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Special Forum on the Canadian Mission in Afghanistan (February 2010): Human Rights Watch presentation to Special Committee (May 5, 2010)

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Special Committee on the Canadian Mission in Afghanistan
Parliament of Canada

May 5, 2010
Ottawa, Ontario

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Human Rights Watch

Introduction

Mr. Chairman, Members of the Committee, thank you for giving me the opportunity to testify. *Monsieur le President, membres du comité, merci de m'avoir donnée l'occasion de témoigner.* It means a great deal to me to be before this body as both a concerned member of the human rights community, and as a Canadian.

Human Rights Watch has been investigating and documenting human rights abuses in Afghanistan since 1984.¹ I personally have been to Afghanistan twice in the last year, most recently in March. While there, I had the opportunity to meet with members of local human rights groups as well as international bodies. Christopher Gibbons of the Canadian Embassy in Kabul was also kind enough to meet with me. I have also visited the prison known as the Afghan National Detention Facility, or Block D at Pol-e-Charki prison, as well as the US-run detention facility in Parwan that has replaced the former detention facility at Bagram Airfield.

Based on first-hand interviews with former detainees and their family members, as well as on information provided by Afghan nongovernmental organizations and other international organizations working on human rights, Human Rights Watch has developed a good understanding of the problem of detainee abuse in Afghanistan. We are particularly concerned about the torture and other ill-treatment of detainees by the National Directorate of Security (NDS)—the Afghan intelligence service that most frequently takes custody of persons captured by NATO forces.

As discussed below, the transfer of detainees by Canadian forces to the NDS, even under memoranda of understanding that include diplomatic assurances, violates Canada's obligations under international human rights and humanitarian law.

NDS Torture and Ill-Treatment of Detainees in its Custody

NDS torture and ill-treatment of detainees in its custody has been well-known for years. In 2002, 2003 and 2004, Human Rights Watch issued reports citing concerns about torture and other abuse by Afghan detention authorities.² On many occasions we have directly relayed

¹ Helsinki Watch (now Human Rights Watch), *Tears, Blood and Cries: Human Rights in Afghanistan Since the Invasion 1979 – 1984* (New York: Human Rights Watch, 1984), <http://www.hrw.org/en/reports/1984/12/01/tears-blood-and-cries>.

² Human Rights Watch, *All Our Hopes are Crushed: Violence and Oppression in Western Afghanistan*, November 2002, <http://www.hrw.org/en/reports/2002/11/05/all-our-hopes-are-crushed>; Human Rights Watch, *Enduring Freedom: Abuses by U.S. Forces in Afghanistan*, March 2004, <http://www.hrw.org/en/node/12163/section/1>; Human Rights Watch, *Killing You Is*

our concerns to the international forces in Afghanistan and their governments. For instance, in mid 2006, Sam Zarifi, then-deputy Asia director at Human Rights Watch, met with NATO officials, including Canadians, in both Brussels and Kabul, and described our concerns about NDS abuse of detainees. In late 2006, Mr. Zarifi met with the Afghanistan desk at the Department of Foreign Affairs and International Trade here in Ottawa and described our concerns about NDS abuse. In November 2006, Human Rights Watch issued a public letter to the NATO secretary general expressing concern that detainees captured by the International Security Assistance Force (ISAF) were being handed over to the custody of NDS where they were at risk of torture. In that same letter, Human Rights Watch also noted that it knew of at least one instance in which NDS hid from the International Committee of the Red Cross (ICRC) a detainee who had been handed over by NATO.³

Of course, you are all aware of the credible allegations that detainees handed over by Canadian troops to the NDS in 2007 were mistreated. Detainees transferred by Canadians to Afghan custody reported being beaten, whipped, starved, frozen, choked and subjected to electric shocks during interrogation by Afghan government officials, including soldiers, police and NDS officials.

The available information indicates that this pattern of torture and other ill-treatment in NDS detention continues. In addition to allegations that NDS has tortured detainees handed over by ISAF forces, there is also evidence that NDS tortures persons it captures on its own. Detainees initially handed over by ISAF forces might be released and then detained again, this time by NDS or other Afghan government entities directly. Moreover, with many troops engaging in joint operations with Afghan forces, we are concerned that Afghan personnel will take formal custody of detainees, rather than ISAF forces, leaving those detainees outside the scope of any international attention.

The Afghan Independent Human Rights Commission (AIHRC), a nongovernmental organization, published a study in 2009 on detention facilities that concluded that “torture is a commonplace practice in Afghanistan’s law enforcement institutions.” The AIHRC noted, however, that its access to detainees is sometimes limited, which hinders its ability to obtain a full understanding of the scope of abuse.⁴

Very Easy Thing for Us: Human Rights Abuses in Southeast Afghanistan, July 2003, <http://www.hrw.org/en/node/12296/section/1>.

³ Letter from Human Rights Watch to the Secretary General of NATO, “Afghanistan: Letter Regarding Summit in Latvia,” November 27, 2006, <http://www.hrw.org/en/news/2006/11/27/afghanistan-letter-nato-secretary-general-regarding-summit-latvia>.

⁴ AIHRC, “Causes of Torture in Law Enforcement Institutions,” April 2009, http://www.aihrc.org.af/english/Eng_pages/Researches_eng/Research_cause_of_Torture_2009_April.pdf (accessed April 26, 2010).

According to the AIHRC, NATO countries handed over approximately 267 detainees to Afghan custody in 2009. Of those detainees, the AIHRC identified 93 as being turned over by forces from the United Kingdom, 163 from Canada, 10 from the Netherlands and 1 from Denmark. These numbers may be undercounts, however, given that the AIHRC does not have reliable access to NDS facilities. Also, as noted above, some detainees with a significant connection to ISAF operations may not have been formally handed over by ISAF forces.

Many former detainees held by the NDS will not discuss their treatment for fear of retaliation. Nonetheless, Human Rights Watch has obtained detailed recent information about NDS's treatment of detainees that makes clear that the problem of torture persists.

On December 7, 2009, an Afghan man named Abdul Basir died in an NDS detention facility. Later that day, the agency told family members that Basir committed suicide by throwing himself out of a window. On December 8, the authorities returned Basir's body to his family. Photographs obtained by Human Rights Watch show small, dark circles on the deceased man's forehead, blackened cuts on his back, bruising in several places, and a large cut to his shin. These injuries are consistent with severe physical abuse. NDS Department 17, the intelligence service's investigatory branch, had detained Basir for approximately one month in connection with the October 28, 2009 attack on a Kabul guesthouse that housed many United Nations staff. Abdul Basir's father and two brothers were also detained. Family members told Human Rights Watch that NDS officials informed them that if they buried Basir's body without an autopsy his father and brothers would be released. However, concerned that the marks on Basir's body were signs of torture, the family took the body to the Forensic Department of the Health Ministry where an autopsy was carried out. The findings have not been provided to the family. Requests by the AIHRC and by Human Rights Watch that the Office of the Attorney General investigate the death have not been answered. Basir's father and brother remain in detention.

Human Rights Watch has also obtained written interview memoranda prepared by the Afghanistan Justice Project describing the abuse suffered by one former NDS detainee and two relatives of men still in NDS detention, who wish to remain anonymous. One man, Interviewee A, described an NDS raid on his home in January 2009, in which his parents were beaten and his home searched. His brother was taken to NDS detention where he claims that he was beaten and tortured for 18 days. He was allegedly beaten with a cable and rifles; he was subjected to electric shocks, and he was deprived of sleep. He was then transferred to Department 17 where the torture continued. When Interviewee A was finally allowed to see his brother, the brother reported that he had been tortured, and that he

wished he had permission to remove his clothes in order to show Interviewee A the marks of torture.

Another man, Interviewee B, said he was initially arrested by the police in late 2008 and then was handed over to NDS in Khost. While in NDS detention he claims that he was beaten and subjected to electric shocks twice daily for 20 days. He also claims that he was threatened with death and deprived of water. He was only released because elders from his village paid a bribe of 300,000 Pakistani rupees (C\$3600).

A third man, Interviewee C, described his brother's detention by NDS in August 2008. His brother told Interviewee C that he was hung upside down for four days, and beaten for two months. During one of the beatings, the brother was allegedly rendered unconscious, at which time NDS officers placed his thumbprint on a false confession to indicate his agreement. He claims that the document was never read to him, and that he was never given access a lawyer. Interviewee C's brother was administered medication to revive him and then he was beaten again. Interviewee C explained that when a human rights monitoring delegation was present at the detention facility, his brother and other detainees who had been tortured were hidden in a basement so that the visitors could not see them.

The UK government has disclosed at least 9 separate instances, most of them in 2009, in which detainees handed over by British forces were allegedly abused in NDS custody. One allegation relates to the NDS in Kandahar, the region where most Canadian transfers have occurred. Most recently, the UK courts have commenced a judicial review of the transfer of detainees from UK forces to Afghan custody. Transferred detainees alleged being beaten and subjected to electric shock by NDS officials, as well as forced to endure stress positions and sleep deprivation. In its 2009 *Country Reports on Human Rights Practices* for Afghanistan, the US State Department reported similar allegations. It said that human rights organizations reported extensive torture and abuse of detainees, including beatings, use of a scorching bar, flogging by cable, battering by rod, electric shock, deprivation of sleep, food and water, abusive language, sexual humiliation and rape.⁵

The continuing use of torture and other abuse against detainees by the NDS is well-established. As detailed below, international law prohibits the transfer of detained individuals to the authorities of another state where they face a serious risk of torture and ill-treatment.

⁵ US State Department, Bureau of Democracy, Human Rights, and Labor, "Country Reports on Human Rights Practices—2009: Afghanistan," March 11, 2010, <http://www.state.gov/g/drl/rls/hrrpt/2009/sca/136084.htm> (accessed April 26, 2010).

International Legal Obligations

International humanitarian law and human rights law absolutely prohibit torture and other forms of cruel, inhuman or degrading treatment or punishment. Not only are states prohibited from engaging in torture, they are equally prohibited from transferring someone to the custody of another state to face torture. This fundamental tenet of international law must be the guiding principle in your consideration of Canada's role in the treatment of detainees in Afghanistan.

The requirement that states not transfer detainees to other states to face torture, known as the obligation of *nonrefoulement*, is explicitly provided in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and has been recognized to be implicit in other human rights treaties. It is also recognized in the laws of war, notably the Geneva Conventions of 1949 and their Additional Protocols, and customary international law, including during non-international armed conflicts such as the current conflict in Afghanistan.

International Humanitarian Law

International humanitarian law (the laws of war) prohibits torture and ill-treatment of all combatants and civilians whether in international or non-international armed conflict. Torture is a "grave breach" of the Geneva Conventions of 1949 and a serious violation of the laws of war, a crime so serious that states are required to seek out and prosecute anyone they believe perpetrated torture.⁶

This prohibition extends to the transfer of captured combatants or detained civilians to a party in whose custody they would face torture. Under the Third Geneva Convention, applicable during international armed conflicts, "Prisoners of war may only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention."⁷

⁶ See, e.g., Geneva Convention relative to the Treatment of Prisoners of War (Third Geneva Convention), adopted August 12, 1949, 75 U.N.T.S. 135, entered into force October 21, 1950, <http://www1.umn.edu/humanrts/instree/y3gctpw.htm> (accessed April 26, 2010), art. 13 and 130; International Committee of the Red Cross (ICRC), *Customary International Humanitarian Law* (Cambridge: Cambridge University Press, 2005), chapter 44.

⁷ Third Geneva Convention, <http://www1.umn.edu/humanrts/instree/y3gctpw.htm>, art. 12.

Under the laws of war applicable to Canadian forces in Afghanistan, Canada is prohibited from transferring persons to the NDS or other authorities where they are in danger of being tortured. The US invasion of Afghanistan in 2001 following the September 11 attacks was governed by the law of international armed conflict—that is, a conflict between two states. But at least since the formation of the Karzai government in 2002, the conflict in Afghanistan has been a non-international armed conflict under the laws of war, a civil war between insurgent groups and the Karzai government, with the backing of foreign forces. Applicable law includes article 3 common to the four Geneva Conventions of 1949 (“Common Article 3”), the Second Additional Protocol of 1977 to the Geneva Conventions (Protocol II), and customary international humanitarian law.

Common Article 3 specifically protects detained persons in non-international armed conflicts, prohibiting cruel treatment, torture, and “outrages against personal dignity, in particular humiliating or degrading treatment.” Although Common Article 3 does not expressly address the transfer of detainees, the prohibition against inhumane treatment applies “in all circumstances” and “at any time and in any place whatsoever.”⁸

Canada is also bound by Protocol II to the Geneva Conventions, which applies during non-international armed conflicts.⁹ Protocol II prohibits torture and humiliating and degrading treatment and requires that persons “whose liberty has been restricted in any way whatever for reasons related to the armed conflict shall be treated humanely.”¹⁰ Relevant is article 5(4) of Protocol II, which provides that before individuals who are deprived of their liberty are released, “necessary measures to ensure their safety shall be taken by those so deciding.” An ICRC legal advisor has noted, “While this provision does not contemplate the transfer of persons from one state to another, it nonetheless contains the important humanitarian principle that detaining authorities bear certain responsibilities for the detainees when they release them.”¹¹ The ICRC *Commentary* on article 5(4) explains that it is concerned both with the decision-making process with respect to release, as well as with the safety of the detained person following release.¹²

⁸ Article 3 common to the four Geneva Conventions of 1949, adopted August 12, 1949, entered into force October 21, 1950; see also ICRC, *Customary International Humanitarian Law*, rule 90.

⁹ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 U.N.T.S. 609, entered into force December 7, 1978, <http://www1.umn.edu/humanrts/instrree/y6pagc.htm> (accessed April 26, 2010). Canada ratified Protocol II in 1990.

¹⁰ *Ibid.* articles 4(2) and 5(3).

¹¹ Cordula Droege, “Transfers of detainees: legal framework, non-refoulement and contemporary challenges, *International Review of the Red Cross*, vol. 90, no. 871, Sept. 2008, p. 676.

¹² ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: Martinus Nijhoff Publishers, 1987), pp. 1393-1394.

Thus Canadian forces are not only bound by the prohibition against torture found in the laws of war when deciding to transfer a detainee out of their custody, they must also consider the safety of that person following transfer. They must assess that person's future safety and be confident that he will not be subjected to torture or ill-treatment.

During non-international armed conflicts, all persons taken into custody are entitled to the legal protections of domestic law, regardless of whether they are in the physical control of the Afghan government or a foreign government. As such, they are also protected by international human rights law, as discussed below.

International Human Rights Law

The prohibition against torture is enshrined in every major human rights treaty and is considered *jus cogens*, a norm of international law that states cannot derogate from under any circumstance.¹³ The Convention against Torture, to which Canada is a party, and other international instruments explicitly prohibit *refoulement*, the transferring persons to a state where they would face torture. Article 3 states:

1. No State Party 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.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.¹⁴

¹³ See, e.g., International Covenant on Civil and Political Rights, adopted December 16, 1966, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976, <http://www1.umn.edu/humanrts/instree/b3ccpr.htm> (accessed April 26, 2010), art. 7; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture), adopted December 10, 1984, G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987, <http://www1.umn.edu/humanrts/instree/h2catoc.htm> (accessed April 26, 2010). Canada ratified the convention in 1987. Article 1 of the Convention against Torture defines torture as: "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain is inflicted by or at the acquiescence of a public official or other person acting in an official capacity."

¹⁴ Convention against Torture, <http://www1.umn.edu/humanrts/instree/h2catoc.htm>, art. 3. See also American Convention on Human Rights ("Pact of San José, Costa Rica"), adopted November 22, 1969, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force July 18, 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992), <http://www1.umn.edu/humanrts/oasinstr/zoas3con.htm> (accessed April 26, 2010), art. 22(8); Inter-American Convention to Prevent and Punish Torture, O.A.S. Treaty Series No. 67, entered into force February 28, 1987, <http://www1.umn.edu/humanrts/oasinstr/zoas9tor.htm> (accessed April 26, 2010), art. 13(4); and United Nations International Convention for the Protection of All Persons from Enforced Disappearance, adopted January 12, 2007, G.A. res.

The Committee against Torture (CAT), the international expert body that monitors states' compliance with the Convention against Torture, has repeatedly reaffirmed the absolute nature of the Article 3 prohibition against return to torture.¹⁵ In its *Conclusions and recommendations* to Canada in 2005, the Committee recommended that Canada “unconditionally undertake to respect the absolute nature of article 3 in all circumstances.”¹⁶ The UN Human Rights Committee, which monitors compliance with the International Covenant on Civil and Political Rights, upheld the prohibition on *refoulement* in cases involving Canada.¹⁷

Article 3 applies to transfers that occur within a war zone such as Afghanistan. The Committee Against Torture (CAT) rejected a claim from the United Kingdom that article 3 was not applicable to detainees transferred from the UK detention facilities in Iraq and Afghanistan to the local authorities because it did not amount to an extradition, return or expulsion. The CAT stated 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.”¹⁸ The CAT has held that “Whenever substantial grounds exist for believing that an individual would be in danger of being subjected to torture upon expulsion to another State, the State party is under obligation not to return the person concerned to that State.”¹⁹

61/177, UN Doc. A/RES/61/177 (2006), <http://www1.umn.edu/humanrts/instreet/h4paped.html> (accessed April 26, 2010), art. 16.

¹⁵ See, e.g. UN Committee Against Torture (CAT), “Consideration of Reports Submitted by State Parties under Article 19 of the Convention, Conclusions and Recommendations of the Committee Against Torture, France,” CAT/C/FRA/CO/3, April 3, 2006, [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CAT.C.FRA.CO.3.En?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CAT.C.FRA.CO.3.En?Opendocument) (accessed April 25, 2010), para. 6.

¹⁶ CAT, “Consideration of Reports Submitted by State Parties under Article 19 of the Convention, Conclusions and Recommendations of the Committee Against Torture, Canada,” CAT/C/CR/34/CAN, July 7, 2005, [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CAT.C.CR.34.CAN.En?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CAT.C.CR.34.CAN.En?Opendocument), (accessed April 25, 2010), para. 5.

¹⁷ See UN Human Rights Committee, “Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the ICCPR: Chit Ng v. Canada (Communication No. 469/1991),” UN Doc. CCPR/C/49/D/469/1991, January 7, 1994, <http://www1.umn.edu/humanrts/undocs/html/469-1991.html> (accessed April 26, 2010), para. 14.1; and UN Human Rights Committee, “Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the ICCPR: Joseph Kindler v. Canada (Communication No. 470/1991),” UN Doc. CCPR/C/48/D/470/1991, November 11, 1993, <http://www1.umn.edu/humanrts/undocs/html/dec470.htm> (accessed April 26, 2010), para. 6.2.

¹⁸ CAT, “Consideration of Reports Submitted by State Parties under Article 19 of the Convention, Conclusions and Recommendations of the Committee Against Torture, United Kingdom of Great Britain and Northern Ireland,” CAT/C/CR/33/3, December 10, 2004, [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CAT.C.CR.33.3.En?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CAT.C.CR.33.3.En?OpenDocument) (accessed April 26, 2010), para. 4(b) and para. 5(e).

¹⁹ CAT, “Views of the Committee Against Torture under Article 22 of the Convention against Torture: *Tapia Paez v. Sweden* (Communication No. 39/1996), CAT/C/18/D/39/1996 (1996), April 28, 1997, <http://www1.umn.edu/humanrts/cat/decisions/39-1996.html> (accessed April 26, 2010).

The CAT and the Human Rights Committee, as well as UN special rapporteurs, rightly criticized the Bush administration for claiming that the human rights treaties did not apply to US personnel (military and intelligence) operating outside the United States. The treaty bodies have been clear that the treaties extend to places where a state has either formal jurisdiction or “effective control,” and that the human rights treaties still apply even where the laws of war are applicable.²⁰

Notably, the Convention against Torture does not contain any exclusion or derogation clauses. The CAT has rejected the exclusion of persons considered “threats to national security” or common criminals from the convention’s article 3 protections.²¹

“Diplomatic Assurances” in the Afghan MOU and Canada’s Legal Obligations

Assurances given by a receiving state that detainees will not be mistreated, so-called “diplomatic assurances,” do not satisfy the sending state’s *nonrefoulement* obligation. Diplomatic assurances are unreliable and by their very nature unenforceable.

Specifically, the memoranda of understanding (MOUs) between the governments of Canada and Afghanistan, which contain diplomatic assurances against torture, do not satisfy Canada’s legal obligation to ensure that prisoners are not transferred to a state where they face a real risk of torture. The current monitoring provided for in the MOUs is inadequate. While we have received anecdotal reports that the conditions of recently transferred detainees have improved, we have been unable to verify these reports. Furthermore, those reports pertain only to the specific detainees identified as transferred by Canadian forces. The nature of the NATO mission as well as the number of joint Afghan-NATO operations provide ample opportunity for detainees who have effectively been captured by Canadian forces to formally be taken into custody by other NATO allies or by the Afghans. Those detainees, who may subsequently be handed over to NDS custody, fall outside the terms of the MOUs and are not subject to any form of monitoring or reporting, other than the limited monitoring that the AIHRC is able to conduct of NDS facilities as a whole. Thus, assurances do little to protect most detainees in Afghan custody from torture.

²⁰ See, e.g., UN Commission on Human Rights, Report of the Independent Expert on the Protection of Human Rights while Countering Terrorism, Robert K. Goldman, E/CN.4/2005/103, February 7, 2005, <http://www2.ohchr.org/english/bodies/chr/docs/61chr/E.CN.4.2005.103.pdf> (accessed April 26, 2010).

²¹ See Manfred Nowak and Elizabeth McArthur, *The United Nations Convention Against Torture: A Commentary* (Oxford: Oxford University Press, 2008), p. 148, note 54 and note 55.

Further, individualized monitoring alone may place detainees at risk since they remain in the custody of their torturers. This monitoring may fail to detect torture, since it relies either on a sufficiently trained observer who can detect unreported torture, or self-reporting by a victim who may be too scared to disclose mistreatment. System-wide monitoring alone may fail to capture the scope of the problem, including that some detainees may be hidden from the monitors. Moreover, monitoring is a post-hoc attempt at a solution. While monitoring may help assure the government that substantial grounds do not exist that suggest a person may be subjected to torture, it cannot replace the individualized review that Canada needs to undertake prior to transferring any detainee in order to comply with its obligation of *nonrefoulement*.

Even were one to accept that monitoring by independent human rights organizations as well as by the Canadian government would be sufficient to prevent torture by the NDS, the MOUs contain no guarantee that such access will be afforded, and offer no express opportunity for intervention if it is not. Given the NDS's dismal record of torture and abuse, there is ample reason for this Committee to conclude that such assurances are ineffective. Neither the AIHRC nor the ICRC has unfettered, private access to all detainees. Moreover, the MOUs are between the governments of Canada and Afghanistan, signed by the Afghan Minister of Defense, with no direct participation by the NDS; this calls into question whether the NDS, which continues to be the primary custodian of transferred detainees, would even consider the MOUs to be applicable to them.

When monitoring fails, the results can be both brutal and permanent. This government is familiar with brutality of torture from the Maher Arar case. The current MOU regime does not provide a way for the Canadian government to intervene if it believes a transferred detainee is being tortured. Even if the MOU were redrafted in such a way to permit intervention, any such action would be too late for any tortured detainee.

Human Rights Watch has documented numerous cases around the world where prisoners transferred to the custody of another country on the basis of diplomatic assurances have faced torture and other abuse. The European Court of Human Rights has developed a detailed jurisprudence on this issue, which, though stopping short of a wholesale prohibition on transfers based on diplomatic assurances, has repeatedly found on a case-by-case basis that diplomatic assurances are inadequate to protect transferred persons from torture.

In a string of cases decided since 1996, the European Court of Human Rights (the "European Court") reaffirmed that diplomatic assurances do not permit states to send persons to

places where they are at risk of torture or cruel, inhuman or degrading treatment. Although Canada is not bound by European Court rulings, the court's jurisprudence on states' obligations under the torture prohibition in article 3 of the European Convention on Human Rights²² is helpful for understanding Canada's obligations under international law, such as the Convention against Torture and the general prohibition against torture.

The European Court first addressed diplomatic assurances in the 1996 case of *Chahal v. UK*.²³ In that case, the court ruled that the UK could not return an alleged Sikh militant to India in reliance on diplomatic assurances against torture from New Delhi, no matter what crimes he was suspected of or his status in the UK. The UK government had argued that Chahal had such a high profile in the UK and India that he would be guaranteed fair treatment. The European Court, however, ruled that the UK's public branding of Chahal as a "terrorist," coupled with the Indian government's lack of control over brutal security forces in the Punjab, instead made him particularly vulnerable to torture and ill-treatment.²⁴

In 2008, the European Court returned to the principles of *Chahal* in a series of cases. While it has never concluded that removals based on diplomatic assurances are a per se violation of article 3, the court fashioned an approach that rightly questions the reliability of promises of humane treatment from governments that routinely torture and ill-treat detainees.

In *Saadi v. Italy*, the court ruled that Italy would violate article 3 if it deported a Tunisian national lawfully residing in Italy to Tunisia.²⁵ Saadi, who had been convicted in absentia of terrorism-related offenses in Tunisia, claimed that he would be at risk of torture and ill-treatment in Tunisia, where the mistreatment of suspected terrorists is routine and well documented.

Tunisia declined to provide the Italian authorities with the detailed set of guarantees against torture that Italy had requested, but instead conveyed that Tunisian laws guaranteed

²² "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, entered into force September 3, 1953, as amended by Protocols Nos 3, 5, 8, and 11 which entered into force on September 21, 1970, December 20, 1971, January 1, 1990, and November 1, 1998, respectively, <http://www.echr.coe.int/nr/rdonlyres/d5cc24a7-dc13-4318-b457-5c9014916d7a/o/englishanglais.pdf> (accessed April 26, 2010).

²³ *Chahal v. United Kingdom*, Application No. 70/1995/576/662, Judgment of November 11, 1996; Reports 1996-V, available at www.echr.coe.int.

²⁴ *Ibid.* para. 5. Careful not to doubt the good faith of the Indian government in providing the assurances, the European Court noted that human rights violations by certain members of the Indian security forces were a "recalcitrant and enduring problem. Against this background, the court is not persuaded that the above assurances would provide Mr. Chahal with an adequate guarantee of safety."

²⁵ *Saadi v. Italy*, Application No. 37201/06, Judgment of February 28, 2008, ECHR 2008, available at www.echr.coe.int.

prisoners' rights and that Tunisia had acceded to “the relevant international treaties and conventions.” The court, however, found that “the existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where, as in the present case, reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention.”²⁶

The court noted that even explicit and detailed assurances would not necessarily be sufficient. The court stated that such assurances “would not have absolved the Court from the obligation to examine whether such assurances provided, in their practical application, a sufficient guarantee that the applicant would be protected against the risk of treatment prohibited by the Convention. The weight to be given to assurances from the receiving State depends, in each case, on the circumstances obtaining at the material time.”²⁷

The European Court in subsequent rulings has upheld the *Saadi* standard. Most recently in April 2010, the court again found that reliance on diplomatic assurances was inadequate to assuage the risk that the applicant, a Tunisian national, would face torture upon expulsion from Italy. In *Trabelsi v. Italy* the court found that Italy breached its obligations under article 3 by transferring Trabelsi to Italy.²⁸ The court concluded that given the previous evidence that prisoners were frequently subjected to torture in Tunisia, Italy’s reliance on diplomatic assurances from Tunisia was inadequate.

Finally, in the most relevant case to the conflict in Afghanistan, the European Court ruled in March of this year that the UK government’s transfer of detainees from UK custody in Iraq to

²⁶ *Ibid.* para 147.

²⁷ *Ibid.* para. 149.

In two subsequent rulings, involving transfers from Russia to Central Asian republics, the European Court continued to uphold its commitment to the *Saadi* standard. In *Ismoilov v. Russia*, decided in April 2008, the petitioners were a group of Uzbek refugees who were detained in the Russian city of Ivanovo. The Tashkent authorities, known for the systematic practice of torture, claimed that the men had been involved in fomenting the 2005 events in the Uzbek city of Andijan, in which hundreds of unarmed protesters were killed by state security forces. The Russian courts ruled in favor of the men’s extradition, relying on promises of humane treatment and fair trial from the Uzbek authorities. The European Court ruled that given Uzbekistan’s well-documented record of torture, “the Court is not persuaded that the assurances from the Uzbek authorities offered a reliable guarantee against the risk of ill-treatment.” See *Ismoilov v. Russia*, Application No. 2947/06, Judgment of April 24, 2008, ECHR 2008, available at www.echr.coe.int.

The court’s June 2008 ruling in *Ryabikin v. Russia* was notable, among other things, because Aleksandr Ryabikin, threatened with extradition from Russia to Turkmenistan, was not a threat to national security, but an alleged white collar criminal. Application no. 8320/04, June 19, 2008. The European Court ruled that if extradited he would “almost certainly be detained and runs a very real risk of spending years in prison.” Taking note of Turkmenistan’s extremely poor conditions of detention, as well as problems of ill-treatment and torture, the *Ryabikin* panel invoked *Saadi*. See *Ryabikin v. Russia*, Application No. 8320/04, Judgment of June 19, 2008, available at www.echr.coe.int.

²⁸ *Trabelsi v. Italy*, Application No. 50163/2008, April 13, 2010, available at www.echr.coe.int.

the Iraqi high tribunal violated article 3. In *Al Saadoon v. UK* the court held that because the UK knew that the detainees faced the death penalty, its transfer violated the UK government's obligation to protect persons in its custody from inhuman treatment.²⁹ The court's ruling makes clear that European countries cannot transfer persons in their custody to the custody of another government, where "substantial grounds ha[ve] been shown for believing there to be a real risk of the applicants" being subjected ill-treatment.³⁰

The European Court jurisprudence makes clear that diplomatic assurances do not permit the transfer of persons to the custody of a state that has a track record of torture and ill-treatment. In light of the evidence of the pervasive abuse of detainees in the custody of Afghan authorities, transferring detainees to Afghan custody violates Canada's international legal obligations.

Recommendations

The path for Canada is clear: because of compelling evidence that persons transferred to Afghan custody face a real risk of torture, Canada should immediately cease transferring detainees to Afghan custody.

Human Rights Watch recognizes that barring transfers to the NDS—the effective recipient of most detainees transferred to Afghan custody—does not resolve the question of what to do with persons taken into custody. Indeed, when Canada previously suspended such transfers there were reports of summary executions of alleged insurgents who had been captured by Afghan forces operating jointly with Canadian forces. These practices should not reoccur. Canada must at all times adhere to its obligations under international law; practical difficulties in meeting those obligations never justify violations of the law or complicity in violations by other parties. The Canadian government should immediately explore alternative detention arrangements with other governments and with Afghanistan. It should also take rapid steps toward establishing sustainable, long-term detention options that are consistent with Canada's international legal obligations—options that require training local authorities and strengthening local detention capacity so that Afghanistan can meet its own international legal obligations.

NDS facilities are not the only places in Afghanistan where "national security" detainees or prisoners are held. The Afghan National Detention Facility (ANDF), which is Block D at Pol-e-

²⁹ *Al Saadoon and Mufdi v. United Kingdom*, Application No. 61498/08, Judgment of March 2, 2010, available at www.echr.coe.int.

³⁰ *Ibid.*, para. 133-134.

Charki prison, also holds persons captured in counterinsurgency operations. Operated by the Afghan Ministry of Defense, the prison offers humane living conditions, including access to health care and regular family visits, which are due in large part to the extensive training, supervision and mentoring provided by the US military. While there remain significant problems concerning the rights to due process and a fair trial at the ANDF, at the time of writing Human Rights Watch is unaware of reports of mistreatment of detainees. Canada could explore entering into a similar partnering relationship with the Ministry of Defense or another agency of the Afghan government that would allow for a sustainable model for detention that would meet international standards.

The US-run detention facility in Parwan, at Bagram Airfield, represents another possible approach. While Human Rights Watch continues to oppose long-term detention without charge by US forces in Afghanistan, our current concerns largely relate to shortcomings in due process rather than detainee treatment. Moreover, the United States is engaged in training and mentoring Afghans to ultimately take over the operation of the detention facility in a manner similar to the ANDF. The target date for handing over the facility to the Afghan government is January 2011. Once the facility is transitioned into Afghan control, and operates within the Afghan justice system, it may be a reasonable alternative site of detention for persons picked by Canadian forces.

Canada should also redouble its efforts to reforming Afghan justice institutions, including the NDS, and improving Afghan detention capacity. The treatment of prisoners is a field in which Canada excels and where it can lend substantial, meaningful assistance to the Afghan government's national requirements.

A significant motivation for torture by NDS and other Afghan justice and detention institutions is the belief that criminal convictions can only be secured through confessions. A study by the AIHRC released in 2009 found that only 21 percent of law enforcement officers used documents and evidence-collection to build a case. Forty percent of the officers surveyed responded that they used "other" methods, or did not answer that question. One of the most pressing reform requirements in Afghanistan is to train national security prosecutors on other means of building a case, including point-of-capture evidence-gathering and the use of forensics. By building the knowledge and capacity of Afghan investigators and prosecutors forced confessions will no longer be seen as necessary in a criminal prosecution. Here again, there is an opportunity for Canada to actively engage with Afghans and other nations working on rule of law to build the Afghan government's capacity for detention and trials that comply with international standards.

There remains a role for monitoring the treatment of transferred detainees, both those currently in NDS custody and any future transfers, but monitoring must be both systematic and individual. Instead of relying on the monitoring system currently set forth in the MOUs, Canada should explore working with other NATO countries and local human rights groups to create a full-time international presence at NDS detention facilities. Canada would need to ensure that this full-time presence would include the right to full access throughout the facility, to private access and interviews with detainees, an agreement that any allegations of mistreatment can be fully investigated by the Attorney General's Office and the AIHRC, and an agreement that detainees cannot be transferred to other facilities. Any such agreement would need to have the explicit approval of the NDS.

The torture of detainees handed over by Canadian forces to Afghan custody is a tragedy. But it also presents an opportunity to help reform Afghanistan's treatment of prisoners. I do not suggest that this will be easy, but it is certainly necessary. The training of Afghan military, police and intelligence services on proper detention practices will promote the rule of law in a manner that is consistent with Canada's mission in Afghanistan and Canada's international legal obligations. It will also provide a real and lasting service to the Afghan people.

Mr. Chairman, Members of the Committee, I thank you for your time, and would be happy to answer any questions.