

REDRESS

Seeking Reparation for Torture Survivors

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FOREIGN AFFAIRS COMMITTEE: NEW INQUIRY: AFGHANISTAN

Submissions of The Redress Trust (REDRESS): 23 January 2009

SUMMARY OF SUBMISSIONS

- UK Armed Forces in Afghanistan can detain and arrest persons; such persons are transferred to the Afghanistan authorities within 96 hours, or released, on the basis of a Memorandum of Understanding (MOU) between the UK and Afghanistan which purports to protect the human rights of the persons so transferred against torture and ill-treatment
- Serious human rights violations, including torture and ill-treatment, are widespread in Afghanistan prisons and detention centres; the UK must abide by the absolute prohibition against refoulement and not transfer persons in its custody where there are substantive grounds for believing the person faces a real risk of torture
- The MOU is not an acceptable mechanism to use in fulfillment of the UK's non-refoulement obligation; the UK should refrain from transferring detainees; it should also take more steps to assist the Afghan authorities to bring about an environment where there is in reality no longer a real risk of torture

INTRODUCTION

1) This submission is put forward in response to the Foreign Affairs Committee's (FAC) call for evidence in respect of its new inquiry into foreign policy aspects of the UK's relations with Afghanistan.

2) The Redress Trust (REDRESS) is an international non-governmental organisation with a mandate to assist survivors of torture to access adequate and effective remedies and reparation for their suffering. Since its establishment in December 1992, it has accumulated a wide expertise on the rights of victims of torture both within the United Kingdom and internationally.¹

3) The submission relates to the UK's contribution to tackling problems relating to human rights within Afghanistan, and deals with the practice and policy of the UK in transferring detainees to the Afghan authorities in the context of the realities of the Afghanistan detention, prison and legal system.

4) UK forces in Afghanistan form part of the International Security Assistance Force (ISAF) whose latest UN Security Council mandate was extended on 22 September 2008.² Based on a 2003 North Atlantic Council's decision, NATO has "strategic

¹ See generally www.redress.org

² UN Security Council Resolution 1833 (2008). The mandate applies for a year from 13 October 2008, and includes "...the need for further progress in security sector reform, including further strengthening of the Afghan National Army and in particular of the Afghan National Police...[and] justice sector reform... [and] in this context the importance of

command, control and coordination” of the ISAF.³ The original 2001 UN Security Council Resolution authorising the role of ISAF in Afghanistan stressed that “all Afghan forces must adhere strictly to their obligations under human rights law and... under international humanitarian law.”⁴

UK POLICY ON DETENTION AND TRANSFER OF DETAINEES

5) The UK Government states that: “Afghanistan’s law of Prisons and Detention Centres provides for the respect of human rights and outlines minimum standards for detention. The prison authorities are also bound by Afghanistan’s international obligations, most notably the International Covenant on Civil and Political Rights [ICCPR] and the UN Convention against Torture and Other Cruel, Inhuman And Degrading treatment or Punishment [UNCAT]. Nevertheless conditions in prisons are basic. We are working closely with the authorities to improve facilities to meet UN minimum standards. We are also training prison guards in humane treatment and proper registration of those being held.”⁵

6) ISAF troops can arrest and detain persons, where necessary, for force protection, self-defence, and to fulfil the ISAF mission as set out in UN Security Council resolutions; ISAF puts a limit of 96 hours on detention by ISAF troops, within which time detainees should either be released or transferred to the Afghan authorities.⁶

7) On 30 September 2006⁷ the UK signed a Memorandum of Understanding (MOU) with Afghanistan concerning the transfer by the UK Armed Forces to Afghan authorities of persons detained in Afghanistan; the UK is “confident that the human rights of detainees handed over by UK forces are not breached and they have access to sufficient food and clean water.”⁸

8) The MOU states that detainees will be transferred to Afghanistan authorities at the earliest opportunity where suitable facilities exist and where such facilities are not in existence the detainee will be released or transferred to an ISAF approved facility;⁹ the target of 96 hours derives from NATO policy.¹⁰

9) The MOU also states that all detainees will be treated by the UK Armed Forces in accordance with applicable provisions of international human rights law.¹¹ The MOU states further that the responsibility for the treatment of detainees so transferred, including the prohibition against torture and ill-treatment and protection against torture, is the responsibility of the Afghan authorities in accordance with its international human rights obligations;¹² the Afghan Independent Human Rights Commission (AIHRC) and UK personnel (including Embassy representatives and

further progress in the reconstruction and reform of the prison sector in Afghanistan, in order to improve the respect for the rule of law and human rights therein.”

³ ISAF website accessed 18 January 2009 at <http://www.nato.int/ISAF/structure/comstruc/index.html>

⁴ UN Security Council Resolution 1386 (2001), 20 December 2001

⁵ FCO Human Rights Annual Report 2007, p 125

⁶ Ibid

⁷ The MOU is Appendix 3 to the FAC’s Second Report of 2006-2007 *Visit to Guantanamo Bay* pp 61-64, available at <http://www.publications.parliament.uk/pa/cm200607/cmselect/cmcaff/44/44.pdf>. Although purportedly signed on 23 April 2005 the MOU was actually signed on 30 September 2006, as pointed out by the FAC in footnote 78 of its Report; this was stated by the Secretary of State for Defence on 8 January 2007 at Hansard, House of Commons Debates 8 January 2007, col 77W [not 8 January 2006 as appears in the FAC footnote].

⁸ FCO Human Rights Annual Report 2007, p 125

⁹ MOU, para 3.1

¹⁰ “In terms of NATO’s detention policy...NATO forces can detain captured individuals for up to 96 hours with the possibility of a small extension, but that would be really only in the most extreme circumstances and would have to go up the chain of command. So in principal 96 hours at which point they’re handed over to the Afghan authorities. And that is what has been done, almost without exception... as far as I’m aware” – NATO spokesperson, Weekly Press Briefing 4 October 2006, accessed 18 January 2009 at <http://www.nato.int/docu/speech/2006/s061004b.htm>

¹¹ MOU, para 3.1

¹² MOU, para 3.2, which also states Afghan authorities will ensure any detainee so transferred will not be transferred to the authority of another state, including detention in another country, without prior written UK agreement.

members of the UK's Armed Forces) will have full access to such transferees while they are in custody; the International Committee of the Red Cross (ICRC) and relevant UN human rights institutions will be allowed to visit them;¹³ the UK will notify the ICRC and the AIHRC within 24 hours of transfers;¹⁴ the UK will be notified prior to the initiation of any criminal proceedings and prior to any release, as well any allegations of improper treatment;¹⁵ no transferee will be subject to the death penalty.¹⁶

UK OBLIGATIONS AGAINST REFOULEMENT

10) The UNCAT sets out that “No State Party shall expel, return (“refouler”) or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture.”¹⁷ The European Court of Human Rights (ECtHR) has held that the principle of non-refoulement is an inherent and indivisible part of the absolute prohibition of torture as without it any other approach would be “contrary to the spirit and intention of [Article 3 of the European Convention on Human Rights which prohibits torture]”.¹⁸

11) The absolute prohibition imposes a negative duty on states to refrain from torturing and also a range of positive obligations including the obligation to “prevent such acts by not bringing persons under the control of other states if there are substantial grounds for believing that they would be in danger of being subjected to torture.”¹⁹ The requirement in the UNCAT’s Article 2(1) to take “effective legislative, administrative, judicial or other measures to prevent acts of torture” must equally encompass the absolute principle of non-refoulement²⁰ otherwise it would mean that the absolute principle of non-refoulement may not be “practical” and “effective.”²¹

12) The FCO guidance note on MOUs states that “an MOU records international ‘commitments’, but in a form and with wording which expresses an intention that is not to be legally binding.”²² Their use has become contentious since states, including the UK, began trying to use them to mitigate risks of torture and other ill-treatment that would otherwise prevent the transfer of people, especially terrorist suspects.

13) In the leading ECtHR case of *Chahal v United Kingdom*²³ the UK attempted to deport Mr Chahal to India, arguing that the risk of torture or ill-treatment should be balanced against the risk he posed to UK national security, but the ECtHR

¹³ MOU, para 4.1; para 4.2 provides that UK Embassy and military personnel will also have full access to question transferees.

¹⁴ MOU, para 5.1, which states “...normally within 24 hours, and if not, as soon as possible after...”

¹⁵ MOU, para 5.2

¹⁶ MOU, para 6.1

¹⁷ Article 3 (1)

¹⁸ *Soering v. United Kingdom*, Application No. 14038/88 (ECtHR 1989) at para 88.

¹⁹ See General Assembly, “Interim Report of the Special Rapporteur of the Commission on Human Rights on the Question of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN General Assembly, 55th Session, Item 116(a) of the provisional agenda, Human Rights Questions: Implementation of Human Rights Instruments”, U.N. Doc. A/55/290. (2000) at 27. The Committee against Torture (CAT) has previously found that the principle of non-refoulement not only reflects a treaty obligation of states parties to the UNCAT but also constitutes a *jus cogens* norm: “non-refoulement must be recognized as a peremptory norm under international law, and not merely as a principle enshrined in Article 3” - Committee Against Torture, “Summary Record of the 624th Meeting”, U.N. Doc. CAT/C/SR.624, (2004) at paras 51 – 52. See also *Alzery v. Sweden*, U.N. Doc. CCPR/C/88/D/1416/2005 (10 November 2006) at para 11.8.

²⁰ See CAT “General Comment No. 2: Implementation of Article 2 by States Parties”, U.N. Doc. CAT/C/GC/2/CRG.1/Rev.4 (23 November 2007) at para. 19; see also Manfred Nowak and Elizabeth McArthur, *The United Nations Convention Against Torture: A Commentary* (Oxford University Press, 2008), p 113 (characterising Article 2(1) as an “umbrella clause” encompassing Article 3).

²¹ As required by the Committee against Torture; see for example “Initial Report of Peru” U.N. Doc. CAT/C/SR.193 at para 44 (9 Nov. 1994); “Initial Report of Morocco” U.N. Doc. CAT/C/SR. 203 (16 November 1994) at para 51.

²² Treaties and MOUs: Guidance on Practice and Procedure, FCO, 2004, p 1, available at: www.fco.gov.uk/resources/en/pdf/pdf8/fco_pdf_treatymous.

²³ No. 22414/93 ECtHR, 1996.

disagreed.²⁴ The UK also sought to rely on the Indian Government's assurance to mitigate against the risk facing Mr Chahal, but the ECtHR held: "...the Court is not persuaded that the...assurances would provide Mr Chahal with an adequate guarantee of safety."²⁵

14) The UK has argued that article 3 of the UNCAT is not applicable to detainees transferred from UK detention in Afghanistan to the Afghani authorities since these suspects are subject to the jurisdiction of that country – transfer was not a question of extradition, expulsion or deportation and thus article 3 is not applicable;²⁶ however, taking into account the purpose of the absolute prohibition against refoulement, the term 'another State' should in fact be interpreted as referring to any transfer of a person from one State jurisdiction to another "otherwise... the UK could easily circumvent [its] obligations by transferring suspected terrorists or other individuals first to their own detention facilities in...Afghanistan and then handing them over to the domestic authorities without having to assess any risk of torture."²⁷

15) In relation to the UK therefore the Committee against Torture has recommended that it "should apply articles 2 and 3, as appropriate, to transfers of a detainee within [its] custody to the custody whether de facto or de jure of another State."²⁸

16) Instance of torture of detainees transferred by the Canadians are dealt with in paragraphs 26-27 below; in these regards the Canadian Federal Court of Appeals recently ruled that the Charter of Rights and Freedoms does not apply to Afghan detainees in the custody of Canadian ISAF units and could not be used to prevent their transfer;²⁹ that case is being appealed to the Canadian Supreme Court.³⁰ However, the UK House of Lords confirmed in 2007³¹ that the reach of both the Human Rights Act 1998 and the European Convention on Human Rights extends to persons in UK custody in Iraq.³²

17) A very recent decision in the Court of Appeal³³ concerned the transfer of two persons held by the UK in Iraq to the Iraqi authorities for trial for war crimes. The Court declined to halt the transfer. The particular factual and legal issues are and were case-specific to Iraq and the detailed history of the men's detention, involving inter alia the changing status of UK forces in that country, their mandate which was

²⁴ Ibid, para 37 and 80; the ECtHR said: "The prohibition provided by Article 3 against ill-treatment is equally absolute in expulsion cases. Thus, whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion. In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration."

²⁵ Ibid, para 105. Further, in the recent decision of *Saadi v Italy* 37201/06, 28 February 2008 the ECtHR rejected arguments that the threshold for deciding on real risk should be the higher standard of "more probable than not" rather than "substantial grounds for believing" (at paras 137-139 and 140). Another even more recent decision of the ECtHR has also confirmed the absolute nature of a state's responsibility not to refoul a person facing a real risk of torture, irrespective of the 'character' of the person: "...[W]henver substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion or extradition. In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration" - *Ismoilov v Russia*, 2947/06, 24 April 2008.

²⁶ CAT/C/SR.627, para 25. The argument was also made in relation to the UK in Iraq.

²⁷ Manfred Nowak and Elizabeth McArthur, *The United Nations Convention Against Torture: A Commentary* (Oxford University Press, 2008), p 199

²⁸ CAT/C/CR/33/3, para 5(e)

²⁹ *Amnesty International Canada v. Defence Staff for the Canadian Forces* (2008 FCA 401) A-149-08, December 17, 2008, available at <http://decisions.fca-caf.gc.ca/en/2008/2008fca401/2008fca401.html>

³⁰ See BC Civil Liberties Association press release "A setback for human rights protection", 18 December 2008, available at http://www.bccla.org/pressreleases/08afghan_prisoner.pdf

³¹ *Al Skeini and others v Secretary of State for Defence* [2007] UKHL 26

<http://www.publications.parliament.uk/pa/ld200607/ldjudgmt/id070613/skeini-1.pdf>

³² Leading to The Baha Mousa Public Inquiry, available at <http://www.bahamousainquiry.org/>

³³ *Al-Saadoon & Anor, R (on the application of) v Secretary of State for Defence* [2009] EWCA Civ 7 <http://www.bailii.org/ew/cases/EWCA/Civ/2009/7.html>

due to expire at the end of 2008, the basis on which the UK had custody, death penalty considerations, jurisdictional matters, conflict between international law norms, and other aspects. The question of refoulement to *torture* was only touched on in relation to whether the imposition of the death penalty was compatible with norms of customary international law, with the court concluding that it was in “no position whatever to arrive at any overall conclusion” on this aspect.³⁴

18) Furthermore, after the Court of Appeal’s decision in the above case the ECtHR granted a request from the UK lawyers concerned that “[the men] should not be transferred or removed from the custody of the United Kingdom until further notice”,³⁵ however, although the UK Government received notification of this from the ECtHR the men were subsequently transferred to the Iraqi authorities.

19) It is submitted that the above case does not alter the UK’s non-refoulement obligations in Afghanistan and does not constitute judicial endorsement of the MOU as a mechanism for fulfilment of these obligations.

TORTURE IN AFGHANISTAN

20) Torture, ill-treatment and the abuse of human rights generally in Afghanistan is a serious and widely recognised problem, as confirmed by the US Department of State’s latest report which states that “the country’s human rights record remained poor... Human rights problems continued, including extrajudicial killings; torture; poor prison conditions; official impunity; prolonged pretrial detention... [T]here were instances in which members of the security forces acted independently of government authority.”³⁶

21) Instances of torture and killings have not been effectively investigated; such abuses involve government officials, local prison authorities, police chiefs, and tribal leaders; security forces continue to use excessive force, including beating and torturing civilians, and the use of torture of detainees by local authorities in Herat, Helmand and Badakhshan have been reported; torture and abuse includes pulling out fingernails and toenails, burning with hot oil, beatings, sexual humiliation, and sodomy.³⁷

22) In 2008 the UN Secretary-General released a report noting that cases of torture of detainees held by the Afghan authorities continue to be reported and that the absence of effective oversight of the National Directorate for Security (NDS) is of particular concern.³⁸

23) The former UN High Commissioner for Human Rights has stated that “on the issue of detention, including the transfer of detainees by international forces to their Afghan counterparts, I have shared my concerns regarding the treatment of detainees with the Government, ISAF and representatives of contributing states. Transfers to the National Security Directorate (NDS) are particularly problematic, given that it is not a regular criminal law enforcement body and operates on the basis of a secret decree.”³⁹

³⁴ Ibid, para 70

³⁵ Letter from the ECtHR dated 30 December 2008 to Public Interest Lawyers

³⁶ Afghanistan: Country Reports on Human Rights Practices – 2007, released 11 March 2008, available at <http://www.state.gov/g/drl/rls/hrrpt/2007/100611.htm>

³⁷ Ibid. See also torture of Afghan journalist in Daily Telegraph 19 May 2008 “Afghan journalist in torture claim”

³⁸ UN General Assembly, 62nd Session, agenda item 19, “The Situation in Afghanistan”, A/62/722 –S/2008/159 at <http://www.unama-afg.org/docs/ UN-Docs/ repots-SG/2008/08march06-SG-report-SC-situation-in-afghanistan.pdf>

³⁹ Press release by UN High Commissioner for Human Rights, “High Commissioner for Human Rights Concludes Visit to Afghanistan”, 20 November 2007, available at

24) There has also been a report by a former SAS soldier about hundreds of Iraqis and Afghans captured by British and American special forces rendered to prisons where they faced torture; in February 2008 Ben Griffin said that individuals detained by SAS troops in a joint UK-US special forces taskforce had ended up in interrogation centres in Iraq and Afghanistan, as well as Guantánamo Bay; he had not witnessed torture himself but added: "I have no doubt in my mind that non-combatants I personally detained were handed over to the Americans and subsequently tortured"; he was served with a High Court order preventing him making further disclosures.⁴⁰

25) The AIHRC has noted "the lack of commitment demonstrated by the Government towards the promotion, protection and monitoring of human rights."⁴¹ There has been a report that "on at least one occasion the NDS hid a detainee who had been handed over by NATO from the ICRC."⁴²

26) Detainees transferred to the Afghan authorities by other ISAF states, such as Canada, have reportedly been tortured. Allegations include whipping with electric cables, electric shocks, suspensions, beatings, exposure to excessive cold, sleep deprivation and other abuse.⁴³ The AIHRC is said to have confirmed these events.⁴⁴

27) Amnesty International (AI) has also reported that six transferees previously held by Canadians were tortured by the NDS.⁴⁵ Canadian officials have received first-hand reports of torture and it is believed that the number of transfers is far higher than has been admitted and does not include immediate in-field transfers in the course of military operations.⁴⁶

THE MOU: CONCERNS RELATING TO DETAINEES' TRANSFER

28) Given the UK's clear obligations against non-refoulement on the one hand and the prevalence of torture in Afghanistan on the other, its use of and reliance on the 2006 MOU to absolve it of responsibility for detainees transferred is of serious concern.

29) There is no substantial difference in principle between this MOU and other MOUs or Diplomatic Assurances or Deportations With Assurances (DWAs) which the UK has sought to use to deport persons (in particular terror suspects) from UK territory to another state where there is a real risk of torture. The criticisms which NGOs⁴⁷ have

<http://www.unhchr.ch/hurricane/hurricane.nsf/0/8FA97A1314FB08B5C1257399005990A3?opendocument>

⁴⁰ "Court gags ex-SAS man who made torture claims", [Richard Norton-Taylor, The Guardian](#), Friday 29 February 2008

⁴¹ AIHRC Annual Report 1 January – 31 December 2007, p 61, available at http://www.aihrc.org.af/Annual_Rep_2007.pdf

⁴² Human Rights Watch, Letter to NATO Secretary-General, 27 November 2006, available at <http://www.hrw.org/en/news/2006/11/27/afghanistan-letter-nato-secretary-general-regarding-summit-latvia> HRW urged "a common policy that requires NATO members to be involved at all stages of the detention process. NATO should ensure that the ICRC, United Nations, and Afghan Independent Human Rights Commission have access to all detention centers where NATO detainees are held to monitor prison conditions and investigate allegations of prisoner abuse. Finally, NATO and the Afghan Government should publicize the names of detainees and the date and location of their arrest as well the name of the detainee's father, birthplace, and current village or town" - Ibid

⁴³ Graeme Smith, "From Canadian custody into cruel hands", *Globe and Mail*, 23 April, 2007; Graeme Smith, "Personal Account: A story of torture", *Globe and Mail*, 24 April 2007.

⁴⁴ Ibid

⁴⁵ Amnesty International, "Afghanistan: Detainees transferred to torture: ISAF complicity", AI Index: ASA 11/011/2007 at p 23 footnote 64

⁴⁶ Ibid

⁴⁷ See, for example, REDRESS, "Non-refoulement under Threat", May 2006, at <http://www.redress.org/publications/Non-refoulementUnderThreat.pdf> ; Amnesty International, "Memorandums of Understanding and NGO Monitoring: a challenge to fundamental human rights", January 2006, at <http://www.amnesty.org/en/library/info/POL30/002/2006/en> ; Human Rights Watch World Report 2008, "Mind the

consistently made in relation to such mechanisms and their use to circumvent the UK's non-refoulement obligations apply *mutatis mutandis* to the 2006 MOU. Eminent UN and European human rights experts and bodies too have voiced serious concerns and reservations regarding the use of these mechanisms.⁴⁸

30) Further, this strong body of opinion against these mechanisms being used because of their incompatibility with the non-refoulement principle has developed within the context of the putative deportation of individual persons in, for instance, the UK, with the authorities seeking on a case by case basis to argue before the courts that the deportation in question was lawful; in respect of the 2006 MOU there is not even such a case by case approach - all detainees are either released or transferred, no individual assessment is made, and there is no independent scrutiny - and a fortiori this MOU is even more unsuitable as a means to fulfilling the UK's international law obligations.

31) MOUs generally (and related mechanisms as mentioned in paragraph 26 above) as well as the 2006 MOU in particular do not and cannot provide an effective safeguard against torture and other ill-treatment, and other serious human rights violations. Relying on them/it to facilitate the transfer of people where there are substantial grounds for believing that they would face a real risk of torture is fundamentally inconsistent with the principle and obligation of non-refoulement in international human rights law.

32) Human rights violations in Afghanistan, including torture and ill-treatment, are well-established to be systematic, endemic, persistent and widespread. To transfer detainees flies in the face of EU policy stated by the Council of Europe last year: "In order to strengthen EU credibility and convincing power, coherence needs to be assured between external action against torture in third countries and the EU's own performance... [by] ensuring full respect for human rights when adopting measures to fight terrorism, including the upholding of the principle of non-refoulement."⁴⁹

33) The MOU is not acceptable as a way for the UK to abide by its obligations:

- selective post-transfer monitoring of individuals is not a proper and acceptable alternative to non-refoulement, and is no substitute for broad and effective institutional reforms and protective mechanisms;
- even the best monitoring mechanisms can be ineffective in preventing acts of torture, because torture is almost always practiced secretly; system-wide monitoring entails large number of detainees visited in private conditions to ensure the authorities can't identify who has provided what information;
- post-transfer visits to an individual puts them in an impossible position – they must either stay silent or report the abuse; if they choose the latter they become clearly identifiable, thus exposing themselves to further abuse;
- neither state is likely to acknowledge torture has occurred after transfer, as this would be an admission that core international law obligations have been breached and that

Gap: Diplomatic Assurances and the Erosion of the Global Ban on Torture," March 2008, at <http://hrw.org/wr2k8/diplomatic/index.htm>

⁴⁸ These critical experts include: the UN Special Rapporteur on Torture; the UN High Commissioner for Human Rights; the UN Special Rapporteur on Human Rights and Counter-Terrorism; the European Commission; the EU's Network of Independent Experts on Fundamental Rights; the European Parliament; the Council of Europe's European Commission for Democracy through Law (Venice Commission), and the Council of Europe Commissioner for Human Rights.

⁴⁹ Council of the EU, 18 April 2008, 8407/1/08 Implementation of the EU guidelines on torture and other cruel, inhuman or degrading treatment or punishment - stock taking and new implementation measures, p 13 available at http://www.consilium.europa.eu/ueDocs/cms_Data/docs/hr/news129.pdf

the MOU has failed; both states share an interest in creating the impression that the MOU is meaningful rather than establishing factually that it actually is;

- the absence of any enforcement or remedial mechanism where abuse has taken place after transfer underscores its ineffectiveness; they have no legal effect and the persons they aim to protect have no effective recourse if their rights are breached, including a lack of the right to reparation;
- legitimising and institutionalising the use of such an MOU where torture is widespread sends an unfortunate signal to other states with poor human rights records that such mechanisms are internationally acceptable;
- the provision for UK personnel (embassy and/or military) to have access is of little practical significance as there is no reason to expect such persons will have expertise in torture issues; further, the ICRC and UN institutions will not exercise their 'right' of access unless it is unrestricted and applicable to all detention centres and all detainees for the reasons already referred to above;
- there is no practical mechanism, nor could there be, for what happens if the Afghan authorities refuse to co-operate with the representative, and if there is a breach there is little that can effectively be done about it;
- this MOU (and others, however designated) does not and cannot deal with the fundamental problem that resorting to diplomacy to ensure compliance with the absolute prohibition against torture is not acceptable; in order for torture and other ill-treatment to be prevented, effective legislative, judicial, and administrative safeguards must be in place on a state-wide basis, which is manifestly not the position in Afghanistan

RECOMMENDATIONS

34) The UK should:

- accept full responsibility under international humanitarian law and international human rights law for all persons it detains in Afghanistan;
- stop transferring detainees in its custody and any future detainees on the basis of the MOU or any other similar basis;
- retain and continue such custody until Afghanistan has properly and effectively implemented mechanisms and safeguards in its detention and prison systems for the prohibition and prevention of torture and ill-treatment;
- in regard to all those already transferred by it since the UK entered Afghanistan (both before or since the MOU was signed and whether or not they were transferred in terms of it), properly investigate what has happened to all such persons; where allegations of torture or ill-treatment arise these should be properly investigated;
- make full reparation to any person abused post-transfer;
- take full, comprehensive and effective steps to assist the Afghan authorities in building the rule of law, internationally acceptable prison and detention systems and a torture-free society
- take a lead in working with and within UN, EU, NATO and ISAF institutions to ensure the strengthening of and compliance with its non-refoulement principles and obligations

All of which is respectfully submitted

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