

Remaking Bagram

The Creation of an Afghan Internment
Regime and the Divide over
U.S. Detention Power

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I. Introduction

September 9, 2012 should mark the end of a six-month transition process, in which thousands of detainees are transferred from the U.S. military to the Afghan government and the Afghan government takes control of the Detention Facility in Parwan (DFIP). Many Afghans saw this transfer as a restoration of Afghan sovereignty over detentions. However, Open Society Foundations research suggests that the detention agreement struck between the Afghan and U.S. governments in March 2012 masks a difference in understanding. While the Afghan government maintains that under this agreement U.S. detentions will end as of September 9, 2012, the United States wants to retain control over part of the detention facility, the DFIP, so that it can continue to capture, hold, and perhaps detain individuals there for the foreseeable future.

Compounding the seriousness of this political divergence is what may become the real legacy of U.S. detention in Afghanistan: the creation of an Afghan internment regime. The United States has been using internment in Afghanistan for many years, where detainees are “preventatively detained” for “imperative security reasons,” rather than accused of a crime and tried in a court. In order to facilitate the transfer of the detainees interned by the U.S. military, the Afghan government created its own internment regime, closely resembling the U.S. system. Though the Afghan government has chosen to transfer many of the detainees to a criminal court, more than 50 are now being held by the Afghan government without charge or trial through this new internment power. Senior Afghan officials have told the Open Society Foundations that they believe the new system is unconstitutional.

The introduction of internment to Afghanistan, and the process by which around 3,100 detainees are being transferred, has happened with very little public or political scrutiny in Afghanistan. The Afghan internment regime was not created through an act of Parliament, but by unilateral executive action. The document establishing the procedures to be used for internment, an unpublished “inter-ministerial agreement” called “The Procedure for Transition and Management of Bagram Detention Facility and Pul-e-Charkhi Detention Facility from the United States of America to the Islamic Republic of Afghanistan” (The transition procedure) is vaguely worded, resulting in troubling uncertainty over who can be detained, on what grounds, and for how long. The scope of internment under the transition procedure is also unclear, and leaves open the possibility that internment will not be limited to detainees transferred from the DFIP. Instead, it may also be used to intern individuals captured in future U.S. and Afghan operations, and become a permanent rather than a temporary, limited detention power assumed by the Afghan government.

Though numerous Afghan officials have told Open Society Foundations researchers that they believe Afghan internment will come to an end in September 2012, when they assume the detention transition will be complete, U.S. statements and actions suggest otherwise. U.S. forces have continued to capture individuals in military operations and detain them on the “U.S. side” or part of the DFIP since the transition process began in March 2012, adding around 600 detainees to the facility. So even though they have almost completed the transfer of the 3100 that were being held in

March, these additional captures and detentions makes it all but impossible for them to meet the Afghan government expectation of a full handover of the facility.

Indeed, Open Society Foundations has learned that disagreements over these issues led to a temporary suspension of U.S. transfers, which appears to have been resolved only days before the scheduled handover. Open Society Foundations understands that this suspension that relates to concerns among Afghan officials regarding the legality of the internment regime—a regime that appears to have been critical to the U.S. agreement to handover the DFIP likely due to the lack of admissible evidence against many high value detainees.

The United States also appears to want continued detention powers in Afghanistan beyond September 2012, something which all Afghan officials interviewed for this report have categorically rejected. The National Security Advisor, Dr Rangin Dadfar Spanta, told the Open Society Foundations, “We cannot allow allies and friendly countries to have detention centers here. This is illegal.”¹ So despite an apparent agreement in March 2012 to transition the DFIP to Afghan control, disagreement between the United States and Afghanistan appears to remain, centered on sovereignty, and control over detainees captured in ongoing U.S. military operations.

The process for transferring U.S.-held detainees to Afghan custody has been hampered by a lack of proper due process protections, insufficient evidence, and lack of clear, transparent standards for determining whether detainees will be released, prosecuted, or interned. These problems have been exacerbated by the short, six-month timeframe of the transfer process. The sudden, large influx of new detainees for prosecution at the national security criminal court – the Justice Center in Parwan (JCIP) - has made worse the problems of case back log and lack of capacity, increasing the risk of prolonged detention and due process violations.

Third country national, or non-Afghan detainees, represent yet another major, unresolved issue. These detainees remain in U.S. custody at the DFIP, their fate uncertain. Given the lack of progress thus far in repatriating, releasing, or resettling these detainees, many are at risk of falling into the kind of indefinite detention limbo reminiscent of Guantanamo Bay, making it likely that the United States will continue to control at least a portion of a detention facility after the September 9th handover.

Meanwhile, the transfer of approximately 3,100 U.S.-held detainees to the Afghan authorities, something the Afghan government has long sought, has come at a high cost: the establishment of a new, Afghan regime of internment. While many in the Afghan government have said that it was introduced as a temporary measure in order to process those individuals transferred by the U.S. who continued to pose a threat, others have said that Afghan internment is here to stay. Though internment may be legal under international laws of war, such regimes are notoriously open to abuse, particularly in countries already wracked with impunity and weak rule of law. It is therefore particularly concerning that internment has been adopted in Afghanistan, and in a manner that lacks transparency, and that many feel is unconstitutional.

¹ Open Society Foundations interview with Dr. Rangin Spanta, Kabul, September 2, 2012.

II. Background

In January 2002, the U.S. government began detention operations in Afghanistan at Bagram Air Field in Parwan province. For many years, detainees were held at the Bagram Theater Internment Facility, a converted Soviet aircraft machine plant. In 2009, the United States opened a new long-term detention facility nearby called the Detention Facility in Parwan (DFIP).² The detainee population at Bagram has grown steadily over the course of the conflict, and in the past few years, exponentially. In 2004, the United States held just around 100 detainees at its detention facility, which rose to around 600 by 2007.³ In recent years the detainee population at the DFIP has exploded, from approximately 1,100 detainees in September 2010 to 3,110 in March 2012.⁴

The Afghan government has long complained that U.S. detention operations at the DFIP were an affront to Afghan sovereignty, and made clear its desire that all Afghan detainees and U.S. detention facilities be transferred to Afghan control.⁵ There is also no clear legal authority for preventative detention in Afghan law, which appears to violate several constitutional guarantees such as protection from arrest and detention without due process of law, punishment except by decision of an authorized court, as well as the right to counsel and right to be informed of charges and presented before a court upon arrest.⁶

The transition of the DFIP has been on the horizon for many years, though the United States has failed repeatedly to meet previous deadlines for the handover. Meanwhile, the dramatic increase in

² "Out of Sight," *Amnesty International*, pg. 5, February 18, 2009.

[http://phc.amedd.army.mil/PHC%20Resource%20Library/Bagram_Theater_Internment_Facility_\(B_TIF\).pdf/](http://phc.amedd.army.mil/PHC%20Resource%20Library/Bagram_Theater_Internment_Facility_(B_TIF).pdf/).

³ "A Growing Afghan Prison Rivals Bleak Guantanamo," *New York Times*. February 26, 2012.

<http://www.nytimes.com/2006/02/26/international/26bagram.html?pagewanted=all/>.

⁴ Background briefing with U.S. officials, March 9, 2012; Interview with General Farouq, June 4, 2012.

In 2005, according to the Associated Press, the Pentagon estimated that there were just 350 detainees held at the DFIP. See "U.S. to hand over remaining Afghan detainees," August 4, 2005.

http://www.msnbc.msn.com/id/8829700/ns/world_news-south_and_central_asia/t/us-hand-over-remaining-afghan-detainees/. By the time President Obama was elected in 2008, that number had almost doubled, to 600 detainees, (see Human Rights First), and almost doubled again to 1,100 two years later (see Julian E. Barnes: "U.S. Seeks Role in Afghan Jail", *Wall Street Journal*, September 22, 2010.

<http://online.wsj.com/article/SB10001424052748703399404575505864255940020.html#printMode> (ode). See also "A Growing Afghan Prison Rivals Bleak Guantanamo," *New York Times*. February 26, 2012.

<http://www.nytimes.com/2006/02/26/international/26bagram.html?pagewanted=all/>;

"DEFYING U.S. PLAN, PRISON EXPANDS IN AFGHANISTAN." *The New York Times*. The New York Times, 07 Jan. 2008. Web. 30 Aug. 2008.

<http://www.nytimes.com/2008/01/07/world/asia/07bagram.html?ref=bagramairbaseafghanistan/>.

⁵ BBC News. BBC, 24 May 2005. Web. 30 Aug. 2010.

http://news.bbc.co.uk/2/hi/south_asia/4572657.stm/. See also "Afghan President Demands Control of Bagram Prison." *The Guardian*. *Guardian News and Media*, 01 May 2012. Web. 30 May 2012.

<http://www.guardian.co.uk/world/2012/jan/05/afghanistan-demands-us-return-bagram>.

⁶ Constitution of Afghanistan, Art 27 and Article 31.

the detainee population at the DFIP has added substantially to the challenges of transferring the facility and detainees to Afghan control, despite transition being so clearly on the political agenda.

Afghan and U.S. officials first agreed in 2005 that all Afghan detainees held by the United States at the DFIP would be transferred to Afghan control, pledging to do so “as soon as the Afghan government has capacity to detain them.”⁷ In January 2010, the Afghan Ministry of Defense announced that a memorandum of understanding had been signed within the Afghan government to transfer DFIP to Afghan authorities, potentially as soon as the end of the year. U.S. military officials also stated that the facility could be transferred by the end of that year or in the first half of 2011.⁸ In 2011, however, the United States stated that transfer of the DFIP could not happen before 2014 because “the Afghans don’t have the legal framework or the capacity to deal with violence being inflicted on the country by the insurgency.”⁹

The repeated failure to reach an agreement on the transfer of the DFIP and U.S.-held detainees became a source of significant tension between the U.S. and Afghan governments. Control over the conduct of special operations by the U.S. military was another long-standing point of contention, with civilian casualties and mistaken targeting inflaming relations with Afghans in the conflict areas. Despite a decrease in civilian harm in night operations by the international military after numerous operational directives aimed at improving civilian protection, the massive surge in operations in 2010-2011 negated potential gains as more and more communities were affected. Consequently, nighttime operations have remained a major flashpoint for public anger at international forces and at the Afghan government’s lack of control over such operations.¹⁰ By early 2012, detention and night raids had become major obstacles to the finalization of the Strategic Partnership Agreement between the two countries, a multi-year framework for U.S.-Afghan relations and aid beyond the withdrawal of U.S. combat forces in 2014.¹¹

⁷ “U.S. to hand over remaining Afghan detainees,” *Associated Press*, August 4, 2005.

http://www.msnbc.msn.com/id/8829700/ns/world_news-south_and_central_asia/t/us-hand-over-remaining-afghan-detainees/. See also Kim Gamel, “Afghans Agree on Handover Plan for US-run Prison,” *Associated Press*, January 9, 2010.

http://seattletimes.nwsourc.com/html/nationworld/2010753905_apasafghanusprison.html/.

⁸ Julian E. Barnes, U.S. Seeks Role in Afghan Jail, *Id.*. In fact the U.S. did begin transferring limited numbers of detainees to Afghan custody in 2010/2011.

⁹ Kevin Sieff, “Afghan Prison Transfer Delayed,” *Washington Post*, August 12, 2011

http://www.washingtonpost.com/world/asia-pacific/afghan-prison-transfer-delayed/2011/08/12/gIQApcGMBJ_story.html

¹⁰ “The Cost of Kill/Capture: Impact of the Night Raid Surge on Afghan Civilians,” *The Liaison Office and Open Society Foundations*, September 2011. <http://www.soros.org/publications/cost-killcapture-impact-night-raid-surge-afghan-civilians/>. See also OSF/TLO’s previous work on night raids: “Strangers at the Door: Night Raids by International Forces Lose Hearts and Minds of Afghans,” *The Liaison Office and Open Society Foundations*, February 2010.

<http://www.soros.org/reports/strangers-door-night-raids-international-forces-lose-hearts-and-minds-afghans/>.

¹¹ “Afghan Pact Vows U.S. Aid For a Decade,” *The New York Times*, Apr 23, 2012.

http://www.nytimes.com/2012/04/23/world/asia/us-and-afghanistan-reach-partnership-agreement.html?_r=2.

On January 5, 2012, President Karzai surprised many when he issued a public ultimatum demanding that the DFIP transfer be completed within a month.¹² Seen as a sign of President Karzai's frustration with failure to meet past deadlines for the transfer, his demand also reflected other diplomatic tensions, including a belief that the Afghan government had been excluded from preliminary peace talk initiatives between the United States and the Taliban, and allegations of detainee mistreatment at the DFIP (although these allegations later turned out to relate to treatment in the Afghan, not the U.S. side of the facility).¹³

The diplomatic breakthrough came in March 2012 when the U.S. and Afghan governments announced an agreement on the transfer of the DFIP, signing a "Memorandum of Understanding between the Islamic Republic of Afghanistan and the United States of America on the Transfer of U.S. Detention Facilities in Afghan Territory to Afghanistan" (hereafter, the "Detentions MoU").¹⁴ By signing the Detentions MoU, the Afghan government committed to the creation of an internment regime in Afghanistan. The degree to which the establishment of internment in Afghanistan was a pre-condition for the handover of DFIP is unclear, though U.S. officials had been pressing the Afghan government to establish such a detention regime as early as 2005.¹⁵ There seems little doubt though that the creation of an internment regime was not rooted in an independent decision among Afghan leaders who had come to view internment as necessary for the security of Afghanistan.

One month after the signing of the Detentions MoU, the U.S. and Afghan governments signed a Memorandum of Understanding on the similarly highly contentious issue of operations by U.S. Special Forces, giving the Afghan government, at least in writing, greater control over these military operations, something they had long lobbied for.¹⁶ This Special Operations MoU also referred to an Afghan internment regime. Shortly afterwards, in May 2012, the United States and Afghanistan

12 "Afghan Government Sets New Ultimatum for Bagram Prison Handover," Office of the President. N.p., n.d. <http://president.gov.af/en/news/6842>>./.

13 In late December 2011 and early 2012 the Afghan government had expressed frustration at its lack of control of the negotiation process with insurgent groups. In this context control of national security detainees has additional political value. "Afghan President Hamid Karzai 'Plans talks with Taliban.'" *BBC News*, January 29, 2012. <http://www.bbc.co.uk/news/world-asia-16779547/>. Also in January 2012 an Afghan commission made allegations about torture in detention facilities, which were initially described as American facilities, with officials later admitting the allegations of abuse related to treatment in the Afghan-controlled portions of the DFIP. "Karzai's Ultimatum Complicates U.S. Exit Strategy" *New York Times*, January 8, 2012. http://www.nytimes.com/2012/01/09/world/asia/karzais-ultimatum-on-afghan-prison-complicates-us-exit-strategy.html?_r=1&pagewanted=all/.

14 Memorandum of Understanding between the Islamic Republic of Afghanistan and the United States of America on Transfer of U.S. Detention Facilities in Afghan Territory to Afghanistan, March 9, 2012. On file with RPI. <http://www.whitehouse.gov/sites/default/files/2012.06.01u.s.-afghanistanspassignedtext.pdf/>.

15 "Foiling U.S. Plan, Prison Expands in Afghanistan" *New York Times* January 7, 2008. <http://www.nytimes.com/2008/01/07/world/asia/07bagram.html?ref=bagramairbaseafghanistan> /.

16 "Memorandum of Understanding between the Islamic Republic of Afghanistan and the United States of America on Afghanization of Special Operations on Afghan Soil" hereafter, the "Special Operations MoU"). <http://mfa.gov.af/en/news/8542/>.

finalized the Strategic Partnership Agreement to provide a framework for Afghan-U.S. relations and U.S. assistance to Afghanistan post-2014.

III. Methodology

This report has been researched, written, and edited by the Open Society Foundations' Regional Policy Initiative on Afghanistan and Pakistan, which works on security and human rights concerns in Afghanistan, Pakistan, and the wider region. Interviews were conducted between May and September 2012 with more than 40 senior Afghan and U.S. government officials directly involved in the transition process, as well as senior lawyers and representatives of civil society, as well as some international human rights experts. In addition, the U.S. entity that oversees detention operations in Afghanistan – the Combined Joint Inter-Agency Task Force 435 (Task Force 435) – provided written responses to some of the questions posed by Open Society Foundations researchers, but several other requests with U.S. officials remained outstanding at the time of publication. Interviews with Afghan officials were primarily conducted in Kabul in the Dari language, with the assistance of an interpreter. One challenge in the research was that the DFIP transition is managed and controlled by a very small group of Afghan and U.S. government officials, and key agreements and documents have not been made public.

Research for this report also involved a review of legal documents and Afghan laws, in their English language translations. The Open Society Foundations was unable to obtain two important documents relevant to the DFIP transition process. The first is an unnumbered, and undated Presidential decree referred to in the Inter-Ministerial Agreement that, according to one Afghan government official familiar with the decree, created the Afghan Commission overseeing the DFIP transition. The second contains the terms of reference for the members of the Technical Committee and the Afghan review boards.

IV. The Divide over Bagram and the Future of U.S. Detentions

When the transition of the U.S. detention facility and detainees to Afghan control was first announced in March 2012, both governments committed to completing the handover process by September 9, 2012. According to Article 9(c) of the Detentions MoU, “the United States Commander at the DFIP is to retain responsibility for the detainees held by the United States at the DFIP under the Law of Armed Conflict during the processing and transfer period, which is not to last more than six months.”¹⁷ The wording and public framing of this agreement implied that the Afghan government would assume control of the DFIP and that U.S. detentions at the facility would come to an end upon completion of the transition. This is how every Afghan government official interviewed by Open Society Foundations has understood the meaning and effect of the transition agreement.

¹⁷ Article 9(c), Detentions MoU.

Indeed, this was described as an important restoration of Afghan sovereignty over detention, a point repeated in a number of interviews with Afghan officials to Open Society Foundations researchers. However, Open Society Foundations research suggests that the detention agreement struck between the Afghan and U.S. governments in March 2012 masked a number of unresolved issues.

The United States Pushes for Post-Handover Detention Power

It is clear that U.S. and Afghan officials have different interpretations of the Detentions MoU as well as what the “Transfer of U.S. Detention Facilities” referred to in its title ultimately means.¹⁸ The Open Society Foundations has learned that disagreements between the U.S. and Afghanistan over the DFIP transition has led to a temporary suspension of U.S. detainee transfers to the Afghan government, which was resolved only days before the handover deadline.¹⁹

Based on interviews with senior Afghan officials, the Afghan government clearly sees September 9, 2012, as marking the end of U.S. detention in Afghanistan. President Karzai’s spokesperson, Aimal Faizi, told Open Society Foundations researchers that “After Sept 9 no one will be transferred into the U.S. side of the DFIP.” However, it appears that the United States is intent on retaining control over a portion of the DFIP, perhaps as much as two blocks.²⁰

U.S. officials told Open Society Foundations researchers that “The March 9, 2012 Detentions MOU does not limit the authority of US forces to capture and detain the enemy. The U.S. still retains the authority to capture--and detain unprivileged enemy belligerents who have been captured--in accordance with the Law of Armed Conflict.”²¹ The official indicated that such individuals could be transferred to U.S. custody at the DFIP post-September 9: “If we decided to put them in Parwan then they would be part of the population that would be transferred as part of the MoU.”²²

Even assuming that the Afghan government is prepared to allow the United States to retain a portion of the DFIP, the length of time U.S. forces may hold any Afghan detainee remains in dispute at the time of writing. “After the signing of the [Detentions] MoU the time limit to hold detainee is 72 hours and should be respected,”²³ according to Presidential spokesperson Faizi. The Afghan position seems to be that the United States can only hold detainees for as long as it takes them to transfer to Afghan authorities, which does not require a “holding” or detention facility in the DFIP.²⁴ National

¹⁸ Detentions MoU.

¹⁹ Interviews with two senior Afghan officials, Kabul, Afghanistan September 2, and 3, 2012.

²⁰ Conversation with official, September 5, 2012.

²¹ Email response from U.S. Embassy Kabul in response to questions from Open Society Foundations, September 6, 2012.

²² *Id.*

²³ Interview with Aimal Faizi, Presidential Spokesperson, Kabul, Afghanistan, September, 2, 2012

²⁴ Excluding the third country nationals, an issue which seems to be off the table in the short term, until the detention and transfer of Afghan nationals has been resolved, based on Open Society Foundations interviews with officials in Kabul in September 2012. For more see Third Country Nationals section VII below.

Security Advisor Dr. Spanta spelled this out, “there will be no detention by the U.S. authorities in Bagram or elsewhere for a few days or weeks. The agreement is only that if there are some technical problems, they can take two to three days to transfer, to Kabul for instance, but principally they have to hand them over. There is a big difference in perception between them and us on this issue. ...I have discussed this with Karzai yesterday there is no tolerance with him on this issue.”²⁵

Presidential spokesman Faizi stated that this limitation on the United States - to only have temporary detention power on the battlefield - is also reflected in the Special Operations MoU, which requires U.S. special forces operations to be approved by and coordinated with Afghan forces. “According to the [Special Operations] MoU there should be no unilateral military operations; if an Afghan citizen arrested in any unilateral Afghan or joint operation with international forces they will be transferred to the Afghan authorities...if the U.S. wants to investigate them they can do so while they are in Afghan custody.”²⁶

National Security Advisor Dr. Rangin Dadfar Spanta told Open Society Foundations researchers that “we cannot allow our allies and friends to have a detention center in Afghanistan, this is illegal... through night raids and special operations they cannot and should not take new detainees, they must hand over at that place [of capture] to Afghans.”²⁷

A related problem, which for Afghan officials appears to have undercut the spirit of the Detentions MoU, is that since March 9th the United States has continued to capture and detain individuals, and send them to the U.S. side of the DFIP. The Open Society Foundations has been told that the United States has added approximately 600 additional detainees to the DFIP since March 9, 2012.²⁸

General Farouq Barezai, Afghan commander of the DFIP, acknowledged that the Detentions MoU only applies to the 3,100 detainees held at Bagram as of March 9, 2012—and that the transfer of additional detainees “needs another, separate agreement.”²⁹ Article 11 of the Detentions MoU explicitly leaves open the possibility that individuals captured after September 9, 2012, will be transferred into the Afghan internment regime.³⁰

According to National Security Adviser Dr. Spanta, the fact that the United States has continued to transfer captured individuals to the U.S. side of the DFIP since March 9, 2012. “is not in accordance with our agreement.”³¹

²⁵ Interview with Dr. Rangin Dadfar Spanta, National Security Advisor, Kabul, Afghanistan, September 3, 2012.

²⁶ Interview with Aimal Faizi, Presidential Spokesperson, Kabul, Afghanistan, September, 2, 2012.

²⁷ Interview with Dr. Rangin Dadfar Spanta, National Security Advisor, Kabul, Afghanistan, September 3, 2012.

²⁸ Interview with Dr. Rangin Dadfar Spanta, National Security Advisor, Kabul, Afghanistan, September 3, 2012.

²⁹ Interview with General Farouq Barezai, August 13, 2012.

³⁰ Article 11, Detentions MoU. See also Article 9, Special Operations MoU, which indicates that U.S.-held detainees transferred into Afghan custody may be interned by the Afghan government.

³¹ Dr. Spanta, *Id.*

U.S. officials acknowledged that there is currently no clear agreement between the U.S. and Afghan governments over how post-March 9 cases will be handled, or a set timetable for completing these additional transfers. U.S. officials at Task Force 435, which oversees U.S. detention operations in Afghanistan, have told Open Society Foundations researchers that the United States intends to process these detainees under the same process established by the Detentions MoU: “The process for transferring detainees who were detained after the signing of the March 9 detention operations MoU will eventually proceed in similar fashion to those detainees who were detained before the MoU.”³² According to the U.S. State Department, “it is our intention that any Afghan nationals detained on or after 9 March 2012 will go into the same transfer processes that were established for pre-9 March 2012 detainees, and will be steadily transferred to GIRoA (the Afghan government).” But given that Afghan government officials are so categorical about the end of U.S. detention power in the DFIP after September 9, 2012, the fate of these detainees is unclear.

One official, speaking on background, speculated that part of the reason for reluctance among some in the U.S. military to hand all detainees over to the Afghan authorities was concern that they might be released for the wrong reasons: “They’ve got ‘bad guys’ sitting in detention, they wonder who will release them, for political reasons, for corruption reasons, for ‘the system doesn’t work’ reasons.”³³ There are also legitimate concerns regarding the U.S. obligation not to transfer detainees when there are substantial grounds for believing that they are at a risk of torture. The Open Society Foundations and the Afghanistan Independent Human Rights Commission, as well as the UN have documented widespread torture and mistreatment of security-related detainees in Afghan custody in locations across the country.³⁴

V. The Creation of an Afghan Internment Regime

Detention without judicial review is a profoundly serious derogation from the human rights obligations of a state, and should only be undertaken by a government in exceptional circumstances, with clear, well-defined legal criteria for internment and appropriate procedural protections. When the Afghan government introduced internment in 2012, it did so through executive fiat, without any legislative action or consultation, raising serious concerns about legality and constitutionality. Several provisions and omissions in the framework also leave it dangerously vulnerable to abuse in the future. The following section examines the legal basis for internment in Afghanistan, and points to

³² Response by CJIATF-435 to Open Society Foundations questions via email, August 6, 2012. Indirect sources have described this to Open Society Foundations as sending these detainees to “the back of the line.”

³³ Open Society Foundations interview with official, speaking on background. September 2, 2012.

³⁴ 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 2012. <http://www.soros.org/reports/torture-transfers-and-denial-due-process-treatment-conflict-related-detainees-afghanistan/>.

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/](http://unama.unmissions.org/Portals/UNAMA/Documents/October10%202011%20UNAMA%20Detention%20Full-Report%20ENG.pdf/).

troubling uncertainties regarding the scope of the detention authority created by the internment regime.

Constitutionality and Legal Basis for Internment

Senior Afghan officials and legal experts, including the head of the Independent Commission for Oversight of the Implementation of the Constitution (ICOIC), Gul Rahman Qazi, several defense lawyers, and parliamentarians have told the Open Society Foundations that they regard the manner in which the government has created an internment regime as in conflict with Afghan law and the Constitution.³⁵ The “transition procedure,” which created the internment regime in Afghanistan, is not an act of Parliament, but an executive agreement signed in March 2012 by the Ministers of Defense, Interior, and Justice, as well as the Attorney General, Director of NDS, and the head of the Supreme Court.³⁶ The legal status of the transition procedure is not clear. It is highly questionable whether such an agreement is legally and constitutionally sufficient to provide the government with the power to intern. Several of the transition procedure provisions appear inconsistent with fundamental constitutional rights, including Article 25, which provides individuals with a presumption of innocence until convicted in a court of law, Article 27, which states that “No one shall be pursued, arrested, or detained without due process of law ...” and Article 31, which provides a right to a defense attorney and to appear before a court.³⁷ As discussed below, the Afghan Constitution does permit derogation from clause 2 of Article 27, but only in situations of declared public emergency, a power that President Karzai has not chosen to invoke.

³⁵ Interview with Gul Rahman Qazi, Kabul Afghanistan, August 12, 2012; interview with Mohammed Farid Hamidi, Commissioner AIHRC, August 15, 2012, Kabul, Afghanistan; interview with Rohullah Qarizada, head of AIBA, August 11, 2012, Kabul, Afghanistan; interview with Shabir Ahmad, director of International Legal Foundation-Afghanistan (ILF-A), Kabul, August 11, 2012, Kabul, Afghanistan; interview with Qawi Abdul Afzali, Deputy Executive Director Legal Aid Organization of Afghanistan (LAOA), Kabul, Afghanistan, August 12, 2012; interview with Dr. Rateb Mozafari, Executive Director LAOA, Kabul, Afghanistan, May 20, 2012; interview with Shinkai Karokhail, member of Parliament, Kabul, Afghanistan, June 2, 2012; interview with Shukria Barakzai, member of Parliament, Kabul, Afghanistan, June 3, 2012. It should be noted that there have been disagreements between the office of the President, parliament, the Supreme Court and the Independent Commission for the Supervision and Implementation of the Constitution about the mandate of the commission to arbitrate disputes over the constitution. For more see: “Afghanistan’s Electoral Stalemate,” *International Crisis Group*, February 23, 2011, <http://www.crisisgroup.org/en/regions/asia/south-asia/afghanistan/B117-afghanistans-elections-stalemate.aspx/>; and see also “Reforming Afghanistan’s Broken Judiciary,” *International Crisis Group*, November 17, 2010. <http://www.crisisgroup.org/en/publication-type/media-releases/2010/asia/reforming-afghanistans-broken-judiciary.aspx/>.

³⁶ “The Procedure for the Transition and Management of Bagram Detention Facility and Pul-e-Charki Detention Facility from the United States of America to the Islamic Republic of Afghanistan” was signed on March 3, 2012. Copy of the procedure in Dari and English obtained by the Open Society Foundations, on file.

³⁷ The Constitution of the Islamic Republic of Afghanistan, Article 25, 27, and 31, <http://www.afghanembassy.com.pl/cms/uploads/images/Constitution/The%20Constitution.pdf/>.

International humanitarian law recognizes that states may intern individuals for imperative reasons of security in non-international armed conflict.³⁸ In 2009, Afghanistan became a state party to Additional Protocol II of the Geneva Conventions (AP II), which together with Common Article 3, establishes minimum protections applicable to all those detained and interned in non-international armed conflict. As a state party, Afghanistan must respect the minimum guarantees and protections provided in the treaty. But AP II *does not alone* give the Afghan government the right to use internment. AP II only regulates internment and sets out minimum guarantees as a matter of international law—it is up to states to establish the appropriate legal frameworks regulating the substantive grounds and procedures for internment and ensure that such a regime is legal and constitutional as a matter of domestic law.³⁹ Afghanistan must therefore adopt an appropriate domestic legal framework for internment that is consistent with Afghan law and Constitution.

There appears to be a belief among some Afghan officials that AP II is legally sufficient to introduce internment under Afghan law. National Security Advisor Dr. Rangin Dadfar Spanta told the Open Society Foundations that “we have to find a legal way to keep dangerous people until the threat is over.” Asked what the legal framework is for Afghan internment regime, Dr. Spanta said that “AP II and the Geneva conventions, they are integral part of Afghan domestic law and Parliament passed and President signed them. ...AP II is a part of our law.” Similarly, Rahim Wardak, who was Minister of Defense when the Detentions MoU was signed, has stated that because Afghanistan is a state party to AP II that “it is a part of our law, and we are going to implement it.”⁴⁰ Minister Wardak claimed that a temporary “procedure” exists (presumably the transition procedure established by the inter-ministerial agreement), and that a more permanent mechanism would be introduced. However, it is not clear that the Afghan government is attempting to introduce legislation that would authorize or regulate internment. Dr. Spanta said that the Ministry of Justice would be working on legislation to make internment compatible with the Afghan constitution, but that “this change doesn’t happen suddenly, it is a process.”

However, as noted above, simply being a state party to AP II does not provide Afghanistan with the domestic legal authority to intern, nor does it resolve whether internment is legal under Afghan law and the Constitution. According to the head of the Commission on the Constitution, Gul Rahman Qazi, although the establishment of an internment regime based on AP II is referred to in the transition procedure, and in a Memorandum of Understanding on between the United States and Afghanistan, this is not legally sufficient as a matter of Afghan domestic law. “It is just a suggestion—until now we do not have any law [authorizing internment] because it is against current Afghan law and the Constitution...it violates both Articles 25 and 27 [of the Constitution].” Qazi said that while many detainees transferred by the United States may be released or transferred to Afghan courts for prosecution, the government is currently holding many others under an

³⁸ Articles 5 and 6 of Additional Protocol II, which regulates conduct in non-international armed conflict, clearly mentions internment.

³⁹ Persons may not be deprived of their liberty “except on such grounds and in accordance with such procedure as are established by law.” International Convention on Civil and Political Rights (ICCPR), Article 9.1.

⁴⁰ Minister Rahim Wardak, CSIS press conference, Washington DC, April 4, 2012.

<http://csis.org/event/statesmens-forum-afghanistan-minister-defense-wardak-and-minister-interior-mohammadi> (Question to Minister at 00:56:45).

internment regime, without charge or trial. “This is illegal,” according to Qazi. “Even if it were just one person detained like this, it would be illegal.”⁴¹

Leading Afghan lawyers have also criticized the internment regime as unconstitutional. “If the government is independent, and respects the rule of law, it will not implement this regime,” asserted Rohullah Qarizada, head of the Afghan Independent Bar Association. “It is unconstitutional...if government wants to have the same system as [the U.S. had] in Bagram, then they will continue with this procedure-- if the Americans support them in this. But either way it is illegal.”⁴² Heads of the major legal aid organizations of Afghanistan, including the Legal Aid Organization of Afghanistan, the International Legal Foundation - Afghanistan (ILF-A) all believe that the internment regime is inconsistent with Afghan domestic law and the Constitution.⁴³ Mohammed Farid Hamidi, a Commissioner of the Afghanistan Independent Human Rights Commission (AIHRC) agreed, “We have no legal basis for this under the law or the Constitution.” The AIHRC sent a letter to the ICOIC formally requesting an official opinion on the constitutionality of the internment regime, and the ICOIC responded by saying that it regards it as being unconstitutional.⁴⁴

Asked to respond to these criticisms, acting Minister of Defense Enayatullah Nazari acknowledged that there did not appear to be any basis in Afghan law for such a regime: “It is the Americans that call detention without trial “administrative detention” [internment]. [They] rely on the Geneva Conventions. But Afghan lawyers and the Constitutional Commission look at Afghan law, and administrative detention is not mentioned. It is only in the Geneva Conventions.”⁴⁵

The transition procedure does contain several important procedural protections. Under Article 4, detainees must be informed about the reasons of detention, and they are guaranteed “the right to challenge their detention with the least possible delay” before a three person review board, as well as the right to present evidence and call witnesses (this process will be discussed in detail in section VI below). Detainees are also permitted to be assisted by a “personal representative and if available, legal support.”⁴⁶ While these procedural protections offer some minimal guarantees, they do not appear to be consistent with several protections in the Afghan Constitution, including the right to defense counsel, as discussed above. Moreover, as discussed below in section VI there are serious questions as to whether, in practice, these due process protections are fully respected.

The Afghan Constitution does permit derogation from some fundamental rights in situations of public emergency. Under Articles 143, the president, with the approval of parliament, may declare a

⁴¹ Interview with Gul Rahman Qazi, August 11, 2012, Kabul, Afghanistan.

⁴² Interview with Rohullah Qarizada, August 11, 2012, Kabul, Afghanistan.

⁴³ Interview with Shabir Ahmad, director of International Legal Foundation-Afghanistan (ILF-A), August 11, 2012, Kabul, Afghanistan; interview with Qawi Abdul Afzali, Deputy Executive Director Legal Aid Organization of Afghanistan (LAOA), Kabul, Afghanistan, August 12, 2012; interview with Dr. Rateb Mozafari, Executive Director LAOA, Kabul, Afghanistan, May 20, 2012.

⁴⁴ Interview with Mohammed Farid Hamidi, August 15, 2012, Kabul, Afghanistan and with AIHRC investigator, September 2, 2012.

⁴⁵ Interview with Enayatullah Nazari, Acting Minister of Defense, August 13, 2012, Kabul, Afghanistan.

⁴⁶ Transition procedure (*Id.*), Article 4.

state of emergency if “the protection of independence and national life become impossible through the channels specified” in the constitution. Extension beyond two months must be approved by the parliament. Under Article 145 of the Constitution, during a declared state of emergency, the president may suspend a number of constitutional provisions including clause two of Article 27, which states that “No one shall be pursued, arrested, or detained without due process of law.”⁴⁷ However, the constitutional requirements for this derogation are high: the president must not only formally declare a public state of emergency, but he must also secure the approval of the leaders of Parliament as well as the chief justice of the Supreme Court. While the constitution does not explicitly allow for or set out what is required to establish an internment regime, a declaration of emergency appears to allow for a comparable derogation of constitutional rights in so far as it permits the suspension of due process rights under Article 27. However, the process for declaring an emergency stands in stark contrast to the manner in which the President has established internment: without any scrutiny by the parliament, the Supreme Court, or the public.

Moreover, even if the Afghan government were to adopt expanded detention powers through declaration of a public emergency and suspension of clause two of Article 27, there are still many other constitutional rights that an emergency detention regime must comply with, including the presumption of innocence, the right to counsel, and right to be informed of grounds for arrest, which the transition procedure and the existing internment regime may still violate.⁴⁸ Finally, as Shabir Ahmad of ILF-A points out, the transition procedure doesn’t seem to truly address an emergency situation: “We cannot declare a state of emergency and use only for Bagram detainees; we can’t just declare Bagram an emergency.”⁴⁹

Significantly, President Karzai has made clear his opposition to internment. A spokesperson for President Karzai, Aimal Faizi, told Open Society Foundations researchers, “Nothing exists in Afghan law about administrative detention...the President himself is against administrative detention.”⁵⁰ Nevertheless, he has issued executive orders, including a Presidential decree, and allowed an inter-ministerial agreement to establish the procedures for such a regime.

President Karzai has long been reluctant to describe the insurgency in Afghanistan as an armed conflict, as the invocation of internment under AP II implies. Regardless of the reasoning, public disavowals of this kind, coupled with the unilateral, undemocratic means of creating this new detention power have prevented public scrutiny and democratic accountability.

⁴⁷ See Chapter Nine of the Afghan constitution which sets out the conditions for a state of emergency, in which several articles or parts of articles of the constitution can be suspended, including paragraph two of Article 27, as noted. Freedom of assembly can also be suspended, as can phone and email privacy, and the need for warrants in order to conduct home searches.

<http://www.afghanembassy.com.pl/cms/uploads/images/Constitution/The%20Constitution.pdf/>.

⁴⁸ Articles 20, Constitution of Afghanistan.

⁴⁹ Interview with Shabir Ahmad, director of International Legal Foundation-Afghanistan (ILF-A), August 11, 2012, Kabul, Afghanistan.

⁵⁰ Interview with Aimal Faizi, Presidential Spokesperson, Kabul, Afghanistan, September 2, 2012.

The Criteria for Internment under the Inter-Ministerial Agreement

Under Article 4.1 (h) of the transition procedure, an individual may be interned if they meet one of the following criteria:

- (i) the detainee was a member of, or substantially supported an armed group engaged in hostilities against Afghanistan or international forces; or
- (ii) the detainee committed or attempted to commit a belligerent act; or
- (iii) the detainee substantially supported the commission or attempted commission of a belligerent act by another.

There is significant ambiguity in the detention criteria, particularly with respect to the meaning of “member of” and “substantially support.” Lack of guidance on how to interpret this is problematic, particularly where evidence is often scant (see section VI for discussion regarding sufficiency of evidence in detainees’ case files). There may be significant divergence or arbitrariness over what conduct meets the criteria for internment, and how such interpretations ultimately relate to determinations regarding the threat individuals posed, and the necessity of subjecting such individuals to preventative as opposed to criminal detention.

More troubling is how such vague criteria might facilitate the misuse or abuse of the internment regime.

Several leading Afghan lawyers voiced serious concerns regarding the wide, undefined scope of the internment power that the procedure apparently establishes. “This is the real issue,” cautioned Abdul Qawi Afzali, deputy director of LAOA. “If this allows the government going forward to grab someone, to put them in prison under administrative detention, it could be for whatever arbitrary reason, how they look, or how they smell. This is the fear.”

Internment in Afghanistan: Here to Stay?

Several high-level Afghan officials told the Open Society Foundations that the transition procedure was adopted only in order to receive those interned by the U.S. at the DFIP, and upon completion of the handover, no additional individuals will be placed in internment, but will be dealt with under Afghan criminal law. Asked whether internment will be applied to individuals captured after September 9, acting Minister of Defense Enayatullah Nazari said that “Based on the [Detentions MoU] it is the Afghans who have authority to deal with prisoners after September 9...anyone arrested will be dealt with according to Afghan law.”⁵¹

General Farouq also suggested that after September 9, 2012, no additional detainees will be interned, and all detentions would be under Afghan control. “After September 9 there will be no more Review Boards, no more Technical Committee... Anyone captured after September 9 would be referred to the Afghan side...” General Farouq acknowledged that the Review Boards may continue their work until the cases of those transferred pursuant to the Detentions MoU are resolved.

⁵¹ Interview with Enayatullah Nazari, Acting Minister of Defense, August 13, 2012, Kabul, Afghanistan.

Interviews with Afghan officials from the National Directorate of Security (NDS), MOJ, as well as MOI also indicate that the Afghan government believes that the transition procedure does not introduce wider internment powers that can be used for individuals captured by Afghan forces, but only applies to U.S. detainees transferred from the DFIP pursuant to the Detentions MoU, and that upon completion of the transition of the DFIP, the administrative bodies established to implement the internment regime (discussed below) will all be dissolved.

The likelihood that the Afghan internment regime will persist well after September 9, 2012, seems much greater should the United States continue its detention operations at the U.S. side of the DFIP, as discussed above. The United States may insist that an internment regime remain in place on the Afghan side to receive U.S. detainee transfers given the lack of admissible evidence against many high value detainees due to be transferred to Afghan custody. As discussed in section VI, the Afghan review boards that determine whether detainees may be interned can consider certain classified intelligence that is inadmissible in Afghan courts. Indeed, Open Society Foundations researchers learned that disagreements over the legality and future of Afghan internment led to a temporary suspension of U.S. detainee transfers, lifted only days before the scheduled handover.⁵²

Even more troubling is that there is nothing in the transition procedure that explicitly limits internment to individuals who have been held by the U.S. at the DFIP or even those initially captured by the U.S. or international forces. On the face of it, there is nothing that prevents the Afghan government from using the transition procedure to not only to intern post-handover, but to subject anyone it deems to meet the detention criteria to internment anywhere in the country.

Indeed, National Security Advisor Dr. Rangin Dadfar Spanta told Open Society Foundations researchers that the Afghan government will expand the use of internment beyond the DFIP transition, and could subject individuals captured in Afghan operations to internment. “For example, if we arrest the shadow governor of the Taliban for Logar on the streets of Kabul, according to our legal system we may have to release him because we have no proof that he’s involved in killing people. An Afghan judge will ask was he armed, did he attack someone, but even if we have voice recordings [intelligence intercepts] it is not valid [as evidence in Afghan courts]. But we know he is the shadow governor and commander of dozens of terrorists... How can we keep him legally and respect his rights? That’s what AP II provides, it provides him protections and commits Afghanistan to protecting his human rights, but at the same time it allows us to keep him [in internment].”

The lack of clear, well-defined legal limits to the internment regime—and the prospect that it will be used to intern individuals captured post-handover or in future Afghan operations is deeply concerning. As Rohullah Qarizada, head of the Afghan Independent Bar Association stated, “There is nothing written [in the Procedure or MoU] limiting this only to the 3,100 detainees at Bagram or limiting it to the transfer. That’s why we’re worried that if the Afghan government or the U.S. decided, they could still put people into administrative detention after the handover deadline, and they will say that there’s nothing in the agreement that prevents this.”⁵³

⁵² Communication and interviews with officials, September 2,3 and 4, 2012, Kabul, Afghanistan.

⁵³ Interview with Rohullah Qarizada, August 11, 2012, Kabul, Afghanistan.

While the Afghan government, including the parliament, might legitimately decide that the state of the conflict and scale of security threats necessitate the use of internment in some instances, the government must still do so in a way that is lawful under Afghan and international law.

Critics like Abdul Qawi Afzali urge others to take seriously the implications of such a regime given the realities of politics and rule of law in Afghanistan. “Consider the fact that even our regular laws are ignored by powerful people,” Qawi cautions. “What will happen when you give them the actual, legal power to detain people like this law does?”

VI. Detainee Transfers in Practice: The Transfer of Afghan Detainees from U.S. to Afghan Custody

The process for transferring U.S.-held detainees to Afghan custody has been hampered by a lack of proper due process protections, insufficient evidence, and lack of clear, transparent standards for determining whether detainees will be released, prosecuted, or interned. These problems have been exacerbated by the short, six-month timeframe of the transfer process. The sudden, large influx of new detainees for prosecution at the national security criminal court – the Justice Center in Parwan (JCIP) - has made worse the problems of case back log and lack of capacity, increasing the risk of prolonged detention. Serious concerns remain regarding whether detainees brought before Afghan review boards for potential internment receive a meaningful opportunity to challenge the grounds of their detention, particularly given the lack of access to independent counsel, as well as the quality of and access to evidence used in review board determinations.

Though almost all of the approximately 3,100 detainees held at the DFIP as of March 9, 2012 have been transferred to Afghan custody, over 600 detainees remain to be transferred. The procedures, and bodies established to accomplish this transition may become enduring features of the Afghan detention and judicial system, and so warrant a critical review at this juncture.

The Technical Committee Review: Prosecution, Internment, or Release

The Technical Committee plays a critical role in the transfer of U.S. detainees: it determines which can be processed under criminal law by Afghan courts, and which go to a three member “review board” that may decide to continue their internment.

The Technical Committee and its responsibilities were apparently created through an unpublished presidential decree.⁵⁴ According to other officials, it is comprised of fifteen representatives from the MOD, MOI, NDS, the Supreme Court and the Attorney General’s office.

⁵⁴ Article 5 of the Internment procedure states that a Commission will be formed by presidential decree. The presidential decree creating the Commission is both unnumbered and undated in the Procedure.

The U.S. military supplies a case file to the Technical Committee for each detainee transferred from U.S. custody. The Technical Committee determines, on a consensus-basis, whether there is enough evidence that would be admissible in Afghan courts to warrant a transfer of the case for criminal prosecution.⁵⁵ All cases that are referred for criminal prosecution are sent to the Justice Center in Parwan (JCIP), an Afghan national security court within the DFIP created in 2010 with extensive U.S. government support in order to criminally prosecute detainees held by the United States at the DFIP. Afghan prosecutors at the JCIP then decide whether to charge and try detainees, release for lack of evidence or time served, or to refer detainees back to the Technical Committee for further review.

The high number of cases referred by the Technical Committee to the JCIP raises several serious concerns. One is that it increases the backlog, which prolongs detention and undermines due process, although a backlog may be inevitable given the speed of transferring such a vast number of detainees from the U.S. There lack of sufficient evidence against many detainees can result in further delays when the JCIP refers detainees' cases are referred back to the Technical Committee.

Transferred detainees' case files may include evidence admissible in Afghan court such as witness statements by international or Afghan forces, or forensic evidence such as fingerprints and explosive residue tests, and photographs of the detainee or of weapons or ammunition allegedly used by or in the possession of the detainee. The case file may also contain classified information or evidence, including intelligence reports from U.S. or Afghan military and intelligence agencies. U.S. officials say they have endeavored to declassify significant amounts of information in order to share with the Technical Committee and ensure such information is considered in review of detainees' cases, however, some officials have also privately acknowledged that there have been disagreements about the appropriate levels of declassification within and between government agencies.⁵⁶ Resistance to declassification and information sharing may stem from a more general mistrust of Afghan security and intelligence officials.⁵⁷

Attempts by Open Society Foundations researchers to obtain a copy of the decree has so far been unsuccessful.

⁵⁵ Interview with Judge Mahmoud Ahmadi, Supreme Court representative to the Technical Committee, Kabul, July 16, 2012; interview with Prosecutor Akram, Attorney General's Office representative to the Technical Committee, Kabul, July 12, 2012.

⁵⁶ Open Society Foundations' researchers' interviews in Afghanistan and Washington D.C., 2011-2012.

⁵⁷ This lack of trust is evidenced in a number of areas, including the protracted stalemate around information sharing and control over U.S. special operations kill/capture operations with Afghan security officials (for more see The Liaison Office/Open Society Foundations reports on night raids, *Id.*). There is also tension from growing numbers of "Green on Blue" attacks, with insider attacks by Afghan National Security Forces, or people dressed as such, resulting in the deaths of 40 international military in 2012. For more see: "'Green-on-Blue' attacks challenge Afghan security", *NPR*, August 23, 2012. <https://www.npr.org/2012/08/23/159922434/green-on-blue-attacks-challenge-afghan-security.U.S/>. Officials have sometimes made allegations about Afghan security officials colluding with insurgent forces. For example see: Miles Amoor: "Afghan troops and Taliban in pact to loot NATO convoys," *Sunday Times*, May 20, 2012. <http://milesamoor.com/2012/05/20/afghan-troops-and-taliban-in-pact-to-loot-nato-convoys/>.

Neither the Afghan nor the U.S. government allows its classified information to be seen by the detainee or a detainee's legal counsel in criminal prosecutions at the JCIP, though such information is made available to and used by Review Boards.

According to General Farouk, the Technical Committee also weighs the relevance and probative value of the admissible evidence to determine if there is "enough evidence" to move forward with criminal prosecution. Cases with "weak evidence," that is insufficient for a criminal indictment, are referred to the review board, not to the JCIP. Before the process began the Open Society Foundations understood that there was insufficient evidence for criminal prosecution for around 75 percent of those held by the United States at the DFIP.⁵⁸ Despite this, according to the most recent numbers of cases processed, the Technical Committee has referred around 65 percent of cases for criminal prosecution at the JCIP.⁵⁹

Open Society Foundations interviews with an official involved in the process suggest that, in practice, the Technical Committee's threshold for "enough" or "sufficient" evidence to refer for criminal prosecution is very low. One source claimed that the Technical Committee has referred many cases for criminal prosecution that lack sufficient evidence for a fair trial.⁶⁰

According to one official, files referred for criminal prosecution may consist of just "three or four pages" that could fit easily inside an envelope and often the only information in the file is the detainee's identifying details such as his name and father's name, and the files often come "without any evidence" that could support an indictment.⁶¹ The deficiency of evidence in transferred detainees' cases is so acute that the source says prosecutors at the JCIP have begun to refer cases back to the Technical Committee with the request that the Technical Committee provide more information, leading to prolonged detention and uncertainty for detainees.⁶²

The lack of evidence against many of the detainees referred for prosecution is a serious concern, and will undoubtedly impact the fairness and quality of the trials that detainees receive. Lack of evidence against U.S.-held detainees has been a long-standing concern, hampering the Afghan government's ability to properly charge and try U.S.-held detainees.⁶³ Evidence collection is of course a problem writ large in Afghanistan—however, the evidentiary and due process challenges that have arisen in

Lt. Col. Daniel L. Davis: "Truth, lies and Afghanistan: How military leaders have let us down." *Armed Forces Journal*. <http://www.armedforcesjournal.com/2012/02/8904030/>.

⁵⁸ Open Society Foundations interviews with officials, Washington, D.C., April 2012.

⁵⁹ As of August 12, of the 2,573 cases reviewed by the Technical Committee 1, 621 were referred to the JCIP. Interview with General Farouq, Kabul, Afghanistan, August 13, 2012.

⁶⁰ Interview with source, May 27, 2012.

⁶¹ Interview with source, May 27, 2012, and June 9, 2012.

⁶² Interview with source, May 27, 2012

⁶³ "Detained and Due Process Denied," *Human Rights First*, May 2011.

<http://www.humanrightsfirst.org/wp-content/uploads/pdf/Detained-Denied-in-Afghanistan.pdf/>.

See also Jonathan Horowitz, "Better Evidence Will Lead To More Justice In Afghanistan," *Huffington Post*, October 7, 2009.

http://www.huffingtonpost.com/jonathan-horowitz/better-evidence-will-lead_b_312193.html/.

the context of the DFIP transfer highlight the significant difficulties in moving from a military detention regime (relying often on intelligence, classified information, hearsay, and forms of evidence inadmissible in court) to criminal detention and prosecution.⁶⁴

As noted above, around two thirds of cases transferred are going to the JCIP for criminal prosecution, much higher than the proportion of detainee cases that the United States has historically referred to the JCIP.⁶⁵ Such a massive influx has contributed to a ballooning of the already-considerable backlog of cases at the JCIP. Prolonged detention and delay is already a serious issue at the JCIP; some detainees' trials take place within months of being transferred while others have to wait for years.

The issue of prolonged pre-trial detention is a serious problem throughout the Afghan justice system. Though referral of detainees to the criminal justice system should provide detainees with greater due process rights, in practice many may still face prolonged detention, lack of access to legal counsel, unfair trials, and other due process violations that are similar to those suffered by detainees subjected to internment.⁶⁶ As the problems at the JCIP highlight, referral for criminal prosecution is by no means a simple solution to the challenge of protecting the rights of conflict-related detainees.

The Afghan Review Boards: Due Process in Internment

The cases the Technical Committee does not refer to the JCIP for criminal prosecution are referred to an Afghan review board, to determine whether the individual will continue to be detained under Afghanistan's internment regime.⁶⁷

⁶⁴ "Detained and Due Process Denied", *Human Rights First*. <http://www.humanrightsfirst.org/wp-content/uploads/pdf/Detained-Denied-in-Afghanistan.pdf/>. See also Jonathan Horowitz, "Better Evidence Will Lead To More Justice In Afghanistan," *Huffington Post*, October 7, 2009. http://www.huffingtonpost.com/jonathan-horowitz/better-evidence-will-lead_b_312193.html/. See also "Letter to President Obama: End Detention Without Trial and Close Guantanamo" *Human Rights Watch*, January 10, 2012. <http://www.hrw.org/news/2012/01/10/letter-president-obama-end-detention-without-trial-and-close-guantanamo>; <http://www.hrw.org/news/2012/05/09/justice-trial/>. See also "No real justice in Guantanamo" *Human Rights Watch*, January 19, 2012. <http://www.hrw.org/news/2012/04/19/no-real-justice-guantanamo/>;

⁶⁵ Interview with U.S. officials January 2012; Telephone interview with U.S. official, May 22, 2012.

⁶⁶ "Torture, Transfers, and Denial of Due Process: The Treatment of Conflict-Related Detainees in Afghanistan," Afghanistan Independent Human Rights Commission / Open Society Foundations, March 17, 2012. <http://www.soros.org/sites/default/files/conflict-related-detainees-afghanistan-20120319.pdf>; United Nations Assistance Mission in Afghanistan, 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/; "Arbitrary Detention in Afghanistan: A Call for Action", Vol. II, UNAMA, January 2009; United States Assistance Mission in Afghanistan, Arbitrary Detention in Afghanistan: A Call for Action, Vol. I, UNAMA, January 2009. http://www.ohchr.org/Documents/Countries/ADVC_Vol_I_UNAMA.pdf/.

⁶⁷ The transition procedure refers to these as an "impartial board," and the U.S. and Afghan governments refer to the boards as "impartial review boards."

There are currently three review boards operating (referred to as A, B, and C). Each review board is composed of three Afghan officials, one each from the Ministry of Defense, the Ministry of Interior, and the National Directorate of Security.⁶⁸ When a case is referred to the review board from the Technical Committee, the review board first determines whether a detainee meets the criteria for continued detention set out in article 4.1(h) of the transition procedure. This determination is made by a majority decision and based on a “preponderance of the evidence” standard. If the review board finds that the detainee meets the criteria for detention, it then determines whether “continued detention is necessary, taking into consideration the detainee’s potential for rehabilitation or reintegration.”⁶⁹ If so, then the detainee remains interned without charge or trial in the DFIP. If the review board determines that continued detention under the internment regime is not necessary, it may refer the case to the JCIP or recommend that the detainee be released.

Concerns regarding a lack of due process in the Afghan review board system largely mirror those that have persisted with U.S. Detention Review Boards (DRBs) and failure to meet minimum procedural protections under international humanitarian and human rights law, particularly the lack of clear detention criteria, the lack of evidence and overreliance on classified evidence unavailable to the detainee, and the lack of access to independent legal counsel.⁷⁰

Lack of Clarity Regarding Criteria Used by the Afghan Review Board

The criteria employed to determine whether a detainee should be interned are vague. As discussed above in section IV, there is significant ambiguity with respect to the meaning of “member of” and “substantially support” as elements of the detention criteria. Without guidance there is wide scope for interpretation, particularly where evidence is often scant. There may be significant uncertainty or arbitrariness over what conduct meets the criteria for internment.

One senior Afghan official stated that, in determining whether a detainee meets the requirements to be detained, the review board will also “analyze what group they are a part of, the profile of that group,” specifying that some anti-state groups are “ideologically opposed” to the Afghan state, while others are “not so serious” or “anti-state but don’t take action.”⁷¹ It is unclear whether the government has consistent, official positions on which specific groups qualify as security threats so as to render membership sufficient to meet the internment criteria. Given the diversity of groups and factions opposed to the government—as well as wide ranging opinions among Afghans regarding the

⁶⁸ Art. 4.1(e).

⁶⁹ The transition procedure, article 4.1(i).

⁷⁰ “Detained and Due Process Denied: How to Make U.S. Detention Comply with the Law,” *Human Rights First*, May 2011. For outline of minimum procedural rights under international human rights and humanitarian law for those held in interment or administrative detention see Jelena Pejic, “Procedural Principles and Safeguards for Internment” and “Administrative Detention in Armed Conflict and other Situations of Violence,” *ICRC*, June 2005. http://www.icrc.org/eng/assets/files/other/irrc_858_pejic.pdf. See also Rachel Reid: “Are the U.S. Detainee Review Boards for suspected Afghan insurgents fair? Ask Mullah Tractor,” *LA Times*, October 19, 2010. <http://www.hrw.org/news/2010/10/19/hidden-justice/>. Daphne Eviatar: “Justice remains elusive for many at U.S. prison in Afghanistan.” *Huffington Post*, February 13, 2011. http://www.huffingtonpost.com/daphne-eviatar/justice-remains-elusive-f_b_822669.html/.

⁷¹ Interview with Afghan government official, Kabul, June 2, 2012.

actual threat posed by such groups—review board assessments may in practice be inconsistent and subject to a significant degree of arbitrariness

The transition procedure also fails to provide specific guidance on the types of evidence or information the review board may consider in determining whether to continue to intern individuals. According to General Farouq, the review board may rely on any of the following four sources of information in addition to any Afghan or U.S. intelligence about the detainee that it possesses:

- Information from tribal elders or other influential community members from the detainee’s area;
- Information from local government organs regarding the detainee;
- Intelligence from other detainees; and
- Opinions of “highly educated and professional people” who sit with the detainees to “convince them to change their behavior.”

General Farouq stated that the review board was unlikely to ever actually consult a detainee’s community members in order to reach a decision and that a case would rarely warrant “such a serious investigation or research.” Given the lack of evidence in many of the detainees’ case files forwarded by the United States, the actual information that the review board considers is likely to be largely classified evidence that the detainee himself may never see. In such circumstances, it is not clear that detainees are in fact provided a meaningful opportunity to challenge the grounds of their internment, as required under international law.

Deeply troubling is the lack of any clear provision in the transition procedure or any subsequently issued standard operating procedures or guidelines that prohibit the use of evidence or information obtained through torture. While this is clear under Afghan criminal law, such a clear prohibition on the use of such evidence in the deliberations of review boards is critical to deterring mistreatment and safeguarding the rights of detainees.

Inadequate Legal Assistance Made Available to Detainees during the Review Board

Under the transition procedure, detainees are entitled to be assisted by a “personal representative and, if available, legal support.”⁷² In practice, however, detainees are not entitled to choose independent, civilian legal counsel—they are appointed a military lawyer.⁷³ According to General Farouq, this significant restriction on the ability of detainees to challenge the basis of their detention because “we do not want others to have access to our classified documents.” He stated, “We can trust the military legal officers and put all types of information in front of him,” adding that “military legal officers can read that [classified information] and defend the detainees.”⁷⁴ General Farouq was unconcerned with impartiality issues arising from the use of military lawyers instead of independent counsel, stating that these military officers “take an oath that they will defend the detainees, not the government.” One Technical Committee member stated that, “in the beginning of the process there was some lack of trust by detainees of their defense lawyers, but now they have confidence in their defense lawyers.”

⁷² transition procedure, Article 4(1) (f).

⁷³ Interview with Gen. Farouq, Kabul, May 29, 2012.

⁷⁴ *Id.*

However, the use of military lawyers instead of independent, outside defense lawyers raises serious concerns regarding the impartiality of such legal representation, as well as detainees' trust in their legal counsel and ability to work with their representative to meaningfully challenge their detention. The use of military "personal representatives" at U.S. DRBs instead of independent counsel of choice has been subject to similar criticism by outside observers for failing to provide meaningful representation to detainees.⁷⁵

Aside from the question of the independence or impartiality of detainees' legal representatives, there remain questions about the quality of the representation that detainees receive from Afghan military lawyers. Although the transition procedure grants a detainee "the opportunity to present evidence and call reasonably available witnesses to appear on his behalf" before the review board, it is not clear whether the military lawyers are attempting to identify and locate witnesses or collect evidence, and how, even if witnesses are identified, the Afghan government ensures witnesses are able to travel to and testify at the DFIP.

Lack of Certainty Over Length of Detention

One of the most significant gaps in the internment regime created by the Afghan government is the lack of any provision specifying how long the government will possess the authority to administratively detain individuals. As noted in section V, above, it seems that the United States intends to keep detaining well beyond the detention transfer period, which is the primary reason for the creation of an Afghan internment power. The transition procedure contains language that links internment authority to Additional Protocol II, which could suggest that the internment power may exist only for imperative security reasons and, at a maximum, until the cessation of hostilities as mandated under international law. However, the transition procedure contains no explicit provisions linking the existence of such a regime to the imperative reasons of security or "duration of hostilities," nor are there any provisions that provide more specific guidance or criteria for determining when hostilities have in fact ended.

Afghan officials provided conflicting answers regarding how long transferred detainees could be interned. General Farouq and one high-ranking Afghan government official involved in the process stated that detention could continue until the end of hostilities. Another Afghan official cited the Geneva Conventions as allowing internment of men, women, and children until the end of the conflict, but was certain that could not apply to Afghanistan; "Afghanistan has had war for 34 years, who knows how much longer it will last?"⁷⁶ Another high-ranking Afghan government official stated that administrative detention would only continue until the expiry of the six-month deadline in the Detentions MoU after which point no further administrative detention would be allowed in Afghanistan and anyone held in detention would be released.

⁷⁵ Rachel Reid: "Are the U.S. Detainee Review Boards for suspected Afghan insurgents fair? Ask Mullah Tractor," *LA Times*, October 19, 2010. <http://www.hrw.org/news/2010/10/19/hidden-justice/>. See also Daphne Eviatar: "Justice remains elusive for many at U.S. prison in Afghanistan." *Huffington Post*, February 13, 2011. http://www.huffingtonpost.com/daphne-eviatar/justice-remains-elusive-f_b_822669.html/.

⁷⁶ Interview with source, May 28, 2012.

The lack of a clear, definitive answer to these critical questions greatly exacerbates the risk that the internment power will be subject to abuse and that detainees will be held in prolonged, indefinite detention.

Review by the Commission and Consultation with the United States

The Afghan review boards do not represent the final decision regarding releases since detainees recommended for release are also subject to two further, ill-defined review processes. When the review board recommends a detainee for release this decision must then be approved by a “Commission” of senior Afghan politicians, which is not set out in either the Detentions MoU or the transition procedure. This determination may also then be subject to a U.S. “consultation” through the U.S.-Afghan Bilateral Committee on Detentions established under the Detentions MoU.

The Commission’s “Review” of Review Board Recommendations for Release

The review by the Commission is not contained in either the Detentions MoU or the transition procedure. Article 4.1(j) of the transition procedure states that the Ministry of Defense shall order a detainee’s release if the review board finds he does not meet the criteria for internment, but in reality they cannot order a release but only make a recommendation, subject to approval or veto by the Commission.⁷⁷ Notably, the Commission’s power to override the review board mirrors the system created by the United States in which U.S. DRBs could only recommend the release of a particular detainee and the final decision for release could only be made by the Commander of Task Force-435 or higher-level Department of Defense officials.

The Commission’s decision-making process is completely opaque. It is unclear what the criteria are for the Commission’s determinations, what standard of review it applies, and what deference is given to determinations made by the review board. One Afghan official described the process as a “review” of the review board’s decision, in which the Commission can require the detainee to appear before it and answer questions, though the detainee would not be entitled to the assistance of any advocate because the Commission “is not a court.”⁷⁸ When asked how the Commission determines whether to affirm or reject the recommendation of the review board, the official merely stated that, “the Supreme Court, the Attorney General, [and others on the Commission] are high positions in the country and they are highly educated.”⁷⁹

General Farouq stated that the Commission could conduct its own inquiry but that the members would not need to consult any of the documents reviewed by the review board. Rather, the Minister

⁷⁷ “The detainee shall be released on order of the Ministry of National Defense of the Islamic Republic of Afghanistan, [emphasis added] if it is determined by the board that the detainee does not meet the criteria for detention described in Paragraph (h) of this article, and in accordance with Memorandum of Understanding between the United States and Afghanistan.” The reference to the MoU appears to be a reference to Article 9 of the Detentions MoU which requires Afghanistan to “consult with the United States” before it releases any transferred detainees and to “consider favorably” any American recommendation that the person remain in detention.

⁷⁸ Interview with Afghan government official, May 28, 2012.

⁷⁹ Interview with Afghan government official, Kabul, May 28, 2012.

of Defense, who chairs the Commission, would consult “other intelligence resources” at his disposal. Detainees would not as regular practice appear before the Commission, according to General Farouq, and the Commission would generally make decisions without any participation or representation by the detainee. In some exceptional circumstances, a detainee may be asked to appear before the Commission—however, the detainee would not be entitled to the assistance of any personal or legal representative. Furthermore, if the Commission refuses to release an individual, it is not required to and will not produce any written reason for its decision.⁸⁰

The release of detainees held at the DFIP is widely seen as a potentially powerful bargaining chip in negotiations with the Taliban.⁸¹ Given the confusion and lack of clarity outlined in various stages of the DFIP transfer, there could be multiple opportunities for political interference. However, the lack of any rules or transparency governing the Commission’s role in making a decision to release a detainee would appear to be the most vulnerable part of the system, leaving it open to arbitrary decision-making and political horse-trading.

Shukria Barakzai, a member of parliament, warned that if the 3,000 detainees are treated as “treasure” to be mined for political benefit, those subject to the process would have “no rights.”⁸² A transparent and independent oversight or complaints mechanism for the review boards, or for the entire detainee transfer process, could improve the integrity of the review and release processes under the internment regime. The Commission does not yet perform that function.

“Consultation” with U.S. Required before Release

The final stage of review for all transferred detainees that the Afghan government decides to release, whether via the Review Boards or the JCIP is consideration by a joint U.S.-Afghan “bilateral committee.” This consultation is established by the Detentions MoU, which notes that the United States should be consulted and provide input before any detainee is released.

Article 9 of the Detentions MoU states: “Afghanistan affirms that it is to consult with the United States before the release, including release prior to indictment, of the transferred detainees, and, if the United States provides its assessment that continued detention is necessary to prevent the detainee from engaging in or facilitating terrorist activity, Afghanistan is to consider favorably such assessment.”

What it means for Afghanistan to “consider favorably” U.S. assessments—and in turn the extent to which the United States will retain effective control over detainee releases is unclear. U.S. officials have previously described the consultation process as a “dual key” mechanism, and insinuated that

⁸⁰ Interview with Gen. Farouq, Kabul, May 29, 2012.

⁸¹ "U.S. Reportedly Releasing High-level Detainees in Exchange for Pledges of Peace." CBSNews. CBS Interactive, 07 May 2012. Web. 30 May 2012. <http://www.cbsnews.com/8301-502223_162-57428814/u.s-reportedly-releasing-high-level-detainees-in-exchange-for-pledges-of-peace/>; "Afghanistan: Karzai and the Taliban in a Tizzy Over News of Secret Peace Talks." The Daily Beast. Newsweek/Daily Beast, 10 Jan. 2012. Web. 30 Jan. 2012. <<http://www.thedailybeast.com/articles/2012/01/10/afghanistan-karzai-and-the-taliban-in-a-tizzy-over-news-of-secret-peace-talks.html>>.

⁸² Interview with Shukria Barakzai, Member of Parliament, Kabul, June 3, 2012.

the United States may retain a de facto veto power over any proposed detainee release.⁸³ General Farouq has disputed this characterization, and describes the process as more cooperative and based on “consensus.”

According to the Afghan government, as of August 14, 2012, the Joint Committee had reviewed the cases of 24 detainees recommended for release. Of those, 18 were approved for release and 6 detainees’ cases were referred to NDS for further investigation.

VII. The Uncertain Fate of Third Country National Detainees

The United States currently holds more than 50 non-Afghan detainees, or TCNs at the DFIP.⁸⁴ These detainees are from several different countries, though the majority are from Pakistan.⁸⁵ While most were captured in Afghanistan, it is believed that some were captured in other countries and then transferred to the DFIP by the CIA. Many TCNs have been held in internment at the DFIP for years.⁸⁶

TCNs are not addressed in the Detentions MoU. Though the Detentions MoU suggests that the United States will “transfer U.S. detention facilities in Afghanistan to Afghan control” it appears likely that the United States will continue to hold TCNs at the DFIP after the September 9, 2012, deadline for the processing and transfer of detainees, given how little progress has been made in transferring, repatriating or resettling them. Afghan National Security Advisor Rangin Dadfar Spanta says that the Afghan government has given the U.S. two possibilities, “for the middle term. U.S. forces can hand them over to the Afghan authorities, and we will deal with them according to the Afghan legal system. The second is to take them outside Afghanistan. But we cannot provide our allies and friends with their own detention facility here.”⁸⁷

Given some of the home nations involved, which include Yemen and Pakistan, this is a fraught political process, particularly if the United States is to meet its international obligation of non-refoulement (not transferring detainees to countries where there are substantial grounds for believing they face a risk of torture). Some TCNs have been recommended for release by U.S. DRBs either

⁸³ Background briefing with U.S. officials, March 9, 2012. See also “Detainees Are Handed Over to Afghans, but Not Out of Americans’ Reach,” *New York Times*, May 31, 2012.

<http://www.nytimes.com/2012/05/31/world/asia/in-afghanistan-as-bagram-detainees-are-transferred-united-states-keeps-its-grip.html?pagewanted=all/>.

⁸⁴ National Security Advisor, Dr. Rangin Dadfar Spanta, Kabul, September 2, 2012.

⁸⁵ Interview with officials, April 2012, Washington D.C, and source, August 15, 2012, Kabul, and Lahore, Pakistan, August 21, 2012.

⁸⁶ “Administration Looking into Repatriating Non-Afghan Detainees at U.S.-run Prison.” *Washington Post*. The Washington Post, 25 Jan. 2012. Web. 30 Aug. 2012.

[http://www.washingtonpost.com/world/national-security/administration-looking-into-repatriating-non-afghan-detainees-at-us-run-prison/2012/01/23/gIQAzsvsLQ_story.html/...](http://www.washingtonpost.com/world/national-security/administration-looking-into-repatriating-non-afghan-detainees-at-us-run-prison/2012/01/23/gIQAzsvsLQ_story.html/)

⁸⁷ Interview with Dr. Rangin Dadfar Spanta, National Security Advisor, Kabul, Afghanistan, September 3, 2012.

because there is no basis for their original detention or they no longer pose threat—yet they remain in U.S. custody at the DFIP awaiting repatriation or resettlement agreements to be negotiated between the United States and other countries.⁸⁸

The United States claims that it is moving ahead with these negotiations, which center on security guarantees and humane treatment assurances from detainees' home countries.⁸⁹ The United States must also obtain consent of the Afghan government in order to secure an exit visa for detainees before they can be repatriated or resettled in third countries.

The Open Society Foundations understands that the United States and other countries such as Pakistan have made limited progress in negotiating agreements and establishing clear policies on critical issues like security guarantees and humane treatment assurances. The fact that many Pakistani TCNs are still awaiting confirmation of their nationality, some after years of detention in DFIP, reflects just how far negotiations for many TCN cases still have to go.⁹⁰

“The United States and Pakistan have had years to resolve these cases—yet these individuals remain in detention, with even the most basic of issues still to be settled,” according to Sarah Belal, director of Justice Project Pakistan, which represents several Pakistani detainees. “Detainees and many of their families are often too eager to see developments like the handover as a sign of their imminent release—when the reality is much more complicated. There may be challenges, but after so much time the U.S. and Pakistani governments must provide a clear plan and policies for resolving these cases without delay and inform detainees and their families about the status and potential outcomes of their cases.”⁹¹

These unresolved issues do not just apply to the existing population of TCNs, the United States may continue capture and detain TCNs in future operations.. The United States appears reluctant to hand over many high value targets to the Afghan government, and faces considerable challenges in moving the detainees to their home nations, or to another U.S. detention facility, given how politically contentious U.S. detention at Guantanamo Bay has been, making it likely that the United States will continue to control at least a portion of a detention facility after the September 9th handover. The DFIP transition and ongoing U.S. detention operations may also have implications for detainees' rights under U.S. law, specifically whether detainees held at the DFIP have the same habeas rights

⁸⁸ “Detainees OK'd for Release Still Held at Bagram”, *Dawn*, April 6, 2012.

<http://dawn.com/2011/04/06/detainees-okd-for-release-still-held-at-bagram/>.

⁸⁹ Interviews with U.S. officials. See also Washington Post, Jan 23, 2012.

http://www.washingtonpost.com/world/national-security/administration-looking-into-repatriating-non-afghan-detainees-at-us-run-prison/2012/01/23/gIQAzsvsLQ_story.html/.

⁹⁰ Interview with Sarah Belal, JPP, Lahore, Pakistan, August 21, 2012. Interviews with various government officials. *The Express Tribune*, May 28, 2012. <http://tribune.com.pk/story/385319/lhc-directs-mofa-to-confirm-nationalities-of-pakistani-detainees-in-bagram/>.

⁹¹ Open Society Foundations interview with Sarah Belal, Director, Justice Project Pakistan, Lahore, August 21, 2012.

under the U.S. Constitution as Guantanamo Bay detainees and are able to challenge their detention before a U.S. court.⁹²As the transition period ends, these questions remain utterly unresolved.

Lack of U.S. Detainee Monitoring Program

The United States continues to be the only NATO country in Afghanistan not to have a system to monitor the treatment and confinement conditions of detainees transferred into Afghan custody.⁹³ Though the risk of detainee mistreatment at the DFIP may be relatively low, the Afghanistan Independent Human Rights Commission, and the Open Society Foundations, as well as the UN have documented widespread torture and mistreatment of security-related detainees in Afghan custody in locations across the country.⁹⁴

Given such findings and the pervasiveness of detainee mistreatment, particularly of security-related detainees in Afghan custody, detainees transferred to Afghan custody at the DFIP may still face a risk of mistreatment, particularly once the U.S. presence reduces. The risk of torture or mistreatment is higher for those detainees who are transferred to the JCIP and then, post-conviction, transferred to provincial prisons. The United States has a legal obligation to not to transfer an individual to a state where there are substantial grounds for believing they will face a risk of torture.⁹⁵ Without any

⁹² In response to challenges from family members of detainees in the DFIP, the U.S. Court of Appeals for the D.C. Circuit has ruled that U.S.-held detainees at the DFIP do not enjoy habeas rights (the constitutional right to challenge their detention before a court), in contrast to detainees held at the U.S. facility in Guantanamo Bay in Cuba. However, the prospect that detainees will continue to be held at the DFIP past the September 9 2012 transition, particularly the continued detention of TCN detainees for an unspecified period of time, as well as the transition process and large scale transfer of detainees to the JCIP could alter this determination. A U.S. District Court recently ordered a hearing on the extension of habeas rights to detainees held at DFIP, seemingly in light of the DFIP transition and the Detentions MoU.

[http://www.cadc.uscourts.gov/internet/opinions.nsf/0471E6B4F164929085257807007002E8/\\$file/09-5265-1245894.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/0471E6B4F164929085257807007002E8/$file/09-5265-1245894.pdf); <http://www.lawfareblog.com/2012/06/has-judge-john-bates-been-listening-to-npr/>; <http://www.lawfareblog.com/2012/07/read-out-from-motions-hearing-in-al-maqaleh-and-hamidullah/>.

⁹³ Under international law states should not transfer detainees to authorities where they face a risk of torture. Monitoring is regarded as a useful but not sufficient preventative tool. For more on the use and efficacy of monitoring, see: AIHRC and Open Society Foundations, "Torture, Transfers, and Denial of Due Process: The Treatment of Conflict-Related Detainees in Afghanistan," March 2012.

<http://www.soros.org/reports/torture-transfers-and-denial-due-process-treatment-conflict-related-detainees-afghanistan/>.

⁹⁴ AIHRC and Open Society Foundations, Id. 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/.

⁹⁵ Article 3 in the Convention against Torture obligates States not to transfer "a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture or CAT), adopted December 10,

mechanism to track and monitor transferred detainees, the United States may not be able to verify that is fulfilling its non-refoulement obligation and forgoes an opportunity to introduce an institutional mechanism that contributes to deterring mistreatment. Such a mechanism would also be helpful in monitoring the treatment of TCNs transferred back to their home countries. However, it is important to note that while post-transfer monitoring is a potentially helpful preventative tool, it is not on its own sufficient to meet states' legal obligations. Monitoring also does not render states immune from potential responsibility and consequences under international law for torture that takes place post-transfer.

U.S. officials stated that there have been efforts to establish a monitoring program that would eventually include the DFIP but that a lack of negotiating capacity in the Afghan government has thus far prevented an agreement from being reached. The Afghan government has also yet to negotiate and finalize an MoU with the Afghanistan Independent Human Rights Commission, which has a constitutional mandate to monitor conditions of detention, and will be the enduring human rights monitoring presence in the country. With the handover now almost complete, the window to establish such a program—and protect detainees from the torture and mistreatment that has been witnessed in other elements of the Afghan prison and security system—is quickly closing.

1984 (19 Qaws 1363), G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987, art. 3.

<http://www2.ohchr.org/english/law/cat.htm>. There are different interpretations as to the substantive legal standard for non-refoulement, and in particular the threshold of risk of torture that triggers a state's obligation not to transfer. Numerous human rights bodies and courts have interpreted this standard as being a "real" risk of torture, meaning that the risk may not be merely hypothetical. See General Comment 1 of the Committee against Torture, para 6:

http://www1.umn.edu/humanrts/cat/general_comments/CAT_C1XX_Misc1_1997.html; Committee against Torture, *N.T.W. v. Switzerland*, CAT/C/48/D/414/2010 Communication No. 414/2010, para 7.2-7.3, http://www2.ohchr.org/english/bodies/cat/docs/jurisprudence/CAT-C-48-D-414-2010_en.pdf; Human Rights Committee in General Comment 31: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G04/419/56/PDF/G0441956.pdf?OpenElement>, para. 12; *Chahal v. United Kingdom*, App. No. 70/1995/576/662, 30 Eur. Ct. H.R. para 74 (1996); *Queen in re: Maya Evans v. Sec'y of State for Defence*, [2010] EWHC 1445 (Q.B.) (U.K.); It is important to note that the United States interprets its obligation somewhat differently. The United States ratified CAT subject to an understanding that the phrase "where there are substantial grounds for believing that he would be in danger of being subjected to torture" in Article 3 means "if it is more likely than not that he would be tortured." *Resolution of Advice and Consent to Ratification, S. Exec. Rep. No. 101-30, 1990*, <http://thomas.loc.gov/cgi-bin/ntquery/z?trty:100TD00020>. The U. S. government has also taken the view that Article 3 does not impose legal obligations on the United States with respect to individuals who are outside U.S. territory, although it has stated that, as a matter of policy, it will not transfer persons to countries where it is more likely than not that they will be tortured. See *Second Periodic Report of the United States of America to the Committee Against Torture, May 6, 2005, para. 30*, <http://www.state.gov/g/drl/rls/45738.htm>. See also *Diplomatic Assurances and Rendition to Torture: The Perspective of the State Department's Legal Advisor: Hearing before the Subcomm. on Int'l Organizations, Human Rights, and Oversight, 110th Cong. 12 (2008)*, statement of John B. Bellinger, III, Legal Advisor, State Department, www.fas.org/irp/congress/2008_hr/rendition.pdf.

VIII. Recommendations

The Open Society Foundations makes the following recommendations to the Afghan and U.S. governments.

To the Afghan Government:

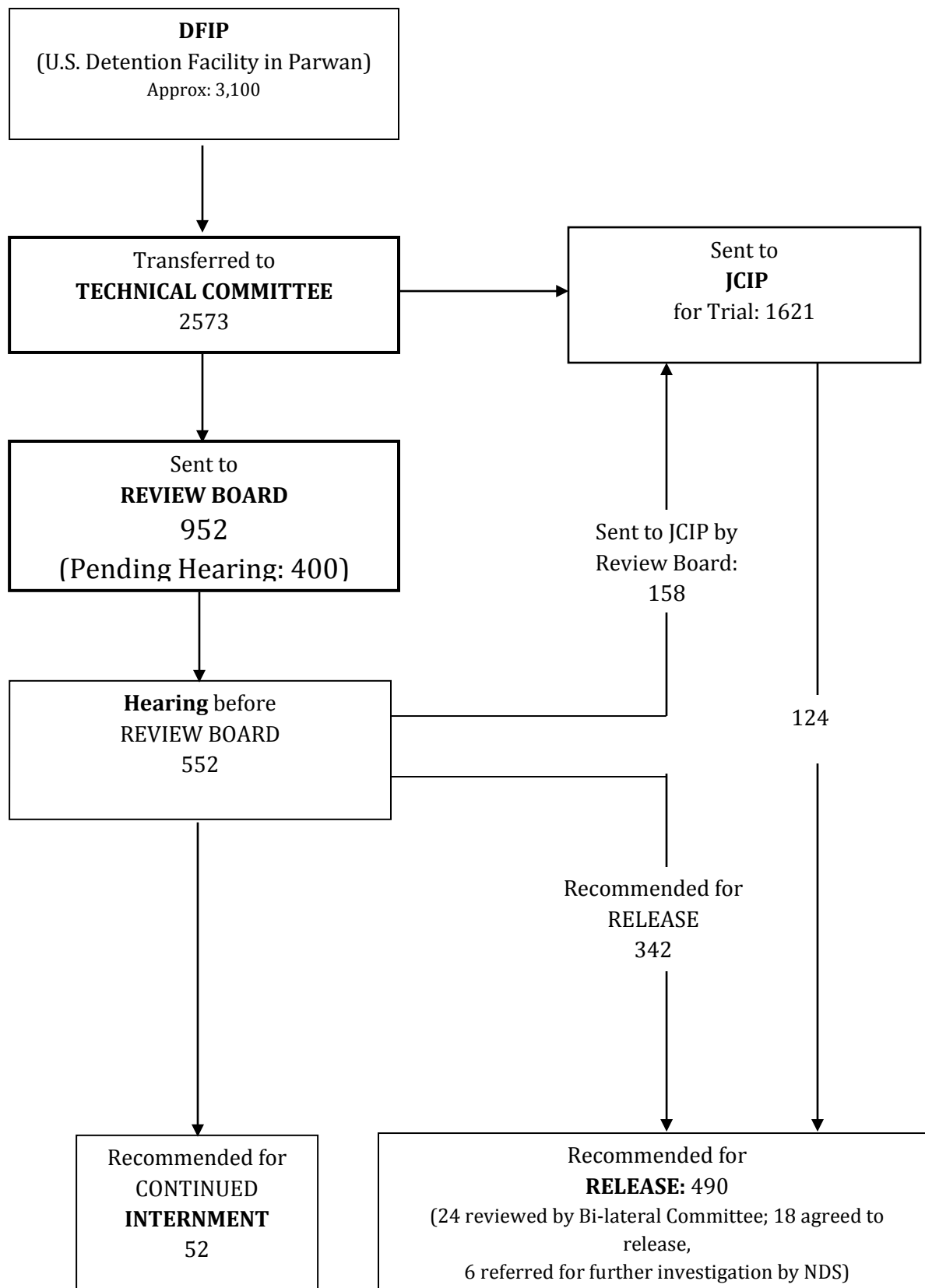
- Suspend internment of detainees and ensure all detentions, including detention of individuals transferred from U.S. custody comply with Afghan law and Constitution.
- Conduct a review of national security detention policy, to assess whether counter-terrorism legislation is effective and rights respecting, and whether internment is required. Included in this review a consultation of the security ministries, Supreme Court, Ministry of Justice, Independent Commission for Oversight of the Implementation of the Constitution, parliamentarians, the Afghanistan Independent Human Rights Commission and the Detention Working Group.
- If following this consultation the Afghan government determines that internment is absolutely necessary for imperative security reasons, ensure that the detention regime is made consistent with the Constitution of Afghanistan, including Chapter Two, as well as all applicable international and domestic laws, including the Penal Code and the Interim Criminal Procedure Code. Ensure it is created through legislation passed by Parliament, which establishes a clear and comprehensive domestic legal framework governing internment, and must be renewed annually by parliament.
- If Parliament passes any legislation enabling the internment consider expressly limiting internment only to those individuals transferred from U.S. custody at the DFIP and not to individuals captured by Afghan forces. Pass a regulation or legislation revoking the inter-ministerial agreement and the unpublished presidential decree relating to the DFIP transition.
- Include in legislation specific guidance on the legal criteria for internment. Make proceedings and decisions of review boards public. Ensure any detainees subject to internment in Afghanistan are afforded all appropriate due process protections, including regular periodic review (at least once every six months), an opportunity to meaningfully challenge their detention, access to defense lawyer of their choice, and access to the evidence used against them.
- Increase the number of qualified judges, prosecutors, defense lawyers, and court administrators to address the severe backlog of cases awaiting criminal prosecution at the Justice Center in Parwan.
- Ensure that independent monitors, in particular the AIHRC, are granted full, unfettered access to all detainees in Afghanistan, including those at the DFIP. Immediately negotiate an MoU with the AIHRC guaranteeing and governing AIHRC monitors' access to the Afghan controlled DFIP.
- Assess and address concerns of the U.S. government regarding the possibility of detainee escape or release for improper political or financial reasons.

- Address problems of national security detentions outside the internment system, including widespread due process violations, and the need to make public all legislation and Presidential decrees governing the legal authority of NDS. Ensure defense lawyers and human rights monitors have access to detainees and all NDS detention facilities at all stages of detention.

To the U.S. Government:

- Ensure that all policies and procedures agreed upon to transfer detainees to Afghan custody are consistent with the Constitution of Afghanistan and all applicable domestic Afghan laws. Publicly urge the Afghan government to take the necessary steps to ensure the legality and constitutionality of any internment regime.
- Urgently find a resolution with the Afghan government and inform the Afghan people how U.S.-captured individuals captured since the March 9 Detentions MoU will be handled.
- Make clear how long the U.S. government might maintain a detention facility for TCNs in Afghanistan, what international and domestic laws apply to TCN detainees, and ensure TCN detainees enjoy periodic review and have a meaningful opportunity to challenge their detention.
- Ensure access to independent legal counsel for all TCNs, particularly in light of the continued uncertainty about TCNs in the DFIP transition. Provide information to TCN detainees and their families regarding the status of their cases, which would also be aided by providing access to counsel.
- Ensure that TCNs are not repatriated to countries where they face a risk of torture or ill-treatment, and that the treatment of repatriated detainees is properly monitored. Ensure the provision of effective financial and technical support to the Afghan government in order to expand the capacity of the JCIP to handle the influx of referrals from the DFIP transition.
- Finalize a detainee-monitoring agreement with Afghanistan to monitor treatment of detainees transferred from U.S. to Afghan custody at the DFIP. Ensure that the Afghan government fulfills its commitment under the Detentions MoU to permit independent monitors' access to the DFIP, specifically through the finalization of an MoU with the Afghanistan Independent Human Rights Commission guaranteeing and governing monitoring access, including access to any detainees who continue to be held in U.S. facilities within an Afghan controlled DFIP.
- Carry out a review of the quality of evidence on the basis of which the U.S. captures and detains individuals, as well as the quality and adequacy of evidence provided to Afghan officials for subsequent detention internment or prosecution under Afghan law.

DFIP transfer:
Numbers as of August 12, 2012



Glossary

AIHRC	Afghanistan Independent Human Rights Commission
AP II	1977 Second Additional Protocol to the Geneva Conventions (which lays out a range of rights and protections in non-international armed conflicts, including rights for persons who are denied liberty)
Bilateral Committee	U.S.-Afghan committee that oversees implementation of the Detentions MoU and reviews cases of transferred detainees recommended for release by the Afghan government on Detentions
CIA	Central Intelligence Agency (US intelligence agency)
DRB	Detention Review Board (U.S. military body that reviews detention of individuals)
DFIP	Detention Facility in Parwan: until March 2012 a U.S. run internment facility in Bagram district, Parwan province, Afghanistan
ICOIC	Independent Commission for the Oversight of the Implementation of the Constitution
Transition Procedure	“The Procedure for Transition and Management of Bagram Detention Facility and Pul-e-Charkhi Detention Facility from the United States of America to the Islamic Republic of Afghanistan” - An inter-ministerial agreement which establishes the Afghan procedure for internment
ISAF	International Security Assistance Force
JCIP	Justice Center in Parwan: a criminal court dealing with national security cases located near the DFIP

Detentions MoU:	Memorandum of Understanding between the Islamic Republic of Afghanistan and the United States of America on the Transfer of U.S. Detention Facilities in Afghan Territory to Afghanistan”
NATO	North Atlantic Treaty Organization
NDS	National Directorate of Security (the Afghan intelligence agency)
MoD	Ministry of Defense
MoI	Ministry of Interior
Review Board	Government of Afghanistan administrative body that reviews cases of detained individuals to determine whether to release, refer for criminal prosecution, or continue to intern
Special Operations MoU	Memorandum of Understanding between the Islamic Republic of Afghanistan and the United States of America on Afghanization of Special Operations on Afghan Soil
Task Force 435	Combined Joint Inter-Agency Task Force 435
TCNs	Third Country Nationals (in this context detainees who are held in Afghanistan but originate from another country)
Technical Committee	Government of Afghanistan body that reviews the cases of each detainee transferred from U.S. custody at the DFIP and determines whether to refer for criminal prosecution, continued internment, or release