

CLOSING
BAGRAM
The Other Guantanamo



Repatriating Pakistani citizens
from U.S. detention in Afghanistan

About Justice Project Pakistan

Justice Project Pakistan is a legal action charity that provides pro bono legal representation to the most vulnerable prisoners facing the harshest punishments in Pakistan. Our clients include those facing the death penalty, the mentally ill, victims of police torture and detainees in the “war on terror”. Justice Project Pakistan was established in December 2009 and is based in Lahore, Pakistan.

Justice Project Pakistan’s vision is to employ strategic litigation to set legal precedents that reform the criminal justice system in Pakistan. We litigate innovatively, pursuing cases on behalf of individual clients that hold the potential to set precedents that allow those in similar conditions to better enforce their legal and human rights. We model a more equitable legal practice, inspiring and training a new generation of Pakistani lawyers to litigate strategically and challenge unjust laws and inhumane conditions.

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List of abbreviations

AACPR	Action in Aid of Civil Power Regulations
ACLU	American Civil Liberties Union
ATA 1997	Anti-Terrorism Act 1997
ATC	Anti-Terrorism Court
BSA	Bilateral Security Agreement
BTIF	Bagram Theater Internment Facility
DAC	Detainee Assistance Center
DFIP	Detention Facility in Parwan
DNI	Director of National Intelligence
DNMC	Do Not Meet Criteria
DOD	Department of Defense
DRB	Detainee Review Board
ECtHR	European Court of Human Rights
FATA	Federally Administered Tribal Areas
FOIA	Freedom Of Information Act
ICRC	International Committee of the Red Cross
IFTA 2013	Investigation for Fair Trial Act 2013
MFA	Ministry of Foreign Affairs
NDAA 2013	National Defense Appropriations Act for fiscal year 2013
SPA	Strategic Partnership Agreement
SPA 1952	Security of Pakistan Act 1952
TCN	Third Country National
UNAMA	United Nations Assistance Mission to Afghanistan
WPMO 1960	West Pakistan Maintenance of Public Order Ordinance 1960

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I. Executive Summary

You do not know what is going on here. What is in my heart would break yours. There are so many hardships, so many problems. [...] We are prisoners; we cannot say nor do anything. I don't know what will happen to me after this.

Javed, a current detainee, by phone to his uncle Mubashar¹

On 23 May, 2013 President Barack Obama delivered a speech at the National Defense University where he announced that after more than 12 years of war, “this war, like all wars, must end” and reiterated his pledge to close the controversial U.S. military detention facility at Guantanamo Bay.² In Afghanistan, the United States has operated a similar detention facility for over a decade, often referred to as “Bagram prison”, or the Detention Facility in Parwan (DFIP).³ At its height, the DFIP held over 3,000 detainees. Since its very early years, it was marred by allegations of detainee abuse.⁴ More recently it has been cast as a violation of Afghan sovereignty.⁵ For many Afghans, Bagram continues to symbolize much of what has gone wrong with the U.S. mission in Afghanistan.

In March 2013, after years of negotiation, the U.S. military finally handed over the DFIP and Afghan detainees to Afghan authorities.⁶ However, despite commitments that the United States is no longer operating prisons on Afghan soil, the United States continues to hold more than 60 non-Afghan detainees or Third Country Nationals (TCNs), in indefinite detention without charge, trial, or access to a lawyer.⁷ After years of detention, and with U.S. forces withdrawing from Afghanistan, these detainees are at grave risk of falling into the kind of indefinite detention limbo that has befallen those at Guantanamo Bay.

The majority of these detainees are Pakistani citizens, some of whom have been in detention since 2002. Some detainees have already been “cleared” for release in 2010, yet remain trapped in indefinite detention. After years of being held by the U.S. government without charge, trial or any real progress on their cases, Pakistani detainees are losing hope. They doubt the value and

¹ Justice Project Pakistan interview with Mubashar (real name, date, location withheld).

² President Barack Obama, Counter-terrorism address at the National Defense University (Full transcript), 23 May, 2013 <http://www.guardian.co.uk/world/2013/may/23/obama-drones-guantanamo-speech-text>.

³ The portion of the facility where Afghan detainees are held is called the Afghan National Detention Facility – Parwan (ANDF-P).

⁴ Hilary Andersson, “Afghans ‘abused at secret prison’ at Bagram airbase”, *BBC News*, 15 April, 2010, <http://news.bbc.co.uk/1/hi/8621973.stm>; Anna Coren, “Ex-Afghan prisoner claims Bagram abuse”, *CNN*, 25 September, 2012, <http://edition.cnn.com/2012/09/24/world/asia/afghan-prisoner>.

⁵ Kate Clark, “‘The other Guantanamo’: Bagram and the struggle for sovereignty”, *Afghanistan Analysts Network*, 10 September, 2012, <http://www.afghanistan-analysts.org/the-other-guantanamo-bagram-and-the-struggle-for-sovereignty>.

⁶ There remains controversy over a certain number of Afghan detainees, the U.S. wants to hold onto indefinitely. See Daphne Eviatar, “US detention at Bagram: it’s not over till it’s over”, *Huffington Post*, 25 March, 2013, http://www.huffingtonpost.com/daphne-eviatar/us-detention-at-bagram-it_b_2950162.html.

⁷ Note that the number of TCN detainees has grown from 50 in September 2012 to 66 in June 2013. Letter from the President – Regarding the War Powers Resolution, 14 June, 2013, <http://www.whitehouse.gov/the-press-office/2013/06/14/letter-president-regarding-war-powers-resolution>.

independence of the U.S. review system. They feel abandoned by their own government after years of failing and refusing to act or assist them.

Across the border in Pakistan, detainees' families know little about their condition and nothing about their eventual fate. For years, families have been waiting for news, their lives also in limbo. They endure emotional, economic, and social burdens from the long absence of their loved ones, all worsened by the restrictions the U.S. military imposes on communication. Sons grow up never knowing their fathers. Mothers die without ever again seeing their sons. Wives strive to keep hope that their husbands will someday return. Neither the United States nor Pakistan provides families with any direct information regarding their relatives' legal status, or the conditions under which they could ever be released. Families blame the Pakistani government for failing to provide them with urgently needed assistance and basic information—and for failing to defend the rights of their citizens in U.S. detention. Families also denounce the United States as hypocritical, questioning why it continues to detain their relatives in indefinite detention without charge or trial, while proclaiming to champion human rights and the rule of law.

Critical to resolving the fate of these detainees are the repatriation negotiations between the U.S. and Pakistani governments. Much like Afghan detainees in the past, TCN cases are reviewed every six months not by a court but by an administrative, Detainee Review Board (DRB), staffed entirely by U.S. military personnel. Any recommendation for transfer or release by the DRB is only the first step, however. The receiving country and the United States must then complete what are often lengthy, bureaucratic negotiations over the terms of repatriation.

Negotiations between the United States and Pakistan over detainees held at the DFIP have dragged on for years. At the center lie humane treatment and security assurances. They guarantee that any transferred detainee will be treated humanely by the Pakistani government, and that any potential future threat the United States perceives detainees to pose is sufficiently mitigated.

The United States is under an obligation in international law, not to send an individual to a country where they are at a real risk of torture. To fully comply with this obligation, the United States must ensure that any humane treatment assurances sought from the Pakistani government effectively protect the detainee against a real risk of torture. More than mere promises, these should include concrete measures such as access to legal counsel, which will effectively address the record of torture and detainee abuse in Pakistan.

The U.S. government is also seeking security assurances from Pakistan, to assuage fears detainees might return to or join hostilities against the United States. The U.S. government must ensure that the threat assessments are based on sufficient and credible evidence. It must avoid the reportedly overstated fears of recidivism that have characterized threat assessments of Guantanamo Bay detainees. Furthermore, due process flaws of the U.S. detention regime are particularly acute for TCN detainees. Limited witness participation at DRBs denies detainees the possibility to present an alternative narrative to the U.S. military's evidence against them. In turn, this makes changing U.S. threat perceptions virtually impossible. It should also be recognized that Pakistan has an extensive legal framework and security apparatus. This can help address U.S. security concerns and reduce the risk the United States perceives detainees to pose. Finally, the risk a detainee is believed to pose

must be weighed against the enormous legal, moral and political costs of continuing their indefinite detention.

While agreement on assurances has long been the central obstacle to repatriation, both governments have failed to adopt clear and consistent policies on repatriation.

The Pakistani government has failed to meet its domestic and international duty to uphold the rights of its citizens in U.S. detention. It has failed to invest the necessary political and bureaucratic capital and failed to adopt clear policies on repatriation. The United States has placed little priority on resolving these detainees' cases, failed to adopt standard policies on repatriation—particularly on humane treatment and security assurances—and has tended to overstate the potential security risks that detainees pose. Though the United States is withdrawing combat troops by end 2014, there are troubling indications that it is seeking to continue detaining TCNs long past that deadline.⁸ This raises the worrying specter of another Guantanamo Bay on Afghan soil.

The time is ripe for both Pakistan and the United States to bring an end to the detention of Pakistani citizens at the DFIP. With the end of the U.S. combat role in 2014, and President Karzai making clear that the Afghan government will not take custody of TCN detainees, the United States is running out of time.⁹ Bringing an end to the U.S. war in Afghanistan will mean releasing, or repatriating detainees that it is still holding. It must act now to ensure that it does not repeat the injustice of the past, and condemn TCN detainees to a fate similar to that of Guantanamo detainees, making Bagram yet another “symbol around the world for an America that flouts the rule of law.”¹⁰

In Pakistan, the first peaceful and democratic political transition in the country's history is a unique opportunity to change course. By forcefully engaging with the U.S. government and acting decisively, the new Pakistani government can establish itself as a strong U.S. partner and a nation that upholds its citizens' rights. The Pakistani government also has the capability of addressing many of the humane treatment and security concerns that have thus far obstructed progress on negotiations. Dedicating the requisite political will and crafting innovative policy solutions that draw on the resources of both countries could radically change the prospect of successfully resolving detainees' cases before it is too late. Failure to do so will result in the indefinite detention of Pakistani citizens, prolonging the injustice and suffering of detainees and their families. It will leave an indelible mark on both the United States and Pakistan for years to come.

⁸ Kevin Sieff, “In Afghanistan, a second Guantanamo”, *The Washington Post*, 4 August, 2013, http://articles.washingtonpost.com/2013-08-04/world/41067331_1_detention-center-afghanistan-guantanamo-bay/2.

⁹ Emma Graham-Harrison, “US handover of Afghan prisoners to Kabul increases pressure on UK”, *The Guardian*, 24 March, 2013, <http://www.guardian.co.uk/world/2013/mar/24/us-handover-afghan-prisoners-pressure-uk>.

¹⁰ President Barack Obama, Counter-terrorism address at the National Defense University (Full transcript), 23 May, 2013 <http://www.guardian.co.uk/world/2013/may/23/obama-drones-guantanamo-speech-text>.



A picture of Kaleem taken before his detention. Kaleem was 14 years old when he disappeared from Pakistan in 2008. He was “cleared” for release in 2010.

II. Methodology

This report aims to document the views and experiences of Pakistani detainees held at the DFIP as well as those of their family members. It also seeks to assess U.S. and Pakistani government efforts at resolving their cases, ending their indefinite detention without trial, and repatriating detainees to their home country. This report is based on 18 interviews—conducted by Justice Project Pakistan (JPP)—with family members of current detainees and two interviews with ex-detainees. Out of approximately 40 Pakistani detainees held at the DFIP, 11 detainees' families were contacted and interviewed for this report. In addition, interviews were conducted with U.S., Pakistani and Afghan government officials in Washington, D.C., Islamabad, and Kabul, including officials from the U.S. Department of State, Pakistani Ministries of Foreign Affairs, Interior and Law & Justice and Afghan Ministry of Defense. Interviews were also conducted with several independent experts and former officials with first-hand knowledge of the issues. Interviews were conducted between October 2012 and May 2013. Interviews were conducted in English, Urdu and, when necessary, Dari with the help of a translator. The names of all ex-detainees and detainee family members interviewed have been changed to protect their identities.

JPP also acts as legal representatives of detainees and their families in ongoing litigation in the Lahore High Court. JPP's litigation seeks to compel the Pakistani government to take necessary steps to repatriate its citizens held at the DFIP. Interviews for this report were not conducted as part of or pursuant to ongoing litigation. They were conducted for the purpose of documenting the experiences and views of detainees and assessing the status and prospects of ongoing negotiations regarding their repatriation and release.

Information for this report was also obtained through documents obtained through JPP's litigation and U.S. government documents related to DRB proceedings—made available through Freedom of Information Act (FOIA) requests by the American Civil Liberties Union (ACLU)—and publicly available information.

JPP faced several challenges conducting interviews for this report. 80 percent of the families of current Pakistani detainees live in remote areas, often in zones of conflict in the Federally Administered Tribal Areas (FATA) or Balochistan. JPP could not contact many of these families due to the security situation and limited telecommunications coverage. For these reasons, JPP could only conduct interviews with the relatives of current detainees who were willing to travel to Pakistan's larger cities. Families often travelled long distances and lost days of work in order to share stories and experiences with JPP interviewers. One ex-detainee denied JPP's request for an interview, stating that he was too traumatized by his detention.

To avoid burdening the families, JPP sought to interview two members of a detainee's family, usually male members who were able to take time away from work. Because of cultural apprehensions, JPP was unable to meet most female relatives of detainees—only two female relatives were interviewed. Furthermore, due to old age and financial difficulties, many of the parents of current detainees were unable to meet with JPP interviewers. For interviewees who had to take time off work, JPP provided reimbursement for cost of travel, accommodation and a per diem.

The U.S. government did not respond to specific detainees' and detainees' family members' claims regarding treatment, conditions, and criticisms of due process. Family members also have quite limited knowledge of the conditions and procedural or legal status of detainees given U.S. restrictions on the nature and substance of communications between detainees and their family members. However, criticisms and claims regarding problems in due process afforded detainees, as well as understanding of the status of their cases, and repatriation negotiations were consistent among detainees and detainees' families and broadly consistent with reporting and findings of other non-governmental organizations.

Despite several requests at multiple, and at the highest, levels the Pakistani Ministry of Foreign Affairs (MFA) in Islamabad denied requests for interviews or for answers to written questions. JPP sought several times to meet with U.S. Department of Defense (DOD) officials in Washington, D.C., specifically with the office of the Deputy Assistant Secretary of Defense for Detainee Policy. Though JPP has met with DOD officials on detainee policy several times before, JPP was unable to secure a meeting in time for publication of the report. Requests for answers to written questions were submitted but no answer was received as of the date of publication of this report.



A picture of Javed taken during his detention. In 2004 Javed was kidnapped from Karachi, Pakistan by unknown individuals. Javed's father died of a heart attack shortly after his son's disappearance.

III. Background

a) Overview

In response to the 11 September, 2001 attacks, the United States launched a military offensive in Afghanistan to target al-Qaeda and remove the Taliban from power. As part of its military operations, the United States established several detention centers in Afghanistan, the largest of which was adjacent to Bagram Air Base, approximately 60 kilometers north of Kabul.

Detention of suspected militants and terrorists at this facility, initially called the Bagram Theater Internment Facility (BTIF), began shortly after the offensive in Afghanistan.¹¹ In 2004, because of difficulties detaining additional individuals at Guantanamo Bay, BTIF became the primary detention site for suspected militants and terrorists—including Afghans and non-Afghans captured as part of the United States’ “global war on terror.”¹² By 2008 the facility held approximately 630 detainees, more than double the number of detainees at Guantanamo.¹³ With space and resources under strain, and concerns regarding confinement conditions and treatment rising, BTIF was shut down and replaced by a permanent detention facility called the DFIP, in operation since September 2009.¹⁴ As the conflict in Afghanistan intensified, the number of detainees held at the DFIP rose to over 3,000 by September 2012.¹⁵

In addition to thousands of Afghan nationals, the U.S. military has also held TCNs at the DFIP. Currently, the United States holds over 60 TCNs, around 40 of whom are from Pakistan.¹⁶ Unlike Afghan detainees, TCNs have never been eligible for outright release or prosecution by Afghan authorities. Their only options are transfer to their home country for release, rehabilitation or prosecution—or continued internment at the DFIP.¹⁷

b) DFIP Handover and the Fate of TCNs

For years, U.S. detention operations have been a major point of contention between the U.S. and Afghan governments. The DFIP, or “Bagram” as it has often been referred to popularly in Afghanistan, became a potent symbol of the U.S. and international military presence in Afghanistan.

¹¹ Tim Golden, “U.S. prison grows beyond capacity in Afghanistan”, *The New York Times*, 7 January, 2008, <http://www.nytimes.com/2008/01/07/world/asia/07iht-07bagram.9047054.html>.

¹² Transfers from BTIF to Guantanamo Bay ceased in 2004, largely due to the extension of *habeas corpus* rights to Guantanamo Bay detainees.

¹³ Tim Golden, “Foiling U.S. plan, prison expands in Afghanistan”, *The New York Times*, 7 January, 2008, <http://www.nytimes.com/2008/01/07/world/asia/07bagram.html?ref=asia&pagewanted=all>; “Bagram detention centre now twice the size of Guantanamo” *The Independent*, 8 January, 2008, <http://www.independent.co.uk/news/world/asia/bagram-detention-centre-now-twice-the-size-of-guantanamo-768803.html>.

¹⁴ Golden, “U.S. prison grows beyond capacity in Afghanistan”, 7 January, 2008.

¹⁵ “Issues linger”, *The New York Times*, September 10, 2012.

¹⁶ “US Army hands over Bagram Prison to Afghanistan”, *BBC News*, 25 March, 2013, <http://www.bbc.co.uk/news/world-asia-21922047>; Letter from the President – Regarding the War Powers Resolution, 14 June, 2013.

¹⁷ Department of Defense internal memorandums released through ACLU FOIA request, http://www.aclu.org/files/pdfs/natsec/bagram20100514/07bagrampolicy_30-92.pdf.

Negotiations for transfer and control of the DFIP from U.S. to Afghan authorities began in 2010. As these dragged on and the United States continued to maintain control over the facility and the detainees, the Afghan government increasingly viewed the handover as a matter of national sovereignty.¹⁸ After several deadlines for the transfer of authority passed without a successful handover, the Afghan government made control over the DFIP and Afghan detainees a precondition for a Strategic Partnership Agreement (SPA).¹⁹ The SPA provides a framework for continued cooperation between the U.S. and Afghan governments after the 2014 drawdown.²⁰ It is also the basis for negotiations of the Bilateral Security Agreement, which will authorize and govern the U.S. military presence and operations in Afghanistan post-2014.²¹

On 9 March, 2012, the governments of the United States and Afghanistan signed a Memorandum of Understanding (Detentions MoU) to transfer control of the DFIP from the U.S. to the Afghan government within six months.²² However, disagreements over the meaning of key provisions of the Detentions MoU arose, relating to detention authority over future captures and the adoption of an Afghan internment regime. As a result, the United States failed to hand over full control of the DFIP within the specified timeframe and suspended the detainee transfer process.²³ By late March 2013, six months after the initial handover deadline had passed, the U.S. and Afghan governments signed a new MoU which—according to the Afghan government—does not authorize detention without trial and does not grant the United States a veto on detainee releases.²⁴ Both governments announced that they had finally resolved their differences and completed the transfer of the DFIP and its approximately 3,000 Afghan detainees.²⁵

However, the highly troubled handover of the DFIP only impacted Afghan detainees.²⁶ The United States continues to have custody and full authority over roughly 60 TCNs, seemingly in contravention

¹⁸ “US unveils Bagram handover plan”, *Al-Jazeera English*, 27 February, 2010, <http://www.aljazeera.com/news/asia/2010/02/2010227134828232750.html>.

¹⁹ Kate Clark, “The Bagram Memorandum: Handing over ‘the Other Guantanamo’”, *The Afghanistan Analysts Network*, 21 March, 2012, www.aan-afghanistan.com/print.asp?id=2619.

²⁰ Emma-Graham Harrison, “Afghanistan and US agree on strategic partnership document”, *The Guardian*, 22 April, 2012, <http://www.guardian.co.uk/world/2012/apr/22/afghanistan-us-strategic-partnership-document>.

²¹ Ibid.

²² Ibid.

²³ Open Society Foundations, “Remaking Bagram: The creation of an Afghan internment regime and the Divide over U.S. detention power”, 6 September, 2012, <http://www.opensocietyfoundations.org/sites/default/files/BagramReportEnglish.pdf>; “US army hands over Bagram”, *BBC News*, 25 March, 2013.

²⁴ Kate Clark, “The Other Guantanamo 5: A New MoU for Bagram and, Finally a Handover”, *The Afghanistan Analysts Network*, 24 March 2013, www.aan-afghanistan.org/print.asp?id=3310. Unlike the 2012 MoU, the 2013 is a classified document. Therefore, it remains unclear whether the 2013 MoU actually resolves the core disputes between the two governments that led to the initial suspension of the handover - including the legality of internment under Afghan law, U.S. veto power over releases and the process for handling detainees captured in post-handover U.S. operations.

²⁵ “US army hands over Bagram” *BBC News*, 25 March, 2013.

²⁶ Open Society Foundations, “Remaking Bagram: The creation of an Afghan internment regime and the Divide over U.S. detention power”, 6 September, 2012, <http://www.opensocietyfoundations.org/sites/default/files/BagramReportEnglish.pdf>. The 2012 MoU is vaguely worded and does not explicitly exclude TCNs from handover of detainees from the U.S. to Afghan authority; however, Afghan and U.S. officials at the time agreed separately that the 2012 MoU did not apply to TCNs. Given that the MoU signed in 2013 is classified, it is unknown whether it too carves out an exception for continued U.S. detention of TCNs.

of a provision of the 2012 Detentions MoU, prohibiting the United States from operating prisons on Afghan soil.

Since 2010, the U.S. has repeatedly expressed its intention to transfer TCNs back to their home countries.²⁷ Yet the process has dragged on for years, with very little progress made, leaving detainees and their families completely uncertain as to when or whether they will ever be released or their cases decided. U.S. failure to craft a clear policy regarding TCN repatriations, as well as poor diplomatic relations with and political instability in home countries have all obscured and complicated an already opaque and cumbersome process.

With the U.S. withdrawal of combat forces on the horizon, and the handover of Afghan detainees to Afghan authorities now complete, the continued detention of TCNs raises the specter of another Guantanamo Bay on Afghan soil. TCNs, some of whom have already been recommended for release by the detention review system described below, are falling into a dangerous legal and political limbo—similar to that of many Guantanamo detainees. Afghan officials have insisted they will not permit the U.S. to operate detention centers on Afghan soil.²⁸ But the United States continues to have control and custody over TCNs in the DFIP, outside of the jurisdiction of any courts and law, and with no certainty as to when such detention power will end.²⁹

c) Due process for detainees

Since 2009 DRBs, administrative boards staffed entirely by U.S. military officers, regularly review the status of Afghan and TCN detainees.³⁰ A detainee's status is first reviewed within 60 days of his transfer to DFIP, after which DRB hearings are held every six months.³¹ Detainees are not permitted access to independent legal counsel. Instead, they are assigned a "personal representative" (PR), a non-legally trained member of the U.S. military who is supposed to represent the detainee's best interest before the DRB.³²

DRB hearings are open to the detainee only when unclassified evidence is presented. In this portion of the hearing, detainees may be present and call witnesses, question called witnesses, make

²⁷ "US to transfer Bagram detainees", *Al-Jazeera English*, 27 April, 2010, <http://www.aljazeera.com/news/asia/2010/04/20104278111295558.html>; Peter Finn and Julie Tate, "Administration looking into repatriating non-Afghan detainees at U.S.-run prison", 24 January, 2012, http://www.washingtonpost.com/world/national-security/administration-looking-intorepatriating-non-afghan-detainees-at-us-run-prison/2012/01/23/gIQAzsvsLQ_story.html/.

²⁸ Rod Nordland, "Issues Linger as Afghans Take Control of a Prison", *The New York Times*, 10 September, 2012, http://www.nytimes.com/2012/09/11/world/asia/parwan-prison-at-bagram-transferred-to-afghans-at-least-formally.html?_r=0.

²⁹ Kevin Sieff, "In Afghanistan, a second Guantanamo," *Washington Post*, 4 August, 2013, http://articles.washingtonpost.com/2013-08-04/world/41067331_1_detention-center-afghanistan-guantanamo-bay.

³⁰ Department of Defense internal policy memorandums, http://www.aclu.org/files/pdfs/natsec/bagram20100514/02bagrampolicy_1-8_20090422.pdf, p. 8. The review system was in place for Afghan detainees until the handover of detention authority to Afghanistan.

³¹ Ibid., p.7.

³² Department of Defense internal policy memorandums, http://www.aclu.org/files/pdfs/natsec/bagram20100514/07bagrampolicy_30-92.pdf, ps.9-10.

statements to the DRB and present documentary evidence.³³ A closed session then follows, where only U.S. military personnel are allowed and classified evidence is presented, denying the detainee the possibility to challenge evidence brought against him.³⁴ This includes hearsay evidence gathered by U.S. informants or personnel and intelligence files, including photographs and audio/video recordings.³⁵ At no time are detainees permitted to consult or communicate with a lawyer, even those that are represented by outside counsel. JPP has sought to communicate directly with its clients at DFIP for the past three years, which the DOD continues to deny.

Upon reviewing a detainee's case, the DRB issues a recommendation of continued internment, release or transfer for criminal prosecution or participation in a reintegration programme. The commanding officer of the DFIP then decides whether to approve the DRB's recommendation or not.³⁶

For most Afghan detainees, a recommendation for release or prosecution often led to being transferred out of U.S. detention—and a final disposition of their case. For TCNs however, a recommendation for repatriation to their home country or resettlement in a third country brings no such resolution. It is only the beginning of a long, politicized process. Before any transfer can take place, the United States and receiving states must come to an agreement on several critical issues.³⁷

The first step is confirmation of the detainee's nationality, which has taken years in some cases. In an effort to fulfill its *non-refoulement* obligations under international law, the United States then requests humane treatment assurances from the receiving State.³⁸ *Non-refoulement* prohibits a State from transferring an individual to another State where he may face a real risk of torture or inhumane treatment.³⁹ Much like the prohibition on torture, it is an absolute principle allowing for no exceptions.⁴⁰ According to international case-law, diplomatic assurances alone do not satisfy a State's international legal obligation.⁴¹ If such assurances are requested, they must be put in context with other relevant factors, such as the political and human rights situation of the receiving State. They must also be credible enough to mitigate the risk of torture or ill-treatment, by for example

³³ Department of Defense internal policy memorandums, http://www.aclu.org/files/pdfs/natsec/bagram20100514/07bagrampolicy_30-92.pdf, ps. 5-7.

³⁴ Ibid.

³⁵ Human Rights First, "Detained and Denied in Afghanistan: How to Make U.S. Detention Comply with the Law", May 2011, ps. 9-10.

³⁶ http://www.aclu.org/files/pdfs/natsec/bagram20100514/07bagrampolicy_30-92.pdf, p. 7

³⁷ CM No. 3196/2011 in WP No. 21073/2010 *Ms. Sultana Noon vs. Federation of Pakistan*, para. 4; Reply filed by the MFA in *Sultana Noon vs. Federation of Pakistan*, 11 July, 2012, para. 9.

³⁸ Diplomatic Note No. 2011/12 POL, US Embassy Islamabad to MFA, 23 May 2012.

³⁹ Article 3(1) United Nations Convention Against Torture.

⁴⁰ Human Rights Watch, "Still at Risk: Diplomatic Assurances No Safeguard Against Torture", April 2005, p. 7. Note however that Article 32(1) of the 1951 Convention Relating to the Status of Refugees allows for expulsion on national security grounds.

⁴¹ See *Chahal v. United Kingdom*, Application No. 22414/93, European Court of Human Rights Grand Chamber, 15 November, 1996, [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58004#{"itemid":"\[001-58004"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58004#{); *Agiza v. Sweden*, Communication No. 233/2003, UN Doc CAT/C/34/D/233/2003; *Mohammed Alzery v. Sweden*, CCPR/C/88/D/1416/2005, UN Human Rights Committee, 10 November 2006; *Saadi v. Italy*, Application No. 37201/06, European Court of Human Rights Grand Chamber, 28 February, 2008, [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-85276#{"itemid":"\[001-85276"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-85276#{); *Othman (Abu Qatada) v. United Kingdom*, Application No. 8139/09, European Court of Human Rights Chamber, 17 January, 2012, [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-108629# {"itemid":"\[001-108629"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-108629#{)

allowing for effective monitoring mechanisms upon return.⁴² The U.S. government also requires security guarantees from receiving States to ensure that repatriated detainees do not re-engage in terrorism or militancy and no longer represent a threat to the United States and its allies. Lastly, detainees must secure an exit visa from the Afghan authorities.

Even though the U.S. government has been holding TCNs for over a decade in detention without trial, it has failed to craft regular policies or strike agreements with TCN home country governments. Despite over ten years of grappling with this issue, the U.S. and Pakistani governments still have no clear, consistent bilateral processes and policies for securing the release and repatriation of detainees.

d) Litigation efforts

Human rights organizations and independent observers have decried the lack of adequate due process guarantees under the DRB system and observed that detainees do not have a meaningful option to challenge their detention.⁴³

For TCNs, the deficiencies in due process are particularly acute. PRs are generally unable to conduct full investigations as most of the detainee's families and relations are residing in foreign countries. Because their witnesses and other evidence are located outside of Afghanistan, TCNs are also generally unable to present witnesses and challenge U.S. military determinations. Since negotiations on assurances are held strictly between the U.S. government and the receiving State, TCNs have little understanding of the negotiation process and limited input into the humanitarian assurances that will protect them upon their return.

These serious deficiencies in the due process afforded detainees have led to several litigation efforts to ensure that detainees' rights are protected and that their continued detention is in compliance with international law.

In September 2006, the U.S. District Court for the District of Columbia (DC) entertained a writ of habeas corpus on behalf of Yemeni detainee Fadi Al-Maqaleh.⁴⁴ In 2009, Judge John D. Bates held that DFIP detainees were entitled to the same habeas corpus review as those detained in Guantanamo Bay. The decision was later overturned in May 2010 by a DC District Court of Appeal, which distinguished detentions at the DFIP on two grounds: the United States has shown no intention of permanently remaining at Bagram and the DFIP is located in an active war zone. Applying the 2010 decision of the Court of Appeal, Judge Bates dismissed the habeas petitions of the

⁴² Ibid.

⁴³ Amnesty International, "The 'New' Bagram Unveiled: But Will There be Change", 23 November, 2009, <http://www.amnesty.org.au/hrs/comments/22159>; Andrea Prasow, "The Bagram Detainee Review Boards: Better, But Still Falling Short", 1 June, 2010, <http://www.hrw.org/news/2010/06/02/bagram-detainee-review-boards-better-still-falling-short>; Human Rights First, "Detained and denied in Afghanistan", p. 13; Afghanistan Independent Human Rights Commission and Open Society Foundations, "Torture, Transfers, and Denial of Due Process: The Treatment of Conflict-Related Detainees in Afghanistan", March 17, 2012, <http://www.aihrc.org.af/media/files/AIHRC%20OSF%20Detentions%20Report%20English%20Final%2017-3-2012.pdf>.

⁴⁴ International Justice Network, Al-Maqaleh Client Overview, <http://www.ijnetwork.org/clients/226-fadi-al-maqaleh>.

Maqaleh petitioners in October 2012.⁴⁵ The *Maqaleh* petitioners have since appealed Judge Bates October 2012 decision. Lawyers for Fadi Al-Maqaleh have sought permission to visit their client at the DFIP, but were denied access by DOD upon arrival in Afghanistan.

In April 2009, the ACLU filed a FOIA request pertaining to the detention and treatment of detainees held at the DFIP.⁴⁶ The request has been successful in obtaining a large number of redacted documents, including lists of detainees held at the DFIP, U.S. government policy memorandums and transcripts of DRB hearings of both Afghan and TCN detainees.⁴⁷

Courts in the United Kingdom entertained a habeas petition regarding Yunus Rahmatullah, a Pakistani detainee initially captured by UK forces in Iraq but later handed over to U.S. forces who illegally transferred him to the DFIP.⁴⁸ Petitioners argued that pursuant to a MoU between the UK and the U.S. governments, the UK government had sufficient control over the detention to request his return. The UK government denied having power over the detention to satisfy a writ of habeas corpus.⁴⁹ On 31 October 2012, the Supreme Court held his transfer to the DFIP and current detention, long after hostilities in Iraq have ended, as a *prima facie* violation of international law.⁵⁰

In October 2010, JPP filed a writ petition in the Lahore High Court seeking the repatriation of Pakistani citizens held at DFIP. JPP argued that the Pakistani government is under a constitutional obligation to ensure the protection of the rights afforded to its citizens by domestic and international law. The Court has repeatedly ruled in JPP's favor, imposing a positive duty on the Pakistani government to assist and repatriate its citizens.⁵¹ Since 2010, JPP's litigation has been effective at increasing the number Pakistani government visits to the DFIP and confirming the nationality of all Pakistani detainees.⁵² However, the Pakistani government has failed to take action beyond those ordered by the Lahore High Court. Though the Ministry of Foreign Affairs announced the return of six Pakistani detainees from the DFIP in October 2012, they remain in detention, raising serious questions regarding the Pakistani and U.S. governments' actual progress on repatriation negotiations. For detainees and their families, after years of uncertainty and detention without trial, such negotiations happen in far-away capitals, between unknown bureaucrats and politicians, making it difficult to hold on to the hope that they will ever have justice, or see their each other again.

⁴⁵ International Justice Network, "Judge Dismisses Case of Bagram Detainees, Attorneys Vow to Appeal," October 12, 2012, <http://ijnetwork.org/ijn-news-newsroom-53/277-judge-dismisses-case-of-bagram-detainees-attorneys-vow-to-appeal>.

⁴⁶ American Civil Liberties Union, Bagram FOIA, <http://www.aclu.org/national-security/bagram-foia>.

⁴⁷ American Civil Liberties Union, Bagram Documents Released under FOIA, March 14, 2013, <http://www.aclu.org/national-security/bagram-documents-released-under-foia>.

⁴⁸ *Yunus Rahmatullah v. Secretary of State for Foreign and Commonwealth Affairs and Secretary of State for Defence* [2011] EWCA Civ 1540.

⁴⁹ Ibid.

⁵⁰ *Secretary of State for Foreign and Commonwealth Affairs and another v Yunus Rahmatullah* [2012] UKSC 48 at 40.

⁵¹ *Sultana Noon vs. Federation of Pakistan*, order dated 27 September, 2011; *Sultana Noon vs. Federation of Pakistan*, order dated 20 January, 2012.

⁵² *Sultana Noon vs. Federation of Pakistan*, order dated 28 May, 2012.



Nargis holding a picture of her husband Maqsood. Nargis and Maqsood got married in 2009. Maqsood disappeared in 2010.

IV. Experiences of families and ex-detainees

After a while I lost all hope that I would ever leave Bagram. I accepted that I would never be free. Sometimes the soldiers would tell me I would be released; but I never believed them.

Jibran, ex-detainee released from the DFIP in 2009⁵³

Who will answer for the nine years of illegal detention the Americans have put him in? They locked him up without any reason. Where in the world is that considered justice?

Imran, brother of current DFIP detainee⁵⁴

After years of detention without charge or trial, and with no end in sight, detainees are losing all hope of ever returning home. The effects of their indefinite detention are felt in Pakistan. Their families have to bear the financial, emotional and social impact of their absence. With little information about their relatives' cases, and the review and repatriation processes, families of current detainees feel powerless. Though the United States has already handed over the vast majority of Afghan detainees to Afghan authorities—a substantial number of whom have now been charged and tried or released—Pakistani detainees still face an unknown future.⁵⁵ Detainees and their families feel abandoned by their own government, which has failed to provide them with information and for years done little to secure their release. They are also angry at the U.S. government for what they view as unjust detention, a lack of real due process, and for leaving detainees trapped in a legal limbo, unsure of when, how, or if they will ever have their day in court, or be reunited with their families.

a) Detainees in Despair

After years of detention without trial, and with no change in their circumstances, detainees have little faith in the U.S. detainee review and repatriation process.⁵⁶ They express distrust of their U.S. military representatives and criticize the quality of evidence presented against them. Even when detainees are “cleared” for transfer or release by DRBs, they nevertheless remain in detention, often for many years.⁵⁷ With their fate left to political negotiations over repatriation, many detainees have lost hope that their cases will ever be resolved, and are growing increasingly desperate.

Ayaz, a boyish man barely in his 20s, is one of the lucky few to have been released from the DFIP. In 2005, at only 15 years of age, Ayaz travelled to Afghanistan and found work in a restaurant. According to Ayaz, he had been working at the restaurant for several weeks when one morning U.S.

⁵³ Justice Project Pakistan interview with Jibran, November 2012 (real name, location withheld).

⁵⁴ Justice Project Pakistan interview with Imran, April 2013 (real name, location withheld).

⁵⁵ Azam Ahmed & Habib Zahori, “Afghanistan frees detainees in show of sovereignty before Karzai visits U.S.”, *The New York Times*, 4 January, 2013, <http://www.nytimes.com/2013/01/05/world/asia/afghanistan-releases-detainees-ahead-of-trip-by-karzai-to-washington.html?ref=asia&r=0>.

⁵⁶ Human Rights First, “Detained and denied in Afghanistan”, p. 13; Andrea Prasow, “The Bagram Detainee Review Boards”; Amnesty International, “The ‘New’ Bagram Unveiled: But Will There be Change”; Afghanistan Independent Human Rights Commission and Open Society Foundations, “Torture, Transfers, and Denial of Due Process”.

⁵⁷ The term “cleared” here refers to individuals who have been recommended for transfer or release by the DRB, at least once.

soldiers entered, asked for him by name, and took him away. Ayaz was first detained in what he believed to be a U.S. military base in Paktika province, before being transferring him to the DFIP. He does not know why he was taken but he believes that a co-worker falsely accused him of being a terrorist in exchange for a bounty. After years of DRB hearings, Ayaz had little faith in the process:

The DRBs were a joke, another way to humiliate us. At my DRB they said that I was a suicide bomber and that I want to bomb the USA. I had a representative who was not a lawyer. He would often make my case worse. After the hearing the Americans would tell me the result within a month and whether I would be sent back to Pakistan or would have to stay there for 6 more months. The only evidence they had against me is what they first forced me to sign at [a U.S. military base in] Paktika [province].⁵⁸

Ayaz was eventually repatriated to Pakistan in 2011 and released after spending six years in detention. According to Ayaz, for at least two of those six years in detention he had been “cleared” by the DRB, most likely because U.S. officials determined he was never actually a combatant, and that they had no grounds to hold him. Yet he remained in detention for years, uncertain of when or if he would ever be released.

Yasir, now a 31 year-old man from Balochistan province in Pakistan, was captured in February 2004 by UK forces in Iraq where he traveled to work in real estate. UK forces handed him over to the U.S. military, which transferred him to Afghanistan after a few months for detention at the DFIP.⁵⁹ After six years of detention, Yasir was eventually recommended for repatriation and release by the DRB.⁶⁰ Yet he remains in detention today, receiving DRB hearings every six months, which time and again have recommended him for transfer. As he told the review board at his August 2010 hearing:

I came to the DRB six months ago, 2 December 2009. I had said everything I wanted to say. The result was given to me on 22 February 2010 and was given to me and my government. Nothing changed in my case or in my manners. I still have good behavior. If I am obligated to talk in DRB, I will talk. If not, I won't because nothing has changed.⁶¹

Malik, a 43 year-old rice exporter from Faisalabad, disappeared with Yasir from Iraq in 2004. Like Yasir, he was detained by UK forces who handed him over to U.S. forces. The U.S. military then transferred him from Iraq to the DFIP, where he has been held ever since. Malik sharply criticized the DRBs, the purported independence of the military officials who represent him in DRB proceedings, and the evidence against him. Speaking in English before the DRB—a language he learned from his U.S. captors—Malik said:

I am a prisoner here. I don't have any power. He [the PR] is in your [the DRB's] command. You are his boss. He does not have any relation with me. Whatever he is saying, he will just say for your favor nor for my favor. [...] Did you detain anybody else after you detained me when you think that I'm a big commander or I'm a big

⁵⁸ Justice Project Pakistan interview with Ayaz, November 2012 (real name, location withheld).

⁵⁹ *Secretary of State v. Yunus Rahmatullah* [2012] UKSC 48 at 3.

⁶⁰ DRB transcript obtained through ACLU FOIA request,

<http://www.aclu.org/files/pdfs/natsec/bagram20101220/Detainee1433.pdf>.

⁶¹ Ibid.

*fish. So you should have some information from me about other people too. Did you detain anybody else after me or any organization? [...] When I gave these statements, I was in a condition when I had broken ribs, my eyes was swollen, and blood was coming from my mouth and my eyes were swollen for almost three months, so I gave my statement in these conditions. [...] I do not know why I was captured. I do not know. Please provide me any proof of that the associations that you're telling me that I'm associated with. Please provide me any proof of these associations.*⁶²

A deeply flawed system, the DRB process not only fails to provide detainees with fundamental due process guarantees, such as independent legal representation and the right to view much of the evidence used against them, but it is also unable to end the detention of many individuals who have been erroneously detained or the United States no longer has any grounds to hold.

Though the exact figure has not been made public, some detainees have been captured and detained erroneously, and have been deemed by the U.S. government as “do not meet criteria” (DNMC) for detention—and should be immediately released. Nevertheless, because of the inability of the two governments to reach agreement on repatriation, these individuals may spend years in U.S. detention.

A significant number of detainees have told their relatives that the DRBs have declared them “innocent.” DRBs, however, are not courts of law and do not determine an individual’s guilt. They are administrative review mechanisms that assess the future threat posed by an individual for purposes of continued preventive detention.⁶³ Often, when detainees say that they have been found “innocent”, they have been told that the DRB has recommended them for transfer to Pakistan for release. For TCNs, however, this recommendation does not mean they return home, or have their cases transferred to a regular court. Instead they remain in detention, in legal limbo, until the U.S. and Pakistani governments can negotiate the terms of their repatriation.

Jibran was detained in 2004 at the age of 16. He spent five years in detention at the DFIP, and was eventually repatriated to Pakistan in 2009. Based on his account of his detention and DRB proceedings, it appears that Jibran was released because U.S. authorities eventually determined that he had never been involved in any militant activity and had been mistakenly detained. While accompanying a mentally ill friend to Afghanistan in search of a *hakim*, a mystical healer, Jibran and his friend were surrounded and detained by U.S. and Afghan forces as they made a call from a shop that offered paid use of a telephone. After being thrown in a dark cell in an unknown location for 40 days, Jibran spent the next six months in a detention center in Kandahar where he was interrogated by U.S. and Afghan personnel, before the U.S. military transferred him to the DFIP.⁶⁴ As months turned into years, Jibran lost all hope that he would ever return to his home in Pakistan:

⁶² DRB transcript obtained through ACLU FOIA request,
<http://www.aclu.org/files/pdfs/natsec/bagram20101220/Detainee1432.pdf>.

⁶³ U.S. government internal policy memorandum released through ACLU FOIA request,
<http://www.aclu.org/files/pdfs/natsec/bagram20130418/Proposed%20Revisions%20to%20Detainee%20Review%20Procedures.pdf>.

⁶⁴ Justice Project Pakistan interview with Jibran, November 2012 (real name, location withheld).

After a while I never believed I would leave. I decided I would never leave. Sometimes the soldiers would tell me I would be released; but I never believed them.⁶⁵

After five years in detention, Jibran was finally released in 2009, at the age of 21. According to Jibran, upon his release, a U.S. military officer apologized for capturing and detaining him.

I asked the officer with me why they were freeing me and where they were sending me. His name was Lt Col Hendricks I think. He said the U.S. wanted to free me in 2007 because of a lack of evidence but Pakistan did not want me back. He apologized for capturing me. I replied that this detention has stolen five years of my life; your apology is not very helpful. How do I get those five years back?⁶⁶

b) Indefinite detention and repercussions for families

With detainees absent for years, parents have been left without their sons, and wives without their husbands. For all the families interviewed, their relative's detention meant they are robbed of someone who provided substantial financial support, and was often the family's primary breadwinner. Many are large, traditional families with relatives living together in the same house, often in Pakistan's urban slums or poor rural areas where families must pool their incomes to make ends meet. The loss of a major income earner has forced young children to give up their education and elderly family members to return to the workforce. Torn from their relatives, struggling to earn a living, and sometimes ostracized by their own communities, families bear a heavy burden, and do not know when or if their lives will ever return to normal.

Maqsood, from Punjab, Pakistan, married his wife, Nargis in 2008, just two years before he was detained by U.S. forces. Because of his long history of mental illness, Maqsood had to look for work far from his native village in Punjab. Prior to his capture, he was employed on a water-boring project in Chamman near the Afghanistan-Pakistan border, returning to his home in Punjab every three weeks. However, due to his psychiatric condition, Maqsood would occasionally wander off, leaving his family for weeks at a time. His family believes that he unwittingly crossed the Pakistan-Afghanistan border and was captured by U.S. forces.⁶⁷ Maqsood told his family that U.S. guards said he was captured and detained for crossing the border without documentation.⁶⁸

In a society where women living alone are frowned upon, without her husband Nargis was forced to move in with her brother, Mukhtar. Already struggling to make ends meet, Mukhtar says that he has taken on a significant financial load to provide for his sister:

I now have to take care of my sister as well as myself. It is very burdensome. It is not acceptable that a married woman still lives with her brother. People shun us because our relative is in prison.⁶⁹

⁶⁵ Ibid.

⁶⁶ Justice Project Pakistan interview with Jibran, November 2012 (real name, location withheld); 'Lt Col Hendricks' is a pseudonym.

⁶⁷ Justice Project Pakistan interview with Nargis and Mukhtar, November 2012 (names, location withheld).

⁶⁸ Ibid.

⁶⁹ Justice Project Pakistan interview with Mukhtar, November 2012 (real name, location withheld).

Financial hardships are a common concern for all families of current detainees. Some families have been forced to sell their homes. Others have to make a choice between providing an education to their children or siblings or taking them out of school to save money or send them to work. Even after making these difficult sacrifices, many still find it challenging to meet their family's needs. Gul Muhammad is the father of a current detainee, Kaleem, who disappeared from Pakistan at the age of 14. An ex-army officer, he works when and where he can, and is currently employed as a miner in Balochistan. With four remaining children to put through school, the burden of his son's detention and the loss of financial support he provided his family are difficult for him to bear:

My salary is PKR 14,000 PKR [\$140] per month, but my rent is PKR 4,000 [\$40] and the school fees of my children amount to PKR 4,500 PKR [\$45]. It is very difficult for me to juggle my expenses. I am the only one working. If my son was here he would have been able to help me.⁷⁰

Gul Nawaz is the brother of Abdul Jabbar, a Pashtun man of the Afridi tribe held since 2005. His family lives in a remote village in Khyber Agency in north-western Pakistan. Desperate to find work, Abdul Jabbar was invited by an Afghan friend to Afghanistan. When Abdul Jabbar reached Jalalabad, his friend falsely accused him of being a terrorist and handed him over to U.S. forces. As Gul Nawaz heavy-heartedly explained, he and his family have "lost one of the breadwinners in the family. I work when I can and one of my elder brothers works as well. My younger brother goes to school", Gul Nawaz added, "He says he wants to work but we forbid him. It's important that he get an education."⁷¹ Because of their deteriorating financial situation, Gul Nawaz and an elder brother have moved to Saudi Arabia, hoping to earn enough to sustain their family in Pakistan.

Many have been forced to rely on the support of their local community and extended family to make ends meet. In 2002, Muhammad traveled to Afghanistan to find work. According to his family he was falsely accused as being a terrorist by a co-worker. He has been held since 2002 not knowing if or when he will be able to return to Pakistan. Muhammad's mother and only brother live in a small, remote mountainous area in northern Pakistan. Their village is deep within the mountains accessible only by a dirt road, eight hours drive from the closest major town, Mansehra. They live in the same village as their extended family, where the "family, Jahanzeb [Muhammad's cousin] in particular, help out with the rent, which is 3,000 PKR a month, and all other expenses."⁷² Muhammad's maternal uncle, Imtisal, despairs at the far-reaching financial repercussions of Muhammad's detention: "It is very difficult for me to see my sister in this state. I am a poor laborer; I have barely enough money to sustain myself. What can I do to help her?"⁷³

Families also face significant challenges in maintaining contact with loved ones in detention. Unlike relatives of Afghan detainees, families of Pakistani detainees are generally unable to visit their relatives at the DFIP.

While the U.S. military provides detainee families with financial assistance to visit relatives, because of the significantly higher costs Pakistani families face in travelling to and from Afghanistan, such

⁷⁰ Ibid.

⁷¹ Justice Project Pakistan interview with Gul Nawaz, December 2012 (real name, location withheld).

⁷² Justice Project Pakistan interview with the cousin and uncle of Muhammad, November 2012 (names, locations withheld).

⁷³ Justice Project Pakistan interview with Imtisal, November 2012 (real name, location withheld).

assistance is typically too little to make such a trip realistic.⁷⁴ With a monthly income between \$150 and \$300 family members of current detainees are simply in no position to afford such travel and are often unable to forgo work and income for an extended period of time.

Junaid has been held since 2008 and leaves behind a wife and three young children, the eldest being 13 years-old. Junaid's wife, children, parents and siblings all live in Abbottabad, two and a half hours drive away from Islamabad. Junaid's brother, Ali, is now the only one working with their father in the family business, a steel mill. On a video-call with his family Junaid told his brother, Ali, not to visit him because the burden of work would fall on their elderly father. "Once I asked my brother if I should come to Bagram and visit him. He forbade me from coming," explained Ali, "He said that if I come, our father will bear all the load of the work."⁷⁵

Resources are not the only impediment to Pakistani families visiting their relatives in detention. Family members are afraid of being detained by the U.S. or Afghan governments, hurt or killed in armed clashes and attacks that make travel between the two countries, particularly in the border regions, extremely fraught. Maqsood's brother-in-law, Mukhtar, was told he and his family could visit the DFIP to testify before the DRB. Scared of the security situation in Afghanistan, particularly for a Pakistani, he chose not to go. "We were allowed to come to Bagram twice to visit for the DRB hearings," said Mukhtar, "They told us we could come. But we decided not to go because the security situation was very bad and there is strong prejudice against Pakistanis in Afghanistan."⁷⁶

Imran's brother, Ibrahim, has been held at the DFIP since 2003. Originally from Swat, Imran now lives in Karachi where he drives a rickshaw. Although he wants to visit his brother at the DFIP, Imran is anxious that he, too, will be detained. "I wanted to try myself to go and meet my brother and asked the ICRC if they could help", Imran explained. "They said that they cannot take responsibility for me and cannot help me if I am detained by the Afghans or Americans. They said I should go there on my own if I want to meet him."⁷⁷

Unable to visit their relatives at the DFIP, family members of detainees must rely on the video teleconferences and phone calls organized by the ICRC to communicate with their loved ones. To participate, families must travel to one of several cities within Pakistan which often means taking a day off work and losing valuable income for those who live on daily wages. "I am the only one working," said Gul Muhammad, whose son Kaleem has been in detention since 2008, "if Kaleem was here he would have been able to help me with the house expenses. I have to take holidays more often to go for my calls with Kaleem. If I did not take those holidays I could work and it would be manageable."⁷⁸

Although they must travel far and lose valuable income, families gladly shoulder these burdens if it means speaking an hour with their detained relatives. Yet conversations between detainees and their relatives are censored and they are unable to speak openly. The U.S. military permits detainees to discuss their health and personal matters only. They are prohibited from any mention of the

⁷⁴ Justice Project Pakistan interview with a U.S. government official (name, date, location withheld).

⁷⁵ Justice Project Pakistan interview with Ali, April 2013 (real name, location withheld).

⁷⁶ Justice Project Pakistan interview with Mukhtar, November 2012 (real name, location withheld).

⁷⁷ Justice Project Pakistan interview with Imran, April 2013 (real name, location withheld).

⁷⁸ Justice Project Pakistan interview with Gul Muhammad, December 2012 (real name, location withheld).

circumstances of their capture, the charges against them, conditions of detention, or political issues, such as elections in Pakistan. If their conversations venture into such subject matter, the U.S. military immediately severs the connection.⁷⁹

The U.S. military also restricts the language of communication for video and phone calls. Detainees and their relatives are only allowed to speak in a language understood by the translator present during the detainee's conversations. Only Urdu and Pashto are allowed.⁸⁰ Any discussions in, for example, Punjabi or Kohistani, which may be the mother tongue of detainees and their families, are strictly forbidden. For many family members who speak no Pashto and only limited or no Urdu, they are unable to meaningfully communicate with their loved ones.

Years of detention without charge or trial and only limited communication means children of detainees grow up knowing little or nothing of their fathers. Now twelve years old, Zain was only three years old when his father, Malik, disappeared in 2004. Zain says he thinks of Malik when he goes to school and sees other children in the company of their fathers. But after so many years of detention, he no longer has any real memory of his father:

I don't remember him much. I was quite young when he left. I remember he took me to school when I was admitted to Class 1. Then he disappeared and now I can't even remember his face. I miss him. When I see other boys playing with their fathers, and the things they do together, I do miss him. I think of him then.⁸¹

Though he misses his father, and looks forward to hearing from him, U.S. military restrictions prohibit Zain and other family members from asking about their relatives' well-being. The U.S. military strictly prohibits any discussion of the conditions of detention at the DFIP. Not being allowed to freely communicate with their relatives in detention exacerbates the worry and mistrust of families in Pakistan.

Detainees have also missed out on major events in their families' lives as countless weddings, birthdays and religious festivals go by in their absence, unable to share these events with their families.

Issa, Malik's father, passed away in October 2012, never again having seen his son. Malik's family is not only deeply saddened that he remains in detention, but also that he has missed out on so much in their lives. As his elder brother told JPP interviewers:

A few weeks ago, my daughter got married and Malik was not there to celebrate with us. How many Eids have gone by that we have not celebrated with him? How many joyous occasions will pass by without him being present? My elder brother passed away, and then my father passed away, and Malik was not there.⁸²

For some, their loved one's ongoing detention can be harder to bear than their death. Najibullah is the younger brother of Ibrahim, held since 2003. He has always been close to Ibrahim and sorely

⁷⁹ Justice Project Pakistan interviews with relatives of current detainees (names, dates, locations withheld).

⁸⁰ Justice Project Pakistan interviews with anonymous officials (names, dates, locations withheld).

⁸¹ Justice Project Pakistan interview with Zain, March 2013 (real name, location withheld).

⁸² Justice Project Pakistan interview with Malik's elder brother, January 2013 (name, location withheld).

misses him. He lives in Rawalpindi where he works as a laborer. As Najibullah explained to JPP lawyers:

When someone dies, you mourn them for three days and then you move on. You are at peace, knowing that they lived their lives fully and are now in the hands of God. We cannot be at peace for my brother. How do I know how he is really doing? How do I know when or if he will come back? To us, his fate is worse than death.⁸³

Most family members said they were concerned about the physical and mental state of their relatives in detention, including apparent weight loss and depression, which they say has been made worse by the uncertainty and lack of progress in their cases. Gul Nawaz is the brother of Abdul Jabbar, held since 2005.⁸⁴ Gul Nawaz leads a simple life, finding employment when and where he can. He says that, having seen his brother on videoconference calls, he is deeply troubled by his deteriorating mental and physical health condition:

He has lost much weight while in detention and we have witnessed his condition worsen by the year [...] Sometimes when I speak to him he forgets what he is talking about and then asks me what we were just discussing. I am very worried about his mental condition. Abdul Jabbar seems sad and worried. He sometimes says that he is angry at his detention. During our last phone call [November 2012], he appeared very weak [...] I have not told the rest of my family how much weight he has lost.⁸⁵

Gul Muhammad's son Kaleem has been detained since 2008. Years of detention have taken a visible toll on Kaleem and caused much anxiety for his family. "He has lost weight," according to Gul Muhammad, "He used to be in good health, now he looks weak. He has lost all hair on his head but he has a full beard. I don't think they have shaved his head. I think he has lost his hair because of the stress. Apart from that we have absolutely no idea how he is doing in detention."⁸⁶

Many Pakistani detainees held at the DFIP have ill and aging parents back home. Parents worry and wonder whether they will ever see their child again before passing away.

Kaleem disappeared from Pakistan in 2008 at the age of 14. Kaleem's father sent him to their ancestral home in South Waziristan to collect their belongings in anticipation of another military offensive in the area; but he never returned. Wracked by grief and worry at his detention and unaware when he will come back, his parents' health has deteriorated seriously. According to Gul Muhammad:

My blood pressure is high. I need medication but I cannot buy any because I do not have enough money and I have no time to go to a government hospital. [...] My wife was crying every day during Ramadan and praying desperately for his return. Her health has deteriorated severely. She was fasting every day for 4 years, hoping for our son to come back. She has diabetes and is losing sight in her eyes. She needed an operation in one of her eyes for which I could barely pay.⁸⁷

⁸³ Justice Project Pakistan conversation with Najibullah, October 2012 (real name, location withheld).

⁸⁴ Justice Project Pakistan interview with Gul Nawaz, December 2012 (real name, location withheld).

⁸⁵ Ibid.

⁸⁶ Justice Project Pakistan interview with Gul Muhammad, December 2012 (real name, location withheld).

⁸⁷ Ibid.

Not only do relatives of Pakistani detainees contend with financial woes and the sorrow of their relatives' detention, but they feel as if their government and their communities have turned their back on them. Nargis, whose husband Maqsood has been in detention since 2010, is ostracized by her community. Deprived of her marital home by her husband's detention, she has been forced to move in with her brother. For a married woman in rural Punjab, her circumstance is considered socially and culturally unacceptable:

*My community has turned its back on me. It is severely frowned upon that I am living with my brother. As a married woman I must live with my husband, not my own family. I am a burden on him. It is a very difficult situation for me. How can I live like this?*⁸⁸

Other families lament the stigma attached to having a family member in detention. Because of his brother Ibrahim's detention, Imran and his family feel they are considered terrorists by his community and the government. "We are Pakistani, we live in Pakistan." Imran explains, "But because of my brother's detention all people see us as are terrorists. We need to do away with this negative image that the government and our community have of us."⁸⁹

Instead of reaching out and providing families of detainees with assistance, Pakistani government officials view some families with mistrust, subjecting them to investigations and harassment. Bahadur Khan is a government school teacher in Khyber Agency, FATA. His younger brother, Murtaza, has been held at the DFIP since 2005. After his brother's detention, his family was summoned by the Political Agent—a representative of the central government in FATA. Bahadur, his family and his neighbors were all investigated and questioned by Pakistani intelligence officers:

*The intelligence agencies started knocking on our door and asking questions to our friends and neighbors. Our community replied that our family would rather put pens than guns in people's hands. This was two months after my brother's capture. It continued for six or seven months.*⁹⁰

Gul Muhammad, a former Pakistan army officer, was targeted for speaking of his son Kaleem's detention at a press conference organized in support of victims of enforced disappearances in Pakistan. "I get harassed sometimes by [intelligence] agencies," he claims. "They called me on my phone two or three times. They asked me who I am, where my son is. They ask me if I have ever spoken ill of Pakistan. I told them: why would I do that? Pakistan is my country."

⁹¹

c) Kept in the Dark

Individuals detained at the DFIP often simply disappeared while travelling or working abroad, with their families having no idea what happened to them. All families interviewed have gone months, sometimes up to a year before discovering that they are still alive and are being detained by the

⁸⁸ Justice Project Pakistan interview with Nargis, November 2012 (real name, location withheld).

⁸⁹ Justice Project Pakistan interview with Imran, April 2013 (real name, location withheld).

⁹⁰ Justice Project Pakistan interview with Bahadur Khan, April 2013 (real name, location withheld).

⁹¹ Justice Project Pakistan interview with Gul Muhammad, December 2012 (real name, location withheld).

United States at the DFIP, usually informed through letters sent through the ICRC or through phone calls from released Afghan detainees.⁹²

When their relatives initially disappear, families are wracked with worry, fearing the worst. Imran's brother Ibrahim disappeared in Peshawar while he was traveling for work. His family did not know if he was alive or dead for six months until they received a letter from Ibrahim through the ICRC saying that he was being detained at the DFIP. "We were happy in a way because we knew where he was and that he was safe. We thought that he was dead for some time," said Imran. "We are very worried though. We still do not know why he was picked up or detained."⁹³

Javed disappeared from the streets of Karachi in 2004. He was dropping his father off at the hospital when he was kidnapped by unknown individuals. Javed's family discovered he was being held at the DFIP after receiving a letter from the ICRC, more than a year after his initial detention. Though they are not certain, his family believes he was kidnapped by Pakistani intelligence agencies and sold to the U.S. government, accused of being a terrorist.⁹⁴ Worried about what might happen to them or other family members if they spoke out, the family remained silent and simply hoped for his eventual return. As Mubashar, Javed's uncle, explained:

*I do not know why he was taken or who took him away but it cannot be anyone else apart from the intelligence agencies. At that time, Musharraf was still in power and people would get picked up left and right. A guy in my neighborhood ended up in Guantanamo Bay. At the time, we thought that if we just kept quiet and did not cause a ruckus then Javed would return.*⁹⁵

When his young son, Kaleem, disappeared in 2008, Gul Muhammad spent many months looking for him. He travelled to South Waziristan and Peshawar in Pakistan, and even across the border to Khost province in Afghanistan, but could find no trace of him. "I spent a lot of money on these trips" says Gul Muhammad "I almost bankrupted myself."⁹⁶ A year after his son disappeared, he finally received a call from the ICRC informing him that Kaleem, was alive and being held by the United States at the DFIP.

After finally discovering that their loved ones are still alive and in detention, families are unable to find out much more about their relatives' situations and conditions. Families are not provided with any information regarding the charges or evidence against detainees, or the circumstances of their capture. Though JPP represents many detainees and maintains frequent contact with their relatives, detainees are denied access to counsel who could explain to families the circumstances and reasons for their detention. As explained above, the U.S. military also prohibits detainees from discussing such matters with their own families. Most families also have little to no understanding of what the DRB system is or how the repatriation process functions. Left largely in the dark, families feel powerless and are resigned to hoping that the government or international organizations will come to their aid. All of the family members interviewed by JPP requested that the U.S. government either

⁹² Justice Project Pakistan interviews with relatives of current detainees (names, dates, locations withheld).

⁹³ Justice Project Pakistan interview with Imran, April 2013 (real name, location withheld).

⁹⁴ Justice Project Pakistan interview with Mubashar, December 2012 (real name, location withheld).

⁹⁵ Ibid.

⁹⁶ Justice Project Pakistan interview with Gul Muhammad, December 2012 (real name, location withheld).

release their relative, whom they firmly believe to be innocent, or provide evidence of their guilt and try them in a court of law.⁹⁷

Those few family members from Pakistan who have participated in DRB hearings as telephone witnesses have little regard for the DRB process. Yusuf, a farmer in Punjab, testified before Malik's—his brother—DRB in 2010. He was asked questions about Malik's character and whereabouts. After completing his testimony Yusuf says he was told by the U.S. translator that the U.S. government had no objection to sending his brother back—and the family was hopeful for his return. Yet after three years, Yusuf and his family have heard nothing from the U.S. military. Yusuf's initial hope for his brother's return and pride in the role he believed he had played in securing it, turned into a bitter sense of betrayal. “[The United States] lied to us and told us he is coming back,” Yusuf told JPP interviewers.⁹⁸

Pirzada, a university professor in Punjab and the brother of current detainee Mustafa was contacted by the U.S. military in September 2012. He was asked to answer a number of questions regarding his brother's whereabouts and character. After participating as a witness, Pirzada rejected the purported impartiality and independence of the DRB. To him the DRB is “[the U.S. military's] own court with their own lawyers and their own judges.” According to Pirzada.⁹⁹ Though he was provided with numbers for the Detainee Assistance Center (DAC) where detainees' family members can provide information and request to be a witness before the DRB, “I didn't believe it [calling the DAC] would serve any purpose or have any impact,” he said.¹⁰⁰

Although several family members demonstrated some familiarity with the DRB process, the reality is that most families know absolutely nothing about the review process, how it works and what function it serves. The testimony of family members of a detainee can, however, be crucial to his case. By vouching for the character of the detainee or indicating to the DRB that the detainee will be looked after and provided with employment upon return, relatives of current detainees could help sway the DRB's recommendation from continued internment to transfer or release. But even if families trusted the system enough to participate, they are often unaware of how to do so. According to Gul Nawaz, whose brother has been in detention since 2005, neither he nor anyone else in his family has ever heard about what happens at the DRB. “We know nothing about his DRB hearings. No one has told us anything.”¹⁰¹

For many Pakistani families, perhaps even more problematic, is that neither the Pakistani nor the U.S. government has informed them how detainees are repatriated or released. Family members interviewed knew little to nothing about the repatriation process or the status of negotiations often the most critical step in resolving Pakistani detainees' cases. “I do not know anything about the process,” said Ali, whose brother has been in detention for six years. “I do think there is some sort of process. Why would they [the Pakistani government] have asked for nationality documents otherwise?”¹⁰² Muddassir, whose nephew has been in detention since 2002, likewise protested that

⁹⁷ Justice Project Pakistan interviews with relatives of current detainees (names, dates, locations withheld).

⁹⁸ Justice Project Pakistan interview with Yusuf, January 2013 (real name, location withheld).

⁹⁹ Justice Project Pakistan interview with Pirzada, March 2013 (real name, location withheld).

¹⁰⁰ Ibid.

¹⁰¹ Justice Project Pakistan interview with Gul Nawaz, December 2012 (real name, location withheld).

¹⁰² Justice Project Pakistan interview with Ali, April 2013 (real name, location withheld).

he and his family do not “know anything about his release—we do not know how or when it is happening.”¹⁰³

Some families were aware of some of the basic logistics of release—but knew nothing about the actual negotiations and substantive political and legal process that could actually lead to their return. As one family member explained:

*The ICRC has explained the process to me. First he will be released to the Embassy's custody. Then he will be given to the ICRC who sends him to Islamabad via an ICRC plane. They told me that the ISI [Pakistan's foreign intelligence agency] might hold him for three days. I have no further information; that is all they told me.*¹⁰⁴

When asked who they believe should inform them about the repatriation and review process, families of Pakistani detainees hold the Pakistani government chiefly responsible. Yet, according to family members, Pakistani officials have largely failed to do so.¹⁰⁵

Pakistani officials have consistently failed to provide families with an explanation of the repatriation process, the negotiations with the United States, or made clear that their relatives' fate ultimately hinge on those negotiations. One family member said that in response to their inquiries, the Ministry of Foreign Affairs simply told them that “the detainees have DRB hearings. The results are sent to Washington where they decide whether or not to give the detainees back to their home countries [...] That is all they told me. I just know that [the detainees] are given to the embassy and then brought back.”¹⁰⁶

With little to no assistance from their own government, or the United States, families must rely on JPP lawyers as well as the ICRC for limited guidance and updates. With little to no direct contact with those actually responsible for the fate of detainees, families feel abandoned and helpless, eager for the even the most basic information and understanding of what will happen.

Fareed, a land-owner living near Quetta, Balochistan and cousin of a current detainee, says that after years of trying to get the Pakistani government to do more, his family has lost hope. “Talking to politicians might help. But we cannot do it. Someone has to help us do that. They will not listen to us.”¹⁰⁷ As an ethnic Baloch, Fareed and his family believe Pakistani authorities are even less likely to help them. “The government is not going to help us, especially since we are Baloch.”¹⁰⁸

Other family members erroneously believed that after the DFIP was handed over to the Afghan government, as had been announced by the U.S. and Afghan governments, their relatives would finally be released. Before his brother was detained at the DFIP, Gul Nawaz used to listen to music on the radio every night. Now he listens to the news, anxious to hear about developments, and was heartened when he heard that the United States was handing over the DFIP, believing it would expedite his brother's repatriation:

¹⁰³ Justice Project Pakistan interviews with relatives of current detainees (names, dates, locations withheld).

¹⁰⁴ Justice Project Pakistan interview with Fareed, December 2012 (real name, location withheld).

¹⁰⁵ Justice Project Pakistan interviews with relatives of current detainees (names, dates, locations withheld).

¹⁰⁶ Justice Project Pakistan interview with Pirzada, March 2013 (real name, location withheld).

¹⁰⁷ Justice Project Pakistan interview with Fareed, December 2012 (real name, location withheld).

¹⁰⁸ Justice Project Pakistan interviews with Asif and Fareed, December 2012 (real names, location withheld).

*On the radio I heard that President Obama sent letters to Bagram to hand it over to the Afghans. I think that will help. My brother has also told me that once the prison is handed over to Afghans, he will go free soon.*¹⁰⁹

Families feel despair after years of no news, no progress and no understanding of what can be done to resolve their relative's fate. Imtiaz, a corn farmer in the northern, mountainous region of Pakistan, is a cousin of Muhammad who has been in detention since 2002. Imtiaz travelled more than six hours on dirt paths and rugged roads to meet JPP interviewers to share his family's ordeal, and the hopelessness they now feel:

*We just leave it to the hands of God now. Only God can make sure Muhammad is safe. What do you want us to do? No one knows when Muhammad will be coming back. Only God knows.*¹¹⁰

d) Families' and Detainees' Views of the U.S. and Pakistani Governments

Detainees and family members interviewed largely hold the Pakistani government responsible for failing to secure detainees' release, and for failing to take steps to repatriate detainees. According to several interviewees, instead of providing families with information and assistance, the Pakistani government has focused on avoiding blame, and shifting responsibility on to U.S. officials. Families are equally critical of the United States, not only for what they see as the unjust detention of their relatives, but also for what they see as U.S. hypocrisy in failing to respect human rights and the rule of law.

The first, most basic step towards repatriation is confirmation of a detainee's Pakistani nationality. Only after the Pakistani government has confirmed detainees' nationality can negotiations with the United States meaningfully move forward. Yet Pakistani officials took over six years to do so for most detainees, significantly delaying the process and prolonging their detention.¹¹¹

In the eight agonizing years of his brother's detention, the Pakistani government contacted Gul Nawaz only once, which was to request his brother's nationality documents—information which the government should already have on file.¹¹² Pirzada, like Gul Nawaz and many other family members, is very critical of what he sees as years of Pakistani government inaction:

*They [the Pakistani government] claim they are doing the best they can. They claim the decision is not in their hands. In 2012 they asked for documents to confirm my brother's nationality. It took them four years to ask for those documents.*¹¹³

Family members say that the Pakistani government's inaction leaves them feeling betrayed, and abandoned by their own government. As Mubashar whose nephew, Javed, has been in detentions since 2005, told JPP interviewers:

¹⁰⁹ Justice Project Pakistan interview with Gul Nawaz, December 2012 (real name, location withheld).

¹¹⁰ Justice Project Pakistan interview with Imitaz, November 2012 (real name, locations withheld).

¹¹¹ Report filed by the MFA in *Sultana Noon v. Federation of Pakistan*, 25 September, 2012.

¹¹² Justice Project Pakistan interview with Gul Nawaz, December 2012 (real name, location withheld).

¹¹³ Justice Project Pakistan interview with Pirzada, March 2013 (real name, location withheld).

*I am angry at the Pakistani government. Raymond Davis killed two Pakistani citizens and he got off scot-free. Raymond Davis' government helped him out. Javed is an innocent Pakistani and the Pakistani government is doing nothing to help him.*¹¹⁴

Nargis and her brother have lost complete faith in the Pakistani government's commitment to their relative's return. "They have not achieved anything", she and her brother protested, "They do not care about the average Pakistani. No minister has ever spoken about Bagram; the government has never even held a press conference on this issue."¹¹⁵

Four years after he was released and returned to Pakistan, Jibran still feels like his government failed him:

*The Pakistani government does not care about average people. The government should have done a lot more to help me. They should have asked the US to prove that I am innocent or guilty.*¹¹⁶

Former detainees also criticize Pakistani officials for disrespectful treatment while they were in detention, for failing to provide them with desperately needed assistance, and for not even believing that they were Pakistani. Ayaz, released in 2011, recounted a 2009 visit by a Pakistani diplomat to the DFIP in which the Pakistani ambassador treated him rudely—and instead of ensuring Ayaz was being properly treated and offering assistance, was "interrogating me like the Americans."¹¹⁷ Jibran, another former detainee, shared a similar experience:

*In 2007 or 2008, I cannot remember, I was visited by a Pakistani diplomat. He was very rude. He asked me crudely where I was from. I told him Kohistan. He said that I am not Pakistani and that I cannot even speak Urdu. I told him to check and see where I am sending my ICRC letters; it's an address in Pakistan. He dismissed me. The second time around someone else came. He was just as rude. He also said that I was not Pakistani and asked me for a proper letter with a proper address.*¹¹⁸

The Pakistani government's treatment of detainees has angered their families as well. Hafeez, whose uncle Abdul Jabbar is in detention told JPP interviewers:

*Why are they locking him up like that? He is innocent. The Pakistani government should help him out. They need to help him get out of there. This is unfair. They are doing nothing to help him even though he is Pakistani. Why is the government not upholding his rights?*¹¹⁹

From detainees' and their families' perspectives, who simply want to understand where their cases stand, the Pakistani and U.S. governments are constantly pointing the finger at each other.

¹¹⁴ Justice Project Pakistan interview with Mubashar, December 2012 (real name, location withheld). Raymond Davis is a former CIA contractor who killed two Pakistani men in Lahore in 2011. See "CIA contractor Ray Davis freed over Pakistan killings", BBC News, 16 March, 2011, <http://www.bbc.co.uk/news/world-south-asia-12757244>.

¹¹⁵ Justice Project Pakistan interview with Nargis and Mukhtar, November 2012 (real names, locations withheld).

¹¹⁶ Justice Project Pakistan interview with Jibran, November 2012 (real name, location withheld).

¹¹⁷ Justice Project Pakistan interview with Ayaz, November 2012 (real name, location withheld).

¹¹⁸ Justice Project Pakistan interview with Jibran, November 2012 (real name, location withheld).

¹¹⁹ Justice Project Pakistan interview with Hafeez, December 2012 (real name, location withheld).

Detainees and their families are left confused, confounded, and frustrated. Pakistani officials frequently claim in communications with family members as well as before the Lahore High Court that the U.S. government is to blame for failure to move forward with repatriation and release of detainees.¹²⁰ But many families believe Pakistani officials are trying to hide their own failures and inaction. When asked who he believed was holding the repatriation process back Mubashar whose nephew Javed disappeared from Karachi in 2004 said: “I think both governments, but particularly Pakistan, are lying [about their powerlessness]. The Pakistani government always lies.”¹²¹

Meanwhile U.S. officials have told at least some detainees that it is the Pakistani government that is preventing their repatriation. “The Americans very often tell him [Maqsood] they want to set him free but that the Pakistani Ministry of Interior says he is not Pakistani,” according to Maqsood’s brother-in-law, Mukhtar. “They say they want to free him but his government does not want him back.”¹²²

Muhammad, who has been in detention since 2002, also told his family that U.S. officials told him that the Pakistani government is preventing his repatriation. “The Americans keep telling him they want to free him but the Pakistanis don’t want him back,” according to Muhammad’s cousin Imtiaz. “They constantly say that to him.”¹²³

Family members are equally critical of the United States, seeing the continued detention of their loved ones without charge or trial as wrong and unjust. According to Pirzada, the detention of his brother, Mustafa is “a grave injustice” that flouts the rule of law:

*Everything in this world follows a law. People are arrested along the lines of the law. Here there is no law. There is just the will of the Americans: if they wanted to arrest him then they will go ahead and do that; when they want to free him they will do it whenever they want. There is no law or justice. If there is a law, tell us what it is. Even if he is tried under U.S. law we are ready to accept and believe that. At least we will be able to hire lawyers to defend him. The Americans are in control; they control everything.*¹²⁴

Families see a double standard and hypocrisy in the United States’ actions. Mubashar, whose nephew has been detained since 2005, claimed that the U.S. government cannot at the same time champion human rights and hold individuals in indefinite detention. “If the United States talks so big,” claimed Mubashar, “then they must also follow through with their words. They cannot claim to be in favor of justice and then not do anything.”¹²⁵

Experiences of detainees released from long-term detention in the DFIP as well as Guantanamo Bay has demonstrated that for those who return, often after years of detention, their ordeal takes a new form. Psychologically scarred, having spent years in detention without adequate education or professional training, often stigmatized upon their return, former detainees are often unable to find

¹²⁰ Justice Project Pakistan interviews with relatives of current detainees (names, dates, locations withheld); Report filed by the MFA in *Sultana Noon vs. Federation of Pakistan*, 25 September, 2012.

¹²¹ Justice Project Pakistan interview with Mubashar, December 2012 (real name, location withheld).

¹²² Justice Project Pakistan Interview with Mukhtar, November 2012 (real name, location withheld).

¹²³ Justice Project Pakistan interview with Imtiaz, November 2012 (real name, location withheld).

¹²⁴ Justice Project Pakistan interview with Pirzada, March 2013 (real name, location withheld).

¹²⁵ Justice Project Pakistan interview with Mubashar (real name, date, location withheld).

work or a spouse, and find it difficult to re-integrate into society.¹²⁶ Some detainees who were wrongly detained at the DFIP, held for years without charge or trial, demand compensation and other forms of redress from the U.S. government. According to Ayaz, who spent six long years in detention:

*It was very cruel treatment, especially if you were young like me. I was only 15. I was thrown in jail without charge or trial. They did not make any difference between children and adults. I could not even complete my studies. I don't have any skills, I couldn't learn any. I want compensation. I have mental and kidney problems because of what they used to feed me.*¹²⁷

But for most family members, after years of waiting for their relatives to return, anger has given way to despair. While several NGOs have declared their willingness to pursue a legal remedy against the United States for the prolonged detention of their relatives, families, in general, just want their loved ones to return home, and their ordeal to end. According to Mubashar, an NGO offered to sue the U.S. government on his family's behalf. But Mubashar refused. "We don't care about suing the U.S. government. We want him back; that is all we care about."¹²⁸ Both Nargis and her brother say they are in no state of mind to seek any legal remedy against the U.S. government. In their own words, they could not "dream of doing anything to the U.S. We do not have the energy or the power to file a case against the U.S. We just want Maqsood to come back."¹²⁹

Saimah's son, Malik, has been in detention since 2004. After nine long years, Saimah feels resigned, and says she harbors no ill will or anger towards the U.S. military:

*I just want my child back with me. I bless them. I will not curse them for fear of being asked to account for it in the afterlife. It was my son's fate, so be it. I just want him back. I bless them.*¹³⁰

¹²⁶ Justice Project Pakistan interviews and conversations with ex-detainees (names, dates, locations withheld). See also “Guantanamo and its aftermath: U.S. detention and interrogation practices and their impact on former detainees”, *Human Rights Center University of California Berkeley*, November 2008, http://www.law.berkeley.edu/files/IHRLC/Guantanamo_and_Its_Aftermath.pdf; “Returning home: resettlement and reintegration of detainees released from the U.S. naval base in Guantanamo Bay, Cuba”, *Human Rights Center University of California Berkeley*, March, 2009, <http://www.law.berkeley.edu/files/IHRLC/ReturningHomeDownloadable.pdf>.

¹²⁷ Justice Project Pakistan interview with Ayaz, November 2012 (real name, location withheld).

¹²⁸ Justice Project Pakistan interview with Mubashar, December 2012 (real name, location withheld).

¹²⁹ Justice Project Pakistan interview with Nargis and Mukhtar (real names, locations withheld).

¹³⁰ Justice Project Pakistan interview with Saimah, April 2013 (real name, location withheld).



A picture of Ibrahim taken during his detention. Ibrahim disappeared in 2003 from Pakistan while traveling for work.

V. Repatriation

We can never retake the legal and moral high ground when we claim the right to do unto others that which we would vehemently condemn if done to one of us.

Colonel Morris Davis, former Guantanamo Bay chief prosecutor¹³¹

Though the U.S. government has been operating detention facilities and holding Pakistani citizens since 2002, negotiations over the repatriation of Pakistani citizens have dragged on for years. At the root of this delay lies the failure of the U.S. and Pakistani governments to agree on two key issues: humane treatment and security guarantees.

There are legal, policy and political challenges to repatriation confronting both governments. To satisfy its *non-refoulement* obligation when transferring detainees to Pakistan, the United States must confront Pakistan's record of torture and ill-treatment of detainees, particularly those held for national security reasons. Humane treatment is a serious concern. However, there are factors specific to detainees' cases that may substantially mitigate the risk of abuse they would face in Pakistan. There are also effective, concrete measures that the United States and Pakistan can take to ensure transferred detainees' rights are respected.

The United States is also seeking security assurances from the Pakistani government in order to address fears that detainees might pose a security risk to the United States upon release. Such fears should not be overstated or politicized in a way that violates the rights of all detainees by effectively trapping them in indefinite detention without charge or trial. In addition, systemic flaws in the U.S. detention review system—most salient in the case of TCN detainees—may undermine the accuracy of threat assessments. These shortfalls produce a one-sided impression built on evidence that is near impossible for the detainee to challenge. It is also important to weigh potential security concerns against the broader legal, moral and political costs of indefinite detention.

Negotiations have stalled for years hampered by a failure to enact coherent policies, conduct sustained negotiations and insulate the repatriation process from politicization, both within the United States, and between the U.S. and Pakistani governments. Yet it is clear that both governments have the policy and legal options necessary to move the process forward, repatriate detainees, and bring an end to their indefinite detention.

a) Non-refoulement and humanitarian assurances in international law

The principle of *non-refoulement* in international law prohibits a state from transferring an individual in its custody to the custody of a state where there are substantial grounds for believing that the individual would face a real risk of torture or cruel, inhuman or degrading treatment.¹³² Though

¹³¹ "President Obama: Close Detention Facility at Guantanamo Bay", <https://www.change.org/petitions/president-obama-close-detention-facility-at-guantanamo-bay>

¹³² Article 3(1) United Nations Convention Against Torture (UNCAT). The term "transfer" includes extradition, deportation and any other forms of transfer from one State to another. See also Sir Elihu Lauterpacht and Daniel Bethlehem, "The scope and content of the principle of non-refoulement: opinion", in Erika Feller, Volker Turk and Frances Nicholson (eds.), *Refugee Protection in International Law*:

controversial, many States—including the United States—use diplomatic assurances in an attempt to satisfy their *non-refoulement* obligation.¹³³ These are non-legally binding promises by the receiving State to respect the transferee's rights and guarantee humane treatment.

States' increasing reliance on diplomatic assurances to ensure transferred detainees are not subjected to torture has been sharply criticized.¹³⁴ The United States' expansion of counter-terrorism and detention operations, initially pursuant to the "war on terror," led to a significant increase in the use of such assurances.¹³⁵ Cases in which transferred detainees were subsequently tortured despite the provision of diplomatic assurances have clearly demonstrated the weakness of such assurances, and the prospect that assurances can be used by states to circumvent the ban on torture.¹³⁶

Courts, international bodies, and human rights organizations emphasize that reliance on diplomatic assurances is insufficient to meet a state's *non-refoulement* obligation, particularly when sending detainees to states with a record of torture.¹³⁷ In evaluating whether or not a real risk of torture exists, the European Court of Human Rights (ECtHR) has found that States may not simply rely on diplomatic assurances and that the weight of assurances depends on the circumstances of the case.¹³⁸ In cases where humane treatment concerns exist given the human rights record of the receiving state, the Court has required provisions that went beyond mere promises, and included mechanisms for meaningful oversight of detainee treatment. In *Othman* the ECtHR found that in addition to Jordan's commitment to respect its international legal obligations, a MoU signed between the UK and Jordan required the transferred detainee to be presented before a judicial officer promptly after his arrest and for regular visits by an independent body nominated by both

UNHCR's Global Consultations on International Protection, 2003, www.unhcr.org/publ/PUBL/419c75ce4.pdf; Emanuel-Chiara Gillard, "There's no place like home: states' obligations in relation to transfers of persons", *International Review of the Red Cross*, Volume 90, Number 871, September 2008, <http://www.icrc.org/eng/assets/files/other/irrc-871-gillard.pdf>.

¹³³ Although *non-refoulement* is considered a legally binding obligation in international law, the United States does not view it as legally binding outside of the territory of the United States. However, the United States has stated that it complies with *non-refoulement* as a matter of policy in circumstances where individuals are held outside of the territory of the United States. Furthermore, the United States understands "substantial grounds" in article 3 UNCAT as meaning "more likely than not that the person would be tortured." See Department of State Legal Adviser John Bellinger, "Testimony Before the House Foreign Affairs Subcommittee on International Organizations, Human Rights and Oversight", 10 June, 2008, available at http://www.fas.org/irp/congress/2008_hr/rendition.pdf, p. 8; Section 1242(a) Foreign Affairs Reforms and Restructuring Act 1998.

¹³⁴ "UNHCR Note on Diplomatic Assurances and International Refugee Protection", August 2006, para. 2

¹³⁵ Human Rights Watch, "Torture and non-refoulement: Briefing to the 60th session of the UN Commission on Human Rights", 29 January, 2004, <http://www.hrw.org/news/2004/01/28/torture-and-non-refoulement>; Human Rights Watch, "Still at risk: Diplomatic assurances no safeguard against torture", April 2005, p. 3; Columbia Law School Human Rights Institute, "Promises to keep: diplomatic assurances against torture in US terrorism transfers", December 2010, p. 8; Open Society Justice Initiative, "Globalizing torture: CIA secret detention and extraordinary rendition", February 2013, p. 7.

¹³⁶ Human Rights Watch, "Empty Promises: diplomatic assurances no safeguard against torture", April 2004 p. 23; Human Rights Watch, "Still at risk", p. 22, 80.

¹³⁷ Human Rights Watch, "Empty Promises", p. 4-5; Human Rights Watch, "Still at risk", p.27 ; REDRESS, "Non-refoulement under threat", Seminar proceedings, 16 May, 2006; Open Society Justice Initiative, "Globalizing torture", p. 7, 9, 15, 20; *Chahal* at 97-105; *Saadi* at 147; *Agiza* at 13.3; *Alzery* at 11.3; *Othman* at 187.

¹³⁸ *Chahal* at 97-105; *Saadi* at 147; *Othman* at 187.

governments in order to ensure humane treatment.¹³⁹ The UN Committee against Torture and Human Rights Committee have also found in cases where the receiving state has a record of torture, assurances must include more than mere promises.¹⁴⁰

Though it may help protect detainees' rights, monitoring alone is also not sufficient to meet states' legal obligations, and experience has shown its effectiveness can vary widely. Detainee monitoring must be conducted in a rigorous manner that includes expert personnel and free, unfettered, and confidential access to detainees. In *Alzery*, for example, the UN Human Rights Committee held that the monitoring mechanism included in diplomatic assurances between Sweden and Egypt was inadequate because Swedish embassy staff monitoring started five weeks after the detainee's transfer, thus neglecting a long, critical period of time during which the detainee was at highest risk of torture.¹⁴¹ The proposed monitoring scheme was also inadequate because embassy staff did not insist on private interviews with detainees, and there were no forensic and medical experts present during meetings with detainees.¹⁴²

The transfer of any detainee from the DFIP to Pakistan or to any other state must be in compliance with *non-refoulement*. Experience, case law, and authoritative interpretations of treaty law clearly establish that diplomatic assurances that constitute no more than mere promises or statements of commitment to respect detainees' rights are insufficient to meet states' legal obligations. Both the U.S. and Pakistani governments must do more to ensure detainees' rights are protected and make certain that whatever measures are adopted are adequate to ensure that no detainee is subjected to a real risk of torture or other cruel, inhumane or degrading treatment.

b) Mitigating the risk of torture or ill-treatment upon return

To satisfy its *non-refoulement* obligation when transferring detainees to Pakistan, the United States must confront Pakistan's record of torture and ill-treatment of detainees, particularly those held for national security reasons. Though humane treatment is a serious concern, there are factors specific to detainees' cases and the nature of the alleged threats that they pose that may substantially mitigate the risk of abuse they would face in Pakistan or in Pakistani custody. There are also effective, concrete measures that the United States and Pakistan can take to ensure transferred detainees' rights are respected.

¹³⁹ *Othman* at 77.

¹⁴⁰ *Agiza* at 13.4; *Alzery* at 11.5.

¹⁴¹ *Alzery* at 11.5. Individuals held without the knowledge or access to relatives or legal counsel, are particularly vulnerable. This includes post-transfer, pre-trial and incommunicado detention. See "General recommendations of the Special Rapporteur on torture",

<http://www.ohchr.org/Documents/Issues/SRTorture/recommendations.pdf>, p. 2; Open Society Justice Initiative, "Pretrial detention and torture: why pretrial detainees face the greatest risk", 2011, <http://www.opensocietyfoundations.org/sites/default/files/pretrial-detention-and-torture-06222011.pdf>, ps. 28-44.

¹⁴² Ibid.

1. Assessing the Risk of Torture or Ill-Treatment to Pakistani Detainees Transferred from the DFIP

Torture within the Pakistani criminal justice system and security apparatus is seen by independent observers and human rights organizations to be endemic and widespread.¹⁴³ Reports indicate that individuals detained for national security reasons are particularly vulnerable to torture and mistreatment.¹⁴⁴ There are numerous, credible reports of Pakistani armed forces and intelligence agencies engaging in mistreatment and torture of detainees in their custody either to extract confessions or for intimidation purposes.¹⁴⁵ Any humane treatment assurances must take into account this record and fully address the potential risks associated with transferring individuals to Pakistan.

Humane treatment assurances should also take into account the individual characteristics of each detainee.¹⁴⁶ In particular, the United States should carefully examine the risks to individuals suspected of ties with groups perceived by elements of the Pakistani state to be security threats or associated with acts deemed prejudicial to Pakistan. Caution should also be taken in cases of

¹⁴³ “Pakistan: torture in custody has spread like a cancer in the country”, Asian Human Rights Commission, 28 June, 2010, <http://www.humanrights.asia/news/ahrc-news/AHRC-STM-134-2010>; “Stakeholders submission concerning the Universal Periodic Review of Pakistan”, Asian Legal Resource Centre & Christians Against Torture France, 23 April, 2012, <http://www.alrc.net/PDF/ALRC-UPR-14-002-2012.pdf>; “Annual report: Pakistan 2013”, Amnesty International, 23 May, 2013, <http://www.amnestyusa.org/research/reports/annual-report-pakistan-2013?page=show>; “Civil society urges Govt. enact law to end torture”, Human Rights Commission of Pakistan, 26 June, 2013, <http://hrdp-web.org/hrdpweb/civil-society-urges-govt-enact-law-to-end-torture/>.

¹⁴⁴ Human Rights Watch, “Cruel Britannia: British complicity in the torture and ill-treatment of terror suspects in Pakistan”, November 2009, ps. 10-11; Human Rights Commission of Pakistan, “Blinkered slide into chaos”, June 2011, <http://hrdp-web.org/hrdpweb/wp-content/pdf/ff/6.pdf>; Human Rights Watch, “We can torture, kill or keep you for years’: Enforced disappearances by Pakistan security forces in Balochistan”, July 2011; Amnesty International, “The hands of cruelty”, December 2012, <http://www.amnesty.org/en/library/asset/ASA33/020/2012/en/192d6b7c-5b74-40ee-9ac7-2919cae14daf/asa330202012en.pdf>.

¹⁴⁵ Ibid. The case of the ‘Adiala 11’ exemplifies the impunity with which armed forces and intelligence agencies operate in the context of national security. The case involves 11 men, some of whom were subject to enforced disappearances in parts of Punjab and FATA from 2007 to 2008 and subsequently detained in Adiala Jail, Rawalpindi. So far, four of the 11 detainees have died in custody, highlighting the poor conditions in which they are held. These men are held beyond the rule of law because Pakistan’s intelligence agencies believe them to be morally—if not legally—culpable. See Amnesty International, “The hands of cruelty”, ps. 28-31; “Adiala missing inmates: ISI say terror suspects “held on moral grounds””, *The Express Tribune*, 21 January, 2013, <http://tribune.com.pk/story/496957/adiala-missing-inmates-sc-summons-case-review-report/>

¹⁴⁶ Assessments of the risk of torture must be individualized and must take into account all factors including the existence in the receiving state of a pattern of a “gross, flagrant or mass violations of human rights.” See Article 3(2) United Nations Convention against Torture; *Chahal* at 97-105; *Saadi* at 147; *Agiza* at 13.3; *Othman* at 187; *Sameh Sami Khouzam v. Attorney General of the United States; Secretary of the Department of Homeland Security; Assistant Secretary of the Department of Homeland Security*; Nos. 07-2926 & 08-1094, US Court of Appeals for the Third Circuit, 5 December 2008, p. 45. Furthermore, the test under Article 3(2) UNCAT is absolute and cannot be balanced against national security concerns. See *Gorki Ernesto Tapia Paez v. Sweden*, CAT/C/18/D/39/1996, UN Committee Against Torture (CAT), 28 April, 1997, <http://www.unhcr.org/refworld/docid/3ae6b6de10.html>; Human Rights Watch, “Still at risk”, p. 8.

detainees who are ethnic Baloch, and affiliated with nationalist political parties or armed groups, whose members have been victims of abuse by Pakistani officials while in detention.¹⁴⁷

Several factors may mitigate the potential risks DFIP detainees face upon their return to Pakistan, which should also be taken into account when assessing the adequacy of assurances. Pakistan's record on treatment of former U.S.-held detainees is quite positive, and interviews with released Guantanamo Bay and DFIP detainees indicate that they have not been subjected to any mistreatment upon return to Pakistan.¹⁴⁸ The small number of DFIP detainees that would be transferred to Pakistan—approximately 40 in total—may also reduce the risk of mistreatment, given the likely public attention of these cases and the limited number of detainees that would transferred into Pakistani custody.

There are also indications that the Pakistani government's perception of the threat DFIP detainees pose places them at a lower risk of torture upon return. According to a Pakistani Ministry of Interior (MoI) official, in the absence of any evidence of criminal activity in Pakistan on detainees' part, the Pakistani government will only hold detainees repatriated for prosecution on charges of traveling to Afghanistan without adequate documentation, not on anti-terror charges.¹⁴⁹ Based on extensive interviews with Pakistani government officials, it is clearly not the case that the Pakistani government considers detainees held at the DFIP to be threats to Pakistan merely by virtue of their detention or due to U.S. threat perceptions.¹⁵⁰ This may reduce the risk that such detainees will be subject to any mistreatment upon their return or transfer into Pakistani custody.

2. *Humane Treatment Assurances*

There are several substantive measures that the U.S. and Pakistani governments can put in place to address the potential risk of torture. While no one measure is a stand-alone solution or necessarily fulfills the United States' *non-refoulement* obligation, experience has shown that policies and mechanisms do exist that can significantly mitigate the risk of abuse and enable the safe transfer of detainees. In addition, because the Pakistani government holds every repatriated detainee—even those slated for release—for at least some period of time for debriefing, the United States must ensure that proper assurances are sought and provided for all detainees transferred to Pakistani custody.¹⁵¹

¹⁴⁷ Baloch individuals suspected of ties to nationalist or insurgent groups have been particularly susceptible to enforced disappearances and torture, held incommunicado without access to their lawyers or family, and detained in secret facilities where there is no official record of arrest or detention. See Human Rights Watch, "We can torture you", p. 29-30, 39, 42-43.

¹⁴⁸ Justice Project Pakistan interviews with ex DFIP detainees (names, dates, locations withheld); McClatchy Guantanamo Inmate Database, detainees.mcclatchydc.com/mi_services/gitmo/detainees/18, detainees.mcclatchydc.com/mi_services/gitmo/detainees/63, detainees.mcclatchydc.com/mi_services/gitmo/detainees/16, detainees.mcclatchydc.com/mi_services/gitmo/detainees/12, detainees.mcclatchydc.com/mi_services/gitmo/detainees/13, detainees.mcclatchydc.com/detainees/17; Laurel E. Fletcher & Eric Stover, "Guantanamo and its aftermath", ps. 61-62.

¹⁴⁹ Justice Project Pakistan interview with a Pakistani government official (name, date, location withheld).

¹⁵⁰ Justice Project Pakistan interviews with Pakistani government officials (names, dates, locations withheld).

¹⁵¹ Justice Project Pakistan interviews with ex-detainees (names, dates, locations withheld); Justice Project Pakistan interview with a Pakistani government official (name, date, location withheld); Anjum Herald Gill, '17

Firstly, assurances will only be effective if they are sought from and provided by the Pakistani government entities that are responsible for internal security and detentions. In Pakistan, the Ministry of Defense (MoD) and the MoI are in charge of security and detention, and will be responsible for the treatment of individuals transferred to Pakistan.¹⁵² Though the MFA is the United States' principal interlocutor in negotiating the terms of assurances, any agreement must include input and credible commitments from the MoD and MoI.

Guaranteeing access to counsel is critical to ensuring detainees' rights are respected and that they are protected from abuse. Though detainees have not had legal representation in U.S. detention, immediately granting detainees access to counsel upon being transferred to Pakistani custody—and ideally for some period immediately before they are transferred—could significantly mitigate the risk of abuse detainees face in Pakistan. Detainees should also be provided the opportunity to express any concern themselves, or supply individualized information to U.S. officials relevant to assessing the risk of torture upon return. This includes input into any specific arrangements that could mitigate the risk of mistreatment. Access to independent legal counsel—a constitutional right under Pakistani law—is one of the most effective means of protecting individuals in detention from torture and abuse.¹⁵³ Pakistani law also grants counsel the right to regular visits with clients, which will not only deter abuse but also help ensure any mistreatment is promptly identified, ended and adequate remedies are sought.¹⁵⁴ Providing detainees with legal counsel will also help ensure detainees' due process and fair trial rights are protected while in Pakistani custody, such as the right to challenge any further detention in Pakistani custody, legal representation in the event of prosecution in Pakistan, the right to be informed of the charges against them and access to evidence used against them.¹⁵⁵ Pakistani courts, including the Supreme Court and the Peshawar High Court, have recently demonstrated a willingness to intervene in sensitive national security cases to protect detainees' rights, highlighting the need for legal counsel to allow detainees repatriated from the DFIP the opportunity to protect their rights.¹⁵⁶

ex-Guantanamo prisoners released', *Daily Times*, 28 June, 2005; U.S. diplomatic cable, www.cablegatesearch.net/cable.php?id=07ISLAMABAD333&q=bagram.

¹⁵² Rules of Business, Schedule II, 5.1, 18.1, 18.2, 18.31, 18.32. The MoI has administrative control over the Federal Investigation Agency, the Intelligence Bureau and para-military forces such as the Frontier Corps. The MoD has administrative control over the armed forces, including Military Intelligence and the Inter-Services Intelligence.

¹⁵³ Article 10 Constitution of Pakistan 1973. For access to legal counsel as a strong safeguard against torture, see: APT, "The role of lawyers in the prevention of torture", January 2008, http://www.apt.ch/content/files_res/roleoflawyers.pdf; "Preventing torture: an operational guideline for national human rights institutions", May 2010, http://www.ohchr.org/Documents/Countries/NHRI/Torture_Prevention_Guide.pdf, p. 3; "Preventing torture: a handbook for OSCE field staff", <http://www.osce.org/odihr/42871>, p. 33; European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (CPT), "21st General Report of the CPT: 1 August 2010 – 31 July 2011", 10 November, 2011, <http://www.cpt.coe.int/en/annual/rep-21.pdf>, ps. 15-21; Committee Against Torture, General Comment 2, Implementation of article 2 by States Parties, U.N. Doc. CAT/C/GC/2/CRP. 1/Rev.4 (2007); "General recommendations of the Special Rapporteur on torture", <http://www.ohchr.org/Documents/Issues/SRTorture/recommendations.pdf>, p. 2.

¹⁵⁴ Article 10(1) Constitution of Pakistan 1973; Rule 538 Pakistan Prison Rules. The Pakistan Prison Rules are a set of laws and regulations governing jails, the duties of jail authorities and the rights of prisoners.

¹⁵⁵ Articles 9 & 10 Constitution of Pakistan 1973; Sections 241-A & 265-C Code of Criminal Procedure

¹⁵⁶ Waseem Ahmad Shah, "Missing persons freed by forces: KP govt places lists before court", *Dawn*, 26 July, 2012, <http://beta.dawn.com/news/737515/missing-persons-freed-by-forces-kp-govt-places-lists-before-high->

Detainee monitoring may also mitigate the risk of abuse.¹⁵⁷ Though monitoring alone is not sufficient to meet states' *non-refoulement* obligations, it has been shown to be effective when monitors are independent, and have full, unfettered access to detention facilities and detainees, as well as private, confidential interviews with detainees. Trained forensic and medical experts have also been shown to be critical elements of a detainee monitoring regime in order to properly evaluate and identify any physical evidence of abuse.¹⁵⁸

Because jails in Pakistan are under the exclusive administrative control of provincial governments, access to detainees by independent monitors can vary according to province. Where such access is authorized, as it is in Sindh province, monitors specialized in detecting signs of torture from NGOs such as the ICRC or the Human Rights Commission of Pakistan (HRCP) may be more easily permitted unfettered and confidential access to detainees. Such organizations could be approached to engage in or oversee monitoring of transferred detainees. In provinces where access is more restricted—Punjab for example—arrangements should be made to ensure effective and reliable monitoring mechanism are in place.

Pakistani law also permits provincial governments to authorize judges, doctors, psychiatrists and national and provincial lawmakers regular access to jails, enabling Pakistan to put in place yet another layer of monitoring and transparency.¹⁵⁹ Authorized individuals have the right to hold confidential interviews with detainees.¹⁶⁰ Pakistani law is silent on whether visits can be held without prior notice. A specially tasked, delegation of lawmakers, doctors and judges could also engage in detainee monitoring or complement systematic monitoring by independent bodies and ensure that detainees' rights are respected. Pakistani government officials could ensure that such monitors had confidential, unfettered access to detainees.

Notifications of transfer from the DFIP to Pakistan to relatives of detainees, legal counsel and third party monitors may also significantly mitigate the risk of torture. Evidence shows that detainees held in incommunicado detention are at much greater risk of torture.¹⁶¹ In the past, the U.S. and Pakistani governments have generally failed to provide such notification to family members or legal counsel.

¹⁵⁷ See *Agiza* at 13.4; *Alzery* at 11.5; *Othman* at 77 for a description of the value of detainee monitoring in mitigating torture risks.

¹⁵⁸ Ibid.

¹⁵⁹ Rules 913, 917 Pakistan Prison Rules.

¹⁶⁰ Rule 919, 924 Pakistan Prison Rules.

¹⁶¹ Human Rights Committee, General Comment 20, Article 7 (Forty-fourth session, 1992), <http://www.unhchr.ch/tbs/doc.nsf/0/6924291970754969c12563ed004c8ae5>, para. 11; "General recommendations of the Special Rapporteur on torture",

<http://www.ohchr.org/Documents/Issues/SRTorture/recommendations.pdf>, p. 2; "Joint study on global practices in relation to secret detention in the context of countering terrorism of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Martin Scheinin; the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading treatment or Punishment, Manfred Nowak; the Working Group on Arbitrary Detention represented by its Vice-Chair, Shaheen Sardar Ali; and the Working Group on Enforced or Involuntary Disappearances represented by its Chair, Jeremy Sarkin", A/HRC/13/42, 19 February, 2010,

<http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A-HRC-13-42.pdf>, ps. 19-20, paras. 33-34;

Prompt notification of a detainee's impending transfer to Pakistan, including the authorities that will receive and have custody of the detainee, and the location of detention is a basic, easy-to-implement measure that will not only bring detainees and their families peace of mind, but also help ensure detainees' rights are protected.

c) U.S. Security Concerns

The United States is seeking security assurances from Pakistan to address concerns that repatriated detainees may "engage in hostilities against the United States or its coalition partners" upon release.¹⁶² However, it is important that security assessments are realistic and accurate, and that the United States avoid exaggerated fears of "recidivism," which stalled the repatriation of Guantanamo Bay detainees. The Pakistani government also has an extensive security apparatus, legislative framework, and well-developed law enforcement capabilities, which could be better utilized to provide assurances. Finally, the United States should balance any security concerns against the significant legal, moral, and political costs of continuing to hold detainees in indefinite detention without trial.

1. Avoiding Overstated Fears of Recidivism

U.S. concerns that repatriated detainees may engage in hostilities against the United States in the future—termed “re-engagement” or “recidivism”—must be addressed in order to repatriate detainees. However, the assessment of the recidivism risk of Pakistani detainees considered for repatriation should be rigorous and based on credible evidence, not politics or speculation.

First and foremost, it is necessary to acknowledge that not all detainees represent a risk of re-engaging in militancy upon release.¹⁶³ Some detainees have been wrongfully detained, having never engaged in hostilities against U.S. forces, as the cases of Jibran, who was released in 2009, and two Pakistani detainees released in August 2012 have demonstrated.¹⁶⁴ U.S. officials' stated security concerns often overlook this category of detainees, and inaccurately characterize all detainees as posing some level of threat or risk of “recidivism” that must be mitigated through security assurances.

¹⁶² Department of Defense internal policy memorandums, http://www.aclu.org/files/pdfs/natsec/bagram20100514/07bagrampolicy_30-92.pdf.

¹⁶³ The Constitution Project, “The Report of The Constitution Project’s Task force on Detainee Treatment”, 16 April, 2013, <http://detainetaskforce.org/read/files/assets/common/downloads/The%20Report%20of%20The%20Constitution%20Project.pdf>, p. 295.

¹⁶⁴ A U.S. military official apologized to Jibran for his detention and recognized they had no grounds to detain him. One of the detainees released in 2012 declined to be interviewed for the report. Based on past conversations with him and his family, he was held on the sole basis of an accusation—later proven to be false—by an Afghan co-worker. The other detainee could not be contacted. However, a U.S. government official confirmed that he was being held hostage by militants in Afghanistan when the U.S. military stormed the compound and detained all its occupants.

Studies have also found that U.S. government estimates of recidivism of Guantanamo Bay detainees have been overstated and misleading, based on inaccurate or unsubstantiated data and lacking evidence that specific released detainees joined or returned to the fight against the United States.¹⁶⁵

In 2010 the U.S. government estimated a 25 percent rate of confirmed and suspected recidivism among released Guantanamo Bay detainees. But in a comprehensive study of U.S. DOD reports and publicly available information, the New America Foundation (NAF) found that the actual rate of recidivism for released detainees was 6 percent.¹⁶⁶ NAF's study excluded individuals who were alleged only to have been "associated" with militant groups and included only those individuals that have participated in attacks on U.S. interests or its allies—including Pakistan—not more broadly in actions against countries like Russia.¹⁶⁷ In 2013, another analysis by the NAF found that the overall number of ex-detainees that have "confirmed of reengaging" stands at 4 percent—in stark contrast to the Director of National Intelligence's (DNI) 2013 estimate of 16.1 percent—and the total number ex-detainees "suspected of reengaging" is at 4.7 percent—significantly lower than DNI's number of 11.9 percent.¹⁶⁸

Though the recidivism rate for detainees released from DFIP is not known, there are indications that it may also be quite low. In 2010, the U.S. commander in charge of detention operations in Afghanistan, Vice Admiral Harward, stated that the "recapture" rate of detainees held at the DFIP that year was less than 1 percent.¹⁶⁹ Though Vice Admiral Harward noted that this was different from the recidivism rate, which could not be confirmed, he cited this low rate as indicative of the

¹⁶⁵ Because of the high profile of ex-Guantanamo detainees, there is reasonable reliability of publicly available reporting on recidivism of ex-detainees. See The Constitution Project, "The Report of the Constitution Project", p. 299-300; Mark Denbeaux, "Released Guantanamo detainees and the Department of Defense: propaganda by the numbers?", *Seton Hall University School of Law*,

http://law.shu.edu/publications/guantanamoreports/propaganda_numbers_11509.pdf; Peter Bergen, Katherine Tiedemann and Andrew Lebovich, "How many Gitmo alumni take up arms?" *Foreign Policy*, 11 January, 2011,

http://www.foreignpolicy.com/articles/2011/01/11/how_many_gitmo_alumni_take_up_arms?wp_login_redirect=0; New America Foundation, "Appendix: Guantanamo – Who really 'returned to the battlefield?'", 11 January, 2011,

http://www.foreignpolicy.com/files/fp_uploaded_documents/110112_RecidivismAppendix2.pdf; Nancy Talianian, "Congress receives misleading report about Guantanamo 'recidivism'", *Huffington Post*, 9 December, 2010, http://www.huffingtonpost.com/nancy-talianian/congress-receives-mislead_b_794514.html; House Armed Services Committee, "Leaving Guantanamo: policies, pressures, and detainees returning to the fight", January, 2012, http://armedservices.house.gov/index.cfm/files/serve?File_id=dd0b4c6e-528e-4138-9755-86bae92e1cdb, ps. 68-77.

¹⁶⁶ Director of National Intelligence, "Summary of the reengagement of detainees formerly held at Guantanamo Bay, Cuba", http://www.foreignpolicy.com/files/fp_uploaded_documents/110111_0_120710_Summary_of_the_Reengagement_of_Detainees_Formerly_Held_at_Guantanamo_Bay_Cuba.pdf; New America Foundation, "Appendix: Guantanamo".

¹⁶⁷ Peter Bergen, "How many Gitmo alumni take up arms?"

¹⁶⁸ Director of National Intelligence, "Summary of the reengagement of detainees formerly held at Guantanamo Bay, Cuba", March 2013, <http://www.dni.gov/files/documents/March%202013%20GTMO%20Reengagement%20Release.pdf>; New America Foundation, "How many Guantanamo detainees 'return to the battlefield?'", 7 May, 2013, http://newamerica.net/sites/newamerica.net/files/profiles/attachments/GTMO_Appendix_5-7-2013.pdf

¹⁶⁹ DOD News briefing with Vice Adm. Harward from Afghanistan, 30 November, 2010, <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=4727>.

success of the U.S. military's rehabilitation and reintegration program.¹⁷⁰ Documents released through an April 2013 ACLU FOIA request reveal that DOD described the recidivism rate of detainees released from what was then the BTIF were "relatively low."¹⁷¹

Upon release, detainees interviewed by JPP are more pre-occupied with resettling and reintegrating into normal life than taking up arms against the United States.¹⁷² Many face significant social stigma, difficulties finding jobs, and lasting mental and physical health issues.¹⁷³ Overemphasis on a very small percentage that have re-engaged in hostilities against the United States gives a false impression of the actual threat posed by repatriated and released detainees, undermining the accuracy of U.S. threat assessments and fuelling politicized narratives in the U.S. public and Congress that unnecessarily and unjustly prolong detention.¹⁷⁴

2. Flaws in Review Process and Balancing the Costs of Continuing Indefinite Detention

Flaws in U.S. capture practices and detention review regime may undermine the accuracy of threat assessments, and lead to a biased picture of a detainee's propensity to turn to or re-engage in militancy or terrorism. The United States must also consider the serious legal, political and moral costs of continuing to hold detainees at the DFIP.

The U.S. practice of paying bounties—particularly in the earlier years of the war—as well as the widely reported practice of individuals providing false information to U.S. forces because of tribal rivalries or personal enmities has led to the wrongful detention of many individuals, both in Afghanistan and at Guantanamo Bay.¹⁷⁵ Relatives of current Pakistani detainees allege that similar

¹⁷⁰ Ibid. Department of Defense, "Report on progress toward security and stability in Afghanistan", December 2012, http://www.defense.gov/news/1230_Report_final.pdf, p. 40.

¹⁷¹ Department of Defense memorandums released through ACLU FOIA request, <http://www.aclu.org/files/pdfs/natsec/bagram20130418/Unlawful%20Enemy%20Combatant%20Review%20Board%20Procedures.pdf>, p. 1.

¹⁷² Justice Project Pakistan interviews and conversations with ex-detainees (names, dates, locations withheld)

¹⁷³ Ibid.; University of Berkeley, "Returning home", ps. 3-7.

¹⁷⁴ Carol Rosenberg, "Congress, rules keep Obama from closing Guantanamo Bay", *McClatchy*, 9 January, 2012, <http://www.mcclatchydc.com/2012/01/09/135179/congress-rule-keep-obama-from.html#.Ua19fNL-F1w>; "US still lacks Guantanamo transfer safeguards: Lawmakers", *The Express Tribune*, 9 February, 2012, <http://tribune.com.pk/story/333887/us-still-lacks-guantanamo-transfer-safeguards-lawmakers/>

¹⁷⁵ "Human Rights Watch 2006 World Report Chapter on Pakistan", <http://www.hrw.org/world-report-2007/pakistan>; Tom Malinowski, "Who's really locked up in Guantanamo", 16 March, 2006, <http://www.hrw.org/news/2006/03/15/whos-really-locked-guantanamo>; Mona Samari, "Bounties paid for terror suspects", *Human Rights Defender*, 16 January, 2007,

<http://www.amnesty.org.au/hrs/comments/2167/>; Ann Wright, "More bounties in Afghanistan and Pakistan will result in detention of innocent civilians", *Common Dreams*, 1 October, 2007,

<https://www.commondreams.org/archive/2007/10/01/4241>; Jennifer Daskal, "How to close Guantanamo", 04 January, 2008, <http://www.hrw.org/news/2008/01/03/how-close-guantanamo>; Mark Pope, "How did so many innocent people end up in Guantanamo Bay?", *Reprive*, 30 August, 2012, http://www.reprive.org.uk/publiceducation/2012_08_30_Public_Education_Innocents_Guantanamo/; Mark Denbeaux & Joshua Denbeaux, "Report on Guantanamo detainees: a profile of 517 detainees through analysis of Department of Defense data", *Seton Hall University Law School*,

http://law.shu.edu/publications/guantanamoReports/guantanamo_report_final_2_08_06.pdf, p.15. The U.S. military has acknowledged that false information provided on the basis of personal enmity has been a problem in detention operations in Afghanistan. See Ray Rivera, "In an Afghan village, living in fear of both sides", *The New York Times*, 23 April, 2011,

<http://www.nytimes.com/2011/04/24/world/asia/24paktika.html?pagewanted=all>; Human Rights First,

practices, including kidnapping in Pakistan by bounty hunters or intelligence officers seeking bounties and false accusations by Afghan co-workers for monetary gain or due to personal enmity, led to the detention of their relatives, raising serious concern that these detainees might be wrongfully held.¹⁷⁶

There are cases where it appears that the U.S. military relied in part on circumstantial evidence—such as mere presence in or proximity to a compound believed to be used by militants and terrorist—to justify capture and detention.¹⁷⁷ In the case of a Pakistani detainee released in 2012, a U.S. official confirmed to JPP interviewers that he was actually taken hostage by militants, and mistakenly detained by U.S. forces when they raided the compound in which he was being held.¹⁷⁸ The official added that the U.S. military interrogated him only after his transfer to the DFIP and conducted little to no investigation.¹⁷⁹

For Afghan detainees, witness participation is easier. The U.S. military provides support to witnesses, including financial assistance for travel. The U.S. military explains the DRB process and the purpose of witness testimony, and engages frequently with the Afghan government and population. This allows detainees to more easily present information, such as evidence of past enmity or character testimonies, crucial to elucidating cases of wrongful detention and mitigating U.S. security fears.¹⁸⁰ Moreover, evidence suggests that detainees who call witnesses have a lower chance of being recommended for continued internment, indicating that witnesses are crucial to mitigating U.S. threat perception.¹⁸¹

By contrast, witness participation for Pakistani detainees is sorely lacking. One U.S. government official admitted that witness participation at the DRB is skewed in favor of Afghan detainees.¹⁸² Relatives of Pakistani detainees are unaware of how exactly they can meaningfully participate in DRB proceedings.¹⁸³ Attorneys' eagerness to contribute to the DRB is stifled by the DOD's limited cooperation and unwillingness to respond to requests of DRB transcript disclosures. In addition, the Pakistani government refuses to participate in DRB proceedings, even upon detainees' express

"Detained and Denied", ps. 14-19. A large number of Pakistani detainees were captured when the use of bounties was widespread.

¹⁷⁶ Justice Project Pakistan interviews with the relatives of Kaleem, Ibrahim, Javed, Abdul Jabbar, Murtaza and Muhammad (real names, dates, locations withheld). For evidence that Pakistani officials or elements of the Pakistani government and security services claimed bounties see: Pervez Musharraf, "In the line of fire: a memoir", 25 September, 2006, p. 237 ("We have earned bounties totaling millions of dollars. Those who habitually accuse us of "not doing enough" in the war on terror should simply ask the CIA how much prize money it has paid to the government of Pakistan.").

¹⁷⁷ Human Rights First, "Detained and denied", ps. 14-15; Open Society Foundations, "The cost of kill/capture: Impact of the night raid surge on Afghan civilians", 19 September, 2011,

<http://www.opensocietyfoundations.org/sites/default/files/Night-Raids-Report-FINAL-092011.pdf>, ps. 9-15.

¹⁷⁸ Justice Project Pakistan interview with a U.S. government official (name, date, location withheld).

¹⁷⁹ Ibid.

¹⁸⁰ Justice Project Pakistan interview with a U.S. government official (name, date, location withheld); Lieutenant Colonel Jeff A. Bovarnick, "Detainee Review Boards in Afghanistan: From Strategic Liability to Legitimacy", *The Army Lawyer*, June 2010, http://www.loc.gov/rr/frd/Military_Law/pdf/Bovarnick-Detainee.pdf, ps. 34-35.

¹⁸¹ Lieutenant Colonel Jeff A. Bovarnick, "Detainee Review Boards in Afghanistan", p. 35

¹⁸² Justice Project Pakistan interview with a U.S. government official (name, date, location withheld).

¹⁸³ Justice Project Pakistan interviews and conversations with relatives of current detainees (names, dates, locations withheld).

request. Such participation could help provide background information on the detainee or a commitment to negotiate terms of repatriation with the U.S. government, thereby increasing the chances a detainee is recommended for transfer. As one Pakistani government official stated, detainees sometimes nominate Pakistan embassy staff as witnesses but Pakistani officials decline to participate, claiming they “have nothing to say.”¹⁸⁴

Without meaningful involvement of their relatives, legal counsel or the Pakistani government, Pakistani detainees are left to fend for themselves, unable to present exculpatory evidence or mitigate U.S. threat perceptions. Furthermore, information available to the U.S. military regarding a detainee’s character or the ability of the Pakistani government to implement security measures is partial at best, and non-existent at worst. Consequently, security assessments of Pakistani detainees are incomplete, based not on a comprehensive and detailed understanding of a detainee’s propensity to engage in militancy or terrorism and of existing mechanisms mitigating perceived threats, but a wholly one-sided impression built on evidence that is near impossible for the detainee to challenge.

Crucially, it also appears that an overemphasis on the alleged security threat detainees may pose, worsened by the systematic lack of adequate due process provided to detainees, leads to too little consideration of the profound legal, moral and political consequences of indefinite detention. By continuing to detain individuals to guard against the statistically low possibility of recidivism, and denying detainees fundamental due process rights, the United States deals a serious blow to its international credibility and moral authority.¹⁸⁵ As a result, the U.S. government will find it increasingly difficult to engage with its partners in the region as many will perceive a double-standard in the U.S. government’s line of thought: advocating respect for human rights, yet detaining individuals without charge or trial.¹⁸⁶ In the past, disagreements regarding Guantanamo Bay and the practice of indefinite detention have caused substantial rifts between the U.S. and allied governments.¹⁸⁷ With little progress on their cases, the continued detention of TCNs at the DFIP has the potential to be as divisive as Guantanamo Bay and cause profound discord between the United States and key allies.

3. Security and Anti-Terrorism Mechanisms in Pakistan

For detainees who are deemed by the U.S. government to represent a threat to the United States after their release, it is necessary to acknowledge that Pakistan has a robust counter-terrorism legal framework and an extensive security and intelligence apparatus, capable of mitigating U.S. fears.

¹⁸⁴ Justice Project Pakistan interview with a Pakistani government official (name, date, location withheld)

¹⁸⁵ Rosa Brooks, “Let them go”, *Foreign Policy*, 28 March, 2013,

www.foreignpolicy.com/articles/2013/03/28/let_them_go?page=full.

¹⁸⁶ Human Rights First, “How to close Guantanamo: blueprint for the next administration”, December 2012, p.1
The Constitution Project, “The Report of The Constitution Project”, ps. 278-279; Peter Foster, “Barack Obama: close Guantanamo as it is damaging America”, *Telegraph*, 30 April, 2013,
www.telegraph.co.uk/news/worldnews/barackobama/10028946/Barack-Obama-close-Guantanamo-as-it-is-damaging-America.html.

¹⁸⁷ “Close Guantanamo camp, Hain says”, *BBC News*, 17 February, 2006,

http://news.bbc.co.uk/2/hi/uk_news/politics/4722408.stm; “UK told US won’t shut Guantanamo”, *BBC News*, 11 May, 2006, http://news.bbc.co.uk/2/hi/uk_news/politics/4760365.stm.

It should be noted that any post-transfer detention under the Action in Aid of Civil Power Regulations 2011 (AACPR), which effectively legalized indefinite detention without charge or trial in northwest Pakistan, would be a serious violation of detainees' rights. The AACPR are in clear violation of the Pakistani Constitution and fundamental rights.¹⁸⁸ The AACPR contains few procedural guarantees, and those that exist are not implemented.¹⁸⁹ The AACPR are also in clear violation of Pakistan's international human rights obligations.¹⁹⁰ Furthermore, there are numerous credible reports of human rights violations, including torture and enforced disappearance of individuals held under the AACPR.¹⁹¹ Any detainee held by the Pakistani government post-transfer should be held in a manner fully consistent with their rights under the Pakistani constitution, and pursuant to domestic criminal law.

Some security concerns could be addressed through prosecution of detainees transferred to Pakistani custody, assuming the U.S. government has sufficient evidence and that such evidence is admissible in Pakistani courts. For detainees suspected of committing or conspiring to commit acts in Pakistan, prosecutions, whether through the criminal justice system or the special Anti-Terrorism Courts (ATCs), should not raise significant legal issues, provided that the U.S. military's evidence is properly shared with the Pakistani government and is admissible in Pakistani courts.¹⁹²

For detainees suspected of committing unlawful acts in Afghanistan, prosecutions could be more problematic. Though the Penal Code expressly allows for prosecuting Pakistani citizens for acts committed abroad, there is ambiguity regarding the applicability of the Anti-Terrorism Act 1997 (ATA 1997)—Pakistan's seminal counter-terrorism legislation—to acts committed abroad.¹⁹³ The ATA 1997 applies only to Pakistani territory and does not explicitly cover acts committed outside Pakistan, except for directing terrorist activities in Pakistan while residing abroad.¹⁹⁴ On the other hand, Pakistani prosecutors have used the ATA 1997 to prosecute individuals for acts committed abroad. Individuals have been charged with planning and helping to execute the 2008 Mumbai attacks under the Act and are being tried in the Anti-Terrorism Courts (ATCs) since 2009.¹⁹⁵ Though

¹⁸⁸ "Promise of a post-Adiyala Pakistan", *Dawn*, 12 March, 2012, <http://beta.dawn.com/news/702189/promise-of-a-post-adiyala-pakistan>; Amnesty International, "Hands of cruelty".

¹⁸⁹ Amnesty International, "Hands of cruelty", ps. 41-44.

¹⁹⁰ Ibid.; Article 9 Constitution of Pakistan 1973; Article 9 ICCPR.

¹⁹¹ Amnesty International, "Hands of cruelty", ps. 18-30; Umer Farooq, "Year for recovery of missing persons' fails to hold its promise", *The Express Tribune*, 1 January, 2013, <http://tribune.com.pk/story/487159/year-for-recovery-of-missing-persons-fails-to-hold-its-promise/>; Mudassir Raja, "Chambers of horror: Govt lifts lid on secret K-P internment centres", *The Express Tribune*, 10 July, 2013, <http://tribune.com.pk/story/574969/chambers-of-horror-govt-lifts-lid-on-secret-k-p-internment-centres/>.

¹⁹² Sections 188, 189 Code of Criminal Procedure. As per section 12 Anti-Terrorism Act 1997, Anti-Terrorism Courts have exclusive jurisdiction over offences under the Act. However, the decision to prosecute under the Penal Code or under the Anti-Terrorism Act 1997 depends on the nature of the acts, evidence in the prosecutor's possession and prosecutorial discretion.

¹⁹³ Sections 3, 4 Pakistan Penal Code; Section 188 Code of Criminal Procedure

¹⁹⁴ Sections 1, 11-V Anti-Terrorism Act 1997.

¹⁹⁵ "Pakistan charges seven people over Mumbai attacks", *BBC News*, 25 November, 2009, <http://news.bbc.co.uk/2/hi/8378281.stm>; Saeed Shah & Richard Orange, "Mumbai attacks: Pakistan charges seven men on eve of anniversary", *The Telegraph*, 25 November, 2009, <http://www.telegraph.co.uk/news/worldnews/asia/india/6655560/Mumbai-attacks-Pakistan-charges-seven-men-on-eve-of-anniversary.html>; Matt Glenn, "Pakistan to begin trial of 5 Mumbai terror attack suspects", *JURIST*, 11 July, 2009, <http://jurist.law.pitt.edu/paperchase/2009/07/pakistan-to-begin-trial-of-5-mumbai.php>;

the Indian government has accused Pakistan of dragging its feet on the matter, the case demonstrates the possibility of transmitting evidence for prosecutions and interpreting the ATA 1997 as applicable to acts committed outside of Pakistan.¹⁹⁶

There is some concern within the U.S. government that security assurances relying on the prospect of terrorism prosecutions of detainees would be insufficient because of the high acquittal rate of ATCs, estimated by some to be 75 percent.¹⁹⁷ However, it is important to remember that the definition of terrorism under the ATA 1997 includes more traditional criminal acts not associated with terrorism such as kidnapping for ransom, stoning, throwing bricks, and extortion.¹⁹⁸ These cases represent a significant proportion of ATC caseload, undermining the accuracy of acquittal rates in cases more traditionally associated with terrorism.¹⁹⁹ One of the main causes of the high acquittal rate, witness intimidation, would be less likely in DFIP detainees' cases, which would presumably rely on physical and forensic evidence and witnesses outside Pakistan.²⁰⁰ However, the U.S. and Pakistani governments would have to agree on how to transfer evidence and measures to allow witnesses to testify in court, such as testimony via video-link.

Any prosecution must fully respect detainees' due process rights, as protected by Pakistani domestic and international law.²⁰¹ Prosecutions should be based on evidence that is admissible in Pakistani courts.²⁰² As per Pakistani law, any evidence—including classified evidence transmitted by the U.S. government to Pakistani prosecutors—must be recorded in the presence of the accused.²⁰³ Hearsay

"India urges Pakistan to speed up Mumbai attacks trial", *BBC News*, 31 August, 2012, <http://www.bbc.co.uk/news/world-asia-india-19432829>.

¹⁹⁶ Lydia Polgreen and Souad Mekhennet, "Militant network is intact long after Mumbai siege", *The New York Times*, 29 September, 2009, http://www.nytimes.com/2009/09/30/world/asia/30mumbai.html?_r=0&pagewanted=all; "Pakistan has not done enough on attacks", *The Wall Street Journal*, 23 November, 2009, <http://www.livemint.com/Politics/VVwBxLqgnXN2tSfGKUf94l/Pakistan-has-not-done-enough-on-attacks.html>; Zahid Gishkori, "2008 Mumbai attacks: Panel leaves for India to gather evidence", *The Express Tribune*, 14 March, 2012, <tribune.com.pk/story/349704/2008-mumbai-attacks-panel-leaves-for-india-to-gather-evidence/?print=true>.

¹⁹⁷ "75 pc acquittal rate in Pak terror trials: US report", *The Indian Express*, 31 August, 2011, <http://www.indianexpress.com/news/75-pc-acquittal-rate-in-pak-terror-trials-us-report/839640/>; State Department, "Country reports 2012", ps. 168.

¹⁹⁸ Section 6(2)(e), (g), (k) Anti-Terrorism Act 1997.

¹⁹⁹ Hassan Abbas, "Stabilizing Pakistan through police reform", *Asia Society*, July 2012, http://asiasociety.org/files/pdf/as_pakistan_police_reform.pdf, ps. 51-52.

²⁰⁰ State Department, "Country reports 2012", ps. 168; Aatekah Mir-Khan & Asad Kharal, "Prosecuting terrorists: out of 559 cases in 2012, suspects acquitted in 414", *The Express Tribune*, 1 April, 2013, <tribune.com.pk/story/529353/prosecuting-terrorists-out-of-559-cases-in-2012-suspects-acquitted-in-414/?print=true>.

²⁰¹ Article 10-A, Constitution of Pakistan, 1973; Article 10 Universal Declaration of Human Rights; Article 14 International Covenant on Civil and Political Rights.

²⁰² Under Pakistan law, evidence includes the examination-in-chief and cross-examination of witnesses. See 1994 Cr LJ 2026 (2031, 2033) (All); Santosh Dey v. Smt. Archana Cuha (1992) 2 Cal LT (HC) 1 : 1 Cal.

²⁰³ Section 353 Code of Criminal Procedure. It is however possible for the judge to order proceedings to be held in camera, with only counsel present as per section 352 Code of Criminal Procedure.

evidence and confessions not made to a magistrate or police officer of the rank of Superintendent and above are not admissible.²⁰⁴

For repatriated detainees who are subsequently released, the Pakistani government also has a robust legal framework that enables authorities to order security measures such as house arrest and surveillance. Such measures have been used in the past to monitor detainees repatriated from Guantanamo Bay and the DFIP.²⁰⁵ Ayaz and Jibran, ex-DFIP detainees interviewed for this report, have stated that the Pakistani government has placed them under surveillance since being released.²⁰⁶

Several domestic laws provide the Pakistani government with extensive powers to monitor released detainees. The Security of Pakistan Act 1952 (SPA 1952), the West Pakistan Maintenance of Public Order Ordinance 1960 (WPMO 1960), and the ATA 1997 all allow the Pakistani government to order measures be taken against individuals suspected to be national security or public order threats.²⁰⁷ Under Section 3 SPA 1952, the government can limit the movements of an individual to certain areas, require him to remain in a prescribed location and notify his movements to the authority prescribed in the order if the government is “satisfied” that such an order is necessary to prevent the individual “from acting in any manner prejudicial to the defence or the external affairs or the security of Pakistan.” Similarly, under the WPMO 1960, the government can order an individual deemed a threat to “public safety or the maintenance of public order” to remain in the area specified by the order.²⁰⁸ This statute also grants the power to order a person’s expulsion from a location and order that he enter in a surety bond for the compliance of the order’s directions.²⁰⁹

The ATA 1997 grants broad powers to the Federal and Provincial governments, allowing for measures similar to the SPA 1952 and the WPMO 1960. Under section 11-EE(1) ATA 1997 the Pakistani government may place a person’s name on Schedule IV of ATA 1997, upon receipt of information from “any source” that a person is engaged in terrorist activities or affiliated with terrorist organizations. This then allows the government to order the person to execute a bond with one or more sureties, to report their movements to the local police station and any changes to their

²⁰⁴ PLD 2005 SC 63; 2004 Cr.LJ 475; PLD 1985 Kar. (DB); Section 164 Code of Criminal Procedure; Section 21-H Anti-Terrorism Act 1997.

²⁰⁵ McClatchy Guantanamo Inmate Database, detainees.mcclatchydc.com/mi_services/gitmo/detainees/18, detainees.mcclatchydc.com/mi_services/gitmo/detainees/63, detainees.mcclatchydc.com/mi_services/gitmo/detainees/16, detainees.mcclatchydc.com/mi_services/gitmo/detainees/12, detainees.mcclatchydc.com/mi_services/gitmo/detainees/13, detainees.mcclatchydc.com/detainees/17; Aimee Kligman, “After 2 years in Guantanamo, released Pakistani scholar still has nightmares”, *Examiner.com*, 19 January 2011, www.examiner.com/article/after-2-years-guantanamo-released-pakistani-scholar-still-has-nightmares; Carol Grisanti & Fakhar Ur Rehman, “I wake up screaming’: A Gitmo nightmare”, *NBC News*, 18 January 2011, http://www.nbcnews.com/id/41128834/ns/world_news-south_and_central_asia/t/i-wake-screaming-gitmo-nightmare/#.UZSRJq; Justice Project Pakistan interviews with ex-detainees (names, dates, locations withheld).

²⁰⁶ Justice Project Pakistan interviews with ex-detainees (real names, dates, locations withheld)

²⁰⁷ Security of Pakistan Act 1952 (Act No. XXXV of 1952); West Pakistan Maintenance of Public Order Ordinance 1960 (Ordinance XXXI of 1960); Anti-Terrorism Act 1997 (Act No. XXVII of 1997).

²⁰⁸ Section 5.

²⁰⁹ Section 5(1)(c),(e) West Pakistan Maintenance of Public Order Ordinance 1960.

permanent residence.²¹⁰ Section 11-EE(2) ATA 1997 also authorizes the government to forbid a person from visiting certain locations such as schools or public processions, and to order an inquiry into a listed person's financial assets.²¹¹ Furthermore, the government can order that any activity of a person listed under Schedule IV be monitored.²¹²

Under the Investigation for Fair Trial Act 2013 (IFTA 2013), passed in February 2013 the Pakistani government can now request a warrant for surveillance of a person where there is a "reasonable threat or possibility of an attempt to commit a scheduled offence", including offences under the ATA 1997.²¹³ Surveillance under the IFTA 2013 includes interception of telecommunications such as e-mails, SMS and calls as well as use of covert surveillance and human intelligence.²¹⁴ In addition to providing legal cover for an activity that Pakistani intelligence agencies have long engaged in, information collected under a lawful warrant for surveillance under the IFTA 2013 is admissible as evidence at trial.²¹⁵

These laws grant the Pakistani government significant power to monitor released detainees. However, both the U.S. and Pakistani governments must also take care to ensure that these measures are applied in a reasonable, lawful manner that does not violate detainees' rights. In practice, such measures can also lead to harassment of repatriated detainees by security and intelligence officials, stifling detainees' attempts at reintegration in normal life and further alienating them from society.²¹⁶ All detainees enjoy a presumption of innocence and full procedural guarantees under Pakistani law. The imposition of such security measures should fully respect the procedural guarantees provided under Pakistani law and be based on evidence that is admissible and complies with the standards of evidence in Pakistani law.²¹⁷ Mere detention at the DFIP should not be sufficient ground to order security measures.

d) Ad Hoc Negotiations and Lack of Clear Policies

Both the United States and Pakistan have largely failed to craft clear and consistent policies on repatriating detainees. Instead, they have engaged in ad hoc negotiations, significantly prolonging detention and leaving detainees' fates uncertain. Focusing on single individuals or a small, limited

²¹⁰ Section 11-EE(2)(a),(b),(c) Anti-Terrorism Act 1997.

²¹¹ Sections 11-EE(2)(d), (e) Anti-Terrorism Act 1997.

²¹² Section 11-EE(2)(f) Anti-Terrorism Act 1997.

²¹³ Sections 10(1), 16 Investigation for Fair Trial Act 2013.

²¹⁴ Section 16 Investigation for Fair Trial Act 2013.

²¹⁵ Section 23 Investigation for Fair Trial Act 2013.

²¹⁶ Justice Project Pakistan interviews with ex-DFIP and Guantanamo Bay detainees (names, dates, locations withheld); Justice Project Pakistan conversations with the lawyer of an ex-Guantanamo Bay detainee on Schedule IV (name, date, location withheld); See also University of Berkeley, "Guantanamo and its aftermath" ps. 61-62; University of Berkeley, "Returning home", ps. 3-5. Ex-detainees have reported law enforcement officials requesting bribes and curtailing their freedom of movement beyond what is authorized by the law.

²¹⁷ See Article 9 Constitution of Pakistan, 1973; *Hassan Nasir vs. The Crown* PLD 1953 Sind 37; *Amatul Jalil Khwaja and others vs. Federation of Pakistan* PLD 2003 Lahore 310; *Mulazim Hussain Shah vs. Province of Punjab* PLD 2006 Lahore 108; *Malik Ashraf Awan vs. Government of the Punjab* 2006 YLR 376; *Abdul Rauf vs. Chief Commissioner Islamabad* PLD 2006 Lahore 111; *Mamoona Saeed v. Government of Punjab* PLD 2007 Lahore 128; *Aneera Khanum vs. Government of the Punjab* 2007 P Cr. LJ 527; *Province of Sindh vs. Roshan Deen* PLD 2008 Supreme Court 132; *Hafiz Muhammad Saeed vs. Government of the Punjab* 2009 YLR 2475; *Muhammad Nadeem vs. Government of Punjab* PLD 2010 Lahore 371; *Khwaja Mureed Hussain vs. Government of the Punjab* 2013 P Cr. L J 312.

group of detainees at a time has made it difficult to build on past successes and to standardize terms of repatriation. Certain U.S. government officials have expressed concern that “precious time is being wasted” and the United States runs a real risk of creating “another Guantanamo”, where detainees are held indefinitely without charge, trial or legal representation and are unable to return to their home countries.²¹⁸

While negotiations over the repatriation of Pakistani detainees have dragged on for years, hamstrung by a lack of political will, bureaucratic delays, and a failure to engage on substantive issues, U.S. and Pakistani negotiations over Pakistani citizens held in Guantanamo Bay, have shown that timely, high-level engagement can yield results. Between 2003 and 2004, a broad agreement forged by high-level officials in the U.S and Pakistani governments, including representatives from both the Pakistani Ministry of Foreign Affairs and Interior, led to the repatriation 63 of Pakistani citizens from Guantanamo Bay.²¹⁹ However, for DFIP detainees, Pakistan has relied instead on what one U.S. official called a “snowfall” of routine diplomatic notes.²²⁰ For years, Pakistani efforts to secure the release and repatriation of detainees were limited to these diplomatic notes, which focused on requesting names of detainees, charges, and consular access, and did little to advance negotiations on the humane treatment and security assurances necessary for repatriation.²²¹

Finally, in January 2012, the Lahore High Court ordered the Pakistani government to commence negotiations with the U.S. government.²²² In response, the Pakistani government formed an inter-ministerial committee or “Bagram Committee,” tasked with coordinating Pakistani efforts and negotiating detainees’ repatriation. On 9 July, 2012, the committee met with U.S. embassy officials and discussed the possibility of negotiating a mechanism to arrange for the transfer of detainees.²²³ Pakistani government officials present at the meeting claimed their U.S. counterparts were vague and did not give clear answers as to the possibilities of repatriation, insisting that such a decision will be taken in Washington.²²⁴

Though the “Bagram Committee” formed by the Pakistani government at the very least reflected a willingness to engage with the U.S. government, it has been relatively ineffective. Since its formation, the committee has only met twice.²²⁵ Some of its members were not provided with even the most basic information regarding the detention of Pakistani citizens at the DFIP, such as the number of detainees, the legal basis for their detention or the background of U.S.-Pakistan negotiations and repatriations.²²⁶ Since the Bagram committee met in July 2012 no further negotiations between the U.S. government and the committee have taken place.²²⁷ Recent court

²¹⁸ Justice Project Pakistan interview with a U.S. government official (name, date, location withheld).

²¹⁹ Guantanamo Docket Timeline, <http://projects.nytimes.com/guantanamo/timeline>; U.S. diplomatic cable, <http://wikileaks.org/cable/2006/08/06ISLAMABAD17261.html>.

²²⁰ Justice Project Pakistan interview with a U.S. government official (name, date, location withheld).

²²¹ Diplomatic Notes obtained through *Sultana Noon v. Federation of Pakistan*.

²²² *Sultana Noon v. Federation of Pakistan* order dated 21 January, 2012

²²³ Report filed by the MFA in *Sultana Noon v. Federation of Pakistan*, 11 July, 2012.

²²⁴ Justice Project Pakistan interview with Pakistani government officials (names, dates, locations withheld).

²²⁵ Justice Project Pakistan interview with Pakistani government officials (names, dates, locations withheld).

²²⁶ Ibid.

²²⁷ Justice Project Pakistan interview with Pakistani government officials (names, dates, locations withheld).

filings suggest the committee has been side-stepped altogether with the Director for Afghanistan at the MFA now taking the lead in conducting negotiations.²²⁸

Pakistani officials have also failed to consistently confirm detainees' nationality, adding significant delay and complications to the repatriation process. Although the Pakistani embassy in Kabul was for years communicating via diplomatic notes with its U.S. counterparts, it refused to formally recognize detainees as Pakistani citizens when prompted by the United States.²²⁹ It was only in response to an order from the Lahore High Court that a formal process for confirmation of nationality was finally established in 2012. Under this procedure, the Pakistani embassy in Kabul was made responsible for initial nationality assessments with further confirmation provided by the Ministries of Foreign Affairs and Interior in Islamabad.²³⁰ However, confirmation of Pakistani detainees' nationality still remains an obstacle. In 2012, the Pakistani government officially confirmed the nationality of two detainees. In August 2012, shortly before their repatriation was due, the Pakistani embassy reneged on the government's confirmation, which risked bringing the repatriation of those detainees to a standstill.²³¹ Their repatriation proceeded only after the ICRC intervened, and obtained nationality documents from the detainees' families.²³²

Interviews with U.S. officials also point to confusion on the U.S. government side of the negotiating table. In an interview with JPP, one U.S. official stated that the DOD is solely responsible for drafting and vetting security assurances, with the State Department only transmitting assurances to and from Pakistan.²³³ Another official, however, contradicted this claim, insisting that the State Department is deeply involved in vetting and assessing security assurances.²³⁴ According to this official, the State Department, being the point of contact between the U.S. and foreign governments, has "people on the ground" who can correctly evaluate the feasibility of specific assurances and provide valuable input to the vetting process.²³⁵ After over a decade of managing such detentions, the roles and responsibilities of different U.S. government agencies and officials in the repatriation negotiation process remain somewhat unclear.

Internal bureaucratic confusion, ad hoc negotiations, and the lack of clear, consistent policies has also meant critical issues like the transfer and use of evidence remain unresolved.²³⁶ Because much of this evidence is classified, and is often hearsay from U.S. military personnel or confidential informants, it is unclear what evidence can or will be shared with Pakistani authorities and whether such evidence would be admissible in Pakistani courts.²³⁷ Similarly, there are questions as to what evidence may be used as a basis for the imposition of security orders and restrictions on repatriated detainees.²³⁸ Though Pakistani law gives primacy to written evidence, practice dictates that the written testimony of a witness has little to no evidentiary value if he does not corroborate his

²²⁸ Report filed by the MFA in *Sultana Noon v. Federation of Pakistan*, 20 February, 2013.

²²⁹ Justice Project Pakistan interviews with U.S. government officials (names, dates, locations withheld).

²³⁰ Report filed by the MFA in *Sultana Noon v. Federation of Pakistan*, 25 April, 2012.

²³¹ Justice Project Pakistan interviews with U.S. government officials (names, dates, locations withheld).

²³² Ibid.

²³³ Justice Project Pakistan interview with U.S. government officials (names, dates, locations withheld).

²³⁴ Justice Project Pakistan interview with a U.S. government official (name, date, location withheld).

²³⁵ Ibid.

²³⁶ Justice Project Pakistan interviews with U.S. government officials (names, dates, locations withheld).

²³⁷ Human Rights First, "Detained and Denied", ps. 9-10.

²³⁸ Justice Project Pakistan interviews with U.S. government officials (names, dates, locations withheld).

statement in open court.²³⁹ The U.S. and Pakistani governments have failed to agree on how to allow witnesses to testify in court, particularly if they are U.S. military personnel or informant sources.

With the U.S. drawdown proceeding apace, time is running out. There is also now concern that, unable to repatriate detainees to Pakistan, the United States may transfer custody of Pakistani detainees to Afghan authorities, raising significant humane treatment concerns.²⁴⁰ In October 2011, the United Nations Assistance Mission to Afghanistan (UNAMA) published a detailed report indicating that Afghanistan's intelligence agencies tortured conflict related detainees in their custody.²⁴¹ In March 2012, the Afghanistan Independent Human Rights Commission found that torture was prevalent in 11 different detention facilities run by Afghan intelligence and security services.²⁴² In January 2013, UNAMA published another report on the treatment of conflict-related detainees in Afghan detention and found that "torture persists and remains a serious concern in numerous detention facilities across Afghanistan."²⁴³ These reported instances of ill-treatment at the hands of Afghan security and intelligence, led International Security Assistance Force states to repeatedly suspend detainee transfers.²⁴⁴ Furthermore, there are indications that Pakistani citizens have been tortured while in Afghan government custody.²⁴⁵

e) Politicization of the repatriation process

Due to a failure to craft a clear policy and the ad hoc nature of current negotiations, the issue of TCN detainees is becoming more politicized, both within the United States, and between the U.S., Afghan, and Pakistani governments. The Pakistani government seems to be using the repatriation

²³⁹ Article 75 Qanun-e-Shahadat Ordinance, 1984. Witness testimony in open court is *de facto* required due to the high level of document forgery.

²⁴⁰ Section 1025, National Defence Authorization Act 2013. It is worth mentioning that there have not recently been reports of detainee abuse at the ANDF-P or the DFIP.

²⁴¹ UNAMA, "Treatment of conflict-related detainees in Afghan custody", October 2011, http://unama.unmissions.org/Portals/UNAMA/Documents/October10 %202011_UNAMA_Detention_Full-Report_ENG.pdf.

²⁴² Afghanistan Independent Human Rights Commission and Open Society Foundations, "Torture, transfers, and denial of due process: the treatment of conflict-related detainees in Afghanistan", 17 March, 2012, <http://www.aihrc.org.af/media/files/AIHRC%20OSF%20Detentions%20Report%20English%20Final%202012-3-2012.pdf>, ps. 12-28.

²⁴³ "UNAMA releases report on treatment of conflict-related detainees in Afghan custody", 20 January, 2013, <http://unama.unmissions.org/Default.aspx?ctl=Details&tabid=12254&mid=15756&ItemID=36279>; UNAMA, "Treatment of conflict-related detainees in Afghan custody: one year on", January 2013, <http://unama.unmissions.org/LinkClick.aspx?fileticket=VsBLO5b37o%3D&tabid=12323&language=en-US>.

²⁴⁴ Quentin Sommerville, "NATO halts Afghan prisoner transfer after torture fears", *BBC News*, 6 September, 2011, <http://www.bbc.co.uk/news/world-south-asia-14809579>; Richard Norton-Taylor, "Philip Hammond cites torture risk as he halts transfers of prisoners to Afghan jail", *The Guardian*, 29 November, 2012, <http://www.guardian.co.uk/world/2012/nov/29/prisoner-transfer-to-afghan-jails-halted>; Rod Nordland & Thom Shanker, "U.S. military stops sending detainees to some Afghan prisons on rights fears", *The New York Times*, 16 January, 2013, [http://www.nytimes.com/2013/01/17/world/asia/us-military-stops-sending-some-detainees-to-afghan-custody.html? _r=0](http://www.nytimes.com/2013/01/17/world/asia/us-military-stops-sending-some-detainees-to-afghan-custody.html?_r=0); "Australia halts transfers to Afghan jails", *The Australian*, 16 May, 2013, <http://www.theaustralian.com.au/national-affairs/australia-halts-transfers-to-afghan-jail/story-fn59niix-1226644472335>.

²⁴⁵ "Deportees tell awful tales of torture in Afghan jails", *The Nation*, 20 September, 2012, <http://www.nation.com.pk/pakistan-news-newspaper-daily-english-online/national/20-Sep-2012/deportees-tell-awful-tales-of-torture-in-afghan-jails>; "Torture' of Pakistani labourers: Border gate re-opened after Afghan assurance", *DAWN*, 22 December, 2012, <http://beta.dawn.com/news/773192/torture-of-pakistani-labourers-border-gate-reopened-after-afghan-assurance>.

negotiations as an opportunity to score political points against the United States, comfortable with stalled or significantly prolonged negotiations that it believes only strengthen its hand as U.S. forces drawdown. Meanwhile, motivated by overstated concerns regarding recidivism and politicking around being ‘hard on terror’, U.S. congressional representatives have threatened to impose measures similar to those that have blocked Guantanamo Bay detainee transfers.

The deterioration of U.S.-Pakistani relations more broadly over the past several years, has contributed to the politicization of the negotiation process. The Raymond Davis incident in January 2011, the killing of Osama bin Laden in May 2011, the Salala attack in November 2011, and ongoing U.S. drone strikes have all made Pakistan’s relationship with the United States highly controversial and politicized, undermining good faith in the negotiation process, and hardening Pakistani officials’ stances towards the provision of assurances.²⁴⁶ Several Pakistani government officials interviewed by JPP criticized requests for assurances as an infringement on Pakistan’s sovereignty.²⁴⁷ Officials were particularly reproachful of U.S. demands for humanitarian assurances, claiming that such conditions were hypocritical and imposed a double-standard given the United States’ chequered human rights record in the past decade, particularly with regard to detainee treatment scandals at Bagram, Guantanamo Bay and Abu Ghraib.²⁴⁸

There are also indications that the Pakistani government has stalled negotiation on repatriations, believing that its hand will only strengthen over time as U.S. forces withdraw from Afghanistan.²⁴⁹ One Pakistani official claimed that the United States, under pressure to resolve detainees’ cases by the end of the current U.S. mission in 2014, would send Pakistani detainees back to Pakistan “without requesting any assurances.”²⁵⁰

Congressional politics could complicate repatriation negotiations. The National Defense Appropriations Act for fiscal year 2013 (NDAA 2013) requires the administration to notify the relevant Congressional committees if a detainee is transferred to his home country or to the Afghan

²⁴⁶ “US official Raymond Davis on Lahore murder charges”, *BBC News*, 28 January, 2011, <http://www.bbc.co.uk/news/world-south-asia-12305049>; Peter Baker, Helene Cooper & Mark Mazzetti, “Bin Laden is dead, Obama says”, *The New York Times*, 1 May, 2011, <http://www.nytimes.com/2011/05/02/world/asia/osama-bin-laden-is-killed.html?pagewanted=all&r=0>; Adam Entous and Siobhan Gorman, “CIA strikes strain ties with Pakistan further”, *The Wall Street Journal*, 29 August, 2011, <http://online.wsj.com/article/SB1000142405311904199404576536471230621138.html>; Dion Nissenbaum, Tom Wright, Owais Tohid and Adam Entous, “Airstrike ravages U.S.-Pakistan ties”, *The Wall Street Journal*, 28 November, 2011, <http://online.wsj.com/article/SB10001424052970204630904577061270317324992.html>; Hannah Strange, “US raid that killed Bin Laden was ‘an act of war’ says Pakistani report”, *The Telegraph*, 9 July, 2013, <http://www.telegraph.co.uk/news/worldnews/asia/pakistan/10169655/US-raid-that-killed-bin-Laden-was-an-act-of-war-says-Pakistani-report.html>.

²⁴⁷ Justice Project Pakistan interviews with Pakistani government officials (names, dates, locations withheld)

²⁴⁸ Justice Project Pakistan interviews with Pakistani government officials (names, dates, locations withheld); Seymour M. Hersh, “Chain of Command”, *The New Yorker*, 17 May, 2004, http://www.newyorker.com/archive/2004/05/17/040517fa_fact2?currentPage=all; Center for Constitutional Rights, “Report on torture and cruel, inhuman, and degrading treatment of prisoners at Guantanamo Bay, Cuba”, July, 2006, http://ccrjustice.org/files/Report_ReportOnTorture.pdf; Ian Pannell, “Ex-detainees allege Bagram abuse”, *BBC News*, June 24, 2009, http://news.bbc.co.uk/1/hi/world/south_asia/8116046.stm; Open Society Justice Initiative, “Globalizing torture”

²⁴⁹ Justice Project Pakistan interviews with Pakistani government officials (names, dates, locations withheld).

²⁵⁰ Justice Project Pakistan interview with a Pakistani government official (name, date, location withheld).

government 10 days ahead of time. The law also requires the Secretary of Defense to conduct individual threat assessments of transferees, assess the security environment of the receiving country for detainees transferred for release and produce a report on recidivism of DFIP detainees.²⁵¹ The measures included in NDAA 2013—which have some similarities to those put in place to block President Obama’s efforts to shutter Guantanamo Bay—raise concerns that Congressional frustrations over the U.S.-Pakistan relations and exaggerated fears of recidivism will delay or potentially block the repatriation of detainees and resolution of their cases. In the context of Guantanamo detainees, Congress has imposed a full ban on transfers to the United States, even for prosecution, and has put in place multi-faceted certification requirements that must be met prior to any transfer abroad. While the DFIP transfer requirements are much less extensive, the mere threat of imposing significant Congressionally-mandated restrictions on detainee transfers may affect the negotiation process and hamstring U.S. officials in assessing assurances and conducting unbiased, balanced threat assessments.²⁵²

The NDAA for fiscal year 2014 suggests a risk of continued congressional movement in this direction. The House of Representatives adopted language that requires more detailed reporting on recidivism of DFIP detainees, which suggests a gradual escalation in the rhetorical battle over DFIP transfers if not the actual legal requirements for transfer.²⁵³ The focus on recidivism signals that too little attention has been paid to the costs of continuing to hold such detainees and the actual security threat they pose, prolonging their detention and creating further hurdles for their repatriation.

Finally, there are indications that the United States is seeking to extend its authority to detain TCNs in Afghanistan past the 2014 end of combat operations by incorporating new terms into the Bilateral Security Agreement (BSA) being negotiated with the Afghan government.²⁵⁴ The extension of such authority would be a troubling development. It would contradict the U.S. intention to end detention operations in Afghanistan, as stated in the Detentions MoU between the U.S. and Afghan governments, and would risk condemning TCNs to the same legal and political limbo and indefinite detention that has befallen Guantanamo Bay detainees.

²⁵¹ Sections 1025(b)(1), 1026 NDAA 2013.

²⁵² “Statement by the President on H.R. 4310”, 3 January, 2013, <http://www.whitehouse.gov/the-press-office/2013/01/03/statement-president-hr-4310>.

²⁵³ National Defense Authorization Act for Fiscal Year 2014, House of Representatives, 14 June, 2013, <http://beta.congress.gov/congressional-record/2013/06/14/house-section/article/H3594-6> (Rep. Buck McKeon: “Finally, what he will do with the high-value terrorists still held in Afghanistan? This is a particularly critical priority for me. There are several extremely dangerous individuals still in custody in Afghanistan. The only option that I see, as completely unacceptable for those detainees, is to allow their release. We’ve already seen the outcome of making this tragic mistake in Iraq.”).

²⁵⁴ Sieff, “In Afghanistan, a second Guantanamo.”



*A picture of Malik. Malik disappeared from Iraq in 2004. He leaves behind
a wife and three young children*

VI. Recommendations

To the Government of Pakistan and the Government of the United States

- Hold quarterly meetings between high-level U.S. and Pakistani officials to negotiate and finalize a bi-lateral agreement for the repatriation of Pakistani detainees. Officials should at minimum include relevant representatives from each country's embassies in Kabul and Islamabad, the U.S. State Department and Department of Defense, and the Pakistani Ministry of Interior and Ministry of Foreign Affairs.
- Sign a comprehensive, public bi-lateral agreement on the repatriation of Pakistani detainees held by the United States that:
 - Requires U.S. military to notify the Pakistani embassy in Kabul of the detention of a Pakistani citizen within 72 hours of their capture or of a detainee's request to notify, subject to the consent of the detainee, and that the Pakistani government officially verify and confirm the detainee's nationality within 60 days of capture;
 - Guarantees detainees access to Pakistani consular officials as well as access to independent legal counsel while in U.S. detention;
 - Ensures that humane treatment assurances are assessed on an individualized basis taking into account relevant factors including a detainee's age, ethnicity, religion, suspected militant activity or affiliation while also relying on previously agreed upon assurances and measures that have been determined to sufficiently mitigate the risk of torture upon return for detainees in a similar situation;
 - Ensures that an independent, third-party monitoring body as well as detainees' legal counsel are allowed to conduct unfettered, confidential, private, and unannounced visits of any detainee returned to Pakistani custody from the date of his transfer onwards;
 - Guarantees Pakistani judicial oversight of detainees' access to counsel and monitors' access to detainees and detention facilities by Supreme Court or High Court justices with judicial findings and judicial orders made public;
 - Specifies the nature and substance of the security assurances that the Pakistani government is providing to mitigate the security risk detainees are believed to pose to the United States following their return to Pakistan;
 - Ensures any such security assurances are in full compliance with the Fundamental Rights provided to Pakistani citizens under the Constitution of the Islamic Republic of Pakistan, 1973, and implemented in accordance with due process provided under Pakistani law and international human rights law, including the fair opportunity to challenge the imposition of any security restrictions and guarantee that detainees

not be held without charge or trial under any law or regulation, which are inconsistent with Pakistani and international legal standards.

- Requires that any and all evidence shared with Pakistani authorities regarding security measures or prosecution of detainees transferred to Pakistan be made public and available to detainees and their legal counsel in Pakistan, and be reviewable by a Pakistani judge regarding admissibility;
- Guarantees that any detainee transferred to Pakistani custody will be held in accordance with Pakistani law and Constitution, and that individuals will not be held in detention without charge or trial under the Action in Aid of Civil Power Regulations.
- Guarantees any detainee transferred for prosecution in Pakistan is afforded a fair trial, including a trial before impartial and independent courts, access to counsel, adequate time and facilities to prepare a defense, and the prohibition of the use of evidence obtained through torture;
- Provides repatriated detainees with a medical examination within two hours of their return to Pakistan. The results of the medical examination should be made available to the detainee, his family, a third-party monitoring body and counsel, when applicable;
- Ensures that all detainees are presented, within 24 hours of their return to Pakistan, before an independent and impartial judge or judicial officer to assess the legality of any type of post-transfer detention or restriction of liberty, in the presence of detainees' legal counsel;
- For detainees who are repatriated for prosecution, ensures they are promptly informed of the charges against them, preferably before transfer to Pakistan, and are allowed the opportunity to have confidential access to counsel within 36 hours of their arrival in Pakistan.

To the Government of Pakistan

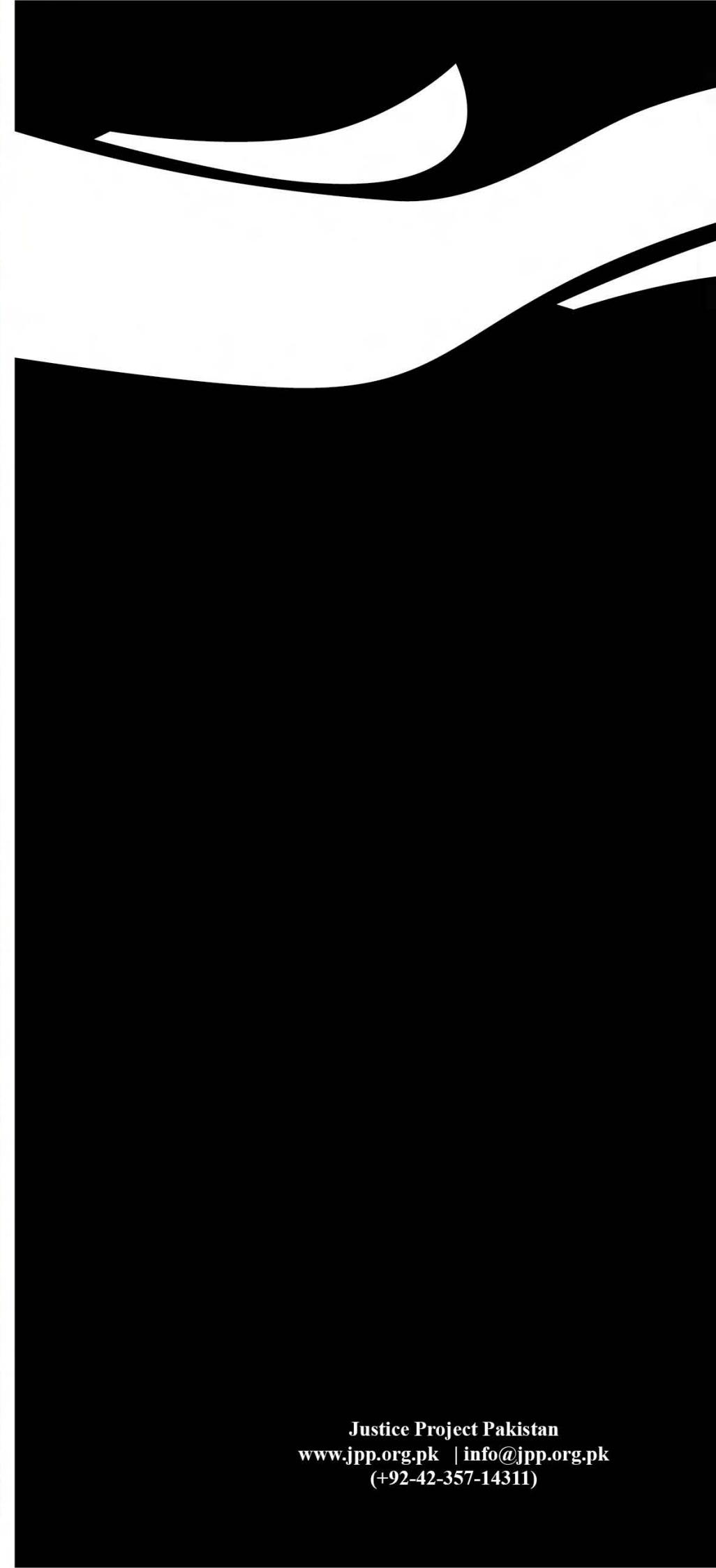
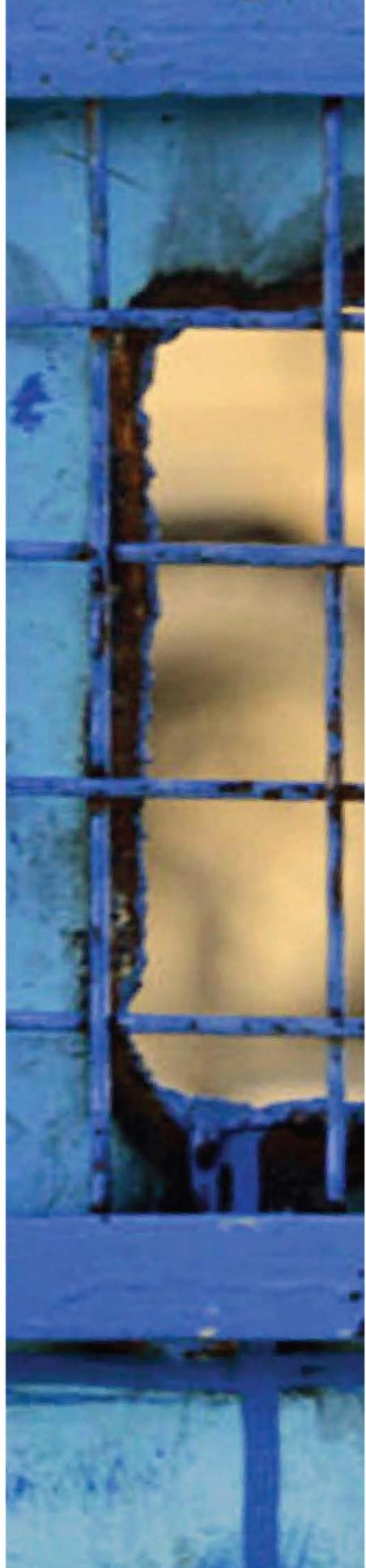
- Adopt a clear, consistent detainee repatriation policy that:
 - Aims to repatriate all Pakistani detainees by December 2014;
 - Clearly establishes the office of the Director General Afghanistan in the Ministry of Foreign Affairs as the lead point of contact and negotiator over the security and humanitarian assurances provided to the United States;

- Clearly delineates the authorities and responsibilities of all other involved government agencies and establishes clear lines of communication between different government bodies.
- Require the office of the Director General Afghanistan at the Ministry of Foreign Affairs to provide detainees' family members and their legal counsel with quarterly updates on the status of detainees' cases before the DRBs, results of DRB proceedings, and the status of repatriation negotiations.
- Provide detainees' families with income support through a dedicated federal government programme. The amount of income support should be calculated per household and should cover income lost due to their relative's detention, schooling fees to be paid for family members who have yet to complete their matriculation exams and income lost due to travel for ICRC arranged phone and video calls.
- Provide ex-detainees with income support and housing assistance through a dedicated programme, as well as other rehabilitation and reintegration support such as job training, education, and counseling. The amount of income support must not fall below the minimum wage of 10 000 PKR per month and should be determined on a case-by-case basis taking into account factors such as number of dependents, nature of employment prior to detention, wages earned prior to detention, level of education and skills training. For each detainee, the support programme and training can be withdrawn only once it is reasonable to assume that an ex-detainee no longer requires such assistance.
- Ensure repatriated detainees are presented before an independent and impartial judge or other judicial officer in presence of their legal counsel, within 24 hours of their arrival in Pakistan, in order to assess the legality of any continued detention.
- Inform detainees of their right to have confidential meetings and correspondence with legal counsel. Detainees should also be fully informed of the nature and purpose of any post-repatriation humane treatment monitoring scheme agreed to between the U.S. and Pakistani governments.
- Ensure independent judicial oversight of the implementation of security and humanitarian assurances.

To the Government of the United States

- Adopt clear, consistent policies that accelerate the pace of negotiations over detainees' repatriation, incorporate realistic, balanced assessments of the actual security risk posed by detainees, and ensure an end to their indefinite detention without charge or trial.
- Make public any intention to continue detaining individuals at the DFIP past 31 December, 2014, or any intention to, at any time, transfer an individual from the DFIP to any other U.S. detention or correctional facility.

- Do not adopt policies that impose undue, unreasonable burdens on the repatriation negotiation process or on the substantive terms that enable the transfer of detainees from the DFIP.
- Promptly resettle in a third country any detainee who cannot be repatriated to Pakistan due to a credible fear of torture or persecution.
- For detainees who have been recommended and approved for release, conduct subsequent DRB hearings only if new evidence is available or only if the detainee wishes to address the DRB.
- For DNMC detainees and for those who are determined not to pose a future threat to the United States, provide a written document to each detainee, signed by a high-ranking Department of Defense or State Department official declaring detainees to have been wrongfully detained, if appropriate, or that detainees were determined not to pose any future threat to the United States as well as suitable compensation for individuals that were wrongfully detained or mistreated in U.S. custody.
- For detainees repatriated for release, provide funding for income support programmes to repatriated detainees.
- Finalize as soon as possible clear, standardized policies and procedures on security and humanitarian assurances that provide a transparent and reasonable basis for negotiation with Pakistani officials.
- Provide detainees with access to legal counsel while in detention in DFIP or permit quarterly contact with legal counsel through PRs to ensure that detainees fully understand the role of legal counsel and the potential assistance counsel can offer to the detainees, as well as the nature and status of repatriation negotiations.
- Conduct fair, accurate and rigorous assessments of humane treatment risks taking into account the specifics of each detainee's case, including age, ethnicity, religion, suspected militant activity or political affiliation.
- Conduct fair, accurate and rigorous assessments of security risks, taking into account the circumstances of capture, grounds for detention, the degree to which the existing security framework in Pakistan and the extent of social and family support provided detainees upon return mitigate any alleged threats detainees are assessed to pose.



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