

THE CONSTITUTION PROJECT



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The Report of The Constitution Project's Task Force on **Detainee Treatment**

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# Detainee Treatment

## Detainee Transfers and Proxy Detention

President Obama's early executive orders closed the CIA's "black sites," but their effect on the CIA's rendition of detainees to foreign custody was less clear. Executive Order 13491 required a task force to "to study and evaluate the practices of transferring individuals to other nations in order to ensure that such practices ... do not result in the transfer of individuals to other nations to face torture."

In his confirmation hearings for the post of CIA director, Leon Panetta said that President Obama had prohibited "extraordinary rendition — when we send someone for the purpose of torture or actions by another country that violate our human values." But Panetta said "renditions where we return individuals to another country where they prosecute them under their laws" were "an appropriate use of rendition."<sup>46</sup> Rendition for the purpose of torture has always been formally forbidden, though. All renditions under President Bill Clinton and many renditions under President George W. Bush were ostensibly for the purpose of prosecution (rather than solely for interrogation); many nonetheless resulted in torture.

On August 24, 2009, the Special Task Force on Interrogations and Transfer Policies issued a press release outlining its transfer recommendations.<sup>47</sup> Despite the history of renditions resulting in torture, the task force announced that the United States could continue to transfer individuals based on "assurances" from the receiving country that they would not be tortured. They recommended "that the State Department be involved in evaluating assurances in all cases," and that the inspectors general from DOS, DOD and DHS "prepare annually a coordinated report on transfers conducted by each of their agencies in reliance on assurances."<sup>48</sup> They also recommended

that agencies obtaining assurances from foreign countries insist on a monitoring mechanism, or otherwise establish a monitoring mechanism, to ensure consistent, private access to the individual who has been transferred, with minimal advance notice to the detaining government.<sup>49</sup>

It is not clear whether these recommendations have been fully implemented. The interrogations and transfer task force's recommendations as to transfers by the CIA remain classified, and its full recommendations and report have never been released.

The Obama administration has not abandoned the Bush administration's argument that Article 3 of the CAT — which prohibits refoulement of prisoners to countries where they are in serious danger of torture — is not legally binding for transfers occurring entirely outside the United States. The Department of Defense and the CIA have never publicly adopted implementing regulations for Article 3 of CAT.

In an interview with Task Force staff, Harold Hongju Koh said the process of obtaining diplomatic assurances regarding detainee treatment is overseen by DOS, and that the CIA no

longer had the authority to transfer suspects to foreign intelligence services without DOS's approval. Koh noted that some of the most controversial renditions under the Bush administration occurred without DOS involvement.<sup>50</sup>

Within DOS, both the Legal Advisor's Office and the Bureau of Democracy, Human Rights, and Labor now must approve any transfers that require diplomatic assurances. Koh said that he and Michael Posner, head of the Bureau of Democracy, Human Rights, and Labor, were scrupulous about evaluating assurances:

The day the Obama administration transfers someone to a condition where they will be tortured, without adequate assurances, is the day I leave the administration. . . . I'm saying unequivocally it has not happened since I've been here, and that's three years. It's not going to happen while I'm here. It's not going to happen while Posner is here. I believe you can have confidence in that.<sup>51</sup>

Under the Obama administration, there have been no public allegations of suspects being tortured after the United States transferred them across an international boundary. (This excludes transfers within Afghanistan, discussed below.) But there have been credible reports of the United States providing intelligence and assisting in transfers and interrogations carried out by allies.

In 2011, *The Nation* reporter Jeremy Scahill wrote that the CIA was interrogating Al Qaeda-affiliated prisoners in

a secret prison buried in the basement of Somalia's National Security Agency (NSA) headquarters, where prisoners suspected of being Shabab members or of having links to the group are held. Some of the prisoners have been snatched off the streets of Kenya and rendered by plane to Mogadishu. While the underground prison is officially run by the Somali NSA, US intelligence personnel pay the salaries of intelligence agents and also directly interrogate prisoners.<sup>52</sup>

Former detainees did not allege that they were beaten or physically tortured, but did describe being held for extended periods without counsel, in squalid conditions.

Somali intelligence officials and former detainees told Scahill that Americans conducted interrogations at the prison. One detainee, Kenyan citizen Ahmed Abdullahi Hassan, told fellow detainees that he had been rendered "Guantánamo style" on a plane from Nairobi to Mogadishu. A U.S. intelligence official told Scahill that the United States "provided information which helped get Hassan — a dangerous terrorist — off the street" but did not carry out the rendition itself.<sup>53</sup> The United States denied that the CIA was running a secret prison in Somalia, but acknowledged providing "support to the [Somali government] during debriefings of terror detainees" on "rare occasions."<sup>54</sup>

An American teenager, Gulet Mohamed, was detained, interrogated, and allegedly beaten and deprived of sleep by Kuwaiti authorities in late 2010 after being placed on the United States' no-fly list. Mohamed and his family alleged that he had been interrogated by FBI agents in

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Kuwait even after attempting to assert his right to counsel, and claimed that he was being detained at the United States' behest. A State Department official denied this. Mohamed was eventually allowed to return to the United States after suing the United States, when it appeared that a federal judge would shortly order his return. Another American citizen, Sharif Mobley, has made similar allegations about a threatening interrogation by U.S. officials in Yemen.<sup>55</sup>

Another case of proxy detention involves a Yemeni journalist, Abdulelah Haider Shaye. Shaye, who had reported on civilian deaths resulting from U.S. targeted killings in Abyan province and interviewed Anwar al-Awlaki, was convicted of terrorism charges by a Yemeni state security court in January 2011, after a trial criticized by some human rights groups. His attorneys alleged that he had been kept in solitary confinement and tortured in prison. It is unknown whether the United States had any role in his initial arrest, but in February 2011 President Obama intervened to prevent the Yemeni president from pardoning Shaye.<sup>56</sup>

Even more troubling than those cases is the evidence that Afghan detainees have been tortured after U.S. forces turned them over to the Afghan National Directorate of Security (NDS). An October 2011 report from the U.N. Assistance Mission in Afghanistan (UNAMA) 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.<sup>57</sup>

The U.N. reported that coalition forces were involved in the capture or transfer of 19 individuals who were subsequently tortured in NDS custody.<sup>58</sup> (Coalition forces transferred approximately 2,000 individuals to Afghan security in 2009 and 2010, most of whom the U.N. team did not interview.)

Torture was especially pervasive in Department 124, the NDS's facility for "high-value detainees" in Kabul. Of 28 former detainees at Department 124, 26 told UNAMA they had been tortured by methods such as "beating, suspension, and twisting and wrenching of genitals." Seventeen of those 26 had been captured by coalition forces. Five of the 26 were children.<sup>59</sup>

According to *The Washington Post*, Department 124 is across the street from the United States' military headquarters in Kabul, and was built with U.S. funds.<sup>60</sup> Afghan and U.S. officials said that CIA officials met with Department 124's leadership once a week, and reviewed their interrogation reports.<sup>61</sup> In contrast, the International Committee of the Red Cross (ICRC), the United Nations, and Afghanistan's Independent Human Rights Commission (AIHRC) had no access to the facility, and the ICRC had warned the United States about reports of torture there. Several Afghan intelligence officials told the *Post* that the CIA knew of detainees' mistreatment, though they disapproved of it.<sup>62</sup>

The CIA's relationship with the NDS is long-standing. Leaked government documents show that it was only in 2008 that the government of Afghanistan, rather than the CIA, began supplying the agency's budget. Allegations of the NDS's torture of prisoners are equally long-standing, and were included in several of DOS's annual human rights reports on Afghanistan. For example, the 2010 report relayed an allegation from Human Rights Watch that in December 2009, a detainee named Abdul Basir

died as a result of abuse in a National Directorate of Security (NDS) detention facility. Although NDS authorities claimed that Basir committed suicide, small dark circles on his forehead, cuts on his back, bruising in several places, and a large cut on the shin were found on Basir's body.<sup>63</sup>

In an interview with Task Force staff, a former U.S. official who served in Afghanistan said that "everyone has always had concerns about NDS."<sup>64</sup> Canadian Diplomat Richard Colvin put it more bluntly in 2009 testimony to the Canadian parliament: "[T]he NDS tortures people, that's what they do. And if we don't want our detainees tortured, we shouldn't send them to the NDS."<sup>65</sup>

Despite having the strongest ties to NDS, the United States was slower than its allies to respond to allegations of torture. In September 2007, the United States, Canada, the United Kingdom, Norway, the Netherlands and Denmark exchanged letters with the Afghan government stating that coalition forces could access NDS facilities to monitor the treatment of detainees they transferred.<sup>66</sup> At the time, the Netherlands, the U.K. and Canada already had bilateral agreements with Afghanistan for monitoring detainees' treatment after a transfer. By February 2010, according to a DOS cable, the United States had the "dubious distinction" of being "the only detaining nation in Afghanistan that does not have a monitoring program" for detainees transferred to Afghan custody.<sup>67</sup> President Obama's task force on interrogation and transfers recommended that the U.S. embassy in Kabul "develop a plan to physically monitor the status of detainees transferred by U.S. forces,"<sup>68</sup> but as of spring 2012 that recommendation had not been fully implemented.<sup>69</sup>

In an interview with Task Force staff, the former U.S. official said that there was "ample reason why the U.S. government should've had a monitoring program in place" before it did, and that "[t]here's no doubt in my mind that more torture took place in Afghanistan due to the [government's] failure to put in place, at a sooner date, a monitoring program."<sup>70</sup> But until the 2011 U.N. report, there was very little public or press outcry about allegations that U.S. forces had transferred detainees to be tortured by the NDS. This was in contrast to several allies, particularly Canada. On December 30, 2009, Canadian Prime Minister Paul Harper suspended Parliament until March, a move the opposition denounced as "almost despotic," in an attempt to evade a parliamentary investigation into Canadian complicity in abuse by the NDS.<sup>71</sup>

The United States' allies in Afghanistan consider themselves to have a binding legal obligation under CAT Article 3 not to transfer a detainee to a country where he will be at serious risk of torture. To enforce this prohibition, a Canadian court ordered a halt to transfers to certain NDS facilities in 2008, and a British court did the same in 2010.<sup>72</sup> By contrast, the United States executive branch takes the position that Article 3 of CAT is not legally binding overseas, and so its prohibition on refoulement is a matter of policy rather than a legal requirement.<sup>73</sup> The former official said that the United States would likely have acted on reports of the NDS torturing detainees "long before it did" if the government applied Article 3 of CAT as a matter of law.<sup>74</sup>

The United States eventually did respond to the allegations of torture by NDS. In mid-July 2011, it banned transfers to the NDS facility in Kandahar.<sup>75</sup> Before the UNAMA report was published, the mission's human rights chief briefed U.S. officials on its findings. After that briefing, the former official said, "it took the military only a few days" to suspend transfers to the NDS, and only a few more weeks to reach agreement with the Afghan government on the conditions for resuming transfers.<sup>76</sup>

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In order for transfers to an NDS facility to resume, the United States would interview detainees about whether they or fellow prisoners had been abused, making every possible effort to protect the detainees' identities and prevent retaliation for reporting torture. The guards and interrogators had to attend a human rights training course. If a second round of detainee interviews also revealed no indications of abuse, transfers could resume subject to ongoing monitoring by the United States and/or the AIHRC. Having left Afghanistan, the former official did not know the details of the monitoring program's implementation, but thought the military personnel who designed it "were doing a good job. ... I wish the State Department could've moved at the speed the military did."<sup>77</sup>

Despite these steps, a March 2012 report by the AIHRC and the Open Society Institute (OSI) identified several gaps in the United States' monitoring of detainee transfers. First, the post-transfer monitoring program only applied to U.S. forces under the command of the International Security Assistance Force (ISAF) for Afghanistan, not to Special Forces troops assigned to counterterrorism missions. The State Department had not yet created a monitoring program for transfers by non-ISAF U.S. military forces, and the AIHRC was not informed of non-ISAF detainees' transfers to NDS custody.<sup>78</sup>

Second, there was evidence that the military's restrictions on transfers were not being applied to transfers by the CIA. Eleven detainees told AIHRC researchers that they had been detained by U.S. personnel and transferred to the NDS detention facility in Kandahar, despite a July 2011 ban on U.S. military transfers to that prison.<sup>79</sup> Four of the detainees told AIHRC that they were subsequently tortured by the NDS in Kandahar:

According to one detainee, "I was severely beaten by cable in the head and neck. I was shackled and they connected the shackles to an electrical current and shocked me until I was unconscious. They also beat me on the back and waist very hard. As a result, my left hand is still hurting and even my tongue is severely damaged from the electric shock." Three other transferred detainees also alleged that they were abused in NDS Kandahar, including being subjected to beatings with cables.<sup>80</sup>

AIHRC and OSI found these allegations credible.<sup>81</sup>

U.S. military officials told OSI that the prohibition on transfers to NDS-Kandahar remained in effect and was binding on special forces as well as the regular military. But this left open the possibility that it was not binding on the CIA, and that the CIA was continuing to transfer detainees to the NDS facilities where there was a high likelihood of torture.<sup>82</sup> Notably, several of the detainees who were transferred to NDS-Kandahar told AIHRC that before they were transferred they were taken to "Mullah Omar's House." According to OSI, "Mullah Omar's House" is a local nickname for Firebase Maholic, a facility that the press has reported the CIA used as a base for operations in Kandahar.<sup>83</sup> OSI reported that an unidentified but credible source confirmed in December 2011 that U.S. intelligence and Special Forces personnel continued to operate out of the facility, as does a U.S.-trained paramilitary force.<sup>84</sup>

None of the above reports suggest that the United States transferred detainees to the NDS for the purpose of torture. But there is strong evidence of transfers occurring when the United States knew or should have known that torture was a likely outcome. That is a violation of

Article 3 of CAT, regardless of which U.S. forces are responsible for the transfer, and regardless of whether it begins on U.S. soil or takes place entirely overseas.

A former U.S. official argued that the United States' responsibility should not arise only from "putting the handcuffs on someone."<sup>85</sup> Rather, "[i]f the U.S. is going to put its reputation and resources on the line working hand in glove with another country's security forces, they need to have a clear understanding regarding what's acceptable treatment of detainees."<sup>86</sup> This meant a detailed, independent assessment of the intelligence services' human rights records — the source pointed out that the U.S. government is in a far better position than NGOs or journalists to conduct such an evaluation given the secret nature of these services — ongoing oversight, and a willingness to "step back" when serious violations occur.<sup>87</sup>

These steps are especially important given serious allegations that Asadullah Khalid, who became head of the NDS in late 2012, has personally taken part in detainee abuse. The Canadian diplomat Richard Colvin alleged in testimony in 2009 that Khalid was

an unusually bad actor on human rights issues. He was known to have had a dungeon in Ghazni, his previous province, where he used to detain people for money, and some of them disappeared. ... [I]n Kandahar we found out that he had indeed set up a similar dungeon under his guest house. He acknowledged this. When asked, he had sort of justifications for it, but he was known to personally torture people in that dungeon.<sup>88</sup>

Khalid has denied these allegations, stating "this is just propaganda about me,"<sup>89</sup> but human rights groups believe they are credible.<sup>90</sup>

A June 2012 document released by the British Ministry of Defence reported that according to the director of the UNAMA's Human Rights Unit, there was "systematic abuse taking place in Kandahar ... of many times the magnitude of the problem elsewhere" and Khalid was one of the "principal culprits."<sup>91</sup> Based in part on this evidence, the British High Court ruled in November 2012 that the Ministry of Defence could not resume transfers to the NDS.<sup>92</sup>

Most recently, in January 2013 the United Nations released a follow-up report on treatment of detainees in Afghan custody, which found that torture continues to be a serious problem. Of the prisoners it interviewed, UNAMA found that "178 out of 514 detainees held in NDS facilities, or 34 percent, experienced torture or ill-treatment, down 12 percent from the previous year."<sup>93</sup> The rate of torture by Afghan National Police or Afghan Border Police actually increased, from 35 percent to 43 percent.<sup>94</sup>

Abuse was more systematic in Kandahar than in any other location. Half of the detainees the U.N. interviewed in Kandahar provided graphic, detailed descriptions of torture.<sup>95</sup> There were also credible reports of the enforced disappearance of 81 detainees in Kandahar.<sup>96</sup> Five detainees in Kandahar alleged that they were tortured at "Mullah Omar's House" by being repeatedly beaten with a pipe or stick on the soles of their feet.<sup>97</sup> (The U.N. report did not address the AIHRC/OSI report that "Mullah Omar's house" is a local nickname for a base also used by U.S. intelligence forces.)

UNAMA found that despite NATO coalition members' efforts at monitoring and preventing

abuse, there was "reliable and credible evidence that 25 of the 79 (31 percent) detainees transferred by international forces experienced torture" — an increase from 2011.<sup>98</sup> According to the U.N. report, restrictions on transfers better monitoring by international forces had led to "early improvement in some NDS facilities with a decrease in allegations of torture. ... However, after ISAF resumed transfers to these facilities and reduced its monitoring, UNAMA observed an increase and resumption in incidents of torture."<sup>99</sup>

Some detainees were tortured after international forces sent them to prisons where the U.S. and allied militaries had not lifted the prohibition on transfers. According to the U.N. report,

following investigations into the cases referred ... ISAF maintained in all instances that international military forces, including U.S. Special Forces, had not been involved in the capture or transfer of the detainees in question. ISAF recommended that UNAMA attempt to confirm the allegations of capture and transfer with an "other government agency."<sup>100</sup>

"Other government agency" is a commonly used government euphemism for the CIA. The U.N. report and OSI and AIHRC's reporting suggest that the CIA continues to transfer detainees to Afghan prisons where torture is known to be widespread, in violation of the Convention Against Torture. Detainees likely have also been transferred to torture prisons by the military, despite genuine efforts to prevent this from occurring.

The CIA has not publicly commented in response to the new U.N. report. The U.S. military has once again halted transfers to the facilities where the U. N. alleges that torture has occurred, and has asked Afghanistan to investigate allegations of torture by U.S.-trained units.<sup>101</sup> Past requests for investigation have had little effect, though. According to press reports, General John Allen, the commander of U.S. forces in Afghanistan, said his staff had requested that Afghanistan investigate 80 specific allegations of detainee abuse. "To date, Afghan officials have acted in only one instance," Allen said, and the official responsible was transferred rather than fired.<sup>102</sup>

As of January 2013, Asadullah Khalid was receiving medical treatment in the United States after an assassination attempt in December. President Obama and Defense Secretary Leon Panetta both visited him in the hospital. In response to human rights groups' criticism of the visit, White House spokesman Tommy Vietor said it was "appropriate" given that "Mr. Khalid and the team he oversees work closely with the United States to protect Afghan citizens and American civilians and military service members in Afghanistan."<sup>103</sup>