**Arbitrary Detention and Imminent Refoulement of Former Bagram Prison Detainees**

Submission to the UN Human Rights Committee

By the Allard K. Lowenstein International Human Rights Clinic

Prior to the Adoption of the List of Issues for the United States

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1. **Reporting Organization**
2. The Allard K. Lowenstein International Human Rights Clinic at Yale Law School, based in New Haven, Connecticut, undertakes projects on behalf of human rights organizations and individual victims of human rights abuses around the world. This submission was prepared by law student interns Yusef Al-Jarani, Alissa Fromkin, Mariana Olaizola, Amber Qureshi, and Louise Willocx under the supervision of Hope Metcalf, Executive Director of the Orville H. Schell, Jr. Center for International Human Rights, and Ryan Thoreson, Robert M. Cover-Allard K. Lowenstein Fellow in International Human Rights.
3. **Issue Summary**
4. This submission highlights violations of the International Covenant on Civil and Political Rights (ICCPR) stemming from U.S. counter-terrorism policies relating to arbitrary detention and refoulement of former U.S. detainees in Afghanistan. While the U.S. government formally transferred control of the Bagram prison to the Afghan government in 2013, it has failed to fulfill its responsibility to ensure that former U.S. detainees are provided their rights under the ICCPR.
5. We are aware of three former U.S. detainees, all of whom have been subjected to arbitrary detention in Afghanistan and at least one of whom has been forcibly transferred to his country of origin where he is at imminent risk of torture and death. Several months ago, Laçin (Musa) Akhmadjanov, Mr. Abdul Fatah, and Mr. Sa’id Jamaluddin were transferred from the Bagram prison to a detention center in Kabul, in anticipation of their forced repatriation. They have not been allowed access to counsel in either Bagram or Kabul. In or around December 2018, Mr. Sa’id Jamaluddin was forcibly returned to Tajikistan and is being held without access to counsel, human rights monitors, or any other means of communication. Mr. Akhmadjanov and Mr. Fatah face the prospect of forced deportation as well, which would likewise expose them to severe human rights violations and possible torture or death in their countries of origin.
6. These three cases highlight the failure of the United States to ensure that former U.S. detainees are provided adequate due process and remain free from torture. We urge the Human Rights Committee to hold the United States accountable for the consequences and legacy of its abusive counter-terrorism policies in Afghanistan.
7. **ICCPR Legal Framework and Prior Recommendations**
8. The following articles of the ICCPR are implicated by the arbitrary detention and refoulement of former U.S. detainees in Afghanistan:
	1. Article 7: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”
	2. Article 9(1): “Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”
	3. Article 9(4): “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.”
	4. Article 9(5): “Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.”
	5. Article 14(3): “In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: . . . (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; . . . (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing.”
9. In its concluding observations on the fourth periodic report of the United States, the U.N. Human Rights Committee stated that the United States should “end the system of administrative detention without charge or trial and ensure that any criminal cases against detainees held in Guantanamo and in military facilities in Afghanistan are dealt with through the criminal justice system rather than military commissions, and that those detainees are afforded the fair trial guarantees enshrined in article 14 of the Covenant.”[[1]](#footnote-1)
10. The Committee also stated that the United States “should strictly apply the absolute prohibition against refoulement under articles 6 and 7 of the Covenant; continue exercising the utmost care in evaluating diplomatic assurances, and refrain from relying on such assurances where it is not in a position to effectively monitor the treatment of such persons after their extradition, expulsion, transfer or return to other countries; and take appropriate remedial action when assurances are not fulfilled.”[[2]](#footnote-2)
11. In the U.S. government’s one-year follow-up response to the priority recommendations of the Human Rights Committee, the United States responded to the Committee’s concerns surrounding U.S. detention in Afghanistan by stating only that “[a]s of December 10, 2014, the Department of Defense no longer operates detention facilities in Afghanistan.”[[3]](#footnote-3)
12. **Current U.S. Government Policy or Practice**
13. Since the United States formally transferred control of the Bagram prison to Afghanistan, the United States has evaded responsibility for the continuing violations of the rights of former U.S. detainees under international law. This is especially concerning given that at least three former U.S. detainees continued to be arbitrarily held after the issuance of the Human Rights Committee’s last concluding observations on the United States in 2014, and at least one of those detainees has been forcibly returned to his country of origin where he faces the immediate risk of torture and death.
14. Mr. Laçin (Musa) Akhmadjanov is an Uzbek national who fled persecution from Uzbekistan in 2001 at the age of 21.[[4]](#footnote-4) The United States detained him at the Bagram Theatre Internment Facility from May 23, 2010 to December 2014 without charge or providing grounds for his detention.[[5]](#footnote-5) In December 2014, U.S. officials transferred him to the Afghan National Detention Facility, under the custody and control of Afghanistan.[[6]](#footnote-6) Mr. Akhmadjanov has been acquitted by Afghan courts of all charges under Afghan law but remains in custody.[[7]](#footnote-7)
15. Mr. Abdul Fatah and Mr. Sa’id Jamaluddin are stateless brothers originally from Tajikistan.[[8]](#footnote-8) Both were detained by the United States at the Bagram Theatre Internment Facility from March 2009 to December 2014.[[9]](#footnote-9) The United States never charged them or provided grounds for their arrest or detention.[[10]](#footnote-10) The brothers were transferred to the Afghanistan National Detention Facility in December 2014.[[11]](#footnote-11) Afghanistan continued holding them without a valid justification, despite an Afghan court determination in 2012 that they had already served their sentence.[[12]](#footnote-12)
16. In or around December 2018, Afghan officials forcibly transferred Mr. Jamaluddin to Tajikistan, where he faces likely torture or death. Family members of Mr. Jamaluddin have attempted to communicate with Mr. Jamaluddin but have been denied access. Furthermore, to our knowledge, Tajik officials have denied Mr. Jamaluddin access to counsel and other means of communication.
17. Afghan officials have also threatened to repatriate Mr. Akhmadjanov and Mr. Fatah to their home countries, where they face similar threats to their lives.[[13]](#footnote-13) Both men have been transferred from Bagram to a detention center in Kabul in anticipation of their forced transfer, which could occur at any moment.
18. **Human Rights Committee General Comments**
19. Article 9(1) prohibits arbitrary arrests and detentions and unlawful deprivations of liberty. As the Human Rights Committee has stated in paragraph 11 of its general comment No. 35 (2014) on liberty and security of person, “detention that lacks any legal basis is [] arbitrary. Unauthorized confinement of prisoners beyond the length of their sentences is arbitrary as well as unlawful.”[[14]](#footnote-14)
20. In general comment No. 35, the Committee also stated that article 9(4) of the ICCPR entitles anyone deprived of liberty to have a court “decide without delay on the lawfulness of the detention and order release if the detention is not lawful. It enshrines the principle of habeas corpus.”[[15]](#footnote-15) The “object of the right is release” and once a reviewing court orders release, “it must be complied with immediately.”[[16]](#footnote-16)
21. Article 9(5) provides the right to compensation for victims of unlawful detention. General comment No. 35 states that victims of unlawful arrest or detention “are entitled to financial compensation” for the “pecuniary and non-pecuniary harm resulting from the unlawful arrest or detention” in addition to other remedies.[[17]](#footnote-17)
22. General comment No. 35 also warns that “arbitrary detention creates risks of torture and ill-treatment . . . . Prolonged incommunicado detention violates article 9 and would generally be regarded as a violation of article 7 [right to be free from torture].”[[18]](#footnote-18)
23. In general comment No. 20 (1992) on the prohibition of torture or other cruel, inhuman or degrading treatment or punishment, the Human Rights Committee has mandated that states “must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement.”[[19]](#footnote-19)
24. The Human Rights Committee, in general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, has stated that article 14, subparagraph 3(b) requires that “the accused is granted prompt access to counsel. Counsel should be able to meet their clients in private and to communicate with the accused . . . lawyers should be able to advise and to represent persons charged with a criminal offence.”[[20]](#footnote-20)
25. **Other U.N. Body Recommendations**
26. In January 2017, the U.N. Working Group on Arbitrary Detention declared that the detention of Mr. Akhmadjanov, Mr. Fatah, and Mr. Jamaluddin was arbitrary and violated articles 2, 3, and 10 of the Universal Declaration of Human Rights (UDHR), and articles 9 and 14 of the ICCPR.[[21]](#footnote-21) It recommended the men be released immediately and compensated for their unlawful detention in accordance with article 9(5) of the ICCPR.[[22]](#footnote-22) Finally, the Working Group requested that the governments of Afghanistan and the United States provide information on what steps the two countries are taking to address the unlawful detention of Mr. Akhmadjanov, Mr. Fatah, and Mr. Jamaluddin.[[23]](#footnote-23)
27. The United States’ reply, dated 13 September 2016, confirmed the refoulement concerns and stated that the United States “continue[s] to discuss the detainees’ long-term disposition, taking into account Afghanistan’s domestic laws and international legal obligations.”[[24]](#footnote-24) The Afghan government did not reply to the Working Group.
28. **Recommended Questions**
29. What is the U.S. government doing to end violations of the rights of former U.S. detainees in Afghanistan who continue to be unlawfully and arbitrarily detained?
30. What is the U.S. government doing to ensure that Mr. Jamaluddin is returned to Afghanistan and released or resettled in a safe third country?
31. What is the U.S. government doing to ensure that Mr. Akhmadjanov and Mr. Fatah, formerly under U.S. detention and transferred by the U.S. to Afghan custody, are not refouled to their home countries where they will very likely face torture or death?
32. What is the U.S. government doing to ensure that former U.S. detainees held in Afghanistan and Tajikistan, including Mr. Akhmadjanov, Mr. Fatah and Mr. Jamaluddin, are provided their right to challenge their continued detention in court and have access to counsel?
33. What compensation will the U.S. government provide to former U.S. detainees, including Mr. Akhmadjanov, Mr. Fatah, and Mr. Jamaluddin, for the violation of their right against arbitrary detention in accordance with article 9(5) of the ICCPR?
34. **Suggested Recommendations**
35. The United States should acknowledge that it is directly responsible for the past and ongoing violations of Mr. Akhmadjanov, Mr. Fatah, and Mr. Jamaluddin’s rights to be free from arbitrary detention and torture and the right to life.
36. The United States should make efforts to ensure that Tajikistan will return Mr. Jamaluddin to Afghanistan where he can be released or resettled in a safe third country.
37. The United States should increase efforts to end the arbitrary and unlawful detention of former U.S. detainees held in Afghanistan, including Mr. Akhmadjanov and Mr. Fatah, by working to arrange their release to a third country or within Afghanistan.
38. The United States should make efforts to ensure that former U.S. detainees in Afghanistan, including Mr. Akhmadjanov and Mr. Fatah, are not refouled to their home countries where they will face torture or death.
39. The United States should make efforts to ensure former U.S. detainees held in Afghanistan and Tajikistan, including Mr. Akhmadjanov, Mr. Fatah and Mr. Jamaluddin, are provided their right to access counsel and courts, including in the process of resettlement.
40. The United States should provide adequate compensation to former U.S. detainees held in Afghanistan, including Mr. Akhmadjanov, Mr. Fatah, and Mr. Jamaluddin, for the violation of their right against arbitrary detention according to article 9(5) of the ICCPR.
41. The United States should cease to institute or operate detention facilities in foreign jurisdictions which hold individuals without adequate due process protections.
1. Human Rights Committee, Concluding observations on the fourth periodic report of the United States of America (CCPR/C/USA/CO/4) (2014), para. 21, https://tbinternet.ohchr.org/\_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fUSA%2fCO%2f4&Lang=en.. [↑](#footnote-ref-1)
2. *Id.*, para 13. [↑](#footnote-ref-2)
3. One-Year Follow-up Response of the United States of America to Priority Recommendations of the Human Rights Committee on its Fourth Periodic Report on the Implementation of the International Covenant on Civil and Political Rights, para. 28, https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/USA/INT\_CCPR\_FCO\_USA\_19957\_E.pdf. [↑](#footnote-ref-3)
4. Working Group on Arbitrary Detention, Opinion No. 53/2016 Concerning Laçin Akhmadjanov, A/HRC/WGAD/2016/53 (“WGAD Opinion No. 53”), http://ap.ohchr.org/documents/dpage\_e.aspx?si=A/HRC/WGAD/2016/53. [↑](#footnote-ref-4)
5. *Id*., paras. 7, 44. [↑](#footnote-ref-5)
6. *Id*., para. 9. [↑](#footnote-ref-6)
7. *Id*. [↑](#footnote-ref-7)
8. Working Group on Arbitrary Detention, Opinion No. 56/2016 Concerning Abdul Fatah and Sa’id Jamaluddin, A/HRC/WGAD/2016/56, A/HRC/WGAD/2016/56 (“WGAD Opinion No. 56”), http://ap.ohchr.org/documents/dpage\_e.aspx?si=A/HRC/WGAD/2016/56. [↑](#footnote-ref-8)
9. *Id*., para. 7. [↑](#footnote-ref-9)
10. *Id*., para. 40. [↑](#footnote-ref-10)
11. *Id*., para. 9. [↑](#footnote-ref-11)
12. *Id*., para. 50. [↑](#footnote-ref-12)
13. WGAD Opinion No. 53, para. 15; WGAD Opinion No. 56, paras. 13-14. [↑](#footnote-ref-13)
14. Human Rights Committee, General Comment No. 35, para. 11 (2014), https://tbinternet.ohchr.org/\_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2FGC%2F35&Lang=en. [↑](#footnote-ref-14)
15. *Id*., para. 39. [↑](#footnote-ref-15)
16. *Id*., para. 41. [↑](#footnote-ref-16)
17. *Id*., paras. 49-52. [↑](#footnote-ref-17)
18. *Id*., para. 56. [↑](#footnote-ref-18)
19. Human Rights Committee, General Comment No. 20, para. 9 (1992), https://tbinternet.ohchr.org/\_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fGEC%2f6621&Lang=en. [↑](#footnote-ref-19)
20. Human Rights Committee, General Comment No. 32, para. 34 (2007), https://tbinternet.ohchr.org/\_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f34&Lang=en. [↑](#footnote-ref-20)
21. WGAD Opinion No. 53, para. 65; WGAD Opinion No. 56, para. 61. [↑](#footnote-ref-21)
22. WGAD Opinion No. 53, para. 67; WGAD Opinion No. 56, para. 63. [↑](#footnote-ref-22)
23. WGAD Opinion No. 53, para. 69; WGAD Opinion No. 56, para. 65. [↑](#footnote-ref-23)
24. Letter, Keith M. Harper, U.S. Ambassador to the United Nations Human Rights Council, to Chair-Rapporteur Adjovi, September 13, 2016. [↑](#footnote-ref-24)