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USA: Government opposes habeas corpus review for any Bagram detainees; reveals 'enhanced' administrative review procedures

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On 14 September 2009, the US government filed a legal brief in federal court in its continuing bid to prevent any detainee held in US custody at Bagram airbase in Afghanistan, wherever and under whatever circumstances he was taken into custody, from being able to challenge the lawfulness of his detention in US court.¹ According to the brief, there are currently about 600 detainees held at the base. Some have been held for years. A majority of the detainees are Afghan nationals, according to the International Committee of the Red Cross (ICRC), which has access to detainees held at the base. All of the detainees are held without access to legal counsel or to judicial review of their detention by any court. Attached to its brief, the US administration has revealed its revised administrative review procedures for detainees held in Bagram.

The USA is violating its international obligations by attempting to deny Bagram detainees any access to the courts and legal counsel, as well as through its general failure to ensure accountability for human rights violations that have been committed at the base in recent years. Amnesty International will continue to seek a change in approach. The organization urges the US government to:²

- Grant all detainees held in the US base at Bagram access to legal counsel, relatives, doctors, and to consular representatives, without delay and regularly thereafter;
- Grant all Bagram detainees access to US courts to be able to challenge the lawfulness of their detention;
- Assist the Afghan government in creating mechanisms to ensure fair trials for those in detention, including the option of mixed national/international tribunals to try those apprehended in counter-insurgency operations by Afghan as well as US and other international forces.³

THE U.S. GOVERNMENT'S POSITION

The government's brief to the Court of Appeals for the District of Columbia (DC) Circuit seeks reversal of the April 2009 ruling by DC District Court Judge John Bates that three detainees held in Bagram could challenge the lawfulness of their detention in his court. The three are Yemeni nationals Fadi al Maqaleh

¹ *Al Maqaleh, et al., v. Gates, et al.* Brief for Respondents-Appellants, In the United States Court of Appeals for the District of Columbia Circuit, 14 September 2009.

² For further recommendations previously sent to the US administration, see Amnesty International: USA: Out of sight, out of mind, out of court? The right of Bagram detainees to judicial review, 18 February 2009, AI Index: AMR 51/021/2009, <http://www.amnesty.org/en/library/info/AMR51/021/2009/en>; See also USA: Urgent need for transparency on Bagram detentions, 6 March 2009, <http://www.amnesty.org/en/library/info/AMR51/031/2009/en> USA: Administration opts for secrecy on Bagram detainee details, 12 March 2009, <http://www.amnesty.org/en/library/info/AMR51/034/2009/en>

³ 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.

and Amin al Bakri, and Redha al-Najar, a Tunisian national.⁴ Habeas corpus petitions filed on their behalf have sought to challenge their detentions in light of the US Supreme Court's June 2008 ruling in *Boumediene v. Bush* that detainees held in the US Naval Base at Guantánamo Bay in Cuba have this right.

In its *Boumediene* ruling, the Supreme Court said that "the costs of delay can no longer be borne by those who are held in custody", and that the detainees were entitled to a "prompt" habeas corpus hearing. This observation, Judge Bates, said "is equally powerful here". He suggested that the Supreme Court had clearly been at least partially motivated "by the prospect of indefinite Executive detention without judicial oversight". Applying the *Boumediene* ruling to these three Bagram detentions raised in the case before him, he concluded that "detainees who are not Afghan citizens, who were not captured in Afghanistan, and who have been held for an unreasonable amount of time – here, over six years – without adequate process may invoke... the privilege of habeas corpus". Judge Bates found that these three detainees were in that category, and he denied the government's motion to dismiss their petitions.⁵ Even this narrow ruling, which itself left Afghan nationals in US custody in Bagram without effective access to any court for the foreseeable future, went too far for the US administration and it announced its intention to appeal.

The government's appeal brief asserts its position, articulated earlier in the year in relation to the Guantánamo detentions,⁶ that its authority to subject detainees to long-term detention in Bagram resides in the Authorization for Use of Military Force (AUMF). The AUMF, passed by US Congress on 14 September 2001, authorizes the US President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons". It is a broadly worded resolution that was routinely used to seek to justify human rights violations by the Bush administration.

In his ruling in April, Judge Bates concluded that "the objective degree of control" that the USA operates over the Bagram air base is "very high" and "not appreciably different" to that operated by the USA at Guantánamo. In its 14 September brief to the Court of Appeals, the government protests that Judge Bates had given "short shrift to the disparate histories, foundations, and purposes of the two sites". "The nature of the United States presence at Bagram", the government argues, "is fundamentally different from that at Guantánamo. Guantánamo has been under the complete jurisdiction and control of the United States for more than 100 years...The United States presence at Bagram Airfield, in contrast, is less than a decade old". While "the United States has no plans to leave Guantánamo", it "intends to relinquish control of Bagram Airfield after completing its mission in Afghanistan". The brief makes no attempt to give a timeline for this mission to be accomplished or whether it would occur within the

⁴ According to their habeas corpus petitions, Amin al Bakri was seized on 30 December 2002 as he was on the way to Bangkok airport in Thailand to fly home after a short business trip. Redha al-Najar was arrested at his home in Karachi in Pakistan in or around May 2002. Fadi al Maqaleh's petition alleges that he was not in Afghanistan at the time he was taken into custody in or around 2003, but the Bagram authorities have asserted that he was detained in Afghanistan.

⁵ In the case of a fourth detainee, Afghan national Haji Wazir, who was taken into custody in Dubai, United Arab Emirates in 2002 before being transferred to Bagram via Qatar, Judge Bates sought further briefing from the parties, but eventually ruled that Haji Wazir could not pursue habeas corpus in US District Court. This decision has been appealed to the DC Circuit Court of Appeals. For further information on Judge Bates' ruling, see USA: Federal judge rules that three Bagram detainees can challenge their detention in US court, 3 April 2009, <http://www.amnesty.org/en/library/info/AMR51/048/2009/en>.

⁶ See USA: Different label, same policy? Administration drops 'enemy combatant' label in Guantánamo litigation, but retains law of war framework for detentions, 16 March 2009, <http://www.amnesty.org/en/library/info/AMR51/038/2009/en>.

lifetime of a detainee held there; to the contrary, the brief notes that the lease providing for exclusive use and possession of the premises by the USA continues indefinitely until the USA decides to terminate it.

Moreover, the brief asserts, "United States activity at Bagram Airfield, specifically including detainee affairs, is conducted with a keen eye towards its implications for the sensitive and active diplomatic dialogue between the United States and Afghanistan. Nothing remotely similar could be said about Guantánamo and United States relations with Cuba". The United States is present at Guantánamo, it continues, "without regard to the interests of the Castro regime in Cuba". In contrast, the United States is present at Bagram "in support of the interests of the Afghan government", and indeed a central purpose of US military operations in Afghanistan is "to support the sovereignty of the Afghan state".

None of this alters the central fact that the Bagram detainees are under the complete control of the USA. US authorities determine whether they are detained or released. They determine what they eat and where they sleep. They determine when and how they are interrogated.

As Amnesty International has repeatedly pointed out, the notion that a government can deny rights to those in places under its jurisdiction or effective control, without possibility of effective remedy or recourse, that it would guarantee to those on its sovereign territory, would allow a government unilaterally to strip individuals of the human rights and protections due them under international law. Article 2.1 of the International Covenant on Civil and Political Rights (ICCPR) provides that the scope of this treaty's application should extend to "all individuals within its territory and subject to its jurisdiction" and "without distinction of any kind" including on the basis of national origin. 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." The UN Human Rights Committee, overseeing implementation of the ICCPR, 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."⁷

Two of the rights recognized in the ICCPR are the right of anyone deprived of their liberty to be able to challenge the lawfulness of their detention in a court and the right to an effective remedy for violations of rights under the treaty. The UN Human Rights Committee has underlined that these two key rights are among those which cannot be diminished even in times of public emergency that threatens the life of the nation.

However, the US administration continues to argue that these detentions are an essentially executive matter. The brief asserts that "United States military operations during an active war on foreign land in conjunction with allied multi-national and host-country forces implicate a variety of sensitive foreign affairs, diplomatic, and military considerations for the Executive Branch". Moreover, extending US habeas corpus jurisdiction to the Bagram detainees "in the midst of the military build-up and combat in Afghanistan" would have "severe" practical consequences, the US government asserts, and "permitting detainees there to sue their military captors in distant United States courts would have serious adverse consequences for the military mission in Afghanistan". US judicial intervention in the cases would also likely cause friction with the Afghan authorities, the US government argues. What the brief ignores is any recognition of friction already caused by the USA's Bagram detention policy. For example, the US authorities have not allowed the Afghan Independent Human Rights Commission to interview detainees held at the base without US military monitoring, effectively blocking any independent Afghan monitoring of the conditions and treatment to which the detainees are subjected. The Afghan government has long voiced its concerns about the Bagram detentions.

It is within the power of US Congress to grant habeas corpus rights "in a war zone", the brief argues, but Congress has not done so. Indeed, "far from remaining silent", Congress "expressly barred any habeas

⁷ For references, see USA: Out of sight, out of mind, out of court? The right of Bagram detainees to judicial review, 18 February 2009, <http://www.amnesty.org/en/library/info/AMR51/021/2009/en>

rights" for such detainees when it passed the Military Commissions Act of 2006. The courts, the administration continued, "should respect that judgment" and Judge Bates' ruling that the US District Court has jurisdiction to consider the habeas corpus claims of these three detainees should be reversed.

While claiming that the USA acts "out of respect for Afghanistan's status as an independent and sovereign nation", the brief fails to address in any substantive manner the rights to which detainees in US custody in Afghanistan may be entitled under the Afghan Constitution, other Afghan laws, or the obligations owed by Afghan executive or judicial authorities to guarantee and enforce those rights for Bagram detainees. The brief thus conceals the fact that the USA denies detainees any effective access to means of asserting their rights or protections under those laws or by those institutions, and conceals any "frictions" its posture in that regard is currently causing with Afghan authorities.⁸ Nor does it address in any respect the USA's and Afghanistan's international human rights obligations to detainees.

'ENHANCED' DETAINEE REVIEW PROCESS

Attached to the government's appeal brief are the new "Detainee Review Procedures at Bagram Theater Internment Facility (BTIF), Afghanistan", approved by Deputy Secretary of Defence William Lynn on 2 July 2009 and due to go into effect this month. In *addition* to asserting a general, non-exhaustively defined authority "to detain persons temporarily, consistent with the laws and customs of war (e.g., in self-defense or for force protection)", these procedures also purport to authorize the detention and internment at Bagram of anyone who meets one of two criteria:

- Persons who planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for those attacks; or
- Persons who were part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy forces.

The government's brief asserts that these standards are "based on the AUMF", a resolution that was "not geographically limited to Afghanistan", and claims that the review processes afforded to detainees held at Bagram will be "enhanced" under the new procedures.

Under the Bush administration, the US military authorities at Bagram eventually established the Unlawful Enemy Combatant Review Board (UECRB) which – like the Combatant Status Review Tribunal and the annual Administrative Review Board operated at Guantánamo – consisted of panels of three military officers who assessed the detainee's status, including through the use of secret information from those involved in the capture and interrogation of the detainee. The UECRB operated by majority vote. The "implementing guidance" for the UECRBs is classified, but given that the CSRTs used at Guantánamo could rely on information obtained under torture or other cruel, inhuman or degrading treatment, there was no reason to believe that the UECRBs could not. The documentation prepared for the UECRB evaluations of detainees was classified. The detainee had no access to legal counsel for this review scheme (or at any other time, including during interrogation).

Reviews of "enemy combatant" status at Bagram were, it was claimed, "usually" conducted "within 75 days of a detainee being in-processed into the BTIF". After this initial assessment, the UECRBs provided a six-monthly review of each detainee's case with a view to making a recommendation as to whether the

⁸ The brief acknowledges Afghan law and judicial institutions in only the most limited terms, noting that the terms of the "Status of Forces Agreement (SOFA)" it says was entered into by Afghanistan and the USA in 2003 give the USA exclusive criminal jurisdiction over its own personnel, but mooting that "common crimes committed by Afghan citizens who access the airfield could be prosecuted by Afghanistan, not the United States", apparently conceding only to that limited extent that "Afghan law thereby also applies at Bagram".

detainee should be released or remain in detention. After April 2008, detainees were allowed to appear before the panel for their initial review, and could submit written submissions in subsequent reviews. Bagram detainees deemed to be "enemy combatants" could still be transferred to their home countries, including Afghanistan, under criteria and procedures that remained classified.

Under the new procedures, the UECRBs appear to be renamed "detainee review boards", in line with the new administration's decision to drop the use in litigation of the terms "enemy combatant" and "unlawful enemy combatant" for those held at Guantánamo, and now, it seems, at Bagram.⁹ The Boards will still be composed of three US military officers, who will decide, by majority vote, and by a "preponderance of the evidence", as to what recommendation to make on the detainees case. Their recommendations can include continued detention; transfer to Afghan authorities for criminal prosecution; transfer to Afghan authorities for participation in a reconciliation program; release without conditions; (in the case of non-Afghan nationals), transfer to a third country for criminal prosecution, participation in a reconciliation program, or release.

The procedures include the following:

- Detainees will receive "timely notice of the basis for their internment, including an unclassified summary of the specific facts that support the basis for their internment".
- Detainees will receive "a timely and adequate explanation of the detainee review procedures"
- Reviews will occur within 60 days of the detainee's transfer to Bagram and at least every six months thereafter.
- The military officers sitting on the detainee review boards, with the senior officer serving as president of the board, will have access to "all reasonably available information (including classified information) relevant to the determinations of whether the detainee meets the criteria for internment and whether the detainee's continued internment is necessary".
- Each detainee will be assigned a US military officer to assist him as a "personal representative" before the board. This representative is supposed to "act in the best interests of the detainee" and to "assist the detainee in gathering and presenting the information reasonably available in the light most favourable to the detainee". The detainee may waive the appointment of such a representative, unless he or she is under 18 years old or suffering from mental illness, or is otherwise deemed to be incapable of understanding and participating in the scheme.
- The detainee will be allowed to call witnesses "if reasonably available", and if national or operational security would not be compromised.
- The hearings, except the board's deliberations and voting, or during any "testimony or other matters that would compromise national or operational security", will be open. The detainee will be allowed to attend open sessions, will be allowed to testify, but will not be compelled to testify. The Pentagon has informed Congress that representative of the ICRC, which has access to the Bagram detainees, and "possibly non-governmental organizations", will be allowed to attend all open sessions.

The detainee review boards are close cousins of the Combatant Status Review Tribunals (CSRTs) developed by the Bush administration for use at Guantánamo two and a half years after detentions began there, and after the US Supreme Court ruled, in June 2004, that the US District Court could consider habeas corpus petitions filed on behalf of Guantánamo detainees. Over the years, the CSRTs were shown

⁹ The brief refers to the four individuals in whose names the case was originally brought simply as 'enemies'. In a letter attached to the brief, from the Office of the Under Secretary of Defense to Senator Carl Levin, detainees are referred to as "unprivileged enemy belligerents".

to be sham creations, vulnerable to political interference, and designed to delay or block independent judicial review.¹⁰

Whatever marginal 'enhancements' the new procedures purport to provide are simply dwarfed by the huge distance by which they continue to fall short of the human rights and rule-of-law obligations of the USA in relation to these detainees. 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 detainee review boards is no substitute for habeas corpus review.

In the continuing absence of the possibility in Afghanistan for detainees to challenge the lawfulness of their detention in an independent and impartial court, the USA must provide that opportunity in the US courts. All detainees must have access to legal counsel, and to be able to obtain an effective remedy for any human rights violations committed against them in detention.

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¹⁰ See: USA: No Substitute for habeas corpus: Six years without judicial review in Guantánamo, 1 November 2007, <http://www.amnesty.org/en/library/info/AMR51/163/2007/en>