



# Fixing Bagram

## Strengthening Detention Reforms to Align with U.S. Strategic Priorities

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## About Us

Human Rights First believes that building respect for human rights and the rule of law will help ensure the dignity to which every individual is entitled and will stem tyranny, extremism, intolerance, and violence.

Human Rights First protects people at risk: refugees who flee persecution, victims of crimes against humanity or other mass human rights violations, victims of discrimination, those whose rights are eroded in the name of national security, and human rights advocates who are targeted for defending the rights of others. These groups are often the first victims of societal instability and breakdown; their treatment is a harbinger of wider-scale repression. Human Rights First works to prevent violations against these groups and to seek justice and accountability for violations against them.

Human Rights First is practical and effective. We advocate for change at the highest levels of national and international policymaking. We seek justice through the courts. We raise awareness and understanding through the media. We build coalitions among those with divergent views. And we mobilize people to act.

*Human Rights First is a non-profit, nonpartisan international human rights organization based in New York and Washington D.C. To maintain our independence, we accept no government funding.*

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## OVERVIEW

Eight years after launching Operation Enduring Freedom (OEF) in Afghanistan—with a mission to kill and capture “high-value” al Qaeda and Taliban members and destroy the safe havens from which al Qaeda planned and directed the 9/11 attacks—the United States government has announced several significant detention reforms in Afghanistan. Human Rights First has closely monitored U.S. detention policies and practices since September 11, 2001. In this paper, we analyze the new detention reforms announced in September 2009 and make recommendations for further improvement in U.S. detention practices in line with U.S. policy interests and legal obligations. We base our recommendations on an analysis of the applicable humanitarian and human rights law and field visits to Afghanistan.

In September 2009, the Pentagon announced improved detainee review board (DRB) procedures for detainees being held by the U.S. military at the Bagram Theater Internment Facility (BTIF) at Bagram Air Base, Afghanistan. The Pentagon also announced reforms to both U.S. and Afghan prisons focused on rehabilitation and skills training of prisoners in order to prevent radicalization, as well as an assessment on evidentiary gaps that hinder successful and fair prosecution of suspected insurgents transferred by international military forces to Afghan courts. These reforms reflect an understanding on the part of the Obama administration that the role of detention must be carefully calibrated to provide optimal protection to U.S. troops and to the Afghan population, while at the same time, minimizing the risk of alienating the very population U.S. troops are there to protect. Time will tell whether these reforms will be implemented effectively and can resolve the underlying problems of arbitrary and indefinite detention, mistaken captures, and lack of evidence for legitimate prosecutions in Afghan courts.

General Stanley McChrystal, Commander of U.S. Forces-Afghanistan (U.S.FOR-A) and the International Security Assistance Forces (ISAF), in his August 2009 assessment on Afghanistan stated that:

Detention operations, while critical to successful counterinsurgency operations, also have the potential to become a strategic liability for the U.S. and ISAF. With the drawdown in Iraq and the closing of Guantanamo Bay, the focus on U.S. detention operations will turn to the U.S. Bagram Theater Internment Facility (BTIF). Because of the classification level of the BTIF and the lack of public transparency, the Afghan people see U.S. detention operations as secretive and lacking in due process. It is critical that we continue to develop and build capacity to empower the Afghan government to conduct all detentions operations in this country in accordance with international and national law.<sup>1</sup>

The detention reforms initiated by the Obama administration appear to fit within the “integrated civilian-military counterinsurgency strategy in Afghanistan” announced by President Obama on March 27, 2009 to “integrate population security with building effective local governance and economic development” and “establish the security needed to provide space and time for stabilization and reconstruction activities.”<sup>2</sup>

The emphasis on security for the Afghan population is essential to build and maintain support for American military presence and to marginalize support for insurgents. A 2009 ABC News poll found that only 37 percent of Afghans say they support Western forces, down from 67 percent in 2006.<sup>3</sup> The poll data is consistent with the conversations Human Rights First had with former prisoners detained by the U.S. military in Afghanistan at Bagram Air Base, Afghan civilians, and government officials. Those we interviewed, although not supportive of the Taliban or other insurgent groups, repeatedly cited as reasons for the decline in support civilian casualties, arbitrary detention and ill-treatment, intrusive house searches, the use of dogs against villagers, failure to admit and compensate for losses resulting from personal and property damage as well as from wrongful detention, and cultural insensitivities. Such conduct undermines the cooperation of civilians with the Afghan government and international troops and sends a message that foreign troops are at war with, rather than assisting, the Afghan people.

Under current ISAF counterinsurgency rules, foreign military forces, including U.S. forces that are part of the ISAF mission, must transfer detainees to Afghan custody within 96 hours. In contrast, under the OEF counterterrorism

mission detainees captured by U.S. forces are transferred to Bagram for long-term detention, subsequently released, and since 2007 are transferred to Afghan custody for criminal prosecution in the U.S.-built Afghan National Defense Facility (ANDF) in Pul-e-Charkhi prison.

There are approximately 600 individuals being held in long-term detention by the United States in the Bagram Theater Internment Facility. Most are Afghans, but a small number are non-Afghans, including some who were captured outside Afghanistan and rendered to Bagram for detention. The BTIF will be replaced with a new theater internment facility in 2009.

In April 2009, Human Rights First interviewed former prisoners held by the United States in Afghanistan who at the time of their release were found by the U.S. military not to be a threat to U.S., Afghan or Coalition forces. Some detainees we interviewed had been detained for five years, others from four months to two years. According to those we interviewed in April, prisoners held by the U.S. military in Afghanistan were not informed of the reasons for their detention or the specific allegations against them. They were not provided with any evidence that would support claims that they are members of the Taliban, al Qaeda or supporters of other insurgent groups. They did not have lawyers. Detainees were not allowed to bring village elders or witnesses to speak on their behalf or allowed to offer evidence that the allegations could be based on individual animosities or tribal rivalries. These prisoners had no meaningful way to challenge their detention. Former prisoners and Afghan government officials told Human Rights First that captures based on unreliable information have led to the wrongful detention of many individuals, which in turn creates friction between the Afghan people and the Afghan government as well as the U.S. military.

In 2008 and in our follow-up visit to Afghanistan in 2009, we found that individuals transferred from U.S. to Afghan custody for prosecution in the Afghan National Defense Facility are tried in proceedings that fail to meet Afghan and international fair trial standards. Prosecutions were based on allegations and evidence provided by the United States, supplemented by investigations conducted by the Afghan intelligence agency, the National Directorate of Security (NDS), years after the initial capture. Although lawyers defend detainees at the ANDF, during the trials there were no prosecution witnesses, no out-of-court sworn prosecution witness statements, and little or no physical evidence presented to support the charges.

Human Rights First submitted its findings and recommendations to the Pentagon's Office of Detainee Affairs, U.S. Central Command (CENTCOM), and the President's Special Task Force on Detainee Disposition, created by Executive Order on January 22, 2009, which was tasked to identify "lawful options . . . 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."<sup>4</sup> In May 2009, at the time of our submissions to the government, we were aware that the Pentagon was revising detainee review procedures in Bagram and that broader detention reforms in Afghanistan were being considered. (For a detailed examination of our findings and recommendations see Human Rights First, *Undue Process: An Examination of the Detention and Trial of Bagram Detainees in Afghanistan in April 2009* (2009)).

Under the newly announced DRB procedures, detainees will have improved notification procedures, the ability to attend the hearings, call witnesses that are "reasonably available" and question government witnesses, and have a personal representative to assist them during the proceedings. If properly implemented, these procedures will certainly be an improvement over the quality of process afforded to Bagram detainees under the previous Unlawful Enemy Combatant Review Board (UECRB) procedures. On the other hand, similarities between the DRBs and the discredited Combatant Status Review Tribunals (CSRTs) in Guantanamo are cause for concern. Specific problems with the CSRTs that may also arise in the DRBs involve enforcement of detainees' entitlement to exculpatory information and their ability to review and challenge the evidence against them and produce their own evidence, including witnesses, all in the absence of entitlement to legal representation or independent review of their detention. It thus remains to be seen whether these new procedures go far enough to protect against arbitrary detention while also creating a sound evidentiary basis for fair prosecutions.

We are mindful that the United States, along with NATO allies and the Afghan government, is engaged in armed conflict with insurgent groups in Afghanistan and that detention is an element of armed conflict. But the United States should take additional steps to ensure an end to the arbitrary detentions that have undermined its counterinsurgency goals. U.S. counterinsurgency doctrine recognizes the benefits of consent from, and the need for cooperation of, the local population. A key determinant of that consent and cooperation is the degree to which the Afghan people view detention practices as fair, humane and beneficial to their security, and as progressively achieved through their own institutions. Reforms that accomplish these goals will deprive al Qaeda and the Taliban of the propaganda and recruiting opportunities created by unjust policies and practices.

Human Rights First urges further reforms to:

- ensure that U.S. detentions are on a sound legal basis;
- reduce the risk of arbitrary detentions by providing detainees a sufficient way to challenge their detention and improving evidentiary procedures at capture;
- increase the transparency in U.S. detention operations;
- increase the capacity of the Afghan authorities to handle detentions on their own; and
- strengthen the fairness of Afghan criminal prosecutions of those captured by the United States.

Our recommendations to accomplish these reforms are outlined in detail at the end of this policy paper.

## DETENTIONS IN AFGHANISTAN

### Authority to Detain

On September 14, 2009, the Pentagon unveiled a new policy guidance with modified procedures for reviewing the status of detainees being held in Afghanistan. The modified procedures follow the definitional framework of detention authority under the 2001 Authorization for Use of Military Force (AUMF) that the Obama administration adopted for Guantanamo detainees in March 2009.<sup>5</sup> Under this framework, U.S. forces operating under OEF can detain “unlawful enemy belligerents” (and no longer unlawful enemy combatants)<sup>6</sup> who meet the following 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;

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 armed forces.<sup>7</sup>

The policy guidance further instructs that:

Internment must be linked to a determination that the person detained meets the criteria detailed above and that the internment is necessary to mitigate the threat the detainee poses, taking into account an assessment of the detainee’s potential for rehabilitation, reconciliation, and eventual reintegration into society. If, at any point during the detainee review process, a person detained by OEF forces is determined not to meet the criteria detailed above or no longer to require internment to mitigate their threat, the person shall be released from DOD custody as soon as practicable. The fact that a detainee may have intelligence value, by itself, is not a basis for internment.<sup>8</sup>

The new definition requires a demonstration of “substantial support” of Taliban or al Qaeda forces or associated forces engaged in hostilities against the United States and its coalition partners, while the previous criteria for capture and detention required only “support” of those forces. Some U.S. district courts that have evaluated this definition in Guantanamo habeas cases have rejected it as too broad.<sup>9</sup>

Passed by Congress in response to the 9/11 attacks, the AUMF authorizes the 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.”<sup>10</sup> According to the government, because “the laws of war have evolved primarily in the context of international armed conflicts,” the President has the authority to detain “those persons whose relationship to al Qaeda or the Taliban would, in appropriately analogous circumstances in a traditional armed conflict, render them detainable.”<sup>11</sup> While detention is an essential element in armed conflict, we submit that the AUMF—a **U.S. domestic law**—is an insufficient basis for detention by the United States in the **current** non-international armed conflict in Afghanistan.<sup>12</sup>

The international armed conflict between the United States and Afghanistan began on October 7, 2001, in response to the September 11 attacks, and concluded with the inauguration of Hamid Karzai on June 19, 2002, following his election by an Afghan *loya jirga*, to the presidency of the transitional administration of Afghanistan.<sup>13</sup> At this time, the hostilities involving international military forces and Afghan forces against the Taliban and al Qaeda became a non-international armed conflict (NIAC) governed by the international humanitarian law of NIAC, which is codified in Common Article 3 of the Geneva Conventions and Additional Protocol II.<sup>14</sup> The United States is no longer fighting the Afghan regime but is assisting the government in fighting insurgents in Afghanistan. The International Committee of the Red Cross (ICRC) has concluded that, since June 2002, the war in Afghanistan is a non-international armed conflict.<sup>15</sup>

The United States has consistently and publicly stated that “a central purpose of United States military operations in Afghanistan is to support the sovereignty of the Afghan state. That is true both for Operation Enduring Freedom . . . and for U.S. participation in the ISAF.”<sup>16</sup> To advance this policy objective, and in the absence of a U.N. Security Council resolution explicitly authorizing long-term detentions by coalition forces in Afghanistan, the Afghan government as the host nation should either confer detention authority upon the United States through its domestic legislation or by way of a **public** U.S.-Afghan security agreement. Either must set forth grounds and procedures for detention in accordance with international law.

Reliance upon the AUMF to detain Afghan nationals not in the United States but in Afghanistan undercuts U.S. policy objectives to encourage increased responsibility of the Afghan government for its national security affairs. A public U.S.-Afghan security agreement or Afghan legislation would bolster U.S. support for Afghan sovereignty and advance U.S. strategy to progressively devolve responsibility for detentions to the Afghan government. The implementation of such legislation or an agreement regularizing U.S. detention would also advance the credibility of U.S. military actions in the eyes of Afghans, thus supporting U.S. counterinsurgency goals in Afghanistan.

## Detainee Review Board Procedures

Detention is an essential element of armed conflict, but the grounds and procedures for detention must be consistent with international humanitarian law and the applicable standards of international human rights law. Common Article 3 and Additional Protocol II (AP II) do not provide procedural guidelines to govern reviews of detention in non-international armed conflicts. Thus it is necessary to refer to human rights law for guidance.<sup>17</sup> The ICRC has also developed a set of principles and safeguards which “reflect the official position of the ICRC” governing security detention in armed conflict and situations of violence.<sup>18</sup> The guidelines “are based on IHL, human rights treaties [such as the International Covenant of Civil and Political Rights], and human rights jurisprudence.”<sup>19</sup> According to the guidelines, detainees in non-international armed conflict must have the right: to challenge the lawfulness of their detention, have an independent and impartial body decide on continued detention or release, to notice of charges, to

a legal representative, to attend hearings, to have contact with family members, and to have access to medical care.<sup>20</sup>

Detainees held by the U.S. in Afghanistan since 2001 have had their status reviewed under various practices and procedures.<sup>21</sup> Beginning in 2007 and until September 2009, detentions in Bagram were reviewed by the Unlawful Enemy Combatant Review Board.<sup>22</sup> These procedures were an inadequate mechanism for detainees to meaningfully challenge their detention. In April 2009, Human Rights First interviewed former detainees who were released by the U.S. military after having been found to “no longer be a threat to U.S., Afghan or coalition forces.” Interviewees consistently reported that no information was given to them about the grounds for detention, they had no ability to examine any information that supported the reason for detention, were not able to bring in witnesses to rebut the military’s claims, and they had no knowledge of procedures or mechanisms to review of their detention. Detainees also complained of not having lawyers to assist them while in detention.<sup>23</sup> (See generally Human Rights First, *Undue Process: An Examination of the Detention and Trial of Bagram Detainees in Afghanistan in April 2009* (2009)).

In April 2009, a district court judge ruling on habeas petitions filed on behalf of four detainees all of whom were allegedly captured outside Afghanistan and brought to Bagram for long-term detention concluded that UECRBs were “plainly less sophisticated and more error-prone” than the flawed CSRTs in Guantanamo. Judge Bates concluded that “the UECRB process at Bagram falls well short of what the Supreme Court [in *Boumediene v. Bush*] found inadequate at Guantánamo.”<sup>24</sup> Judge Bates also expressed concern that a detainee has no “meaningful opportunity to rebut [the government’s] evidence” and that the “ever-changing definition of enemy combatant, coupled with uncertain evidentiary standards, further undercut the reliability of the UECRB review.”<sup>25</sup> Judge Bates held that non-Afghans captured in Afghanistan and brought to Bagram had the right to habeas in U.S. courts.<sup>26</sup>

The new procedures made public and implemented in mid-September 2009 do address some of the complaints, but further reforms are needed to guard against arbitrary detention and allow detainees a more meaningful mechanism to challenge their detention as well as to make detentions more transparent and legitimate in the eyes of the Afghan people.

Under the new policy guidance, a Detainee Review Board replaced the Unlawful Enemy Combatant Review Board. The review board determines whether the person meets the criteria for initial detention, or continued detention, including whether he shall be released without conditions or transferred to Afghan authorities for criminal prosecution or participation in a reconciliation program.<sup>27</sup> For non-Afghans at Bagram, the review board can also recommend transfer to a third country for criminal prosecution, participation in a reconciliation program, or release.<sup>28</sup> Detainees currently in Bagram will have their status reviewed under the new DRBs when they come up for their already scheduled six-month review status determinations.

The new proceedings are an improvement from the UECRBs in the following areas:

- Under the new procedures a detainee’s status is reviewed within 60 days, rather than 75 days, of a detainee’s transfer to the BTIF and thereafter “at least every six months.”
- The review board’s report and recommendation will be in writing and will be reviewed for “legal sufficiency” by the office of the Staff Judge Advocate for the convening authority.
- Detainees will now be provided “timely notice of the basis for their internment” and provided an unclassified summary of facts that support the basis for their internment.
- Detainees will receive notice of the results of their review boards, in writing and orally, within seven days after completion of the “legal sufficiency review.”
- Detainees will be able to present information and evidence and bring witnesses who are “reasonably available” either in person, through video or teleconference, or in a sworn statement.

- Detainees will be allowed to testify or address the review board and attend “open sessions, subject to operational concerns.”
- Detainees will be assigned a personal representative to “assist the detainee in gathering and presenting the information reasonably available in the light most favorable to the detainee.”
- If the review board decides that a detainee does not meet the criteria for internment, the detainee “shall” be released from DoD custody “as soon as practicable.” Decisions to recommend internment, or transfer to Afghan authorities for criminal prosecution, or participation in a reconciliation program are subject to review by the convening authority.<sup>29</sup>

Although the DRBs are an improvement from the UECRBs, there are similarities between the DRBs and the discredited CSRTs. One of the lessons learned from the CSRTs is the potential for a gap between rules and their proper implementation. In Guantanamo, detainees’ requests for witnesses were denied, decisions on detention were made largely on classified information which a detainee could not see, there was no confidentiality between the personal representative and a detainee, and the CSRT process by which a detainee’s status was determined was subject to political interference. The Detainee Review Board procedures however, include several improvements to the CSRTs at Guantanamo as well. For instance, the DRB procedures do not presume the validity of the government’s information as did the CSRTs. Unlike the CSRTs, a decision by the DRB that a detainee is not an “unlawful enemy belligerent” results in release and appears at least on paper to not be subject to further review by the convening authority. The DRB panel can also recommend a range of options for a detainee such as participation in a reconciliation program and where there is evidence of criminal conduct transfer to prosecution in Afghan courts.

Nevertheless, Human Rights First urges further reforms to detainee proceedings in Bagram in order to ensure that detainees have sufficient ability to challenge their detention and thereby guard against arbitrary detention. In particular, we have concerns in the following areas:

### ***Information Relied Upon to Make Detention Decisions***

The review board, comprised of field-grade military officers, will assess “all reasonably available information (including classified information relevant) to determine whether each person transferred to the BTIF meets the criteria for internment and, if so, whether the person’s continued internment is necessary . . . to mitigate the threat the detainee poses.”<sup>30</sup>

The guidance for the review board procedures however, fails to exclude evidence obtained through torture or cruel treatment in assessing initial or continued detention. This omission should be rectified immediately in order to confirm the stated intention of the Obama administration to make a clean break from past practices and policies that justified and excused detainee abuse.

Moreover, this exclusion is necessary in order to meet U.S. treaty obligations under article 15 of the Convention Against Torture, which prohibits statements obtained as a result of torture being used as evidence in any proceeding, except against a person accused of torture as evidence that the statement was made.<sup>31</sup> The use of information that has been obtained by torture or other cruel, inhuman or degrading treatment is antithetical to the rule of law. The Supreme Court has held that the rationale for excluding coerced statements is not just their unreliability; they should be inadmissible even if “statements contained in them may be independently established as true” because of the fundamental offence that coercive treatment of detainees causes to the notion of due process and the rule of law.<sup>32</sup>

The Pentagon should make every effort to break from past practices and policies and ensure that DRB determinations are not based on unreliable and coerced information.



### ***Detainee's Ability to Confront Evidence***

In contrast to the UECRB, the new procedures allow detainees to question witnesses called by the review board but subject to “any operational or national security concerns.”<sup>33</sup> Detainees can also call witnesses “if reasonably available” and considered by the board to have “relevant testimony to offer.” At the board president’s discretion “relevant witnesses” may testify either in person, through video or teleconference, or in a sworn statement.<sup>34</sup> A similar provision applied to CSRTs in Guantanamo, but a Seton Hall Law School study of publicly available CSRT records found that even where a witness requested by a detainee was another detainee at Guantanamo, the CSRTs denied three quarters of such requests. And every request for witnesses not at Guantanamo was denied.<sup>35</sup>

Facilitating the presence of witnesses and exculpatory information is challenging, but given that detentions are in Afghanistan such requests should be processed more efficiently and should not be summarily dismissed as was the case with detainees being held at the U.S. naval base in Guantanamo Bay, Cuba and who requested evidence from their home countries or place of capture.

Under the DRB rules, detainees will not have access to classified evidence. Every effort should be made to avoid unnecessary classification, to declassify evidence or to separate classified sources and methods from substance, so that the review board does not rely exclusively on classified evidence. Detainees appearing before CSRTs were permitted to see unclassified evidence, but were unable to examine a majority of the evidence relied upon by the government in support of detention. The Seton Hall study found that the government relied exclusively on classified evidence in a majority of the cases.<sup>36</sup> The study concluded that at least 55 percent of the detainees asked to see classified evidence used against them or to present exculpatory evidence in the form of witnesses and/or documents.<sup>37</sup> Every request to review classified evidence was denied. In its brief to the U.S. Supreme Court in *Boumediene v. Bush*, the Bush Administration conceded that “in most cases” classified information “formed part of the basis for the government’s determination that they were enemy combatants.”<sup>38</sup>

### ***Lack of Independence of the Review Board***

According to ICRC guidelines, detainees should be able to challenge their detention before an independent and impartial body.<sup>39</sup> But the DRB procedures do not address the issue of lack of independence of the reviewing body. The guidelines note that to “ensure neutrality” of the review board, none of the review board members would be “directly involved” in a detainee’s capture or transfer to the BTIF.<sup>40</sup> But neutrality and independence are different. Independence goes to the lack of prejudice within the body and neutrality goes to the lack of outside influence.

The CSRT procedures in Guantanamo—which had similar provisions about the “neutrality” of the board—were fraught with the lack of independence and concerns about “command influence” and that a decision by the board was not binding. In a review of habeas cases, the Seton Hall CSRT Study showed that in at least three cases, detainees were initially found not to be “enemy combatants” but their cases were subjected to repeat CSRT proceedings without the presence of detainees and they were then found to be “enemy combatants.”<sup>41</sup> A U.S. Army Major who sat on 49 CSRT panels, indicated that in six of these hearings “there was a unanimous decision that the detainee was a Non Enemy Combatant (NEC). In all of these NEC cases, the Command directed that a new CSRT be held or the original CSRT was ordered reopened. In each of those cases, the ‘new evidence’ that was presented was in fact a different conclusory intelligence finding, which was not justified by the underlying evidence.”<sup>42</sup> The Major described command influence over the CSRT process, including in relation to cases of Uighur detainees. Some of these detainees had been found not to be “enemy combatants” while others had been affirmed as “enemy combatants” based on evidence that was essentially the same.<sup>43</sup>

In order to ensure independence of the proceedings, as well as to further the end goal of shifting detention authority to Afghanistan, the United States should involve Afghan judges—as they are not members of the detaining authority—in reviewing the detention of individuals held by the United States military. This also furthers U.S. strategy to build the capacity of the Afghan people to handle their own national security affairs.

### ***Personal Representative and Not Legal Counsel***

According to ICRC guidelines, detainees in non-international armed conflict should have the right to a legal representative when challenging their detention.<sup>44</sup> Under the DRBs, a personal representative will be assigned to each detainee to assist the detainee before the review board “not later than” thirty days prior to a detainee’s hearing.<sup>45</sup> The military personal representative will have access to “all reasonably available information (including classified information) relevant to the determination of whether the detainee meets criteria for internment and whether the detainee’s continued internment is necessary.”<sup>46</sup> The personal 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 favorable to the detainee.”<sup>47</sup> The detainee may waive the appointment of such a representative, unless he is under eighteen years old or suffering from “a known mental illness,” or is “determined by the convening authority” to be “incapable of understanding and participating meaningfully in the review scheme.”<sup>48</sup>

A personal representative was appointed to each detainee for the CSRT process in Guantanamo. But a study of CSRT cases, found that in 78 per cent of cases, the detainee and his personal representative met only once, and in 91 per cent of these cases their meeting was less than two hours. In a third of cases, the meeting lasted for less than half an hour (this included the time needed for interpretation).<sup>49</sup> Moreover, there was no confidential relationship between the personal representative and the detainee in Guantanamo and the representative could relay to the CSRT any inculpatory information learned from the detainee.

The expectation that the personal representative will act in the best interest of the detainee, as would an attorney, is unreasonable given the inherently conflicting pressures faced by the representative due to his mission and place in the chain of command.

### ***Criteria Used to Determine “Level of Threat”***

Questions remain about what criteria is used to determine a detainee’s “level of threat” to support detention. The guidance states that the review board will assess whether a detainee is an “Enduring Security Threat” which is defined in a separate guidance policy that is not public.<sup>50</sup> The guidelines further provide that the “Enduring Security Threat” is not a “legal category,” but an “identification of the highest threat” a detainee poses for “purposes of transfer and release determinations.” It is, however, unclear how this assessment is made and what mechanisms exist to ensure that “threat” assessments are not exaggerated or inflated. It is also unclear whether there is any place in the threat assessment process for consideration of the detriment to the overall U.S. mission that results from overbroad or vague grounds for detention.

## **DETENTION REFORMS IN BOTH U.S. AND AFGHAN PRISONS**

In the summer of 2009, Major General Douglas Stone—who ran detainee operations in Iraq in 2007 and 2008 and initiated detainee reforms aimed at de-radicalization and faster processing—was sent to Afghanistan to assess U.S. and Afghan detentions and to report his findings to CENTCOM. In September 2009, General McChrystal’s assessment on Afghanistan entitled “COMISAF Initial Assessment” was made public by the *Washington Post*.<sup>51</sup> Annex F, entitled *Detainee Operations, Rule of Law, and Afghan Corrections*, includes recommendations by Gen. Stone and outlines a series of reforms to both U.S. and Afghan detentions. Gen. McChrystal states that “the long-term goal [is] getting the U.S. out of the detention business” and that the “desired endstate must be the eventual turnover of all detention operations in Afghanistan, to include the BTIF, to the Afghan government once they have developed the requisite sustainable capacity to run those systems properly.”<sup>52</sup>

Human Rights First recognizes the significant challenges to accomplishment of this goal. There are serious problems with conditions of detention, treatment, and trials under Afghan authority. After thirty years of conflict, the formal Afghan justice sector is weak and faces serious difficulties, including poor infrastructure, inadequate training and education of lawyers and judges, lack of access to laws and textbooks, and corruption. International military troops are concerned that some individuals that they transferred to Afghan custody under ISAF rules were quickly released and re-engaging in anti-government activities. Individuals affiliated with the Taliban have broken out or bribed their way out of Afghan prisons.<sup>53</sup> There has also been lack of coordination between North Atlantic Treaty Organization (NATO) allies on rule of law reform. Human Rights First is also aware that prisons in Afghanistan play a role in radicalizing prisoners and recruiting people for the insurgency which further underscores the need to process prisoners expeditiously, house prisoners in humane conditions, separate hardline from petty criminals, ensure fair trials, and to institute vocational training programs to help reintegrate former prisoners who have served their sentence into society.

General McChrystal's report notes that at the BTIF "due to a lack of capacity and capability, productive interrogations and detainee intelligence collection have been reduced. As a result, hundreds are held without charge or without a defined way out."<sup>54</sup> The report also raises concerns about an overcrowded Afghan Corrections System (ACS) where insurgents mingle with petty criminals, radicalize non-insurgent inmates and use the facilities to conduct operations against Afghan and coalition forces.<sup>55</sup>

Annex F of the report outlines some ways to address these concerns. The report recommends the creation of a new Combined Joint Interagency Task Force (CJIATF) to work towards the "long term goal of getting the U.S. out of the detention business" and to "build the capacity of the Afghan government to take responsibility of detention in its own country."<sup>56</sup> The CJIATF will assume "oversight responsibilities to support detention and interrogation operations of all U.S.-held detainees in Afghanistan and train and apply corrections management techniques" and "rule of law principles in all detentions."<sup>57</sup> In essence, before the U.S. turns over detention operations to Afghanistan, it will apply rule of law reforms to current detention regimes and engage in capacity building on the Afghan side to handle such detentions. The CJIATF is also tasked to design and implement programs to address de-radicalization, rehabilitation, vocational and technical training, and segregating detainee populations in both U.S. and Afghan prisons.<sup>58</sup>

General McChrystal's report recommends the creation of a "Legal Group" within the CJIATF to "identify gaps in the Rule of Law framework that are inhibiting U.S. and Afghan detention/corrections operations from completing their mission and will develop solutions through consistent engagement with GIRoA [Government of the Islamic Republic of Afghanistan] elements and the International Community."<sup>59</sup> The report also noted that ISAF will be training its forces to better collect intelligence and evidence for prosecution in the Afghan judicial system.<sup>60</sup> These important steps should take into account the evidentiary gaps that exist in current capture practices by both OEF and ISAF forces and hinder Afghan prosecutions.

Afghan defense lawyers and prosecutors have both expressed concerns to Human Rights First that there are problems with the evidence that is transferred with a detainee both by ISAF and OEF forces. On many occasions evidence is simply lacking or does not meet evidentiary requirements under Afghan criminal procedure. Human Rights First has observed trials of former Bagram prisoners at the ANDF where there are no prosecution witnesses or sworn statements, thereby depriving a defense counsel of the ability to challenge the evidence. Instead, a judge decides the fate of a prisoner based on a summary of unverified allegations that have largely been collected by international military forces and transferred to Afghan authorities. Such trials fail to meet both international and Afghan fair trial standards. (For examples, read Human Rights First, *Arbitrary Justice: Trials of Bagram and Guantanamo Detainees in Afghanistan* (2008)).

## RECOMMENDATIONS

General McChrystal's report concludes that there are "strategic vulnerabilities in a non-Afghan system . . . [of detention and that] an Afghan system reinforces their sense of sovereignty and responsibility."<sup>61</sup> Human Rights First agrees. To establish legitimacy in the eyes of the Afghan people and to more fully align U.S. detentions with strategic priorities, additional steps are needed now:

- to ensure that U.S. detentions are on a sound legal basis;
- to increase the capacity of the Afghan authorities to handle detentions on their own;
- to establish more transparency in U.S. detention operations;
- to reduce the risk of arbitrary detentions by providing detainees a sufficient way to challenge their detention and improving evidentiary procedures at capture; and
- to strengthen the fairness of Afghan criminal prosecutions of those captured by the United States.

To achieve these goals, Human Rights First makes the following recommendations for action by the U.S. and Afghan governments:

### Increase Afghan Involvement and Provide Greater Transparency

#### To the United States and Afghan Governments:

***The governments of Afghanistan and the United States should establish a transparent legal framework for the detention of those captured by the U.S. military in Afghanistan, either through a security agreement or Afghan legislation that sets forth the legal grounds for detention and the procedures for the review of detention and which meets the requirements of international humanitarian law and human rights law applicable to non-international armed conflict.***

The Afghan government retains formal sovereignty over its territory, including with respect to persons detained by international military forces operating in Afghanistan. An appropriate, publicly declared legal framework established by the governments of the United States and Afghanistan is necessary to guard against arbitrary detention, ensure that both international and Afghan military forces operate within the rule of law, and bolster the credibility of those operations among the Afghan people and within the international community. In order to ensure wider support for such a detention scheme, any agreement or legislation should be approved by the Afghan National Assembly in accordance with article 90 of the Afghan Constitution.

#### To the U.S. Department of Defense:

***Amend the Detainee Review Board (DRB) procedures to provide for joint U.S.-Afghan participation on the Board.***

Implementing a joint U.S./Afghan detainee review body that includes participation by Afghan judges would begin to involve Afghan authorities in detainee review procedures. This would promote an Afghan justice system that complies with international standards, would enable Afghanistan to take some measure of responsibility for its own citizens and others on its territory, would add to the quantum of information upon which detention decisions are based, and would hopefully provide greater credibility to detention decisions among the Afghan population.

Although the new procedures suggest that the DRB panel will not be involved in the capture or apprehension of a detainee, efforts to increase Afghan participation can help insulate the DRB from command influence and ensure that the decision-making process is impartial and independent.

***Ensure transparency in the Detainee Review Board procedures in order to promote credibility and to assess the effectiveness of the new procedures.***

Facilitate observation of the detainee review board proceedings by Afghan and international human rights organizations and publicly make available the transcripts of DRB proceedings.

***Grant human rights observers access to detainees and detention facilities in Afghanistan.***

Human Rights First's research suggests that treatment of detainees at Bagram has improved since the implementation of the 2006 Army Field Manual and application of Common Article 3 to Afghanistan, yet independent human rights monitors are not permitted access to the detention facility and to detainees. International and Afghan-based human rights organizations, in particular the Afghan Independent Human Rights Commission (AIHRC), should be provided access to facilities where conflict-related detainees are held and should be allowed to meet with detainees privately so that a public, credible, and independent assessment can be made about conditions of confinement and interrogation techniques. Such access and reporting would set an example of transparency and inspire confidence that the U.S. is meeting its humane treatment obligations. Although the International Committee of the Red Cross (ICRC) does have access to the BTIF and to detainees, its findings are confidential and thus the public does not learn about conditions of confinement and treatment.

## **Reduce the Risk of Arbitrary Detentions**

**To the U.S. Department of Defense:**

**Amend the Detainee Review Board procedures to improve the ability of detainees to examine and challenge the evidence against them, exclude evidence gained through coercion, and create a combined repository of information.**

- Amend the procedures to explicitly state that no evidence/information that is a result of coercion may be used by the review board to determine whether a detainee meets the criteria for initial detention, continued detention, or for referral to prosecution in Afghan courts.
- Ensure that classified evidence is not the exclusive or predominant form of information relied upon by the DRB in making its decisions about a detainee. Every effort should be made to assess what information can be declassified so as to facilitate its use by a detainee before the DRB or in the event of future prosecution in Afghan courts.
- The DRB proceedings provide for a "Legal Sufficiency Review" of the DRB's decisions by the Staff Judge Advocate. This review should include an accounting of all efforts to obtain exculpatory information requested by a detainee and a detailed explanation of the results of such requests. The results of this audit should be made available to every detainee who requests exculpatory evidence.
- It will advance the U.S. strategy in Afghanistan to ensure that the new DRB process is set up to examine the universe of intelligence and information that led to a detainee's capture, including a review/assessment of the inculpatory and exculpatory evidence and whether facts support detention, criminal prosecution, release, or rehabilitation and reconciliation. We therefore recommend creation of a "Combined Detainee Document Management System" that consists of records from every U.S. and Afghan agency that has intelligence or information on a detainee—such as the Central Intelligence Agency, Department of Defense, Federal Bureau of Investigation, Department of Justice, National Security Agency, Department of State, Afghan

National Directorate of Security, Afghan National Army, Afghan National Police, and the Afghan National Security Council. Such a document repository would allow the DRB to fully assess the universe of information/intelligence when making a decision. The detainee should be provided as much unclassified information as possible in order to effectively challenge the evidence against him and to request exculpatory evidence. For detainees imprisoned in Bagram for several years, the challenges to finding credible information are particularly great, and could be better met through the availability of a central data source.

***Provide detainees with a legal representative.***

Although it will require additional resources, detainees should be provided a legal representative rather than a non-lawyer personal representative. Lawyers are trained and ethically obligated to work in the best interests of their client. A lawyer would therefore have greater independence and would be more effective than a non-lawyer in identifying witnesses and gathering evidence to challenge the lawfulness of his or her client's detention. Moreover, the detainee's conversations with a lawyer will be confidential, which is not the case with a non-lawyer military representative.

***Repatriate or transfer non-Afghans detained in Afghanistan.***

The United States should stop rendering persons captured outside of Afghanistan to Bagram. All persons captured outside Afghanistan and brought to Afghanistan must be repatriated to their country of origin for release or prosecution unless there is sufficient evidence to support criminal prosecution in U.S. courts. Upon repatriating detainees, the United States should turn over all evidence in its possession, including exculpatory evidence.

***Establish procedures at capture that reduce the risk of detention based on faulty intelligence and that facilitate fair decisions regarding detention or criminal prosecution.***

- For future captures, work with the government of Afghanistan to implement guidelines that minimize erroneous detention, loss of civilian life, and damage to property.

Operation Enduring Freedom (OEF) troops should develop and implement guidelines to authenticate intelligence that is used to justify raids and other military actions—working more closely with local communities, officials, and with Afghan National Security Forces (ANSF)<sup>62</sup>—in order to weed out faulty information based on personal or tribal animosities. OEF forces should also develop guidance for conducting operations that demonstrate respect for religious and cultural values and minimize damage to property during house searches and seizures.

- Provide training and resources to implement reliable detainee documentation procedures at the point of capture.

In order to ensure that individuals are detained based on reliable information, soldiers and intelligence officers must be provided with proper training and support. Additional resources must be allocated to train soldiers and intelligence officers (including ANSF who may work with OEF forces) in collection and maintenance of information to support detention, mitigate risks of erroneous detentions or release of dangerous individuals due to insufficient evidence, and for future prosecution, if necessary.

According to the Pentagon's May 2008 Detainee Operations, Joint Publication 3-63 guidelines, capturing units are supplied with flex-cuffs, goggles, zip-lock bags, trash bags, duct tape and evidence/property custody document forms. The military leadership should seek JAG officer (Judge Advocate General) input regarding what additional supplies, such as cameras, markers, labels, rulers, etc., might be necessary to effectively collect evidence at the point of capture. Procedures to establish a chain of custody should be implemented.

- Soldiers should be required to write a sworn statement describing the circumstances and reasons for the capture. This may involve basic training as to what information is relevant, including but not limited to the

name of the detainee, the point of capture, evidence found with the detainee, witness names, and the reason for capture, including whether it was based on an intelligence source.

- The intake officer at a Forward Operating Base (FOB), or any other detention facility, should be a lawyer or, at a minimum, a paralegal who should examine whether all evidence has been properly identified and whether the sworn statement is complete.
- Intelligence officers who are involved in identifying a potential suspect for capture should be required to record the reasons in support of capture. Reasonable measures should be taken to protect the identity of informants. Efforts should be made to assess what information can be declassified so as to facilitate its use in prosecutions where warranted. This information should be included in the detainee's file as he is processed through the system.<sup>63</sup>

## **Increase Capacity for Fair Criminal Trials in Afghan Courts**

### **To the U.S. Department of Defense:**

#### **Establish a new task force to improve the quality of evidence collected by U.S. troops and identify improvements in due process for cases transferred by the United States for criminal prosecution in Afghan courts.**

- After finding evidentiary and due process failures in Afghan courts, Human Rights First recommended in its April 2008 report *Arbitrary Justice: Trials of Bagram and Guantanamo Detainees in Afghanistan* that the Pentagon create a legal task force to facilitate fair prosecutions of individuals in Afghan courts. We recommended that this task force should work to improve the quality of information and evidence that is collected by U.S. forces and transferred to Afghan authorities. (The U.S. military's Task Force 134 in Iraq reportedly assisted with documentation of evidence and prosecution of insurgents in the Central Criminal Court of Iraq. JAG officers trained soldiers and marines to collect evidence for criminal prosecution in Iraqi courts. U.S. soldiers also appeared as witnesses in Iraqi courts, sometimes through video teleconference.<sup>64</sup>) We continue to stress that proper documentation of evidence and source information by intelligence officers and soldiers will lead to more reliable and fair prosecutions of detainees, reduce the risk of releasing dangerous prisoners due to insufficient evidence, and minimize the risk of detaining innocents.
- The "Legal Group" created under Combined Joint Interagency Task Force (CJIATF) should be provided with the necessary resources to facilitate fair prosecutions and should include Afghan lawyers to ensure that evidentiary standards under Afghan law are met in preparing files for prosecutions in the Afghan justice system.

### **To the Afghan Supreme Court and the Ministry of Justice**

Direct judges presiding over the Afghan National Defense Facility (ANDF) trials to comply with the Afghan criminal procedure code, Afghan constitution, and international fair trial standards. Specifically, the Afghan courts in these cases should:

- Ensure that defense counsel has access to all information that will be relied upon by the prosecution during trial.
- Require in-court witness testimony and allow cross-examination of witnesses by defense counsel.

## To the ANDF Review Committee and the Afghan Attorney General

- Notify defense counsel prior to the questioning of his client by the investigator and prosecutor and allow defense to be present during his client’s questioning as mandated by the Afghan criminal procedure code.
- Request eye witness testimony or out-of-court sworn statements from U.S. and Afghan officials conducting detainee investigations and make available the information to defense counsel.
- Respect and enforce the decision of the highest court of Afghanistan after it has confirmed the acquittal of a defendant by permitting the release of the defendant.

## CONCLUSION

Further reforms in U.S. detentions practices as well as continuing investment in a strengthened Afghan justice system will foster better relations with the Afghan population and advance the U.S. strategic mission to grow the capacity of Afghans to provide for their own security. The detention reforms unveiled by the Obama administration if properly implemented are an improvement in U.S. detention policies. But further reforms are needed to ensure that detention operations are under an appropriate legal framework and that detainees have a meaningful way to challenge their detention consistent with international law and U.S. policy to support and respect the sovereignty of Afghanistan and build the capacity of the Afghan authorities to take responsibility for detention operations. Moreover, by implementing better detainee documentation and evidence collection procedures in situations of armed conflict the United States would guard against the detention of innocent individuals and unfair prosecution of those tried in Afghan courts. Respect for the rights of Afghan citizens is not only important to defeat the insurgency, but is also a necessary precondition to establishing long-term stability in Afghanistan through the rule of law.

## GLOSSARY

AIHRC	Afghan Independent Human Rights Commission	ICRC	International Committee of the Red Cross
ANDF	Afghan National Detention Facility	ICCPR	International Covenant of Civil and Political Rights
ANSF	Afghan National Security Forces	IHL	International Humanitarian Law
AUMF	Authorization for Use of Military Force	ISAF	International Security Assistance Force
BTIF	Bagram Theater Internment Facility	JTF435	Joint Task Force 435
CCCI	Central Criminal Court of Iraq	NATO	North Atlantic Treaty Organization
CENTCOM	U.S. Central Command	NDS	National Directorate of Security
CJIATF	Combined Joint Interagency Task Force	NIAC	Non-international armed conflict
CSRT	Combatant Status Review Tribunal	OEF	Operation Enduring Freedom
DRB	Detainee Review Board	UECRB	Unlawful Enemy Combatant Review Board
FOB	Forwarding Operating Base		



# ENDNOTES

- <sup>1</sup> COMISAF's Initial Assessment, Initial United States Forces-Afghanistan (USFOR-A) Assessment, August 30, 2009, Annex F, p. F-1.
- <sup>2</sup> *White Paper of the Interagency Policy Group's Report on U.S. Policy toward Afghanistan and Pakistan*, March 2009, [http://www.whitehouse.gov/assets/documents/Afghanistan-Pakistan\\_White\\_Paper.pdf](http://www.whitehouse.gov/assets/documents/Afghanistan-Pakistan_White_Paper.pdf)
- <sup>3</sup> The poll concluded that in 2005, 83 percent of Afghans had a favorable opinion of the United States but in 2009 just 47 percent hold that view. And 25 percent say attacks on U.S. forces or International Security Assistance Force (ISAF) can be justified, up from 13 percent in 2006. While 25 percent of Afghans say violence against U.S. or other Western forces can be justified, this number jumps to 44 percent among those who report coalition bombing, raids or shelling in the area. ABC News/BBC/ARD Poll, "Support for U.S. Efforts Plummets Amid Afghanistan's Ongoing Strife," February 9, 2009, <http://abcnews.go.com/images/PollingUnit/1083a1Afghanistan2009.pdf>.
- <sup>4</sup> Executive Order No. 13,493, *Review of Detention Policy Options* (January 22, 2009).
- <sup>5</sup> *In re Guantánamo Bay Detainee Litigation*, No. 08-442, Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantánamo Bay (D.D.C. March 13, 2009).
- <sup>6</sup> Under the OEF counterterrorism mission launched in 2001, and up till September 2009, U.S. forces could detain "unlawful enemy combatants" in order to: "[P]revent] them from returning to the battlefield and [deny] the enemy the fighters needed to conduct further attacks and perpetrate hostilities against innocent civilians U.S. and coalition forces, and the Government of Afghanistan. The United States also gathers important intelligence from the unlawful enemy combatants during their detention, which in turn enables the United States to prevent future attacks." (*Bakri v. Bush*, No. 1:08-1307, Declaration of Colonel Charles A. Tennison, dated September 15, 2008, submitted in support of Respondents' Motion to Dismiss ("Tennison Declaration"), ¶9.). A September 2006 Pentagon directive defined "unlawful enemy combatant" as: "[P]ersons 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." (U.S. Department of Defense, The Department of Defense Detainee Program, Directive 2310.01E (Sept. 5, 2006), p. 9).
- <sup>7</sup> Detainee Review Board Procedures at Bagram Theater Internment Facility (BTIF), Afghanistan, attached as an appendix to Brief of Respondent-Appellants appeal to the U.S. Court of Appeals for the District of Columbia, *Maqaleh v. Gates*, Nos. 09-5265, 09-5266, 09-5277 (D.C. Cir. Sept. 14, 2009) ("2009 DRB Procedures").
- <sup>8</sup> *Ibid.*
- <sup>9</sup> See, e.g., *Hamilly v. Obama*, 616 F. Supp. 2d 63, 69, 76 (D.D.C. 2009) (The Court "rejects the concept of 'substantial support' as an independent basis for detention . . . [and] finds that 'directly support[ing] hostilities' is not a proper basis for detention. In short, the Court can find no authority in domestic law or the law of war, nor can the government point to any, to justify the concept of 'support' as a valid ground for detention." The Court elaborated: "After repeated attempts by the Court to elicit a more definitive justification for the 'substantial support' concept in the law of war, it became clear that the government has none. Nevertheless, the government asserted that 'substantial support' is intended to cover those individuals 'who are not technically part of al Qaeda,' but who have some meaningful connection to the organization by, for example, providing financing. . . . [A] detention authority that sweeps so broadly is simply beyond what the law of war will support."); *Gherebi v. Obama*, 609 F. Supp. 2d 43, 71 (D.D.C. 2009) (interpreting "substantial support" to include individuals who were actual members of enemy organizations' armed forces); *Anam v. Obama*, No. 04-1194, 2009 WL 2917034, at 2 (D.D.C. Sept. 14, 2009) (adopting *Hamilly* ruling).
- <sup>10</sup> Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).
- <sup>11</sup> *In re Guantánamo Bay Detainee Litigation*, *supra* note 9.
- <sup>12</sup> The Supreme Court in 2006 in *Hamdan v. Rumsfeld* rejected the Bush administration's argument that the conflict with al Qaeda is an international armed conflict based on a reasoning that international armed conflict can only be between states and that non-international armed conflict can only occur within the territory of a single state. Instead, the court appeared to conclude that that the conflict with al Qaeda in Afghanistan is a non-international armed conflict as understood for the application of Common Article 3. 548 U.S. 557, 628-631 (2006).
- <sup>13</sup> According to the Bonn Agreement, art. 1: "An Interim Authority shall be established upon the official transfer of power on 22 December 2001. . . ." Art. 3: "Upon the official transfer of power, the Interim Authority shall be the repository of Afghan sovereignty, with immediate effect." See *Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions* (December 5, 2001).
- <sup>14</sup> Although neither the United States nor Afghanistan is a party to AP II, much of its content is widely deemed to be customary international humanitarian law. See also Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, International Committee of the Red Cross (Cambridge Univ. Press, 2005), vol. 1 (the ICRC's authoritative iteration of customary IHL).
- <sup>15</sup> International Committee of the Red Cross, "International humanitarian law and terrorism: questions and answers," May 5, 2004, <http://coe-dmha.org/TAPpdfs/IIIMEF2006/Resource%20Materials/International%20Law/IHL%20docs/Handbooks,%20Guidance%20references/IHL%20%20&%20terrorism.pdf>.
- <sup>16</sup> *Maqaleh v. Gates*, No. 09-5265, Brief for Respondents-Appellants, (D.C. Cir. Sept.14, 2009), pp. 39-40.
- <sup>17</sup> The preamble to Additional Protocol II establishes the link between AP II and human rights law by stating that "international instruments relating to human rights law offer a basic protection to the human rights." The United States and Afghanistan are both parties to the International Covenant of Civil and Political Rights (ICCPR), which prohibits arbitrary detention and mandates court review of any detention. Article 9(4) of the ICCPR states: "Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."
- <sup>18</sup> The ICRC has stated that Common Article 3 and Additional Protocol II "provide no further guidance on what procedure is to be applied in cases of internment . . . [thus] the gap must be filled by reference to applicable human rights law and domestic law, given that international humanitarian law

(IHL) rules applicable in non-international armed conflict constitute a safety net that is supplemented by the provisions of these bodies of law.” See International Committee of the Red Cross, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, 30th International Conference of the Red Cross and Red Crescent (Geneva: November 2007), p. 11 (“2007 ICRC IHL Conference”) and Jelena Pejic, *Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence*, 87 *International Review of the Red Cross* 375 (2005).

<sup>19</sup> Pejic, *Procedural Principles and Safeguards*, *supra* note 18, pp. 384-390.

<sup>20</sup> *Ibid.*

<sup>21</sup> According to the U.S. periodic report submitted to the Committee against Torture in 2005, the review process for detainees prior to the UECRB was as follows: “Detainees under DoD control in Afghanistan are subject to a review process that first determines whether an individual is an enemy combatant. The detaining Combatant Commander, or designee, shall review the initial determination that the detainee is an enemy combatant. This review is based on all available and relevant information available on the date of the review and may be subject to further review based upon newly discovered evidence or information. The Commander will review the initial determination that the detainee is an enemy combatant within 90 days from the time that a detainee comes under DoD control. After the initial 90-day status review, the detaining combatant commander, on an annual basis, is required to reassess the status of each detainee. Detainees assessed to be enemy combatants under this process remain under DoD control until they no longer present a threat. The review process is conducted under the authority of the Commander, U.S. Central Command (USCENTCOM). If, as a result of the periodic Enemy Combatant status review (90-day or annual), a detaining combatant commander concludes that a detainee no longer meets the definition of an enemy combatant, the detainee is released.” *Update to Annex One of the Second Periodic Report of the United States of America to the Committee Against Torture* (May 2005), available at <http://www.state.gov/g/drl/rls/55712.htm>

<sup>22</sup> According to a November 2006 affidavit of Col. Rose Miller, Commander of Detention Operations in Bagram, the review board was called “Enemy Combatant Review Board” (ECRB) and consisted of five commissioned officers who evaluated a detainee’s status. The change to UECRB occurred sometime in 2007 and now comprises of three officers rather than five. *Ruzatullah v. Rumsfeld*, No. 07-CV-07107 (D.D.C. Nov. 19, 2006).

<sup>23</sup> According to Col. Charles Tennison, the Commander of Detention Operations in 2008, Combined Joint Task Force 101, a detainee in Bagram under the UECRB was “notified of the general basis of his detention within the first two weeks of in-processing. . . . [b]arring operational requirements.” A review of a detainee’s status in Bagram was “usually conducted” within seventy-five days of detention and every six months thereafter. The UECRB, comprised of three commissioned officers, assessed a detainee’s status and by majority vote recommended to the Commanding General or his designee that a detainee either be released or remain in detention. The UECRB reviewed information from a “variety of sources, including classified intelligence and testimony from individuals involved in the capture and interrogation of the detainee.” Since April 2008, detainees being screened for the first time had an opportunity to appear before the UECRB for their initial review and make written submissions in subsequent reviews. The “implementing guidance” for UECRBs and the documentation prepared for UECRB evaluations of detainees were, and remain classified. See *generally* Tennison Declaration, *supra* note 6.

<sup>24</sup> *Maqaleh v. Gates*, No. 06-1669, Memorandum Opinion, (D.D.C. Apr. 2, 2009).

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.* On April 2, 2009, Judge Bates, applying the test articulated in the landmark Supreme Court case in *Boumediene v. Bush*, which recognized habeas rights for Guantánamo detainees, ruled that three non-Afghan detainees captured outside Afghanistan and brought to Bagram can challenge the lawfulness of their detention in U.S. federal courts. In the case of Afghan petitioner Haji Wazir, Judge Bates concluded that there was a “possibility of friction with Afghanistan” should Wazir obtain habeas review in U.S. courts. Judge Bates delayed his ruling on the case until further arguments could be made by the parties. On June 26, Judge Bates affirmed the motion to dismiss Haji Wazir’s petition. The case is under appeal in the Court of Appeals in the District of Columbia.

<sup>27</sup> 2009 DRB Procedures, *supra* note 7, p. 4.

<sup>28</sup> *Ibid.*

<sup>29</sup> See *generally* 2009 DRB procedures, *supra* note 7, pp. 1-6.

<sup>30</sup> *Ibid.*, pp. 1-2.

<sup>31</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 U.N.T.S. 85, art. 15. The treaty was ratified by the United States in 1994.

<sup>32</sup> *Rochin v. California* 342 U.S. 165 (1952).

<sup>33</sup> *Ibid.*

<sup>34</sup> 2009 DRB Procedures, *supra* note 7, p. 3-4.

<sup>35</sup> Mark Denbeaux & Joshua Denbeaux, *No-Hearing Hearings, CSRT: the Modern Habeas Corpus? An Analysis of the Proceedings of the Government’s Combatant Status Review Tribunals at Guantanamo* (2006), pp. 2-3 (hereinafter “No-Hearing Hearings”).

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*

<sup>38</sup> *Boumediene v. Bush*, No. 06-1195, Brief for the respondents, in the U.S. Supreme Court, (Oct. 2007).

<sup>39</sup> Pejic, *Procedural Principles and Safeguards*, *supra* note 18, pp. 384-390.

<sup>40</sup> *Ibid.*

<sup>41</sup> *No-Hearing Hearings*, *supra* note 35, p. 37.

<sup>42</sup> *Hamad v. Gates*, No. 07-1098, Response to omnibus motion to stay orders to file certified index of record, (D.C Cir. Oct. 4, 2007), Exhibit A.

<sup>43</sup> *Ibid.*

<sup>44</sup> Pejic, *Procedural Principles and Safeguards*, *supra* note 18, pp. 384-390.

- 45 2009 DRB Procedures, *supra* note 7, p. 3.
- 46 *Ibid.*, p. 5.
- 47 *Ibid.*, p. 6.
- 48 *Ibid.*
- 49 *No Hearing Hearings*, *supra* note 35, pp. 14-18.
- 50 2009 DRB Procedures, *supra* note 7, p. 5.
- 51 COMISAF's Initial Assessment, *supra* note 1, p. F-1.
- 52 *Ibid.* Annex F, p. F-2.
- 53 Sam Yousufzai and Ron Moreau, "Afghan Prison Blues," *Newsweek*, February 11, 2008 (describing how Taliban members bribed their way out of NDS custody); Sami Yousafzai, "Inside the Prison Escape," *Newsweek*, June 30, 2008 (describing how Taliban fighters and other prisoners broke out of Sarposa prison in Kandahar which had 15-20 men crammed in tiny cells and allowed inmates to pay \$100 a month to possess mobile phones); Hamid Shalizi, "Knives, Petrol Bombs Found in Afghan Prisons," *Reuters*, July 5, 2008. (describing how Afghan security forces found knives, petrol bombs, and mobile phones in Pul-e-Charkhi prison outside of Kabul).
- 54 COMISAF's Initial Assessment, *supra* note 1, p. F-1.
- 55 *Ibid.*
- 56 *Ibid.*, p. F-1-F-2.
- 57 *Ibid.*, p. F-2
- 58 *Ibid.* In September 2009, the Pentagon announced the creation of Joint Task Force 435 – Operation Enduring Freedom (JTF 435), - whose Deputy Commander, Brig. Gen. Mark Martins is tasked to: "provide care and custody for detainees, oversee detainee review processes and reconciliation programs, and to ensure U.S. detainee operations in Afghanistan are aligned effectively with Afghan criminal justice efforts to support the overall strategy of defeating the Taliban insurgents." Mark Seibel, "Task Force Created to Combat Al Qaeda in Afghan Prisons," *McClatchy Newspapers*, October 1, 2009.
- 59 COMISAF's Initial Assessment, *supra* note 1, p. F-3.
- 60 *Ibid.*, p. 2-18.
- 61 *Ibid.* p. 2-16.
- 62 The ANSF includes Afghan National Army (ANA), Afghan National Police (ANP), and Afghan National Army Air Corps (ANAAC).
- 63 These recommendations are based on conversations with former JAG officers who served in Iraq.
- 64 See Major W. James Annexstad, "The Detention and Prosecution of Insurgents and Other Non-Traditional Combatants—A Look at the Task Force 134 Process and Future of Detainee Prosecutions," *Army Lawyer*, July 2007. Human Rights First has not examined the trials at CCCI and cannot attest to the fairness of the proceedings. Nor have we examined the adequacy of the investigations to build a criminal case by Task Force 134. The comparison to Task Force 134 is to show that the U.S. military has engaged in evidence gathering and has made soldiers available for testimony in Iraqi criminal trials of persons captured by the United States.