

## Executive Summary

*After two days [in a National Directorate of Security (NDS) facility in Kandahar] they transferred me to NDS headquarters [in Kandahar]. I spent one night on their veranda. On the following day, an official called me to their interrogation room. He asked if I knew the name of his office. I said it was “Khad” [Dari term for the former NDS]. “You should confess what you have done in the past as Taliban; even stones confess here,” he said. He kept insisting that I confess for the first two days. I did not confess. After two days he tied my hands on my back and start beating me with an electric wire. He also used his hands to beat me. He used his hands to beat me on my back and used electric wire to beat me on my legs and hands. I did not confess even though he was beating me very hard. During the night on the same day, another official came and interrogated me. He said “Confess or be ready to die. I will kill you.” I asked him to bring evidence against me instead of threatening to kill me. He again brought the electric wire and beat me hard on my hands. The interrogation and beating lasted for three to four hours in the night. The NDS officials abused me two more times. They asked me if I knew any Taliban commander in Kandahar. I said I did not know. During the last interrogation, they forced me to sign a paper. I did not know what they had written. They did not allow me to read it.*

**Detainee 371, May 2011<sup>1</sup>**

From October 2010 to August 2011, the United Nations Assistance Mission in Afghanistan (UNAMA) interviewed 379 pre-trial detainees and convicted prisoners at 47 detention facilities in 22 provinces across Afghanistan. In total, 324 of the 379 persons interviewed were detained by National Directorate of Security (NDS) or Afghan National Police (ANP) forces for national security crimes - suspected of being Taliban fighters, suicide attack facilitators, producers of improvised explosive devices, and others implicated in crimes associated with the armed conflict in Afghanistan.

Interviews were conducted at facilities including ANP detention centres, NDS facilities, Ministry of Justice prisons and juvenile rehabilitation centres; as a result of transfers, the interviews dealt with detainees located in 24 of Afghanistan’s 34 provinces.<sup>2</sup> With two exceptions, Government officials from the ANP, NDS, Ministry of Justice and other departments cooperated with UNAMA and provided full access to detainees and facilities.<sup>3</sup>

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<sup>1</sup> All dates referenced in the accounts of detainees refer to their period of detention not to the date of their interview/s with UNAMA.

<sup>2</sup> Of the 324 conflict-related detainees UNAMA interviewed, 273 were held or had been held in NDS detention facilities, 117 were held or had been held in ANP facilities and 12 had been held in Afghan National Army detention facilities. Of the 324 detainees, 78 had been detained by both NDS and ANP or the Afghan National Army. See the Methodology section of this report for details on the methodology UNAMA used to conduct research for this report.

<sup>3</sup> NDS officials did not provide UNAMA with access to NDS Counter-Terrorism Department 90/124 in Kabul and the provincial detention facility in Kapisa.

NDS and ANP are the main Afghan security forces engaged in detaining and arresting conflict-related detainees with NDS responsible for investigation of national security crimes and interrogation of such detainees. NDS is the State's principal internal and external intelligence-gathering organ, conducting security and law enforcement operations to gather actionable intelligence to prevent crimes against public security. As the country's police force, ANP deals with both criminal and conflict-related offences.<sup>4</sup> International military forces also play a significant role in detention of individuals for conflict-related offences.

UNAMA's research focused on detention practices of the NDS with a secondary focus on detention by ANP. UNAMA's interviews concentrated on the treatment of detainees by NDS and ANP officials and the Government of Afghanistan's compliance with due process guarantees under Afghan and international human rights law.<sup>5</sup> UNAMA made no assumptions or findings on the guilt or innocence of those detainees it interviewed for crimes of which they were suspected, accused or convicted.

UNAMA acknowledges the critical and extremely difficult role that NDS and ANP have in safeguarding national security in the current situation of armed conflict in Afghanistan.

### **Torture and Abuse of Detainees by NDS and ANP**

UNAMA's detention observation found compelling evidence that 125 detainees (46 percent) of the 273 detainees interviewed who had been in NDS detention experienced interrogation techniques at the hands of NDS officials that constituted torture, and that torture is practiced systematically in a number of NDS detention facilities throughout Afghanistan. Nearly all detainees tortured by NDS officials reported the abuse took place during interrogations and was aimed at obtaining a confession or information. In almost every case, NDS officials stopped the use of torture once detainees confessed to the crime of which they were accused or provided the requested information. UNAMA also found that children under the age of 18 years experienced torture by NDS officials.<sup>6</sup>

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<sup>4</sup> The National Directorate of Security and the Afghan National Police are allowed by law to detain suspects for up to 72 hours after which time the law requires them to transfer detainees to a facility run by the Central Prison Directorate.

<sup>5</sup> Reports and concerns regarding torture, ill-treatment and arbitrary detention of detainees in Afghan detention facilities are not new. See April 2009 report of the Afghanistan Independent Human Rights Commission, *Causes of Torture in Law Enforcement Institutions*, April 2009, available at [www.aihrc.org.af/2010\\_eng/Eng\\_pages/Reports/Thematic/Research\\_cause\\_of\\_Torture\\_2009\\_April.pdf](http://www.aihrc.org.af/2010_eng/Eng_pages/Reports/Thematic/Research_cause_of_Torture_2009_April.pdf); Report of the UN High Commissioner for Human Rights on the situation of human rights in Afghanistan Tenth Session, January 2009 (A/HRC/10/23), available at [daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/103/68/PDF/G0910368.pdf?OpenElement](http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/103/68/PDF/G0910368.pdf?OpenElement); "[2010 and 2009 Country Reports on Human Rights Practices](http://www.state.gov/documents/organization/160445.pdf)" US State Department, 8 April 2011, available at <http://www.state.gov/documents/organization/160445.pdf> and <http://www.state.gov/g/drl/rls/hrrpt/2009/sca/136084.htm>.

<sup>6</sup> UNAMA interviewed 37 children detained in NDS or ANP facilities. Twenty-three of the 37 child detainees reported torture or ill-treatment including 19 reports of torture or ill-treatment by NDS officials and four by ANP officials. On 30 January 2011, the Government of Afghanistan (Ministry of Interior, Ministry of Justice, Ministry of Defence and NDS) and the UN signed an *Action Plan between the Government of the Islamic Republic of Afghanistan and the United Nations Country Task Force on Monitoring and Reporting regarding Children associated with National Security Forces in Afghanistan*. The *Baseline Report on Action Plan*

More than one third of the 117 conflict-related detainees UNAMA interviewed who had been in ANP detention experienced treatment that amounted to torture or to other cruel, inhuman or degrading treatment.<sup>7</sup>

In situations where torture occurred, it typically took the form of abusive interrogation practices used to obtain confessions from individuals detained on suspicion of crimes against the State. The practices documented meet the international definition of torture. Torture occurs when State officials, acting in their official capacity inflict or order, consent or acquiesce to the infliction of severe physical or mental pain or suffering against an individual to obtain a confession or information, or to punish or discriminate against the individual.<sup>8</sup> Such practices amounting to torture are among the most serious human rights violations under international law, are crimes under Afghan law and are strictly prohibited under both Afghan and international law.<sup>9</sup>

Detainees described experiencing torture in the form of suspension (being hung by the wrists from chains or other devices attached to the wall, ceiling, iron bars or other fixtures for lengthy periods) and beatings, especially with rubber hoses, electric cables or wires or wooden sticks and most frequently on the soles of the feet. Electric shock, twisting and wrenching of detainees' genitals, stress positions including forced standing, removal of toenails and threatened sexual abuse were among other forms of torture that detainees reported. Routine blindfolding and hooding and denial of access to medical care in some facilities were also reported. UNAMA documented one death in ANP and NDS custody from torture in Kandahar in April 2011.

UNAMA found compelling evidence that NDS officials at five facilities systematically tortured detainees for the purpose of obtaining confessions and information.<sup>10</sup> These are

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*Implementation* requires NDS to investigate any cases of ill-treatment of detainees under 18 years old by NDS officials and sanction perpetrators.

<sup>7</sup> UNAMA interviewed 55 detainees held in ANP facilities on criminal offences. Thirteen (24 percent) of these 55 detainees reported torture or ill-treatment by ANP officials.

<sup>8</sup> *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, article 1.

<sup>9</sup> Article 29 of the Constitution of Afghanistan provides "No one shall be allowed to or order torture, even for discovering the truth from another individual who is under investigation, arrest, detention or has been convicted to be punished." The *Penal Code* criminalises torture and article 275 prescribes that public officials (this would include all NDS and ANP officials) found to have tortured an accused for the purpose of obtaining a confession shall be sentenced to imprisonment in the range of five to 15 years.

<sup>10</sup> For this report, UNAMA defines a systematic practice or use of torture as a pattern or practice of interrogation methods that constitute torture occurring *within* a facility which demonstrate that facility's policy or standard operating procedure for dealing with conflict-related detainees. Since nearly all conflict-related detainees UNAMA interviewed in the named facilities were subjected to interrogation methods amounting to torture, the facility's management and investigative staff must have known, committed, ordered or acquiesced to the practice of torture. As such, it can be concluded that torture was an institutional policy or practice of the facility and was not used by a few "bad apples" in only isolated incidents or on rare occasions.

the provincial NDS facilities in Herat, Kandahar, Khost and Laghman, and the national facility of the NDS Counter-Terrorism Department 124 (formerly Department 90) in Kabul. UNAMA received multiple, credible allegations of torture at two other provincial NDS facilities in Kapisa and Takhar. UNAMA did not find indications of torture at two provincial NDS facilities, Paktya and Uruzgan, at the time of its visits to these facilities.

UNAMA received numerous allegations regarding the use of torture at 15 other locations covering 17 NDS facilities.<sup>11</sup> Twenty-five percent of detainees interviewed in these 17 facilities alleged they had been tortured. At the time of writing of this report, UNAMA had not established the credibility of the allegations based on the number of interviews conducted and the need to corroborate allegations satisfactorily. UNAMA continues to investigate these allegations.

Detainees in ANP custody reported that abuse occurred in a broader range of circumstances and settings. Some of this abuse constituted torture while other methods amounted to cruel, inhuman, or degrading treatment. Reports of abuse by the ANP included police officers committing torture or ill-treatment at the time of arrest, at check posts, at district headquarters, and at provincial headquarters.

The Government of Afghanistan is obliged under Afghan law and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* to investigate promptly all acts of torture and other ill-treatment, prosecute those responsible, provide redress to victims and prevent further acts of torture. The Government's obligation to respect the prohibition against torture is also *non-derogable* meaning that no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, can be invoked as a justification of torture. UNAMA calls on the Afghan authorities to take all possible steps to end and prevent torture, and provide accountability for all acts of torture.

### **Transfer of Detainees to NDS and ANP by International Military Forces**

UNAMA's detention observation included interviews with 89 detainees who reported the involvement of international military forces either alone or together with Afghan forces in their capture and transfer to NDS or ANP custody. UNAMA found compelling evidence that 19 of these 89 detainees were tortured in NDS custody and three in ANP custody.

Under the *Convention against Torture* States are prohibited from transferring individuals to another State's custody where a substantial risk of torture exists.<sup>12</sup> Rules of the

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<sup>11</sup> The facilities are NDS provincial facilities in Badakhshan, Badghis, Baghlan, Balkh, Dai Kundi, Farah, Helmand, Kunar, Kunduz, Nangarhar, Samangan, Sari Pul, Wardak, Zabul and Kabul (Department 17/40, Department 18/34 and Department 1).

<sup>12</sup> Article 3 in the *Convention against Torture on non-refoulement* obliges States not to transfer "a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture". Further, "[I]f a person is to be transferred or sent to the custody or control of an individual or institution known to have engaged in torture or ill-treatment, or has not implemented adequate safeguards, the State is responsible, and its officials subject to punishment for ordering, permitting or participating in this transfer contrary to the State's obligation to take effective measures to prevent torture."

International Security Assistance Forces (ISAF) also state that consistent with international law, persons should not be transferred under any circumstances where there is a risk they will be subjected to torture or other forms of ill-treatment.

The situation described in this report of transfer to a risk of torture speaks to the need for robust oversight and monitoring of all transfers of detainees to NDS and ANP custody by international military forces in Afghanistan, and suspension of transfers to facilities where credible reports of torture exist.<sup>13</sup>

Canada and the United Kingdom ceased transfers of detainees to NDS facilities in Kandahar and Kabul at various times in recent years based on reports of torture and ill-treatment. These countries implemented post-transfer monitoring schemes allowing them to track the treatment of detainees their armed forces handed over to Afghan authorities. The United States Embassy recently finalised plans for a post-transfer detainee monitoring programme and a proposal is with the Government of Afghanistan for its consideration.<sup>14</sup> The Embassy advised UNAMA that it regards the programme as a positive way for the US to continue its work with the Government to ensure its detention system is safe, secure and humane.<sup>15</sup>

In early July 2011, US and ISAF military forces stopped transferring detainees to NDS and ANP authorities in Dai Kundi, Kandahar, Uruzgan and Zabul based on reports of a consistent practice of torture and mistreatment of detainees in NDS and ANP detention facilities in those areas.<sup>16</sup> In early September 2011, in response to the findings in this report, ISAF stated that it stopped transferring detainees to certain NDS and ANP installations as a precautionary measure.<sup>17</sup>

Torture and ill-treatment by NDS and ANP could also trigger application of the “Leahy Law” which prohibits the US from providing funding, weapons or training to any unit of the security forces of a foreign country if the Secretary of State has credible evidence that such

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<sup>13</sup> See Chapter V of this report.

<sup>14</sup> Under a US Presidential Executive Order 13491 dated 22 January 2009, a special task force on interrogations and transfer policies issues recommended the US establish a post-transfer detainee monitoring program which President Obama ordered.

<sup>15</sup> UNAMA interview with US government official 29 August 2011, Kabul.

<sup>16</sup> UNAMA meetings with International Security Assistance Forces (ISAF) officers August 2011 and NDS Deputy Director Kandahar, Col Abdul Wahab 21 August 2011. The suspension of transfer of detainees was ordered pursuant to a FRAGO (fragmentary order used by the US military to send timely changes of existing orders to subordinate and supporting commanders while providing notification to higher and adjacent commands) dated 12 July 2011.

<sup>17</sup> UNAMA meetings with ISAF officials, September 2011, Kabul and 7 September 2011 public statement of ISAF spokesperson General Carsten Jacobson, “We are aware that a UN report will come out and we will look into that report. We have not stopped the overall transfer of detainees, but to certain installations only.” ISAF officers informed UNAMA that in early September ISAF stopped transferring detainees to 16 installations that UNAMA identified as facilities where UNAMA found compelling evidence of torture and ill-treatment by NDS and ANP officials as follows: NDS national Counter-Terrorism Department 90/124 in Kabul; NDS provincial facilities in Herat, Kandahar, Kapisa, Khost, Laghman and Takhar; and Kandahar District 2 NDS office; ANP district facilities in Kandahar including Daman, Arghandab, District 9 and Zhari; ANP headquarters in Khost, Kunduz and Uruzgan; and the ANP district facility in Dasht-e-Archi, Kunduz.

unit has committed gross human rights violations, unless the Secretary of State determines that the concerned government is taking effective remedial measures.<sup>18</sup> In the situation of Afghanistan this would presumably require the US to resume transfer of detainees only when the Government of Afghanistan implements appropriate remedial measures that include bringing to justice NDS and ANP officials responsible for torture and ill-treatment.

### **Lack of Accountability of NDS and ANP officials for Torture and Abuse of Detainees**

UNAMA found that accountability of NDS and ANP officials for torture and abuse is weak, not transparent and rarely enforced. Limited independent, judicial or external oversight exists of NDS and ANP as institutions and of crimes or misconduct committed by NDS and ANP officials including torture and abuse.

Most cases of crimes or abusive or unprofessional conduct by NDS officials are addressed internally. Senior NDS officials advised UNAMA that NDS investigated only two claims of torture in recent years, neither of which led to charges being pursued against the accused.

In December 2010, NDS established an internal oversight commission to examine allegations of mistreatment of detainees, due process issues and detention conditions. Following monitoring visits to several NDS facilities in January 2011, the commission was to report to the Director General of NDS. UNAMA observed the commission's visits to several detention facilities and had concerns regarding the scope and quality of its investigations. Although a positive measure initially, the oversight body appears to have been ineffective to date in addressing torture, abuse and arbitrary detention as this report's findings suggest.

Internal and external accountability mechanisms exist for ANP criminal conduct with most cases addressed internally through the Ministry of Interior. Alleged crimes committed by ANP officials should be referred to the Directorate of Military Affairs in the Attorney General's Office for investigation and criminal trial by a military prosecutor. However, little information from the Ministry of Interior is available regarding any referral of such cases to the judicial system. Although private citizens can report crimes or misconduct committed by police officers through an office of the Ministry of Interior which assesses claims for investigation by one of three Ministry of Interior structures, few cases are pursued through this mechanism.

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<sup>18</sup> The "Leahy Law" refers to discreet sections in the *Foreign Operations Appropriations Act*, Section 563 of P.L. 106-429 (2001) and the *Defence Appropriations Act*, Section 8092 of P.L. 106-259 (2001). The Leahy provision within the *Foreign Appropriations Act* provides "None of the funds made available by this Act may be provided to any unit of the security forces of a foreign country if the Secretary of State has credible evidence that such unit has committed gross violations of human rights, unless the Secretary determines and reports to the Committees on Appropriations that the government of such country is taking effective measures to bring the responsible members of the security forces unit to justice" and the *Defence Appropriations Act* states "none of the funds made available by this Act may be used to support any training programme involving a unit of the security forces of a foreign country if the Secretary of Defence has received credible information from the Department of State that a member of such unit has committed a gross violation of human rights, unless all necessary corrective steps have been taken." Together with provisions in *Arms Export Control Act*, Section 22 U.S.C. 2778 (1976), these provisions together form the basis of an across-the-board policy aimed at ensuring US assistance does not contribute to human rights abuses.

## **Due Process Violations and Arbitrary Detention**

In almost all criminal cases in Afghanistan, including national security prosecutions, the case against the defendant is based on a confession, which the court usually finds both persuasive and conclusive of the defendant's guilt. In most cases confessions are the sole form of evidence or corroboration submitted to courts to support prosecutions. Confessions are rarely examined at trial and rarely challenged by the judge or defence counsel as having been coerced.

Under Afghan law, where a confession is obtained illegally or forced, for example, under torture, it should be inadmissible in court. However, even in cases where defence lawyers raise the issue of forced confession through torture, courts usually dismiss the application and allow the confession to be used as evidence. This evidentiary practice clearly violates the letter and spirit of the law and is inconsistent with many expert studies that show information gained by torture is manifestly unreliable and non-probative of an individual's guilt or innocence.<sup>19</sup>

UNAMA documented other due process concerns and violations by NDS and ANP officials. These include the routine failure to meet procedural time limits demarcating the phases of the pre-trial criminal investigation and chain of custody, lack of clarity in the roles of arresting authorities and prosecutors, and lack of judicial oversight of pre-trial detention until very late in the pre-trial process. Since most conflict-related detainees do not have

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<sup>19</sup> See Report of the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E. Méndez, to the UN Human Rights Council, February 2011 "Torture and ill-treatment are and always will be ineffective means or tools for intelligence or information gathering and law enforcement. Confessions and statements obtained under torture are inherently unreliable, and often disorient and disperse the efforts of law enforcement and investigations personnel. It is therefore crucial to recognise that alternatives to brutality are available and, indeed, effective in addressing the needs of States in fighting crime in all its forms." See also Alfred W. McCoy, "The Myth of the Ticking time Bomb," *The Progressive*, October 2006, [http://www.progressive.org/mag\\_mccoy1006](http://www.progressive.org/mag_mccoy1006) (accessed September 2011) "So the choices are clear. Major success from limited, surgical torture is a fable, a fiction. But mass torture of thousands of suspects, some guilty, most innocent, can produce some useful intelligence. Useful intelligence perhaps, but at what cost? The price of torture is unacceptably high because it disgraces and then undermines the country that countenances it. For the French in Algeria, for the Americans in Vietnam, and now for the Americans in Iraq, the costs have been astronomical and have outweighed any gains gathered by torture." Lt. General John Kimmons, the US Army's Deputy Chief of Staff for Intelligence at a September 25, 2006 press conference noted "I am absolutely convinced [that] no good intelligence is going to come from abusive practices. I think history tells us that. I think the empirical evidence of the last five years, hard years, tell us that. Moreover, any piece of intelligence which is obtained under duress, through the use of abusive techniques, would be of questionable credibility, and additionally it would do more harm than good when it inevitably became known that abusive practices were used. And we can't afford to go there." [Press conference transcript available at http://www.globalsecurity.org/security/library/news/2006/09/sec-060906-dod02.htm](http://www.globalsecurity.org/security/library/news/2006/09/sec-060906-dod02.htm).

Dr. Marvin Zalman, *Criminal Procedure: Constitution and Society* (2007) found "CIA and FBI reports point out the problems of inaccurate recollection and false confessions from torture. The use of torture in Algiers, Northern Ireland and Israel did not and has not produced desired political results." *Human Rights Watch* "France/Germany/United Kingdom 'No Questions Asked' Intelligence Cooperation with Countries that Torture" (June 2010) found "Several of the best known claims that torture produced information that has helped disrupt or prevent terrorist attacks have proven on closer examination to be false."

access to defence counsel or information about their rights, the absence of these procedural safeguards has a huge negative impact on detainees' ability to challenge the legality of their detention, prepare a credible defence, or seek protection from torture or coercion.

Under Afghanistan's *Interim Criminal Procedure Code*, custody is linked with the phase of a criminal case. Police may detain an individual for up to 72 hours after an arrest, while they conduct initial interviews, prepare charges and hand the case over to a primary prosecutor (*Saranwal-e-btadaiah*) who confirms the charges and basis for detention.<sup>20</sup> Prosecutors then have a maximum period of 30 days from the time of arrest to investigate and file an indictment. During this process, suspects are to be transferred to a detention centre administered by the Central Prison Directorate – currently within the Ministry of Justice.<sup>21</sup>

Separation of detention authority is aimed at ensuring suspects do not remain in the custody of those responsible for their interrogation for long periods, effectively serving as a safeguard against coercion and abuse. This safeguard is all the more important since the *Interim Criminal Procedure Code* does not provide for judicial review of the legality of detention in the early investigative stages after arrest. Rather the prosecutor effectively retains the ability to detain or release from the time in which charges are brought until the beginning of trial with minimal judicial oversight.<sup>22</sup>

In practice, ANP and NDS officials routinely disregard these time limits and safeguards. UNAMA found that 93 percent of all NDS detainees interviewed were held for periods longer than the 72 hour maximum — an average of 20 days — before being charged with a crime and transferred to a Ministry of Justice detention centre. Many ANP and NDS officials attributed their inability to meet time limits to inadequate human resources, lack of logistical and technical capacity, and difficulties in travel to and from remote locations with poor infrastructure and insecurity to detention facilities.

UNAMA found that many prosecutors in national security cases delegate their investigative authority to the NDS and interview the detainee only after NDS completes its initial investigation and transfers the detainee to a Ministry of Justice prison which can take several months. In some cases, prosecutors draft the indictment solely on the basis of information gathered by NDS. This system of delegating the prosecutor's authority along with the lack of speedy judicial review of the legality of detention means that most detainees do not see a judge or a prosecutor until they reach trial – a period of time that can extend up to three months from the time of arrest.<sup>23</sup> This situation violates Afghanistan's obligation under the *International Covenant on Civil and Political Rights* to

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<sup>20</sup> *Interim Criminal Procedure Code*, Official Gazette No. 820 (25 February 2004), articles 31, 34 and 36.

<sup>21</sup> Pursuant to a decision of the Council of Ministries on 20 May 2011, preparations are underway to transfer the Central Prison Directorate from the Ministry of Justice to the Ministry of Interior. As at September 2011, the Ministry of Justice had handed over most responsibilities in this area to the Ministry of Interior in advance of the actual legal transfer.

<sup>22</sup> *Interim Criminal Procedure Code* articles 6(3), 8(4), 34(2), 36, 53 (3) (b) and 84 and *Law on Prisons and Detention Centres* articles 22 and 51.

<sup>23</sup> *Ibid.*



ensure all Afghans arrested or detained are brought promptly before a judge or other appropriate judicial official, and is inconsistent with provisions in the Constitution of Afghanistan that prohibit arbitrary detention.<sup>24</sup>

Another weakness in procedural safeguards for detainees in NDS custody is the lack of access to counsel. Despite the right of all detainees under Afghan law to a defence lawyer at all stages of the process, only one of the 324 detainees UNAMA interviewed in ANP or NDS detention reported they had defence counsel. Almost all defence lawyers and legal aid providers informed UNAMA they had minimal access to NDS facilities as NDS officials deliberately prevented them from accessing detainees.<sup>25</sup> NDS officials told UNAMA they deny detainees' access to defence lawyers for fear they will influence detainees and hinder NDS investigations. Defence counsel reported they generally had better access to detainees held in ANP facilities but only after ANP investigating officials presented the case to the prosecutor.

Although detainees have the right under Afghan law to family visits, only 28 percent of detainees interviewed were permitted family visits during their detention in NDS facilities.

### **Torture and Arbitrary Detention Undermine Reconciliation and Reintegration**

Torture, ill-treatment and arbitrary detention by the NDS and ANP are not only serious violations of human rights and crimes they also pose obstacles to reconciliation and reintegration processes aimed at ending the armed conflict in Afghanistan. UNAMA's research along with the findings of other experts who have analysed the emergence and growth of the insurgency post-2001, highlights that such abuses in many cases contributed to individual victims joining or rejoining the Taliban and other anti-Government armed groups.<sup>26</sup>

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<sup>24</sup> *International Covenant on Civil and Political Rights*, articles 9 (1) and (3), and articles 23 (1) (3), 24 (1) and 27 (1) and (2) of the Constitution of Afghanistan. Case law of the UN Human Rights Council holds that a prosecutor is not a sufficient independent judicial authority to rule on issues of detention.

<sup>25</sup> UNAMA interviews with defence lawyers from the International Legal Foundation-Afghanistan (ILF-A) and the Legal Aid Organisation of Afghanistan (LAOA), 16 July 2011. A complicating factor is the low number of defence counsel in Afghanistan. According to the Afghanistan Independent Bar Association, 1,200 defence lawyers are registered in Afghanistan. According to Ministry of Justice Central Prison Directorate monthly statistics, approximately 20,700 individuals were detained in Ministry of Justice detention facilities in Afghanistan as of June 2011.

<sup>26</sup> See Report of the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston Addendum Preliminary Note on the Mission to Afghanistan (4 – 15 May 2008) (A/HRC/8/3/Add.6-29 May 2008): "When I spoke with elders from conflict-affected areas, I was repeatedly told that abuses by police were tempting people to support the Taliban. These realities have not, however, been adequately recognised by the Government or the international community. The belief that human rights can be traded off for stability and security seems widely held. It is gravely misplaced. We need to recognise that ensuring respect by Government security forces for basic human rights is *necessary* in order to ensure security and stability." Stephen Carter and Kate Clark in *"No Shortcut to Stability: Justice, Politics and Insurgency in Afghanistan"* (2010) explore at length how abusive security forces, ill-advised raids by the international forces, and the broader failings of the justice system have alienated communities from the Government and pushed some individuals into the insurgency. Anand Gopal in *"The Battle for Afghanistan: Militancy and Conflict in Kandahar"* (2010) provides a detailed account of how these dynamics played out in Kandahar. He found that after the fall of the Taliban regime many senior Taliban commanders and officials decided not to oppose the

The findings in this report bring into focus a tension between programmes the Government of Afghanistan launched to promote reintegration and reconciliation with insurgents and abusive practices, particularly against conflict-related detainees, by ANP and NDS officials. The Government's Peace and Reintegration Programme established incentives for insurgents to resolve grievances, reconcile with and reintegrate into their communities. At the same time, ANP and NDS abuses continue to provide individuals with an incentive to put their security in the hands of anti-Government elements and to fight actively against the Government.

The need to reduce the number of persons arbitrarily detained has been also recognised as a key confidence-building measure in efforts to promote reconciliation nationally among local communities and with anti-Government elements. The Government established several prisoner-release programmes to address the lack of confidence and mistrust in Government among local communities caused by high numbers of individuals detained arbitrarily and mistreated in detention. The High Peace Council recently began reviewing cases of conflict-related detainees held without evidence or access to courts as a means of confidence-building. Such efforts are undermined when the ANP, NDS, and the criminal justice system as a whole continue to tolerate torture and prolonged, arbitrary and abusive detention.

### **Torture and Abuse by State Officials Compromises National Security**

It has long been the position of the United Nations that effective counter-terrorism measures require compliance with human rights and that torture and other abusive practices by State officials such as those documented in this report undermine national security. The UN Global Counter-Terrorism Strategy and Plan of Action affirm that human rights for all and the rule of law are essential components of counter-terrorism, recognising that effective counter-terrorism measures and protection of human rights are not conflicting goals, but complementary and mutually reinforcing.<sup>27</sup> The UN Special Rapporteur on Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism notes there is broad consensus that combating terrorism in compliance with human rights is not only a legal and moral obligation of States but also the most effective way to fight against terrorism.<sup>28</sup>

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new government. In explaining why many of them nevertheless came to assume prominent positions in the insurgency over the next few years, he emphasises that their experiences of being arbitrarily arrested and tortured by Afghan security forces led many to conclude there was no place for them in the new order. Martine van Bijlert in *Unruly Commanders and Violent Power Struggles: Taliban Networks in Uruzgan* in *Decoding the New Taliban: Insights from the Afghan Field* (ed. Antonio Giustozzi) (2009) noted that this phenomenon is sufficiently common for Afghans to refer to such insurgents as *majbur*, or forced Taliban. Antonio Giustozzi in *Koran, Kalashnikov and Laptop: The Neo Taliban Insurgency in Afghanistan* (2008) found "Beatings and torture appear to be used routinely for this purpose [interrogation]. Since many of those [alleged Taliban] arrested are then released, if for no other reason than a lack of capacity in [NDS'] prisons, these practices are likely to have driven many into the hands of the insurgency."

<sup>27</sup> A/RES/60/288 (8 September 2006).

<sup>28</sup> Available at <http://www.un.org/terrorism/terrorism-hr.shtml>.

## Observations

Torture and arbitrary detention are two of the most pressing human rights issues impeding the establishment of rule of law, transition of lead security responsibilities from international military forces to Afghan National Security Forces and arguably long-term reconciliation in Afghanistan. Persistent ill-treatment of detainees and the inability of judicial authorities to respect basic due process guarantees have long been factors fostering public mistrust in the Government, dissatisfaction with Afghan security forces and the growth and viability of the insurgency. Individuals detained by the NDS or ANP suffer torture without recourse or accountability, the ability to seek redress, to challenge the basis of their detention or, ultimately, to refute the persuasive power of a coerced confession gained through torture.

Afghanistan's Constitution, laws and international legal obligations provide an effective legal framework for prohibiting torture and ill-treatment.<sup>29</sup> While some critical safeguards are not yet in place, particularly the right to challenge the basis of detention, effective implementation of existing laws could ensure the worst abuses are stopped and hold accountable perpetrators of torture and ill-treatment.

UNAMA's detention observation shows that NDS officials are responsible for the serious human rights violations and crimes documented in specific NDS facilities. UNAMA's findings to date are that NDS officials systematically tortured detainees in a number of detention facilities across Afghanistan. Torture does not appear to have been practiced systematically in each NDS facility UNAMA observed. In other facilities UNAMA observed, more investigation is required to determine whether torture is used systematically in the facility. UNAMA concludes on the basis of the findings of this observation programme that the use of torture is not a *de facto* institutional policy directed or ordered by the highest levels of NDS leadership or the Government. This together with the fact that NDS cooperated with UNAMA's detention observation programme suggests that reform is both possible and desired by elements within the NDS. In response to the findings of this report, the leadership of NDS advised UNAMA that it plans to investigate reports of torture and address concerns through a time-limited action plan.

The comments and response of the Government of Afghanistan, the NDS and the Ministry of Interior to the findings in this report are attached as Annex II.

Use and acceptance of abusive interrogation tactics amounting to torture also reflects the need for much greater attention to reforms in the judiciary, prosecution and law enforcement sectors. Police, prosecutors and NDS intelligence officials and interrogators should be trained in national and international legal frameworks prohibiting torture and in interrogation techniques that have proved to be more reliable in gaining the long term trust and cooperation of detainees and suspected perpetrators of terrorism that strengthen national security. These techniques also provide reliable intelligence, information and testimonial evidence on which courts can base decisions and on which police, prosecutors

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<sup>29</sup> See Annex 1 for an overview of applicable laws.

and courts can minimise arbitrary detention and increase respect for due process guarantees the Government is obliged to provide to all detainees.

UNAMA offers the following recommendations to the Government of Afghanistan and its international partners to address and end the practice of torture and ill-treatment, and arbitrary detention in all NDS and ANP facilities.

## **Key Recommendations**

### **To the National Directorate of Security (NDS)**

- Take immediate steps to stop and prevent torture and ill-treatment at all NDS facilities and particularly at facilities where such practices have been used as a method of interrogation:
  - Investigate all reports of torture and ill-treatment at provincial NDS facilities in Herat, Kandahar, Khost, Laghman and NDS Counter-Terrorism Department 90/124 in Kabul. Remove, prosecute, discipline and punish those officials found responsible. Permit independent oversight of these investigations and publicly report on findings and remedial actions;
  - Promptly issue directives prohibiting torture and ill-treatment in all circumstances to all NDS personnel and advise them and their superiors they will be prosecuted and disciplined if found committing, ordering or condoning such practices;
  - Permit full, regular and unhindered access of independent monitors to all NDS facilities including the Afghanistan Independent Human Rights Commission, UNAMA, International Committee of the Red Cross and others.
- Review the working methods of the NDS oversight/detention monitoring commission, identify why it has not uncovered torture at the facilities visited, and adopt methods that ensure future monitoring missions are effective.
- Implement an external accountability mechanism that allows independent and transparent investigations into alleged abuses within NDS facilities.
- Ensure all NDS interrogators and their superiors receive mandatory training in lawful and effective interrogation methods, alternative investigative approaches (such as forensics), and legal obligations under Afghan and international law that prohibit torture and ill-treatment, in coordination with international partners.
- Change policies and practices on access of defence lawyers to detainees. Permit defence lawyers to visit all detention facilities and offer their services to any detainee at all stages of the process as required by Afghan law.

### **To the Afghan National Police**

- Take immediate steps to stop and prevent torture and ill-treatment:
  - Investigate all reports of torture and ill-treatment at police facilities and remove, prosecute, discipline and punish all police officers and their superiors found responsible for committing or condoning such practices;

- Permit independent oversight of these investigations and publicly report on findings and remedial actions.
- Permit full, regular and unhindered access of independent monitors to all Afghan National Police and Ministry of Interior facilities including the Afghanistan Independent Human Rights Commission, UNAMA, International Committee of the Red Cross and others.
- Issue and implement regulations instructing police that a limited number of designated officials with the Criminal Investigation Division, Counter-Terrorism Unit, and similar units conduct interrogations. Issue and train these officials on a standard operating procedure on lawful and effective interrogation and legal obligations on the prohibition of torture and ill-treatment.

#### **To the Government of Afghanistan**

- Make the legal framework and procedures regulating NDS public and transparent, and ensure legal procedures provide for the external investigation and prosecution of allegations of serious criminal conduct, including torture and ill-treatment of detainees by NDS officials, in the civilian criminal justice system.

#### **To the Supreme Court**

- Direct primary and appeal court judges to routinely investigate all allegations of torture and coerced confessions and strictly enforce prohibitions on the use of evidence obtained through torture as required under the Constitution of Afghanistan and the *Interim Criminal Procedure Code*.

#### **To the Supreme Court, Ministry of Justice, Ministry of Interior and Parliament**

- Revise the *Interim Criminal Procedure Code* to guarantee the right of detainees to be brought promptly before a judge for an initial and periodic review of the lawfulness of pre-trial detention, and the right of detainees to challenge the legality of their detention with a speedy court decision.

#### **To Troop Contributing Countries and Concerned States**

- Suspend transfer of detainees to those NDS and ANP units and facilities where credible allegations or reports of torture and ill-treatment have been made pending a full assessment. Review monitoring practices at each NDS facility where detainees are transferred and revise as necessary to ensure no detainees are transferred to a risk of torture.
- Review policies on transferring detainees to ANP and NDS custody to ensure adequate safeguards and use participation in joint operations, funding arrangements, the transition process, intelligence liaison relationships and other means to stop the use of torture and promote reforms by NDS and ANP.
- Build the capacity of NDS and ANP facilities and personnel including through mentoring and training on the legal and human rights of detainees and detention practices in line with international human rights standards.

- Increase efforts to support training to all NDS and ANP interrogators and their supervisors in lawful and effective interrogation methods, and alternative investigative approaches (such as forensics).

A full set of recommendations is found at the end of this report.