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USA: Out of sight, out of mind, out of court?
The right of Bagram detainees to judicial review

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Here is no human rights. We are suffering, our condition is too bad
Bagram detainee Wazir Mohammad, 2002[1]

Federal courts should not thrust themselves into the extraordinary role of reviewing the military's conduct of active hostilities overseas, second-guessing the military's determination as to which captured alien as part of such hostilities should be detained, and in practical effect, superintending the Executive's conduct in waging a war… Petitioner places much emphasis on his allegations that he is a Yemeni citizen who was captured in Bangkok, Thailand, while on a trip there in December 2002, and that the Central Intelligence Agency detained him for some months before transferring him to US military custody in Bagram, Afghanistan… Petitioner's allegation that he was not captured on a battlefield in Afghanistan is immaterial…"
US Justice Department, in the case of Amin al Bakri, Bagram detainee, 2008[2]

1. A judicial invitation to change course on Bagram detentions

On 22 January 2009, President Barack Obama signed three executive orders on detentions and interrogations. One of them committed his administration to closing the detention facility at the US Naval Base in Guantánamo Bay within a year, and directed officials to conduct an immediate review of all the cases of detainees currently held there to determine what should happen to them. Another order took substantial steps towards ending the use of secret detention and torture. The third set up an interagency task force to review the "lawful options" available to the US government with respect to the "apprehension, detention, trial, transfer, release, or other disposition of individuals captured or apprehended in connection with armed conflicts or counterterrorism operations". Amnesty International has welcomed the executive orders and has called on the new administration to ensure that the USA adopts laws and policies on detentions fully consistent with its international obligations. The organization has made a number of recommendations to this end, which it has sent to the new administration.[3]

[1] USA: The threat of a bad example: Undermining international standards as 'war on terror' detentions continue, August 2003, http://www.amnesty.org/en/library/info/AMR51/114/2003/e.
[2] *Al Bakri v. Bush*, Respondents' motion to dismiss petition for writ of habeas corpus and complaint for declaratory and injunctive relief, In US District Court for the District of Columbia, 15 September 2008.
[3] See USA: The promise of real change. President Obama's executive orders on detentions and interrogations, 30 January 2009, http://www.amnesty.org/en/library/info/AMR51/015/2009/en. See also, Checklist for first 100 days, http://www.amnesty.org/en/library/info/AMR51/117/2008/en.

The new administration has not yet said what its intentions are for US detentions in Afghanistan, in particular the long-term detention facility being operated by the US Department of Defense at Bagram airbase, where hundreds of detainees are being held. In a Senate Armed Services Committee hearing on 27 January 2009, asked about the future of detentions in Bagram under the new administration, US Secretary of Defense Robert Gates confirmed that "we certainly continue to hold detainees at Bagram. We have about 615 there, I think, something in that ballpark". New detentions by US and allied forces in Afghanistan have been occurring on a regular basis. For example, according to reports from the American Forces Press Service, at least 65 "militants" were taken into custody by coalition forces during January 2009.[4] Given that President Obama is committed to "refocus[ing] American resources on the greatest threat to our security – the resurgence of al Qaeda and the Taliban in Afghanistan and Pakistan" – including by substantially increasing US troop levels in Afghanistan, US detentions in Bagram and elsewhere in Afghanistan are likely to continue, if not increase.[5] The US government must ensure that all detentions, wherever they are conducted, are brought into full compliance with international law and standards.

The new administration has already been provided an opportunity to break from the approach of its predecessor to the Bagram detentions, in litigation currently pending in US federal court. In an immediate response to President Obama's executive order on Guantánamo, Judge John Bates of the US District Court for the District of Columbia (DC) invited the new administration to tell him by 20 February 2009 whether, on the question of judicial review, it will adopt a different stance on the Bagram detentions to that taken by the Bush administration.

Since 2002, an unknown number of people – believed to be more than 2,000 – have been held in the detention facility at Bagram airbase, currently known as the Bagram Theater Internment Facility (BTIF).[6] Most of the approximately 800 detainees who have been held at Guantánamo were held in Bagram and/or Kandahar airbases prior to being transferred to the US Naval Base in Cuba. Some were held in these US facilities in Afghanistan for many months. Today, several hundred people – the majority of them Afghan nationals, but also individuals of other nationalities – are being detained in US military custody there. They are held without charge or trial, or access to the courts or lawyers. Some have been held for years. Some were taken into custody inside Afghanistan, some outside – the four habeas corpus petitions

[4] In addition to the Bagram detentions, US forces have held, and continue to hold, detainees at several forward operating bases in Afghanistan, most notably in Kandahar and Jalalabad.

[5] http://www.whitehouse.gov/agenda/foreign_policy/. There are currently 38,000 US troops in Afghanistan, in addition to approximately 19,000 troops from other countries. On 17 February 2009, the Pentagon announced that pursuant to a presidential decision, Secretary Gates had ordered the deployment of an additional 12,000 US troops to Afghanistan – 4,000 soldiers and 8,000 Marines. A further 5,000 "enabler forces" would also be deployed under the presidential deployment decision. 'President orders 12,000 soldiers, Marines to Afghanistan'. American Forces Press Service, 17 February 2009.

[6] It was previously known as the Bagram Collection Point (BCP). The US authorities have said that during the course of its military operations in Afghanistan, US and allied forces have detained "thousands of individuals believed to be members or supporters of either al Qaeda or the Taliban… A small percentage of the total number of individuals captured by the United States or transferred to United States control are or have been held at the BTIF".

currently pending before Judge Bates involve nationals of Yemen, Tunisia, and Afghanistan reportedly taken into custody in Pakistan, Thailand, and United Arab Emirates and in Afghanistan.[7] For some detainees, their transfer to and detention in Afghanistan was the first time they had been in that country.[8] While the detainee population at Guantánamo has dropped from its peak of around 680 detainees in 2003 to approximately 245 today, in early 2009 there were more than 600 detainees in the Bagram facility, more than double the number of people who were being held there in 2004.

As at Guantánamo, in the absence of judicial oversight, the detentions in Bagram have been marked by the torture or other ill-treatment of detainees, particularly in the early years. If anything, detainees at Bagram suffered more deprivations and had less legal protection than those at Guantánamo. As in the case of Guantánamo, accountability for such abuses has been minimal. As at Guantánamo, the detainees at Bagram have included children, denied their right under international law to special treatment according to their age.[9] As at Guantánamo, detainees have been subject to transfers into and out of the base without judicial or other independent oversight or notification of family members. As at Guantánamo, the Central Intelligence Agency (CIA) is believed to have conducted secret detentions and interrogations at Bagram, and both facilities have served as hubs for the program of unlawful 'renditions' operated largely by the CIA. At least two of the cases currently before Judge Bates concern individuals who are alleged to have been subjected to enforced disappearance at unknown locations by or on behalf of the CIA before being taken to Bagram (see further below).

The USA's detention of Afghans and non-Afghans in Afghanistan without a proper legal framework or accountability has fostered significant popular resentment in Afghanistan. Afghan President Hamid Karzai, as well as the country's Independent Human Rights Commission (AIHRC), have repeatedly called for, and failed to obtain, access to at least monitor conditions at US detention facilities.[10] Under the Afghanistan Constitution, the AIHRC has the right to monitor the human rights situation in Afghanistan and investigate violations. Nevertheless, the AIHRC has not had access to the Bagram detainees because it rejected the conditions being placed on it by the US authorities – including that it should be accompanied at all times by US military officials.

The International Committee of the Red Cross (ICRC) is the only international organization that has been granted access to detainees held at Bagram. Over the years, it has not had access to all detainees held in US custody there or elsewhere in Afghanistan.[11] The organization

[7] The cases are being coordinated by the International Justice Network, www.ijnetwork.org.
[8] For example, Pakistan national Muhammad Saad Iqbal al-Madni has said that he was arrested in Jakarta, Indonesia, on 9 January 2002, taken to Egypt two days later and held there until 12 April 2002. Thereafter he was flown to Afghanistan where he was held in US custody between 13 April 2002 and 22 March 2003 when he was transferred to Guantánamo. He was released to Pakistan in August 2008.
[9] According to the US authorities, about 90 children have been held by US forces in Afghanistan, and as of April 2008 there were about 10 children being held as "unlawful enemy combatants" in Bagram. Written replies by the US government to the UN Committee on the Rights of the Child. UN Doc.: CRC/C/OPAC/USA/Q/1/Add.1/Rev.1/. 2 June 2008.
[10] Afghanistan government officials have some limited access to some Afghan detainees held at Bagram.
[11] In early 2008, the USA granted the ICRC access to detainees in some of its forward operating bases in Afghanistan.

maintains a general policy of confidentiality, but has repeatedly revealed its concerns about the lack of resolution of the legal status of the Bagram detainees, and the distress indefinite detention causes to detainees and their families.[12] During 2008, after prolonged negotiation between the ICRC and the US authorities, programs of family visits and telephone contact were set up.[13]

President Obama's executive order of 22 January 2009 on Guantánamo noted that the detainees held in the US naval base in Cuba have the constitutional right to challenge the lawfulness of their detention, following the US Supreme Court's June 2008 ruling, *Boumediene v. Bush*.[14] In that ruling, which came six and a half years after detentions began at Guantánamo, the Supreme Court rejected the Bush administration's arguments that these men, as non-US nationals captured and held outside the sovereign territory of the USA, were beyond the reach of this fundamental legal protection. The Court declared as unconstitutional attempts by the administration and Congress, through the 2006 Military Commissions Act (MCA), to strip the detainees of their right to habeas corpus. It dismissed as deficient the substitute scheme established by those branches to replace habeas corpus proceedings. That scheme consisted of Combatant Status Review Tribunals (CSRTs), panels of three military officers empowered to review the detainee's "enemy combatant" status, with limited judicial review of final CSRT decisions under the 2005 Detainee Treatment Act (DTA). The CSRTs, established by the administration more than two years after the Guantánamo detentions began, could rely on secret and coerced information in making their determinations on the status of detainees who were not entitled to legal representation.

As this report describes, the non-transparent administrative review – seemingly similar in nature to the CSRT scheme – which the Bagram detainees now receive is not even subject to the sort of narrow judicial review which the Supreme Court found inadequate in the Guantánamo cases, in the *Boumediene* ruling.

On 7 January 2009, Judge Bates heard oral arguments on the question of whether the *Boumediene* ruling reaches detainees held by the USA in Bagram airbase. At that time, the Bush administration was still in office. The Justice Department argued that the US courts have no jurisdiction over the detainees held in Bagram, on the asserted grounds that for those

[12] For example, Families of detainees in Guantánamo and Bagram desperate for news, April 2006, http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/afghanistan-tvnews-250406.

[13] In September 2008, after what the ICRC has described as "lengthy dialogue" between itself and the US authorities, Bagram detainees began face-to-face family visits. By December, there had been "96 family visits", according to the ICRC. This visit program followed the initiation of a program of video telephone calls between detainees and relatives in January 2008. Between January and December 2008, some 2,057 telephone/video calls had been made, according to the ICRC. According to a recently released detainee, he was allowed one 20 minute conversation every two months. He said that "during those conversations I was not allowed to share information with them about my case, my treatment or anything else about Bagram. I was only allowed to say that I was fine (regardless of whether I actually was fine) and that I received good food and good treatment (regardless of whether I actually did)." Declaration of Jawed Ahmed, 3 November 2008 (see below).

[14] Although the US Supreme Court ruled that the Guantánamo detainees were entitled to a "prompt" habeas corpus hearing, eight months after the Boumediene ruling the vast majority of them had still not had a hearing on the merits of their cases.

detentions the habeas corpus stripping provisions of the MCA were still fully intact. It argued that the detainees themselves had no constitutional rights to habeas corpus or other protections, and no rights enforceable under international law.

In an order issued on 22 January 2009, Judge Bates noted that the executive order on Guantánamo signed earlier that day indicated "significant changes to the government's approach to the detention, and review of detention, of individuals currently held at Guantánamo Bay". He wrote that "a different approach could impact the Court's analysis of certain issues central to the resolution of these [Bagram] cases as well". He therefore invited the new administration to inform him by 20 February 2009 whether it wished to "refine" the government's position in the Bagram litigation. Depending on how the new administration replies to this invitation, Judge Bates "will decide whether further briefing or some other course is appropriate".[15]

Amnesty International urges the new administration to adopt a position on all US detentions in Afghanistan fully consistent with its international obligations, including in relation to conditions of confinement, interrogation techniques, and procedural rights. This must include meaningful access by detainees to a means of challenging the lawfulness of their detention in fair hearings before independent courts, with the assistance of independent legal counsel. Any detainee who is found to be unlawfully held must be immediately released. Amnesty International also reiterates its call upon the new administration to abandon any vestiges of the global war paradigm used by the previous administration to deny respect for human rights, including the perpetration of secret detention, torture, secret transfers of detainees, and arbitrary detention.

2. A short history of detentions at Bagram airbase

Following the hearing in his court on 7 January 2009 – seven years after detentions in Bagram began – District Court Judge John Bates issued an order requiring the US government to disclose by 16 January 2009 the number of people being held in the Bagram airbase, how many of them were taken into custody outside of Afghanistan, and how many of them were Afghan nationals. He said that the government could file under seal any of the information that was classified. True to form for an administration that consistently exploited classification to keep from public scrutiny its detention and interrogation policies, the Bush administration filed a response to the order in which any detail of detainee numbers, nationalities, or where they were originally taken into custody was classified as secret and redacted from the unclassified version of the filing.[16]

Detentions at Bagram air base, located in Parwan province about 65 kilometres north of Kabul, began in January 2002. At the time, the detention facility at the US air base at Kandahar,

[15] On 22 January 2009, Judge Bates invited the new administration if it wanted to change its position on the Guantánamo detentions (specifically in relation to the definition of 'enemy combatant' being used in the habeas corpus proceedings). In its response on 9 February 2009, the Justice Department sought a delay, and Judge Bates extended the deadline to 13 March 2009 for the administration to respond on the definitional question.

[16] *Al Maqaleh v. Gates*. Declaration of Colonel Joe E. Etheridge, 15 January 2009. In the US District Court for DC, 16 January 2009.

which had opened in late 2001, held most of those in US custody in Afghanistan. For example, on 8 January 2002, three days before the first detainees landed at Guantánamo, there were 302 detainees in US custody at Kandahar, 38 at Bagram, 16 at Mazar-e Sharif, and eight on the US Navy assault ship, the USS Bataan.[17] A communication within the Department of State dated 24 January 2002 stated that "Bagram is a temporary 'collection center' where some detainees stop over enroute to their permanent location", and revealed that 27 detainees of nine nationalities were then being held at Bagram, where there were plans "to construct accommodations for 75 detainees".[18] In May 2002, Bagram was designated as the "primary collection and interrogation point", while Kandahar continued to function as a "short term detention facility" to which the ICRC no longer had access.[19] With transfers to Guantánamo continuing apace, the detainee population in Bagram remained low for most of 2002.[20]

After the USA stopped using Kandahar air force base as a major detention facility in June 2002, and as transfers to Guantánamo tailed off from late 2003, the numbers of detainees held in Bagram rose. The ICRC noted in 2006 that while detainees were initially held in Bagram for limited periods, "since mid-2003 many have been detained there for longer periods, in some cases for more than two years".[21] The Jacoby military review in 2004 noted that many "low level enemy combatants (LLECs)" had "already been detained in the Bagram Collection Point for extensive periods" and had "little chance for release in the foreseeable future".[22] The four detainees whose habeas corpus petitions were before Judge Bates in District Court in February 2009 had all been held in Bagram for more than five years.

By May 2004, the number of detainees in Bagram was around 300, about half the number held in Guantánamo at that time. In July 2004, "due to a growing detainee population", the Kandahar detention facility was "re-designated as a collection point" and began holding detainees for longer periods of time.[23] The ICRC was granted access to the facility and by April 2005 was visiting around 70 detainees who were being held there. The humanitarian

[17] Department of Defense News Briefing – General Richard B. Myers, 8 January 2002. http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=1082

[18] Information memorandum on nationalities at Bagram, to The Deputy Secretary from PM – Gregory M. Suchan, Acting. 24 January 2002. (DOS-000059). The nine nationalities were Yemeni (10); Afghani (4); Pakistani (1); Kuwaiti (2); Saudi Arabian (5); Tunisian (2); Egyptian (1); Palestinian (1) and Moroccan (1). A handwritten note on the memo by Deputy Secretary of State Richard Armitage reads: "Greg, What happened to the Uighurs?" Seven years later, 17 Uighurs remained in Guantánamo, see USA: Indefinite detention by litigation: 'Monstrous absurdity' continues as Uighurs remain in Guantánamo, 12 November 2008, http://www.amnesty.org/en/library/info/AMR51/136/2008/en.

[19] Review of Department of Defence Detainee Operations and Detainee Interrogation Techniques. Conducted by US Navy Vice Admiral A.T. Church III. Submitted to Secretary of Defense, 7 March 2005 (the Church report), page 185-6.

[20] On 29 October 2002, for example, General Tommy Franks, Commander, US Central Command, said: We just shipped about – between 20 and 25 to Guantánamo Bay over the last few days… If my memory serves, that number of 20 to 30 that we have – detainees that we have in Bagram probably represents between six and 10 nations in terms of the nationality of those detainees". General Franks Briefs at the Pentagon, 29 October 2002, http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=3800.

[21] Families of detainees in Guantánamo and Bagram desperate for news, April 2006, *op. cit.*

[22] Special inspection of detainee operations and facilities in the Combined Forces Command-Afghanistan, led by Brigadier General Chuck Jacoby. 2004 (Jacoby report).

[23] Church report, *op. cit.*, page 185.

organization stopped visiting the Kandahar facility in July 2005 after it was informed by the US authorities that the base would no longer hold detainees.[24] The detainees in Kandahar were transferred to Bagram.

In March 2005, the ICRC had revealed that it remained concerned that its "observations regarding certain aspects of the conditions of detention and treatment of detainees in Bagram and Guantánamo have not yet been adequately addressed".[25] By mid-2005 there were between 450 and 500 detainees held in Bagram. In August 2005, the authorities indicated that about 350 of them were Afghan nationals, which would suggest that 100 or more detainees of other nationalities were held at Bagram at that time.[26] In an interview in December 2005, Afghan national Haji Mohamed Rafik told Amnesty International that he had seen many detainees from other countries when he was held in Bagram from late 2004 to July 2005. He also said that he had seen a female detainee kept in a separate cell in the detention facility when he was there.

The US government reported to the UN Committee on Torture and UN Human Rights Committee in 2006 that, as of 20 February 2006, there were "approximately 400" detainees in US facilities in Afghanistan, apparently down from 2005 totals. However, the detainee population at Bagram proceeded to rise and reached around 600 in mid-2006 and 660 in May 2007. By July 2008 there were about 600 detainees in the base, more than twice as many as were then held in Guantánamo.

The detainees in Bagram have never been a homogenous group, but have comprised individuals of different nationalities who have been picked up from a variety of locations and in different circumstances, including in faraway countries and in situations other than armed conflict. A March 2005 US military review of detentions (the Church report) stated that "persons came into US custody in Afghanistan through several means". Only a "small number… were captured during traditional force-on-force fighting against Taliban or al Qaeda groups, or following the seizure of an enemy facility", and "many of these detainees have since been transferred to GTMO [Guantánamo]". Others were "captured by opposition groups, such as the Northern Alliance, and transferred to US control". Yet others were taken into detention following operations in which "specific personnel are sought based on intelligence information", or "in the immediate aftermath of attacks against US or Afghan forces, if there is reason to suspect that the person has information pertaining to the attack, or which could help to prevent future attacks". "Cordon and sweep" operations in areas "known to harbour Taliban or al Qaeda elements" also resulted in detentions. The Jacoby military review in 2004 noted that detainees were brought to Bagram "from a variety of sources", often from "non-DoD [US Department of Defense] sources". It indicated that the basis for US detentions in Afghanistan was "often poorly documented", and that in some locations "cordon and search operations

[24] Jawed Ahmed, an Afghan journalist, has said that he was held in Kandahar for several days in October 2007 before being transferred to Bagram (see further below). US forces in Kandahar use Kandahar air base as well as Firebase Gecko (now known as Maholic) to hold detainees.
[25] ICRC operational update, 29 March 2005.
[26] "There's approximately 110 Afghan detainees under US control in Guantánamo and somewhere around 350, I believe, that are at the facility at Bagram." Defense Department operational update briefing on Afghanistan, 4 August 2005, http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=3068

yield large numbers of detainees without apparent application of specific criteria".[27] The 2004 Jacoby military review referred to "overcrowding conditions" at Bagram, but the detail remained classified as secret.

Amnesty International wrote to the US administration in April 2002 raising allegations of ill-treatment of detainees in US custody in Afghanistan, but never received a response.[28] It is now known that detainees at Bagram airbase were subjected to torture or other ill-treatment, particularly in the 2002 to 2005 period.[29] Early on in Operation Enduring Freedom, the "dedicated US [military] interrogation personnel" who began arriving in the Afghanistan theatre of operations from late November 2001 relied upon US Army Field Manual FM 34-52. These interrogators "took so literally FM 34-52's suggestion to be creative that they strayed significantly from a plain-language reading of FM 34-52" and developed techniques that "went well beyond" those authorized in the manual.[30] For example, forced nudity was used by interrogators against detainees as a variation of the FM 34-52 technique of "ego down". It was also used as a "control" technique by military guards.[31]

In an interview in Kabul in July 2003, Afghan national Alif Khan told Amnesty International that he had been held in US custody in Bagram for five days in May 2002, prior to his transfer to Kandahar and Guantánamo. He said that he was held in handcuffs, waist chains, and leg shackles for the whole time, subjected to sleep deprivation, denied water for prayer and ablution, and interrogated once or twice a day. He was kept in a cage-like structure with eight people, and no speaking was allowed between the detainees. Another Afghan national Sayed Abbasin, recalled to Amnesty International in May 2003 the 40 days he had spent in US custody in Bagram in mid 2002. He said that he had not been hit by anybody, but that he had been forced to stand, sit and kneel. He described how being forced to kneel for four hours a day felt worse than being beaten. He described a regime of sleep deprivation – 24-hour lighting and guards banging on cells and shouting to keep detainees awake.[32] Moazzam Begg, a UK national who was abducted in January 2002 from Pakistan by US agents, was taken to Bagram where he said he was subjected to "pernicious threats of torture, actual vindictive torture and death threats – amongst other coercively employed interrogation techniques". He alleged that he was interrogated "in an environment of generated fear, resonant with terrifying screams of fellow detainees facing similar methods. In this atmosphere of severe antipathy

[27] Jacoby report, *op. cit.*
[28] See Memorandum to the US Government on the rights of people in US custody in Afghanistan and Guantánamo Bay, April 2002, http://www.amnesty.org/en/library/info/AMR51/053/2002/en, and page 8 of USA: Human dignity denied: Torture and accountability in the 'war on terror', October 2004, http://www.amnesty.org/en/library/info/AMR51/145/2004/en.
[29] With the passage of the USA's Detainee Treatment Act in 2005 and the 2006 revisions of the US Army Field Manual on interrogations, there are greater protections than earlier under US law and policy for detainees in US military custody (see further below). However, to what extent current detention conditions and interrogation techniques employed in Bagram are consistent with international law cannot be properly determined without independent access by human rights monitors to the detention facility and detainees held there.
[30] Church report, *op. cit.* page 196.
[31] AR 15-6 Investigation of Intelligence Activities at Abu Ghraib. Conducted by Major General George R. Fay and Lieutenant General Anthony R. Jones. Page 88
[32] See USA: The threat of a bad example: Undermining international standards as 'war on terror' detentions continue, August 2003, http://www.amnesty.org/en/library/info/AMR51/114/2003/e.

towards detainees was the compounded use of racially and religiously prejudicial taunts."[33] Such allegations were routinely dismissed by the Bush administration with its increasingly hollow mantra that all detainees in US custody were being treated "humanely".[34]

In January 2002, the then White House Counsel had drafted a memorandum to President Bush suggesting that a determination that the Geneva Conventions did not apply to those captured or held in Afghanistan would free up US interrogators and make their prosecution for war crimes under US law less likely.[35] In February 2002, President Bush issued a directive that no-one taken into custody in Afghanistan would qualify for prisoner of war status and that Article 3 common to the four Geneva Conventions – prohibiting torture and other ill-treatment, among other things – would not apply to them either. A previously classified 2003 legal opinion to the Pentagon from the US Justice Department on the military interrogation of "alien enemy combatants" held outside the USA advised that even "if interrogation methods were inconsistent with the United States' obligations under [the UN Convention against Torture], but were justified by necessity or self-defense, we would view these actions still as consistent ultimately with international law".[36]

Bisher al-Rawi, an Iraqi national and UK resident seized in Gambia in late 2002 and transferred to Guantánamo via Afghanistan, told his Combatant Status Review Tribunal hearing in Guantánamo in September 2004 that "we were taken from Gambia to Kabul and then to Bagram Airbase. In Bagram, I provided information only after I was subjected to sleep deprivation, and various threats were made against me."[37] The recently released minutes of a meeting in October 2002 involving military and other lawyers and officials discussing the development of interrogation techniques for use in Guantánamo noted that there were "many reports from Bagram about sleep deprivation being used". In line with the official public relations message that all detainees in US custody were being treated "humanely", the meeting noted that "officially it is not happening". A senior CIA lawyer present at the meeting, who noted that the USA's reservations to its ratification of the UN Convention against Torture gave interrogators "more license to use more controversial techniques", offered the notion that the interrogations were only limited to the criterion that "if the detainee dies you're doing it wrong".[38]

In December 2002, two Afghan men, Dilawar and Mullah Habibullah, died in custody at Bagram. Leaked and eventually declassified passages of official investigative reports into their

[33] Letter from Moazzam Begg, Guantánamo Bay, copied among others to Amnesty International, dated 12 July 2004. http://news.bbc.co.uk/nol/shared/bsp/hi/pdfs/01_10_04.pdf.
[34] Amnesty International's request in April 2003 to visit detainees held in Bagram was rejected by the Pentagon in a letter asserting that the detainees "continue to be treated humanely".
[35] Memorandum for the President from Alberto R. Gonzales. Decision re application of the Geneva Convention on Prisoners of War to the conflict with al Qaeda and the Taliban. Draft 25 January 2002.
[36] Military interrogation of alien unlawful combatants held outside the United States. Memorandum for William J. Haynes II, General Counsel of the Department of Defense, signed by John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, US Department of Justice, 14 March 2003.
[37] USA: Guantánamo and beyond: The continuing pursuit of unchecked executive power, May 2005, http://www.amnesty.org/en/library/info/AMR51/063/2005/en.
[38] Counter Resistance Strategy meeting minutes, 2 October 2002. The minutes paraphrase the interventions made by participants at the meeting.

deaths point to a terrifying final few days in the lives of these two men, subjected to cruelty and brutality by numerous US personnel. Declassified passages of the Church report released under Freedom of Information Act (FOIA) litigation in June 2006, for example, stated that:

> "These techniques – sleep deprivation, the use of scenarios designed to convince the detainee that death or severely painful consequences are imminent for him and/or his family, and beating – are alleged to have been used in the incidents leading to the two deaths at Bagram in December 2002.... The patterns of detainee abuse in these two incidents share some similarities. In both cases, for example, the [detainees] were handcuffed to fixed objects to keep them awake. Additionally, interrogations in both incidents involved the use of physical violence, including kicking, beating and the use of 'compliance blows' which involved striking the [detainees'] legs with the MP's [Military Police guard's] knee. In both cases, blunt force trauma to the legs was implicated in the deaths."[39]

Dilawar, a taxi driver, was kept chained to the ceiling of his cell for much of a four-day period, hooded for most if not all of the time. At times, his pleas for water were denied. Under interrogation, unable to hold his handcuffed hands above his head as he was ordered, a soldier would hit them back up whenever they began to drop. He was physically assaulted during interrogation. He was estimated in one 24-hour period to have been struck over 100 times with blows to the side of the leg just above the knee. His legs, according to one coroner, "had basically been pulpified". The coroner who conducted the autopsy later stated that she had "seen similar injuries in an individual run over by a bus".[40]

A US Army Major with an oversight role in the Combined Joint Task Force-180 (CJTF-180) had "identified questionable practices a month prior to the deaths" but "did not ensure corrective action was taken". A passage of the Church report declassified and released in February 2009, reveals that in February 2003, the CJTF-180 Commander prohibited "several interrogation techniques implicated in the detainee deaths", including "the practices of handcuffing the detainee as a means of enforcing sleep deprivation; hooding a detainee during questioning; and any form of physical contact used for the purposes of interrogation". Some of these techniques were "revived without explanation" in March 2004, and three months later, interrogation policy being used by US forces in Iraq was adopted.[41]

Two days before the first of the two deaths in Bagram, then US Secretary of Defense Donald Rumsfeld had authorized aggressive interrogation techniques for use at Guantánamo – including prolonged isolation, stripping, hooding, exploitation of phobias, and stress position. Shortly after this, the authorized techniques "became known to interrogators in Afghanistan", according to the US Senate Armed Services Committee in December 2008. Indeed, in January 2003, the Officer in Charge of the Intelligence Section at Bagram had seen a presentation

[39] Church report, *op. cit.* Pages 228 and 235.
[40] See US detentions in Afghanistan: an aide-mémoire for continued action, June 2005, http://www.amnesty.org/en/library/info/AMR51/093/2005/en. By 2006, seven low-ranking soldiers, charged variously with assault, maltreatment, dereliction of duty and making false statements had received sentences ranging from five months' imprisonment to reprimand, loss of pay and reduction in rank. See USA: Amnesty International's supplementary briefing to the UN Committee against Torture, May 2006, http://www.amnesty.org/en/library/info/AMR51/061/2006/en.
[41] Church report, *op. cit.*, pages 196 and 236.

listing the techniques that had been authorized by Secretary Rumsfeld. Towards the end of that month, the Staff Judge Advocate for CJTF-180 in Afghanistan produced a memorandum on "interrogation techniques". This remains classified, but included discussion of stripping of detainees and exploiting the fear of dogs.[42]

Torture or other ill-treatment of detainees continued even after the deaths of Dilawar and Mullah Habibullah drew widespread public concern. Afghan national 'Ala Nour alleged that after he was taken to Bagram in late 2003 (which he said had followed beatings during interrogations at a US forward operating base) he had been threatened with dogs, stripped, blasted with cold water, given a jumpsuit and put in a cell with 12 other people, with a plastic bucket in the corner for a toilet. He said that he was interrogated some 22 times in Bagram, each time shackled and handcuffed. He was released after about five months, during which time he said that he had met with the ICRC once. Another Afghan national, Haji Mohamed Rafik, said that he had been held in Bagram from October 2004 to July 2005, and that for the first five months had been held in an 'individual' cell and prohibited from talking to other detainees, before being put in a 'cage' with 14 other detainees. He said that he would have complained to the ICRC about long-term sleep deprivation, but did not because US soldiers were always present with the ICRC delegation. Another Afghan national, Mohammed Anwar, was held in Bagram from October 2004 to May 2005. He told Amnesty International that his treatment by US forces in Bagram had been very bad, and had included stripping and curtailment of religious practices, and that there was "no human behaviour there". Haji Zaher, an Afghan national held in Bagram in late 2004 said that talking to fellow detainees resulted in punitive isolation in a small 'cage'. He said that he had been interrogated nine times: "They told me that I was not able to see my family, my mother and father. I could not see my children if I didn't given them information. They said that I will be staying in prison for many years and that I will die in here. So all the time, they put pressure on me in this way to confess to something that they wished". He said that this included the threat of transfer to Guantánamo where he would be held for the rest of his life if he did not cooperate.[43]

A 2004 US military report into abuses against detainees in US custody in Iraq noted that "non-doctrinal" interrogation techniques were developed and approved for use in Afghanistan and Guantánamo "as part of the Global War on Terrorism". From 2002 US interrogators in Afghanistan were stripping detainees, "isolating people for long periods of time, using stress positions, exploiting fear of dogs and implementing sleep and light deprivation."[44] In December 2008, the US Senate Armed Services Committee concluded that Secretary of Defense Rumsfeld's December 2002 authorization of such interrogation techniques for use at Guantánamo was not only "a direct cause of abuse" at Guantánamo, but had contributed to abuse of detainees in US custody in Afghanistan and Iraq.[45] The Committee stated that the US administration's authorization of aggressive interrogation techniques, plans and policies had "conveyed the message that physical pressures and degradation were appropriate treatment for

[42] Senate Armed Services Committee inquiry into the treatment of detainees in US custody. Executive summary and conclusions, released in December 2008, http://levin.senate.gov/newsroom/supporting/2008/Detainees.121108.pdf.
[43] Information in this paragraph taken from interviews of former detainees by Amnesty International in Afghanistan in December 2005.
[44] AR 15-6 Investigation of Intelligence Activities at Abu Ghraib, *op. cit.*
[45] Senate Armed Services Committee inquiry into the treatment of detainees, *op. cit.*

detainees in US military custody". Bagram was one location where this message became reality.

Agents of the Federal Bureau of Investigation (FBI) deployed to Afghanistan between late 2001 and the end of 2004 reported personally observing military interrogators in Bagram and elsewhere employing stripping of detainees, sleep deprivation, threats of death or pain, threats against the detainee's family members, prolonged use of shackles, stress positions, hooding and blindfolding other than for transportation, use of loud music, use of strobe lights or darkness, extended isolation, forced cell extractions, use of and threats of use of dogs to induce fear, forcible shaving for the purposes of humiliating detainees, holding unregistered detainees, sending detainees to other countries for "more aggressive" interrogation and threatening to do this.[46]

Even child detainees were not spared. Omar Khadr, who was held in Bagram for some three months from late July 2002 when he was 15 years old, has described being subjected to such ill-treatment in Bagram and has also said that he "would always hear people screaming, both day and night. Sometimes it would be the interrogators [censored], and sometimes it was the prisoners screaming from their treatment... Most people would not talk about what had been done to them. This made me afraid". He has said that "while detained in Bagram, I was held with other adult detainees in a building like an airplane hangar with some chicken-wire fencing dividing the prisoner area and some wooden plank dividers or walls for separate prisoner areas. I was still on a stretcher and still had holes in my body and stitching. I was kept with all the adult prisoners".[47] Another child detainee held in Bagram for seven weeks in late 2002 and early 2003, Afghan national Mohammed Jawad, has alleged that he was subjected to isolation, forced standing, stress positions, and physical assaults as part of the interrogation process in the airbase. He has described his detention in isolation cells on the second floor of the detention facility, in which he was kept handcuffed and hooded and subjected to sleep deprivation.[48] Both Khadr and Jawad remain in Guantánamo as of February 2009, with the lawfulness of their detentions still not having been judicially reviewed on the merits, and without accountability or remedy for the abuses they have endured in US custody.

It has only been since September 2006, nearly five years after detentions began at Bagram, that the USA has applied the baseline standard of Common Article 3 to the Geneva Conventions to the treatment of detainees held in US military custody. The Pentagon's detainee policy now includes the requirement that all those in US military custody "will be respected as human beings" and that "inhumane treatment of detainees is prohibited and is not justified by the stress of combat or deep provocation".[49] Under the Detainee Treatment

[46] A review of the FBI's involvement in and observations of detainee interrogations in Guantánamo Bay, Afghanistan, and Iraq. Oversight and Review Division, Office of the Inspector General, US Department of Justice, May 2008.
[47] USA: In whose best interests? Omar Khadr, child 'enemy combatant' facing military commission, April 2008, http://www.amnesty.org/en/library/info/AMR51/028/2008/en.
[48] See USA: From ill-treatment to unfair trial. The case of Mohammed Jawad, child 'enemy combatant', August 2008, http://www.amnesty.org/en/library/info/AMR51/091/2008/en.
[49] Department of Defense Directive 2310.01E, The Department of Defense Detainee Program. 5 September 2006.This directive was issued after the US Supreme Court found for the applicability of Common Article 3 (*Hamdan v. Rumsfeld*, June 2006).

Act, individuals held in Department of Defense (DoD) detention or by other agencies in DoD facilities (of which Bagram is one) must not be subjected to any treatment not authorized by the Army Field Manual, the latest version of which was issued in September 2006.[50] The US administration has described the manual as "the gold standard in terms of how prisoners and detainees will be treated", one that is "far above the baseline standard set by Common Article 3".[51] However, Amnesty International has concerns that parts of the manual are in fact inconsistent with the prohibition of torture and other ill-treatment. For example, Appendix M of the Manual provides for an interrogation method described as "physical separation" (e.g. solitary confinement), initially for 30 days, but with provisions for unlimited extensions. At the same time, the Manual states that the use of separation must "not preclude the detainee getting four hours of continuous sleep every 24 hours." Again there are no limitations placed on this, meaning that such limited sleep could become a part of the 30-day separation regime, and extendable indefinitely. Furthermore, and even after President Obama's executive order on interrogations signed on 22 January 2009, the USA appears still to fail to recognize that the International Covenant on Civil and Political Rights also applies to all its actions, and the actions of the Afghan government, in Afghanistan.[52]

In any event, without independent oversight of detentions or access to detainees, either by courts, legal counsel or human rights monitors, how this recent policy and law has translated into action in Bagram remains publicly unknown. There have been allegations that have raised concerns in this regard. According to the *New York Times* in January 2008, for example, a confidential ICRC memorandum the previous summer complained that dozens of detainees had been hidden from the ICRC in secret isolation cells at Bagram, some held there for months before being moved into the main facility and registered. Harsh interrogation techniques were allegedly employed against the detainees held incommunicado there.[53] The memorandum apparently referred to in this article was released under FOIA litigation in February 2009. Dated 25 July 2007, and entitled 'ICRC report of undisclosed detention facility at Bagram airfield, Afghanistan', the entirety of the text is redacted (blacked out).[54]

Allegations of ill-treatment made in a sworn declaration given by Jawed Ahmad, an Afghan journalist released from Bagram in September 2008 also give cause for concern. The previous administration said that it "[took] issue with many of the allegations contained in the declaration", without providing any further detail of which parts it disagreed with.[55] Amnesty International is not in a position to verify Jawed Ahmad's allegations, but considers that the US authorities must ensure an independent investigation into them, make public the findings of such an investigation and, if warranted, ensure that any perpetrators are brought to justice.

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[50] DTA §1002(a). The Army Field Manual is FM 2-22.3 Human Intelligence Collection Operations.
[51] Transcript of conference call with senior administration officials on the executive order interpreting common Article 3, 20 July 2007, http://www.prnewswire.com/cgi-bin/stories.pl?ACCT=104&STORY=/www/story/07-20-2007/0004629772&EDATE.
[52] See USA: The promise of real change, *op. cit*, n.3.
[53] Defying US plan, prison expands in Afghanistan, New York Times, 7 January 2008.
[54] Memorandum available at 43 of http://www.ccrjustice.org/files/2009-02-02%20DOD%20JS%20Release%20-%20pg%201-43.pdf.
[55] *Wazir v. Gates*, Reply to petitioner's opposition to respondent's motion to dismiss for lack of subject matter jurisdiction, In US District Court for DC, 17 November 2008.

Jawed Ahmad is a 22-year-old Afghan national who was detained in Bagram from 26 October 2007 to 21 September 2008.[56] At the time he was taken into custody, he was working as a journalist for Canadian Television (CTV) News, a division of a private Canadian television network. As part of his work reporting on the conflict in and around Kandahar, he had regular contact with local Taleban leaders. He has said that he was arrested at the US air base in Kandahar after he went there by appointment to meet a public affairs official. Jawed Ahmad has described being held for nine days in a Kandahar detention facility, subjected to around two dozen interrogations. Accused by his interrogators of working for the Taleban, he has alleged that he was kicked, subjected to verbal abuse, sleep deprivation, threats to his family, and that he would be transferred to Guantánamo.

After nine days, Jawed Ahmad alleges, his head was shaved, he was dressed in an orange jumpsuit and told he was being flown to Guantánamo. In fact he was flown to Bagram, where he would be held for the next 11 months. Upon arrival he says that he was made to stand barefoot in the snow for six hours, and forced to stand up when he fell down. Eventually taken inside the detention facility, he says he was taken to an isolation cell for the next 18 days, and subjected to repeated interrogations. He says that he was interrogated more than 100 times in Bagram, and that he was subjected to sleep deprivation, exposure to extreme cold, and beatings.

Acting through Jawed Ahmad's father as "next friend", US lawyers filed a habeas corpus petition in US District Court in June 2008 shortly before the *Boumediene* ruling was handed down by the Supreme Court. In the event, the petition was dismissed as moot as Jawed Ahmad was released in the following September.[57] Jawed Ahmad was denied access to legal counsel for the entire time he was held in custody, and says that he was not given a hearing of any kind.

In earlier years, perhaps Jawed Ahmad would have been transferred to Guantánamo, where detainees are now recognized by the US Supreme Court has having the constitutional right to habeas corpus review. The all-but last transfers to Guantánamo from Afghanistan occurred on 22 September 2004, a few weeks after the US Supreme Court made the first of its landmark rulings on the Guantánamo detentions – finding that the US federal courts had jurisdiction to consider habeas corpus petitions from the Guantánamo detainees (*Rasul v. Bush*).[58] In its

[56] Unless otherwise stated, the allegations relating to his detention in Bagram are taken from Jawed Ahmad's declaration, dated 3 November 2008, filed in the US District Court for DC in *Wazir v. Gates*.
[57] On 23 September 2008, the US Justice Department filed notice in the District Court that on 21 September 2008 the USA had "relinquished all legal and physical custody" of Jawed Ahmad and "transferred him to the Government of Afghanistan for release". The District Court Judge dismissed the case on 7 November 2008.
[58] After the 22 September 2004 transfer of 10 detainees from Afghanistan to Guantánamo, there were no further transfers to the naval base announced by the US authorities until 6 September 2006 when President Bush revealed that 14 "high-value" detainees had been transferred from secret CIA custody in unknown locations to Guantánamo. The administration exploited the cases of the 14 to obtain the Military Commissions Act. From the time of these 14 transfers until the *Boumediene* ruling in 2008, a period during which the administration sought to end habeas corpus review for "enemy combatants" in the name of national security, it transferred a further six detainees to Guantánamo from unknown locations, including at least two who had been held in secret CIA custody. Announcing each transfer, the Pentagon emphasised the alleged dangerousness of the detainee being transferred.

October 2003 brief arguing for the Court not to take such a decision, the government suggested that "any judicial review of the military's operations at Guantánamo would directly intrude on those important intelligence-gathering operations. Moreover, any judicial demand that the Guantánamo detainees be granted access to counsel to maintain a habeas action would in all likelihood put an end to those operations".[59] Its argument to keep Guantánamo as a judiciary-free zone was rejected by the Supreme Court. With the administration's original reason for holding detainees in Guantánamo thereby damaged by the *Rasul* ruling, albeit not yet terminally, the Bagram detainee population began to grow, and the Guantánamo detainee population to decline. At the time of the *Rasul* ruling in 2004, there were around 600 detainees in Guantánamo and about 300 in Bagram. When the *Boumediene* ruling was handed down in 2008 there were about 270 detainees in Guantánamo and about 650 in Bagram.

3. Current non-judicial review of Bagram detentions is inadequate

Everyone has the right to liberty and security of person.[60] A government may only arrest, detain or imprison a person strictly in accordance with the law.[61] Arbitrary detention, the antithesis of this legal obligation, is absolutely prohibited under international human rights law, which applies at all times. The notion of arbitrariness of detention under human rights law, in accordance with the UN Human Rights Committee's "constant jurisprudence", is "not to be equated with 'against the law', but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law".[62] Detainee access to a court to challenge the lawfulness of detention is a basic requirement of international human rights law. No-one may be denied effective remedy for conditions of detention or treatment that violate their rights, such as the right to be free from torture or other ill-treatment.[63] Among the Bagram detainees whose habeas corpus petitions are currently before Judge Bates in the US District Court are individuals who were allegedly subjected to enforced disappearance prior to being taken to Bagram. Enforced disappearance, like torture, is a crime under international law. Remedy and accountability remain absent in such cases.

Even where it does apply, international humanitarian law (the law of war) does not displace international human rights law. Rather, the two bodies of law complement each other. The International Court of Justice (ICJ) has stated that: "The protection of the International Covenant on Civil and Political Rights [ICCPR] does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency." More recently, the ICJ has reiterated that: "More generally, the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation…" The USA has made no such derogation, and even if it had, a number of fundamental human rights provisions are non-derogable, as is the right to access to a court to the extent necessary to protect other rights which are expressly non-derogable (see further below).

[59] *Rasul v Bush*, Brief for the respondents in opposition, US Supreme Court, October 2003.
[60] E.g., Article 3, Universal Declaration of Human Rights; Article 9, International Covenant on Civil and Political Rights (ICCPR).
[61] Article 9, ICCPR. Principle 2, United Nations Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.
[62] Communication No 1128/2002: Angola. UN Doc: CCPR/C/83/D/1128/2002.
[63] E.g. Article 2, ICCPR

The UN Human Rights Committee has stated: "The [ICCPR] applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive." In July 2006, the Committee called upon the USA to "review its approach and interpret the ICCPR in good faith" and in particular to: "acknowledge the applicability of the Covenant in respect of individuals under its jurisdiction and outside its territory, as well as in times of war".

In relation to specific international armed conflicts, international humanitarian law (IHL) provides legal grounds for detention of individuals who are recognised and treated under the Third Geneva Convention as prisoners of war, captured in a specific international armed conflict and detained only until the end of that particular conflict. The rights of such detainees in international armed conflicts to court review of the lawfulness of their detention may be restricted by IHL. However, in no other situation – whether situations of relative peace or of non-international armed conflict, does IHL provide independent grounds for detention of individuals; for detentions to be non-arbitrary in all such situations, there must be an express legal basis in applicable national laws, and access to a court to challenge the lawfulness of the detention against the asserted grounds.

The US-led intervention in Afghanistan in October 2001 constituted an international armed conflict until after mid-June 2002 when it became a non-international armed conflict.[64] (Today, the US government is operating in Afghanistan with the consent of that country's government.[65]) This means that each detainee in Afghanistan has the right to access to a court to challenge the lawfulness of his or her detention, and is entitled to be released unless after a fair hearing the court finds that the individual's detention is authorized by some specific law (usually criminal law) that is itself consistent with international human rights and humanitarian law. The obligation to ensure that the rights of those held by the USA in Bagram are respected falls jointly upon both governments and each government must ensure adherence to international law and standards in the treatment of the detainees. As described below, however, it is undisputed that the Bagram detainees are entirely under the control of the US authorities.

[64] The US military has described the intervention in Afghanistan from 7 October 2001 until early 2005 thus: "Broadly speaking, the campaign can be broken into three major phases: an initial phase of intense aerial bombardment lasting from October to late November 2001 in which the preponderance of US ground presence consisted of SOF [Special Operations Forces]; a build-up of US conventional forces that began in late November 2001 with the insertion of Marines into Camp Rhino, near Kandahar; and a period of ongoing low-intensity conflict and counter-insurgency operations involving a mix of conventional forces and SOF that began in May 2002…" Church report, *op. cit.* page 179.

[65] Under an agreement made in 2002, personnel attached to the US Department of Defense "may be present in Afghanistan in connection with cooperative efforts in response to terrorism, humanitarian and civic assistance, military training and exercises, and other activities". Under the agreement, the US government maintains exclusive criminal jurisdiction over US personnel, who may not be "surrendered to, or otherwise transferred to, the custody of an international tribunal or any other entity or state without the express consent of the Government of the United States".

Under international law, anyone detained or arrested on matters of a criminal nature must be brought promptly before a judge or other officer authorized by law to exercise judicial power.[66] This is to ensure that the person has been detained according to proper process and that his or her rights have been respected. This applies as much to someone who is suspected of war crimes, crimes against humanity, or genocide as to those suspected of lesser crimes.[67] Further, anyone whose rights have been violated must be able to seek effective remedy, including through the courts.[68] In particular, the right under international law of anyone deprived of their liberty, in any manner or on any grounds, to take proceedings before a court to challenge the lawfulness of their detention[69] (habeas corpus is the procedure in the USA reflecting this principle) is a right that not only safeguards the right to liberty; it also provides protection against a variety of human rights violations, including the right not to be subjected to enforced disappearance, secret detention, arbitrary detention, unlawful transfer, torture and other cruel, inhuman or degrading treatment, and the right to a fair trial by an independent and impartial tribunal established by law and to seek remedy for violations.

No exceptional circumstances whatsoever, including war or threat of war, or any public emergency, may be invoked as justification for torture or other cruel, inhuman or degrading treatment, or enforced disappearance. Moreover, even in an emergency which threatens the life of the nation, "in order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished".[70] Neither the national emergency proclaimed by President Bush on 14 September 2001, nor the Authorization for Use of Military Force (AUMF) passed by Congress on the same day, both of which were cited in the Military Order on the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism signed by President Bush on 13 November 2001, justified the denial of judicial review to those entitled to it or other human rights violations committed by the USA since then.[71] The previous US administration cited both the AUMF and the 2001 Military Order in justifying the Bagram detentions. Amnesty International has called for both the AUMF and the Military Order to be revoked.

As at Guantánamo, the detainees in Bagram are held by the US military as "enemy combatants", although the authorities have recently taken to also labelling the Bagram detainees as "unlawful enemy combatants". This change has occurred during litigation since

[66] See the International Covenant on Civil and Political Rights (ICCPR), article 9(3); Declaration on the Protection of all Persons from Enforced Disappearance, General Assembly resolution 47/133 of 18 December 1992, article 10. See also Principle 4 of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment ("Any form of detention or imprisonment and all measures affecting the human rights of a person under any form of detention or imprisonment shall be ordered by, or be subject to the effective control of, a judicial or other authority").
[67] See Article 59.2 of the Rome Statute of the International Criminal Court
[68] See Article 2 of the International Covenant on Civil and Political Rights.
[69] See ICCPR, article 9(4).
[70] UN Human Rights Committee, General Comment 29, para. 16.
[71] The AUMF was a resolution passed by US Congress in the immediate aftermath of the attacks of 11 September 2001 authorizing the President to "use all necessary and appropriate force" against anyone involved in the attacks "in order to prevent any future acts of international terrorism against the United States". The AUMF, in Amnesty International's view, was hastily passed, is open to dangerously expansive interpretation, and was exploited by the previous administration which did not consider it needed congressional approval for its actions anyway.

2007 on Bagram cases, without explanation and without clarification of what definition of "unlawful enemy combatant" the military was applying.[72] As at Guantánamo, the USA applies the notion of a global armed conflict to the Bagram detention regime, as well as pointing out the ongoing armed conflict in Afghanistan when justifying indefinite detention (see further below).

A Pentagon directive issued in September 2006 included the instruction that any detainee in US military custody not granted prisoner of war status "shall have the basis for their detention reviewed periodically by a competent authority". [73] The Bagram authorities have recently (on an unknown date since 2007) established the Unlawful Enemy Combatant Review Board (UECRB) which – like the Combatant Status Review Tribunal and the annual Administrative Review Board operated only at Guantánamo – consists of panels of three military officers who assess the detainee's status, including through the use of secret information from those involved in the capture and interrogation of the detainee.[74] The UECRB operates by majority vote. The "implementing guidance" for the UECRBs is classified, but given that the CSRTs used at Guantánamo can rely on information obtained under torture or other cruel, inhuman or degrading treatment, there is no reason to believe that the UECRBs cannot. [75] The documentation prepared for the UECRB evaluations of detainees is classified. The detainee has no access to legal counsel for this review scheme (or at any other time, including during interrogation).

Reviews of "enemy combatant" status are "usually" conducted "within 75 days of a detainee being in-processed into the BTIF". [76] According to the US authorities, after this initial assessment the UECRBs provide a six-monthly review of each detainee's case with a view to recommending to the Commanding General of the Combined/Joint Task Force-101 whether the detainee should be released or remain in detention. Since April 2008, detainees have been allowed to appear before the panel for their initial review, and can submit written submissions in subsequent reviews. Bagram detainees deemed to be "enemy combatants" may still be

[72] The MCA defines an "unlawful enemy combatant" as "a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is a part of the Taliban, al Qaeda, or associated forces"). A 2006 Pentagon directive defines it as "persons not entitled to combatant immunity, who engage in acts against the United States or its coalition partners in violation of the laws and customs of war during an armed conflict. For purposes of the war on terrorism, the term Unlawful Enemy Combatant is defined to include, but is not limited to, an individual who is or was part of or supporting Taliban or al Qaeda forces or associated forces that are engaged in hostilities against the United States or its coalition partners". Department of Defense Directive 2310.01E, The Department of Defense Detainee Program. 5 September 2006.

[73] Department of Defense Directive 2310.01E, *op. cit.*

[74] In line with the recent additional labelling of the Bagram detainees as "unlawful enemy combatants" as well as "enemy combatants", the UECRB was previously known as the Enemy Combatant Review Board (ECRB). ECRB panels were made up of five military officers.

[75] President Obama's executive orders on 22 January 2009 on detentions and interrogations were silent on the question of the question of admissibility of coerced information in administrative review of criminal proceedings. See: USA: The promise of real change, *op. cit.*, n.3.

[76] Declaration of Colonel Charles A. Tennison, Commander of Bagram detentions (filed in District Court litigation), 15 September 2008.

transferred to their home countries, including Afghanistan, under criteria and procedures that remain classified.[77]

The ICRC has emphasised that the development of this review system "does not mitigate the need for more robust procedural safeguards at Bagram BTIF".[78] In *Boumediene*, the US Supreme Court found that the narrow judicial review of CSRT decisions provided under the DTA to Guantánamo detainees was an inadequate substitute for habeas corpus.[79] As no international armed conflict exists in Afghanistan today, all detainees there have the right to effective access to a fair hearing before an impartial court for the determination of the lawfulness of their detention. Administrative review by the UECRB – an executive body at least as flawed as the CSRT and the decisions of which are not even subject to narrow judicial oversight – is an even less adequate substitute for habeas corpus.

In any event, as in the case of Guantánamo, the detention regime at Bagram has been conducted under a unilateral US interpretation of international humanitarian law (law of war)[80], and fails to comply with international human rights law, which applies at all times but which the USA has refused to apply to the detentions of anyone it labels as an "enemy combatant". Under human rights law, detainees in both Guantánamo and Bagram have the right to challenge the lawfulness of their detention in an independent and impartial court, and to release if the detention is found to be unlawful.

As a practical matter, no effective judicial review of the lawfulness of Bagram detentions is currently available in Afghanistan. The US military's complete control over the Bagram detainees and legal agreements between the two governments effectively keeps them out of the control of the Afghan government. Furthermore, Afghanistan's judicial system continues to fall far short of international standards.[81] This practical reality in no way exempts the USA from ensuring the rights of the detainees to judicial review is fully realized – indeed, it accentuates the USA's obligation. In the absence of alternatives, if access to judicial review in the US courts is the only route by which the USA can ensure compliance with its obligations under international law, it must ensure that such review in the US courts is granted. While it is generally preferable that the court conducting judicial review be located close to the place of

[77] Declaration of Colonel Charles A. Tennison, *op. cit*.
[78] US detention related to the events of 11 September 2001 and its aftermath – the role of the ICRC. ICRC operational update, 30 July 2008.
[79] USA: No substitute for habeas corpus: six years without judicial review in Guantánamo, November 2007 http://www.amnesty.org/en/report/info/AMR51/163/2007.
[80] The Department of Defense defines the "law of war" as "that part of international law that regulates the conduct of armed hostilities and occupation" and asserts that it "encompasses all international law applicable to the conduct of hostilities that is binding on the United States or its individual citizens, including treaties and international agreements to which the United States is a party (e.g., the Geneva Conventions of 1949), and applicable customary international law." *Ibid*. The issue thus centres on which parts of international law the USA considers are binding on it. As has been seen during the "war on terror", the USA like most states seeks to minimize its international obligations.
[81] The Afghan judiciary suffers from systemic corruption and a lack of qualified judicial personnel across the country and remains susceptible to pressure by public office holders and armed groups affiliated with the government. Trials are marked by procedures that fail to meet international standards of fairness, including violations of the right to call and examine witnesses and the denial of defendants' rights to legal defence and access to information.

detention, as physical access of the court to the detainee is an important element in such review, as with the Guantánamo detention facility, the preference for physical proximity cannot be used as a basis for depriving any detainee of effective judicial review altogether.

The denial of judicial review for detainees designated by the USA as "enemy combatants" in the so-called "war on terror" has been an integral part of an unlawful US detention regime operated over the past seven years. Treating detainees as perceived security threats and "intelligence assets" from whom information could be coerced rather than as human beings to whom legal process was due led not only to arbitrary detention, but also to detention conditions and interrogation techniques that violated international law, including the prohibition on torture or other cruel, inhuman or degrading treatment, secret detention and enforced disappearance, as well as the formulation of administrative review and trial procedures geared to admit information obtained under torture or other ill-treatment.

Effective judicial review of executive detentions, coupled with fundamental reform of the legislative and policy framework under which such detentions have operated, would offer protection against such human rights violations, and a route to remedy for detainees, and should be fully guaranteed by the new administration and Congress as part of bringing the USA's policies and practices into line with international law and standards.

The history of detentions at Bagram – as well as the history of US detentions in Guantánamo and elsewhere in what the Bush administration called the "war on terror" – serves to highlight the need for full and effective judicial review.

4. If Guantánamo detainees have the right to habeas corpus, why not those at Bagram?

Given that the detainees at Bagram have for a variety of reasons been deprived of any other opportunity for effective court review of the lawfulness of their detention by US forces, if the US courts were now to rule that the detainees held at Bagram do not have the right to habeas corpus, unlike those in Guantánamo, this would be to draw an arbitrary distinction between the two sets of detainees, as well as ignoring the international obligations of the USA. This distinction would in effect turn on the non-transparent executive decisions taken during the Bush administration's term in office that resulted in some detainees being transferred to Guantánamo and held there as "enemy combatants" while others were held under the same status in Bagram.

In a memorandum written to the White House and Pentagon around the time that the Guantánamo detentions began, Justice Department officials noted the administration's plans "regarding the treatment of members of al Qaeda and the Taliban militia detained during the Afghanistan conflict". The memorandum noted that the Pentagon was "intending to make available a facility at the US Navy base at Guantánamo Bay, Cuba (GTMO), for the long-term detention of these individuals, who have come under our control either through capture by our military or transfer from our allies in Afghanistan. At the present moment, [the Pentagon] has confined these individuals in temporary facilities, pending the construction of a more

permanent camp at GTMO."[82] The 2005 Church report noted that the increasing number of detainees being detained in Afghanistan by the Spring of 2002 had "threatened to overcrowd the limited facilities available there", but that Guantánamo had been identified as "a suitable location for a long-term detention and strategic interrogation facility".[83]

The 2004 Jacoby review of military detentions in Afghanistan noted that "the term 'enemy combatant' is broad enough to encompass all individuals who are of custodial interest to the United States but who may not ultimately meet the SECDEF [Secretary of Defense] guidance for transfer to GTMO". This guidance was contained in various secret documents, which as far as Amnesty International is aware have not been declassified.[84] In a media interview in 2002, Secretary Rumsfeld referred to a less than scientific screening process based on the perceived intelligence value of individual detainees.[85] The ICRC has pointed out that the US authorities have said that detainees at both Guantánamo and Bagram are "of important intelligence value", so there would appear to be no categorical distinction on this basis.[86]

Aside from the fact that they were all non-US nationals, there was no distinction based on nationality – Afghan nationals and non-Afghan nationals alike were held at both bases, with more than 100 Afghan nationals eventually transferred to Guantánamo. Neither was there distinction based on location of capture – those taken into custody inside and outside Afghanistan were held in both bases.

In previous legal opinions and litigation the US government has not categorically distinguished between detainees in Bagram and Guantánamo. A Justice Department memorandum dated March 2003, for example, concerned the military interrogation of any "alien unlawful combatant" held outside the USA with no distinction drawn between those who remained in Afghanistan and those transferred to the base in Cuba. The only distinction it made was

[82] Application of treaties and laws to al Qaeda and Taliban detainees. Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel of the Department of Defense, 22 January 2002, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, US Department of Justice.

[83] Church report, *op. cit.*, page 182-3.

[84] For example, Implementing Guidance on Detainee Screening and Processing for Transfers to Guantanamo Bay Naval Base (GTMO), January 2002; Modification 1 to SECDEF Implementing Guidance on Detainee Screening and Processing for Transfers of Detainees in Afghanistan, to Guantanamo Bay Naval Base (GTMO), January 2003, and clarification messaged to this, February 2003. All these documents were classified Secret.

[85] During a visit to Guantánamo in January 2002, Secretary Rumsfeld described the process for transfers: "[W]hat they've done at Bagram and Kandahar is to sort through these people, do a quick sort, and make judgments as to who they believe to be ones that might prove to be particularly useful from an information standpoint and sent a group of them here. I'm sure in some cases we'll find that that first sort wasn't perfect. But it's that kind of a process." (Secretary Rumsfeld Media Availability after Visiting Camp X-Ray, Department of Defense transcript, 27 January 2002). The only distinction made by an April 2004 Pentagon Working Group on interrogations was the recommendation that "exceptional techniques" (such as isolation, stripping, sleep deprivation, and prolonged standing) be authorized for use against "unlawful combatants" held in strategic interrogation facilities, of which Guantánamo was one. In the event, such techniques were used in both Bagram and Guantánamo.

[86] US detention-related to the events of 11 September 2001 and its aftermath - the role of the ICRC, May 2004, http://www.icrc.org/Web/eng/siteeng0.nsf/iwpList454/73596F146DAB1A08C1256E9400469F48.

between US and non-US bases, in relation to the criminalization of torture by US agents.[87] Neither did the government's October 2003 brief to the US Supreme Court in the *Rasul* case distinguish between the two sets of detainees:

> "The President dispatched the armed forces of the United States to Afghanistan to seek out and subdue the al Qaeda network and the Taliban regime. In the course of that campaign – which remains ongoing – the United States and its allies have captured or taken control of thousands of individuals... [T]he military has determined that many of those captured in connection with the hostilities in Afghanistan should be detained during the ongoing conflict as enemy combatants... The United States military has transferred some of these combatants from Afghanistan to the United States Naval Base at Guantánamo Bay, Cuba".[88]

Nor did the US government materially distinguish between the legal status of the detainees in Bagram on the one hand and in Guantánamo on the other when it reported to two treaty monitoring bodies in 2006. The administration told the UN Committee Against Torture and the UN Human Rights Committee that the detainees in US custody in both Afghanistan and Guantánamo were held pursuant to the Military Order signed by President Bush on 13 November 2001.[89]

The US government also told the UN committees that for both sets of detainees "the classification of their legal status" and "the basis for their detention" had been further described in a presidential memorandum dated 7 February 2002. Among other things this memorandum described the "war against terrorism" as being a conflict of "global reach" which had ushered in a "new paradigm" requiring "new thinking in the law of war". It stated that the USA would treat the conflict with the Taleban and *al-Qa'ida* as two separate conflicts, the conflict with *al-Qa'ida* being global in nature. None of the provisions of the Geneva Conventions would apply to "our conflict with al Qaeda in Afghanistan or elsewhere throughout the world", but would apply to the conflict with the Taleban. The President determined, however, that article 3 common to the four Geneva Conventions would apply to neither *al-Qa'ida* nor Taleban detainees (overturned in June 2006 by the Supreme Court in *Hamdan v. Rumsfeld*), and that no detainee from either category would qualify as a prisoner of war.[90] The memorandum indicated that humane treatment was to be a matter of policy rather than law.[91] Amnesty International has called for revocation of this Order.

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[87] Military interrogation of alien unlawful combatants held outside the United States,14 March 2003, *op. cit*. The memorandum asserted that interrogations at Guantánamo would not be covered by the prohibition of torture under the US anti-torture statute, whereas interrogations conducted at "a non-US base in Afghanistan would be".

[88] *Rasul v Bush*, Brief for the respondents in opposition, US Supreme Court, October 2003.

[89] Prior to this it had denied that any detainee was held under the Military Order, and asserted instead that detainees were held more generally under the President's Commander-in-Chief powers.

[90] President Bush reconfirmed this in an executive order issued on 20 July 2007 re-authorizing the secret detention program to continue in the wake of the US Supreme Court's *Hamdan v. Rumsfeld* ruling. President Obama revoked the 20 July 2007 order on 22 January 2009, see USA: The promise of real change, *op. cit*. n.3.

[91] Humane treatment of al Qaeda and Taliban detainees. President George W. Bush, 7 February 2002.

In its brief to the Supreme Court in the *Boumediene* case in October 2007, the Bush administration noted that "although our troops have removed the Taliban from power, armed combat with al Qaeda and the Taliban remains ongoing. In connection with those conflicts, the United States has seized many hostile persons and detained a small fraction of them as enemy combatants." [92] Of those transferred to Guantánamo (the subject of the petition), it emphasised that "each of them was captured abroad and is a foreign national". This was and remains the crucial line, as far as the government's position that the constitution did not reach the detainees was concerned. That the government was applying its global armed conflict framework was clear from the fact that the petitioners included six men seized in Bosnia and Herzegovina and transferred to Guantánamo. According to the US government's recent litigation in District Court opposing judicial review for Bagram detainees, whether or not the detainee held in Bagram was taken into custody while engaged in armed conflict in Afghanistan was "immaterial" to his detention. Thus, even a person detained in, for example, Thailand or United Arab Emirates in 2002, can continue to be held in indefinite detention at Bagram, according to the previous US administration (see further below). The *Boumediene* ruling, it said, has made no difference to this.

The unclear and shifting nature of the legal status of the Bagram detainees, the variety of circumstances in which they were taken into custody, and the claims to unchecked executive power made by the Bush administration, serve to illustrate the need for individualized independent judicial review of the detentions that is prepared to order the release of detainees in respect of whom the administration cannot demonstrate a clear legal authority for the detention. Vague references to international humanitarian law as 'rethought' by the USA, and improvisation of new legal grounds and definitions by the judiciary in order to legitimate detentions which otherwise have no clear legal basis, are simply incompatible with the international prohibition of arbitrary detention. The USA's conduct in the "war on terror" can have left few in doubt about how the absence of judicial review facilitates arbitrary detention and other human rights violations.

5. Lawlessness by lease

The Bush administration's strategy for denying the detainees in Guantánamo and Bagram access to the courts for judicial review of their detentions was essentially the same for each of the facilities. Because these foreign detainees were captured outside the USA and not held on sovereign US territory, the administration maintained that under US jurisprudence they had no rights to due process under the US Constitution. At the same time, in each case the USA has relied upon bilateral agreements with the 'host' nation, coupled with military and political realities, to exclude any possibility of supervision or effective exercise of authority by the territorial state in relation to individual detainees. In effect, the USA has operated a kind of lawlessness by lease.

The USA occupies the Guantánamo base under a 1903 Lease Agreement with Cuba. Under the Agreement, "the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the [leased areas]," while "the Republic of Cuba consents that during the period of the occupation by the United States ... the United States shall exercise

[92] *Boumediene v. Bush*. Brief for the respondents in opposition, US Supreme Court, October 2007.

complete jurisdiction and control over and within said areas".[93] It goes without saying that military and political realities prevent Cuba from exercising any practical control over the base. The Bush administration chose its naval base in Cuba upon Justice Department advice in December 2001 that, under existing constitutional law, the federal courts could not "properly entertain an application for a writ of habeas corpus by an enemy alien" captured abroad and detained in the base because it was not "sovereign" US territory. It maintained this position until the *Boumediene v. Bush* ruling in June 2008 put an end to it. In *Boumediene*, the Supreme Court noted the "obvious and uncontested fact that the United States, by virtue of its complete jurisdiction and control over the [Guantánamo] base, maintains *de facto* sovereignty over this territory".

The governments of the USA (the "lessee") and Afghanistan (the "host nation") entered into an agreement in relation to Bagram air base on 28 September 2006.[94] The USA has the right under the agreement to assign the agreement to a "successor nation or organization", and the agreement lasts until the United States or its successors determine that the base is "no longer required for its use".[95] Under this "Accommodation Consignment Agreement for Lands and Facilities at Bagram Airfield", the USA is given "exclusive, peaceable, undisturbed and uninterrupted possession" of Bagram airbase. This, the Bush administration argued, makes the detentions in Bagram even less subject to judicial oversight than in the case of Guantánamo, where the USA exercises "complete jurisdiction and control" under the lease with Cuba. Clearly, however, the Bagram detainees are entirely under the control of the US military authorities, as the US government itself acknowledges.[96] Again, the reality is that the Afghanistan government does not exercise effective authority or control over detainees held at the base.[97] As things stand, the question of a Bagram detainee's release or continued detention is answered by the US authorities alone.

When the Bush administration had urged the US Supreme Court to reject arguments that the federal courts had habeas corpus jurisdiction over the Guantánamo detainees, it argued that the only "manageable and defensible basis" for limiting habeas jurisdiction was sovereignty. It asserted that "a de facto control and jurisdiction test would serve no limiting function at all, because the US military exercises control over the detainees at Bagram Air Force Base as well". Thus, the administration argued, any legal distinction between "aliens held at the Bagram Air Force Base in Afghanistan, which is controlled by the US military and located outside the sovereign territory of the United States, and aliens held at a facility, such as the Guantánamo

[93] Lease of Lands for Coaling and Naval Stations, 23 February 1903, US-Cuba, Art. III, T. S. No. 418, cited in *Rasul v. Bush*, 542 U.S. 466 (2004). In 1934, Cuba and the USA entered into a treaty providing that, unless the two parties agreed to modify or annul it, the lease would remain in effect "[s]o long as the United States of America shall not abandon the ... naval station of Guantanamo."

[94] The US government has said that the agreement "follows similar such arrangements dating back to at least 2003". *Razatullah v. Rumsfeld*, In the US District Court for the District of Columbia, Declaration of Colonel James W. Gray, dated 23 January 2006 (believed to mean 2007).

[95] Accomodation Consignment Agreement for Lands and Facilities at Bagram Airfield between the Islamic Republic of Afghanistan and the United States of America, 26 September 2006.

[96] "The detention operation [at Bagram] is under the United States' command and control". E.g., *al Bakri v. Bush*, Respondents' motion to dismiss petition for writ of habeas corpus and complaint for declaratory and injunctive relief, In the US District Court for DC, 15 September 2008.

[97] However, this does not mean that it has no responsibility for what happens there. International human rights law does not permit a state to 'contract out' of its obligations vis-à-vis its territory in such a fashion.

Naval Base in Cuba, which is controlled by the US military and located outside the sovereign territory of the United States" would be "arbitrary".[98]

However, according to the Bush administration in its 2008 litigation defending the Bagram detentions, the USA's presence at Bagram airfield "is entirely different from that in Guantánamo Bay", including because the "very mission of the US military force at Bagram is to assist in enhancing the sovereignty of Afghanistan".[99] The administration ignored, among other things, the fact that in both places the International Covenant on Civil and Political Rights (ICCPR) applies, article 9 of which prohibits arbitrary detention and guarantees the right of anyone arrested or detained to challenge the lawfulness of their detention in court in order that that court may decide without delay on the lawfulness of his or her detention and to order his or her release if the detention is not lawful. According to the previous administration in a statement at the time the USA was before the ICCPR's monitoring body, the UN Human Rights Committee: "The United States takes its obligations under the International Covenant on Civil and Political Rights very seriously… One thing that sets the ICCPR apart from other treaties is its enormous substantive scope covering virtually everything modern democratic societies think of as essential civil and political rights. In many senses a truly democratic society and government could not long exist without the vigilant protection of these rights."[100]

The notion that a government can deny rights to those in places under its jurisdiction or control that it would guarantee to those on its sovereign territory has been described by the UN Human Rights Committee as "unconscionable".[101] Such an approach strips international law of its protections and sets a destructive example for other governments to follow. Article 2.1 of the ICCPR provides that the scope of this treaty's application should extend to "all individuals within its territory and subject to its jurisdiction". The International Court of Justice has found that this provision "did not intend to allow States to escape from their obligations when they exercise jurisdiction outside their national territory."[102] The Human Rights Committee has similarly said that "a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party."[103]

At the heart of the *Boumediene* case was Section 7 of the Military Commissions Act, which reads as follows:

> (1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United

[98] *Boumediene v. Bush*. Brief for the respondents in opposition, US Supreme Court, October 2007.
[99] *Wazir v. Gates*, Respondents' motion to dismiss for lack of subject matter jurisdiction and memorandum in support, In the US District Court for DC, 3 October 2008.
[100] Matthew Waxman, Principal Deputy Director of the Policy Planning Staff at the Department of State, and head of US government delegation to the Human Rights Committee. Media roundtable, Geneva, Switzerland, 17 July 2006.
[101] "…it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory". Human Rights Committee, *López Burgos v. Uruguay*, UN Doc. A/36/40, 6 June 1979, ¶ 12.3.
[102] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. 131, ¶ 109.
[103] General Comment 31, UN Doc. CCPR/C/21/Rev. 1/Add. 13, ¶ 10 (2004).

> States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.
>
> (2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005, no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

Before the *Boumediene* ruling, the US administration argued that the MCA had stripped the courts of jurisdiction to consider habeas corpus petitions from detainees held at Bagram (as well as at Guantánamo), and that foreign nationals captured and held outside the USA were not protected by the US Constitution. In July 2007, District Court John Bates denied a government motion to dismiss the habeas corpus petition of Fadi Al Maqaleh, a Yemeni detainee held in Bagram since 2003.[104] Judge Bates noted that the US Supreme Court had three weeks earlier agreed to take the *Boumediene* case. Whatever the Supreme Court eventually ruled, Judge Bates noted, its decision would "likely directly" affect the Bagram cases.[105] The question of the impact of the June 2008 *Boumediene* ruling on the Bagram detentions is now back before the District Court.

US lawyers filed habeas corpus petitions for a number of Bagram detainees challenging the lawfulness of their detention following the *Boumediene* ruling. In January 2009, Judge Bates heard oral arguments in the case of Fadi al Maqaleh and three other men held at Bagram. According to the information presented before Judge Bates, Haji Wazir is an Afghan businessman who was taken into custody in Dubai, United Arab Emirates in 2002, before being transferred to Bagram via Qatar (see further below). Amin al Bakri is a Yemeni businessman, aged 39 or 40, who was seized in Thailand more than six years ago. According to his habeas corpus petition, he was abducted on 30 December 2002 as he was on the way to Bangkok airport to fly home after a short business trip in Thailand. For six months, his wife and children had no idea where he was until they received a postcard from him via the ICRC saying he was in Bagram. His habeas corpus petition conjectures that prior to being taken to Bagram, he had been held in secret custody by or for the CIA. The fourth man is Redha al-Najar, a Tunisian national aged about 43 who was arrested at his home in Karachi in Pakistan in or around May 2002. According to his habeas corpus petition, he was arrested by Pakistani and French-speaking agents in front of his wife and child. He too, it is alleged, may have been

[104] At the time of writing, the circumstances of al Maqaleh's detention were in dispute. According to his habeas corpus petition, his father first learned that he was in US custody when he received a letter from his son "in or about 2003". The petition also alleges that al Maqaleh was not in Afghanistan at the time he was taken into custody". However, the Bagram authorities have asserted that he was taken into custody in Zabul in Afghanistan, without giving a date.

[105] *Al Maqaleh v. Gates*, Order. US District Court for DC, 18 July 2007.

held in secret custody by or for the CIA, and subjected to enforced disappearance for about a year and a half.[106]

Responding to the habeas corpus petitions, the Bush administration argued that the *Boumediene* ruling only invalidated MCA Section 7's provision stripping habeas corpus jurisdiction from the courts in relation to the detentions at Guantánamo. As far as Bagram was concerned, it argued, Section 7 remained intact. The *Boumediene* ruling, the administration asserted,

> "was predicated to a significant extent on the unique status of Guantánamo Bay: the United States has exercised what the Court described as complete jurisdiction and control over Guantánamo Bay for over a century. That exercise of jurisdiction and the distance of Guantánamo Bay from a zone of active hostilities, according to the Court, warranted the extraterritorial application of the [US Constitution's] Suspension Clause there. The United States enjoys no similarly unbounded and indefinite control of Bagram Airfield. The US military presence at Bagram is a transient wartime necessity subject to the host nation's sovereignty, and Bagram is, indeed, in an active war zone."[107]

In its *Boumediene* ruling, the US Supreme Court stated that "the only law we identify as unconstitutional is MCA §7". It did not expressly distinguish between the two parts of Section 7 – nor did it say whether the second paragraph of Section 7 remained intact – instead stating that, "we need not discuss the reach of the writ with respect to claims of unlawful conditions of treatment or confinement." In other words, the Court left open a door for the administration to oppose challenges to its treatment of detainees beyond the fact of their detention. The Bush administration chose to step through it, in relation to detentions at Bagram as well as at Guantánamo. The Bush administration argued that the *Boumediene* ruling is limited to the first paragraph of Section 7 of the MCA, and then only to the "core habeas function" of challenging the legality of detention, and that the second paragraph of Section 7 "remains operative". It argued that the federal courts are prevented from considering challenges, in habeas corpus petitions or any other action, "to any aspect of a detainee's detention apart from the core habeas function of inquiring into the lawfulness of that detention".[108]

Therefore, the former administration argued, the District Court should, for lack of jurisdiction, dismiss the habeas corpus petitions brought before it. Federal courts, it added, "should not thrust themselves into the extraordinary role of reviewing the military's conduct of active hostilities overseas, second-guessing the military's determination as to which captured aliens as part of such hostilities should be detained, and in practical effect, superintending the Executive's conduct in waging a war". The Bush administration had made much the same argument in the Guantánamo litigation. In its brief to the US Supreme Court in the *Rasul* case, for example, the government wrote that

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[106] In an executive order signed on 22 January 2009, President Obama took substantial steps towards removing any purported legal basis for the secret detention program. See USA: The promise of real change, *op. cit*. n. 3.

[107] *Wazir v. Gates*, Respondents' motion to dismiss for lack of subject matter jurisdiction and memorandum in support, In the US District Court for DC, 3 October 2008.

[108] In re Guantanamo Bay detainee litigation, Repondents' opposition to petitioners' motion for temporary restraining order and preliminary injunction, In the US District Court for DC, 11 July 2008.

> "the fact that petitioners in this case are being held while active fighting is still ongoing in Afghanistan and elsewhere... only demonstrates that this litigation implicates political questions that the Constitution leaves to the President as Commander in Chief. Particularly where hostilities remain ongoing, the courts have no jurisdiction, and no judicially-manageable standards, to evaluate or second-guess the conduct of the President and the military. These questions are constitutionally committed to the Executive Branch."

Such arguments were effectively rejected by the US Supreme Court in the case of the Guantánamo detentions. They should be rejected by the federal courts in the case of Bagram also.

While the Bush administration pointed to the ongoing conflict in Afghanistan as a reason to justify the detentions at Bagram, at the same time it applied the notion of a *global* armed conflict in defending the detentions. Thus, according to the Bush administration, whether the individual in question was taken into custody inside or outside Afghanistan, or whether he or she was engaged in actual armed conflict, it was ultimately for the unrestricted discretion of the US authorities whether to attach the label of "enemy combatant" to that person and to detain them indefinitely without charge or trial, judicial supervision or review. In seeking dismissal of the Bagram habeas corpus petitions by the District Court, the government asserted that the question of the circumstances and location of capture were "immaterial" in the Bagram cases. If the individual was a non-US national captured and held outside sovereign US territory, he or she was not protected by the US Constitution. As when it made the same argument in relation to the Guantánamo detentions, this position entirely ignored the USA's obligations under international law.

"Given the nature of the war on terrorism", the Bush administration added, "it would be a significant intrusion into the Executive's ability to wage war if the military were limited to detaining only those enemies who were captured on a traditional battlefield engaging in active combat". This limitation, it said, would be inconsistent with the AUMF "which does not have a geographic limit".[109] In other words, the US military should be permitted to detain anyone anywhere and hold him or her indefinitely as an "enemy combatant" in Bagram or other overseas facilities (except now Guantánamo) without judicial review.

Jawed Ahmad (see above) said that during his time in Bagram in 2007 and 2008, he had shared a cell for five months with Haji Wazir. Haji Wazir's case is now one of those before Judge Bates arguing that the *Boumediene* ruling extends to those held as "enemy combatants" in Bagram as well as in Guantánamo. Jawed Ahmed said that Haji Wazir "told me he suffered a lot and was brutally tortured during those first six months".

According to Jawed Ahmad, Haji Wazir, a 50-year-old Afghan man with seven children who ran a foreign exchange currency business with offices in Afghanistan and Dubai, United Arab Emirates, was arrested in Dubai in 2002. From Dubai he was allegedly transferred to Qatar and then to the Panjshir valley in Afghanistan.[110] He was then transferred to Bagram detention

[109] *Al Maqaleh v. Gates*. Respondents' motion to dismiss first amended petition for writ of habeas corpus, In the US District Court for DC, 15 September 2008.

[110] In 2008 at Guantánamo, a military judge prohibited the government from admitting into evidence statements made by Salim Hamdan in US custody in late 2001 in Panjshir and Bagram. The judge noted

facility where he remained in February 2009. His son has said that he "learned informally that my father had been seized and was being held in Bagram in 2002. We received the family's first letter from him through the International Committee of the Red Cross in 2004." In 2008, he spoke to his father via the video-telephone program established by the ICRC and the prison authorities earlier in the year. According to his son, Haji Wazir "appeared to be physically weak, and said that he is extremely sad and upset about what has happened to his life".[111]

In its motion to have Haji Wazir's habeas corpus petition dismissed by Judge Bates for lack of jurisdiction, the US government alleged that Wazir was taken into custody in Karachi in Pakistan. In its 16 January 2009 response to Judge Bates' order for information on the number of detainees in Bagram, the administration admitted that this was wrong, except that the government had "correctly represented that Mr Wazir was not captured in the United States". As far as can be gleaned from the unclassified version of the government's response, the information as to where Haji Wazir was taken into custody has been redacted. It was not immediately apparent why the government had previously been willing to assert on the public record that he had been detained in Karachi, but was not willing to confirm or deny publicly that he had been detained in Dubai, as alleged. Nevertheless, in the earlier brief, the government had stated that even if Wazir was taken into custody in Dubai, it would make no difference to his status or his lack of entitlement to habeas corpus review in the US courts. The Bush administration asserted:

> "The United States is prosecuting a war against an unconventional non-state enemy whose worldwide network of combatants wear no uniforms and carry no identity cards. They are connected by a complex and ever-evolving web of interlinked terrorist organizations and cells that operate with great autonomy but take direction from al-Qaida leadership. They also reject all laws of warfare. There is no geographic limit as to where the enemy may be hiding or found. Nor does Congress' Authorization for Use of Military Force (AUMF) impose any geographic limit".

The government maintains that the fact Haji Wazir "is a non-US citizen who was captured abroad and, at all relevant times, detained abroad" leaves him without habeas corpus rights under the US constitution. According to the government neither "the lack of proximity between the alleged site of his capture and the place of his detention", nor "the character of the location" where he was captured alters this.[112] The new US administration must reject such arguments. The US lawyers representing Haji Wazir argue that

> "whatever investigation led to his abduction in Dubai obviously did not take place in a 'theater of war' any more than Mr Wazir's arrest took place amidst enemy gunfire. His

"the highly coercive environments and conditions under which they were made". In Panjshir, for example, Hamdan had been interrogated, in his words, "in the manner of torturing". His feet and hands were tied, he had a bag put over his head, he was repeatedly knocked down by his interrogators, and was "duck walked" to and fro. In Bagram, he was held in isolation in harsh and cold conditions. His hands and feet were tied 24 hours a day. During interrogations, he was surrounded by armed soldiers. *USA v. Hamdan*, D-029 Ruling on motion to suppress statements based on coercive interrogation practices and D-044 motion to suppress statements based on Fifth Amendment, 20 July 2008.

[111] *Wazir v. Gates*, Declaration of Zaheerrullah, 3 November 2008, In US District Court for DC.

[112] *Wazir v. Gates*, Respondents' motion to dismiss for lack of subject matter jurisdiction and memorandum in support. In the US District Court for DC, 3 October 2008.

> captors neither stormed nor held any combatant position and he neither took up arms nor resisted his arrest. Acting on information whose veracity has yet to be tested or even openly alleged, US Government officers snatched him from his business in Dubai, a peaceable US ally, and then rendered him, via undisclosed locations, to Bagram. Withholding all due process protections from Mr Wazir is an exercise in arbitrary discretion, and his torture, interrogation, and seemingly unending detention a violation of his fundamental human rights to personal freedom and human dignity. To permit his continued detention without review would mean that the United States could pick up anyone, from any country around the world and escape scrutiny merely by sequestering that person in a foreign military base".[113]

In October 2008, the US administration argued that the Bagram detainees have no rights under international treaty or customary law that can be judicially enforced. For example, citing US legal precedent, it argued that unless a treaty is "self-executing", that is, requires no implementing legislation to make its provisions judicially enforceable, US law was "settled that a treaty is primarily a compact between independent nations", and that violations of the treaty become a matter for international negotiation in which the courts have no role. The ICCPR, the administration argued, was not self-executing. Moreover, it argued that under the MCA, "no person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or civil action or proceeding to which the United States… is a party as a source of rights in any court of the United States." [114]

The Bush administration was thus making a last-ditch attempt to achieve in the case of the Bagram detentions what it failed to achieve in the case of its Guantánamo detention regime – a legal black hole of unchecked executive control over detainees.

6. Transfers of detainees from Bagram

This report focuses on the question of judicial review of Bagram detentions, the question that is currently before the US District Court. Amnesty International considers that all those held by the USA in Bagram, whatever their nationality and in whatever circumstances they were first taken into custody, are entitled to challenge the lawfulness of their detention in an independent and impartial court and to have the assistance of independent legal counsel. At the same time, detainees must be able to seek judicial remedy for any unlawful treatment to which they have been subjected, or which they are facing. This includes the need for judicial oversight in relation to potential detainee transfers out of Bagram to the custody of other governments.

Under the administrative review scheme in Bagram, once it is determined that a detainee "no longer meets the definition of an enemy combatant, the detainee is released". [115] While the US authorities have been saying in litigation since 2006 that they expect "some Afghan detainees and detainees who are nationals of third countries" to remain in US custody in Bagram, it has

[113] *Wazir v. Gates*, Petitioners' opposition to respondents' motion to dismiss for lack of jurisdiction, In the US District Court for DC, 3 November 2008.
[114] *Wazir v. Gates*, Respondents' motion to dismiss for lack of subject matter jurisdiction and memorandum in support. In the US District Court for DC, 3 October 2008.
[115] Declaration of US Army Colonel Joe Etheridge, Commander, Task Force Guardian, Commander of Detention Operations, Combined/Joint Task Force-101, 17 December 2008.

also said that even detainees deemed to be "enemy combatants" by this administrative review process may still be transferred to their home countries, including to Afghan custody, under criteria and procedures that remain classified.[116] An unknown number of detainees have been transferred out of Bagram to the custody of other governments, apparently without judicial supervision or any other fair procedure.

As part of its efforts to preserve exclusively executive control over the Bagram detentions, the Bush administration opposed any judicial review of the question of transfers of detainees to other governments.

US lawyers for Redha al-Najar, for example, sought a judicial order preventing his forcible return to Tunisia or, at least, for the US District Court and legal counsel to be given 30-day advance notice of any such transfer. The motion asserted that he would be at risk of torture and other persecution in Tunisia. Consistent with its approach on the habeas corpus issue, the Bush administration responded that the District Court had no jurisdiction to consider such a motion. It reiterated that Section 7 of the Military Commissions Act states,

> "no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to *any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien* who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant" (emphasis added).

The Bush administration also argued that for the US District Court to grant Redha al-Najar's requested relief would be to "second-guess the Executive Branch's consideration of sensitive foreign policy issues"; would be to "hamper the Executive in timely execution of the foreign policy decision to make a transfer, if any, by conditioning implementation of the decision upon judicial acquiescence or approval"; and would be to "undermine the President's constitutional authority as Commander-in-Chief to capture individuals in armed conflict, to detain them as enemy combatants, and, upon determining that they are no longer enemy combatants or that it is otherwise appropriate, to release them to their home country".[117]

The Bush administration pointed to the stated policy of the USA "not to repatriate or transfer a detainee to a country when the United States believes that it is more likely than not that the individual will be tortured". As Amnesty International has pointed out previously, this policy – linked to the USA's limiting conditions attached to its ratification of the UN Convention against Torture – falls short of the international legal standard under Article 3 of this treaty which prohibits the transfer of a person to another state where there are "substantial grounds for believing that he would be in danger of being subjected to torture" as well as similar obligations regarding risk of torture or other ill-treatment under the International Covenant on Civil and Political Rights, and more generally under customary international law. The Bush administration maintained that, in any event, the District Court had no jurisdiction to consider a claim under the Convention Against Torture, arguing that "not only does Article 3 of the CAT

[116] *Ibid*.

[117] *Al-Najar v. Gates*, Respondents' opposition to petitioner's motion for a preliminary injunction barring respondents from transferring petitioner to Tunisia. In the US District Court for DC, 19 December 2008.

not apply extraterritorially, but it does not create judicially enforceable rights in US domestic courts".[118]

One of President Obama's executive orders signed on 22 January 2009 requires the establishment of a Special Interagency Task Force, whose remit will include the study and evaluation of the

> "practices of transferring individuals to other nations in order to ensure that such practices comply with domestic laws, international obligations, and policies of the United States and do not result in the transfer of individuals to other nations to face torture or otherwise for the purpose, or with the effect, of undermining or circumventing the commitments or obligations of the United States to ensure the humane treatment of individuals in its custody or control".

Amnesty International considers that, in addition to adopting a stance in the litigation pending in US District Court that recognizes the right of detainees to effective judicial review of their transfers from Bagram, the US authorities must adopt a transfer policy that fully complies with the USA's obligations under international law, and ensures that such obligations are judicially enforceable.

The plight of Afghan nationals held in Bagram highlights particular concerns in relation to their potential transfer to the custody of the Afghan authorities. The USA has since late 2006 been saying that it was expecting to transfer a "significant percentage" of the Afghan detainees in Bagram to the Government of Afghanistan", specifically to continued detention in the Afghan National Detention Facility, commonly known as "Block D", which opened in 2007 in Pul-i-Charkhi prison outside Kabul.[119] US Secretary of Defense Robert Gates told the Senate Armed Services Committee on 27 January 2009 that he was "heartened by the Afghan experience", indicating that the US authorities had "returned probably 500 prisoners overall to Afghanistan" from Guantánamo and Bagram. He said that "the Afghans have put, I think, 200 of those on trial and have a conviction rate of about 80 percent." There are serious concerns about the fairness of these trials, however.[120] As noted above, the Afghan judiciary suffers from systemic corruption and a lack of qualified judicial personnel across the country and remains susceptible to pressure by public office holders and armed groups affiliated with the government. Trials are marked by procedures that fail to meet international standards of fairness, including violations of the right to call and examine witnesses and the denial of defendants' rights to legal defence and access to information. It appears that in practice a risk of judicial reliance on information obtained by torture or other coercion remains, despite international and national prohibitions.[121]

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[118] *Ibid*.
[119] Declaration of US Army Colonel Joe Etheridge, Commander, Task Force Guardian, Commander of Detention Operations, Combined/Joint Task Force-101, 17 December 2008.
[120] See: Arbitrary justice: Trials of Bagram and Guantánamo detainees in Afghanistan, Human Rights First, April 2008, available at, http://www.humanrightsfirst.info/pdf/USLS-080409-arbitrary-justice-report.pdf.
[121] Amnesty International is also concerned by the use of the death penalty in Afghanistan. See Stop move toward wide use of executions, news release, 12 November 2008 http://www.amnesty.org/en/for-media/press-releases/afghanistan-stop-move-toward-wide-use-executions-20081112.

Amnesty International will continue to monitor this situation. Meanwhile, no detainee should be transferred from Bagram (or anywhere else in US custody) to the custody of another government, including Afghanistan, where they would face a real risk of torture or other ill-treatment, unfair trials, or similar violations of their human rights. Access to effective judicial review would serve to protect the rights of detainees from transfers that violate this principle.

7. Recommendations

The USA's detention and interrogation of those the Bush administration labelled as "enemy combatants" in the "war on terror" has been an affront to the rule of law and respect for human rights. Amnesty International has welcomed the initial moves taken by President Obama to rectify this situation and continues to call for further measures in his first 100 days in office. [122]

The organization has called on the new US administration and Congress, as a part of the fundamental change now needed, to embrace international law and standards, including by embarking on a program of ratification of international treaties and protocols; withdrawal of all limiting conditions, declarations, and reservations attached to its existing ratifications of human rights treaties; compliance with recommendations of international treaty monitoring bodies; and implementation of the measures necessary to ensure that all US laws, policies and practices conform to these international instruments and are enforceable in the courts.[123]

Like the detention facility at Guantánamo, now the subject of a presidential deadline for closure, the history of detentions at the airbase in Bagram in Afghanistan is one of denial of the human rights and human dignity of those held there. In the absence of independent judicial review, detainees have been subjected to torture and other ill-treatment, arbitrary and prolonged incommunicado detention, and unlawful transfers. It took more than six years for the detainees held at Guantánamo to be recognized as having the right to habeas corpus. It is past time for the detainees in Bagram and other locations in Afghanistan to have the basic protection provided by independent judicial review.

With the new US administration committed to sending more troops to Afghanistan, it is likely that US detentions there will continue, including in Bagram, and may even rise. The new administration and Congress must ensure that all detentions the USA carries out in Afghanistan comply with international law and standards.

US detentions in Afghanistan

- The US administration should take up the invitation from Judge John Bates of the DC District Court and amend the position of the Bush administration on judicial review of Bagram detentions. The government's new position should comply fully with international law and standards and should recognize the rights of the Bagram detainees to judicial review of the lawfulness of their detention in an independent and impartial court; should not rely upon distorted interpretations of international humanitarian law (whether independently or as incorporated by the AUMF) as the

[122] See Amnesty International's checklist for President Obama's first 100 days, at http://www.amnesty.org/en/library/info/AMR51/117/2008/en.
[123] See USA: The promise of real change, *op. cit*, n.3.

basis for such detentions; must reflect the fact that US forces are participating in a *non-international* armed conflict in Afghanistan and only with the consent of its sovereign government; must recognize that its international human rights obligations apply to detentions carried out by agents of the US Government anywhere in the world; and should respect any order to release if the detention is deemed unlawful.

- The US authorities should ensure that the Bagram detainees have meaningful access to independent legal counsel.
- The US administration should make public the precise numbers of people held in Bagram air base, their nationalities, and the date, location and circumstances of their arrest.
- No more detainees should be taken to Bagram from countries outside Afghanistan.
- No detainee should be transferred from Bagram (or anywhere else in US custody) to the custody of another government, including Afghanistan, where they would face a real risk of torture or other ill-treatment, flagrantly unfair trials, or similar violations of their human rights.
- Diplomatic assurances against torture or other ill-treatment or other similar human rights violations, which are inherently neither enforceable nor reliable, should not be used to justify transfers of individuals to countries where they would face a real risk of such violations.
- The US authorities should provide access to the Special Procedures experts of the United Nations, as well as independent human rights organizations, including the Afghanistan Independent Human Rights Commission, and provide them unrestricted access to speak privately with detainees of their choosing and to inspect conditions of detention.
- The US Justice Department should adopt a litigation stance that does not oppose on jurisdictional or other procedural grounds 'conditions of detention' challenges brought by Bagram detainees in US District Court.
- The USA must ensure that all children taken into custody in the context of armed conflict or counter-terrorism operations are treated in full accordance with international law and standards, and that the best interests of the child is the primary focus of government actions in all such cases.
- Under no circumstances should information obtained through the use of torture or other cruel, inhuman or degrading treatment, enforced disappearance, or other forms of coercion, be used in any proceedings except against those allegedly responsible for such violations as evidence that the violations occurred.
- All statements made by detainees alleging or describing treatment that violates international law, including the use of enforced disappearance, secret detention, secret transfers, and torture or cruel, inhuman or degrading treatment, should be declassified.
- The question of the Bagram detentions should be put on the agenda of the Special Interagency Task Force on Detainee Disposition set up under the executive order

signed by President Obama on 22 January 2009, the mandate of which is to "conduct a comprehensive review of the lawful options available to the Federal Government with respect to the apprehension, detention, trial, transfer, release, or other disposition of individuals captured or apprehended in connection with armed conflicts and counterterrorism operations, and to identify such options as are consistent with the national security and foreign policy interests of the United States and the interests of justice". That Task Force should take full account of the USA's international human rights obligations, and its work and resulting report should be as public as possible.

Ending invocation of global war

- The theory that the USA is entitled to detain any individual anywhere in the world at anytime, and hold them in detention indefinitely, on the premise that it is involved in an all-pervasive global and perpetual armed conflict against non-state actors, is inconsistent with international human rights and humanitarian law and should be expressly disavowed and rejected by President Obama and his administration, Congress, and the courts.
- The new administration should clarify that it will not interpret the Authorization for Use of Military Force (AUMF) as representing any intent on the part of Congress to authorize violations of international human rights or humanitarian law, to extend the application of international humanitarian law as a legal basis for detentions outside of situations of international armed conflict, or as otherwise providing authority for such violations. Congress should revoke the AUMF.
- The Military Order on the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism signed by President Bush on 13 November 2001 should be revoked in its entirety.
- The concept of "enemy combatant" as grounds for detention must be reserved in its application to situations recognized by international humanitarian law as constituting international armed conflicts. In respect of non-international armed conflicts, legal grounds for detaining individuals must be clearly set out in national laws of the territory in question, laws that themselves comply with the state's international human rights obligations, and those laws must be the basis for review of the lawfulness of such detentions

Applying and adhering to international human rights law

- The USA must recognize that international human rights law applies to actions by US personnel wherever they exercise effective control over an individual and territory, and that these rights continue to apply at all times, including during armed conflict, except to the extent of any express derogations which are themselves consistent with international human rights and humanitarian law. It must ensure that the treatment of detainees and disposition of their cases is fully consistent with the USA's international obligations in this regard.

Ensuring accountability and remedy

- The new administration and Congress should take the necessary measures to ensure accountability and remedy for human rights violations committed by or at the

instigation of the USA, including in Bagram and other facilities in Afghanistan. Among other things, the US authorities should:

- Set up an independent commission of inquiry into all aspects of the USA's detention and interrogation policies and practices since 11 September 2001.
- Ensure that all allegations of particular violations of individuals' rights under international human rights or humanitarian law are thoroughly and effectively investigated.
- Ensure that all those responsible for crimes under international law are brought to justice, including through criminal prosecution with sentences that take account of the grave nature of the acts concerned.

For further information, see USA: Investigation, prosecution, remedy: Accountability for human rights violations in the 'war on terror', issued in December 2008, and available at http://www.amnesty.org/en/library/info/AMR51/151/2008/en.

To the Government of Afghanistan

Amnesty International urges the Government of Afghanistan to do all in its power and influence to ensure that the treatment of all detainees, including all detainees in US custody, on Afghanistan sovereign territory complies with international law, including by urging the US authorities at a minimum to meet Amnesty International's recommendations as listed above.

As part of meeting this obligation, the Government of Afghanistan should move to:

- ensure that no part of its territory or subject to its control, including military bases whether or not leased or used by other states, is used to carry out or facilitate unlawful detentions or violate the rights of detainees;
- demand full disclosure from the US authorities about all US-controlled detentions and detention facilities in Afghanistan since 2001;
- demand from the USA that in all cases accurate information on the status and whereabouts of each individual deprived of his or her liberty on the territory of Afghanistan is promptly given to his or her relatives or other people of the detainee's confidence, his or her lawyer, and the Afghan Independent Human Rights Commission;
- ensure to the best of its ability that all detainees have access to a court to challenge the lawfulness of their detention;
- review and amend or renegotiate any agreements with the USA which could impede Afghanistan's ability to meet its international human rights obligations in practice.