



To the attention of the Ministers and Representatives
Of Participating Countries and Organizations
To the International Afghanistan Support Conference

Paris, New York, 12 June 2008

Re: The Plight of Afghan Prisoners Transferred from Guantánamo and Bagram to Continuing Illegal Detention and Unfair Trials in Afghanistan

Excellencies:

On the occasion of the International Afghanistan Support Conference, to be held in Paris on June 12th 2008, the Center for Constitutional Rights (CCR) wishes to transmit to the Ministers and representatives attending the conference our concerns regarding the situation of former Guantánamo and Bagram detainees of Afghan nationality returned to Afghan authorities.

There have been more than 200 Afghans detained at the U.S. Naval Station at Guantánamo Bay, Cuba since the prison opened in January 2002. Since then, more than 160 have been repatriated, most of whom are now living in freedom and in the process of trying to rebuild their lives. Others are not so fortunate. Beginning in April 2007, under the terms of a repatriation agreement negotiated between the U.S. and Afghan governments, every Afghan “released” from Guantánamo and returned to Afghanistan has been sent to a U.S.-built detention facility within Pul-e-charkhi prison outside of Kabul, where they have been detained with Afghan prisoners transferred from the U.S. Air Base at Bagram. This facility, named the Afghan National Detention Facility (ANDF), currently holds more than 200 men formerly imprisoned at Guantánamo and Bagram, some of whom have been held at the ANDF for over one year without charge or trial.

Those who have been tried have gone through a patently unfair process: prosecutions have been based largely, if not solely, on flawed and inadequate evidence provided to the prosecution by the U.S. military; prisoners have been prevented from questioning and confronting the evidence against them; and while prisoners are now afforded defense lawyers, the first group to stand trial were unrepresented and access to effective legal assistance remains a concern. Not surprisingly, the majority of trials that have gone forward have resulted in convictions, with sentences as high as 20 years.

There have been some improvements in the process in recent months. Earlier this year, President Karzai appointed a commission to review ANDF prisoners’ files, which has ordered the release of several prisoners. While this is a positive development, it is not enough. More than 200 men continue to be arbitrarily detained at the ANDF, after years of illegal detention at Guantánamo and Bagram. For these men, justice has already been delayed and denied indeed.

The government of Afghanistan has a duty to provide ANDF detainees with fair trials and the minimum due process guarantees enshrined in the Afghan constitution and in international treaties to which Afghanistan is a state party. For its part, the U.S. government has a duty to close Guantánamo responsibly. It should refrain from pressuring other countries to detain

indefinitely or prosecute transferred prisoners as a condition of repatriation, as well as from facilitating convictions in foreign courts with evidence that would not be admissible in U.S. courts, as it is doing in Afghanistan. As the United States “empties” Guantánamo and other widely-criticized prisons, the United Nations, particularly through UNAMA, and the broader international community should closely monitor the transfers and the situation of prisoners upon return to ensure that the men are either released or afforded the fair process they have been denied for years, and not simply wrongfully detained and convicted under a different guise.

Where are the prisoners being held?

As of April 2007, all Afghan prisoners transferred from Guantánamo and Bagram have been sent to the ANDF, a special “national security” wing of Pul-e-charkhi prison outside of Kabul. Built by the United States and financed with over \$20 million, the specific purpose of the ANDF is to hold prisoners transferred from other U.S. detention facilities. The facility has 350 cells and a capacity of up to 700 if detainees are held two to a cell. The United States maintains on-site presence at the facility through training teams and military officers who serve as “mentors” to ANDF military personnel, and has earmarked \$18 million for continued training and mentoring over the next three years.

Who are the prisoners?

To the extent of available information, it appears that all prisoners at the ANDF to date have been Afghan and transferred from either Guantánamo or Bagram on the basis of an assessment by an ANDF task force, composed of representatives from various Afghan government agencies as well as the U.S. embassy. These men had in some cases already been detained and tortured by the United States for more than six years without charge or any fair process by which to challenge their detention. Some had in fact been “cleared” by the U.S. military and determined not to pose a threat to the United States or its allies, yet were still sent to the ANDF for continued detention and criminal prosecution. One prisoner formerly detained at Guantánamo said that when he boarded a plane departing Cuba, he was told only that he was going home. He knew nothing of his continuing detention at the ANDF until he arrived there.

In recent months, ANDF prisoners have gone on hunger strike three times to protest their political prosecutions and sham trials. The most recent strike lasted ten days, during which prisoners had literally sewn their mouths shut in protest.

What are the due process violations?

There are serious concerns regarding the lack of due process and fair trials for ANDF prisoners.

Of the more than 200 prisoners at the ANDF, some of whom have been detained for over one year, many have yet to be charged and tried or released. The first trials did not take place until October 2007, six months after the first prisoners were transferred, and even then only 12 cases went forward. Under Afghan criminal procedure, detainees must be indicted within 30 days of arrest, and international treaties Afghanistan has ratified prohibit arbitrary detention and protect the right to be tried without undue delay.

Prisoners are now offered defense lawyers upon being indicted, but the first 12 men who went to trial – ten of whom were convicted – had no lawyers. Currently, the only entity providing

legal defense for ANDF prisoners is one non-governmental organization; as of April 2008, they had six lawyers representing over 160 defendants.

The prosecutions that have proceeded to date have rested on “evidence” provided by the U.S. military and little else. Given that it is now well-established that torture has been used in interrogations at Guantánamo and Bagram, and that Combatant Status Review Tribunals (CSRTs) conducted at Guantánamo were allowed to consider evidence obtained through torture, it is highly likely that the evidence being provided by the U.S. military to Afghan prosecutors includes statements and information obtained – and corrupted – by torture. The permissibility of such evidence in the CSRTs is currently being challenged in the U.S. Supreme Court, yet the United States is handing over this very evidence to the government of Afghanistan to prosecute prisoners and obtain convictions. The evidence provided by the United States also includes second- and third-hand statements and summary allegations with no names of witnesses who can be interviewed or brought to court, effectively denying prisoners and their lawyers from confronting or challenging the evidence.

It is unsurprising under these circumstances that most of the trials have resulted in convictions. Of the trials conducted as of April 2008, 65 prisoners were convicted while 17 were acquitted. The majority of those convicted were sentenced to prison terms of 3 to 20 years. The rest were sentenced to time-served, still marking them as guilty, legitimizing their period of detention at the ANDF and at Guantánamo and Bagram before, and precluding them from seeking damages for wrongful imprisonment.

In February 2008, President Karzai established a commission tasked with reviewing the files of ANDF prisoners and making recommendations for prosecution or release. The commission has ordered the release of over 40 prisoners to date, although it has also recommended an equal number of cases for trial.

Why is this an issue of international concern?

While there are currently systemic weaknesses in the Afghan judicial system that make the due process violations experienced by ANDF prisoners no different than those experienced by any other Afghan prisoner, the situation of ANDF prisoners is yet unique. The prisoners at the ANDF were captured and detained as “enemy combatants” at Guantánamo and Bagram by U.S. forces and pursuant to U.S. law, policy and procedures. They were transferred from Guantánamo and Bagram to the ANDF pursuant to a bi-lateral agreement between the United States and Afghanistan. Their trials and convictions were based almost exclusively on evidence provided by the U.S. military. As such, there is an international aspect to their detentions and to the responsibility for the violations of their rights.

In addition, on March 20, 2008, the United Nations Security Council renewed the mandate of the UN Assistance Mission in Afghanistan (UNAMA), charging it, among other things, with “*assist[ing] in the full implementation of the fundamental freedoms and human rights provisions of the Afghan constitution and international treaties to which Afghanistan is a state party.*” Resolution 1806 (2008) further stresses the importance of “*accelerat[ing] the establishment of a fair and transparent justice system, strengthen the rule of law throughout the country,*” and “*[s]tresses in this context the importance of further progress in the reconstruction and reform of the prison sector in Afghanistan, in order to improve the respect for the rule of law and human rights therein.*” The UN Security Council added that it “*calls on the Afghan government, and the international community and international organizations*” to implement the

Afghanistan Compact, which has set benchmarks and timelines for progress on the rule of law and human rights.

Pursuant to this resolution, the United Nations, as well as the international community as a whole should work to ensure that Afghanistan is fully able to implement international rule of law and human rights standards providing for fair and impartial trials.

What are the obligations of the governments of Afghanistan, the United States, the United Nations, and the European Union?

To the Government of Afghanistan:

- Review without further delay the cases of remaining ANDF prisoners and immediately charge or release the prisoners.
- For prisoners who will be charged, notify them of the charges against them and their right to a lawyer.
- Ensure that every detainee who requests a lawyer receives one, and provide financial and logistical support and resources to ensure that prisoners actually receive effective representation.
- Commence trials within a reasonable period of time after charge.
- Do not admit any evidence obtained through torture or coercion, including such evidence provided by the U.S. military.

To the Government of the United States:

- Eliminate as a necessary condition for release from Guantánamo or Bagram that detainees must be detained at the ANDF and/or criminally prosecuted.
- Stop facilitating unfair trials with flawed evidence.
- Provide public and transparent information on the United States' involvement in the detention and judicial proceedings of ANDF prisoners.
- Uphold the highest rule of law and human rights standards in cooperating with the correctional and justice systems of Afghanistan.

To the United Nations:

Implement and enforce the UNAMA mandate to ensure fairness and transparency in the prison sector and justice system in Afghanistan, beginning with requesting access to the prisoners at the ANDF and asking the following questions of the Afghan government. Answers to these questions can and should be provided without delay.

- What are the names, nationalities, former places of detention, and dates of transfer of all prisoners at the ANDF?
- How many have been charged? Tried? What were the outcomes of the trials?
- Will district courts in Kabul continue to have jurisdiction over ANDF cases, or are there plans to give jurisdiction to a special national security court, as existed previously?
- Are the trials ongoing?
- What is the composition and mandate of the presidential commission?
- Has evidence obtained through torture or coercion been used as a basis to charge or convict ANDF prisoners? How do you establish that evidence provided by the U.S. military to the prosecution was not obtained through torture or coercion?

- Are there current efforts or plans to provide additional resources for the defense of ANDF prisoners? What is the existing capacity of defense counsel?
- Are transfers to the ANDF ongoing?
- What is the role of the United States in operations at the ANDF and in the prosecution of ANDF prisoners?

The Center for Constitutional Rights (CCR, www.ccrjustice.org) is dedicated to advancing and protecting the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights. Founded in 1966 by attorneys who represented civil rights movements in the South, CCR is a non-profit legal and educational organization committed to the creative use of law as a positive force for social change.

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