview with international official, Kabul city, Kabul Province, Afghanistan, December 11, 2011 (20 Qaws 1390).

Australia

Number of transfers: 154 between August 1, 2010 (10 Asad 1389) and 2 December 2011 (11 Qaws 1390)¹¹¹

Facilities transferring to: DFIP, NDS TarinKowt, Uruzgan.

Monitoring program: Monitor every detainee in Afghan custody and have access to detainees at DFIP

Between August 1, 2010 (10 Asad 1389), and December 2, 2011 (11 Qaws 1390), Australian forces, which operate in Uruzgan province, transferred 53 detainees to Afghan custody at NDS TarinKowt and 34 detainees to US custody at the DFIP.¹¹² After initial screening, Australian forces transfer detainees deemed to be higher-level security risk are transferred to U.S. custody at DFIP, while those deemed as less serious security threats are transferred to NDS TarinKowt, the capital of Uruzgan.¹¹³ As NDS has no holding facilities in TarinKowt, detainees are physically held at the Attorney-General's office, which is located across the street from the NDS.

Australia currently monitors all of the detainees it transfers into Afghan or US custody to assess their ongoing treatment and welfare. Monitoring is conducted via initial visits shortly after their transfer and then on a monthly basis thereafter until the detainee is sentenced by an Afghan court or released from custody.¹¹⁴

As part of its monitoring responsibilities for detainees, Australia also inspects the facilities and the conditions where Australian Defence Forces (ADF)-apprehended detainees are held, but does not usually inspect facilities where detainees are not transferred by Australian elements. Monitoring visits in Uruzgan are unannounced, while visits to DFIP are organized in advance due to logistical and access reasons. Visits in TarinKowt at all facilities (NDS/Attorney-General's Office and the TarinKowt central prison) are conducted in private, while visits to DFIP are recorded in accordance with US requirements.

Allegations of detainee mistreatment are, with the detainee's consent, raised with the detaining authority and, if possible, investigated. Allegations are also reported through the Australian Ambassador, Australian Chain of Command, and to ISAF and relevant human rights organizations. In the event that the Australian Government becomes aware of a credible allegation or reasonable suspicion of detainee mistreatment within a particular detention facility, the Australian government may consider suspending transfers of detainees to that facility pending investigation. Australia halted detainee

¹¹¹Information provided by Australian government official, March 17, 2012 (27 Hoot 1390).

¹¹²*Ibid.*

¹¹³Interview with Australian government official, Kabul city, Kabul Province, Afghanistan, October 14, 2011 (22 Mizan 1390).

¹¹⁴Information provided by Australian government official, March 17, 2012 (27 Hoot 1390).

transfers to NDS TarinKowt for three months from July 2011 in line with ISAF direction.¹¹⁵

Canada

Number of transfers: None, last in July 2011 (Saratani 1390)

Facilities transferring to: DFIP

Monitoring program: Monitor all detainees still in Afghan custody and have access to detainees in DFIP

Canada officially ended combat operations in July 2011 (Saratani 1390), and now maintains only a training mission. In December 2011 (Qaws 1390), Canada signed an agreement with the United States to transfer all individuals captured by its forces to U.S. custody at DFIP, though the likelihood of Canada detaining further individuals without combat troops present is low.

Canada first signed an MoU in 2005 with the Afghan government, but included no provision for monitoring or oversight (unlike the Dutch and British MoUs of the time).¹¹⁶ In 2006, Canadian government officials reported internally that torture was taking place in facilities in Kandahar. In 2009, the former chargé d'affaires in the Canadian Embassy in Kabul, Richard Colvin, told the Canadian House of Commons that, "according to our information, the likelihood is that all the Afghans we handed over were tortured. For interrogators in Kandahar, it was standard operating procedure." Under political and public pressure in 2007, Canada signed a new MoU to begin detainee monitoring.¹¹⁷

Since 2007, civilian Canadian government officials have conducted post-transfer monitoring visits to assess the conditions of detention and treatment of Canadian-transferred detainees held in Afghan facilities, through regular visits to a limited number of designated detention facilities in Kabul and Kandahar. At least one case of torture was still discovered after the monitoring system was put in place, which, according to Colvin, was due to weaknesses in the monitoring regime, including insufficient human resources.¹¹⁸

¹¹⁵ *Ibid.*

¹¹⁶ Testimony of Richard Colvin, formerly acting ambassador at the Canadian Embassy in Kabul, addressing the Canadian House of Commons, November 18, 2009 (27 Aqrab 1388), <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=4236267&Language=E&Mode=1&Parl=40&Ses=2>, [hereinafter "Testimony of Richard Colvin"].

¹¹⁷ See Testimony of Richard Colvin, *Id.* See also First Secretary, Embassy of Canada to the United States, Special Committee on the Canadian Mission in Afghanistan, November 18, 2009 (27 Aqrab 1388), <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=4236267&Language=E&Mode=1&Parl=40&Ses=2>; Testimony of Andrea Prasow, Senior Counter-Terrorism Counsel, Human Rights Watch, May 5, 2010 (15 Saur 1389), http://www.hrw.org/sites/default/files/related_material/Prasow%20Canada%20Testimony%20May%205%202010.pdf; *Amnesty International and BCCLA v. Chief of the Defence Staff*, 2008 F.C. 162 (Can.), http://www.haguejusticeportal.net/Docs/NLP/Canada/A.I.Canada_and_BCCLA_v_Canadian_Defence_Decision_07-02-2008.pdf.

¹¹⁸ Testimony of Richard Colvin, *supra* note 121.

While Canada no longer has combat forces in Afghanistan, it continues to monitor every detainee that it has previously transferred to Afghan custody, all of whom are now held in the MOI-run Sarpoza prison in Kandahar.

Denmark

Number of transfers: Seven in total¹¹⁹

Facilities transferring to: NDS LashkarGah, Helmand

Monitoring program: Monitor all detainees

All detainees captured by Danish forces are transferred to NDS LashkarGah—only seven have been transferred since 2005, five of whom have since been released while two detainees remain in Afghan custody.¹²⁰

Danish representatives monitor all detainees from point of transfer to Afghan custody, until release, with regular, unannounced visits and private interviews with the detainees. Visits are conducted by a medical officer and a lawyer.

Meeting International Legal Obligations and Effective Detainee Monitoring

Under the general international law principle of non-refoulement, which has a basis in international human rights, refugee, and humanitarian law, states are prohibited from transferring persons under their effective control to the custody of another state if there are substantial grounds to believe the individual would face a real risk of torture or cruel, inhuman or degrading treatment or punishment.¹²¹ Monitoring programs by ISAF and

¹¹⁹Interview with Danish government official, Kabul city, Kabul province, October 17, 2011 (25 Mizan 1390).

¹²⁰Interview with Danish government official, Kabul city, Kabul province, October 17, 2011 (25 Mizan 1390). Written email responses of Danish government to Open Society Foundations questions on detention policies and practices, November 28, 2011 (7 Qaws 1390), and December 20, 2011 (29 Qaws 1390). See also Danish Ministry of Foreign Affairs, “Denmark in Afghanistan: Detainees,” <http://www.afghanistan.um.dk/en/menu/DenmarkinAfghanistan/DenmarksIntegratedApproach/Detai nes/>; Memorandum of the Understanding between the Ministry of Defense of the Islamic Republic of Afghanistan and the Ministry of Defense of the Kingdom of Denmark concerning the transfer of persons between the Danish Contingent of the International Security Assistance Force and Afghan Authorities, June 8, 2005 (18 Jaws 1384), <http://www.afghanistan.um.dk/NR/rdonlyres/97DB19DB-2A1D-4C6E-92A1-742671501049/0/DKAFGoverdragelsesaftale.pdf>.

¹²¹The principle of non-refoulement is a general principle of international law with a basis in international human rights law, refugee law, and international humanitarian law. Sir Elihu Lauterpacht and Daniel Bethlehem, “The Scope and Content of the Principle of Non-refoulement: Opinion,” in Erika Feller, Volker Turk and Frances Nicholson (eds.), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection*, Cambridge, UK: Cambridge University Press (2003), www.unhcr.org/publ/PUBL/419c75ce4.pdf. See also Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture or CAT), adopted December 10, 1984 (19 Qaws 1363), G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987 (5 Saratan 1366), art. 3, <http://www2.ohchr.org/english/law/cat.htm>; Nigel Rodley, *Treatment of Prisoners under International Law*, Oxford: Oxford University Press (2009), p. 172; Cordula Drogue, “Transfer of Detainees: Legal

troop contributing nations are welcome steps and can greatly enhance detainee protection. However, monitoring alone is not sufficient to meet states' legal obligations, and experience has shown that the effectiveness of monitoring depends greatly on the circumstances and varies widely.

Because fulfilling the legal obligation of non-refoulement requires ensuring that every detainee transferred to another state's custody is free from a real risk of torture, post-transfer monitoring alone is insufficient.¹²² In order to avoid transferring detainees into circumstances in which they are subject to a real risk of torture, states must assess the risk at a particular facility prior to transfer—post-facto determinations are insufficient. Authoritative legal interpretations and jurisprudence indicate that states should also afford detainees certain procedural guarantees, such as informing the detainee of the decision to transfer and providing them an opportunity to express concerns that transfer would expose them to a real risk of torture or ill-treatment.¹²³ Guidance from legal authorities and practitioners indicates that properly assessing the risk of torture requires states to implement measures that would “take into account all relevant considerations,” such as facility-wide inspections, interviews with non-transferred detainees, and the removal of officials responsible for past abuse.¹²⁴

States that do implement monitoring programs must also genuinely assess the effectiveness of such programs in policy terms, mindful of the dynamic and challenging circumstances in Afghanistan, as well as those practices that are critical to effective monitoring. Visits should be unannounced and states must have full access to detainees and facilities. Interviews with detainees should be conducted in private and in

Framework, Non-Refoulement, and Contemporary Challenges,” *International Review of the Red Cross*, Vol. 90 No. 871, September 2008 (Mizan 1387); Emanuela-Chiara Gillar, “There’s No Place Like Home: States’ Obligations in Relation to Transfers of Persons,” *International Review of the Red Cross*, Vol. 90, No. 871, September 2008 (Sunbola 1387), <http://www.icrc.org/eng/assets/files/other/irrc-871-gillard.pdf> [hereinafter “Gillar, ‘There’s No Place Like Home’”]. See also Center for Human Rights and Global Justice, New York University Law School, *Minimum Standards for Transfer: International Law Concerning Rendition in the Context of Counter-Terrorism*, June 2009 (Jawza 1388), <http://www.chrgj.org/projects/docs/legaladvisory.pdf>.

¹²²The precise definition of non-refoulement, and specific obligations for international forces operating in Afghanistan and transferring detainees are beyond the scope of this report; instead, attention is drawn to the issue of whether monitoring programs, in practice and in the particular context of Afghanistan, are sufficient to meet states’ obligations under international law. See UN Committee Against Torture (CAT), General Comment No. 1: Implementation of Article 3 of the Convention in the Context of Article 22 (Refoulement and Communications), November 21, 1997 (30 Agrab 1376), A/53/44, annex IX, <http://www.unhcr.org/refworld/docid/453882365.html>. See also

Emanuela-Chiara Gillar, “There’s No Place Like Home,” *supra* note 98.

¹²³ *Id.*

¹²⁴ *Id.* See also Committee against Torture, General Comment No. 1, Implementation of article 3 of the Convention in the context of article 22, November 21, 1997 (30 Agrab 1376), UN Doc. A/53/44, Annex IX, para. 5-8.

confidence.¹²⁵ Ideally post-release interviews should also be carried out, when fears of reprisals will be somewhat reduced. Monitors should also assess whether detainees' due process rights are violated, including access to counsel and family members—rights that are critical to protecting detainees from abuse. Monitoring teams should be adequately resourced, and include civilian professionals with expertise and experience in detainee monitoring and interviewing victims of abuse and torture.¹²⁶

In addition, effective and sustainable monitoring systems must be sure to complement and work with national, civilian organizations, like the AIHRC—the national and constitutionally-mandated institution with a long-term commitment to monitoring. Crucially, the AIHRC is an organization committed to monitoring the treatment of all detainees, rather than focusing on those transferred by international forces. States seeking to meet their legal obligations should engage cooperatively with the AIHRC, and ensure its monitors also have full, unfettered access to all detainees and detention facilities.

Joint Operations and Intelligence Sharing

ISAF nations also have legal obligations with respect to detainee treatment arising from their cooperation with Afghan security and intelligence forces. Many ISAF nations conduct combined, or joint operations with Afghan forces, in the course of which individuals may be detained. Following these operations, detainees are often taken into Afghan custody, where they could be at risk of ill-treatment or torture. Some ISAF TCNs, including Germany, have failed to reach agreements with the Afghan government regarding transfers, and have instead adopted a policy of taking part in joint operations with ANSF without “arresting” individuals.¹²⁷

The participation of Afghan forces in joint operations is in most cases unlikely to absolve international forces of their legal obligations to those individuals captured in such operations. International forces play a critical role in joint operations, from logistical and intelligence assistance to force protection; they are often effectively in the lead during such operations as well as physically present and protecting ANSF soldiers while they take individuals into custody. Consequently, international forces must examine their forces' specific involvement in joint operations to determine whether they have any legal obligations to those captured—a determination that cannot be reduced to the mere presence of Afghan forces during an operation or the fact that it is Afghan forces that physically take individuals into custody. Instead, the degree and nature of international forces' involvement in joint operations must be genuinely assessed to determine whether

¹²⁵ See Report of the Special Rapporteur of the Commission on Human Rights on the question of torture and other cruel, inhuman or degrading treatment or punishment, September 1, 2004 (11 Sunbola 1383), UN Doc. A/59/324, para. 41-42.

¹²⁶ For fuller examination of the minimum requirements for effective detainee monitoring and basis in international law and guidance, see Human Rights Institute, *U.S. Monitoring of Detainee Transfers in Afghanistan*, *supra* note 103.

¹²⁷ Interview with foreign officials December 2011 (Qaws 1390), Kabul. See also John Goetz, Marcel Rosenbach, and Alexander Szandar, “Germany Handed Prisoners over to a Government that Tortures,” *Der Spiegel*, November 11, 2008 (21 Agrab 1387), <http://www.spiegel.de/international/world/0,1518,534511,00.html>.

those detained in the course of operations come within international forces' *effective control*, thereby triggering legal obligations under the principle of non-refoulement.¹²⁸

In a welcome move, ISAF officials have stated that, as a matter of policy, ISAF protective measures (as opposed to the policy of individual troop contributing nations) will be triggered not just when individuals come under the effective control of ISAF forces, but whenever an individual is captured in combined ISAF/ANSF operations.¹²⁹ However, effective control remains the prevailing legal standard applied by each ISAF nation's forces. In interviews for this report, officials from some nations indicated that obligations to those captured in joint operations are taken into account, but no nation would specify how it defines effective control and under what circumstances their forces' participation in joint operations would trigger obligations under non-refoulement.

Intelligence sharing is a further concern. Given the widespread use of coercive and abusive interrogation methods by Afghan intelligence officials, there is a significant risk that intelligence gathered by Afghan authorities is gathered through torture. International allies should avoid sharing Afghan intelligence unless they can ensure that in doing so they are in no way complicit with torture or ill-treatment by Afghan authorities, an obligation which arises regardless of whether detainees were transferred from international forces' custody.¹³⁰ However, in interviews with various foreign government officials, no ISAF nation indicated that it had implemented measures to ensure that intelligence gathered by Afghan authorities and then shared and utilized by their forces was not obtained through the use of torture.¹³¹

An ongoing concern is continued cooperation by non-ISAF special operations forces and CIA personnel, who are believed to maintain a relationship with NDS officials, in particular from Department 90/124, which involves visits by some personnel to the department.¹³² Although U.S. officials themselves have not been directly implicated in torture, close cooperation between U.S. and Afghan intelligence officials, particularly at

¹²⁸ U.N. Human Rights Committee, General Comment No. 31 [80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add. 13, May 26, 2004 (4 Jawza 1383), para.12, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G04/419/56/PDF/G0441956.pdf?OpenElement>. See also U.S. Executive Order 13491, "Ensuring Lawful Interrogations," January 22, 2009 (3 Dalwa 1387), http://www.whitehouse.gov/the_press_office/EnsuringLawfulInterrogations/.

¹²⁹ Interview with ISAF officials, Kabul city, Kabul province, Afghanistan, December 2011 (Qaws 1390).

¹³⁰ State parties to the Convention Against Torture (CAT) are obligated "to prevent public authorities and other persons acting in an official capacity from directly committing, instigating, inciting, encouraging, acquiescing in or otherwise participating or being complicit in acts of torture as defined in the Convention," General Comment 2 by the Committee Against Torture on Implementation by State Parties. <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/402/62/PDF/G0840262.pdf?OpenElement>.

¹³¹ Interviews conducted with government officials from the United States, Germany, Denmark, United Kingdom, Canada, and Australia.

¹³² Interviews with international officials, December 2011 (Qaws 1390). See also: Joshua Paltrow and Julie Tate, "U.S. Officials Had Advance Warning of Abuse at Afghan Prisons Officials Say," *The Washington Post*, October 30, 2011 (8 Aqrab 1390), http://www.washingtonpost.com/world/asia_pacific/us-had-advance-warning-of-abuse-at-afghan-prisons-officials-say/2011/10/21/gIQA7Dg2VM_story.html.

NDS Department 90/124, would raise serious concerns that U.S. officials could be complicit in torture and ill-treatment perpetrated by Afghan intelligence officials.

VI. Torture and Mistreatment of U.S. Detainees Transferred to NDS

Researchers documented a number of credible cases in which individuals were detained by U.S. forces and then transferred to Afghan custody, where they were reportedly subjected to torture, including beatings, suspension, and electric shock.

10 cases of individuals detained by U.S. forces transferred to NDS facilities where they reported being tortured between May 2010 and January 2012 (Saur 1389-Jadi 1390).¹³³ In four of these cases individuals reported being held for some period of time at a detention facility located at or near Bagram Air Base, and in four cases individuals were transferred to NDS Kandahar despite such transfers being suspended by all ISAF as well as USFOR-A forces. These cases are strong evidence that U.S. detainee transfers have in fact been tortured by NDS officials. They raise serious concerns regarding U.S. policies on transfers to NDS, particularly transfers by U.S. special operations forces, and whether appropriate safeguards exist to protect detainees' rights and ensure that the United States is not complicit in torture.

U.S. Detainees Transferred to Afghan Custody from "Bagram" and other U.S. Detention Facilities

In four cases, individuals interviewed by researchers for this report said that they were arrested by U.S. forces between May 2010 (Saur 1389) and May 2011 (Saur 1390) and held at "Bagram." All four individuals said that they were then held by the NDS in incommunicado detention, without charge, and subjected to various forms of torture.

There is some uncertainty regarding precisely which facility detainees were at when they describe being held at "Bagram," as this could mean either the long-term U.S. detention facility, DFIP, or the Joint Special Operations Command-run (JSOC) screening or "transit" detention facility at Bagram Air Base, known as "Black Jail" or "Tor Jail." U.S. officials have stated to the AIHRC and the Open Society Foundations that detainees at DFIP are not transferred directly into NDS facilities, indicating that it is more likely detainees were held at the transit detention facility at Bagram Air Base.¹³⁴ Instead, according to the officials, detainees are either released through shuras or are transferred

¹³³ Although detainees described the international soldiers who detained them as Americans, this description may at times be used more generically to describe any soldiers belonging to international forces. However, several factors substantiate the detainees' claims that the forces involved were Americans, including the fact that English was spoken by the forces involved, that detainees report being held at "Bagram" in conditions consistent with the JSOC-run temporary detention facility near Bagram, and that they were detained in areas of responsibility assigned to U.S. forces.

¹³⁴ Interview with U.S. officials, January 11, 2012 (21 JADI 1390).

to the Afghan-controlled block at DFIP for prosecution.¹³⁵ None of the detainees reported being through a Detainee Review Board (DRB) hearing or a release shura. U.S. officials would not comment on whether detainees who are held at JSOC facilities, including the temporary detention facility at Bagram, are subsequently transferred into NDS custody.¹³⁶

Detainees' descriptions of the conditions in which they were held, specifically small, windowless single person cells, excessive light, insufficient water for ablutions before prayer, and noises that interfered with sleep, are consistent with conditions of confinement at the JSOC-run temporary detention or screening facility at or near Bagram Air Field documented in previous Open Society reporting.¹³⁷ This facility is located near to both the DFIP and its predecessor, the Bagram Theater Internment Facility (BTIF), likely producing some confusion. Since detainees are not informed of where they are being held, identifying the location of their detention must be based on their recollections of confinement conditions, physical descriptions, treatment, interrogations, and other details that could help substantiate the exact detention location. Based on this information and information compiled by Open Society on the JSOC temporary detention facility at Bagram, it is likely that all of the four detainees in question spent some time at this facility.¹³⁸ Whether the detainees may also have been held at DFIP is less likely.

Of the four detainees transferred from U.S. custody at DFIP or the temporary detention facility at Bagram to NDS, two were transferred to NDS Wardak, one to NDS Laghman, and one to NDS Kabul Department 90/124, where they report being subjected to torture, including beating, suspension, and electric shock.¹³⁹ One of the detainees transferred to NDS Wardak was also subsequently transferred to Kabul Department 90/124, where he alleges he was again subjected to torture. Detainees reported being held by the United States at DFIP/Tor Jail anywhere from 20 days to six months.

In two additional cases, interviewees said that they were held by U.S. forces at temporary detention facilities in the provinces of their capture, and then transferred directly to NDS custody, where they were subsequently tortured.

Two detainees told the researchers for this report that they were transferred directly from U.S. detention facilities to NDS; one detainee reported being transferred from Jalalabad airfield to NDS Nangarhar, and then to NDS Kabul Department 90/124, where he says he

¹³⁵ A "shura" is a consultation, or meeting; in this case it is a meeting hosted by local leaders to facilitate the release of detainees held at DFIP.

¹³⁶ Various interviews with U.S. officials, Kabul city, Kabul province, Afghanistan, November and December 2011 (Aqrab-Jadi 1390).

¹³⁷ Detainees 10, 49, 57, 98, 99, and 100. See Open Society Foundations, "Confinement Conditions at a U.S. Screening Facility," *supra* note 4. There are also cells for solitary confinement at DFIP, however, according to U.S. officials, individuals are only placed into such cells for disciplinary reasons, if they are a threat to themselves, or for medical reasons. There is no indication that any of these conditions applied in the cases of detainees interviewed by the AIHRC and Open Society. Interview with U.S. officials on visit to DFIP, January 11, 2012 (21 Jadi 1390).

¹³⁸ *Id.*

¹³⁹ Interviews with Detainee 98, Detainee 99, Detainee 100, and Detainee 10.

was subjected to torture, including beating and suspension. The other detainee was transferred from a U.S. detention site in Laghman to NDS Laghman, where he reported being tortured by beating and electric shock.¹⁴⁰

No detainees reported any physical abuse by U.S. forces while in detention in U.S. detention facilities and several noted that they were well-treated, particularly in comparison to their treatment while in Afghan custody.

In none of the cases did detainees report being informed of the basis for their arrest and detention by U.S. forces, nor were they provided with specific reasons for their release or transfer by U.S. forces.

According to one detainee who was held at either DFIP or the temporary detention facility at Bagram Air Base for approximately two and a half months, “One day the Americans came and said they were going to release me, they said that they had made a mistake. I thought that they would release me from there, but instead they gave me to the NDS. I was so happy at first, I thought I would be free, but I didn’t realize this was just the beginning.”¹⁴¹ Another detainee held at “Bagram” stated that U.S. forces suggested to him that he was cleared of wrongdoing and would be set free. “The interpreter came in and said we have good news for you, the investigation is over and you will be released. I asked if this was a joke, and he said, no, the U.S. does not joke about these things.” But instead of being released, he was handed over to NDS Wardak in MaidanShar. “They restarted the interrogations. I said, ‘look, I’ve already been investigated by the U.S., I’m not the one you’re looking for.’”¹⁴² Over the course of the next week, he was repeatedly suspended upside-down from the ceiling and beaten with electric cables, wooden sticks, and metal rods.

Transferred Detainees Subjected to Torture

In all six of the above cases, where individuals were transferred from U.S. custody directly to the NDS, the interviewees said that both Afghans and Americans were present on the raids, and that they were held at U.S. detention facilities where they were interrogated for a short period of time. The first of these arrests was in May 2010 (approximately Saur 1389), and the most recent arrest was in May 2011 (Saur 1390). All six detainees transferred from U.S. to NDS custody reported forms of mistreatment and abuse consistent with accounts provided by other detainees in NDS custody, including suspension, beatings, electric shocks, and denial of medical care. All six cases occurred within the last year and a half.

Two detainees described being suspended while in custody at NDS Wardak.¹⁴³ In both cases, the detainees’ feet were bound and tied to a rope, which was threaded through a pulley on the ceiling. Some detainees who were hung upside-down by their feet from the

¹⁴⁰Interview with Detainee 101.

¹⁴¹Interview with Detainee 99.

¹⁴²Interview with Detainee 98.

¹⁴³Interviews with Detainee 98 and Detainee 99.

ceiling were also beaten. Another detainee reported being suspended in NDS Kabul Department 90/124. He was hung upside-down by chains attached to cuffs around his ankles and beaten with plastic PVC pipes.¹⁴⁴

All six detainees reported being beaten multiple times, over periods ranging from one week to many months. The beatings were administered through a variety of methods, including kicking, slapping, punching, and beating with tools such as rubber hoses, electric cables, wooden sticks, and metal rods. Detainees reported being beaten on multiple areas of their body, including the legs, backside, head, and the soles of their feet. Detainees were beaten in a variety of positions, including while standing, sitting and bound in chairs, suspended from the ceiling, and lying face down on the floor or on a bed. Two of the six detainees described their hands being bound, and NDS officials holding their feet out in front of them—in one case binding them to a stick—and being beaten on the soles of their feet.¹⁴⁵

“They beat me twice a day, once in the morning, once in the evening. They beat me on my arms, my legs, and backside. They used sticks, electric cables, and metal rods. After that you could see the marks, the welts; you could even tell differences between the marks—that this one is from the stick, this one from cable, this one from the metal.”¹⁴⁶

Two detainees reported being subjected to electric shocks. “They used to bind my hands and tie me to a chair and put clips on two of my toes. Then they would have this machine for electricity, they would crank it up and give us shocks. It was very hard and we would be screaming in pain.”¹⁴⁷ Describing the pain of the electric shocks, another detainee said, “It felt like I was half-dead. All my body was trembling and shaking, and my heart was beating very quickly, but I wasn’t able to move or speak.”

Upon being transferred to the NDS, none of the six detainees were ever charged or brought before a judge. After having little to no contact with family while in U.S. custody, transfer to the NDS meant many more months of incommunicado detention—a clear violation of detainees’ fundamental due process rights that also substantially increases the risk of torture. The detainees’ families lacked any knowledge of their condition or whereabouts. In two cases, even when family members managed to locate detainees, they reported having to pay bribes to NDS officials to secure their release.

One detainee stated that he was in U.S. custody at “Bagram” for approximately six months before being transferred to NDS Kabul, where he remained for an additional three months. It was not until he was released from NDS, dropped off on a main road outside the detention facility, and handed 1,000 Afghanis (approximately U.S.\$20), that he could call his family to inform them where he was, after a total of approximately nine months in detention. “My family had no news, no information at all, they didn’t know where I

¹⁴⁴Interview with Detainee 100.

¹⁴⁵Interview with Detainee 100 and Detainee 101.

¹⁴⁶Interview with Detainee 98.

¹⁴⁷Interview with Detainee 99.

was, if I was at Bagram, NDS, or Kabul, or wherever. When I got out I didn't even know where I was. It was somewhere in Kabul, but I don't know the city very well. It was hard to walk. I was dizzy and confused. Some people found me and after I told them what happened they took me to a restaurant, gave me some tea and food and I called my brother and I told him to come and find me. He started crying.”¹⁴⁸

These cases highlight a potential practice in which some U.S. forces seem to be detaining, interrogating, and screening individuals, and then transferring some of them to Afghan officials and facilities that engage in torture. In four of the cases investigated, detainees were transferred to and subjected to torture at NDS facilities where ISAF has since suspended transfers as a result of reports of abuse, including NDS Laghman and Department 90/124.

U.S. Detainees Transferred to NDS Kandahar despite ISAF/USFOR-A Transfer Suspension

Researchers have documented eleven recent, credible cases in which individuals reported being detained by U.S. forces and subsequently transferred to NDS Kandahar despite a July 2011 (Saratani 1390) order suspending all detainee transfers to NDS Kandahar due to reports of detainee abuse. The most recent transfer reportedly occurred in January 2012 (Jadid 1390).

In July 2011 (Saratani 1390), in response to reports of detainee abuse, COM-ISAF and U.S. Forces-Afghanistan (USFOR-A) issued an order suspending all detainee transfers to NDS Kandahar. According to ISAF and U.S. officials, this order still stands and all U.S. forces under ISAF and USFOR-A commands are prohibited from transferring detainees to NDS Kandahar.¹⁴⁹

However, eleven detainees interviewed for this report described being detained by U.S. forces and transferred to NDS Kandahar since the COM-ISAF and USFOR-A orders. Detainees stated that they were detained by “Americans” or “U.S. forces,” or “U.S. special forces,” or sometimes “foreign forces,” and held for 1-2 days before being transferred to NDS Kandahar. Five detainees stated specifically that they were held at “Mullah Omar’s House.”

Firebase Maholic, also known by its previous name, Camp Gecko, is often locally referred to as “Mullah Omar’s House,” a reference to the facility’s well-known past as the residence of Taliban leader Mullah Omar. The facility has been used for many years as a base for the C.I.A. and U.S. special operations forces operating in Kandahar.¹⁵⁰ The

¹⁴⁸Interview with Detainee 98.

¹⁴⁹Interview with ISAF official, Kabul city, Kabul province, December 11, 2011 (20 Qaws 1390).

¹⁵⁰Interview with credible source, December 20, 2011 (29 Qaws 1390), confirming that U.S. intelligence personnel and U.S. Special Forces have operated out of this facility for several years, training Afghan forces and cooperating with Afghan forces on night raids and other operations. See also “U.S. Special Forces Using Former Taliban Base,” Fox News, February 1, 2007 (12 Dalwa 1385), <http://www.foxnews.com/story/0,2933,249501,00.html>; Dexter Filkins, Mark Mazzetti, and James Risen,

base is also reportedly home to Afghan forces including the paramilitary unit known as the “Kandahar Strike Force.” According to reports, the Kandahar Strike Force was assembled and trained by U.S. special operations and C.I.A. personnel and continues to work closely with U.S. special operations and intelligence personnel conducting raids and other operations targeting insurgents.¹⁵¹

One detainee interviewed by the AIHRC reported being arrested by U.S. forces, and abused by Afghan forces while in the presence of “Americans” at Firebase Maholic. “I was in Mullah Omar’s House and they blindfolded my eyes and made me sit on a chair for a few hours. After a moment of silence suddenly lashes of cable struck my head and back very hard from behind, they beat me for one hour. They wanted me to tell them who I had relations with. They were all Afghans beating me, though the beating took place in the presence of Americans. Afghan forces beat me with the Americans there.”¹⁵² It should be noted that researchers received no other claims of U.S. forces present during abuse of detainees, and this account could not be independently verified.

Another detainee reported being arrested by “U.S. forces” during a raid on his home and taken to a location that he guessed was “Mullah Omar’s House,” and beaten by Afghan officers there. “They took me blindfolded to somewhere, my guess is that it was Mullah Omar’s house, where I was beaten and tortured badly by Afghan soldiers and officials. They beat me on the feet, legs and back by something like a cable. The beating continued for a few hours until I felt numb in my back and legs, and it burned with pain on my feet and on the soles of my feet. They punched and kicked me also, and the next day I was transferred to the NDS.”¹⁵³ The detainee stated that he had not been mistreated while in NDS custody, and at the time of the interview, there were marks consistent with beatings visible on the detainee’s back and feet. Some detainees report being treated well while in U.S. custody for 1-2 nights, before being transferred to NDS Kandahar.

Four detainees transferred to NDS officials in Kandahar by “U.S. forces” reported being subsequently tortured by NDS. According to one detainee, “I was severely beaten by cable in the head and neck. I was shackled and they connected the shackles to an electrical current and shocked me until I was unconscious. They also beat me on the back and waist very hard. As a result, my left hand is still hurting and even my tongue is

“Brother of Afghan Leader Said to be Paid by C.I.A.,” *The New York Times*, October 27, 2009 (5 Aqrab 1388), <http://www.nytimes.com/2009/10/28/world/asia/28intel.html?pagewanted=all>; Amnesty International, *Getting Away with Murder? The Impunity of International Forces in Afghanistan*, February 2009 (Dalwa 1387), http://www.es.amnesty.org/uploads/media/Kandahar.Getting_away_with_murder_01.pdf, p. 7-10; Julius Cavendish, “After the US Pulls Out, Will CIA Rely More on Afghan Mercenaries?,” *The Christian Science Monitor*, November 16, 2011 (25 Aqrab 1390), [http://www.csmonitor.com/World/Asia-South-Central/2011/1116/After-the-US-pulls-out-will-CIA-rely-more-on-Afghan-mercenaries/\(page\)/2](http://www.csmonitor.com/World/Asia-South-Central/2011/1116/After-the-US-pulls-out-will-CIA-rely-more-on-Afghan-mercenaries/(page)/2).

¹⁵¹ *Id.*

¹⁵² Interview with Detainee 61.

¹⁵³ Interview with Detainee 63.

severely damaged from the electric shock.”¹⁵⁴ Three other transferred detainees also alleged that they were abused in NDS Kandahar, including being subjected to beatings with cables.

In response to queries regarding these cases, U.S. military officials have stated that there are “no ISAF or USFOR-A forces transferring detainees to NDS Kandahar,” and that the order suspending transfers to NDS Kandahar among other facilities in RC-South remain in full effect.¹⁵⁵ Interviews with detainees as well as responses by U.S. officials to queries from the AIHRC and the Open Society Foundations indicate that there may be U.S. forces or personnel, perhaps including C.I.A. or other U.S. intelligence officials, operating outside ISAF and USFOR-A commands in Kandahar that are detaining individuals and transferring them to NDS Kandahar.

These transfers are occurring despite widely held and long-standing concerns about torture and detainee abuse at NDS Kandahar. ISAF and U.S. forces first prohibited transfers to NDS Kandahar in July 2011 (Saratani 1390), and had received reports of abuse from independent monitors for several years prior. The United Kingdom suspended transfers to NDS Kandahar in January 2011 (Jadid 1389). AIHRC monitors received 10 credible allegations of abuse in NDS Kandahar as recently as January 2012 (Jadid 1390), indicating that detainee abuse continues to be a serious problem.

Yet there is compelling evidence that at least some U.S. forces or personnel continue to transfer individuals to NDS Kandahar despite not only a widely acknowledged risk of torture but also evidence that detainees transferred to NDS Kandahar by U.S. forces have been subjected to torture.

It is important that the transfer policies of *all* U.S. forces and agencies are made clear, and that they meet their obligations to refrain from transferring detainees to facilities where they face a real risk of torture. It is unclear whether and under what circumstances U.S. policy permits detainee transfers from JSOC-run and other temporary detention facilities or from U.S. forces and personnel operating outside ISAF and USFOR-A chains of command to the NDS.

Lack of U.S. Detainee Monitoring Program

Despite the high number of detainees transferred by U.S. forces to Afghan custody, the United States has yet to implement a detainee monitoring program to ensure detainees are free from a real risk of torture. While the U.S. has a role in ISAF’s proposed detainee monitoring program, this monitoring element of the ISAF program will not cover detainees transferred by U.S. forces outside ISAF—a significant gap, particularly with respect to U.S. special forces under the Combined Forces Special Operations Component Command-Afghanistan (CFSOCC-A), which carry out a significant number of detention

¹⁵⁴Interview with Detainee 62. There is some ambiguity as to whether this detainee was being held at NDS Kandahar headquarters or another NDS facility in Kandahar city near to NDS Headquarters when he was allegedly abused.

¹⁵⁵Interview with ISAF/U.S. officials, Kabul city, Kabul province, December 11, 2011 (20 Qaws 1390).

operations. The AIHRC is also not informed of U.S. forces' detainee transfers, leaving such detainees largely uncovered by a specific detainee monitoring program.

The United States remains the only ISAF nation with a long-term detention facility, the Detention Facility in Parwan (DFIP). In recent years, the United States has made significant improvements in its detention policies and practices, particularly by ensuring proper confinement conditions at DFIP and ensuring detainees are free from abuse.¹⁵⁶ Due process for detainees has been slightly improved through the adoption of Detainee Review Boards (DRBs), though serious concerns remain, including detainees still not being afforded a meaningful opportunity to challenge the grounds for their arrest and continued detention. Both the AIHRC and Open Society have welcomed the opportunity to conduct visits to DFIP and DRBs, when the U.S. government has granted access, and the AIHRC and Open Society have engaged productively with U.S. officials on a range of detention issues.¹⁵⁷

However, the United States has made disappointingly little progress on ensuring the rights of transferred detainees are protected. Creation of a U.S. monitoring program to ensure transferred detainees are not subjected to torture has proceeded at a disappointing pace. As early as 2009, a U.S. Inter-Agency Task Force on Interrogation and Transfer Policies recommended physically monitoring the status of transferred detainees.¹⁵⁸ In February 2010 (Dalwa 1388), the U.S. State Department proposed adopting a detainee monitoring program, noting not only the significant number of detainees being transferred from U.S. to Afghan custody, but also NGO reports of torture and ill-treatment of detainees in Afghan custody.¹⁵⁹

U.S. government officials informed the AIHRC and Open Society that the United States is currently in negotiations with the Afghan government to create a U.S. Embassy-led

¹⁵⁶ There have been significant improvements in treatment of detainees in U.S. custody over the past 10 years. While there are still denials of basic rights in terms of due process flaws, there have been very few allegations received regarding mistreatment at DFIP, particularly in recent years. This contrasts with serious reports of abuse and deaths in custody occurring in U.S. detention facilities in earlier days of U.S. detentions in Afghanistan, particularly at the Bagram Theater Internment Facility (BTIF) pre-2006. See Tim Golden, "In U.S. Report, Brutal Details of Two Afghan Inmates' Deaths," *The New York Times*, May 20, 2005 (30 Saur 1384), <http://www.nytimes.com/2005/05/20/international/asia/20abuse.html?pagewanted=all>; Hilary Andersson, "Afghans 'Abused at Secret Prison' at Bagram Airbase," BBC News, April 15, 2010 (24 Saur 1389).

¹⁵⁷ Jonathan Horowitz, "New Detention Rules Show Promise and Problems," April 20, 2010 (31 Saur 1389), <http://blog.soros.org/2010/04/new-detention-rules-show-promise-and-problems/>; Open Society Foundations, *Confinement Conditions at a U.S. Screening Facility on Bagram Air Base*, *supra* note 4.

¹⁵⁸ U.S. Department of Justice, "Special Task Force on Interrogations and Transfers Policies Issues Its Recommendations to the President," August 24, 2009 (2 Sunbola 1388), <http://www.justice.gov/opa/pr/2009/August/09-ag-835.html>.

¹⁵⁹ U.S. State Department, Cable, "Proposed Afghanistan Detainee Monitoring Strategy," *supra* note 108.

monitoring program to monitor transferred detainees.¹⁶⁰ Negotiations are ongoing and progressing, according to officials.¹⁶¹

The United States has also signed agreements with the Afghan government on post-transfer monitoring in the past, yet ultimately failed to follow through on implementation.¹⁶² While an agreement between the U.S. and Afghan governments on a detainee monitoring plan would be welcome, implementation is what matters most.

The United States clearly faces challenges in implementing such a program, many of which are substantially different from those faced by other ISAF nations. The United States detains and transfers far more individuals than any other nation, and transfers to a large number of Afghan facilities, located in many different areas of the country. Many detainees are also subsequently transferred between different Afghan government institutions and facilities. Nevertheless, the United States, like every other ISAF nation, has a strict and absolute legal obligation not to transfer any detainee into circumstances in which he or she will be exposed to a real risk of torture.

That the United States is moving forward with plans for implementing some form of detainee monitoring is a welcome step, as is its involvement in the creation of an ISAF detainee monitoring program. However, concerns remain as to whether a U.S. monitoring program, be it specific to the United States or part of an ISAF program, will be capable of satisfying its legal obligations. The proposed U.S. program will not monitor every detainee transferred into custody, as other nations do. Instead, the proposal envisions conducting interviews with select samples of detainees. There are also concerns of monitoring giving rise to a “two-tier system” in which U.S. transferred detainees are given preferential treatment—the same risk raised by ISAF monitoring or any detainee monitoring program that only assesses the treatment and conditions of transferred detainees. Given the sheer number of detainees and facilities that must be monitored as well as the frequency of visits required, significant resources are needed to properly engage in detainee monitoring, including an appropriate number of experienced monitors as well as the transportation and security resources necessary to conduct regular visits.

Given widespread reports of torture and ill-treatment, as well as the documented failings of other detainee monitoring programs, it remains unclear whether even a robust, well-resourced U.S. monitoring program will be sufficient to ensure that transferred detainees are free from torture. Furthermore, having committed to playing such an integral role in working with the Afghan government to improve rule of law, the United States has a broader obligation to try to ensure that the wider prison population is not subjected to torture. To this end, the United States should also take steps to ensure the AIHRC, which has a national, constitutional mandate to monitor all detainees, is afforded full, unfettered

¹⁶⁰Interview with U.S. State Department Official, Kabul city, Kabul province, December 11, 2011 (20 Qaws 1390).

¹⁶¹*Id.*

¹⁶²*Id.*

access to detention facilities. Any U.S. detainee monitoring program should also engage cooperatively with the AIHRC to ensure all detainees are free from abuse.

The cases of abuse and torture documented in this report underscore the urgent need for such efforts to ensure that the United States meets its legal obligations and never subjects detainees to a real risk of torture.

VII. Due Process Violations

Research shows that NDS officials regularly violate the due process rights of conflict-related detainees, subjecting individuals to prolonged, incommunicado detention without charge and without access to counsel.¹⁶³ The violation of these fundamental due process rights significantly increases the risk of torture. Addressing these due process violations, particularly lack of access to counsel and family members, could greatly reduce the vulnerability of detainee to torture, and should be a priority for the Afghan government and international forces.

The NDS reportedly operates under a number of presidential decrees that are not public and unpublished, despite repeated requests from national and international human rights organizations. In general, the opacity of the legal authority of the NDS frustrates effective oversight and accountability, and increases the likelihood of abuse. Despite the secretive nature of some of the rules governing the NDS, there are fundamental rights that are afforded all detainees under applicable Afghan law, including the constitution, the Afghan Penal Code, and the Interim Criminal Procedure Code (ICPC), as well as under international conventions to which Afghanistan is a state party.¹⁶⁴

Researchers of this report have reviewed an unpublished copy of the National Security Law, which reportedly governs the authority of NDS.¹⁶⁵ Though the National Security Law grants the NDS the power to “organize, arrest, and detain in accordance with the provisions of the Law of Crimes against Internal and External Security,” there is no provision in the law that grants NDS the authority to detain individuals beyond 72 hours, hold individuals incommunicado, deny access to counsel, or violate any other due process rights afforded individuals under the ICPC and the Constitution.

¹⁶³ Interviews with detainees in Kandahar indicate that ANP is also responsible for violating due process rights of conflict-related detainees in that province. Incommunicado detention means that the detainee cannot communicate with anyone other than his or her captors and perhaps his co-detainees, and is permitted no contact with the world outside his place of detention or incarceration. See Nigel Rodley, *Treatment of Prisoners under International Law*, 2nd edition, Oxford: Clarendon Press (ed, 1999), p.334.

¹⁶⁴ See also International Covenant on Civil and Political Rights (ICCPR), to which Afghanistan became a state party in April 1983 (Hamal 1362), <http://www2.ohchr.org/english/law/ccpr.htm>.

¹⁶⁵ National Security Law, issued by an unpublished Presidential decree (Decree no. 89, 13/12/1380), Art. 6. See also UNAMA, *Conflict-Related Detainees in Afghan Custody*, *supra* note 3, p. 41. See also Amnesty International, *Afghanistan: Detainees Transferred to Torture*, *supra* note 102.

Interviews for this report with detainees and defense lawyers, as well as UNAMA's findings, confirm that NDS officials regularly retain custody of detainees beyond the 72-hour time limit established by the ICPC, and prevent individuals from notifying family members, and accessing counsel.¹⁶⁶ Defense lawyers are also consistently prevented from participating in investigations and are sometimes subject to intimidation.

The NDS exercises the power to both investigate and detain, which, in an environment where the rule of law is already weak, increases the risk of abuse. The conduct of investigations is a responsibility that under Afghan law normally belongs to prosecutors. In general, having both detention and investigative authority resting with the same state officials increases the risk that detainees' rights will be violated and that they will be tortured while in custody.¹⁶⁷

Pre-Trial Detention in Violation of Legal Time Limits

Interviews with detainees and defense lawyers, in addition to documentation by other organizations, clearly establish that NDS regularly holds detainees for purposes of interrogation well in excess of the 72-hour time limit established by Afghan law.¹⁶⁸ The vast majority of detainees interviewed were held by NDS beyond 72 hours—many for several weeks or months. Such prolonged periods of pre-trial detention not only are in clear violation of Afghan law but also put detainees at greater risk of torture.¹⁶⁹

Under the Interim Criminal Procedure Code (ICPC), suspects can be held by police for no more than 72 hours before they must be handed over to a prosecutor (also known as the *Saranwal*).¹⁷⁰ Suspects must be informed of the reason for their arrest within 24

¹⁶⁶Interim Criminal Procedure Code, *Official Gazette*, No. 820 (25 February 2004; 6 Hoot 1382) [hereinafter "ICPC"], Art. 31, 34, and 36. Another major issue is the inability of detainees to challenge the lawfulness of their detention before a judge, and unclear legal grounds for pre-indictment and pre-trial detention. UNAMA, *Arbitrary Detention in Afghanistan*, Vol. II, *supra* note 45.

¹⁶⁷ General Recommendations UN Special Rapporteur on Torture, (g), <http://www.ohchr.org/Documents/Issues/SRTorture/recommendations.pdf>; UNAMA, *Conflict Related Detainees in Afghan Custody*, *supra* note 3. See also, Open Society Justice Initiative, *Pre-Trial Detainees and Torture: Why Pre-Trial Detainees Face the Greatest Risk*, Open Society Justice Initiative, http://www.soros.org/initiatives/justice/articles_publications/publications/pretrial-detention-and-torture-20110624/pretrial-detention-and-torture-06222011.pdf [hereinafter "Open Society Justice Initiative, *Pre-Trial Detainees and Torture*"].

¹⁶⁸ICPC Art.15, 25; Interim Criminal Procedure Code, *Official Gazette*, No. 820 (25 February 2004; 6 Hoot 1382), Art 31, 34., [hereinafter *ICPC*], <http://www.asianlii.org/af/legis/laws/icocpfcogn820p2004022513821206a675/>.

See also UNAMA, *Conflict-Related Detainees in Afghan Custody*, *supra* note 3.

¹⁶⁹ UNAMA, *Conflict-Related Detainees in Afghan Custody*, *supra* note 3, p. 44. See also Open Society Justice Initiative, *Pre-Trial Detainees and Torture*, *supra* note 173. Martin Schönteich, "The Scale and Consequences of Pretrial Detention around the World," in *Justice Initiatives: Pretrial Detention* (New York: Open Society Institute, 2008).

¹⁷⁰Police Law, *Official Gazette* No. 862 (2005), <http://www.rolafghanistan.esteri.it/NR/rdonlyres/94667686-6B09-4E6E-9972-905E21EEC1E4/0/PoliceLaw.pdf>. Art. 15, 25; ICPC Art.31, 34.15, 25; Interim Criminal Procedure Code,

hours. Only prosecutors and courts may extend pre-indictment detention beyond the initial 72 hours, and in all cases suspects should be transferred from NDS or police custody to a MOI facility after 72 hours.¹⁷¹

The detention of suspects beyond the 72-hour time limit is a widespread, well-documented problem in the criminal justice system in Afghanistan.¹⁷² Whereas lack of capacity and delay on the part of prosecutors are the most common causes of prolonged police detention of ordinary criminal suspects, for conflict-related detainees, the NDS has deliberately used its power to retain custody of suspects to conduct investigations and interrogations, and prosecutors have delegated or abdicated their investigative responsibilities in such cases.¹⁷³

One detainee was first arrested by international forces in December 2010 (Qaws 1389) and soon after handed over to NDS Kabul. “I spent 30 days in Department 90, and was tortured for 21 days of that month. They said to me, ‘If you are not tortured you will never tell us the truth.’” He remained in NDS custody for a total of three months before he was transferred to MOJ custody. While in NDS custody, the detainee was subjected to beatings as well as sexual abuse, after which he signed a confession.¹⁷⁴ Such prolonged, pre-trial detention by the NDS, apparently for the purpose of continuing investigations, was regularly reported by detainees.

Defense lawyers also complain about prolonged periods of detention by the NDS, and say that when challenged, NDS officials contend that they have the legal authority to detain individuals beyond the 72-hour time limit. As one defense lawyer stated: “The law is 72 hours, but they will keep them for many months. They should be charged after 72 hours and handed to prosecutors. But if you say it’s illegal, the NDS says it has the right under the law—we ask to see this law and the directorate can’t show it. To our knowledge it has no such authority.”¹⁷⁵ There is no publicly available evidence, executive order, or law that grants the NDS legal authority to detain individuals beyond the legally mandated 72-hour time limit. If the Afghan government or NDS officials defend such detention practices as legal, then they must make public those laws or presidential decrees that grant the NDS such authority.

Official Gazette No. 820 (25 February 2004), Art 31, 34, [hereinafter ICPC], <http://www.asianlii.org/af/legis/laws/icocpfcogn820p2004022513821206a675/>.

¹⁷¹ ICPC, Art. 36. Prosecutors must file an indictment within 15 days of initial arrest. This period can be extended by the court at the request of the prosecutor for an additional 15 days. For further details on the procedural time limits imposed by Afghan law, see UNAMA, *Arbitrary Detention in Afghanistan*, Vol. II, *supra* note 44.

¹⁷² United States Assistance Mission in Afghanistan, *Arbitrary Detention in Afghanistan: A Call for Action*, Vol. I, UNAMA, January 2009 (Jad 1387) [hereinafter UNAMA, *Arbitrary Detention in Afghanistan*, Vol. I], http://www.ohchr.org/Documents/Countries/ADVC_Vol_I_UNAMA.pdf. See also, UNAMA, *Conflict-Related Detainees in Afghan Custody*, *supra* note 3.

¹⁷³ UNAMA, *Arbitrary Detention in Afghanistan*, Vol. II, *supra* note 45, p. 55.

¹⁷⁴ Interview with Detainee 6.

¹⁷⁵ Interview with Defense Lawyer 1.

Regardless of the legal authority of the NDS, numerous defense lawyers alleged that the NDS retains custody of detainees in order to ensure that any evidence of physical abuse and torture is no longer apparent—so that injuries such as marks, cuts, and bruises caused by physical abuse have healed. One lawyer interviewed said, “They need to keep them in detention for a longer time to treat the injury, and for it to heal. If the injury is not visible, the court is not likely to believe the detainee.”¹⁷⁶

Incommunicado Detention

Holding detainees in detention incommunicado, primarily by preventing family notification, is a violation of detainees’ rights under Afghan law and contravenes international human rights standards.¹⁷⁷ Most detainees were also unable to communicate with defense counsel, which is discussed in the following section.

Based on interviews with detainees, family contact for detainees in NDS custody, particularly in the first days after their initial arrest, appears to be the exception rather than the rule, a practice that increases the risk of mistreatment and torture.¹⁷⁸ In some cases, NDS officials appear to have held individuals in incommunicado detention, and only after obtaining confessions through the use of torture were detainees transferred to MOI facilities, where they were allowed to contact their families.

One detainee reported spending three weeks in NDS custody in Kandahar, where he was subjected to suspension, beating, and electrocution. “They said confess, confess. Then they would beat us more; whatever they wanted us to say, we did. A human is very weak and so we confessed, we had no choice. The beating stopped after we confessed. All of us then moved here to Sarposa [Kandahar Central Jail].” The detainee’s family attempted to locate him throughout his time with the NDS. “It was 20 days after arresting me before my family found me. They went to many sources, AIHRC, NDS, ANP, and asked all of them where I was, but no one gave them any information. When I arrived at the central jail they were able to find me.”¹⁷⁹

¹⁷⁶Interview with Defense Lawyer 16. See also interview with Defense Lawyer 18.

¹⁷⁷ Detainees have the right to family contact and visits under the Law on Prisons and Detention Centers, *Official Gazette* No. 923 (1 July 2007; 10 Saratan 1386), Art. 31, http://www.unodc.org/documents/afghanistan//Government_of_Afghanistan_LAW_ON_PRISONS_AND_DETENTION_CENTERS_2010.pdf. See also, International Covenant on Civil and Political Rights, Art. 7 and 10(1). Other international standards include Rules 37, 38(1) and (2), and 92, UN Standard Minimum Rules for Treatment of Prisoners(1955); Principles 15, 16(1), 16(4) and 19, Body of Principles for the Protection of All Persons under Any Form of Detention(1988). For the finding of the Human Rights Committee that denial of right to contact family members is inconsistent with standards of humane treatment, see Communication No/ 577/1994, *Espinoza de Polay v. Peru* (Views adopted November 6, 1997; 15 Aqrah 1386), in UN doc. CCPR/C/61/D/577/1994, para. 8.6, http://www.worldcourts.com/hrc/eng/decisions/1997.11.06_Espinoza_de_Polay_v_Peru.htm.

¹⁷⁸Human Rights Commission, Resolution 1997/38, para. 2. Report of the Special Rapporteur on Torture, UN Doc.A/56/156, July 2001 (Saratan 1380), para. 39(f). See also, UNAMA, *Arbitrary Detention in Afghanistan, Vol. II, supranote44*, p. 60.

¹⁷⁹Interview with Detainee 55.

Another detainee had been at NDS Nangarhar for almost two weeks and was still unable to contact his family when monitors interviewed him. “Please send me to the regular jail. At least...at least at the regular jail I could be visited by my family, and it’s an open place.”¹⁸⁰

A number of detainees were unable to notify family members of their detention, and therefore had to rely on released prisoners to pass on word to their relatives. “They didn’t let my family meet me, or send me food, or anything. My family did not know about my situation at all or where I was. I was there for 37 days when another prisoner who was released was able to tell my family where I was.” The detainee alleged he was beaten regularly by NDS officials during his first week of detention in NDS Kandahar. “My family found out about me when I got into Sarposa [Kandahar Central Jail] and then they were able to meet me.”¹⁸¹

International forces also hold individuals for substantial periods of time without permitting family contact or notifying family members of detainees’ whereabouts, a situation which may be prolonged by transferring them to the NDS. One detainee told interviewers that he was held in U.S. custody at “Bagram” for approximately six months without contact with his family. According to the detainee, he was then transferred to NDS Kabul, where he faced an additional three months without family contact, as well as torture before being released. “My family had no news, no information at all, they didn’t know where I was, if I was at Bagram, NDS, or Kabul, or wherever.” When he was finally released after nine months in captivity, he reported that he was dropped off on a road in Kabul and given 1,000 Afghanis [approximately \$20] to find his way home. “I called my brother and I told him to come and find me...He started crying. My whole family was so happy to hear from me. My wife, children, all of them were crying from their happiness.”¹⁸² U.S. forces at DFIP, however, do permit individuals to contact family members through the ICRC, including through a video conference link.

The burden of locating detainees often falls on family members, who may undertake frantic searches to locate loved ones after their arrest. “My father started searching for me as soon as I was arrested,” explained one detainee. “He went to the provincial police, then to Laghman, Jalalabad, Kabul, then to the AIHRC office, then to Bagram. At Bagram they gave him a list of prisoners they had handed over to the NDS. After one and a half months my father found me and came to visit me at the NDS.” During his detention at NDS Kabul, the detainee alleged that he was subjected to severe beatings and threatened with electric shock. “My father paid the prosecutor about 80,000 Afghanis [approximately \$1600]. We sold two cows and borrowed money to pay the prosecutor. My father also spent a lot of money on travel, going back and forth everywhere trying to find me.”¹⁸³

¹⁸⁰Interview with Detainee 22.

¹⁸¹Interview with Detainee 52.

¹⁸²Interview with Detainee 98.

¹⁸³Interview with Detainee 10.

Interviews with defense lawyers confirm that conflict-related detainees are particularly likely to be held in incommunicado detention. As the head of an Afghan legal aid organization explained, “No there is no notification, but families should be notified when individuals are initially detained. Once they feel like it is time, the NDS will allow family members to come and visit. But if families are not influential, and have no connections, then they can’t find out about detainees. They can’t even find out if they are in custody and they don’t know about their fate.”¹⁸⁴

Denial of the Right to Defense Counsel

The right to counsel is guaranteed in Article 31 of the Afghan Constitution, as well as in the ICPC. It is a fundamental procedural protection that mitigates the risk of abuse and other violations of detainees’ rights. The vast majority of detainees interviewed were unable to contact or see a lawyer while in NDS custody.

Authorities do not typically inform detainees of their right to counsel, and detainees are often unaware that they have this right.¹⁸⁵ As one detainee in NDS Kandahar stated, “I was never told anything about a defense lawyer, and no lawyer was ever offered to me. But this is because I am still under investigation and it is too soon for me to have a lawyer.”¹⁸⁶

It is often family members who must contact defense lawyers on behalf of detainees. However, even when families succeed in hiring defense counsel, lawyers are often unable to meet with detainees. Family members of a detainee in Kandahar were told by a defense lawyer that he would not be able to provide representation while the detainee remained in NDS custody. “He said we would have to wait until they were transferred to the central jail.”¹⁸⁷ The detainee was tortured in ANP custody and then transferred to the NDS, where he subsequently died from his injuries.

Partly because it is families, not detainees, who are usually able to contact defense lawyers, it can take a substantial amount of time for lawyers to locate and meet with their clients. “We find clients through their families, but when we go to the NDS they say, ‘we have no one by that name.’ We have to go back and forth searching for them, sometimes it can take up to a month before we can eventually get the information,” explained the head of the Legal Aid Organization of Afghanistan.¹⁸⁸

While lack of access to counsel is a problem in the Afghan justice system as a whole, interviews with defense lawyers indicate that the problem is particularly significant for conflict-related detainees and that NDS officials deliberately and systematically deny access to counsel. According to defense lawyers and legal aid organizations, it usually

¹⁸⁴ Interview with Defense Lawyer 2.

¹⁸⁵ See also UNAMA *Arbitrary Detention in Afghanistan*, Vol. II, *supra*note 44.

¹⁸⁶ Interview with Detainee 41.

¹⁸⁷ Interview with family member of Detainee 58.

¹⁸⁸ Interview with Defense Lawyer 20.

not until after the NDS has completed its investigation or detainees have been transferred to MOI detention facilities that defense lawyers are able to access detainees.

As a result of this access to detainees in NDS custody is generally denied while officials are conducting investigations and interrogations—the precise period in which detainees are at the greatest risk of abuse. “Lawyers face great difficulties interviewing clients,” according to the head of one Afghan legal aid organization. “The NDS doesn’t allow lawyers to come talk to clients freely. Not until the NDS finishes its investigation do they allow the lawyer to be involved. We can see clients, but not before the investigation is complete.”¹⁸⁹ The statement of one NDS director seemed to confirm that the NDS denies access to counsel as a matter of policy: “When the detainee’s investigation is complete and when the report is with the prosecutor, then the suspect can have a defense lawyer. Otherwise, it would not be clear for the defense lawyer whether the suspect is guilty or innocent.”¹⁹⁰

Almost every defense lawyer interviewed claimed the NDS denied access to clients during investigations. “There is no chance for the detainee to see the defense lawyer in the initial investigations; in this primary stage they do not let them call a defense lawyer,” said a lawyer from Jalalabad. A lawyer in Kandahar stated, “No defense lawyer in Kandahar has ever met with a detainee in NDS. NDS officials say things like ‘you are against the NDS, and therefore you are against our constitution and the law of Afghanistan. You are like the friends of the detainees.’”¹⁹¹

The findings of this report contradict official NDS statements that were issued in response to the 2011 UNAMA report on detainees.¹⁹² In its response to the UN report, the NDS asserted that, “NDS has not limited the appointment of defense attorneys. The main challenge is the insufficient number of defense attorneys which makes it difficult to cover all cases. Defense attorneys do not show interest in cases of crimes against internal and external security...and do not provide services in insecure provinces.”¹⁹³

The shortage of defense lawyers in Afghanistan is a very serious challenge, but this does not explain situations in which detainees’ lack of access to counsel results directly from deliberate acts by NDS officials. Interviews for this report with defense attorneys confirm that many work in provinces suffering from significant levels of insecurity—including Kandahar, Kunar, Laghman, and Nangarhar—undermining NDS’s claim that detainees lack counsel because defense lawyers will not work in insecure areas.

Defense lawyers also expressed willingness to take on cases of conflict-related detainees, and many have done so. But it is often the NDS’s own practices and policies that deter lawyers from representing conflict-related detainees. As discussed below, practices such

¹⁸⁹ Interview with Defense Lawyer 2.

¹⁹⁰ Interview with NDS Herat Director, Herat city, Herat Province, July 31, 2011 (9 Asad 1390).

¹⁹¹ Interview with Defense Lawyer 16.

¹⁹² UNAMA, *Conflict-Related Detainees in Afghan Custody*, *supra* note 3, p. 63.

¹⁹³ *Id.*

as excluding defense lawyers from investigations, preventing lawyers from meeting with their clients, and intimidating defense lawyers, all work to dissuade attorneys from taking national security cases and greatly undermine detainees' right to counsel.

Investigations Conducted by NDS Interrogators Instead of Prosecutors¹⁹⁴

In the Afghan justice system, prosecutors are primarily responsible for conducting investigations.¹⁹⁵ Interviews with conflict-related detainees and defense lawyers confirm that in political or national security cases, NDS investigators, rather than prosecutors, often assume responsibility for conducting investigations and interrogations.¹⁹⁶ The assumption of investigative authority by NDS officials, and the delegation of this authority by prosecutors, is a key reason for systematic due process violations and increased risk of detainee mistreatment and torture.¹⁹⁷

As a defense lawyer in Kandahar explained, “Our biggest problem is that the police or the NDS don’t have rights to do investigations of detainees; this is only the right of the prosecutor or judges, but unfortunately they do it illegally and send their findings to the court. They keep a detainee for a long time without any reason; they only have the right to keep him for 15 days and not more but they keep them for months.”¹⁹⁸

¹⁹⁴ While the National Security Law does contain a provision that grants the NDS authority to “investigate and organize arrests in accordance with the provisions of the Law on Crimes against Internal and External Security,” it is unclear what the precise scope of that investigative authority is, and to what extent this provision displaces the investigative responsibilities typically granted to prosecutors. There are no specific provisions in the National Security Law that exempt NDS from adhering to the due process rights granted under the ICPC, which grant detainees the right to have counsel present during various phases of investigation, including line ups, interrogations, and searches. There is also no provision of the National Security Law that permits NDS officials to hold detainees beyond 72 hours in order to conduct investigations.

¹⁹⁵ ICPC, Art. 23, 34, 35, and 37.

¹⁹⁶ UNAMA, *Conflict-Related Detainees in Afghan Custody*, *supra* note 3, p. 46.

¹⁹⁷ Individuals are at greater risk of torture if they remain in the custody of state officials that are also responsible for investigating and interrogating such individuals. “Those legally arrested should not be held in facilities under the control of their interrogators or investigators for more than the time required by law to obtain a judicial warrant of pre-trial detention which, in any case, should not exceed a period of 48 hours. They should accordingly be transferred to a pre-trial facility under a different authority at once, after which no further unsupervised contact with the interrogators or investigators should be permitted.” General Recommendations UN Special Rapporteur on Torture, (g), <http://www.ohchr.org/Documents/Issues/SRTorture/recommendations.pdf>. See also Open Society Justice Initiative, *Pre-Trial Detainees and Torture: Why Pre-Trial Detainees Face the Greatest Risk*, Open Society Justice Initiative, http://www.soros.org/initiatives/justice/articles_publications/publications/pretrial-detention-and-torture-20110624/pretrial-detention-and-torture-06222011.pdf [finding greatest risk of torture for detainees in pre-trial stages when in custody of police attempting to obtain information and confessions from detainees].

¹⁹⁸ Interview with Defense Lawyer 10.

Numerous defense lawyers interviewed claimed that it is during this initial investigatory period that detainees are subjected to mistreatment and torture, claims consistent with accounts provided by detainees.¹⁹⁹

In effect, the NDS has become a “one-stop shop” in which arrest, detention, investigation, and interrogation all take place under the authority of NDS officials, without prosecutorial oversight or judicial review.²⁰⁰ Only upon completion of its investigation does the NDS typically forward the case to prosecutors for formal indictment, which is often based solely on the findings of NDS investigators. The vesting of both investigative as well as detention authority exclusively with the NDS, particularly without any independent judicial review or oversight, greatly increases the vulnerability of detainees to mistreatment and torture.

Denial of Defense Lawyers’ Right to be Present and Participate in Investigations

The most significant challenges identified by legal aid organizations and defense lawyers in representing conflict-related detainees were the exclusion of defense lawyers from investigations and their inability to review findings and case files prior to trial. By excluding defense lawyers from participating in investigations, NDS officials not only undermine detainees’ rights to counsel and to a fair trial, but they also remove a key procedural protection that helps ensure that confessions are not coerced and that detainees are free from torture.

In the Afghan justice system, the presence and participation of defense lawyers in the investigation of suspects play important roles in the judicial process. Under the ICPC, defense counsel has the right to be present during any interrogations of suspects, searches, examination of experts and witnesses, and line-ups. The defense lawyer also has the right to access the findings of the investigation and the case file compiled by the prosecutor prior to trial.²⁰¹ Defense lawyers’ presence and engagement with prosecutors during investigations enable them to ensure that detainees’ rights are respected, to learn of the evidence against their clients, and to assist their clients in preparing a defense. Detainees also have a basic right to understand the grounds for their arrest, and a meaningful opportunity to challenge their detention, which requires both access to legal counsel and the evidence against them.

As discussed above, investigations in political or national security cases are conducted not by prosecutors—generally the proper investigating authorities under Afghan law—

¹⁹⁹ Interviews with Defense Lawyers from Kabul, Nangarhar, Kandahar, Laghman, Kunar. UNAMA also found that the vast majority of complaints of torture and mistreatment occurred while detainees were in NDS or ANP custody, before being transferred to MOI facilities. See UNAMA, *Conflict-Related Detainees in Afghan Custody*, *supra* note 3, p. 44.

²⁰⁰ There is no provision in Afghan law that requires prompt, periodic judicial review of detention, nor do detainees have the right to challenge the legality of their detention. See, UNAMA, *Arbitrary Detention in Afghanistan*, Vol. I, *supra* note 176, p.

iv. http://www.ohchr.org/Documents/Countries/ADVC_Vol_I_UNAMA.pdf.

²⁰¹ ICPC, Art. 38.

but by NDS officials.²⁰² Almost every defense lawyer interviewed pointed to the inability to participate in investigations as the central challenge in representing conflict-related detainees, particularly the NDS denial of access to clients during investigation phase and interrogations, and NDS refusal to share findings of investigations or information compiled in case files.²⁰³ “In normal cases the police and prosecutors will cooperate—but with the NDS we may be able to visit the client, but only to visit—not to participate in the investigation,” one defense lawyer stated.²⁰⁴

As another lawyer explained, “If it’s a regular police case, a murder case for example, the other prosecutors allow us to take part in investigation. Sometimes they will even call us and say we’re looking at this case today and he’s your client. But with NDS, all we are allowed to do is to have the initial agreement with the client. They just do that so they can hold it before the court and say they allowed access. But then after that we never see our client again. They don’t even let us study the file. We only get to study the case once we arrive in court to defend them. The law says that the lawyers have the right to take part in investigation, but they don’t allow us.”²⁰⁵

Intimidation of Defense Lawyers

A number of defense lawyers reported that they or their colleagues have faced intimidation and pressure by NDS officials because of their decisions to represent conflict-related detainees. Such intimidation undermines detainees’ right to counsel and may inhibit the ability and willingness of defense lawyers to document and report abuse of their clients.

As the head of one Afghan legal aid organization explained, “The power is in the hands of the NDS and sometimes they use it to threaten lawyers. This is a big challenge. Lawyers fear they will be arrested. Some are arrested simply for calling certain phone numbers or being in the call history of someone arrested. The NDS will claim that they are helping terrorists get in touch with each other and implement their plans.”²⁰⁶

One defense lawyer in Kabul described how he was detained by the NDS for merely speaking with individuals seeking legal assistance for detainees in NDS custody: “Last year I was detained by NDS for two nights. I was working with [a legal aid organization] at the time. Two people came to me and asked me to take cases in Zabul and Helmand provinces for NDS detainees. The next day I was leaving my home and NDS was waiting

²⁰² Whether the NDS has been granted such investigative authority by presidential decree is unclear given the confidential nature of applicable law. The refusal of the Afghan government to make public laws governing the NDS greatly undermines the ability to assess the legality of NDS actions, protect detainees’ rights, and ensure accountability for violations.

²⁰³ Defense lawyers characterized participation in investigations as including access to case files, evidence obtained by the NDS or other authorities, and presence during questioning, line-ups, and other phases of NDS investigations.

²⁰⁴ Interview with Defense Lawyer 20.

²⁰⁵ Interview with Defense Lawyer 8.

²⁰⁶ Interview with Defense Lawyer 2.

for me, they arrested me and took me away.”²⁰⁷ NDS officials interrogated the lawyer, asking him why he would consider representing detainees and pressuring him not to take on such cases. “Eventually a government Minister intervened and I was released, thank God! But they were planning on taking me to some place to torture me. They told me to sign a paper saying I will never defend any insurgents or Taliban.”²⁰⁸

Such pressure also deters lawyers from taking cases of conflict-related detainees. “Another problem we have with the NDS is that they are threatening the defense lawyer during the trial. For example, if our client is beaten by them, then indirectly they will attack our lawyers. ‘Why would an ILF lawyer complain of an NDS person? How dare you?’ It happens often when the lawyers of [our legal aid organization] work on NDS cases. That’s why our lawyers sometimes do not take these cases. In Afghanistan, this is a dangerous job.”²⁰⁹

VIII. Accountability and Transparency

Afghan Government Efforts to Prevent Torture and Mistreatment of Detainees

In recent years, the Afghan government has taken a number of positive steps to address weaknesses in the justice sector, which has consistently lagged behind the security sector in terms of efforts and resources dedicated to reform.²¹⁰ The Afghan government has also introduced measures which it hopes will help prevent torture and abuse in detention facilities, including improved training for prison officials, and a multiyear program that has so far educated 4,600 prison authorities, staff, and guards on best practices for the treatment of detainees.²¹¹

Several measures have been taken to improve detainee treatment at the NDS in particular. In December 2010 (Qaws 1390), the NDS created an oversight commission charged with monitoring detention facilities and responding to allegations of mistreatment.²¹² In response to the UNAMA detentions report, the Afghan government has also created a government committee to assess the allegations, and a Human Rights Unit in the NDS Office of Legal Affairs, which has access to detainees and is responsible for protecting detainee rights.

²⁰⁷ Interview with Defense Lawyer 19.

²⁰⁸ *Id.*

²⁰⁹ Interview with Defense Lawyer 8.

²¹⁰ Congressional Research Service, “Afghanistan: U.S. Rule of Law and Justice Sector Assistance,” November 9, 2010 (18 Aqrah 1389), <http://www.fas.org/sgp/crs/row/R41484.pdf>.

²¹¹ Afghanistan Independent Human Rights Commission, *The Situation of Detention Centers and Prisons in Afghanistan*, June 25, 2010 (3 Asad 1389), http://www.aihrc.org.af/media/files/Reports/Thematic%20reports/rep_25_jun_2010.pdf, p. 15.

²¹² UNAMA, *Treatment of Conflict-Related Detainees in Afghan Custody*, *supra* note 3, p. 42. There are significant concerns regarding the effectiveness of the detention oversight commission, given that it has failed to uncover torture and abuse documented by the AIHRC, the Open Society Foundations, and UNAMA.

The Afghan government also renewed its commitment to protecting conflict-related detainees from torture and mistreatment.²¹³ It expressed its determination “to abide by the provisions of the enforced laws of the country, particularly Article 29, Chapter Two of the Constitution which deals with the prohibition of torture.”²¹⁴ The NDS has committed to convene a seminar for interrogative and reconnaissance departments, and implemented trainings on interrogation for 80 officials with the support of the UK government.²¹⁵ The NDS acknowledged that “reform is feasible” and has committed to ensuring accountability for torture by investigating allegations of abuse, suspending officials responsible, and prosecuting perpetrators where appropriate.²¹⁶

In a January 2012 (Jadi 1390) meeting with a commissioner of the AIHRC, Dr. Sima Samar, and the head of the NDS, Rahmatullah Nabil, President Hamid Karzai made a commitment that AIHRC monitors would be given unlimited access to NDS facilities.

While the Afghan government’s stated commitment to reform is welcome, and it has taken positive steps to end torture, the government has failed to take some of the most basic steps toward addressing detainee abuse, including holding individuals responsible for torture accountable and ensuring transparency by making findings of investigations public, publishing all laws relevant to the legal authority of the NDS, and ensuring independent monitors have access to all NDS detention facilities.

Failure to Hold NDS Officials Accountable for Torture

The first steps in ensuring accountability for torture are the suspension, investigation, and if justified, removal of officials responsible for torture. The Afghan government has largely failed to hold NDS officials implicated in detainee abuse accountable. Though several NDS officials have been removed from their positions, most have simply been transferred to different detention facilities where they retain responsibility for detainee treatment.

The Afghan Government has removed several officials implicated in torture.²¹⁷ However, in many of these cases, officials were not removed from the NDS but instead shifted or reassigned from one facility to another. The head of NDS Khost, where UNAMA found systematic torture, was installed as the head of NDS Gardez. The head of NDS Gardez

²¹³ In a statement to the media, the Afghan government said: “Torture methods such as electric shock, threat of rape, twisting of sexual organs etc. are methods that are absolutely non-existent in the NDS.” See Martin Petty, “Torture Rife in Afghan Detention Facilities: U.N.,” *Reuters*, October 10, 2011 (18 Mizan 1390), http://www.realclearworld.com/news/reuters/international/2011/Oct/10/torture_rife_in_afghan_detention_facilities_u_n.html. Joshua Levs, “U.N.: Torture in Afghan Prisons,” *CNN*, October 10, 2011 (18 Mizan 1390), http://articles.cnn.com/2011-10-10/asia/world_asia_afghanistan-torture-prisons_1_afghan-prisons-torture-methods-torturing-detainees?_s=PM:ASIA; see also UNAMA, *Treatment of Conflict-Related Detainees in Afghan Custody*, *supra* note 3, p. 61.

²¹⁴ *Id.*, p. 58.

²¹⁵ *Id.*, p. 68.

²¹⁶ *Id.*, p. 70.

²¹⁷ UNAMA, *Treatment of Conflict-Related Detainees in Afghan Custody*, *supra* note 3, p. 62, 69.

was, in turn, made head of NDS Khost. Similarly, the head of NDS Laghman, a facility where AIHRC, Open Society, and UNAMA have all found significant evidence of torture, was made deputy head of NDS Nangarhar, with the head of NDS Nangarhar taking over NDS Laghman. In these cases, individuals implicated in serious allegations of torture were not even demoted or subject to other disciplinary action. Instead, they were simply reassigned to new positions of leadership within the NDS.

According to NDS officials, investigations of individuals are ongoing and after investigations are complete, the NDS will decide whether to discipline or remove officials.²¹⁸ However, despite requests by the researchers, NDS officials have not provided any additional information regarding which, if any individuals are currently under investigation, or have been removed, transferred, or disciplined as a result of allegations of detainee abuse.²¹⁹

*Actions Taken against Government Officials Implicated in Detainee Abuse*²²⁰

Head of NDS Kandahar, General Muhammad Naeem	Removed September 2011 (Sunbola 1390), remains within the NDS
Deputy Head of NDS Kandahar, Col Abdul Wahab	Removed September 2011 (Sunbola 1390), remains within the NDS
Head of NDS Khost, Akhtar Mohammad Ibrahim	Reassigned, currently Head of NDS Gardez
Head of NDS Laghman, Noor Khayder	Reassigned, currently Deputy Head of NDS Nangarhar
Head of NDS Nangarhar	Reassigned, currently Head of NDS Laghman
Head of NDS Farah	Suspended
Director of JCC Helmand, Abdullah Khurram	Reassigned as director of JCC Uruzgan; has since left that position

In response to criticisms regarding the failure to hold individuals accountable, NDS officials have contended that they cannot “ruin a person’s career” based on mere allegations, and investigations are necessary to determine whether removal or other disciplinary action is justified.²²¹ Investigations are certainly necessary and proper when allegations of abuse are made. But investigations must be genuine, findings made public, and action taken against those responsible. So far, there is little indication that the NDS has taken such steps. No findings of any NDS investigations have been made public, and despite credible evidence of torture provided to the NDS by UNAMA, including findings

²¹⁸ Meeting with NDS officials, Kabul City, Kabul Province, December 11, 2011 (20 Qaws 1390).

²¹⁹ *Id.*

²²⁰ *Id.* See also Interview with UNAMA official, Kabul City, Kabul Province, December 12, 2011 (21 Qaws 1390). See also Comments and Responses of the National Directorate of Security to the United Nations Assistance Mission in Afghanistan (UNAMA)’s Report, UNAMA Detentions Report, p. 62, 69. See also interviews with foreign government officials, February 19, 2012.

²²¹ *Id.*

of torture in 16 detention facilities, no officials appear to have been permanently dismissed from the NDS, nor have any officials been prosecuted for abusing detainees.

Transferring individuals into new positions is not meaningful accountability, which requires subjecting individuals to appropriate disciplinary measures, including permanent removal from positions if they are responsible for detainee abuse. Failing to hold individuals accountable for torture not only robs victims of justice, but permits perpetrators to continue abusing detainees, and sends a signal to other officials that torture will go unpunished.

Denial of Access to NDS Facilities

Denial of access to the detention facilities is another challenge faced by AIHRC monitors. Such denials are not always direct or explicit, and AIHRC staff have encountered several forms of restrictions and constraints on access that compromise the effectiveness of monitoring. These restrictions on access are inconsistent with the NDS's previous statements that "all the detention centres and investigation sub-directorates of the NDS are open to inspections [by AIHRC and a group of other institutions] and they have full access to [the facilities]."²²²

Over the research period for this report, AIHRC monitors were explicitly denied access to two NDS facilities: NDS Kunar and NDS Department 90/124. In February 2011 (Dalwa 1390), the director of NDS Kunar denied AIHRC access to the facility stating that NDS Kabul had not granted them permission to grant access to AIHRC monitors. The AIHRC has also repeatedly requested access to NDS Department 90/124, most recently on December 19, 2011 (28 Qaws 1390), and has yet to be granted access.²²³

Significantly, the NDS does not generally permit the AIHRC to conduct unannounced visits to any NDS facilities, which seriously undermines the ability of AIHRC to fulfill its legal mandate and conduct effective monitoring. Before visiting detention facilities, NDS officials usually require the AIHRC to submit a formal letter requesting access at least 1-2 days in advance. NDS officials also prohibit AIHRC monitors from bringing cameras into NDS facilities, which prevents AIHRC monitors from properly documenting physical evidence of abuse such as bruises, scars, and other injuries.²²⁴

AIHRC monitors have encountered a range of additional difficulties in gaining full, unfettered access to NDS facilities. On numerous occasions, NDS officials have abruptly cancelled AIHRC visits—sometimes even while the monitors are on the way to the

²²² UNAMA, *Treatment of Conflict-Related Detainees in Afghan Custody*, *supra* note 3, pp. 59-60.

²²³ In its official written response to AIHRC's request to visit Department 90/124, dated December 31, 2011 (10 Jodi 1390), the NDS stated that the AIHRC could visit Department 17/40 where it could interview individuals that have been detained in Department 90/124.

²²⁴ The use of cameras and other means of documenting conditions and treatment of detainees are standard methods of investigation for the AIHRC. If security concerns exist regarding the possession and use of such equipment by AIHRC monitors in NDS facilities, the AIHRC would welcome the opportunity to address such concerns, particularly through the adoption of protocols and practices that would address security concerns while allowing the AIHRC to properly document evidence of abuse.

facility—and insisted that the visit must be postponed because another monitoring group is visiting the facility. AIHRC monitors have been prevented from visiting facilities under such circumstances multiple times, even when visits were arranged and approved well in advance. Other times, detention officials would simply deny that any visit had been arranged, even if monitors had the proper documentation and approval. The AIHRC also observed during several facility visits that certain protocols and practices of NDS officials, such as official meetings and excessive and prolonged facility tours, resulted in significant delays and time constraints that affected the quantity and quality of detainee interviews AIHRC monitors were able to conduct.

In general, the persistent uncertainty AIHRC monitors face in gaining full, unfettered access to NDS facilities, and the apparent discretion of local NDS officials in granting access, undermines AIHRC's ability to fulfill its mandate to conduct rigorous and effective monitoring of the conditions and treatment of detainees.

IX. Recommendations

National Directorate of Security

- Investigate all credible allegations of torture, including reports of torture at the NDS facilities identified in this report.
- Investigate and hold to account all those who are responsible for torture, including commanding officers. End the practice of moving rather than removing officials responsible for torture and make public or provide to AIHRC the results of investigations and actions taken.
- Ensure AIHRC has full, unfettered, and confidential access to all NDS detainees and facilities, including NDS Kabul Department 90/124, as legally mandated under the Constitution of Afghanistan. Ensure NDS officials permit AIHRC monitors to conduct unannounced visits to all NDS facilities.
- Ensure the NDS Human Rights Unit immediately inspects and investigates NDS detention facilities where the AIHRC alerts the government that it has been denied access.
- Investigate all credible allegations of “off-site” or undisclosed facilities being used by NDS interrogators, and end the use of such facilities or locations for interrogations, to which independent monitors have no access.
- Provide the NDS Human Rights Unit with the authority and resources necessary to effectively investigate allegations of abuse and ensure those responsible are held to account.
- Cease holding detainees incommunicado. Notify family members of detainee's arrest immediately or as soon as practicably possible, ensure access to legal counsel, and permit family members to visit detainees. Transfer all detainees to MOI custody within 72 hours, inform detainees of the reason for their arrest within 24 hours, and ensure all detentions beyond 72 hours are authorized by a prosecutor or judge.
- Ensure investigations are conducted by the proper authorities under Afghan law; permit prosecutors to conduct investigations of suspects.

- Ensure defense lawyers have access to detainees and all NDS detention facilities at all stages of detention as well as proper access to the findings of investigations and evidence against clients.
- Provide mandatory training for NDS interrogators and their superiors on lawful interrogation methods, alternative investigative approaches (such as forensics), and legal obligations under Afghan and international law that prohibit torture and ill-treatment, in coordination with international partners.

Government of Afghanistan

- Make public all legislation and Presidential decrees governing the legal authority of NDS.

Afghan Supreme Court

- Ensure judges do not permit confessions obtained through torture to be admitted in court, as required by the Afghan Constitution and the Interim Criminal Procedure Code.
- Issue guidance to all judges to require them to investigate allegations made by detainees of confessions under duress.
- Ensure that AIHRC monitors can testify in court and make available other evidence relevant to a detainee's allegation of torture, ill-treatment, and other forms of abuse.

Afghan Parliament

- Reform the ICPC to provide detainees the right to have their detention promptly and periodically reviewed by a court and the right to challenge the lawfulness of their detention before a court, consistent with Afghanistan's obligations under the ICCPR.
- Create a mechanism to ensure proper compensation for victims of abuse and torture suffered as a result of acts by state officials.

ISAF Command and Troop Contributing Nations

- Support the NDS and the Afghan government to ensure all detainees are free from torture. Work with the NDS to identify critical deficiencies in resources, and provide appropriate technical and financial assistance to help ensure detainee treatment and interrogations comply with Afghan and international law.
- Enhance the capacity of Afghan officials to conduct lawful and effective interrogations, evidence-based investigations and prosecutions, and strengthen the effectiveness of internal monitoring and accountability mechanisms.
- Make use of ISAF suspension and remediation policies to work with the Afghan government to adopt measures that will protect all detainees from abuse, such as full, unfettered access by AIHRC, detainee access to defense counsel, and accountability for detainee abuse.
- Ensure no detainee is transferred into facilities where there is real risk of torture. Where detainee transfers have been suspended by ISAF due to credible allegations of torture, ensure resumption of transfers to a facility occur only when there is sufficient information to determine that there is no real risk of torture at that facility.

- Ensure the detainee monitoring program has the resources, civilian expertise, and authority necessary to effectively monitor all detainees transferred to Afghan custody.

United States

- Constructively engage with the NDS to ensure it provides guarantees of lawful detainee treatment, and holds officials accountable for abuse.
- Support the NDS and the Afghan government to ensure all detainees are free from torture. Work with the NDS to identify critical deficiencies in resources, and provide appropriate technical and financial assistance to help ensure detainee treatment and interrogations comply with Afghan and international law.
- Enhance the capacity of Afghan officials to conduct lawful and effective interrogations, evidence-based investigations and prosecutions, and strengthen the effectiveness of internal monitoring and accountability mechanisms.
- Ensure all U.S. forces, including U.S. Special Operations Forces and intelligence agency personnel, comply with U.S. detainee transfer policies and international law and are covered by the AIHRC monitoring program.