

Afghanistan/UN, Treatment of Conflict Related Detainees

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N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

[**Source** : *United Nations Assistance Mission in Afghanistan, UN Office of the High Commissioner for Human Rights* , October 2011, Kabul, Afghanistan, available at http://www.ohchr.org/Documents/Countries/AF/UNAMA_Detention_en.pdf , footnotes omitted]

[...]

[1] Since 2004, the United Nations Security Council has mandated the United Nations Assistance Mission in Afghanistan (UNAMA) to support the establishment of a fair and transparent justice system, including the reconstruction and reform of the prison sector, and to work towards strengthening the rule of law.

[2] UN Security Council Resolution 1974 (2011) mandates UNAMA to improve respect for human rights in the justice and prisons sectors as follows: “21. Emphasises the importance of ensuring access for relevant organisations, as applicable, to all prisons and places of detention in Afghanistan, and calls for full respect for relevant international law including humanitarian law and human rights law. 31. Reiterates the importance of the full, sequenced, timely and coordinated implementation of the National Priority Programme on Law and Justice for All, by all the relevant Afghan institutions and other actors in view of accelerating the establishment of a fair and transparent justice system, eliminating impunity and contributing to the affirmation of the rule of law throughout the country. Stresses in this context the importance of further progress in the reconstruction and reform of the prison sector in Afghanistan, in order to improve respect for the rule of law and human rights therein”

UNAMA's Detention Observation Programme

[3] From November 2006 to September 2007, UNAMA and the Afghanistan Independent Human Rights Commission conducted more than 2,000 interviews of detainees at prisons and Afghanistan National Police (ANP) facilities as part of their Arbitrary Detention Verification Campaign.

I. Executive Summary

Torture and Abuse of Detainees by NDS and ANP

[4] UNAMA's detention observation found compelling evidence that 125 detainees (46 percent) of the 273 detainees interviewed who had been in National Directorate of Security (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.

[5] 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. [...]

[6] 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. 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. 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. [...]

[7] Fifteen of the 25 detainees held in Department 90/124 reported having been beaten. Some of these reported having been punched, kicked, or both. Even more reported having been beaten with rubber hoses, plastic pipes, metal pipes, or wooden sticks. Those beaten recalled blows having been inflicted on their feet (including the soles), legs, back, stomach and shoulders. All reported being beaten for the purpose of obtaining a confession. Detainees reported denial of water for ablution during beatings, I asked the NDS official to give me water for ablution, and I said to him 'for Allah's sake and for Quran's sake give me water',

and he said 'there is no Allah or Quran here'. [The detainee stated that NDS officials did not give him water until he confessed.]

Suspension

[...]

[8] Detainees 243, 244, 253 and 331 reported having been beaten with plastic water pipes. [...] Detainees 293 said that he was beaten with a "metal pipe", and Detainee 259 reported he was beaten with a wooden stick.

[9] After beating me for a long time — I cannot remember how long it was — they hung me from an ironbarred door. . . I was hung until evening, and the hood was placed over my head during that time. The door was in the hallway. I was released from that door for sunset prayers, then hung again, then released for evening prayers, then hung again, then freed for dinner, and then hung until 10pm. While I was being hung, I only heard someone telling me over and over that I did not tell the truth. [...]

Forced Prolonged Standing

[10] Of the detainees who reported physical abuse, six out of 11 detainees said they had been forced to stand for a prolonged period. A session of forced prolonged standing began when, after deciding the detainee was not being fully cooperative, an interrogator ordered a guard to take him outside. One detainee quoted an interrogator as saying, "If he will not explain and confess, then let him stand all night." Detainees reported that NDS officials took detainees into the detention sub-compound's yard where they placed hoods on the detainees, hand-cuffed them, and shackled their ankles while they were standing. While sitting down was usually prohibited, NDS officials forced some detainees to sit down and stand up repeatedly. Most detainees who had been forced to stand said they were provided with little or no water even if they were continually subjected to direct sunlight over a long period of time. The length of enforced standing varied considerably, and not all detainees could calculate the period with precision. This torture technique combines elements of a stress position, sleep deprivation, and sensory deprivation. The effects on the detainee are harsh. One detainee who had been forced to stand for multiple days said, "When they took me to the cell, I could not move for two or three days. I had pain in my back, and I could not feel that I still had feet." [...]

Torture of Children at NDS Department 90/124

[11] NDS Department 90/124 used a variety of techniques that amounted to torture; this treatment was also used against child detainees (aged between 14 and 17 years). UNAMA interviewed six children who had been detained in Department 90/124; five reported they suffered torture. UNAMA concluded that five children experienced torture during interrogation for purposes of obtaining a confession. One child was not mistreated or tortured but was threatened with torture.

[12] The five children claimed they made false confessions regarding involvement in national security crimes to stop the torture. Five had been beaten with hard plastic pipes, one with a hard plastic pipe and an electric cable, one with an electric cable on his back and three had been beaten on the soles of their feet. Four of the five children had also been subjected to suspension. One child was threatened with electric shock unless he confessed. One child reported NDS interrogators squeezed his testicles, while another child reported NDS officials threatened with sexual assault.

Transfer of Detainees to NDS and ANP by International Military Forces

[13] UNAMA's detention observation included interviews with 89 detainees who reported the involvement of international military forces either alone or with Afghan security 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 facilities namely, NDS Department 90/124 and NDS Laghman and three in ANP custody (ANP in Kunduz and Tirin Kot). This situation speaks to the need for robust oversight and monitoring of all transfers of detainees to NDS and ANP custody and possible suspension of transfers where credible reports of torture exist.

[14] International Security Assistance Force (ISAF) rules of engagement permit the detention of individuals captured on the battlefield or in counter-terrorism operations that must be released or transferred to the custody of Afghan authorities within 96 hours. Reportedly, Canada, the UK and US have declared caveats permitting them to transfer detainees within 14 days. ISAF rules also state "consistent with international law, persons should not be transferred under any circumstances in which there is a risk that they will be subjected to torture or other forms of ill-treatment". In September 2007, bilateral and multilateral agreements between the Government of Afghanistan and ISAF member states in "Exchange of Letters" permitted ISAF member States access to NDS facilities where they transferred detainees to monitor their treatment. [See Case, Afghanistan/Canada, Agreements on the Transfer of Detainees, printed version of the Casebook, p.2305]

[15] The US and other ISAF military forces, including Canada and the UK reportedly transferred approximately 2,000 individuals to Afghan custody in 2009 and 2010. Judicial rulings in Canada and the UK resulted in suspension of transfers of detainees by those countries' military forces to various NDS facilities over different periods of time. In both cases, the courts' decisions were based on the credibility of information that NDS abused and tortured detainees in selected locations (Kabul and Kandahar). The UK stopped transfers to NDS Kandahar and NDS facilities in Kabul. Canada ceased transfers to all NDS facilities in Kabul, but continued to transfer to Kandahar's MoJ Sarapoza prison. Canadian and the UK governments also implemented monitoring programmes in detention facilities where they handed over detainees to custody of Afghan authorities.

[16] The US has not yet put in place a monitoring programme to track detainees it hands over to Afghan authorities. A US government official advised UNAMA that the US Embassy finalised plans for a post-transfer

detainee monitoring programme and a proposal is with the Afghan government for its consideration. The Embassy stated that it regards the proposed programme as a positive way for the US to continue its work with the Afghan government to ensure its detention system is safe, secure, and humane.

[17] In early July 2011, US 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 these areas. ISAF advised UNAMA that it asked the Government to investigate these reports and indicates it will not resume transfers until the situation is satisfactorily addressed. [...]

Discussion

I. Classification of the situation and of the persons

1. How do you classify the situation in Afghanistan in 2011?
2. (Paras 1-3) How do you classify the conflict-related detainees in Afghan custody? Are they prisoners of war?

II. Legal basis for the detention

3. Is IHL applicable to detention of the conflict-related detainees in Afghan custody? What rules are applicable? Which other branches of international law are applicable? (GC I-IV, Art. 3; P II)
4. May the detainees be detained under IHL of non-international armed conflicts? On what basis? For what reason? May someone be detained for the sole purpose of interrogation?

III. Treatment in detention

5. According to IHL of non-international armed conflicts, how should people deprived of their liberty be treated?
6. (Paras 4-17) Which (if any) of the acts reported amount to torture and which (if any) amount to inhuman and degrading treatment? What is the significance of the distinction for IHL? For international human rights law?
7. Does IHL give the detainees a right to a fair trial? Can the trial of an accused who confessed after having

been treated as described in this report be fair?

8. (Paras 11-12) Do children enjoy special protection against torture?

9. (Paras. 13-17) What rules apply to the transfer of detainees who have been captured in relation to the non-international armed conflict between ISAF member states and the Taliban, to Afghan authorities? Are they covered by Protocol II?

10. What rules of Article 3 common to the Geneva Conventions could be violated by a state transferring detainees to authorities known to ill-treat their detainees? What other rules of international law may be violated?

11. What should ISAF member states do if the detainees to be transferred face the risk of being tortured? Based on the findings of the mission, may ISAF member states not transfer any Afghan detainee to Afghan authorities? If the detainees may not be transferred, what should ISAF member states do with such detainees? (GCI-IV, Common Art. 3).