

STRANDED AT GUANTÁNAMO

FAQs REGARDING INTERNATIONAL PROTECTION FOR GUANTÁNAMO PRISONERS WHO CANNOT BE REPATRIATED SAFELY

NEED FOR HUMANITARIAN PROTECTION

1. How many men detained in Guantánamo cannot safely return to their home countries?

The total number of prisoners who fear return to their home countries is approximately 60.

2. What countries are Guantánamo's at-risk detainees from?

Those in need of humanitarian protection are from diverse countries with recognized records of abuse of minorities, political prisoners, and others, or are stateless and have no country to return to. Detainees who cannot safely be transferred home are from countries such as Afghanistan¹, Algeria, Azerbaijan, China, Egypt, Libya, Morocco, the Occupied Palestinian Territories, Russia, Syria, Tajikistan, Tunisia, and Uzbekistan. In certain countries, the dangers of repatriation are individualized such that some nationals can safely return while others cannot. In most of these countries, however, all nationals would be at great risk if returned there marked with the stain of Guantánamo. Indeed, many traditional receiving countries of asylees, including the United States, regularly grant protection to large numbers of people from these countries because of risks these individuals would face upon return.²

3. Why are these men unable to return home?

Some of the prisoners held at Guantánamo left their country of origin long before they were abducted by the United States because they were at risk of persecution based on, for example, their religious beliefs, political activities or ethnicity. In some cases, the risk of return is increased because of the detainee's incarceration in Guantánamo or his application for asylum.

One man's father, a prominent lawyer, was tortured and killed by government forces and his family was subjected to continuous harassment until they fled their country and were granted asylum in an EU country. The man was abducted and transferred to Guantánamo after fifteen years in his country of asylum. While in Guantánamo, he was threatened by security officials from his home country.

Another is a Libyan who had fled his home country over a decade prior to his abduction. He was living with his Afghan wife and daughter when he was abducted and transferred to Guantánamo. Despite substantiated and undisputed fears of torture if forcibly repatriated to Libya, the U.S. government has twice tried to transfer this man to Libya.

For both of these men, and the several dozen others at risk, there is a likelihood that if returned to their home countries, they would be at risk of persecution or torture.

¹ Only one Afghan cannot be safely repatriated to Afghanistan due to a risk of torture or persecution. All other Afghans at Guantánamo can and should be repatriated.

² In recent years, European countries and the United States absorbed large numbers of refugees fleeing persecution in these countries. In 2005, for instance, Germany, the U.K., France, Canada, and Spain absorbed approximately 10,165 Algerian refugees; the U.S., Canada, Germany and the Netherlands absorbed approximately 42,121 Chinese refugees; Germany, the U.S., Canada, Sweden and Australia absorbed 166 Jordanian refugees; and Switzerland, Germany, Canada, the U.K. and Sweden absorbed 1,196 Libyan refugees. For a more comprehensive breakdown and the main countries of asylum, see *UNHCR Statistical Yearbook 2005: Trends in Displacement, Protection and Solutions* (May 2007).

4. Will the U.S. send individuals to countries with a known record of human rights abuse and where detainees have a verifiable fear of return? Has the U.S. done so?

The U.S. has already sent over forty men who had been imprisoned at Guantánamo to countries with known records of torture and human rights abuse. These countries include Libya, Russia, Syria, Tunisia, Uzbekistan, and others. While not all of these men had particularized fears of repatriation, the United States has not instituted the requisite process to determine whether an individual has reason to fear return. Some have faced torture or abuse upon return; others have disappeared into a network of secret prisons. There is mounting pressure on the United States to implement a process to determine where individuals fear repatriation and cease transferring individuals to torture in violation of international law. Thus far, the United States has refused even to provide notice to attorneys prior to a transfer unless the court orders such notice.

5. Is there evidence of persecution of former detainees when they have been sent home from Guantánamo to countries known to abuse human rights?

Yes. For example, the U.S. sent two men to Libya. They have reportedly been detained without trial since their return despite promises by the Libyan government to release them. Almost no one outside of the Libyan government has been able to communicate with them since their return so their conditions and treatment remain unknown. The U.S. repatriated seven detainees to Russia despite fears of return. Their mistreatment upon return has been documented. And, in June 2007, the U.S. repatriated two Tunisians even though one had previously been convicted *in absentia*. Since their return, they have been subjected to prolonged solitary confinement, physical abuse and threats against themselves and their families.

6. Do some of these men have ties to particular countries?

A small number of Guantánamo detainees that fear *refoulement* have a prior tie to a foreign government to which they could safely return. For instance, some have applied for or been granted refugee or asylee status by a foreign government, have resided in another country for an extended period, or have established family ties.

7. Has the U.S. agreed to take any of these men into the United States?

No. The U.S. has allowed men to remain indefinitely detained for years even after the U.S. has acknowledged their eligibility for release, and the U.S. has been willing to repatriate individuals to countries despite verifiable and undisputed fears of torture or persecution upon their return. But the U.S. has consistently been unwilling to accept Guantánamo detainees who fear *refoulement* within the U.S.

Currently, the U.S. is litigating this issue in response to a challenge by 17 Chinese Uighur men who the U.S. long ago acknowledged were not properly imprisoned and should be released. In many ways, the U.S. is a prisoner of its own unjustifiable virulent rhetoric: because of the creation of Guantánamo and the years of its justification by high-ranking officials, the U.S. has vehemently resisted offering entry of detainees within its territory. However, the U.S. government now recognizes the great need for the humanitarian protection of detainees who must be released, but who cannot be repatriated. The United States is reportedly considering allowing the seventeen Uighur men imprisoned at Guantánamo entry into the United States.

8. What happens to the men at Guantánamo who cannot safely return home?

Because of governmental inaction, men who cannot safely be returned home are currently trapped in Guantánamo even though there is no basis for their continued incarceration, or they are forcibly repatriated despite the risk of torture or persecution upon return. Many are in solitary confinement 23 hours a day with no known endpoint to their detention.

ROLE OF THE INTERNATIONAL COMMUNITY IN THE HUMANITARIAN CRISIS AT GUANTÁNAMO

9. Why should countries consider offering protection to former Guantánamo detainees who cannot safely return to their home countries?

President Obama has given a concrete timeline to close Guantánamo Bay and end the humanitarian crisis that he inherited from the prior administration. As with any other crisis, Guantánamo's man-made crisis requires the diligent and collaborative efforts of the international community. All the individuals at risk if forcibly returned have been detained for years without charge or trial and, absent the intervention of international actors, face an even bleaker future. As evidenced by the U.S. government's own records, most of these men were wrongly detained and present no threat to the United States or any other country.³ They must not face the impossible choice of continued indefinite detention or forcible repatriation to torture or persecution.

10. What legal principles govern the decision to offer protection to Guantánamo detainees?

The humanitarian protection of Guantánamo's at-risk detainees is consistent with the principle of non-*refoulement*, a fundamental principle of international law and the domestic law of most States. Non-*refoulement* – or the prohibition against transfer of an individual to torture or persecution – is a binding obligation deriving from several sources of law including the Refugee Convention and the Convention Against Torture; international human rights law; and the European Convention on Human Rights (ECHR).⁴ The overriding objective of the legal obligations imposed on contracting States is to offer protection to individuals at risk. The principles embodied in these treaties are empty of meaning unless countries intervene when they are being violated or threatened.

RESPONDING TO CONCERNS

11. Would accepting at-risk detainees from Guantánamo pose a national security risk?

Many in Guantánamo were civilians arrested in the turmoil of the war in Afghanistan and were sold to U.S. forces for a bounty.⁵ A U.S. Central Intelligence Agency (CIA) report in 2002 even acknowledged that “a substantial number of the detainees appear to be either low-level militants . . . or simply innocents in the wrong place at the wrong time.”⁶ Upon the release of their nationals, governments have discovered the truth of this CIA acknowledgement that many of the detainees were guilty merely of being “in the wrong place at the wrong time.” The vast majority of the more than 500 detainees

³ A study relying on the records from the U.S. government's flawed CSRTs found that – *even if the records were accepted as true* – a majority of the detainees were determined to have not committed hostile acts against the U.S. or its allies; and only 8% have been characterized as Al Qaeda fighters. Mark Denbeaux, Report on Guantánamo Detainees: A Profile of 517 Detainees through Analysis of Department of Defense Data, Seton Hall University School of Law (Feb. 2006).

⁴ Article 33 of the Refugee Convention is regarded as the cornerstone of refugee protection. It prohibits a State from expelling or returning a refugee in any manner whatsoever to the frontiers of territories where their life or freedom would be threatened on account of certain specified factors. Article 3 of the Convention Against Torture provides that “No State Party shall expel, return (*refouler*) or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture.”

⁵ 86% of the detainees at Guantánamo were turned over to the U.S. by individuals in Pakistan or Afghanistan at a time when the U.S. was offering a considerable bounty for the handover of supposed “suspects.” In one leaflet that was peppered throughout Pakistan and Afghanistan, the U.S. promised “wealth and power beyond your dreams.” The leaflet continued: “You can receive millions of dollars for helping the anti-Taliban force catch al-Qaida and Taliban murderers. This is enough money to take care of your family, your village, your tribe for the rest of your life.” Unsurprisingly, this resulted in the turnover of countless innocent men, or the reliance on U.S. forces for the settling of local or tribal grievances.

⁶ T. Golden and D. Van Natta, *U.S. Said to Overstate Value of Guantánamo Detainees*, N.Y. TIMES, Jun. 21, 2004. See also Lawrence Wilkerson, *Some Truths About Guantánamo Bay*, THE WASH. NOTE, Mar. 17, 2009, at http://www.thewashingtonnote.com/archives/2009/03/some_truths_abo/.

who have been repatriated have been released to freedom either immediately or after a short period of detention in their home countries. European countries demanded and received the return of their nationals within the first three years of the use of Guantánamo as an offshore prison camp for those captured in the “war on terror.” Countries generally implemented processes in order to determine whether their nationals should be charged with criminal activities. However, in most instances, no evidence was found that would justify their continued detention and these men were released without charge and allowed to reintegrate themselves into society.

12. What is the significance of being “cleared for release” by US authorities?

The distinction between being “cleared for release” and “not cleared for release” is largely a distinction without a difference that was the result of a flawed Bush era administrative review process. Prisoners not technically “cleared” have been repatriated and subsequently released, thus signifying that there is no evidence that would justify a continued detention. Moreover, prisoners who have been “cleared for release” as long ago as 2005 still remain in Guantánamo.

OFFERING HUMANITARIAN PROTECTION TO GUANTÁNAMO DETAINEES

13. What can a country do in order to respond to the crisis in Guantánamo and assist President Obama with the rapid and safe closure of Guantánamo?

Countries can play a crucial role in resolving this crisis at Guantánamo. The most urgent need is for States to offer to accept detainees who cannot be repatriated and to employ diplomatic pressure to the United States to encourage the release of detainees and the closure of the prison at Guantánamo.

14. What status is appropriate for Guantánamo detainees upon their entry into a third country?

Countries may consider receiving detainees from Guantánamo as residents or, alternatively, as refugees or asylees or with some form of temporary entry and an application for refugee status to be facilitated thereafter. Other detainees might qualify for family reunification or another legal status in the country, depending on family ties or prior residence. Still others may be granted some other form of legal protection.

15. How and why should a person be assigned to a particular “receiving country”?

Where there are links, such as prior residence or family ties, it would be logical for former detainees to be relocated to countries where such links exist. Other considerations for determining the country of relocation would include shared language or culture or the presence of groups of the person’s nationality or ethnicity which can provide support to the former detainee. Where there are no concrete familial, language, or ethnic ties, the availability of rehabilitation centers, social services and a country’s ability to provide medical or psychological support to a detainee should be considered.

16. What are the obligations of a receiving country towards a detainee from Guantánamo?

The Refugee Convention, in addition to affording refugees protection from *refoulement*, contains provisions regarding non-discrimination (article 3), freedom of religion (article 4), personal status (article 12), access to courts (article 16), employment (article 17), housing (article 21), public education (article 22), social security (article 24), free movement (article 27), travel documents (article 28) and expulsion (article 32).