
U.S. MONITORING OF DETAINEE TRANSFERS IN AFGHANISTAN: INTERNATIONAL STANDARDS AND LESSONS FROM THE UK & CANADA

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SUMMARY & RECOMMENDATIONS

The US should ensure that detainees it apprehends and transfers to Afghan authorities are treated humanely. Just as long-term detention operations in Afghanistan are politically sensitive and pose a strategic liability to US interests, US detainee transfer practices may undercut the counterinsurgency strategy to “win hearts and minds” of the Afghan public insofar as they are associated with abuse or collusion with abusers.

The US has already committed to supporting institutional reform of the Afghan justice and security sectors—in particular, as an integral part of its plans to transition the Detention Facility in Parwan to Afghan control in 2011. Likewise, the US should take steps to systematically reduce the likelihood of abuse against detainees it transfers to the custody of the National Directorate of Security (NDS), an Afghan intelligence agency. As other human rights groups have urged, the US should consider a moratorium on transfers pending demonstrated improvement in NDS facility conditions, or consider alternative transfer arrangements. It should also conduct capacity-building, including training of NDS personnel.

The US should also take steps to deter and detect abuse by the NDS through robust, intrusive and systematic monitoring of NDS facilities where transferred detainees are held. The US should draw on the experiences of Canada and the UK, including their known failures and attempted improvements, and their willingness to declare moratoriums on transfer where there are allegations of abuse and NDS obstructions of access. The US should also establish minimum requirements for monitoring based on international torture prevention monitoring standards. These standards reflect the importance of securing a broad mandate for a monitoring team’s access to detainees. They also reflect the need to design a monitoring protocol that accounts for the ease with which torture can be concealed and the difficulty of achieving deterrence against abuse.

This briefing paper reflects analysis developed in Promises to Keep: Diplomatic Assurances Against Torture in US Terrorism Transfers (Human Rights Institute 2010), a report which assesses the use of diplomatic assurances of humane treatment to safeguard against abuse in military detainee transfers, deportations and other transfer contexts. For more information, see http://www.law.columbia.edu/center_program/human_rights/NatSecHRs

RECOMMENDATIONS

1. Moratoriums on Transfer and Capacity-Building

The US should review detention conditions at each NDS facility at which US-transferees are held by conducting an on-the-ground assessment or considering the observations of independent bodies like the Afghan Independent Human Rights Commission (AIHRC):

- If the review reveals credible allegations of abuse against transferees, the US should declare a moratorium on transfers to each NDS facility at which allegedly abused

transferees are held, pending NDS commitment to identified reform. In the interim, it could transfer detainees to other Afghan authorities or hold them at a US facility. As a long-term solution, it could support the construction of a dedicated ISAF transferee facility under Afghan sovereignty but run with ISAF guidance.

- Regardless of whether a moratorium is declared, the US should develop the capacity of NDS facilities and personnel, including training personnel on human rights-respecting interrogation and detention practices.

Going forward, the US should consider immediately suspending transfers if the NDS denies the US, International Committee of the Red Cross (ICRC) or AIHRC full access to an NDS facility without good cause; or if a transferee makes credible allegations of torture or ill-treatment.

2. Monitoring Guarantees

The US should expressly condition transfers to Afghan authorities on a US monitoring team being given “access to each transferee on a regular basis, with the opportunity for a private interview on each occasion,” following the practice of the UK government, as mandated by *(R)Evans v. Secretary of State for the Defence Department* (2010).

The US should secure a broad mandate for monitoring, set out in assurances, terms of reference or official authorization by the NDS, which explicitly includes:

- Authority to make regular and unannounced visits, including a prompt initial visit and follow-up visits
- Authority to conduct interviews privately, outside the presence of detaining authorities
- Unrestricted access to all areas of the detention facility, access to facility personnel, and access to all documentation concerning persons deprived of their liberty.

To effect the mandate, the NDS should undertake specific obligations:

- Ensure that the monitoring team is, in practice, granted access to exercise the powers under the mandate
- Ensure that US-transferees are held in specified facilities and, if a moratorium on transfers to certain facilities is in place, that they are not subsequently transferred to those facilities
- Notify all detention facility staff of the mandate of the monitoring team
- Ensure that no reprisal is taken against transferees or facility staff in relation to a monitoring visit.

3. US Monitoring Responsibilities

The US government should commit to a monitoring protocol specifying steps to:

- Anticipate future abuse through observation of conditions, by reference to international human rights standards on detention
- Investigate and document possible abuse
- Conduct interviews privately and verify that interviewed transferees are not subject to reprisal
- Conduct interviews in a manner designed to elicit candid responses, e.g., open instead of leading questions, observation of interview subject's demeanor
- Conduct medical and psychological evaluations of each transferee
- Make recommendations and engage in dialogue with detaining authorities about conditions.

The US should establish a dedicated monitoring team with sufficient capacity and training:

- Personnel should be familiar with human rights standards and operationally trained, i.e., be competent to address obstructions by detaining authorities, detect torture or ill-treatment in the particular setting, observe detention conditions and gather evidence of abuse
- The team should consist of multiple personnel, including medical staff, to corroborate evidence of abuse and maximize monitoring capacity.

I. US DETAINEE TRANSFERS IN AFGHANISTAN

The majority of US military forces in Afghanistan are assigned to the International Security Assistance Force (ISAF), which operates as the North Atlantic Trade Organization (NATO) mission in Afghanistan. The US and other ISAF military forces, comprised of allies including the UK, Canada, Denmark and the Netherlands, have transferred thousands of apprehended individuals to Afghan custody since 2001—an estimated 2,000 individuals from 2009 to 2010.¹

ISAF DETAINEE TRANSFERS

ISAF rules of engagement (“rules”) permit the detention of individuals for the self-defense of ISAF or its personnel, or for the accomplishment of the ISAF mission. But within 96 hours, ISAF forces must release these individuals or transfer them to Afghan authorities; the US, UK and Canada have declared caveats permitting them to transfer individuals within 14 days.² ISAF rules provide that individuals should be transferred to the custody of the National Directorate of Security (NDS), an Afghan intelligence agency, and in fact, most have.³ Individuals may also be transferred to the custody of the Afghan National Army or Afghan National Police.

ISAF rules state that, “consistent with international law, persons should not be transferred under any circumstances in which there is a risk that they be subjected to torture or other forms of ill treatment.” Bilateral and multilateral agreements between the Afghan government and ISAF member states reflect this commitment insofar as they include guarantees of humane treatment to transferred individuals (“transferees”) and ISAF member states’ access to monitor treatment and detention conditions.

2007 EXCHANGE OF LETTERS

In fall 2007, the US joined Canada, the UK, the Netherlands, Norway and Denmark in signing an exchange of letters with the Afghan government intended to establish a common approach to these detainee transfers. The letters provide that officials from each government should have access to Afghan detention facilities “to the extent necessary to ascertain the location and treatment of any detainee transferred by that government to the Government of Afghanistan” and, on request, access to interview any transferee in private. The letters guarantee the same access for the ICRC, UN human rights bodies and the Afghan Independent Human Rights Commission. The Afghan National Security Advisor signed the letters on behalf of the

¹ See Department of Defense Bloggers Roundtable with Robert Harward, Commander, Joint Task Force 435, <http://www.dodlive.mil/> (January 27, 2010), available at http://www.defense.gov/Blog_files/Blog_assets/20100127_Harward_transcript.pdf. (“ISAF and US forces operating under ISAF this year alone captured just under 2,000. Those 2,000 go through a short period of detention by ISAF, up to 96 hours, and then they’re turned over to Afghan security – be it NDS, APA, ANP.”)

² *Id.*

³ *Queen in re: Maya Evans v. Sec’y of State for Defence*, [2010] EWHC 1445 (Q.B.) (U.K.), ¶ 43.

government of Afghanistan, adding that the NDS would issue written instructions to all of its provincial offices informing them of visiting procedures.⁴

As of winter 2010, the US was pursuing a bilateral agreement with the Afghan government about a new monitoring arrangement, expected to be in place within months. At the time of publication, details about the new agreement were not publicly available.

COPENHAGEN PROCESS

The US has participated in the Copenhagen Process, a series of meetings among government officials from 28 countries intended to formulate a common framework for handling detainees in international military operations, including conditions for the transfer of prisoners to local authorities or other countries.⁵ Human rights groups, which have for the most part been excluded from the meetings, have expressed concern that the process undercuts existing norms that already govern detention and transfer operations.

The Danish government, which is leading the effort, has emphasized that its objective is to make the existing legal framework “more comprehensive, well-known and feasible.”⁶ The planned Copenhagen Outcome Document will “provide a catalogue of best practice guidelines that aim to provide guidance and assistance to States in ensuring respect for international humanitarian law and human rights in the handling of persons detained in international military operations and in relation to cooperation among States.” Another objective of the process is to provide “a forum for exchanges of experiences, ideas and best practices.”⁷

⁴ See Exchange of Letters on Access to Detainees Transferred to the Government of Afghanistan (Sept. 6, 2007), available at <http://www.afghanistan.gc.ca/canada-afghanistan/documents/detainee-detenu.aspx?lang=eng>.

⁵ See Thomas Winkler, The Copenhagen Process on Detainees: A Necessity, *Nordic Journal of International Law* 78 (2010), 489-498.

⁶ Thomas Winkler, The Copenhagen Process on the Handling of Detainees in International Military Operations (Sept. 4, 2008) in *International Humanitarian Law: Human Rights and Peace Operations* 244 (Gian Luca Beruto ed., 2008).

⁷ Winkler, *supra* note 5 at 498.

II. US STRATEGIC INTERESTS & HUMAN RIGHTS CONCERNS

“Detainee operations are both complex and politically sensitive,” General Stanley McChrystal, then-head of ISAF forces, emphasized in an August 2009 report to the US government. In light of the “strategic vulnerabilities in a non-Afghan system,” ISAF developed a new policy of “transferring responsibility for long-term detention of insurgents” to the Afghan government. According to McChrystal:

*Afghanistan must develop detention capabilities and operations that respect the Afghan people. A failure to address [Afghan government] capacity in this area presents a serious risk to the mission.*⁸

Accordingly, a central element of recent US efforts has been capacity-building of the Afghan security and justice sectors, including training on humane interrogation and detention practices. Joint Task Force 435 (JTF-435), in preparing to transfer detainees held at the Detention Facility in Parwan (DFIP) to Afghan authorities, has “develop[ed] the sustainable capacity” of Afghan partners through “training, management and mentorship on lawful, humane and transparent detainee operations.”⁹ The US State Department has also contracted personnel to train Afghan officers at the Afghan National Detention Facility, although whether the training includes humane detention procedures is unknown.¹⁰

Likewise, it is in US interests to guard against abuse of detainees it transfers to the NDS. Reports of NDS abuse against US transferees undercut US efforts to break the perceptual link between the US and torture. They may diminish the positive impact of JTF-435’s publicized improvements to detention at DFIP, since they link US personnel and operations to abuse. Worse, accounts of NDS abuse carry a specter of purposeful US delivery to abusive interrogation, which is inimical to US efforts to win Afghan “hearts and minds.”

TORTURE AND INHUMANE CONDITIONS AT NDS FACILITIES

US transfers to the NDS may inadvertently result in abuse, undermining the US government’s legal and policy commitment against transferring individuals to the risk of abuse.¹¹

⁸ NATO International Security Assistance Force, “Commander’s Initial Assessment,” August 30, 2009, 15-16, available at http://media.washingtonpost.com/wp-srv/politics/documents/Assessment_Redacted_092109.pdf.

⁹ US Central Command, *New task force assumes control of detainee operations in Afghanistan* (Jan. 8, 2010).

¹⁰ See Department of Defense Bloggers Roundtable with Robert Harward, Commander, Joint Task Force 435, <http://www.dodlive.mil/> (January 27, 2010), available at http://www.defense.gov/Blog_files/Blog_assets/20100127_Harward_transcript.pdf.

¹¹ See Human Rights Council, National report submitted in accordance with paragraph 15 (a) of the annex to Human Rights Council resolution 5/1: United States of America, U.N. Doc. A/HRC/WG.6/9/USA/1, ¶ 84-86 (2010). For a discussion of US obligations under international humanitarian law and human rights law, see Cordula Droeger, *Transfers of detainees: legal framework, non-refoulement and contemporary challenges*, International Review of the Red Cross, Vol. 90 No. 871 (September 2008).

Torture by the NDS is reportedly “widespread and widely known.”¹² UN reports have expressed concerns about reports of torture and “disappearances” after arrest by NDS officials.¹³ Amnesty International has reported receiving “repeated reports of torture and other ill-treatment of detainees by the NDS from alleged victims and their relatives.”¹⁴ According to a 2010 Afghan AIHRC report on torture by various Afghan authorities, “[t]orture is usually carried out during interrogations in order to obtain confessions.”¹⁵

In 2008 a Canadian appellate court found allegations of abuse to detainees transferred to the NDS by Canada to be highly credible and disturbing:

[C]omplaints included allegations that detainees were kicked, beaten with electrical cables, given electric shocks, cut, burned, shackled, and made to stand for days at a time with their arms raised over their heads. While it is possible that these complaints were fabricated, it is noteworthy that the methods of torture described by detainees are consistent with the type of torture practices that are employed in Afghan prisons, as recorded in independent country condition reports, including those emanating from DFAIT (Foreign Affairs and International Trade Canada). Moreover, in some cases, prisoners bore physical signs that were consistent with their allegations of abuse. In addition, Canadian personnel conducting site visits personally observed detainees manifesting signs of mental illness, and in at least two cases, reports of the monitoring visits describe detainees as appearing ‘traumatized.’¹⁶

Detainees transferred by UK forces have also alleged abuse. The UK government has accepted that several of these allegations “may have substance.” The complaints of abuse, made in 2009 about treatment at the NDS facility in Kabul known as Department 17, include an account by one prisoner that he was beaten frequently for more than two months and an account by another detainee that he was electrocuted and hung from the ceiling for three days.¹⁷

¹² Andrea Prasow, senior counterterrorism counsel at Human Rights Watch, *Afghan Torture Is No Secret*, National Post (May 4, 2010).

¹³ In 2007, the UN Secretary General urged the Afghan government to investigate “inhumane treatment and torture of detainees by the authorities, and in particular by the National Directorate for Security.” Report of the UN Secretary General, “The situation in Afghanistan and its implications for international peace and security” report of the Secretary-General, S/2007/555, (Sept. 21, 2007), ¶ 87; see also UN High Commissioner for Human Rights, “High Commissioner for Human Rights Concludes Visit to Afghanistan” (Nov. 20, 2007).

¹⁴ Amnesty International, *Detainees transferred to torture: ISAF complicity?* 29 (2007).

¹⁵ AIHRC, *The Situation of Detention Centers and Prisons in Afghanistan* 16 (June 2010), available at <http://www.unhcr.org/refworld/>.

¹⁶ *Amnesty International and BCCLA v. Chief of the Defence Staff*, 2008 F.C. 162 (Can.), ¶¶ 85-87.

¹⁷ *Queen in re: Maya Evans v. Sec’y of State for Defence*, [2010] EWHC 1445 (Q.B.) (U.K.), ¶ 202-208, 263.

Risk Factors for Abuse

The NDS is the successor agency of KHAD, the Soviet-era security agency, which was notorious for the use of torture. The NDS conducts intelligence gathering, surveillance, arrest and detention of individuals suspected of crimes against national security, pursuant to the 1987 Law on Crimes Against External and Internal Security and the 2008 Law on Combat Against Terrorist Offences.¹⁸ The UN High Commissioner for Human Rights has repeatedly expressed concern that the NDS operates under a secret presidential decree, without sufficient public oversight, enabling abuse.¹⁹

Amnesty International has suggested that the risk of abuse is connected to the NDS practice of holding detainees in incommunicado detention for lengthy periods and the lack of separation between NDS functions for detention, interrogation, investigation and prosecution.²⁰

NDS detention facilities operate without judicial oversight. Independent monitoring bodies including the ICRC and AIHRC have sporadic access. In at least one instance, the NDS hid an ISAF transferee from the ICRC.²¹

MORATORIUMS ON TRANSFER TO THE NDS & ALTERNATIVES

Along with the robust and systematic monitoring of the treatment of transferees recommended by this paper, the US should support capacity-building of NDS personnel and NDS facilities, consider a moratorium on transfers if appropriate, and explore short- or long-term alternatives to transfers to the NDS.

Since 2007, when allegations of NDS abuse first emerged, human rights groups have called on ISAF states to declare moratoriums on transfers to the NDS until effective safeguards against abuse are implemented, including human rights training for all Afghan personnel involved in detention.²² A comprehensive, on-the-ground assessment by the US or an independent organization like the AIHRC could establish whether the US should declare a moratorium on transfers to particular NDS facilities pending identifiable improvements by the NDS. It may be appropriate to declare a moratorium on transfers based on:

¹⁸ See Penal Law for Crimes Committed against Internal and External Security of the Democratic Republic of Afghanistan, Official Gazette Issue No. 14, Serial No. 649 (Aug. 1, 1987); Law on Combat Against Terrorist Offences 2008, available at http://www.ici.org/IMG/Afghan_Law_English.pdf (English translation); Evans, R (on the application of) v. Secretary of State for Defence, [2010] EWHC 1445 (Admin), ¶ 38.

¹⁹ UN High Commissioner for Human Rights, “High Commissioner for Human Rights Concludes Visit to Afghanistan” (Nov. 20, 2007).

²⁰ See Amnesty International, Detainees transferred to torture: ISAF complicity? 29 (2007).

²¹ See Human Rights Watch, Letter to the Secretary General of NATO, “Afghanistan: Letter Regarding Summit in Latvia” (Nov. 27, 2006).

²² See, e.g., Amnesty International, Detainees transferred to torture: ISAF complicity? 29 (2007), 31-34; Redress, Submission to Foreign Affairs Committee: New Inquiry: Afghanistan (Jan. 23 2009), available at http://www.redress.org/downloads/publications/Submission_to_FAC_23_January_2009.pdf.

- Credible allegations of abuse by any ISAF-transferred detainees at facilities where US-transferees are held
- NDS obstructions of access to US-transferees, for US personnel, the AIHRC or ICRC
- “Disappearance” of US-transferees or NDS record-keeping practices that thwart monitoring of detainees.

A moratorium on transfers would provide US authorities time to identify reasons for the ineffectiveness of monitoring guarantees and engage with Afghan authorities on remedial steps.

An assessment of conditions could also identify whether a long-term suspension or ending of transfers to the NDS is called for. In that case, the US could transfer detainees to the custody of other Afghan agencies. The Afghan National Detention Facility could be an appropriate recipient of detainees since it already holds individuals captured in counter-insurgency operations and has humane conditions.²³ The US could also consider holding detainees it would ordinarily transfer to the NDS at DFIP; with the anticipated facility transfer in 2011, those individuals could be transferred to Afghan custody subject to the condition that they would not be handed to the NDS until it met human rights standards for detention.

The US could also support the construction of a dedicated facility for ISAF transferees. In 2006, the Netherlands and UK reportedly proposed a “sovereign Afghan facility, run by the government of Afghanistan, but with ISAF mentors, monitors and management support.” The plan faltered for unknown reasons.²⁴

If it is intent on continuing transfers to existing NDS facilities, the US could condition them on a US or NGO-directed training program for NDS personnel. It could require that US personnel be embedded at particular NDS facilities pending demonstrated improvement in conditions.

While they continue to transfer detainees to NDS facilities, the UK and Canada have both declared moratoriums for varying periods and to particular facilities. As described below, these moratoriums are based on credible reports of abuse and NDS obstructions of access for monitors. The UK and Canada’s resort to moratoriums underscores the need to anticipate problems and secure strong guarantees of access to monitor detainees at the outset. They also show the insufficiency of hypothetical guarantees to deter abuse.

²³ See Testimony of Andrea Prasow, senior counterterrorism counsel, Human Rights Watch, Special Committee on the Canadian Mission in Afghanistan, Parliament of Canada (May 5, 2010).

²⁴ Tonda MacCharles, *Why didn’t safe prison for detainees get built?*, Toronto Star (Dec. 18, 2009).

III. CANADIAN DETAINEE TRANSFERS

Since 2005, Canada has transferred several hundred detainees to Afghan authorities (previously, it transferred detainees to US authorities).²⁵ In 2009, Canada transferred at least 163 individuals to the NDS.²⁶ Between 2006 and 2008, it transferred 243 individuals.²⁷ Overall, Canada has transferred six times as many individuals as the UK, and 20 times as many as the Dutch.²⁸

CANADIAN-AFGHAN MONITORING GUARANTEES

In December 2005, the Canadian Chief of Defense Staff signed a memorandum of understanding (MoU) with the Afghan Minister of Defense.²⁹ Unlike agreements by the UK, Denmark and the Netherlands, Canada's agreement did not permit Canada to access or directly monitor individuals it transferred.³⁰ Rather, it provided that the AIHRC and ICRC would have access to the transferred detainees.

In May 2007, Canada secured a supplemental MoU. It included several new guarantees related to monitoring:

- *Unrestricted access:* Canadian personnel, as well as that of the AIHRC, will have “full and unrestricted access” to detention facilities where transferees are held
- *Limited location:* Detainees will be held in “a limited number of facilities” to “facilitate ongoing access and capacity building projects” by the Canadian and Afghan governments

²⁵ From 2002 to 2005, Canadian military forces in Afghanistan transferred apprehended individuals to US custody. In 2005, prompted by reports of abuse in US-run facilities, Canada made arrangements to transfer all new detainees to Afghan authorities. For a discussion of Canada's decision-making, see Alex Neve, Secretary General of Amnesty International (Canada), Responsibility of the Canadian State under International Law and in Canadian Law: Charter Review, Public Inquiries, and Civil Liability Lawsuits, Nathanson Center Special Forum on the Canadian Mission in Afghanistan, Feb. 8, 2010. (transcript available at http://nathanson.osgoode.yorku.ca//wp-content/uploads/2010/09/Special-Forum-on-Detainees_Session-1_Neve_edit-Feb-28-2010.pdf).

²⁶ See Testimony of Andrea J. Prasow, Senior Counterterrorism Counsel, Human Rights Watch, Special Committee on the Canadian Mission in Afghanistan, 40th Canadian Parliament, 3rd Session (May 5, 2010).

²⁷ Government of Afghanistan Background: Canadian Forces Release Statistics on Afghanistan Detainees (2010), available at http://www.afghanistan.gc.ca/canada-afghanistan/news-nouvelles/2010/2010_09_22b.aspx?lang=eng.

²⁸ Testimony of Richard Colvin, First Secretary, Embassy of Canada to the United States, Special Committee on the Canadian Mission in Afghanistan, House of Commons, 40th Parliament, No. 15 (2nd Session) (Nov. 18, 2009).

²⁹ Arrangement for the Transfer of Detainees Between the Government of Canada and the Government of the Islamic Republic of Afghanistan (Can.—Afg.), December 18, 2005, available at <http://www.afghanistan.gc.ca/canada-afghanistan/assets/pdfs/Dec2005.pdf>.

³⁰ See Letter from Professor Michaels Byers, Canada Research Chair in Global Politics and International Law, University of British Columbia & Professor William A. Schabas OC, Director, Irish Centre for Human Rights, to Luis Moreno-Ocampo, Prosecutor, International Criminal Court, April 25, 2007, available at <http://nathanson.osgoode.yorku.ca/events/special-forum-on-the-canadian-mission-in-afghanistan/special-forum-background-materials/>.

- *Private interviews:* Canadian and AIHRC personnel will “upon request, be permitted to interview detainees in private, without Afghan authorities present”
- *Notification:* Canada will be “notified of any material change of circumstances regarding the detainee including any instance of alleged improper treatment”
- *Afghan investigations:* The Afghan government will “investigate allegations of abuse and mistreatment and prosecute in accordance with national law and internationally applicable legal standards,” and inform Canada, the AIHRC and ICRC of “steps it is taking to investigate such allegation and any corrective action taken”
- *Informing Afghan prison authorities:* The Afghan government will “ensure that all prison authorities under its jurisdiction are advised” of the 2005 and 2007 MoU provisions.

Human rights advocates have recognized that the 2007 MoU is a significant improvement over the 2005 MoU but criticized it for failing to describe steps that Canadian authorities will take in response to allegations of abuse.³¹

INEFFECTIVE MONITORING IN PRACTICE

Investigations by the Canadian parliament, military police complaints commission and media have revealed a devastating gulf between the MoUs’ guarantees and the ground reality.³²

Monitoring of Canadian Transferees by the AIHRC and ICRC

Between 2005 and May 2007, Canada depended on the AIHRC and ICRC for monitoring, rather than conducting monitoring itself. In 2009, then-secretary of Canada’s Kabul embassy, Richard Colvin, provided key documents and testimony suggesting that in practice neither organization could alert Canada to abuse or effectively monitor detainees.

The AIHRC, according to Colvin, had “very limited capacity” and was not granted access to NDS prisons in Khandahar. The ICRC’s confidentiality rules did not permit it to report to the Canadian government on Afghan prisons.³³

The ICRC’s effectiveness as a monitor was also compromised by the Canadian military’s failure to notify it of transfers promptly. The Canadians had an “extremely slow” six-step process that, according to Colvin, took up to two months. As a result, during the first crucial days of their NDS detention, detainees were not monitored. Colvin testified before parliament in November 2009

³¹ See Professor Craig Scott (Osgoode Hall Law School, York University, Toronto), Presentation to House of Commons Special Committee on the Canadian Mission in Afghanistan Feb. 10, 2010), available at <http://nathanson.osgoode.yorku.ca/programs/conferences-workshops/2009-2010/special-forum-on-canadian-mission-afghanistan/craig-scott-february-presentation-parliament/>.

³² For a catalogue of documentary evidence, see *The Documents We’ve Seen*, InsidePoliticsBlog (March 8, 2010), <http://www.cbc.ca/politics/insidepolitics/2010/03/the-documents-weve-seen.html>.

³³ Testimony of Richard Colvin, *supra* note 28 at 2.

that “the likelihood is that all the Afghans we handed over were tortured.”³⁴ In contrast, the Dutch notified the ICRC office in Kandahar immediately upon detaining an Afghan, and the British within 24 hours.³⁵

Inadequate Resources for Canadian Embassy Monitoring

In May 2007, Canada signed a supplemental MoU guaranteeing its personnel full access to detention facilities and private interviews with transferees. But in practice, monitoring was irregular and under-resourced, and abuse continued. Colvin testified before the Canadian parliament:

*[T]o monitor effectively, we needed new resources, at a minimum one full-time officer, to conduct the monitoring...Instead, for the first five months of our new detainee regime, monitoring was done by a succession of officers, some of whom were in the field on short visits of only a couple of weeks. There was too little capacity and not enough continuity. The result was that despite the new MOU, some of our detainees continued to be tortured after they were transferred.*³⁶

In October 2007, the Canadian government finally assigned a dedicated monitor to the NDS facility in Kandahar. Within weeks, “he found incontrovertible evidence of torture,” Colvin testified:

*An Afghan in NDS custody told him that he had been tortured, showed him the marks on his body, and was able to point to the instrument of torture, which had been left under a chair in a corner of the room by his interrogator.*³⁷

CANADIAN MORATORIUMS ON TRANSFER

Despite improvements to monitoring, abuse appears to be a persistent problem among Canadian transferees. According to a September 2010 report in the *Canadian Press*, an NDS official in May 2009 boasted to Canadian military officials that his organization was able to “torture” or “beat” prisoners during the course of its investigations. The NDS official, whom Canadian military officials believed to be a reliable source, made the admission despite the more than 250 prison visits Canadian monitors had made prior to that date.³⁸

³⁴ *Id.* at 3.

³⁵ *Id.*

³⁶ *Id.* at 4.

³⁷ *Id.* at 4; *Amnesty International and BCCLA v. Chief of the Defence Staff*, 2008 F.C. 162 at ¶¶ 95-98 (Can.).

³⁸ See Murray Brewster, *Afghan Officer Boasted to Military About Torturing Prisoners*, *The Canadian Press* (Sept. 8, 2010), available at <http://www.thestar.com/news/world/afghanistan/article/858275--afghan-officer-boasted-to-military-about-torturing-prisoners>.

Canada briefly suspended transfers in response to the report, as it has intermittently done at various points since November 2007.³⁹ Canadian authorities have not articulated their considerations for resuming transfers but there are reasons for concern. At a May 2010 hearing of the Military Police Complaints Commission, Brigadier-General Guy Laroche, a senior military official, said that after the November 2007 halting of detainee transfers based on interviews with tortured detainees, a video camera in an NDS interrogation room was installed, and transfers resumed in February 2008. “Clearly, the installation of one video camera is incapable of preventing systemic, widespread abuse,” the British Columbia Civil Liberties Association wrote on its blog following the hearing.⁴⁰

Canadian human rights advocates have advised that Canada detain apprehended individuals themselves or jointly with another ISAF member state in Afghanistan, and train local authorities so that in the long-term, transfers can take place without putting individuals at risk of torture.⁴¹

³⁹ Alan Woods, *Canada Halts Transfer of Afghan Detainees*, Toronto Star (Jan. 24, 2008), available at <http://www.thestar.com/News/Canada/article/296993>.

⁴⁰ Although the hearings were closed to the public and media, lawyers from the British Columbia Civil Liberties Association were present. See British Columbia Civil Liberties Association, Brigadier-General Laroche: We Had Evidence That Detainees Were Abused and Transferred, BCCLA National Security Blog (May 11, 2010), <http://nationalecurity.bccla.org/2010/05/11/brig-gen-laroche-we-had-evidence-that-detainees-were-abused-and-tortured/>.

⁴¹ See, e.g., Andrea Prasow, *Afghan Torture Is No Secret*, National Post, May 4, 2010.

IV. UK DETAINEE TRANSFERS

The UK began transferring detainees to Afghan authorities in July 2006. As of October 2010, it had transferred 480 individuals to Afghan custody.⁴² Most UK transferees are held at the NDS facility in Lashkar Gah; others are held at the NDS investigatory branch facility in Kabul (“Department 17”) and at a facility in Kandahar.⁴³

UK-AFGHAN MONITORING GUARANTEES

The UK signed an MoU with Afghan authorities in April 2006. It was designed to “avoid the risk of a breach” of the UK’s obligations under the European Convention on Human Rights.⁴⁴ On monitoring, the MoU provides that the UK embassy and armed forces would have “full access to question” any UK transferees. The ICRC and “relevant human rights institutions with the UN system” would be “allowed to visit” transferees.⁴⁵ The UK also signed the 2007 Exchange of Letters between Afghanistan, the US and other ISAF member states, described above.

However, in 2009, the then-head of the NDS, Amrullah Saleh, complained that the agency had no obligations under the MoU or Exchange of Letters, which were signed by the Minister of Defence.⁴⁶

In March 2010, Saleh signed a letter drafted by UK officials describing steps the NDS would take to ensure UK access to transferees. The letter sets out guarantees including:

- *Notification:* The NDS will “notify the British Embassy in Kabul promptly of any allegations of ill-treatment” (presumably, made to the NDS) by UK-Afghan transferees
- *Afghan investigations:* The NDS will “investigate promptly” any allegation made to British Armed Forces or, presumably, made to the NDS, and will “keep the British Armed Forces informed of the process and outcome.”⁴⁷

UK-AFGHAN MONITORING IN PRACTICE

⁴² See UK Foreign and Commonwealth Office, “The UK’s Foreign Policy towards Afghanistan and Pakistan,” Foreign Affairs Committee, UK Parliament, Session 2010-11, *available at* <http://www.publications.parliament.uk/pa/cm201011/cmselect/cmffaff/writev/afpak/afpak01.htm>

⁴³ See *Queen in re: Maya Evans v. Sec’y of State for Defence*, [2010] EWHC 1445 (Q.B.) (U.K.), ¶ 28.

⁴⁴ *Id.* at ¶ 94.

⁴⁵ See Memorandum of Understanding Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Islamic Republic of Afghanistan Concerning Transfer by the United Kingdom Armed Forces to Afghan Authorities of Persons Detained in Afghanistan, (April 23, 2006), *available at* <http://www.publications.parliament.uk/pa/cm200607/cmselect/cmffaff/44/4412.htm#n78>.

⁴⁶ See *Queen in re: Maya Evans*, at ¶ 271.

⁴⁷ See *id.* at ¶¶ 129-131.

In addition to AIHRC and ICRC monitoring, UK personnel monitor transferees at NDS facilities. Royal Military Police staff have ordinarily conducted monitoring, although UK embassy officials may join visits in Kabul. In 2010, the UK established a “Detainee Oversight Team” headed by a Force Provost Marshall and consisting of a Royal Military Police officer, legal adviser and unspecified “medical support.”⁴⁸

Much of what is known about UK monitoring comes from *(R) Evans v. Secretary of State for Defence*, a June 2010 UK appellate court decision considering whether the UK’s practice of transferring captured individuals to the NDS complied with the UK’s obligation under Article 3 of the European Convention not to transfer detainees where there is a real risk of torture or other ill-treatment.⁴⁹ The UK court expressed concern about UK personnel’s access to facilities, tracking of detainees, and ability to conduct private interviews.

Limited Access to NDS Facilities

The UK’s ability to conduct regular monitoring visits has at various times been compromised. In some cases, UK officials have been stymied by security risks and a dramatically increasing number of detainees. At the Lashkar Gah facility, for a six-month period in 2009 and 2010, each transferee was questioned only about once every eight weeks.

NDS officials also obstructed the UK’s access. Although then-chief NDS official Amrullah Saleh’s March 2010 letter said that he would inform NDS staff of the UK’s guarantee of access, in April 2010, NDS officials denied UK personnel access to the Lashkar Gah facility. On one occasion, a high-ranking NDS official denied the authority of Saleh’s letter and said “that he would tell the [UK officials] how the detainees were and there was no need to see them.”⁵⁰

In Kabul, the NDS refused access to UK transferees for a period in 2008, prompting the UK to put a moratorium on new transfers. Although the UK has since lifted the moratorium, it has not made new transfers to the Kabul facility.⁵¹

Effectiveness of Interviews

At Lashkar Gah, the UK has failed to consistently conduct private interviews with transferees. The UK has reported conducting group interviews, sometimes in communal areas and other times through a hatch in a cell door, with guards out of earshot.⁵²

⁴⁸ *Id.* at ¶ 186; UK Foreign and Commonwealth Office, “The UK’s Foreign Policy towards Afghanistan and Pakistan,” Foreign Affairs Committee, UK Parliament, Session 2010-11, available at <http://www.publications.parliament.uk/pa/cm201011/cmselect/cmffaff/writev/afpak/afpak01.htm>.

⁴⁹ See Queen *in re: Maya Evans v. Sec’y of State for Defence*, [2010] EWHC 1445 (Q.B.) (U.K.) ¶ 236-37. The case was decided by the Divisional Court, made up of Court of Appeal judge Lord Justice Richards and High Court judge Justice Cranston.

⁵⁰ *Id.* at ¶ 155.

⁵¹ *Id.* at ¶¶ 165-168. However, the UK did transfer one “high profile” individual in January 2010, to whom its access was initially blocked. *Id.* at ¶ 168.

The UK court in *(R) Evans* emphasized that private visits were essential. It cited allegations of abuse by UK transferees made once they were away from the NDS (in the custody of the Ministry of Justice)—when the same detainees had been interviewed at an NDS facility, they had not made any allegations, perhaps due to fear of retaliation.⁵³

Missing Transferees

Transferees have “disappear[ed] within the system” due to poor record-keeping by Afghan authorities.”⁵⁴ The NDS sometimes transfers detainees between NDS facilities and fails to report doing so, a practice which effectively circumvents the UK’s moratorium on transfers to particular NDS facilities. For instance, in late 2008, NDS officials at “Department 17” (the investigating branch in Kabul) refused UK personnel access to transferees. After the UK and NDS reached an agreement in February 2009, but before the UK arranged a visit, UK transferees were moved to the NDS facility at Pol-i-Charki prison. When interviewed, they made allegations of ill-treatment, including of abuse during the period when the NDS had obstructed UK access.⁵⁵

UK MORATORIUMS ON TRANSFER

The US has placed moratoriums on particular NDS facilities on the basis of the NDS’s refusal to grant access for monitoring and reports of abuse.

NDS “Department 17” in Kabul: In December 2008, the UK put a moratorium on transfers to NDS Kabul after it was denied access to that facility. There were also allegations of abuse to UK transferees. The UK court in *(R) Evans* found that the moratorium should be kept in place, notwithstanding the NDS’s dismissal of the head of the Kabul facility, because there remained a “real risk” of torture to UK transferees.

NDS Kandahar: The UK imposed a moratorium on transfers in mid-2009 based on allegations of abuse by UK transferees who had been detained at Kandahar but subsequently transferred to Pol-i-Charki prison.⁵⁶ The UK lifted the moratorium in February 2010 but has not made any new transfers. The UK court in *(R) Evans* approved of that “precautionary approach,” noting Canadian reports of abuse occurring there. Nevertheless, as described below, it concluded that UK transferees could be sent there subject to specific safeguards.

UK JUDICIALLY-MANDATED CONDITIONS ON TRANSFER

⁵² *Id.* at ¶ 306-308.

⁵³ *Id.* at ¶ 308.

⁵⁴ *See id.* at ¶¶ 171-183.

⁵⁵ *Id.* at ¶ 302.

⁵⁶ *Id.* at ¶ 32-37.

In *Evans*, the UK court concluded that while the moratorium on transfers to the NDS facility in Kabul should be maintained, UK-captured detainees could be transferred to NDS facilities at Kandahar and Lashkar Gah if existing safeguards were strengthened:

- *Monitoring as an Express Condition for Transfer*: The UK government must expressly condition transfers on the UK monitoring team being given “access to each transferee on a regular basis, with the opportunity for a private interview on each occasion;”
- *Monitoring in Practice*: Each transferee “must in practice be visited and interviewed in private on a regular basis;” and
- *Halting Transfers if Assurances Breached*: The UK government “must consider the immediate suspension of further transfers if full access is denied at any point without an obviously good reason...or if a transferee makes allegations of torture or serious mistreatment by NDS staff which cannot be reasonably and rapidly dismissed as unfounded.”⁵⁷

Public Interest Lawyers, a UK organization that supported the suit, hailed the court’s conditions as “promis[ing] to profoundly change British detainee policy in Afghanistan for the better.”⁵⁸

At the time of publication, the effects of the June 2010 decision were not clear. At a minimum, the UK court’s judgment reflects the importance of strong monitoring, with specific assurances carried out in practice, in reducing the risk of torture. The US should adopt these parameters and, in practice, conduct robust monitoring reflective of the international standards described in the next section.

⁵⁷ *Id.* at ¶ 320.

⁵⁸ See Public Interest Lawyers, *UK transfer of Afghan prisoners: High Court victory*, <http://publicinterestlawyers.co.uk/general/news.php?id=141> (no longer available; on file with Columbia Human Rights Institute).

V. INTERNATIONAL MONITORING STANDARDS ON TORTURE

The US should consider the work of torture prevention bodies and international standards in formulating clear requirements for monitoring.

DEVELOPMENT OF TORTURE PREVENTION AND PROTECTION BODIES

Current protocols for monitoring draw from the long-standing work of the ICRC.⁵⁹ The ICRC's monitoring mandate, set out in the Geneva Conventions, is to visit prisoners of war and others to ensure they are treated humanely. Over the last several decades, international and regional human rights systems have modeled their own monitoring mechanisms on the ICRC's practice, seeking authority to visit any place of detention and conduct private interviews with detainees.⁶⁰

Standards were also developed through campaigns to systematically prevent torture through monitoring of detention conditions.⁶¹ The most significant recent developments in anti-torture monitoring are the Optional Protocol to the Convention Against Torture (OPCAT) and European Convention for the Prevention of Torture, both of which establish monitoring bodies with expansive authority to carry out visits: the Sub-Committee to the Committee Against Torture ("OPCAT Subcommittee") and the European Committee for the Prevention of Torture ("European CPT").⁶² The OPCAT also requires state parties to designate domestic bodies with authority to carry out regular visits and describes the kind of membership, training and resources necessary for an effective monitor.⁶³

⁵⁹ See Amnesty International, *Optional Protocol to the Convention Against Torture: Time to take a stand on the prevention of Torture*, IOR 51/006/2001 15-16 (Sept. 2001).

⁶⁰ Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), art. 126, Aug. 12, 1949, 75 UNTS 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), art. 143, Aug. 12, 1949, 75 UNTS 287.

⁶¹ Since at least the 1970s, monitoring of detention conditions has formed an important part of torture prevention campaigns. See Malcom Evans & Rod Morgan, *Preventing Torture: A Study Of The European Convention For The Prevention Of Torture And Inhuman Or Degrading Treatment Or Punishment* 106-117 (1998).

⁶² The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, which came into force in 1989, establishes the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, mandated to "by means of visits, examine the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of such persons from torture and from inhuman or degrading treatment or punishment." Every state party must permit visits to "any place within its jurisdiction where persons are deprived of their liberty by a public authority." European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, art.2, ETS No. 126 (1987), available at <http://www.cpt.coe.int/EN/documents/ecpt.htm>.

⁶³ See Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT), G.A. Res. A/RES/57/199, June 22, 2006 [reprinted in 42 I.L.M. 26 (2003) (hereinafter *OPCAT*)], at art. 18. For a discussion of the specific guarantees and criteria the OPCAT describes for "national preventive mechanisms," see Association for the Prevention of Torture, *Monitoring Places of Detention: A Practical Guide* 46-54 (Apr. 2004).

The creation of these monitoring bodies—and positions such as the UN Special Rapporteur on Torture, the Organization of American States’ Special Rapporteur on the Rights of Persons Deprived of Freedom, and most recently the African Commission on Human and Peoples’ Rights’ Committee for the Prevention of Torture in Africa⁶⁴—reflect a growing consensus that monitoring and systems of visitation play a critical role in the prevention of torture.⁶⁵

The preventive approach to torture envisions multiple layers of long-term monitoring—judicial inspections, internal investigations and ongoing independent monitoring—rather than the kind of short-term, protection-oriented monitoring that takes place after NDS transfers.⁶⁶ The preventive approach is aimed at ending abuse through long-term institutional change, not short-term deterrence. Nevertheless, the work of preventive monitoring bodies is useful in designing better monitoring of NDS transfers.

INVOKING INTERNATIONAL STANDARDS TO NEGOTIATE A STRONG MONITORING MANDATE

The work of preventive monitoring bodies reflects that internationally, governments are increasingly receptive to intrusive monitoring, which would once have been rejected as an encroachment upon state sovereignty.⁶⁷ For instance, while none of the countries in the Middle East and North Africa region, where assurances-based transfers often occur, have signed OPCAT, some have established national human rights institutions with torture monitoring roles. Jordan even invited the UN Special Rapporteur on Torture to conduct a country visit in 2006.⁶⁸

Correspondingly, negotiators seeking robust assurances of access can cite the precedent of these existing monitoring bodies, answering the Afghan government’s concerns about intrusiveness by pointing to US and other countries’ willingness to subject themselves to

⁶⁴ For a comprehensive list of international and regional bodies focused on detention or torture, *see id.* at 41-43 (April 2004). In the Americas, the Special Rapporteur on the Rights of Persons Deprived of Freedom has been appointed since 2004. *See* Resolution of the General Assembly of the OAS on the Study of the Rights and the Care of Persons Under any Form of Detention or Imprisonment OAS Doc. AG/RES. 2037 (June 8, 2004). The African Commission on Human and Peoples’ Rights (“African Commission”) created a Special Rapporteur on Prison and Conditions of Detention in 1996, with a mandate to “examine the situation of persons deprived of their liberty within the territories of States Parties to the African Charter on Human and Peoples’ Rights.” In 2002, the African Commission adopted *Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa* and established a follow-up committee in 2004. In 2009, the African Commission created the Committee for the Prevention of Torture in Africa, charged with giving effect to the guidelines and the prohibition on torture. *See* Resolution on the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines), 32nd Sess., (Oct. 23, 2002); Resolution on the Change of Name of the “Robben Island Guidelines Follow-up Committee” to the “Committee for the Prevention of Torture in Africa,” Res. ACHPR/Res158(XLVI)09 (Nov. 25, 2009).

⁶⁵ *See* Antonio Cassese, *Current Development: A New Approach to Human Rights: the European Convention for the Prevention of Torture*, 83 Am. J. Int’l L. 128, 129-30 (1989).

⁶⁶ *See* Background Paper, Independent Monitoring of Human Rights in Places of Detention, Regional Seminar for the Middle East and North Africa, Jordan, 3-6 September 2007 in 19 Torture J. (2009).

⁶⁷ *See* Manfred Nowak & Walter Suntinger, *International Mechanisms for the Prevention of Torture*, in *Monitoring Human Rights in Europe* 145, 147 (Arie Bloed et al. eds., 1993).

⁶⁸ *See* Background Paper, Independent Monitoring of Human Rights in Places of Detention, *supra* note 66.

monitoring by the ICRC, the OPCAT Subcommittee and the European CPT. Furthermore, negotiators can suggest that rather than reflecting distrust, robust monitoring assurances simply mirror international standards for monitoring places of detention.

MINIMUM REQUIREMENTS FOR EFFECTIVE ANTI-TORTURE MONITORING

The work of monitoring bodies, coupled with international and regional human rights guidelines on investigating allegations of torture, illustrates the minimum requirements any monitoring mechanism should meet to effectively detect abuse and investigate allegations.⁶⁹

The guiding principle for these requirements is that a US monitoring team should be able to: (1) in its preventive function, deter abuse by the fact of its existence and prevent abuse by actively anticipating potential problems; and (2) in its protective function, promptly respond to problems and, where necessary, intervene on behalf of detainees.⁷⁰

To effect these purposes, the monitoring team should have a broad mandate set out in the assurances, terms of reference or official authorization from the NDS or other relevant authorities. Afghan authorities should make explicit guarantees of access and inform staff of the guarantees. The US should commit to designing a monitoring protocol and to carrying out monitoring which in practice fulfills the spirit of the mandate.

The following subsections delineate key parameters for effective monitoring:

- A system of regular and unannounced visits
- Visits conducted with private interviews, observation of detention conditions and investigation and documentation of allegations of abuse
- Competence, training and capacity of monitoring personnel
- Interventions by monitoring personnel in the case of abuse

Authority for Regular and Unannounced Visits

Former UN Special Rapporteur on Torture Nigel Rodley has called regular inspection of places of detention “one of the most effective preventive measures against torture.”⁷¹ Indeed, the principal

⁶⁹ Investigatory guidelines, such as the UN Istanbul Protocol, focus on the documentation of torture and other abuse, a precursor to effective investigation, reporting and prosecution. But they also describe the conditions necessary for monitors to detect abuse and evaluate allegations. See Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 55/89, UN Doc. HR/P/PT/8/Rev.1 (Aug. 9, 1999) (“The documentation methods contained in this manual are also applicable to other contexts, including human rights investigations and monitoring.”).

⁷⁰ The Association for the Prevention of Torture describes the functions that monitoring visits fulfill as including prevention, direct protection through *in situ* visits and documentation of conditions to form a basis of judgment and justify recommendations. See Association for the Prevention of Torture, *supra* note 63, at 28.

⁷¹ Nigel Rodley, Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, Sir Nigel Rodley, UN Doc. A/56/156, ¶ 39 (July 3, 2001). This observation was adopted by the next Special Rapporteur Theo van Boven. See Theo van Boven, Report of the Special Rapporteur on the Question of Torture submitted in accordance with Commission resolution 2002/38, UN Doc. E/CN.4/2003/68, ¶ 26 (Dec. 17 2002).

purpose of both the OPCAT Subcommittee and European CPT is to carry out a system of visits to prevent torture. These and other monitoring bodies have a “strong deterrent effect” against abuse by virtue of their authority to inspect places of detention, at times without prior announcement.⁷²

US monitoring of detainee transfers cannot replace or claim the same benefits as regular and permanent systems of visitation. But like such systems, US monitoring visits, if conducted regularly and in response to problems as they arise, can impact detaining authorities’ behavior.

To be effective, the monitoring team should, like many international, regional and national monitoring bodies, have authority to make both regular and unannounced visits. Unannounced visits are an important way for monitors to detect torture or ill-treatment. As UN Special Rapporteur on Torture Manfred Nowak has noted, unannounced visits enable monitors to “formulate a distortion-free picture of the conditions in a facility.” Were a monitor to announce every visit in advance, “there might be a risk that existing circumstances could be concealed or changed.”⁷³ According to the UN Office of the High Commissioner for Human Rights, visits focused on the protection of particular individuals, unlike visits aimed at prevention of torture generally, “do not usually involve prior notice to any authority.”⁷⁴ On the other hand, regular visits enable monitors to develop their understanding of conditions and, as described below, engage in an ongoing dialogue with detaining authorities, putting them in a position to press for improvements or raise concerns.

Negotiators may balk at the task of procuring authority for regular and unannounced visits. But a monitor with less authority might be ineffective at detecting abuse. It may even inadvertently provide cover for abusive detention conditions. The UN guidelines on effective investigation of torture, the Istanbul Protocol, note this danger in the general context of monitoring for abuse:

[Visits] can in some cases be notoriously difficult to carry out in an objective and professional way, particularly in countries where torture is still being practiced. . . . In some cases, one visit without a repeat visit may be worse than no visit at all. Well-meaning investigators may fall into the trap of visiting a prison or police station, without knowing exactly what they are doing. They may obtain an incomplete or false picture of reality They may give an alibi to the perpetrators of torture, who may use the fact that outsiders visited their prison and saw nothing.⁷⁵

⁷² Manfred Nowak, UN Special Rapporteur on Torture, Report of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment to the General Assembly, UN Doc. A/61/259, ¶ 72 (Aug. 14, 2006).

⁷³ While the Special Rapporteur on Torture visits countries by invitation only, he will accept an invitation only upon “an express agreement by the Government” to cooperate, including by granting him “freedom of inquiry” to visit any place of detention with or without prior notice. See Manfred Nowak, Report of the Special Rapporteur on the question of torture to the Commission on Human Rights 62nd Session, UN Doc. E/CN.4/2006/6, ¶ 22-23 (Dec. 23, 2005).

⁷⁴ Office of the High Commissioner for Human Rights, Professional Training Series No. 7: Training Manual on Human Rights Monitoring, chap. IX ¶ 96 (2001).

⁷⁵ Istanbul Protocol, *supra* note 69, ¶ 128.

By the same token, the US monitoring team should have freedom of movement within a detention facility, to gain an accurate and comprehensive sense of detention conditions. OPCAT, the European Convention on the Prevention of Torture and the UN Special Rapporteur on Torture all require that detaining authorities provide monitors freedom of movement within facilities.⁷⁶

The monitoring team should also have the authority to visit transferees promptly after transfer. The risk of abuse during the period of incommunicado detention following transfer is high.⁷⁷ Reflecting this heightened risk, international standards require that individuals have the opportunity to notify family members and meet with consular authorities promptly after their detention.⁷⁸ Prompt visits can further mitigate the risk of torture and abuse by breaking the incommunicado nature of early detention. As evinced by UN and Council of Europe standards on detention, immediate visits and prompt medical examinations are important to establish whether an individual is later tortured or subjected to adverse detention conditions.⁷⁹

Furthermore, the monitoring team should have the authority to make follow-up visits soon after the initial visit. According to an ICRC expert, “systematic follow-up is imperative to ensure the prisoners’ safety after the visit,” particularly if the authorities learn that the detainee complained of mistreatment during the initial visit.⁸⁰ Prompt follow-up visits may detect the concealment of conditions during the first visit, and can help chart progress or deterioration of conditions.⁸¹

Manner of visits

International standards on the manner in which monitoring visits are conducted reflect the importance of protecting detainees from reprisal, fully investigating potential abuse and preventing a deterioration of detention conditions.

PRIVATE INTERVIEWS

The monitoring team should conduct detainee interviews privately and confidentially to reduce the risk of reprisal against a detainee who reports abuse. UN fact-finding bodies routinely include the requirement for a private interview in their terms of reference, and the OPCAT and

⁷⁶ See OPCAT, *supra* note 63, at art. 14(1) (“Unrestricted access” for the Subcommittee on Prevention) and art. 20(c) (“Access to all places of detention and their installations and facilities” for national preventive mechanisms); European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *supra* note 62, art. 8(2); Report of the Special Rapporteur on the question of torture, Commission on Human Rights 62nd Session, E/CN.4/2006/6 (23 December 2005).

⁷⁷ Evans and Morgan, *supra* note 61, at 260.

⁷⁸ Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, GA Res. 47/173, Principle 16, U.N. Doc. A/RES/43/173 (Dec. 9, 1988); Principles on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions, ECOSOC Res 1989, U.N. Doc. E/1989/89 ¶ 6 (May 124, 1989); Declaration of the Protection of All Persons from Enforced Disappearance, GA Res. 47/133, U.N. Doc. A/47/49, art. 10(2) (Dec. 18, 1992).

⁷⁹ See Standard Minimum Rules for the Treatment of Prisoners, ECOSOC Res. 633C (XXIV), U.N. Doc. A/CONF/611, rule 24 (1955); European Prison Rules, Council of Europe Committee of Ministers Res. (87)3 (Feb. 12, 1987) [*hereinafter* UN Standard Minimum Rules].

⁸⁰ Marina Staiff, ICRC Medical Coordinator for Detention-related Activities, *Visits to detained torture victims by the ICRC (I): Management, documentation, and follow-up*, 10 *Torture J.* 1 (2000).

⁸¹ See Background Paper, Independent Monitoring of Human Rights in Places of Detention, *supra* note 66.

European Convention for the Prevention of Torture both explicitly require that state parties facilitate visits by providing the “opportunity to have private interviews.”⁸²

Where only one detainee is interviewed, private interviews may not actually reduce the risk of reprisal against a detainee, since detaining authorities would know directly from where allegations of ill-treatment came.⁸³ Terms of transfer should include an explicit guarantee that no reprisal is taken against detainees or facility staff in relation to a monitoring visit.

Private interviews are also necessary for effective monitoring. For detainees who have been subjected to violence and repeated interrogation by detaining authorities, “the absolute certainty that no information—no allegation, no complaint—provided by them in the course of an interview will be reported to the authorities without their express permission” is necessary to establish a relationship of trust, which in turn is critical to making interviews a way of detecting abuse.⁸⁴

PREVENTION-ORIENTED VISITS

The monitoring team should assess not just whether a transferee has been abused but also whether “there are specific conditions or circumstances that are likely to degenerate into torture or inhuman or degrading treatment or punishment.”⁸⁵ International standards on detention conditions reflect the multitude of circumstances that may lead to abuse or themselves amount to abuse. The monitoring team should consider:

- The transferee’s access to medical care, including a medical exam to document signs of torture⁸⁶
- The training of personnel in direct contact with the detainee and use of physical restraints⁸⁷

⁸² Manfred Nowak & Elizabeth McArthur, *The United Nations Convention Against Torture: A Commentary*, 1047 (Oxford University Press 2008). The UN guidelines on investigation of torture, the Istanbul Protocol, also emphasize that detainees be interviewed and examined in private, without police or other law enforcement officials, as a “procedural safeguard.” See Istanbul Protocol, *supra* note 69, ¶ 124.

⁸³ See Letter from Human Rights Watch to British Foreign Secretary Miliband on Diplomatic Assurances with Ethiopia (Sept. 17, 2009).

⁸⁴ Staiff, *supra* note 80.

⁸⁵ European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *1st General Report*, No. CPT/Inf (91) 3, ¶ 45-46 (Feb. 20, 1991).

⁸⁶ Medical exams should be conducted promptly after transfer and whenever necessary. Detainees are entitled to adequate medical, psychological and dental care. See UN Standard Minimum Rules, *supra* note 79, Rule 22, 24 and 25; Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UN GA Res. 43/173, Principle 24, U.N. Doc. A/43/49 (Dec. 9, 1988) [hereinafter “UN Detention Principles”]; European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *3rd General Report*, No. CPT/Inf (93) 12, ¶ 33 (June 4, 1993). “Prisoners should be able to approach the health care service on a confidential basis, for example, by means of a message in a sealed envelope.” See CPT, *3rd General Report*, *supra* note 85, ¶ 34; see also Association for the Prevention of Torture, *supra* note 63, at 192-193 (arguing that denial of access to medical care can amount to ill-treatment).

- Disciplinary methods used against detainees, including solitary confinement⁸⁸
- The transferee's ability to communicate a complaint of mistreatment, including by communication with outsiders such as embassy staff or lawyers⁸⁹
- Physical conditions in cells and interrogation rooms, including sanitation, food, light and temperature.⁹⁰

INVESTIGATION AND DOCUMENTATION

The monitoring team should fully investigate and, to the extent feasible, document abuse, with a methodology informed by international detention and torture standards.

Investigation and documentation are critical both to determining the veracity of allegations and building a case for any actions the monitoring team seeks to recommend to the detaining authorities or others. Where detainees allege abuse, the monitoring team should initiate investigations promptly.⁹¹ It should aim to identify the perpetrators and the circumstances under which abuse occurred. Accordingly, it should take steps to secure evidence concerning the incident, identify and interview victims, seize instruments which may be used in ill-treatment and, to the extent possible, gather forensic evidence.⁹² Monitoring officials like the UN Special Rapporteur on Torture include forensic experts on their teams for this purpose, and request that they be permitted to bring tools for documenting evidence of torture, including

⁸⁷ For standards on the use of physical restraints on detainees, see UN Standard Minimum Rules, *supra* note 79, Rule 33-34; European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *2nd General Report*, No. CPT/Inf (92) 3, (Apr. 13, 1992). For a discussion of standards relating to training of prison staff, see Association for the Prevention of Torture, *supra* note 63, at 207-213.

⁸⁸ Solitary confinement can constitute inhuman or degrading treatment, or torture, if applied for an extended period of time or repeated. See UN Detention Principles, *supra* note 86, Principle 7; Human Rights Committee, General Comment 20: Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment; (Mar. 10, 1992). Individuals held in solitary confinement should be granted requests for medical attention without delay. See European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *2nd General Report*, *supra* note 87, ¶ 56; Association for the Prevention of Torture, *supra* note 63, at 108-109.

⁸⁹ Detainees should have access to a mechanism to make complaints regarding treatment to prison or other official authorities. See UN Detention Principles, *supra* note 86, Principle 33; UN Standard Minimum Rules, *supra* note 79, Rule 36; See Association for the Prevention of Torture, *supra* note 63, at 51. Detainees should also have access to counsel. See UN Detention Principles Principle 18, UN Standard Minimum Rules, *supra* note 79, Rule 39. Foreign detainees should have access to diplomatic or consular representation. See UN Standard Minimum Rules for the Treatment of Prisoners, *supra* note 79, Rule 38; Vienna Convention on Consular Relations, 596 U.N.T.S. 8638-8640 art. 36 (Apr. 24, 1963).

⁹⁰ Monitors should examine whether detainees have access to natural light, fresh air and adequate temperatures, and whether security measures depriving detainees of these conditions are justified or threatening to detainees' health. See UN Standard Minimum Rules for the Treatment of Prisoners, *supra* note 79, Rule 10, 11, 19, 26; European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *11th General Report*, No. CPT/Inf (2001) 16 (Sept. 3, 2001); Association for the Prevention of Torture, *supra* note 63, at 144-145. Detainees should be provided adequate, wholesome food and drinking water. See UN Standard Minimum Rules for the Treatment of Prisoners *supra* note 79, Rule 20.

⁹¹ See European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *14th General Report*, ¶ 35, No. CPT/Inf (2004)28 (Sept. 21, 2004), Istanbul Protocol, *supra* note 69, ¶¶ 14, 83, 179.

⁹² *Id.* at ¶ 33.

photo equipment.⁹³ Transferees should have access to medical examinations to corroborate claims of abuse.⁹⁴

Independence, training and resources of monitoring team

The monitoring team should have the necessary training, independence and resources to conduct effective monitoring.

PERSONNEL

Requiring that personnel meet basic requirements for training, expertise and professional experience is critical since inspections take place behind closed doors and are not susceptible to external oversight. Even if a specific monitoring protocol is established, the monitoring team will necessarily exercise broad discretion, particularly in regard to how to respond to the detaining authorities' efforts to block their access or conceal abuse.⁹⁵

Personnel should include multiple individuals competent to assess and document allegations of abuse. A dedicated team of monitors, such as the UK's Detainee Oversight Team charged with monitoring detainee transfers in Afghanistan, should include medical professionals and specialists in human rights and humanitarian law.⁹⁶ Personnel from ethnic or regional backgrounds similar to that of the detainees may be better able to establish relationships of trust.⁹⁷ Multiple individuals should be included in the monitoring team to maximize its capacity and corroborate accounts.

TRAINING

Individuals who are not specifically trained on torture monitoring may overlook signs of abuse and, in an interview, misinterpret a detainee's reticence or confusion. Personnel should be familiar with international standards on detention and indicators of abuse in the environment or detainee's demeanor. They should also have operational training, such how to conduct private interviews and interact with detaining authorities.⁹⁸ The Office of the High Commissioner for Human Rights' "Training Manual on Human Rights Monitoring" and the UN Istanbul Protocol describe interview and documentation techniques that reduce the risk of reprisal against an interviewee and enable monitors to effectively assess allegations.⁹⁹ The Council of Europe

⁹³ See Manfred Nowak, *Fact-Finding on Torture and Ill-Treatment and Conditions of Detention*, J. of Human Rts. Practice 101, 106 (2009).

⁹⁴ See Istanbul Protocol, *supra* note 69, ¶ 123.

⁹⁵ See Evans & Morgan, *supra* note 61, at 144-45 (describing the importance of the "ethos" of the CPT Committee as determining how it will "respond collectively to the operational practicalities encountered during visits").

⁹⁶ Association for the Prevention of Torture, *supra* note 63, at 51.

⁹⁷ *Id.* at 71.

⁹⁸ *Id.* at 72-73.

⁹⁹ See UN Office of the High Commissioner for Human Rights, *supra* note 74; Istanbul Protocol, *supra* note 69.

National Preventive Mechanisms Project is also developing operational training programs to facilitate an exchange of expertise between monitors and share best practices.¹⁰⁰

Interventions

Effective prevention also requires that monitors intervene to protect detainees at risk, where possible.¹⁰¹ This protective role has precedent in the ICRC's work and that of other international and regional human rights bodies.¹⁰² In their protective capacity, monitors can "make representations to the responsible authorities (with evidence that makes clear what was done, but without indicating to which individual it was done, or with evidence citing individual accounts) in order to make it stop."¹⁰³

The monitoring team should not confine themselves to identifying specific risks, but should make recommendations to improve or end conditions that facilitate torture.¹⁰⁴ For instance, national preventive mechanisms mandated under OPCAT "make recommendations to the relevant authorities with the aim of improving the treatment and the conditions of the persons deprived of their liberty," which competent authorities are required to consider.¹⁰⁵

Regular monitoring visits provide an ongoing opportunity to communicate with detaining authorities about detention conditions.¹⁰⁶ According to an ICRC expert, the ICRC's "regular and thorough visits to a place of detention can have a direct impact on the treatment of those held there, provided that open dialogue can be maintained with the authorities in charge."¹⁰⁷

The monitoring team should promptly report allegations of abuse to relevant US authorities. They should recommend whether a moratorium is appropriate and what steps the US or NDS need take before resuming transfers.

¹⁰⁰ See European National Preventive Mechanism against torture (NPM) Project, <http://unipd-centrodirittiumani.it/it/attivita/European-National-Preventive-Mechanism-against-torture-NPM-Project/458>.

¹⁰¹ "Effective prevention requires intervention to protect those at risk. Rarely can this be done on an individualized basis, though if a specific risk is known, that risk can be averted." Malcolm Evans, member of the OPCAT Subcommittee, *Legal Measures to Prevent Torture and Ill-treatment*, cited in Penal Reform International, *The Role of Independent Monitoring in the Prevention of Torture and Inhuman or Degrading Treatment* (Mar. 2010).

¹⁰² See Office of the High Commissioner for Human Rights, *supra* note 74, chap. IX, ¶¶ 86-90 (describing summary reports by UN agencies raising concerns about issues such as adequacy and condition of detention facilities); ¶ 101 (describing ICRC's "[s]tandard practice" of conducting multiple interviews with detaining authorities and preparing confidential report on conclusions and understandings established during the visit).

¹⁰³ Staiff, *supra* note 80.

¹⁰⁴ "[V]isits create the opportunity for independent experts to examine, at first hand, the treatment of prisoners and detainees and the general conditions of detention...Many problems stem from inadequate systems which can easily be improved through regular monitoring." Nowak, *supra* note 72, ¶ 72.

¹⁰⁵ OPCAT, *supra* note 63, art. 19-20.

¹⁰⁶ "By carrying out regular visits to places of detention, the visiting experts usually establish a constructive dialogue with the authorities concerned in order to help them resolve problems observed." Nowak, *supra* note 72, ¶ 72.

¹⁰⁷ Staiff, *supra* note 80.