

# AFGHANISTAN

Detainees transferred to torture:

ISAF complicity?



Amnesty International (AI) is an independent worldwide movement of people who campaign for internationally recognized human rights to be respected and protected. It has more than 2.2 million members and supporters in over 150 countries and territories.

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*Cover image:* A British soldier, part of the International Security Assistance Force (ISAF), searches an Afghan motorcyclist at a temporary checkpoint after a suicide attacker on a motorbike blew himself up, killing one policeman and a civilian in Afghanistan's capital, Kabul, on 23 May 2007.

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## Afghanistan

### Detainees transferred to torture: ISAF complicity?

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#### Summary

Amnesty International has received reports of torture, other ill-treatment, and arbitrary detention by Afghanistan's intelligence service, the National Directorate of Security (NDS). Detainees are transferred from international forces operating in Afghanistan as part of the International Security Assistance Force (ISAF) to Afghan authorities. By transferring individuals to a situation where there is a grave risk of torture and other-ill treatment, ISAF states may be complicit in this treatment, and are breaching their international legal obligations.

This report builds on research by Amnesty International into Afghanistan's justice system and focuses on ISAF detention and transfer policies. It does not cover the US-led Operation Enduring Freedom (OEF) detention system. Amnesty International has already highlighted its concerns regarding US detention policy in Afghanistan and will continue to do so. It has also raised concerns about failures by all parties to the conflict to meet their international obligations – including international military forces, the Afghan Government and armed groups such as the Taliban.

Concerns about the NDS first emerged in 2002, shortly after it was reformed from the previous Afghan intelligence institution, with a UN call for robust reform. The UN reiterated its concerns about the NDS as recently as September 2007 when it called for investigations into allegations of torture and other ill-treatment by the NDS. The full mandate of the NDS is not made public but appears to include powers to arrest, charge, prosecute and judge individuals for a variety of security-related offences. It also operates its own detention facilities.

Since early 2007 Amnesty International has assessed a range of legal, technical and practical issues relating to the transfer of detainees from ISAF custody to Afghan authorities. This report examines Memorandums of Understanding (MoUs) and other agreements signed by a core group of countries (Canada, Denmark, the Netherlands, Norway and the UK) with the Afghan government to regulate such transfers. Another group of countries (including Belgium, France, Germany and Sweden) are also seeking to sign similar types of agreements.

But the issue of detainee transfer is not limited to these countries and it is incumbent on all 37 ISAF states, as a whole and led by NATO, to ensure they fulfil their international obligations and take preventive and remedial action to address patterns of abuse within the Afghan detention system.

The Afghan detention system has fallen between the cracks of reform initiatives supported by the international community, specifically between army and police recruitment and training on the one hand, and the Afghan legal system on the other. Yet detention is an integral part of any justice system and the international community must address its shortcomings together with those of other sectors.

The need for increased efforts to reform the detention system in Afghanistan was recently highlighted by the UN Security Council when it extended ISAF's mandate on 19 September 2007. Along with the obligation to assist the Afghan government, the Security Council added a new aspect to ISAF's role, stating the need for:

*"...further progress in the reconstruction and reform of the Afghan prison sector, in order to improve the respect for the rule of law and human rights..."* (UN Security Council Resolution 1776)

The cases highlighted in this report include allegations of torture by Afghan authorities of transferred detainees; incidents where ISAF states have lost track of transferred detainees; the difficulties in independently monitoring detainees in Afghan custody; and the practice of on the spot transfers without documentation.

Based on this research, Amnesty International concludes that if ISAF states are to comply with their international legal obligations, they must temporarily suspend all transfer of detainees to the Afghan authorities. During this immediate moratorium, ISAF states should ensure that detainees captured by their forces remain in their custody and are treated according to international human rights and humanitarian law. In order that such a moratorium period is as short as possible, ISAF should engage more proactively in the Afghan detention system, and ensure that the Afghan authorities take urgent measures to eliminate torture and other ill-treatment.

In view of the consistent reports of torture and other ill-treatment of detainees by the NDS, and the concerns of the UN and other institutions, the obligation of ISAF states to protect individuals from such treatment cannot be discharged by relying upon MoUs and similar bilateral agreements signed between the Afghan government and ISAF states. They cannot rely on such undertakings by the Afghan government that ill-treatment will not occur.

International legal obligations to protect individuals from torture and other forms of ill-treatment must not be circumvented for the sake of expediency. While the Afghan justice and security sectors remain weak and unable to uphold Afghanistan's international obligations regarding the treatment of detainees, the obligation to protect must be met by ISAF states that capture detainees.

Amnesty International is not advocating for ISAF states to reduce their engagement in Afghanistan, nor for ISAF to introduce forms of long-term internment or take over the judicial functions of the Afghan state. Instead, they should find policy and operational solutions that address the evidence in this report and the issues of torture, ill-treatment and arbitrary arrest practised by the NDS. This is the only way to ensure that ISAF states do not become complicit in torture.

During the proposed moratorium, ISAF states, led by NATO, must work collectively to create a national engagement plan to reform the Afghan prison system so that it operates in full compliance with international law and standards.

ISAF states should explore the feasibility of placing staff and trainers within Afghan detention facilities in order to monitor and train new Afghan detention officials. Training of the police and judiciary could be expanded to include the detention system, either through the European Policing Mission in Afghanistan, or through a consortium of governments, or even individual states. This would complement the military aspects of ISAF's role, with the civilian elements of state building.

Furthermore, the Afghan government must work to end all practices of torture, other ill-treatment and arbitrary detentions; reform the NDS; publish the secret Presidential decree governing its operations; and train its personnel to ensure full compliance with international law and standards.

Independent monitors, such as the International Committee of the Red Cross (ICRC) and the Afghanistan Independent Human Rights Commission (AIHRC), must be given unrestricted access to all NDS facilities. The Afghan government should also invite the UN Special Rapporteur on Torture to visit Afghanistan to follow up on reports of torture and other ill-treatment, and to provide his advice for safeguarding individuals' rights.

Finally the Afghan government must investigate any complaints of torture and other ill-treatment promptly and independently. All detainees must be protected from further abuse. Victims must be provided with access to redress in accordance with international standards.

Amnesty International believes now is the time for the key actors - ISAF states led by NATO, the Afghan Government, the UN, the EU, the AIHRC and the ICRC— to work together to urgently address these issues.

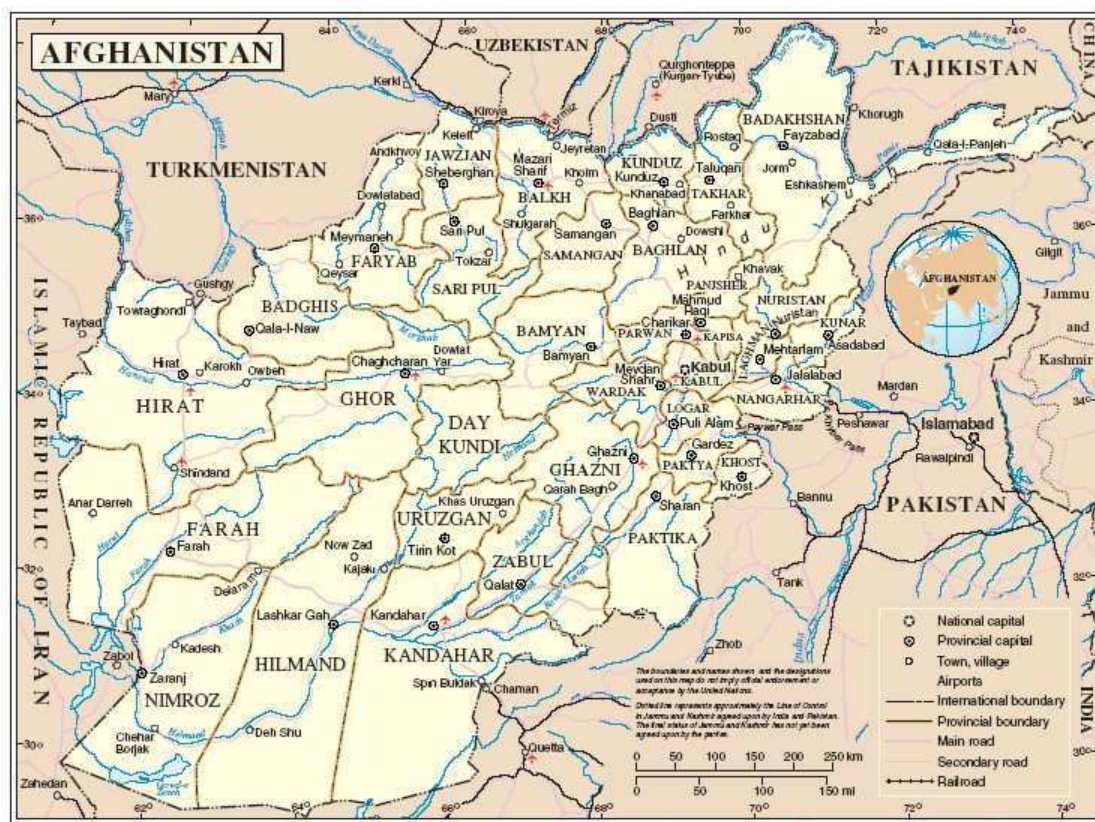
# Afghanistan

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Map No. 3958 Rev. 5 UNITED NATIONS  
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## **Glossary**

AI	Amnesty International
AIHRC	Afghanistan Independent Human Rights Commission
ANA	Afghan National Army
ANP	Afghan National Police
BCCLA	British Columbia Civil Liberties Association
EUPO	European Union Police Mission in Afghanistan
FCO	Foreign and Commonwealth Office
ICCPR	International Convention on Civil and Political Rights
ICRC	International Committee of the Red Cross
IHL	International Humanitarian Law
ISAF	International Security Assistance Force
KhAD	Khadamat-e Etela'at-e Dawlati (or State Information Service)
MoU	Memorandum of Understanding
NATO	North Atlantic Treaty Organisation
NGO	Non-Governmental Organization
NDS	National Directorate of Security <sup>†</sup>
OEF	Operation Enduring Freedom
SRSG	Special Representative of the Secretary-General
UN	United Nations
UNAMA	United Nations Assistance Mission in Afghanistan
UNCAT	United Nations Convention against Torture

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<sup>†</sup>Please note the NDS is sometimes referred to as the National Security Directorate (NSD). In this report it is referred to as the NDS throughout.



# Afghanistan

## Detainees transferred to torture: ISAF complicity?

### 1. Introduction

Detainees held in Afghanistan continue to face torture and other ill-treatment in the context of ongoing conflict involving the Afghan government, international military forces and armed groups such as the Taliban. Amnesty International (AI) is increasingly concerned about the fate of many detainees who face the risk of torture and other ill-treatment when they are transferred to Afghan authorities by the International Security Assistance Force (ISAF).

AI is particularly concerned about the policy of ISAF states to hand over people to the National Directorate of Security (NDS), Afghanistan's intelligence service. AI's research and the work of others reveal a pattern of human rights violations, perpetrated with impunity by NDS personnel.<sup>1</sup> Scores of NDS detainees, some arrested arbitrarily and detained incommunicado, that is without access to defence lawyers, families, courts or other outside bodies, have been subjected to torture and other ill-treatment, including being whipped, exposed to extreme cold and deprived of food.

AI has been particularly concerned about detention practices in Afghanistan since 2002, including detention by US forces operating under Operation Enduring Freedom (OEF),<sup>2</sup> and the Afghan prison system in general.<sup>3</sup> While this report focuses on the detention policy of ISAF states and specific Afghan authorities, AI has also raised concerns about failures by all parties to the conflict to meet their international

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<sup>1</sup> See sections 5 and 6.

<sup>2</sup> See Amnesty International *USA: Memorandum to the US Government on the rights of people in US custody in Afghanistan and Guantánamo Bay* (AI Index: AMR 51/053/2002), April 2002; Amnesty International, *USA: US detentions in Afghanistan: an aide-mémoire for continued action* (AI Index: AMR 51/093/2005), June 2005, and *USA: Human Dignity Denied: Torture and Accountability in the "War on Terror"* (AI Index: AMR 51/145/2004), October 2004.

<sup>3</sup> See Amnesty International, *Afghanistan: Justice and rule of law key to Afghanistan's future prosperity*, Amnesty International, ASA 11/007/2007, 22 June 07; *Afghanistan: Police reconstruction essential for the protection of human rights*, Amnesty International, ASA 11/003/2003; *Afghanistan: Crumbling prison system desperately in need of repair*, Amnesty International, ASA 11/017/2003, July 2003; *Afghanistan: Re-establishing the rule of law*, Amnesty International, ASA 11/021/2003, August 2003.

obligations – including international military forces, the Afghan Government and armed groups such as the Taliban.<sup>4</sup>

ISAF's mandate to operate in Afghanistan stems from UN Security Council resolution 1386 of 20 December 2001. The resolution emphasises that ISAF should "assist the Afghan Interim Authority in the maintenance of security in Kabul and in surrounding areas."<sup>5</sup> As ISAF has expanded to cover the whole country, the importance of ISAF as a detainee transferring organization has increased and AI has been increasingly troubled by reports of detainees being subjected to torture and other ill-treatment by Afghan authorities.

Since early 2007 AI has been investigating the policies of NATO and ISAF states governing detainee transfers (primarily the use of agreements or Memorandums of Understanding<sup>6</sup>) and has been documenting cases of torture and other ill-treatment. This report outlines the complexity of detainee transfers in Afghanistan and demonstrates areas of significant concern where AI believes that the international community has failed to meet its international obligations, particularly the principle of *non-refoulement* which is absolute and allows for no exceptions.

AI is not seeking for ISAF to take over the Afghan judicial process, nor does the organization believe that the human rights and other challenges in the Afghan judicial system will be best resolved by a reduction or drawing back from engagement in the sector. There is a need for the international community, including ISAF states, the UN, the EU with the Afghan government, AIHRC and ICRC to find a way to address detainee transfers and the issue of torture and other ill-treatment.

The detention system has fallen into the cracks between reforms in the security justice sectors, between army and police recruitment and training, and the reform of the Afghan legal system. Detention is an integral part of any justice system and the failure to improve conditions and the provision of human rights in it is a symptom of a failure of the international community's own commitments to promote and uphold human rights in Afghanistan.

Amnesty International is independent of any government, political persuasion or religious creed. It neither supported nor opposed the war in Afghanistan in October

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<sup>4</sup> *Afghanistan: Amnesty International demands immediate release of all hostages*, (AI Index: ASA 11/010/2007), 2 August 2007; *Afghanistan: Mounting civilian death toll – all sides must do more to protect civilians*, AI Index: ASA 11/006/2007, 22 June 2007; *Afghanistan: All who are not friends, are enemies: Taliban abuses against civilians*, (AI Index: ASA 11/001/2007), 19 April 2007; *Afghanistan: NATO must ensure justice for victims of civilian deaths and torture* (AI Index: ASA 11/021/2006), 27 November 2006.

<sup>5</sup> UN Security Council resolution 1386, 20 December 2001.

<sup>6</sup> MoUs and other agreements have been signed between the British, Canadian, Danish, Dutch and Norwegian governments and the Government of the Islamic Republic of Afghanistan. Several other countries, including Belgium, France, Germany and Sweden are in the process of signing MoUs.

2001, and takes no position on the legitimacy of armed struggle against foreign or Afghan armed forces. As in other international or non-international armed conflicts, AI's focus has been to report on and campaign against abuses of human rights and violations of international humanitarian law by all those involved in the hostilities.

## 2. Context

On 7 October 2001, the US-led OEF was launched as a response to the attacks on the US on 11 September 2001. Security Council Resolution 1368 adopted on 12 September 2001 granted international legal authority for OEF, condemning the 11 September attacks and affirming the right of states to individual and collective self-defence. OEF aimed at ousting the Taliban government which had provided a safe haven for Osama bin Laden and *al-Qa'ida*. US forces were supplemented by ISAF forces in 2001.

ISAF's establishment, and its powers of detention, flow from UN Security Council resolution 1386 of 20 December 2001. In accordance with the Bonn Agreement and UN Security Council Resolution 1386, ISAF was established to "assist the Afghan Interim Authority in the maintenance of security in Kabul and in surrounding areas" under Chapter VII of the UN Charter.<sup>7</sup> ISAF was also allowed to "take all necessary measures to fulfil its mandate".<sup>8</sup> This authority was expanded to cover the whole of Afghanistan by UNSC resolution 1510 on 13 October 2003.

Just prior to the expansion of ISAF's mandate NATO, in its first mission outside of Europe, assumed control over ISAF on 11 August 2003.<sup>9</sup> The ISAF mission has, in four stages, taken over from the US-led OEF as its geographical scope has grown from Kabul in 2001 to the entire country by October 2007. ISAF forces initially moved to the north of Afghanistan (October 2004), then to the west (September 2005), then the south (July 2006) and finally took over from OEF forces in the east in October 2006. At present ISAF is made up of more than 35,000 personnel drawing resources from 37 states, including the 26 NATO Member States.<sup>10</sup>

ISAF and the remaining OEF forces are co-operating and conducting joint operations with Afghan security forces, including with the Afghan National Army (ANA), the Afghan National Police (ANP) and the NDS. Due to the lack of ANA forces, ANP and NDS are sometimes deployed to take part in military operations.

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<sup>7</sup> See UN Security Council Resolution 1386 of 20 December 2001, referring to annex 1 of the Bonn Agreement. The mission has been subsequently extended and expanded to all Afghanistan. UN Security Council Resolution 1510 on 13 October 2003 authorized the expansion of ISAF beyond Kabul. See UN Doc S/Res/1746 (2007). See also UN Doc S/Res/1386 (2001), 1413 (2002), 1444 (2002), 1510 (2003), 1563 (2004), 1623 (2005) and 1659 (2006).

<sup>8</sup> Security Council resolution 1386 (2001), paras 1 and 3.

<sup>9</sup> See the analysis in "NATO in Afghanistan: A test of the transatlantic alliance" US Congressional Research Service (CRS), updated 16 July 2007. Introduction available on <http://www.fas.org/sgp/crs/row/RL33627.pdf>, accessed 26 July 2007.

<sup>10</sup> NATO describes itself as leading ISAF. In practice this means that NATO provides administrative and institutional resources for activities undertaken under ISAF. Taken from the ISAF website at <http://www.nato.int/ISAF> accessed 19 September 2007.

Between 2002 and 2005 ISAF forces normally handed over detainees to OEF forces. As ISAF expanded and eventually became larger than OEF, ISAF forces, from 2005, began to transfer detainees directly to the Afghan authorities. At the time NATO received advice that the NDS was the most appropriate institution for it to transfer detainees to.

AI's primary concern is that by trying to fulfil its detention mandate, and supporting Afghan sovereignty by transferring detainees to Afghan authorities, ISAF states are in breach of their international obligations not to send a person in to a situation where they are at substantial risk of torture or other ill-treatment.

The centrality of human rights is included in ISAF's UN mandate and in other international agreements about international engagement in Afghanistan. The UN Security Council resolution establishing ISAF stressed that "all Afghan forces must adhere strictly to their obligations under human rights law...and under international humanitarian law."<sup>11</sup> ISAF's mandate is to "to assist the Afghan Interim Authority in the maintenance of security"<sup>12</sup> It is therefore clear that ISAF forces must themselves, at the very least, adhere strictly to the same international legal obligations.

The two international agreements on the future of Afghanistan - the Bonn Agreement and the Afghanistan Compact - include clear international human rights obligations. Thus the Bonn Agreement provides for the establishment of the Afghanistan Independent Human Rights Commission,<sup>13</sup> as well as providing, in Article V(2):

*"The Interim Authority and the Emergency Loya Jirga shall act in accordance with basic principles and provisions contained in international instruments on human rights and international humanitarian law to which Afghanistan is a party."*<sup>14</sup>

The Afghanistan Compact lists "Governance, Rule of Law and Human Rights" among the "three critical and interdependent areas or pillars of activity for the five years from the adoption of this Compact".<sup>15</sup> The Compact provides, among other things, that by 2010:

*"Government security and law enforcement agencies will adopt corrective measures including codes of conduct and procedures aimed at preventing*

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<sup>11</sup> UN Security Council Resolution 1386 (2001), 20 December 2001, Preamble.

<sup>12</sup> *Ibid.*, para. 1.

<sup>13</sup> Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions, signed 5 December 2001, <http://www.undp.org.af/bonnagreement.htm>, para. III(6).

<sup>14</sup> *Ibid.*, para. V(2)

<sup>15</sup> Afghanistan Compact between the Islamic Republic of Afghanistan and the international community, London, February 2006, p. 2.

*arbitrary arrest and detention, torture, extortion and illegal expropriation of property with a view to the elimination of these practices;*<sup>16</sup>

The Bonn agreement is mentioned in Security Council Resolution 1386, further underlying the undertaking of the international community to place protection of respect for human rights at the centre of international efforts to help rebuild Afghanistan and maintain its security.

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<sup>16</sup> *Ibid.*, p. 8.

### **3. The international legal framework**

AI is concerned that ISAF states are breaching their international obligations by handing over detainees to the NDS where detainees are at grave risk of torture and other ill-treatment. In order to address the legal aspects of this issue it is necessary to understand the legal framework in which international forces operate in Afghanistan.

According to the ICRC, the international armed conflict in Afghanistan ended with the establishment of the transitional government in June 2002. Until that time, according to the ICRC “Persons detained in relation to an international armed conflict involving two or more states as part of the fight against terrorism – the case with Afghanistan until the establishment of the new government in June 2002 - are protected by International Humanitarian Law (IHL) applicable to international armed conflicts [...]”.<sup>17</sup>

With the establishment of the transitional government, the armed conflict became one “not of an international character.”<sup>18</sup> All parties to a non-international armed conflict are obliged, as a minimum, to apply Article 3 common to the four Geneva Conventions. In addition, many of the provisions of international humanitarian law treaties have become rules of customary international law, that is, rules derived from consistent state practice and consistent consideration by states that they are bound by these rules. Such rules apply to all states regardless of treaty obligations. Certain rules originally formulated for international armed conflict are now understood to bind parties to non-international armed conflict as well. In the context of the conflict in Afghanistan, Common Article 3 of the four Geneva Conventions and the relevant rules of customary international humanitarian law continue to apply, as do the rules of international human rights and domestic law.

#### **3.1. International Humanitarian Law**

The standards of humane treatment set out by international humanitarian law (IHL) are binding on all parties in any armed conflict, whether international or non-international. It is a fundamental rule of IHL that all those taking no active part in the conflict (including civilians not participating in hostilities and captured, surrendered and wounded combatants) must be treated humanely. Torture, cruel or inhuman treatment and outrages upon a persons dignity, in particular humiliating and degrading treatment, are prohibited. This basic rule is explicitly reflected in a number of IHL treaties.

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<sup>17</sup> See ICRC, “International humanitarian law and terrorism: questions and answers,” (Accessed 16 May 2007) available at <http://www.icrc.org/Web/eng/siteeng0.nsf/iwpList488/0F32B7E3BB38DD26C1256E8A0055F83E>

<sup>18</sup> Article 3(1) common to the four Geneva Conventions.

Torture is a grave breach of the Geneva Conventions, which obliges high contracting parties to “search for” persons suspected of committing such crimes regardless of their nationality and prosecute them in their own national courts or extradite them to where they would face prosecution.<sup>19</sup> Torture in all contexts, including non-international armed conflict, is also a crime of universal jurisdiction - any state must, under customary international law, do one of the following for suspected perpetrators of torture, even where the suspects are neither nationals nor residents of the state concerned, and the crime did not take place in its territory: (1) bring such persons before its own courts, (2) extradite such persons to any state party willing to do so or (3) surrender such persons to an international criminal court with jurisdiction to try persons for these crimes. Torture may also constitute a crime against humanity or a war crime under the jurisdiction of the International Criminal Court.<sup>20</sup>

### **3.2. International human rights law**

International human rights law applies at all times, in war time or peace.<sup>21</sup> Human rights law is contained in treaties including the International Convention on Civil and Political Rights (ICCPR) and the UN Convention against Torture (UNCAT), to which Afghanistan and all ISAF states are states parties. While some rights guaranteed by international human rights treaties can be subject to derogation during times of public emergency, the right to freedom from torture and other ill-treatment is non-derogable.

Article 4 of the ICCPR provides that even “[I]n time of public emergency which threatens the life of the nation” states may not derogate from the prohibition on torture and other ill-treatment in Article 7 of that Covenant.

In a General Comment on this article, the UN Human Rights Committee reaffirmed that certain rights prescribed in the ICCPR could never be curtailed in an emergency, including the prohibition on torture or cruel, inhuman or degrading treatment or punishment (Article 7), the right to be treated with humanity and dignity when deprived of liberty (Article 10); the prohibitions on hostage-taking, abductions and unacknowledged detention; and deportation or forcible transfer of populations without a valid international legal basis (Article 12).<sup>22</sup> Other provisions mentioned include the right to an effective remedy (Article 2(3)) and the right to procedural

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<sup>19</sup> See, Fourth Geneva Convention Relative to the Protection of Civilian Persons in Times of War, 12 August 1949, arts. 146, 147.

<sup>20</sup> Rome Statute of the International Criminal Court, 1998 UN Doc. 2187 UNTS 90, entered into force 1 July 2002, arts. 7(1)(f), 8(2)(ii), 8(2)(i-ii). See also the International Law Commission's Draft Code of Crimes Against the Peace and Security of Mankind, arts. 8, 9.

<sup>21</sup> See for instance *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, ICJ Reports 2004, para. 106. See also Human Rights Committee, General Comment 31 on Article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant (2004), para. 11.

<sup>22</sup> UN Human Rights Committee, General comment no. 29: States of emergency (article 4), para. 13.



guarantees with regard to non-derogable rights (i.e. to a fair trial when facing the death penalty).<sup>23</sup>

- **The principle of *non-refoulement***

Under international law, and as part of the absolute prohibition on torture and other ill-treatment, states must never expel, return or extradite a person to a country where they risk torture or other ill-treatment – the principle of *non-refoulement*. This is a rule of customary international law applicable to all states.

Article 3(1) of the UNCAT provides;

*“No state shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”*

Moreover, Article 3(2) requires a sending government to take into consideration the existence of gross, flagrant or mass violations of human rights when assessing the risk of torture.

Under Article 1 of the UNCAT, the obligations of states parties also extend to official complicity in, consent or acquiescence to acts of torture. Article 4 of UNCAT requires all State Parties to prohibit participation and complicity in torture.<sup>24</sup> Additional obligations can be found in the rules of state responsibility, whereby a state may be in breach of its international obligations where it knowingly assists in the unlawful act of another state.<sup>25</sup>

The absolute prohibition on transferring detainees to where they risk torture or other ill-treatment is more than a narrow, technical, procedural requirement involving the transfer of detainees across borders, or between states. Rather, it is part and parcel of the prohibition on torture and other ill-treatment itself. As the Human Rights Committee (HRC) has emphasised:

*“No person, without any exception, even those suspected of presenting a danger to national security or the safety of any person, and even during a state of emergency, may be deported to a country where he/she runs the risk of being subjected to torture or cruel, inhuman or degrading treatment.”<sup>26</sup>*

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<sup>23</sup> *Ibid*, paras. 14 and 15.

<sup>24</sup> Convention Against Torture Art 4(1): “Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.”

<sup>25</sup> See Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission in its 53rd session (2001), UN Doc. A/56/10 (supplement 10), ch..IV.E.1, 12 December 2001, arts. 16-17.

<sup>26</sup> Concluding observations of the Human Rights Committee: Canada, UN Doc. CCPR/C/CAN/CO/5, 2 November 2005, para. 15.

The fact that the HRC made this statement while commenting on Article 7 of the ICCPR, which has no explicit provision for *non-refoulement*, further underlines the absolute nature of the prohibition on transferring detainees to where they risk torture or other ill-treatment. The same rule applies to the prohibition on torture and other ill-treatment, or the corollary obligation that detainees (and others) “shall in all circumstances be treated humanely” as provided in international humanitarian law in general, and Common Article 3 in particular.

States’ obligation not to torture or ill-treat detainees extends to the conditions in which, or to which, detainees are released or transferred. A state cannot claim to be treating detainees humanely while knowingly handing them over to torturers – be they within one state outside it, citizens of the same state or officials of another – anymore than it can knowingly ‘release’ detainees in a minefield and claim that their safety is no longer its responsibility. In both cases international law obliges states to transfer or release detainees to a safe environment.

In a legal opinion prepared for the UNHCR in 2001, Elihu Lauterpacht and Daniel Bethlehem expressed this principle clearly, describing “the essential content of the principle of *non-refoulement* at customary law” as follows:

*“No person shall be rejected, returned or expelled in any manner whatever where this would compel them to remain in or return to a territory where substantial grounds can be shown for believing that they would face a real risk of being subjected to torture, cruel, inhuman or degrading treatment or punishment. This principle allows of no limitation or exception.”<sup>27</sup>*

The UN Special Rapporteur on Torture similarly called on governments to respect their obligation to prevent acts of torture and other ill-treatment “by not bringing persons under the control of other States if there are substantial grounds for believing that they would be in danger of being subjected to torture.”<sup>28</sup>

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<sup>27</sup> Sir Elihu Lauterpacht and Daniel Bethlehem, *The Scope and Content of the Principle of Non-refoulement*, Opinion for UNHCR’s Global Consultations, UNHCR, June 2001, para. 253. See also, for instance, Guy S. Goodwin-Gill, *The Refugee in International Law* (Oxford: OUP, 1996), pp. 167-170; Jean Allain, “The *Jus cogens* Nature of Non-refoulement,” 13 *IJRL* 538 (2001).

<sup>28</sup> Report of the Special Rapporteur on Torture Theo van Boven to the General Assembly, UN Doc. A/59/324, 1 September 2004, para. 27. In 2005, the Rapporteur explicitly criticized attempts by states to circumvent the absolute nature of the prohibition on torture and other ill-treatment in the name of countering terrorism, including “returning suspected terrorists to countries which are well-known for their systematic torture practices.” See Statement of the Special Rapporteur on Torture, Manfred Nowak, to the 61st Session of the U.N. Commission on Human Rights, Geneva, 4 April 2005.

## **4. Memorandums of Understanding between ISAF and the Afghan authorities**

In order to put the ISAF's UN Security Council mandate into operation, NATO established an Operational Plan. The Operational Plan agreed between NATO and the Afghan government, among other issues, provides that ISAF forces hand over detainees to Afghan authorities within 96 hours. Officials at NATO Headquarters have informed AI that exceptions to the 96 hour rule are primarily in cases where a detainee is receiving medical treatment.<sup>29</sup>

ISAF states, as the legal state entity, are able to set their own conditions for operating within the framework of NATO's Operational Plan. A number of ISAF states took the view that the Operational Plan provisions for detainee transfer were too general, and subsequently concluded MoUs and other agreements specifically addressing the issue of detainee transfers.

The UK MoU states, for example, that the UK can only detain persons "for force protection, self-defence, and the accomplishment of mission in so far as is authorized by relevant UN Security Council resolutions". It goes on to say that "[t]he purpose of the Memorandum is to...ensure that Participants will observe the basic principles of international human rights law".<sup>30</sup>

However issues remain with such MoUs and similar agreements, not least because they do not specify to which Afghan institution detainees will be transferred to nor address how the Afghan system will separate the functions of interrogation and detention. AI has been able to establish that most detainees are passed on to the NDS, either directly or through another agency such as the ANA or ANP.

NATO officials have asserted that at the moment of the handover to the Afghan authorities, ISAF's responsibility for the detainee ends and responsibility shifts to the state that has chosen to hand over the detainees. At a national level the Canadian government has confirmed that it has a "residual responsibility" after the detainees are handed over but has declined to say what that residual obligation is.<sup>31</sup>

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<sup>29</sup> It was also emphasized that NATO forces are encouraged to hand over detainees as soon as possible and that in most cases detainees are handed over before the 96 hour limit. Interview with NATO Officials, NATO HQ (Brussels), 27 April 2007.

<sup>30</sup> 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, para. 1c and 2.1.

<sup>31</sup> Statement by Canadian Forces' Colonel Neil Anderson during an interview on CBC Radio One, The Current, 10 April 2006.

**Memorandums of Understanding and other agreements between the Afghan Government and ISAF states: some common elements\***

- focus on the hand over of detainees by respective NATO/ISAF states to unspecified “Afghan authorities”;
- provide that Afghan authorities will accept the transfer of detainees from detaining country forces, and Afghan authorities will keep records of transferred detainees;
- provide that the signatories treat detainees in accordance with international law including human rights and humanitarian law (the UK only specifies human rights law);
- provide that representatives of the respective ISAF state, the International Committee for the Red Cross (ICRC), the Afghanistan Independent Human Rights Commission (AIHRC) have access to the detainees after they have been handed over (the Dutch add relevant UN bodies to this list, and the Norwegian MoU limits it only to the AIHRC);
- provide that the ISAF state will be notified prior to the initiation of legal proceedings against, release or transfer to a third country of the detainee (with the exception of Canada);
- provide that no person transferred will be subject to the death penalty.

\* AI has examined the MoUs and other agreements signed between the British, Canadian, Danish, Dutch and Norwegian governments and the Government of the Islamic Republic of Afghanistan.

In the course of legal action against the Canadian government by Amnesty International-Canada and the British Columbia Civil Liberties Association (see box below), the arrangement between the Canadian government and the Afghan government has been closely scrutinized. As a result of the legal proceedings, the Canadian government negotiated a second arrangement, strengthening references to monitoring the conditions of detention and treatment of detainees after transfer and emphasizing Canada’s commitment to supporting rule of law and justice in Afghanistan. While these changes are an improvement, AI believes that Canada’s continued reliance on MoUs concerning the treatment of detainees, with occasional monitoring of the MoU’s implementation, is not sufficient to meet international legal requirements.

Central to this conclusion is that monitoring is a technique to detect torture only after it happens, and cannot substitute for prior precautions that prevent torture from happening in the first place. In other words, monitoring detects the transgressions, but does not forestall them. As such, monitoring cannot meet Canada’s absolute legal obligation to prevent torture, although it can be helpful to inform Canada should Afghanistan breach its obligations to prevent torture and other ill-treatment. Canada’s Foreign Minister has confirmed that in a period of a few months, Canadian monitors detected instances where detainees alleged torture—further evidence that Afghan custody and a substantial risk of torture are inseparable despite Canadian efforts at monitoring.<sup>32</sup>

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<sup>32</sup> Murray Brewster, “Canadians hear six claims of torture from Afghans”, *Globe and Mail (Toronto)*, 8 June 2007; Bruce Campion-Smith, “MacKay admits 6 Afghan abuse allegations exist”, *Toronto Star*, 9 June 2007.

### **Legal action in Canada**

Amnesty International Canada (AI-Canada), in conjunction with the British Columbia Civil Liberties Association (BCCLA) has challenged the Canadian government's policy of handing over detainees to the Afghan authorities in the Canadian courts. Over the past five years AI-Canada has repeatedly called on the Canadian government to substantially revise its policy on the handling of detainees apprehended in the course of military operations in Afghanistan and has outlined serious human rights concerns, including torture and other ill-treatment, both with respect to the practice that was in place between 2002 and 2005 of transferring detainees into the custody of US forces in Afghanistan, and the more recent practice, in place since December 2005,<sup>33</sup> of also transferring detainees into the custody of the Afghan authorities.

In February 2007, AI-Canada and the BCCLA filed an application in the Federal Court of Canada seeking an order that the practice of transferring detainees cease and that Canada locate and account for detainees it has already transferred.<sup>34</sup>

AI considers that the outcome of the case will be of international significance as the approach chosen by the Canadian government is in conformity with current NATO policy and similar to the approach chosen by other ISAF states.

## **4.1. The failure of MoUs to protect**

At the time the first MoUs were signed in 2005, ISAF states may have entertained high expectations regarding the Afghanistan government's treatment of its detainees, and the MoUs arose from a clearly legitimate need to regulate a new bilateral – and multilateral – situation created by the involvement of armed forces of these states in the non-international armed conflict within Afghanistan.<sup>35</sup> NATO and ISAF states were advised that the NDS presented the best long term option for receiving transferred detainees.<sup>36</sup>

Had Afghanistan complied with its international obligations regarding the treatment of detainees, each MoU would have been no more than an essentially technical arrangement between states abiding by their international legal obligations, in which was included a general reiteration of these obligations. Arrangements for extra precautions, such as monitoring by diplomatic and military staff from ISAF states, would have been a welcome addition.

However, AI remains gravely concerned that detainees handed over by ISAF to the Afghan authorities are currently at substantial risk of torture and other ill-treatment. AI reiterates that, in these circumstances, the undertaking by the Afghan

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<sup>33</sup> Arrangement for the transfer of detainees between the Canadian forces and the Ministry of Defence of the Islamic Republic of Afghanistan adopted 18 December 2005. Arrangement for the transfer of detainees between the Canadian forces and the Ministry of Defence of the Islamic Republic of Afghanistan, adopted 3 May 2007.

<sup>34</sup> *Amnesty International Canada and British Columbia Civil Liberties Association v. Chief of the Defence Staff for the Canadian Forces, Minister of National Defence and Attorney General of Canada*, Federal Court file number T-324-07.

<sup>35</sup> For further discussion on the non-international status of the ongoing conflict in Afghanistan please see section 3.

<sup>36</sup> Meeting between NATO officials and Amnesty International representatives, Brussels, 8 October 2007

government in the various MoUs to treat detainees handed over by ISAF states in accordance with international law cannot and does not absolve these nations of their legal obligation not to transfer a persons to a situation “where there are substantial grounds for believing that he would be in danger of being subjected to torture.”<sup>37</sup> Only once it can safely be assessed that no such risk actually exists may ISAF states hand over detainees without violating this obligation. AI is gravely concerned that this is currently not the case.

AI has reviewed the Canadian, Danish, Dutch, Norwegian and UK MoUs and other agreements concluded with the Afghan Ministry of Defence. These agreements aim to give the Afghan government control over detainees in its territory. They also ensure a clear distinction between the ISAF mission and the detention of Afghans and others in the US detention centre at Bagram airbase outside Kabul.<sup>38</sup> They also establish that detainees are supposed to be treated in accordance with international standards. For example, the arrangement between the Canadian and Afghan governments provides the assurance that “the participants will treat detainees in accordance with the standards set out in the Third Geneva Convention.”<sup>39</sup>

In the current situation, there is little to distinguish these agreements from the practice of seeking “diplomatic assurances”, used in other contexts as a disclaimer aimed at absolving the responsibility of the state transferring detainees to states where torture and other ill-treatment occur. This practice has been widely condemned by international human rights bodies<sup>40</sup> as well as human rights NGOs.<sup>41</sup>

While in both cases the agreements may seek to ensure that detainees are not tortured or otherwise ill-treated, they have failed to do so. They also constitute a recognition that the state from which assurances are sought has failed in the past to live up to existing international legal obligations, and that this flouting of international obligations will continue, at least as far as those detainees not covered by the “assurances” are concerned.

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<sup>37</sup> UN Convention against Torture, Article 3.

<sup>38</sup> The distinction from detainees held by the US, under Operation Enduring Freedom (OEF), is important because the ISAF and OEF operations operate under different mandates. As such the Afghan Government engages with the two international military operations separately, and through different legal instruments. Amnesty has separately raised concerns about practices by US forces at Bagram such as *Guantánamo and beyond: The continuing pursuit of unchecked executive power*, (AI Index: AMR 51/063/2005).

<sup>39</sup> Arrangement for the transfer of detainees between the Canadian Forces and the Ministry of Defence of the Islamic Republic of Afghanistan, para. 3, 18 December 2005. This quote refers to the first MoU signed between Canada and Afghanistan. It remains in force and the MoU signed on 3 May 2007 is considered as additional.

<sup>40</sup> See for instance *Committee Against Torture, Communication No. 233/2003, Agiza v. Sweden*, 20 May 2005. See also Human Rights Committee, Communication No 1416/2005. *Alzery v. Sweden*, 10 November 2006. UN Doc. CCPR/C/88/D/1416/2005; Council of Europe, Group of Specialists on Human Rights and the fight against Terrorism, 29 -31 March 2006, Statement by the High Commissioner, <http://www.unhchr.ch/hurricane/hurricane.nsf/view01/C19C689539C57EABC1257146002CE1B9?opendocument>.

<sup>41</sup> See for instance Amnesty International, ‘*Diplomatic assurances*’ – *No protection against torture or ill-treatment*, (AI Index: ACT 40/021/2005), December 2005; and Human Rights Watch, “Empty promises: Diplomatic assurances no safeguard against torture”, April 2004.

## 4.2. Monitoring detention: An insufficient safeguard

AI is concerned that some ISAF states appear to regard the inclusion, within MoUs and other bilateral agreements with the Afghan Government of arrangements to monitor transferred detainees as sufficient to fulfil their international obligations to ensure that they do not transfer detainees to a situation where they are at risk of torture or other ill-treatment. AI is aware of a number of challenges to effective monitoring that, in practice, undermine this assumption.

In a number of cases, while transferring countries have negotiated access to the detainees for their representatives, they have not committed to a systematic monitoring of all detainees that they transfer.

For example the Arrangement between the Canadian and Afghan governments provides that:

*“the Afghan authorities will accept (as Accepting Power) detainees who have been detained by the Canadian Forces (the Transferring Power) and will be responsible for maintaining and safeguarding detainees, and for ensuring the protections provided in Paragraph 3, above [referring to the Third Geneva Convention], to all such detainees whose custody has been transferred to them.”<sup>42</sup>*

A supplementary agreement between the Canadian and Afghan governments establishes that Canadian officials will notify the Afghan Independent Human Rights Commission of any such transfers.<sup>43</sup>

Another agreement, between the UK government and the Afghan government, provides that “representatives of the Afghanistan Independent Human Rights Commission [AIHRC], and UK personnel... and others as accepted between the Participants, will have full access to any persons transferred by the UK A[rm]ed F[orces] to Afghan authorities whilst such persons are in custody.” The agreement also states that the ICRC and other relevant institutions “will be allowed to visit such persons” and that the UK will notify the ICRC and the AIHRC within 24 hours of the transfer.<sup>44</sup>

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<sup>42</sup> Arrangement for the Transfer of Detainees between the Canadian Forces and the Ministry of the Islamic Republic of Afghanistan, para 5 18 December, 2005. The Arrangement signed on 3 May 2007 also adds, “the Afghan authorities will be responsible for treating such individuals in accordance with Afghanistan’s international human rights obligations including prohibiting torture and cruel, inhuman or degrading treatment...” Arrangement for the Transfer of Detainees between the Canadian Forces and the Ministry of the Islamic Republic of Afghanistan, para 4, 3 May 2007.

<sup>43</sup> Letter from Brig General TJ Grant to the Afghan Independent Human Rights Commission, Kandahar Office, 20 February 2007.

<sup>44</sup> 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, para. 4.1 and para 5.1

In addition, Article 38 of Afghanistan's Prison law (2005) allows a number of institutions, including the AIHRC, access to some detention centres without prior notice to the Ministry of Justice. However, the law is not applicable to NDS detention centres. In response, the ICRC and the AIHRC have concluded bilateral agreements with the NDS allowing for monitoring of NDS detention centres.<sup>45</sup>

In practice, however, even the monitoring safeguards contained in such agreements are not met. The AIHRC has indicated that it has often been denied access to detention centres run by the NDS, and lacks the resources and capacity to carry out extensive monitoring. An AIHRC Commissioner stated that "the AIHRC has monitored NDS detention centres, but we had to contact them in advance. It is not free access, although recently we received a letter signed by the head of NDS to provide access to AIHRC's monitors, but this is not happening at the moment... in Kandahar, we have not [been] provided [with] full access and still we don't feel confident about their full cooperation."<sup>46</sup>

While access by AIHRC monitors to NDS detention centres has improved, the issue of whether or not they are able to visit without prior notice differs depending on the prisons and the detainees they are trying to visit. There are reportedly considerable differences between AIHRC's access in Kabul compared with NDS detention centres in the provinces. Furthermore, insecurity in some areas of the country, particularly the south, restrict the commission's access to Helmand, Uruzgan and Zabul provinces.

AIHRC staff members have reportedly expressed concern that they do not have the capacity to respond the volume of detention cases they seek to monitor.<sup>47</sup> In response the Canadian government has recently made a special financial contribution to the AIHRC to build the capacity of the commission's national monitoring section.

The role of the United Nations Assistance Mission in Afghanistan (UNAMA) in monitoring is also significant given its UN mandate "to continue to work towards the establishment of a fair and transparent justice system, including the reconstruction and reform of the correctional system" and more specifically "to continue to contribute to human rights protection and promotion, including monitoring of the situation of civilians in armed conflict."<sup>48</sup>

UNAMA is one of the organisations who have raised serious concerns about the treatment of detainees by the NDS. UNAMA has initiated at least one programme

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<sup>45</sup> Articles 13 and 30, Law on Prisons and Detention Centers, Ministry of Justice, 31 May 2005.

<sup>46</sup> Email exchange between Amnesty International and AIHRC, 14 March 2007 and 25 March 2007.

<sup>47</sup> Information and quote from Graeme Smith, 'We Can't Monitor these People', *The Globe and Mail*, 24 April 2007.

<sup>48</sup> Security Council resolution 1746 (2007) paras. 4 and 13.



with the NDS, alongside the AIHRC to provide human rights training to NDS officers.<sup>49</sup> Given the mandate of UNAMA and its resources it is appropriate for UNAMA to expand its support for the AIHRC in gaining access to NDS detention centres.

The ICRC also monitors Afghan detention centres, including those run by the NDS and, when relevant, informs the Afghan government about its findings. However as noted above it has not been possible for the ICRC to monitor all NDS prisons, or all prisons managed by the Ministry of Justice because of unstable security conditions.<sup>50</sup>

AI is concerned that provisions in the MoUs governing monitoring are only implemented in part. More fundamentally, the organisation emphasises that - even where carried out by a professional, independent and dedicated organization - visits to places of detention, while constituting a crucial element in the prevention of torture and other ill-treatment, are far from being sufficient on their own. These concerns are reinforced by the experiences of the ICRC in Iraq and Guantánamo Bay – and indeed in relation to Bagram in Afghanistan, where torture and other ill-treatment were inflicted extensively despite ICRC's regular visits, monitoring of reported abuse and relaying of concerns.<sup>51</sup>

In this regard, AI recognizes that the ICRC does not claim that visits by its staff to places of detention are all that are needed to safeguard against torture and other ill-treatment, and have refused to take part in monitoring "diplomatic assurances" because of their discriminatory nature, as seen above.<sup>52</sup>

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<sup>49</sup> "The situation in Afghanistan and its implications for international peace and security" Report of the UN Secretary-General, S/2007/152, para. 41, 15 March 2007. "A joint AIHRC and UNAMA arbitrary detention monitoring campaign began in October 2006 throughout Afghanistan with the cooperation of the Ministries of Justice and the Interior and the Office of the Attorney General. Initial findings indicated that in a significant proportion of cases pre-trial detention timelines had been breached, suspects had not been provided with defence counsel, and ill-treatment and torture had been used to force confessions. Access to the National Directorate of Security and Ministry of the Interior detention facilities remained problematic for the Afghan Independent Human Rights Commission and UNAMA."

<sup>50</sup> The ICRC has not for instance been able to monitor 11 of the 33 provincial prisons administered through the ministry of Justice because of insecurity. The Provincial Prisons of Afghanistan: Technical assessment and recommendations regarding the state of the premises and of the water and sanitation infrastructure, follow-up report, ICRC March 2007

<sup>51</sup> "On 29 March 2005, the International Committee of the Red Cross (ICRC), the only international organization with access to detainees held by the USA in Guantánamo and Afghanistan revealed that, more than three years into the "war on terror", it remained concerned that its "observations regarding certain aspects of the conditions of detention and treatment of detainees in Bagram and Guantánamo have not yet been adequately addressed".(300) It has characterized these issues as "significant problems".(301) For its part, Amnesty International is concerned that in the "war on terror" the USA has systematically violated the rights of those it has taken into custody, including the right of all detainees to be treated with respect for their human dignity and to be free from cruel, inhuman or degrading treatment. In some cases, the treatment alleged has amounted to torture." *Guantánamo and beyond: The continuing pursuit of unchecked executive power* p.83 section 12, AMR 51/063/2005

<sup>52</sup> The ICRC has developed a set of pre-conditions without which it would refuse to visit detainees. One of these is "to see all prisoners who come within its mandate and to have access to all places at which they are held." See ICRC website, <http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList265/929018E28243CCB0C1256B6600600D8C>, accessed 28 October 2005.

AI remains concerned that provisions for monitoring within the MoUs, as with other forms of diplomatic assurance regarding torture and other ill-treatment, often appear to be overstated, mistaken or misunderstood. The organization believes that where torture and other ill-treatment is occurring, as in the Afghan detention system, occasional or periodic visits from monitors will not be able to provide sufficient protection on their own.

AI has long advocated for a 12 point plan in order to prevent torture and other ill-treatment (included in appendix) and believes that monitoring can play a constructive role, but the limitations of monitoring as a protective measure should be recognised.

### **4.3. The need for redress**

While the MoUs ensure access to detainees, in differing degrees, by organizations such as the AIHRC, ICRC and the UN, they include no means of redress in cases where torture or other ill-treatment do take place. Under Article 12 of the UN Convention against Torture, every state party must “ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.”<sup>53</sup>

Of the five countries with agreements regarding detainee transfer, only the second Canadian agreement specifies provisions for investigation into allegations of torture or other ill-treatment.<sup>54</sup> However AI fears that investigations by the Canadian government into allegations may not have been “competent” and “impartial”.<sup>55</sup>

Under both the International Convention on Civil and Political Rights (ICCPR) and the UN Convention against Torture, victims of torture and other ill-treatment have the right to “effective remedy” or “redress”, including “fair and adequate

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<sup>53</sup> In its conclusions and recommendations on the UK in 2004 the UN Committee against Torture addressed the issue of the extra-territorial application of the UN Convention against Torture. The Committee expressed concern over the UK’s “limited acceptance of the applicability of the Convention to the actions of its forces abroad, in particular its explanation that “those parts of the Convention which are applicable only in respect of territory under the jurisdiction of a State party cannot be applicable in relation to actions of the United Kingdom in Afghanistan and Iraq”; The Committee rejected this approach, observing that “the Convention protections extend to all territories under the jurisdiction of a State party and considers that this principle includes all areas under the *de facto* effective control of the State party’s authorities”. See UN Committee Against Torture, Conclusions and Recommendations: United Kingdom of Great Britain and Northern Ireland - Dependent Territories, UN Doc. CAT/C/CR/33/3, 10 December 2004, para. 4(b).

<sup>54</sup> Arrangement for the Transfer of Detainees between the Canadian Forces and the Ministry of the Islamic Republic of Afghanistan, para 10, 3 May 2007.

<sup>55</sup> Under cross examination conducted 11 July, 2007 in Federal Court file number T-324-07, Scott Proudfoot from the Canadian Department of Foreign Affairs and International Trade, was only able to say that it was “their impression” that the investigations were “thorough and serious and independent”.

compensation.”<sup>56</sup> The right to redress, or reparations, for victims of human rights violations includes the following components:

- **Restitution**, for instance release (of detainees and prisoners), restoration of legal rights and return of property;
- **Compensation**, including for physical or mental harm, lost opportunities, harm to reputation or dignity and legal and medical costs
- **Rehabilitation**, including medical and psychological care, legal and social services, and social reintegration
- **Satisfaction**, including cessation of continued violations, disclosure of the truth (without causing further harm), search for victims who have been forcibly disappeared or killed, and an apology for the wrong done.
- **Guarantees of non-repetition**, including steps to ensure effective civilian control of military and security forces and that all civilian and military proceedings abide by international standards of due process, fairness and impartiality, and strengthening the independence of the judiciary

None of these are specifically referred to in the MoUs.

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<sup>56</sup> See Articles 2(3)(a) of the ICCPR and 14(1) of the UN Convention against Torture, respectively.

## 5. Transfers and torture

***"We cannot rule out that torture is going on"<sup>57</sup>***

The following section addresses a number of issues raised by ISAF's detainee transfer policies. Concerns relate to a range of situations including when transferred detainees have allegedly been tortured by the Afghan authorities; when governments are concerned that transferred detainees may have been tortured; and when governments, having exposed transferred detainees to the risk of torture and other ill-treatment cannot track or trace them.

In examining ISAF detention procedures, Amnesty International has focused particularly on the ISAF practice of handing over the majority of detainees to the NDS. While recognising that a minority of detainees are transferred to other Afghan agencies, AI has particular concerns about the frequency and scope of torture and other ill-treatment perpetrated by NDS personnel, as illustrated by the three cases below.

Additionally, to demonstrate that torture, other ill-treatment, and arbitrary detention of persons, does not relate only to detainees arrested and transferred by international forces, concerns relating to arrests carried out solely by the NDS are also highlighted.

### 5.1. Detainees handed over by foreign forces

Five ISAF states have MoUs with the Afghan Government regarding detainee transfers. A further four are actively seeking an MoU.<sup>58</sup> Of the remaining 14 ISAF states with more than 100 personnel in Afghanistan, four have confirmed to AI that they do not have an MoU, while the remainder refused to comment or were unable to verify the existence of an MoU (see table below for a full list of countries).<sup>59</sup>

Individual governments have responded in different ways to the issue of detainee transfers. These have included downplaying the number of transfers that occur, either by not revealing the true extent of their transfers (i.e. Canada), not keeping an accurate record themselves (i.e. Belgium and Norway); by failing to take account of the large number of people transferred in the field – who are never

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<sup>57</sup> Liv Monica Stubholt, Ministry of Foreign Affairs interviewed by the Norwegian News Agency NTB, 27 July 2007.

<sup>58</sup> Two countries, Estonia and Australia, have MoUs with a second ISAF state, the UK and Netherlands respectively. Individuals detained by Estonia and Australia are handed over to the respective ISAF force before being handed over to the Afghan Government.

<sup>59</sup> Information regarding the transfer of detainees from US forces is also not considered here due to complications with the mandate and operating procedures of Operation Enduring Freedom.

recorded as having been in the custody of international forces (this mainly includes forces involved in heavy fighting such as the British, Canadian and Dutch forces)<sup>60</sup> and finally some governments have struggled with providing adequate independent monitoring of the detainees they have transferred (particularly the British and the Dutch).

<b>Table 1: ISAF states and detainee transfers<sup>61</sup></b>	
<b>Status of MoU</b>	<b>Countries</b>
Governments with signed MoUs or agreements with the Afghan government regarding the transfer of detainees	Canada, Denmark, the Netherlands, Norway, UK
Governments pursuing an MoU or agreement with the Afghan government regarding the transfer of detainees	Belgium, France, Germany, Sweden
Governments who have an agreement with a second ISAF state regarding the transfer of detainees. Detainees are then transferred from the second ISAF state (the UK or Dutch) to the Afghan authorities as per their MoUs.	Estonia (with the UK), Australia (with the Netherlands)
Governments with no agreement or MoU	Lithuania, Poland, Italy, Portugal, Czech Republic
Governments unable to verify the presence of an MoU	Bulgaria, Macedonia

AI is concerned that the number of detainees transferred, and thereby placed at grave risk of torture and other ill-treatment, may be significantly higher than formerly reported by ISAF states. The organization believes that incomplete records of arrest and transfers are reflective of broader weaknesses in comprehensive monitoring of detainees following their transfer.

<sup>60</sup> In-field transfers occur when International Forces are on joint operations with Afghan institutions. The Afghan institution could be the ANA, ANP or NDS. In the course of joint ISAF and Afghan security forces operations, if people are arrested they can be automatically handed over the Afghan forces even if the international forces are directly involved in the arrest. A transfer of this type was shown in a television documentary entitled "Fighting the Taleban" a documentary by Sean Langan for *Dispatches*, broadcast in the UK on Channel 4 on 8 January 2007.

<sup>61</sup> Please note that the information in this table excludes the US as well as countries that have less than 100 troops in Afghanistan. See [www.nato.int/isaf/](http://www.nato.int/isaf/) for information on troop strength. The countries excluded are; Albania, Austria, Azerbaijan, Finland, Ireland, Latvia, Luxembourg, Iceland, Slovakia, Slovenia and Switzerland.

- **Torture of detainees transferred by Canadian forces**

In April 2007, the Canadian newspaper *Globe and Mail* published allegations of torture and other ill-treatment of Afghan detainees by Afghan security personnel including the NDS, after they had been detained by the Canadian military and handed over to the Afghan authorities. Some interviewees who had been captured over the previous 15 months described how:

*“...they were whipped with electrical cables, usually a bundle of wires about the length of an arm. Some said the whipping was so painful that they fell unconscious. Interrogators also jammed cloth between the teeth of some detainees, who described hearing the sound of a hand-crank generator and feeling the hot flush of electricity coursing through their muscles, seizing them with spasms. Another man said the police hung him by his ankles for eight days of beating. Still another said he panicked as interrogators put a plastic bag over his head and squeezed his windpipe. Torturers also used cold as a weapon, according to detainees who complained of being stripped half-naked and forced to stand through winter nights when temperatures in Kandahar drop below freezing.”<sup>62</sup>*

The Afghan Independent Human Rights Commission (AIHRC) is reported to have confirmed key elements of three of the cases published in the *Globe and Mail* report:

- *“Gul Mohammed, 25, a farmer, said he was captured by Canadians while working the fields west of Kandahar city. The Canadian troops handed him over to Afghan soldiers, starting what he described as a bloody six-month odyssey at the hands of Afghan interrogators from the military, police and intelligence services. He said they beat him with rifle butts, deprived him of sleep, shocked him with electrical probes, and thrashed him with bundles of cables.”*
- *“Sherin, 25, a driver, said he was detained at a checkpoint operated by Canadian and Afghan troops in a district north of Kandahar city. A small man with a quiet voice, he gripped his elbows with both hands and rocked back and forth while describing how he was interrogated by a man who identified himself as a Canadian, before he was thrown in the back of a pickup truck and taken to NDS headquarters. He spent one and a half months in NDS custody, he said, where interrogators punched his face, pulled his beard, and beat him with bundles of electrical cables for 60 strokes at a time.”*

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<sup>62</sup> Graeme Smith, “From Canadian custody into cruel hands”, *Globe and Mail*, 23 April, 2007. For a further account of torture see: Graeme Smith, “Personal Account: A story of torture”, *Globe and Mail*, 24 April 2007.

- “Abdul Wali, 23, a tailor, said he was arrested by the Canadians and was treated politely until they handed him over to the Afghan soldiers, who beat him. He said the beatings were constant, except for pauses when Canadian soldiers visited the outpost. Worse thrashings came later, he said, at the hands of the police and NDS.”<sup>63</sup>

Analysis of interviews with 15 individuals held in Afghan custody, but who were originally captured by Canadian forces, reveals that 10 were transferred to the NDS, either directly or through the Afghan National Army (ANA) or Afghan National Police (ANP). Of the 10 detainees held in NDS custody, six described torture and other forms of ill-treatment.<sup>64</sup> Canadian officials themselves have stated they have received at least six first-hand reports of torture.<sup>65</sup>

The Canadian government has continued to state that more than 40 individuals have been transferred.<sup>66</sup> However, AI believes that the number of transfers may be as high as 200, and that this figure does not include many of the immediate transfers which happen in the course of military operations in-field.

#### • **Losing track of transferred detainees**

AI is also concerned that other ISAF states have been unable or unwilling to maintain an accurate record of the number of detainees transferred to Afghan authorities or their subsequent whereabouts.

The Norwegian government, for example, appeared unable over the course of a year to establish and disclose how many detainees its forces had transferred. Subsequently, in October 2007, the Norwegian government clarified that five detainees had been handed over since the signing of an MoU with the Afghan Government in October 2006. However it is still to establish how many people were transferred prior to the MoU, or to account for their whereabouts and conditions.<sup>67</sup>

Uncertainty over the current whereabouts and well-being of the five detainees identified as have been transferred after MoUs agreement has continued. The Norwegian Defence Minister Anne-Grete Strøm-Erichsen said that three of the five people handed over were since released, not due to proving their innocence, but by buying their freedom from their captors.<sup>68</sup>

<sup>63</sup> Graeme Smith, “From Canadian custody into cruel hands”, *Globe and Mail*, 23 April, 2007.

<sup>64</sup> Information regarding interviews from a confidential source in Afghanistan, July 2007.

<sup>65</sup> “Six claims of torture from detainees: Minister”, Canada Press 8 June 2007 Canadian Press? [http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20070608/detainee\\_allegations\\_070608/20070608/](http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20070608/detainee_allegations_070608/20070608/)

<sup>66</sup> Paragraph 52 of the Affidavit of Colonel Steven Noonan, Canadian Forces, sworn May 1, 2007, in relation to Federal Court of Canada file number T-324-07, and transcripts of cross examination conducted May 2, 2007.

<sup>67</sup> Norske spesialsoldater overleverte fem fanger (“Norwegian special force soldiers handed over five prisoners”), *Dagsavisen*, 13 October 2007.

<sup>68</sup> Norske spesialsoldater overleverte fem fanger (“Norwegian special force soldiers handed over five prisoners”), *Dagsavisen*, 13 October 2007.

In a further admission of the failure of MoUs, the Defence Minister said: "I have no guarantee that the detainees have not been tortured, other than having signed the Memorandum of Understanding."<sup>69</sup>

As described above, both before and after signing an MoU, the Norwegian government appeared unable to confirm the whereabouts and condition of detainees. This has reinforced AI's concern that such MoUs have failed to provide any transparency in the transfer process, or any protection for the individuals' concerned.

In April 2007, the Norwegian embassy in Kabul sent an email to the Norwegian Ministry of Foreign Affairs that raised concerns about "the intelligence service (NDS) who allegedly have ill-treated and tortured several prisoners transferred by international military forces in Afghanistan". As well as highlighting their own concerns, they noted the difficulty in applying remedial pressure on the NDS.<sup>70</sup>

The Ministry announced that Norway would establish what happened to the prisoners handed over by Norwegian soldiers, and whether the MoU had been breached.<sup>71</sup> If detainees had been tortured, the Ministry told another newspaper, the ultimate consequence might be to "stop transfers" of prisoners.<sup>72</sup>

Similarly, the Belgian government appears to have lost track of the single detainee known to have been transferred to the Afghan authorities by Belgian forces. Reports received by Belgian Ministry of Defence state that an individual was arrested by Belgian forces at Kabul international airport on suspicion of driving a fuel tanker intended as a vehicle-borne improvised explosive device or car bomb on 18 April 2007.

The Belgian military has confirmed that paperwork for the transfer of the detainee to the NDS was completed and that they were transferred, but they do not know where the individual is being held.<sup>73</sup> AI has requested clarification from the Belgian authorities regarding this issue. At present Belgium is reported to be seeking to agree an MoU with the Afghan authorities, but AI fears that such an agreement would appear to offer little difference to the capacity of the Belgian government to

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<sup>69</sup> Norske spesialsoldater overleverte fem fanger ("Norwegian special force soldiers handed over five prisoners"), *Dagsavisen*, 13 October 2007.

<sup>70</sup> Email from Andreas Lovold, Norwegian Embassy, Kabul to Norwegian Foreign Ministry, Oslo, written 2 May 2007.

<sup>71</sup> Liv Monica Stubholt, Norwegian Ministry of Foreign Affairs, interviewed by the Norwegian News Agency NTB, 27 July 2007.

<sup>72</sup> UD vil sjekke torturpåstander ("Ministry of Foreign Affairs will investigate allegations of torture"), *Klassekampen*, 28 July 2007

<sup>73</sup> Email exchange between AI Belgium (Francophone) and the Belgian Ministry of Defence, 31 August and 26 September 2007.



make clear, open records of incidents and to follow them up with the Afghan government.

- **The need for independent monitoring**

Challenges in accurately recording the numbers of those arrested by ISAF forces and effectively monitoring their subsequent treatment after transfer to Afghan authorities are particularly evident in the context of continuing military operations in Helmand and Uruzgan provinces. The security situation in these provinces remains unstable, with often heavy fighting involving British and Dutch ISAF contingents, Afghan forces, the Taliban and other armed groups.

The British and Dutch governments have informed AI that they have transferred detainees to Afghan authorities in these provinces. Both governments have stated that they try to ensure that their own officials monitor the detainees, in the British case on a monthly basis.<sup>74</sup> However, as outlined later in the report, because of the prevailing security situation, independent monitoring of transferred detainees by the AIHRC and the ICRC is almost impossible. In this situation, while ISAF states have carried out occasional monitoring of transferred detainees, AI remains concerned that this cannot substitute for regular, independent monitoring.

According to the UK Foreign and Commonwealth Office (FCO), the UK has detained 127 people since September 2006. These are categorized into two groups. In the first group, the initial 51 people were detained before April 2007.<sup>75</sup> Of these 51, 27 were released by UK forces and 24 transferred to the NDS in Helmand province. All but three detainees have since been released by the NDS. Of the remaining three, two detainees have been transferred to NDS in Kandahar and one detainee, transferred by the UK forces to NDS custody on 22 April 2007, remains in NDS custody in Helmand.

The second group consists of a further 76 people detained by UK forces since April 2007, of whom 18 remain in NDS custody. In total 21 people remain in NDS custody 18 in Helmand, 1 in Kandahar and 2 in Kabul.<sup>76</sup>

According to the Dutch government, by August 2007 Dutch forces had detained 59 people. Amongst these are 10 individuals that were arrested by Australian units but for whom the Dutch have taken over responsibility (as provided for in the MoU between the Dutch and Australian forces). The majority have been

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<sup>74</sup> Email exchange and phone conversation with UK Foreign and Commonwealth Office (FCO) official, 6 September and 10 September 2007.

<sup>75</sup> Interview with FCO official in London 26 April 2007, and email exchange with British Embassy (Afghanistan) official, 1 May 2007.

<sup>76</sup> Email exchange and phone conversation with FCO official, 6 September and 10 September 2007.

released shortly after their arrest. Eleven were handed over to the NDS and most of those were released shortly thereafter.<sup>77</sup>

Three individuals were arrested on 29 January 2007 by Dutch forces and handed over to the NDS in Kabul on 4 February. The Dutch Ambassador visited these three detainees in Kabul on 2 March and found them to be in good health. One of them was released by the NDS Security Court in April, and the two others were sentenced to six years' imprisonment for armed opposition and possession of illegal weapons.

Another group of six detainees were handed over to the NDS in Kabul on 15 July by Dutch forces. They were visited by a representative of the Dutch embassy who said they were 'in reasonable condition given the circumstances'. On 14 August two others were handed over to the NDS in Kabul. The total number of people arrested by the Dutch or Australians that were still in Afghan detention by 14 August is 10.<sup>78</sup>

It is encouraging that both the British and Dutch governments have kept records of the detainees they have transferred, and they have also been able to conduct some monitoring themselves. The UK has tried to ensure that detainees are monitored on a monthly basis and have a set list of criteria for which to carry out the monitoring. The UK has also been able to meet detainees without the presence of prison guards.<sup>79</sup>

UK officials have told AI that while the main NDS facility in Kabul is "at its capacity" they are generally satisfied with the cleanliness and amenities of the detention facilities.<sup>80</sup> While the UK authorities prior to September 2007 stated that they were unaware of any evidence of transferred detainees being abused, officials informed AI that a first allegation of torture or other ill-treatment from a transferred detainee had been received on 25 September 2007. The UK government assured AI that the complaint is currently being investigated and that the ICRC and AIHRC had been informed.<sup>81</sup>

The Dutch government has sought to overcome some of the barriers to effective monitoring by insisting that detainees are transferred to Kabul where they can be more easily monitored. In a letter to the Dutch Parliament the Dutch government, referring to the three detainees that were arrested on 29 January, said that "...to the best information of the government the Afghan-Dutch MOU...is

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<sup>77</sup> Letter from the Dutch Minister of Foreign Affairs, Minister of Defence and Minister of Development Cooperation to the Dutch Parliament of 24 August 2007

<sup>78</sup> Information from letters from the Dutch Minister of Foreign Affairs, Minister of Defence and Minister of Development Cooperation to the Dutch Parliament of 20 June and 24 August 2007.

<sup>79</sup> Email exchange and phone conversation with FCO official, 24 September 2007.

<sup>80</sup> Email exchange and phone conversation with FCO official, 6 September and 10 September 2007.

<sup>81</sup> Email exchange and phone conversation with FCO official, 2 October 2007.

respected by the Afghan authorities.<sup>82</sup> However, despite the detainees being in Kabul it is unclear to AI if independent monitors have been able to access these detainees.

Critically, because most of the 31 people held by the NDS after being handed over by British and Dutch forces are in areas not accessible to independent monitors, it is not possible to assert with confidence that they are not at risk of torture and other ill-treatment. In light of the reports of abuse by the NDS outlined in more detail below, AI believes that access by independent monitors constitutes an essential part of an effective monitoring regime, and that, when security conditions threaten to prevent such access, ISAF should take steps facilitate the work of independent monitors.

While AI notes that procedural arrangements provided for in the British and Dutch MoUs appear to be functioning to a greater degree than those of other ISAF states, as described above the organization asserts that MoUs do not absolve the states of their obligations to prevent torture and other ill-treatment.

- **In-field transfers**

Alongside the transfer of detainees as regulated under MoUs or other procedural arrangements, ISAF states are also reportedly transferring detainees over to Afghan custody in-field. This is when international forces are on joint operations with Afghan forces, which could include the ANA, ANP or the NDS, and the individuals are transferred on the spot to Afghan forces.

AI is concerned that such in-field transfers are not subject to procedural regulations and that the subsequent risk of grave human rights abuse is therefore higher. In one illustrative incident, shown in a television documentary broadcast in the UK, British forces were shown handing over a captured Taleban fighter to the ANA in Helmand.<sup>83</sup> In the documentary, the British soldiers appeared convinced that the detainee would be abused when handed over to the ANA, while a number of Afghan soldiers in the film expressed their wish to kill the detainee.

It is believed that hundreds of individuals may have been transferred in-field - with most reportedly occurring in southern Afghanistan and primarily conducted by Australian, British, Canadian, Dutch, and US forces. However the full extent of in-field transfers remains unclear, as does the nature of the treatment of such persons after they are handed over to Afghan forces. Another illustrative case, in which Canadian forces reportedly intervened to stop the summary execution of a detainee they had

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<sup>82</sup> Letter from the Dutch minister of Foreign Affairs, Minister of Defence and Minister of Development Cooperation to Dutch Parliament of 20 June 2007.

<sup>83</sup> "Fighting the Taleban" a documentary by Sean Langan for *Dispatches*, broadcast in the UK on Channel 4 on 8 January 2007.

handed over to the ANA in-field has reinforced AI's grave concerns about this practice.<sup>84</sup>

AI is concerned that ISAF states are failing to effectively address the grave risk of abuse and summary executions that individuals captured during joint Afghan and international operations face from Afghan security personnel in contexts where the international forces are exercising operational control.

## **5.2. Concerns about the NDS**

Torture and other ill-treatment by the NDS, often facilitated by prolonged periods of arbitrary detention of individuals held incommunicado, is not limited to those who have been handed over by international forces present in the country. Amnesty International believes that there are wider patterns of arbitrary detention and abuse of detainees by the NDS.

Conscious of such concerns, UNAMA initiated a joint AIHRC-UNAMA arbitrary detention monitoring programme in October 2006 covering the NDS. A report by the UN Secretary-General on 15 March 2007 noted that:

*"Initial findings indicated that in a significant proportion of cases pre-trial detention timelines had been breached, suspects had not been provided with defence counsel, and ill-treatment and torture had been used to force confessions. Access to the National Directorate of Security and Ministry of the Interior detention facilities remained problematic for the Afghan Independent Human Rights Commission and UNAMA."<sup>85</sup>*

The Secretary General's subsequent report, issued on 21 September 2007, noted that:

*"[t]he Government of Afghanistan must investigate allegations of arbitrary detentions, inhumane treatment and torture of detainees by the authorities, and in particular by the National Directorate for Security."<sup>86</sup>*

The Afghan government itself has also recognised the need for NDS reform. The government's National Development Strategy includes a benchmark to ensure "reforms...strengthen the professionalism, credibility and integrity of key institutions of the justice system [including the] NDS".<sup>87</sup>

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<sup>84</sup> "Cdn. troops battle Taliban in 'The main event'", Canadian TV news report, 29 May 2006.

<sup>85</sup> "The situation in Afghanistan and its implications for international peace and security" Report of the UN Secretary-General, S/2007/152, para. 41, 15 March 2007.

<sup>86</sup> "The situation in Afghanistan and its implications for international peace and security" report of the Secretary-General, para 84, S/2007/555, 21 September 2007

<sup>87</sup> Taken from Rule of Law and Justice Sector Benchmarks, Interim Afghanistan National Development Strategy, Islamic Republic of Afghanistan, December 2005

Over the past two years, Amnesty International has received repeated reports of torture and other ill-treatment of detainees by the NDS from alleged victims and their relatives, as well as a range of organizations including UN agencies. The organization is gravely concerned the absence of effective investigations and prosecution of those responsible, a culture of impunity persists with victims having little hope of justice or redress. The following testimony provides an illustrative example.

**AB,<sup>88</sup> who was detained after an NDS raid in Kandahar province in mid-2005, gave the following statement to Amnesty International in December 2005:**

*“We were taken to the NDS compound in Kandahar... [The room where they beat me] was a big concrete room with a door and small window. It had two big tables and a hanger or hook on the ceiling and the walls were covered with blood... I was beaten on my back and especially my kidneys with a metal cable... After some 50-60 cable blows, I fell unconscious but then when I came to they were still beating me. I didn’t know how long I had been out... [Later] a metal bar was placed under my chained arms and knees and I was hung from the hook on the ceiling and they continued to beat me. I was hung in this position for maybe one hour and lost consciousness. They then put me on the ground and water was thrown on me then I was hung back up again. This may have happened six times but I cannot remember. It could have been 20 or 25 times...”*

*Around 12 or 13 men beat me on the first night of my detention. There was never any questioning and I never saw a prosecutor or judge while in NDS custody. For 10 days and nights after the beating I could not move. After 10 nights I was able to change my clothes and take a bath... After 20-25 days they brought me to a doctor. He gave me some tablets but I didn’t know what they were. Other than that, I received no medical care. I was ‘kept’ [for] two months.”*

AB’s family has not received any assistance or compensation from the government and are now reportedly living on charity from other family members. In an indication of the disillusionment caused by the lack of transparency and apparent impunity shielding suspected perpetrators from prosecution, the family did not lodge a formal complaint about AB’s treatment. They believe that complaints “go nowhere”.

The organization is also concerned at continuing patterns of arbitrary incommunicado detention by the NDS, which can provide the facilitating context for torture or other ill-treatment. Those at risk include journalists and others suspected of opposing the authorities or perceived as critical of government policy.

Kamran Mir Hazar, a journalist for Radio Salaam Watandar and editor of the internet news service Kabul Press, was arrested twice in two months in 2007. Initially arrested without a warrant on 4 July and held incommunicado, he was released four

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<sup>88</sup> AB’s real name is withheld for security reasons.

days later without charge, after civil society actors had made urgent representations to the authorities.<sup>89</sup>

He was arrested again on 9 August 2007 and released after nine hours but “was threatened with being arrested again if he criticized the government in his articles.”<sup>90</sup> According to sources in Kabul, during Kamran’s detention the NDS denied that he had been arrested by them or was in their custody.

In another case Rahmatullah Hanefi, director of a hospital run by the Italian non-governmental organization ‘Emergency’ in Helmand province, was detained by the NDS on 20 March 2007 in Lashkar Gah city. Rahmatullah Hanefi worked as a messenger in the negotiations between the Taleban and the Afghan and Italian governments that led to the release of kidnapped Italian journalist Daniele Mastrogiacomo on 19 March 2007. He was detained incommunicado for almost two months and kept in solitary confinement.

Unnamed Afghan authorities in Kabul confirmed that because he had been charged with an offence against national security he would not be automatically granted a lawyer for his defence.<sup>91</sup> Rahmatullah Hanefi was acquitted of all charges on 16 June and released on 19 June, exactly three months after being detained.

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<sup>89</sup> International Federation of Journalists press release 24 July 2007, available at <http://www.ifex.org/alerts/content/view/full/85067>

<sup>90</sup> Reporters sans frontières, Website editor freed after being held for nine hours in Afghan “Guantanamo”, 10 August 2007, available at [http://www.rsf.org/article.php3?id\\_article=22847](http://www.rsf.org/article.php3?id_article=22847)

<sup>91</sup> “Emergency Mediator, charged with homicide”, *Corriere della Sera*, 23 April 2007.

## **6. Afghan detention structures: the need for reform**

Although progress in reform of the security and justice sectors has been made over the past five years, Afghanistan's security forces and justice system continue to suffer from severe and systemic flaws.<sup>92</sup>

In a briefing to the UN Security Council on 19 July 2002, the UN Special Representative of the Secretary-General (SRSG) for Afghanistan noted that "the real key to the restoration of security lies in the creation of a national army and a national police force, along with a strong demobilization programme. Equally important will be the proposed reform of the National Directorate of Security (NDS)".<sup>93</sup>

However, AI is concerned that the reform of the NDS appears not to have been a priority within international efforts to reform the justice sector, and that long-standing patterns of abuse by NDS personnel has not been adequately addressed.

In order to highlight the linkages between the NDS and the broader justice sector – and why Amnesty International believes ISAF states should be urgently address concerns about detention practices across the sector, a brief description of the context within which prisons and the NDS operate is included below.

### **6.1. Institutional framework**

The institutional framework of the Afghan justice sector includes the Ministry of Justice that has an oversight function for law reform, and administers district and provincial detention centres including Pul-i Charkhi prison, Afghanistan's main detention centre located east of Kabul.

However, the Ministry of Justice does not administer the US-funded high-security wing of the Pul-i Charkhi prison, which is holding Guantánamo detainees handed over by the US to Afghan authorities.<sup>94</sup> It remains unclear if this new wing is administered by the NDS or the Ministry of Defence.

The police lock-ups administered by the Ministry of Interior and the detention centres of the NDS are also outside the Ministry of Justice's remit.

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<sup>92</sup> Report of the Secretary-General, The situation in Afghanistan and its implications for peace and security, UN Doc. A/61/326-S/2006/727 (2006), para. 51.

<sup>93</sup> <http://www.un.org/News/dh/latest/afghan/brahimi-sc-july19.htm> last visited 3 May 2007

<sup>94</sup> The wing is currently believed to hold around 100 Afghans, many of whom have been returned from Guantánamo Bay.

A technical assessment of provincial prisons in Afghanistan issued by the ICRC, in cooperation with the Ministry of Justice and the Central Prisons Department, in 2005, showed that cells are often overcrowded and in poor condition; the state of kitchens, water supply systems and sanitary facilities often poor; and space for access to fresh air, such as a courtyard, is frequently limited.<sup>95</sup>

The Attorney General's office (Public Prosecutor) and the Judiciary should in principle be represented in all districts and all provinces, with the Attorney General's office and the Supreme Court in Kabul theoretically exercising an oversight function of detention. However, as highlighted by the former UN Independent Expert on the Situation of Human Rights in Afghanistan, such "rule of law institutions currently lack efficiency, capacity and nationwide coverage. They are often viewed as susceptible to corruption and have perceived limited legitimacy within much of the country."

Despite efforts over recent years to promote better coherence within the justice and detention systems, particularly through the adoption of key laws including the Interim Criminal Procedure Code, the Police Law, the Prison Law and the Courts' Law, knowledge of this legislation, and its practical implementation, is reported to remain limited amongst government officials.<sup>96</sup>

Amnesty International is also concerned that these laws do not apply equally to all security and justice sector institutions. The Prison Law (2005) does not, for example, apply to NDS detention centres in which many transferred detainees are held for both short and extended periods. In addition, aware of reports of inadequate conditions in detention facilities administered by the Ministry of Justice, the organization fears that conditions in the NDS's detention facilities are likely to be no better.

## **6.2. The NDS**

While most Afghan security and justice sector agencies remain weak and are prone to improper influence and patterns of misconduct, the NDS<sup>97</sup> is regarded as the least transparent of these institutions. AI is concerned that the NDS's acute lack of transparency is a contributing factor in the impunity enjoyed by its operatives. As noted above, reported patterns of NDS abuses remain difficult to monitor effectively

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<sup>95</sup> ICRC, *The provincial prisons of Afghanistan: Technical assessment and recommendations regarding the state of the premises and of the water and sanitation infrastructure*, Kabul, December 2005

<sup>96</sup> See M. Cherif Bassiouni and Daniel Rothenberg, "An Assessment of Justice Sector and Rule of Law Reform in Afghanistan and the Need for a Comprehensive Plan", p 10, Presented at the Conference on the Rule of Law in Afghanistan held in Rome on 2 – 3 July 2007. Other documentation relating to the conference can be found at <http://www.rolafghanistan.esteri.it/ConferenceRol>

<sup>97</sup> The name of Afghanistan's security agency has changed several times, it was initially called AGSA (Department for Safeguarding the Interests of Afghanistan) and was then changed to KAM (Workers' Intelligence Department). In the 1980s it became KhAD (State Information Services). KhAD was a much larger organisation than its predecessors. The current name is the National Security Directorate which has been in use since 2001. For more information on this evolution, see Kakar, M. Hassan, *Afghanistan: The Soviet Invasion and the Afghan Response, 1979-1982*. Berkeley: University of California Press, c1995 1995. <http://ark.cdlib.org/ark:/13030/ft7b69p12h/>



and victims of human rights violations perpetrated by NDS personnel have little hope of accessing redress.

The intelligence service was established during the Presidency of Daoud Khan in the 1970s and was reformed after the Soviet invasion in 1979 when, having received significant assistance from the Soviet intelligence agency the KGB, it was renamed Khadamat-e Etela'at-e Dawlati KhAD (State Information Service). In 2001 the organization was renamed the National Directorate of Security.<sup>98</sup> The NDS's first director general after the fall of the Taleban was Mohammad Arif Sarwari,<sup>99</sup> who was replaced by Amrullah Saleh in February 2004.<sup>100</sup>

The NDS is one of the largest security sector agencies in Afghanistan. With its headquarters in Kabul, the NDS has sub-offices across the country and 30 departments with approximately 15 – 30,000 staff. The NDS is presumed to report directly to President Karzai, although the mandate of the NDS is outlined in a Presidential decree that has not been published and remains secret. Amnesty International has also been informed that the NDS also operates under a law promulgated in 1987, "Law of Crimes against Internal and External Security of the Democratic Republic of Afghanistan", but that its current functions are much broader than this 1987 law would suggest.

Along with other organizations receiving assistance as part of the security sector reform programme, the NDS was reported to have been selected as a recipient of support from the US and German governments. A commentary on the efforts to reform the NDS in 2004 noted that:

*"...among the significant accomplishments made have been the establishment of a merit based appointment system and the promulgation of a charter that circumscribes the wide powers of arrest and detention that it previously held. Plans have been made to create an Intelligence Academy that will train 5,000 new officers within five years. Shortfalls in resources for logistics, communications and transportation have hindered efforts to professionalize the force."<sup>101</sup>*

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<sup>98</sup> For early analysis of the Afghan intelligence service and the Court for National Security, see Amnesty International, "Reports of torture and long-term detention without trial", (AI Index: ASA 11/01/91) 1991; "Afghanistan: Unfair trials by special tribunals", (AI Index: ASA 11/03/91) 1991.

<sup>99</sup> See "Confronting Afghanistan's Security dilemma: Reforming the security sector", Brief 28, Mark Sedra, Berlin International Center for Conversion (BICC) (2003) <http://www.bicc.de/publications/briefs/brief28/content.php>

<sup>100</sup> Asia-Pacific Daily Report February 5, 2004, <http://www.who.int/disasters/repo/12018.pdf>, accessed on 16 July 2007

<sup>101</sup> Security sector transformation in Afghanistan, Mark Sedra, Working Paper 143, Geneva Centre for the democratic control of armed forces (DCAF) (August 2004)

It is unclear, however, how far these plans have advanced. The Afghanistan Compact, the international agreement on international engagement in Afghanistan, does not specifically mention NDS reform.

Public knowledge of the organization and oversight mechanisms of the NDS remains limited, but its powers to detain, prosecute, sentence and imprison people appear to reach far beyond the mandates of many intelligence agencies around the world.<sup>102</sup> Amnesty International is particularly concerned that the NDS's powers of investigation and detention are not separated from its powers of prosecution and imprisonment, and that this improper overlapping of functions violates the right to a fair trial, facilitates impunity for perpetrators of human rights violations and undermines the rule of law.

Amnesty International believes that the secrecy surrounding the mandate, powers and operation of the NDS constitutes a very serious obstacle preventing effective monitoring of detainees, the receipt and investigation of complaints, and steps to provide redress to the victims of torture and other ill-treatment through prosecutions and provision of reparations. The organization urges that efforts to address these issues in relation to the NDS should form an urgent priority within the international community's and Afghan government's broader security sector reform efforts.

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<sup>102</sup> Information received from sources in Afghanistan

## 7. Conclusion

AI is concerned that those captured by ISAF troops and handed over to Afghan authorities are at risk of torture and other ill-treatment while in Afghan custody, particularly the custody of the NDS.

In light of reported patterns of abuse of detainees by the NDS often in the context of arbitrary incommunicado detention, and conscious of an acute lack of transparency over its powers and operations and a climate of impunity shielding NDS personnel suspected of human rights violations from prosecution, Amnesty International believes that the NDS currently poses a serious threat to those in its custody.

The organization also has significant concerns, reinforced by reports compiled by the UN, ICRC and other bodies, about the wider Afghan detention system, and believes that the treatment of detainees across the system repeatedly fails to meet international human rights standards.

AI believes that the Memorandums of Understanding that a number of ISAF states have signed with the Afghan government do not absolve their legal obligation of *non-refoulement*. They are technical agreements that may assist with the physical transfer of prisoners and some aspects of monitoring, but do not fulfil the absolute and non-derogable legal obligation not to put anyone in a situation where they are at risk of torture or other ill-treatment.

To meet their international obligations, ISAF states must impose a temporary moratorium on detainee transfers. In order that the moratorium period is as short as possible ISAF states, led by NATO and working closely with the Afghan government, the UN, EU, AIHRC and ICRC, should explore a range of remedial measures to reform the Afghan detention system - as an integral part of continuing security and justice sector reform efforts.

Options could include assessing the feasibility of placing staff and trainers within Afghan detention facilities in order to monitor and train Afghan detention officials. Training of the police and judicial officers could be expanded to include the detention system, either through the European Policing Mission in Afghanistan or through other multilateral or bilateral agreements with the Afghan authorities. Such efforts would complement the military aspects of ISAF's role with the civilian elements of state building – and represent a significant step towards a situation where the rights of all those detained in Afghanistan are effectively protected.

## 8. Recommendations

ISAF, the Afghan government and relevant partners such as the UN, ICRC, AIHRC and the EU must urgently address the human rights concerns relating to the treatment of detainees. They should develop a comprehensive approach to reform the Afghan detention system in general and the NDS in particular. Effective safeguards against torture and other ill-treatment must be introduced.

### **Specific recommendations to ISAF contributing states**

1. Immediately declare a moratorium on any further transfers of detainees to the Afghan authorities, and take responsibility for the custody of such detainees, until effective safeguards against torture and other ill-treatment are introduced in the Afghan detention system.
2. During the moratorium, contribute to a comprehensive plan to reform the Afghan detention system in line with UN Security Council resolution 1776 mandating ISAF to participate in “the reconstruction and reform of the Afghan prison sector, in order to improve the respect for the rule of law and human rights...” (UNSC Resolution 1776).
3. Ensure all detainees who have already been transferred to the Afghan authorities are not tortured or otherwise ill-treated; that allegations of torture are investigated; and that victims are provided with reparations.
4. Do not rely on MoUs as a basis for concluding that a person may be transferred to Afghan authorities without risk of torture or other ill-treatment.
5. Support legal and institutional reform in Afghanistan to incorporate and apply human rights standards for the treatment of detainees and invest in human rights training for all Afghan personnel involved in detention (see the appendix for Amnesty International’s *12-Point Programme for the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by Agents of the State*).

### **Specific recommendations to NATO**

1. Revise all detainee transfer policies and provide support to member states in the creation of minimum standards regarding detainee transfers for ISAF states operating in Afghanistan.
2. Work with relevant partners including member states, the EU, UN, ICRC and AIHRC to develop a national plan for the Afghan prison system in line with UN Security Council resolution 1776.

### **Specific recommendations to the Afghan government**

1. Establish and ensure implementation of effective system-wide measures to prevent torture and other ill-treatment. This should incorporate all the elements of Amnesty International's *12-Point Programme for the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by Agents of the State* (see appendix).
2. Publish the secret Presidential Decree regarding the operations of the NDS.
3. Ensure that independent monitors, including the ICRC, the AIHRC and UNAMA, have unrestricted and unhindered access to all detention centres in Afghanistan and unsupervised access to all detainees, including high-security detention centres and NDS detention centres.
4. Ensure that victims of torture and other ill-treatment have access to an effective complaints procedure without fear of reprisal.
5. Ensure that all allegations of torture and other ill-treatment are promptly, impartially, independently and thoroughly investigated in accordance with international law. Those suspected of involvement should be prosecuted in proceedings which meet international standards of fairness and do not result in the imposition of the death penalty.
6. Ensure that victims of torture and other ill-treatment and their dependants are able to obtain prompt and adequate reparation from the state including restitution, fair and financial compensation and appropriate medical care and rehabilitation;
7. Reform the NDS to ensure that its operations are properly regulated in transparent legislation which separates the functions of custody and interrogation, and put an end to human rights violations by NDS officials including through competent and independent human rights monitoring.
8. Invite the UN Special Rapporteur against torture to visit Afghanistan, including the detention facilities under the control of the NDS.
9. Comply fully with reporting requirements before the UN Committee Against Torture, the UN Human Rights Committee, and other relevant international and regional monitoring bodies.
10. Ratify and fully implement the Optional Protocol to the UN Convention against Torture, which establishes a system for regular visits by independent monitors to all places of detention.
11. Ratify and fully implement the Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR) to allow individual complaints including for victims of torture or other ill-treatment by Afghan authorities.

### **Specific recommendations to the UN**

1. UNAMA should provide expert advice to ISAF on the development of a coordinated detention policy in order to ensure ISAF's compliance with obligations under international law, including observing the principle of *non-refoulement*.

### **Specific recommendations to the European Union**

1. The European Union Council should develop a code of conduct regarding detainee transfers for member states operating in Afghanistan, and contribute to a comprehensive plan to reform the Afghan detention system in line with UN Security Council resolution 1776.

## Appendix

### **Amnesty International's 12-Point Programme for the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by Agents of the State Amnesty Reference: ACT 40/001/2005**

Torture and other cruel, inhuman or degrading treatment or punishment (other ill-treatment) are violations of human rights, condemned by the international community as an offence to human dignity and prohibited in all circumstances under international law. Yet they happen daily and across the globe. Immediate steps are needed to confront these abuses wherever they occur and to eradicate them. Amnesty International calls on all governments to implement the following 12-point programme and invites concerned individuals and organizations to ensure that they do so. Amnesty International believes that the implementation of these measures is a positive indication of a government's commitment to end torture and other ill-treatment and to work for their eradication worldwide.

#### **1. Condemn torture and other ill-treatment**

The highest authorities of every country should demonstrate their total opposition to torture and other ill-treatment. They should condemn these practices unreservedly whenever they occur. They should make clear to all members of the police, military and other security forces that torture and other ill-treatment will never be tolerated.

#### **2. Ensure access to prisoners**

Torture and other ill-treatment often take place while prisoners are held incommunicado – unable to contact people outside who could help them or find out what is happening to them. The practice of incommunicado detention should be ended. Governments should ensure that all prisoners are brought before an independent judicial authority without delay after being taken into custody. Prisoners should have access to relatives, lawyers and doctors without delay and regularly thereafter.

#### **3. No secret detention**

In some countries torture and other ill-treatment take place in secret locations, often after the victims are made to “disappear”. Governments should ensure that prisoners are held only in officially recognized places of detention and that accurate information about their arrest and whereabouts is made available immediately to relatives, lawyers, the courts, and others with a legitimate interest, such as the International Committee of the Red Cross (ICRC). Effective judicial remedies should be available at all times to enable relatives and lawyers to find out immediately where a prisoner is held and under what authority, and to ensure the prisoner's safety.

**4. Provide safeguards during detention and interrogation** All prisoners should be immediately informed of their rights. These include the right to lodge complaints about their treatment and to have a judge rule without delay on the lawfulness of their detention. Judges should investigate any evidence of torture or other ill-treatment and order release

if the detention is unlawful. A lawyer should be present during interrogations. Governments should ensure that conditions of detention conform to international standards for the treatment of prisoners and take into account the needs of members of particularly vulnerable groups. The authorities responsible for detention should be separate from those in charge of interrogation. There should be regular, independent, unannounced and unrestricted visits of inspection to all places of detention.

#### **5. Prohibit torture and other ill-treatment in law**

Governments should adopt laws for the prohibition and prevention of torture and other ill-treatment incorporating the main elements of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture) and other relevant international standards. All judicial and administrative corporal punishments should be abolished. The prohibition of torture and other ill-treatment and the essential safeguards for their prevention must not be suspended under any circumstances, including states of war or other public emergency.

#### **6. Investigate**

All complaints and reports of torture or other ill-treatment should be promptly, impartially and effectively investigated by a body independent of the alleged perpetrators. The scope, methods and findings of such investigations should be made public. Officials suspected of committing torture or other ill-treatment should be suspended from active duty during the investigation. Complainants, witnesses and others at risk should be protected from intimidation and reprisals.

#### **7. Prosecute**

Those responsible for torture or other ill-treatment should be brought to justice. This principle applies wherever those suspected of these crimes happen to be, whatever their nationality or position, regardless of where the crime was committed and the nationality of the victims, and no matter how much time has elapsed since the commission of the crime. Governments should exercise universal jurisdiction over those suspected of these crimes, extradite them, or surrender them to an international criminal court, and cooperate in such criminal proceedings. Trials should be fair. An order from a superior officer should never be accepted as a justification for torture or ill-treatment.

#### **8. No use of statements extracted under torture or other ill-treatment**

Governments should ensure that statements and other evidence obtained through torture or other ill-treatment may not be invoked in any proceedings, except against a person accused of torture or other ill-treatment.

#### **9. Provide effective training**

It should be made clear during the training of all officials involved in the custody, interrogation or medical care of prisoners that torture and other ill-treatment are criminal acts. Officials should be instructed that they have the right and duty to refuse to obey any order to torture or carry out other ill-treatment.

#### **10. Provide reparation**



Victims of torture or other ill-treatment and their dependants should be entitled to obtain prompt reparation from the state including restitution, fair and adequate financial compensation and appropriate medical care and rehabilitation.

**11. Ratify international treaties**

All governments should ratify without reservations international treaties containing safeguards against torture and other ill-treatment, including the International Covenant on Civil and Political Rights and its first Optional Protocol; and the UN Convention against Torture, with declarations providing for individual and inter-state complaints, and its Optional Protocol. Governments should comply with the recommendations of international bodies and experts on the prevention of torture and other ill-treatment.

**12. Exercise international responsibility**

Governments should use all available channels to intercede with the governments of countries where torture or other ill-treatment are reported. They should ensure that transfers of training and equipment for military, security or police use do not facilitate torture or other ill-treatment. Governments must not forcibly return or transfer a person to a country where he or she would be at risk of torture or other ill-treatment.

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This 12-point programme sets out measures to prevent the torture and other ill-treatment of people who are in governmental custody or otherwise in the hands of agents of the state. It was first adopted by Amnesty International in 1984, revised in October 2000 and again in April 2005. Amnesty International holds governments to their international obligations to prevent and punish torture and other ill-treatment, whether committed by agents of the state or by other individuals. Amnesty International also opposes torture and other ill-treatment by armed political groups.



WHETHER IN A HIGH-PROFILE CONFLICT OR A FORGOTTEN CORNER OF THE GLOBE, AMNESTY INTERNATIONAL CAMPAIGNS FOR JUSTICE AND FREEDOM FOR ALL AND SEEKS TO GALVANIZE PUBLIC SUPPORT TO BUILD A BETTER WORLD.

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## Detainees transferred to torture: ISAF complicity ?

Hundreds of Afghans have been detained by the International Security Assistance Force (ISAF) - comprised of military personnel from 37 countries - during the ongoing conflict in Afghanistan. Many of these detainees are handed over to Afghan authorities, often to the National Directorate of Security (NDS), Afghanistan's intelligence service. In NDS custody, detainees are at risk of torture or other ill-treatment as security personnel attempt to obtain information or false confessions, and even money, in exchange for their freedom.

This report ***Detainees transferred to torture: ISAF complicity?*** documents the failure of ISAF states to uphold basic principles of international humanitarian and human rights law in transferring detainees to Afghan authorities. ISAF states have reached various agreements to regulate such transfers; however, in view of the widespread risk of torture and other ill-treatment, such transfers are unlawful.

Amnesty International calls on the international military forces in Afghanistan to uphold fully their human rights commitments. No individual should be exposed to torture under any circumstances and ISAF states should stop transferring detainees until they have assisted the Afghan authorities in successfully stamping out the practice of torture among its security officials.