

Columbia Law School

**Scholarship Archive**

---

Human Rights Institute

Research Centers & Programs

---

12-2010

## **Promises to Keep: Diplomatic Assurances Against Torture in US Terrorism Transfers**

Human Rights Institute

Follow this and additional works at: [https://scholarship.law.columbia.edu/human\\_rights\\_institute](https://scholarship.law.columbia.edu/human_rights_institute)



Part of the [Human Rights Law Commons](#), and the [International Humanitarian Law Commons](#)

---

Convention Against Torture Assessment  
(U) We reviewed the process that INS used to determine Arar's protection needs under CAT. The INS concluded that Arar was entitled to protection from torture and that returning him to Syria would more likely than not result in his torture.

However, the validity of the assurances to protect Arar appeared not to have been examined.

# PROMISES TO KEEP

## Diplomatic Assurances Against Torture in US Terrorism Transfers

 Columbia Law School Human Rights Institute

aka Barapind on extradition to India, will be dealt with in accordance with the law. He will be entitled to all the rights of defence, protection and remedies available and shall not be subjected to torture, as defined in the Convention against Torture and other Cruel, Inhuman or Degrading treatment or Punishment, 1984.

1. (SBU) Summary: On March 11, 2006, the USG Diplomatic Note 06/254/POL, regarding the extradition to India. The full text of the GOI response as the name and contact information post-extradition follow-up (per additional context regarding the since 1997 (i.e. post-Sandhu extradition political landscape regarding the should also be taken under carry issue moves forward. End Summary.

purposes of the Convention. Indian criminal law prohibits the use of force or causing hurt to extort confession. The judicial decisions have interpreted the law to cover not only the physical hurt but the mental derangement/sufferings also. Persons violating these provisions are subject to prosecution and imprisonment. Once Mr. Barapind is extradited to India, he will be informed about the status of the case against him for the alleged offense.

UNITED STATES DEPARTMENT OF STATE

DECEMBER 2010



# **PROMISES TO KEEP**

**Diplomatic Assurances  
Against Torture in  
US Terrorism Transfers**

Columbia Law School Human Rights Institute

# ACKNOWLEDGEMENTS

This report was written by Naureen Shah and edited by Peter Rosenblum.

Contributing writers, researchers and editors from the 2009-2010 Human Rights Clinic include Leslie Hannay, Tarek Ismail, Alice Izumo, Lisa Knox and Kate Stinson. Contributing researchers from the 2008-2009 Clinic include Meera Shah, Hiba Hafiz, Aliza Hochman, Alissa King and Kate Morris. Students in the Clinic have pursued aspects of the work that lead to this report from 2003 to the present.

Production was coordinated by Greta Moseson and Tarek Ismail. This report was designed by Hatty Lee.

We thank all of the individuals and organizations who provided valuable input and in some cases were kind enough of to review particular sections, including Silvia Casale, Paul Champ, Steve Kostas, Bryan Lonegan, Eric Metcalfe, Brittney Nystrom, John Parry and Amrit Singh.

ISBN: 978-0-615-43177-2

Human Rights Institute  
435 W 116<sup>th</sup> Street  
New York, NY 10027  
212-854-3138  
[www.law.columbia.edu/human-rights-institute](http://www.law.columbia.edu/human-rights-institute)

# PROMISES TO KEEP: ASSURANCES AGAINST TORTURE IN US TERRORISM TRANSFERS

<b>Summary &amp; Key Recommendations</b>	<b>8</b>
<b>Recommendations</b>	<b>23</b>
<b>Part I. US Transfer and Assurances Practices</b>	<b>26</b>
<b>Chapter 1: US Government Resistance to Disclosure &amp; the Prospect for Reform</b>	<b>26</b>
2009 Inter-Agency Task Force Recommendations	26
Benefits and Costs of US Non-Disclosure	27
<b>Chapter 2: Assurances in US Law &amp; Practice</b>	<b>32</b>
US Law on Transfer & Assurances	32
US State Department Role in Negotiating & Evaluating Assurances	33
Transfer Decision-Making by US Agencies	37
Assurances in Transfers from Guantánamo	38
Assurances in Transfers in Afghanistan	42
Assurances in Extradition & Deportation Cases	47
Renditions to Justice & “Extraordinary Renditions”	53
<b>Part II. Transnational Guidance on Diplomatic Assurances</b>	<b>56</b>
<b>Chapter 1: The Development of Diplomatic Assurances Against Torture in International Law &amp; Practice</b>	<b>56</b>
Initial Acceptance of Assurances	57
Renditions: A Turning Point	59
<b>Chapter 2: Recent Guidance from the UN &amp; European Court of Human Rights</b>	<b>63</b>

Assurances As a Legal Black Hole or a “Relevant Consideration”	63
Perspective of UN Experts and Bodies	65
Perspective of the European Court of Human Rights	68

**Chapter 3: Lessons from the UK 73**

UK Deportation with Assurances	73
UK Detainee Transfers in Afghanistan	84

**Chapter 4: Lessons from Canada 87**

Inciting Stronger Judicial Review of Deportations with Assurances	87
Failures in Monitoring: Canada’s Custodial Transfers in Afghanistan	92

**Part III. Institutionalizing Reform: Applying Transnational Guidance to US Practice 95**

**Chapter 1: Transparency & Accountability 95**

Limited US Court Oversight	95
US Rationales for Resisting Court Disclosure	97
Feasibility and Advantages of Greater Disclosure & Judicial Review	98
Feasibility of Disclosure Through Non-Judicial Mechanisms	101
Designing Better Disclosure & Accountability Mechanisms in the US	101

**Chapter 2: Systematic Post-Return Monitoring 103**

US Monitoring Practices	103
The Need for Monitoring Protocols and Requirements	108
Lessons from Human Rights Monitoring Bodies and International Standards	112

<b>Appendices</b>	<b>122</b>
<b>I. Assurances in Deportation &amp; Rendition cases</b>	<b>122</b>
<b>US–Rwanda</b>	<b>124</b>
Karake Assurances	124
<b>UK</b>	<b>128</b>
Libya MoU	126
Lebanon MoU	131
Jordan MoU	133
Ethiopia MoU and Monitoring Agreement	138
Algeria Exchange of Letters	141
UK - India Chahal Assurances	146
<b>Canada–China</b>	<b>147</b>
Sing Assurances	147
<b>Sweden-Egypt</b>	<b>148</b>
Agiza Assurances	148
<b>Italy–Tunisia</b>	<b>151</b>
Assurances	151
<b>II. Assurances in Extradition Cases</b>	<b>154</b>
<b>US–India</b>	<b>154</b>
Barapind Assurances	154
<b>III. Assurances in Guantanamo Cases</b>	<b>159</b>
<b>US–Spain</b>	<b>159</b>
Assurances	159
<b>IV. Assurances in Afghan Detainee Transfers</b>	<b>164</b>
<b>UK–Afghan MoU</b>	<b>164</b>
<b>Canada–Afghan</b>	
MoU 2005	168
MoU 2007	170
<b>US–Afghan</b>	
2006 Exchange of Letters	172



## SUMMARY & KEY RECOMMENDATIONS

**“DIPLOMATIC ASSURANCES” ARE PROMISES NOT TO TORTURE.** They are sought when transferring a detainee from the custody of one government to another. Not surprisingly, they are sought from governments that typically torture.

What was relatively rare and unexamined, a decade ago, has become common currency and a term of art since 9/11. The “global war on terror” has created pockets of detainees held by foreign authorities around the world, with the prospect of more in the future. The pressure for transferring them will only increase as the US and ally governments come to believe that long-term detention is untenable for legal or policy reasons.

Leading human rights advocates have condemned the practice of relying on assurances. According to them, assurances are inherently unreliable in countries that have already demonstrated their willingness to torture in violation of local and international law. Whatever the doubts about their ultimate effectiveness, however, there are clearly better and worse ways of employing assurances: they can serve as the cynical, legalistic veneer to a conscious abdication of responsibility, or a sincere effort to diminish the likelihood of an individual’s mistreatment.

From the past decade, there is evidence of the cynical, the sincere and much that falls in between, where mistakes or incompetence make the motives irrelevant. In their first known use after 9/11, Sweden obtained vague assurances from Egypt that it would respect the rights of two asylum seekers returned to Egypt by a team of masked US commandos. Swedish diplomats waited five weeks before checking on the detainees and, then, did so in the presence of prison officials. For the US the first government acknowledgment of assurances after 9/11 was made to deflect responsibility for the alleged torture of Maher Arar, a Canadian citizen whom the US transferred to Syria. Years later, it emerged that the State Department had dismissed any concerns about the transfer without bothering to review the conditions.

These examples could be treated as unfortunate gaffes committed by pressured officials operating in a difficult environment without clear instructions. Both Canada and Sweden were forced to respond robustly. A public inquiry in Canada led the government to apologize to Arar and pay CAD \$10.5 million in damages. The early disclosures have led US allies to expose the practice to public debate and judicial scrutiny.

Not so the United States, which has never publicly acknowledged fault or a need to improve. The US continues to maintain broad secrecy about its current practice while insisting that others trust it to respect the law and do the right thing. The US government hints publicly at improvements in internal processes while claiming that frank disclosure and judicial review—now extensive in Europe and Canada—are unnecessary and counterproductive. Disclosing the process or text of assurances would harm diplomatic relations, according to US officials, and judicial review would undermine the ability of the US government to ‘speak with one voice.’

But, as we already knew from oblique references by State Department officials and Freedom of Information Act (FOIA) disclosures, there have been other failures of assurances. Now, from the trickle of cables released on WikiLeaks more details are emerging, documenting both the scrupulous efforts

The US maintains broad secrecy about its current practice while insisting that others trust it to respect the law and do the right thing

of individual diplomats and the specific failures of particular assurances. While more details of specific cases will certainly emerge, thus far the leaks simply reinforce the need for clear policies and broader transparency to ensure appropriate vetting and accountability.

This report surveys the law and practice of assurances in the US and, comparatively, in Canada and Europe. It is the culmination of a long-term engagement by Columbia's Human Rights Clinic and its faculty to research and support advocacy on diplomatic assurances. That process has involved advocacy with Swedish NGOs, support for research by Human Rights Watch, FOIA requests with the ACLU and collaborative efforts with UN mechanisms.

Over the past decade, human rights groups, in particular, have produced impressive documentation. But no single source presents the evolving evidence and jurisprudence of diplomatic assurances. This report seeks to fill that gap. We do not take a position on whether assurances can *work*. Rather, we seek to identify elements that are necessary in order to make assurances *plausible*. We focus on what is known about preventing torture and how that can be incorporated into the process.

We describe steps the US should immediately take to institutionalize better practices: submit to judicial review, engage with public scrutiny, and commit to systematic monitoring. But there are limits to reform. In too many cases, and certainly where local authorities routinely practice torture and conceal it, assurances are unlikely to significantly diminish the risk of torture and abuse. The US should vigilantly guard against using assurances to excuse, instead of protect against, transfers to torture.

## I. US PRACTICE ON DIPLOMATIC ASSURANCES

Assurances play a significant role in US counterterrorism practices. They are a tool in implementing legal and moral commitments not to transfer individuals to places where there is a substantial risk of torture. The US has relied on assurances in several contexts:

- To transfer detainees out of its detention facilities at Guantánamo and in Afghanistan
- In “renditions,” i.e. transfers without legal process to deliver individuals for criminal prosecution, interrogation or detention by foreign government authorities at the behest of the US
- To deport or extradite individuals, including terrorism suspects.

### ■ US Resistance to Disclosure and the Prospect for Reform

The Obama administration initially signaled an interest in reforming its transfer and assurances practices. An interagency task force established in January 2009 recommended better monitoring and State Department involvement in evaluating assurances in all cases. But the government has not announced any steps to implement its recommendations. As this report went to print, the offices of Inspector General of the State Department, Department of Homeland Security and Department of Defense were in the process of reviewing assurances practice.

The government has sought to avoid any external constraints over how and whether to use assurances. It has provided next to no information about its minimum standards and protocols for negotiating assurances, monitoring returned individuals and responding to allegations of abuse. It has refused to acknowledge past breaches of assurances or provide redress to victims. In litigation, it has argued that disclosure would jeopardize US foreign policy interests and the government's ability to negotiate assurances in future cases.

**EFFECT OF THE 2010 WIKILEAKS** It is too early to draw extensive conclusions from the cables released by WikiLeaks or determine the broader ramifications of the leak itself. The strongest message thus far is that US diplomats take protection against torture seriously but that individual efforts are not sufficient.

Several cables released in November and December 2010 show that the US rightly resisted Chinese and Tunisian diplomatic pressure to repatriate their nationals from Guantánamo, fearing they would face torture. One Chinese diplomat called the US's publicly stated resistance a “slap in the face.” Chinese and Tunisian diplomats even pressured other governments not to accept their nationals for resettlement. The cables underscore the sensitivity of foreign governments to any implication that their human rights records are not strong. What remains unclear is whether judicial review of assurances would make any difference to foreign governments.

The publication of the leaks may only have heightened China's displeasure. Nevertheless, with its position against disclosure on Guantánamo transfers now undermined by the leaks, the government should take the opportunity to defend and explain its decision. It should commit to a systematic approach to transfers, so that safeguarding against torture is not left to individual diplomats' laudable ability to resist diplomatic pressure.

### ■ **US Transfer and Assurances: Law and Practice**

The US ratified the UN Convention Against Torture in 1994. US obligations on transfer are implemented in the 1998 Foreign Affairs Reform and Restructuring Act (FARRA), which describes an unequivocal policy “not to expel, extradite or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.”

FARRA requires all relevant federal agencies to adopt regulations implementing this policy. In extradition cases, regulations require the State Department to consider “allegations relating to torture,” specifying that the Secretary of State may “surrender the fugitive subject to conditions.” Immigration regulations prohibit deporting an individual “under circumstances that violate [provisions related to threats to life or freedom] or Article 3 of the Convention Against Torture” and explicitly state that the Attorney General (due to changes in agency structure, now the Secretary of the Department of Homeland Security) may determine whether assurances are sufficiently reliable to permit transfer, in consultation with the Secretary of State. There are no known regulations promulgated by the Department of Defense and CIA. However, the government applies FARRA to Guantánamo transfers as a matter of policy.

**US STATE DEPARTMENT'S ROLE IN EVALUATING ASSURANCES** The US State Department takes a leading role in negotiating and evaluating assurances, recommending to the Department of Defense or Department of Homeland Security whether to conduct a transfer (or making that determination on its own, in extradition cases). While State Department officials have described a rigorous review process for evaluating assurances, two past cases raise serious questions about when and how that process is applied.

In the 2002 Maher Arar case, the State Department failed to play any significant role. Arar, a Canadian citizen, was summarily removed from the US and ultimately transferred to the custody of Syrian intelligence officials, who tortured Arar despite providing assurances to the US government. Though the State Department denied involvement in the case, then-Deputy Secretary of State Richard Armitage acknowledged that he had a “brief—only two to three minutes, and casual” conversation about Arar with then-Deputy Attorney General Larry Thompson, who asked whether he had any “foreign policy objections” to removing Arar to Syria. According to Armitage, his “only concern was whether Mr. Arar was a United States citizen,” adding that “Syria was helping us with Al Qaida.”

In the 2006 extradition of Kulbir Singh Barapind, a Sikh separatist who feared torture by local police, by whom he had previously been tortured, the US State Department made passing reference to an earlier case where there had been credible reports of torture. The Department was “unable authoritatively to confirm” whether the individuals were tortured. The State Department's analysis did not address whether the police officers who previously tortured Barapind still held positions of authority or whether the central government authorities giving the assurances had the ability to supervise or control the

state police. Instead, the State Department relied on the existence of Indian laws prohibiting torture—laws that were in place when Barapind was previously tortured.

Rigorous and systematic State Department scrutiny is a crucial safeguard, particularly in the absence of judicial review.

**ASSURANCES IN GUANTÁNAMO TRANSFERS** At least since 2005, the US government has solicited assurances of humane treatment in the transfer of every individual out of Guantánamo. It has declined to repatriate detainees to home countries due to their records on torture or reports of mistreatment to previously returned detainees, including China, Syria, Tunisia and Uzbekistan. In the case of China and Tunisia, it has resisted intense diplomatic pressure by foreign diplomats to repatriate their nationals.

“While we appreciate the efforts of the authorities to close the Guantánamo detention facility, the risk assessment should be a meaningful and fair process, and the courts should be part of it.”

— *UN experts Manfred Nowak and Martin Scheinin*

But publicly, the government has refused to acknowledge cases of breached assurances. In June 2008, then-Legal Adviser John Bellinger admitted there were “allegations” of “mistreatment” in “a small handful of five or so” cases. By that time, he should have been aware of several cases of serious abuse. In litigation, the US has refused to foreclose the option of repatriating foreign nationals to home countries with records of torture. This leaves the 33 Guantánamo detainees who have been cleared for release but who face such repatriation in limbo. Even as the government seeks to negotiate their resettlement in safe third countries, in courts, it has argued that its authority to repatriate them is absolute and unfettered by judicial review, as long as it declares the transfer-compatible with US policy against torture.

In July 2010, the Supreme Court acceded to government arguments against judicial review, refusing to block the transfers of two Algerian detainees who feared mistreatment by government authorities or extremists. UN experts Manfred Nowak and Martin Scheinin condemned the decision, saying they were “extremely worried that the lives of two Algerian detainees could be put in danger without a proper assessment of the risks they could face if returned against their will to their country of origin.”

“This could become the first involuntary transfers of Guantánamo detainees of the Obama administration,” the UN experts said. “While we appreciate the efforts of the authorities to close the Guantánamo detention facility, the risk assessment should be a meaningful and fair process, and the courts should be part of it.”

**ASSURANCES IN AFGHANISTAN TRANSFERS** Individuals picked up by US forces in Afghanistan face abuse or prolonged detention without trial when transferred to Afghan custody or repatriated home. US transfers in Afghanistan occur in various contexts: short-term US detention and transfer to Afghan intelligence; transfers of Afghan nationals held for longer periods at US-run facilities; and possible repatriations of non-Afghan nationals.

The US International Security Assistance Force (ISAF) transfers apprehended individuals to the Afghan intelligence agency National Directorate of Security (NDS), which is known for its routine use of torture.

In 2007, the US joined Canada, the UK, the Netherlands, Norway and Denmark in signing an exchange of letters with the Afghan government intended to establish a common approach to these “battlefield transfers.” But the UK and Canada have both experienced problems with monitoring the treatment of transferred detainees, and there are credible reports that torture has occurred on a large scale. As of winter 2010, the US was pursuing a bilateral agreement with the Afghan government about a new monitoring arrangement, expected to be in place within months, but the details were unknown.

USFOR-A (non-ISAF US forces) may hold individuals detained by its ISAF forces for up to 14 days. US authorities assess whether the individuals should be released, transferred to Afghan authorities or sent to the US detention facility at Parwan, which was opened in 2009 to replace the Bagram Theater Internment Facility. At present, there are about 1,000 detainees at Parwan. As the US prepares to transfer the Parwan facility to Afghan authorities in 2011, detainees there face the prospect of prolonged pre-trial detention and the possibility of unfair trials, given the poor condition of the Afghan criminal justice system. The 50 or fewer non-Afghan nationals at Parwan may be repatriated to their home countries or held in some other US facility in Afghanistan. US plans, and the role of assurances, are unknown.

**ASSURANCES IN EXTRADITION & DEPORTATION CASES** According to the government, it rarely uses assurances of humane treatment in extradition or deportation cases. But where it does, it does not acknowledge the right of the individual to challenge the assurances. In one immigration case, the government terminated the “deferral of removal” of Sami Khouzam, a Coptic Christian facing persecution in Egypt, on the basis of Egyptian assurances it received in 2004. It did not inform Khouzam of the termination of his status—and his loss of protection—until May 2007, three days before he was arrested and detained in preparation for imminent removal. In 2008, the Third Circuit Court of Appeals held that, by failing to provide Khouzam any opportunity to challenge his removal, the government had violated his due process rights.

**ASSURANCES IN RENDITIONS** The US has also conducted renditions—transfers outside of legal process—but the frequency of these practices, their legal basis and the role of assurances is unclear. The US has conducted “renditions to justice,” or kidnappings for the purpose of delivering individuals to criminal prosecution in foreign countries since before 9/11. Former CIA official Michael Scheuer told Congress in 2007 that under the Clinton administration, the US sought assurances that each foreign government would treat captured al-Qaeda “fighters” according to “its own laws.” But according to Scheuer: “There [were] no qualms at all about sending people to Cairo and kind of joking up our sleeves about what would happen to those people in Cairo—Egyptian prison.”

The US has also conducted, directed or assisted in “extraordinary renditions,” transferring individuals without legal process for the purpose of interrogation or detention. Individuals have been held in secret US-run facilities, delivered to foreign authorities, or held in camps ostensibly run by foreign authorities but directed and funded by the US government. At his 2009 confirmation, CIA director Leon Panetta told Congress that, “using renditions, we may very well direct individuals to third countries.” Referring to past cases where assurances were used, Panetta said: “I will seek the same kind of assurances that they will not be treated inhumanely. I intend to use the State Department to assure that those assurances are, in fact, implemented and stood by those countries.”

Scheuer told Congress:  
“There [were] no qualms at all about sending people to Cairo and kind of joking up our sleeves about what would happen to those people in Cairo—Egyptian prison.”

## II. TRANSNATIONAL GUIDANCE ON DIPLOMATIC ASSURANCES

Key human rights experts and tribunals have expressed skepticism about the reliability of assurances, and articulated circumstances under which they should not be used. But this non-categorical approach has left the door open to experimentation, including by the UK and Canada, which, like the US, have used assurances in deportations and transfers in Afghanistan. Their experiences demonstrate both the persistent deficiencies of assurances and the feasibility of better practice by the US.

### Development of Assurances Against Torture in International Law & Practice

International human rights law unequivocally prohibits states from transferring an individual to a place where he is at a real risk of torture or ill-treatment. The UN Convention Against Torture and other human rights instruments affirming this prohibition do not specifically recognize or reject diplomatic assurances. To the contrary, countries have long used assurances in extradition and related contexts, albeit more commonly in the context of guarantees against imposition of the death penalty. In the context of torture, human rights fact-finding and monitoring bodies have long sought assurances from governments that detainees they visit and interview will not later be abused in retaliation.

Taken together, the work of UN experts, bodies and the European Court of Human Rights provides standards for evaluating assurances.

These practices may partially explain why key human rights experts and tribunals initially accepted and even encouraged the use of assurances against torture. For instance, in 1996 then-Special Rapporteur on Torture Nigel Rodley encouraged Canada to seek assurances if it insisted on deporting a failed asylum-seeker to Algeria, calling it “perfectly appropriate and not uncommon.” In contrast, the European Court of Human Rights rejected assurances against torture in a 1996 case, *Chahal v. UK*, based on a scrutinizing assessment of their reliability.

By 2004, a series of revelations about the “global spider’s web,” as European Parliament member Dick Marty put it in a 2006 report, of US-directed renditions and torture had recast the debate from the question of assurances’ effectiveness to whether they should be rejected on principle.

In 2005, UN High Commissioner on Human Rights Louise Arbour indicted assurances as “threaten[ing] to empty international human rights law of its content.” According to Arbour:

*Diplomatic assurances basically create a two-class system among detainees, attempting to provide for a special bilateral protection and monitoring regime for a selected few and ignoring the systemic torture of other detainees, even though all are entitled to the equal protection of existing UN instruments.*

Arbour’s position mirrored the emerging perspective of major human rights organizations. While some advocates privately debated whether to suggest basic requirements for reliable assurances, others insisted that such a position would undermine the advocacy message that assurances should be rejected wholesale. Key human rights organizations continue to urge governments to “reject rather than regulate” assurances altogether, emphasizing, as Amnesty International put it in a 2010 report, that the international human rights system is “fundamentally undermined when states seek to circumvent it with non-binding, bilateral promises not torture.” To date, no coalition of human rights groups has reached consensus on guidelines for assurances, nor have UN or Council of Europe bodies.

## Recent Guidance from the UN & European Court of Human Rights

Nevertheless, the last several years have seen the development of a vast catalogue of instructive findings, analyses and jurisprudence from UN experts and bodies and Council of Europe organs, including the European Court of Human Rights. Taken together, the work of these experts and bodies provides standards for evaluating assurances, although some issues remain unsettled.

In sum, key factors in determining assurances’ reliability include:

- The level of abuse in the receiving country, particularly whether torture rises to the level of “systematic”
- Specificity of terms in assurances
- Post-return monitoring arrangements
- Transparency in decision-making, including providing the text of assurances to reviewing bodies.

**THE LEVEL OF ABUSE IN THE RECEIVING COUNTRY** UN experts, UN bodies and the European Court of Human Rights have all found that assurances cannot mitigate the risk of torture where torture is practiced systematically in the receiving country. According to the UN Committee Against Torture, where torture is systematic, that is, “habitual” or “widespread,” “[i]t may be the consequence of factors which the Government has difficulty in controlling,” e.g., rogue security forces or police. In other words, when torture is so common that the receiving government cannot control those who routinely commit it, the government’s assurances cannot provide protection against abuse.

In some of the countries to which assurances-based transfers are contemplated, the level of torture is something less than systematic, but the human rights situation is worrisome or there is a pattern of abuse against terrorism suspects in particular. The UN Committee Against Torture has emphasized that the existence of a “consistent pattern of gross, flagrant or mass violations of human rights,” while not decisive, is an important factor in considering whether assurances can be effective. Moreover, the European Court of Human Rights has repeatedly found that receiving governments’ records of abuse against terrorism suspects effectively reduces the reliability of assurances.

**SPECIFICITY OF ASSURANCES** As then-Special Rapporteur on Torture Theo Van Boven emphasized in a 2004 report to the UN General Assembly, specific guarantees are critical to ensuring that diplomatic assurances are not “empty gestures.” Van Boven recommended that safeguards “explicitly included in the assurances to be obtained” reflect international human rights norms and standards, including:

- prompt access to a lawyer
- recording of all interrogation sessions and of the identity of all persons present
- prompt and independent medical examination
- forbidding incommunicado detention or detention at undisclosed places.

The European Court has repeatedly rejected assurances based on their lack of specificity, reasoning that vaguely worded guarantees do not provide protection against torture. At the same time, where torture is widespread, assurances specifically referencing protection against torture are no more reliable.

**EFFECTIVE MONITORING** UN experts and bodies have repeatedly cited the lack of effective monitoring as a key reason why assurances are inadequate, but have divided over whether effective monitoring is possible. As described below, an effective system of monitoring requires at least that it be prompt, regular and include private interviews.

**TRANSPARENCY IN DECISION-MAKING** Lack of transparency casts a pall on assurances-based transfers, prompting skepticism. In its most recent report on the US, the UN Committee Against Torture cited “the secrecy of [assurances] procedures including the absence of judicial scrutiny,” and called on the US to “establish and implement clear procedures for obtaining such assurances, with adequate judicial mechanisms for review.”

A major flaw in the UK Commission’s decision-making is its failure to recognize the ease with which torture can be concealed, in assessing both the risk of torture and allegations of abuse by past returnees.

### ■ Lessons from the UK & Canada

The UK and Canada have used assurances in the context of deportation and custodial transfers of individuals apprehended in Afghanistan. Their experiences demonstrate both the feasibility of implementing UN and European human rights standards and the persistent failings of assurances in identifiable circumstances.

### **UK DEPORTATIONS WITH ASSURANCES**

Like the United States, the UK turned to assurances-based deportation as the “best of a bad set of options,” after European Court of Human Rights and UK court decisions essentially foreclosed the options of detention without charge or deportation despite the risk of torture. Beginning in 2005, the UK adopted ostensible reform by securing memoranda of understanding (MoUs) with Libya, Jordan, Lebanon and Ethiopia and an exchange of letters with Algeria. The UK argues that these are more reliable than ordinary assurances due to extensive public and judicial scrutiny.

**UK Disclosures** Compared to the US, the UK has provided a wealth of information about its use of assurances, touting this transparency as a safeguard. In UK

courts, the government has disclosed information about the content of assurances, post-return monitoring and allegations of post-return abuse. UK courts rejected the Libyan assurances in 2007 based on a searching analysis of the Qadhafi regime’s human rights record and its relationship with the UK. But that did not prevent the UK, in 2008, from securing an MoU with Ethiopia.

**UK Monitoring** On monitoring, the UK has enlisted monitoring bodies in the receiving countries to verify treatment of deported terrorism suspects, but human rights groups have criticized them as lacking independence. How the bodies have operated so far is unknown. The MoUs with Libya, Jordan and Lebanon specify that monitors will have the opportunity to conduct private interviews. The Ethiopia MoU does not guarantee private access but does expressly provide for access to individuals alleging ill-treatment “without delay.”

**UK Judicial Review** The Special Immigration Appeals Commission, the UK trial-level court charged with reviewing deportations based on assurances, has focused on the receiving government’s record on torture and its susceptibility to international pressure (particularly from the UK). The Commission showed independence in rejecting the UK government’s characterization of improving country conditions in Libya. But a major flaw in the Commission’s decision-making is its failure to recognize the ease with which torture can be concealed, in assessing both the risk of torture and allegations of abuse of past returnees.

In September 2010, the Commission sustained the deportation of “XX,” an Ethiopian national, although it acknowledged that the nominated domestic monitoring body was not politically independent and



non-governmental organizations, including the ICRC, had no access to detention facilities. The Commission reasoned that the Ethiopian government would find it “in its interests to ensure that the assurances are fulfilled” and its relationship with the UK maintained. But this risk analysis neglects the reality that Ethiopian authorities could interrogate and torture “XX” without risking the exposure of its actions, given the absence of sufficient monitoring by the chosen body or other groups.

In a series of cases, the Commission discounted the allegations of abuse by “Q” and “H,” individuals who withdrew their appeals against deportation based on assurances Algerian authorities made to them, and to a lesser extent, the UK government. In determining whether to deport another Algerian, the Commission summarily rejected a letter from “Q and corroborating reports by Algerian lawyers saying he was tortured, and instead relied on diplomatic notes from the Algerian authorities denying any abuse.

**UK Detainee Transfers in Afghanistan** Like the US, the UK’s ISAF forces transfer individuals they apprehends to the National Directorate of Security. Despite guarantees of humane treatment and monitoring access in UK-Afghan memoranda of understanding, the NDS has at times obstructed UK monitoring. The UK has sometimes lacked the capacity to conduct regular and private interviews with transferees. The UK has accepted that allegations of abuse made in 2009 “may have substance,” including an account by one prisoner that he was beaten every other day for more than two months and an account by another detainee that he was electrocuted and hung from the ceiling for three days. In June 2010, a UK appellate court in *(R)Evans v. Secretary of State for Defence* mandated that the UK expressly condition transfers on guarantees of access, carry out regular and private interviews in practice and consider suspending transfers if the NDS blocks its monitoring access or transferees credibly allege torture.

### CANADIAN DEPORTATIONS & AFGHAN DETAINEE TRANSFER

Like the US, Canada has attempted to use assurances in deportation, extradition and custodial transfers of military detainees. Across contexts, Canada’s experience shows the danger of pursuing transfers despite the receiving authority’s record of torture.

#### **Security Orders and Deportations**

Canada’s attempts to deport terrorism suspects to countries with records of torture incited Canadian courts to carry out more searching review than they ever had before, effectively ruling out deportation with assurances as a policy option, at least for a time.

A handful of security-based deportation cases against terrorism suspects have taken Canada years to litigate

Canada’s use of assurances has been tested in deportations pursuant to “security certificates,” a controversial mechanism which permits the immediate detention of a terrorism suspect until a court approves their deportation or orders their release. In the 2002 case *Suresh v. Canada*, the Canadian Supreme Court held that the government could deport an individual if the danger he poses to security is higher than the risk of torture he faces if deported, even if the assurances are inadequate or non-existent. *Suresh* also suggested that the government consider particular factors in evaluating the reliability of assurances:

- the human rights record of the government giving the assurances
- the government’s record in complying with its assurances
- the capacity of the receiving government to fulfill the assurances, particularly where there is doubt about the government’s ability to control its security forces.

Over the next several years, Canadian efforts to deport terrorism suspects based on security certificates were stymied by the lower courts. A handful of security certificate cases against terrorism

## Allegations of abuse despite monitoring underscore the need for ISAF member states to consider alternatives to transfer to the NDS

suspects have taken the government years to litigate and led to repeated criticism by human rights groups.

The courts' intensified scrutiny of government claims was likely a response to the grave situation created by the government's assertion of authority to detain terrorism suspects until their removal—in practice this meant for years. Courts may also have been unwilling to permit the government to deport individuals when there was a risk of torture.

Judicial pushback against the government's deportation attempts manifested in heavy scrutiny of assurances in the only two recent assurances-based deportation cases in Canada, *Mahjoub v. Canada* and *Sing v. Canada*, decided in 2006 and 2007, respectively. In both cases, the lower courts cited UN guidance in rejecting the government's analysis of the risk of torture and assurances, whereas they had previously reviewed

the government's findings with more deference. The courts conducted a searching analysis of assurances, invoking the *Suresh* guidelines on reliable assurances to halt the government's deportation attempts.

**Canada's Detainee Transfers in Afghanistan** Canada has used assurances, in the form of memoranda of understanding, to transfer hundreds of detainees picked up in Afghanistan—243 individuals between 2006 and 2008. While Canada's role in Afghanistan and transfer arrangements differs from that of the US, its experience illustrates the limits of assurances across contexts, particularly on the issue of monitoring treatment of transferred detainees.

Since 2005, Canadian military forces in Afghanistan have transferred detainees to the National Directorate of Security (NDS). A 2005 Canada-Afghan MoU provided the Afghan Independent Human Rights Commission (AIHRC) and International Committee of the Red Cross (ICRC) access to verify the humane treatment of transferred detainees. A 2007 supplemental MoU guaranteed private access by Canadian personnel as well. In 2009, the former secretary of Canada's Kabul embassy, Richard Colvin, provided key documents and testimony suggesting a devastating gulf between the MoUs' guarantees and the ground reality.

In practice, neither the AIHRC or ICRC could alert Canada to abuse or effectively monitor detainees. The AIHRC had "very limited capacity" and was not granted access to NDS prisons, making it "quite useless", and the ICRC's own confidentiality rules did not permit it to report to the Canadian government on Afghan prisons.

Monitoring conducted by the Canadians was ineffective. Colvin testified:

*[F]or the first five months of our new detainee regime, monitoring was done by a succession of officers, some of whom were in the field on short visits of only a couple of weeks. There was too little capacity and not enough continuity. The result was that despite the new MOU, some of our detainees continued to be tortured after they were transferred."*

Within weeks of the Canadian government assigning a dedicated monitor to the NDS detainees in Kandhar, "[h]e found incontrovertible evidence of torture," Colvin testified. "An Afghan in NDS custody told him that he had been tortured, showed him the marks on his body, and was able to point to the instrument of torture, which had been left under a chair in a corner of the room by his interrogator."

Canada has intermittently suspended transfers to the NDS based on allegations of abuse. In 2009, it briefly suspended transfers after an NDS official boasted to Canadian military officials that his

organization was able to “torture” or “beat” prisoners during the course of its investigations—despite the more than 250 prison visits Canadian monitors had made to date.

Allegations of abuse despite monitoring underscore the need for ISAF member states to consider alternatives to transfer to the NDS or accelerated capacity-building of NDS personnel. Canadian human rights advocates have advised that Canada detain apprehended individuals themselves or jointly with other ISAF member forces, and train local authorities so that in the long-term, transfers can take place without putting individuals at risk of torture.

### III. INSTITUTIONALIZING REFORM: APPLYING TRANSNATIONAL GUIDANCE TO US PRACTICE

#### ■ Transparency & Accountability

The US government has argued against judicial review of the “diplomatic dialogue” between the US and foreign governments concerning the terms of a transfer or, in Guantánamo transfers, even of the transfer decision itself.

**Limited Review by US Courts** Acceding to the government’s litigation positions, US courts have repeatedly held that they have limited or no ability to review the claims of individuals claiming to fear a risk of torture in an assurances-based transfer, in all but a small category of cases.

US courts have interpreted the Supreme Court decision *Munaf v. Geren* as effectively foreclosing risk of torture claims for individuals held in military detention on the ground that courts are not entitled to second-guess determinations by the executive that, among other things, there is a diminished risk of torture. But there are still viable arguments for court injunctions against transfers conducted to “evade judicial review,” to facilitate a foreign government’s detention of an individual “on behalf of the United States,” and where the government has actual or constructive knowledge that the individual is likely to be tortured but decides to transfer him anyway.

In immigration cases, some courts have interpreted the Foreign Affairs Restructuring and Reform Act, which implements US obligations under the UN Convention Against Torture, as precluding judicial review of assurances for individuals who won deferral of removal in their immigration proceedings but later face new government attempts to deport them based on assurances. In extradition cases, courts of appeal are split on whether the Act precludes judicial review of claims that an extradition would violate Article 3 of the Convention Against Torture.

The UK has disclosed information about its negotiations, decision-making and post-return monitoring—not just in court, but at press conferences, in parliamentary proceedings, and in publicly released government reports and journal articles, without dooming its ongoing assurances negotiations.

**FEASIBILITY AND ADVANTAGES OF GREATER DISCLOSURE & JUDICIAL REVIEW**

**UK Disclosure and Scrutiny by Domestic Courts** Undercutting claims that transparency and accountability in assurances policy are infeasible, the UK has disclosed information about its negotiations, decision-making and post-return monitoring—not just in court, but at press conferences, in parliamentary proceedings, and in publicly released government reports and journal articles, without dooming its ongoing assurances negotiations.

US courts are better suited than executive agencies to provide fair process...the structured opportunity for exchange on complicated questions of fact and law gives legitimacy to decisions on the risk of torture

The UK touts these steps as increasing its incentive to ensure assurances are honored and to use them conservatively, to avoid public or judicial outcry if there is breach. Public scrutiny stemming from government disclosure could also put pressure on receiving governments to honor assurances, including guarantees of access to transferred detainees.

**European Court of Human Rights Scrutiny** Challenges to the feasibility of judicial review in the US are undercut by the European Court of Human Rights scrutiny of assurances in dozens of cases where it examined the text of assurances, the identity of the authorities providing the assurances, the course of negotiations and post-return monitoring arrangements.

**Feasibility of Disclosure Through Non-Judicial Mechanisms** Disclosure in commission-style and parliamentary inquiries can establish errors in past decision-making and build political support for necessary reform. Like the US govern-

ment, the Canadian and UK governments have sought to withhold information on national security grounds in litigation on detention and transfer. At the same time, public pressure in both countries has prompted the creation of commissions of inquiry, special parliamentary inquiries and internal agency investigations. In Canada, a 2006 commission of inquiry into the Arar rendition led the government to adopt reform, including training of consular officials on conducting post-return monitoring interviews. In July 2010, the UK announced the creation of a commission of inquiry to investigate alleged UK involvement in the mistreatment of detainees held outside the UK. If conducted through public hearings, with the participation of victims and civil society, the inquiry has the potential to identify practices which facilitate abuse of detainees and recommend policies to prevent future abuse.

**DESIGNING BETTER DISCLOSURE & ACCOUNTABILITY MECHANISMS IN THE US**

US resistance to investigations into past abuse or unwillingness to publicly disclose the outcomes of investigations undercuts the international human rights principle of redress. Resistance to disclosure, especially when national security is cited, implies that abusive practices may be ongoing. A full investigation of past abuse would help identify key problems in assurances policy and ways to improve it.

The US should make public any measures it has taken to improve assurances and transfer practices, describing key parameters of US policy in congressional hearings, and answering questions about practice in press conferences, public speaking engagements or academic journals. If improvements to assurances practice are not legally codified in an executive order or agency regulations, disclosure and public discussion may help such improvements “stick”; a future administration would be compelled to provide some public explanation for its reason for departing from reformed policy.

The US government should also adopt measures to ensure fair review of transfer decisions, including assurances, in immigration, extradition and military detainee cases. In the immigration context, the US government took steps in the right direction in the case of three Rwandan nationals when, in August 2009, it shared with the individuals' attorneys the text of the assurances of humane treatment and post-return access it received from the Rwandan government and provided them an opportunity to respond.

**The US can avoid implying distrust of foreign governments by invoking a set of common monitoring requirements for all assurances-based transfers**

US courts are better suited than executive agencies to provide fair process and to assess assurances generally. Courts of appeal routinely assess the risk of torture in immigration cases, systematically drawing on US State Department reports, evaluating media and human rights reports and making decisions based on an inevitably incomplete set of information. Part of what gives legitimacy to judicial decisions on the risk of torture is the structured opportunity for exchange on complicated questions of fact and law, through oral argument and full legal briefings.

US courts' review of detention of the Guantánamo detainees suggests that judicial review of transfers is feasible. US courts can exercise the same flexibility and competence in assessing detainee transfer claims.

### **■ Systematic Post-Return Monitoring**

For proponents, monitoring is the linchpin of assurances. Monitoring detects breaches of assurances, and deters breach in the first place since detaining authorities know they are being watched. But there is a danger that monitoring schemes could legitimate assurances-based transfers without providing a real safeguard. Yet in other contexts where torture has proven an intractable risk, like police interrogation, rights advocates have pursued intrusive monitoring and other mechanisms to reduce the risk of torture. Likewise, while monitoring of assurances is not a sufficient protection against torture or ill-treatment, an institutionalized and intrusive system of monitoring would be a vast improvement over ad hoc monitoring, which appears to be current US practice.

### **US MONITORING PRACTICES**

The US government has not made public the details of what kind of monitoring it has sought and conducted, but has indicated that it often seeks some monitoring guarantee. Left unknown are whether the US has specific requirements for the monitoring assurances it will accept, or a uniform monitoring protocol for officials who oversee or conduct monitoring, including a method for responding to allegations of abuse.

Known cases suggest that US officials, on a case-by-case basis, determine whether a given monitoring arrangement is sufficient for a particular detainee, based on his circumstances and conditions in the receiving country, or among receiving authorities. Without baseline requirements, US officials may be tempted to accept less robust monitoring guarantees than necessary. In negotiations, the US can avoid implying distrust of foreign governments by invoking a set of common monitoring requirements for all assurances-based transfers.

Known cases also show a troubling failure to anticipate problems like obstructed access to detainees, or to determine the scope of monitoring before the transfer. When US embassy officials visited repatriated Guantánamo detainee Rukniddin Sharopov in a Tajik prison in December 2009, they had ample cause

to be concerned: Sharopov had cried out in court that he was tortured, Tajik authorities had blocked their access to him for three months, and Tajikistan has a record of prisoner abuse and life-threateningly inhumane detention conditions. Yet a leaked cable shows that the US officials' monitoring method left Sharopov little chance of reporting abuse without risking retaliation. The officials interviewed him in the presence of his captors, asked leading questions and apparently failed to conduct a medical or psychological exam that would reveal signs of torture he may have been forced to conceal.

While monitoring is an inherently flawed safeguard against torture—the sending government cannot control what happens once an individual is transferred to the custody of another government—some deficiencies stem from the failure of sending governments to establish competent monitoring bodies, with clear protocols for responding to allegations of abuse and mandates to carry out systematic visits.

## **LESSONS FROM HUMAN RIGHTS MONITORING BODIES & INTERNATIONAL STANDARDS**

The creation of monitoring bodies like the Optional Protocol to the Convention Against Torture (OPCAT) and European Convention for the Prevention of Torture, and positions like the UN Special Rapporteur on Torture, reflect a growing consensus that monitoring and systems of visitation play a critical role in the prevention of torture. Their work shows that internationally, governments are increasingly receptive to intrusive monitoring, which would once have been rejected as a denigration of state sovereignty. Negotiators seeking robust assurances can cite the precedent of these existing monitoring bodies, answering receiving governments' concerns about intrusiveness by pointing to their own willingness to subject themselves to monitoring. Negotiators can also suggest that rather than reflecting distrust, robust monitoring assurances simply mirror international standards for monitoring places of detention.

### ***Minimum Requirements for Effective Anti-Torture Monitoring:***

Based on the practice and standards of existing anti-torture monitoring bodies, the US should establish minimum requirements for assurances-based monitoring mechanisms. The guiding principle for these requirements is that a monitoring body should be able to: (1) in its preventive function, deter abuse by the fact of its existence and prevent abuse by actively anticipating potential problems; and (2) in its protective function, promptly respond to problems and where necessary, intervene on behalf of detainees.

To effect these purposes, the assigned monitor should have a broad mandate set out in the assurances, terms of reference or official authorization from relevant authorities in the receiving country. The monitor should also act according to a pre-determined protocol describing steps to effectively carry out the mandate. Specific recommendations are set out below.

## KEY RECOMMENDATIONS

The US can and should institutionalize better practices on transfers and diplomatic assurances. The government should engage with public scrutiny, set baseline requirements, submit to judicial review, and establish systematic monitoring.

### ***Make public US assurances policy and past cases of abuse***

- Describe assurances policy and address human rights concerns in congressional hearings or other public fora, including standards for negotiating assurances, post-return monitoring, and remedial actions taken in cases of alleged abuse.

### ***Institutionalize reform and restrict agency decision-making authority***

- Promulgate regulations to implement the Special Task Force’s recommendations—codify the State Department’s role in negotiating and assessing assurances, and prohibit other agencies from conducting a transfer without consulting the high-level State Department officials.
- Adopt inter-agency standards on assurances, including on the specificity of guarantees, monitoring and circumstances under which assurances-based transfers should not be pursued.

### ***Rule out the use of assurances where they cannot be effective***

- Rule out the use of assurances where torture is practiced systematically or there are credible and un-resolved allegations that the receiving government has previously breached assurances.
- Do not transfer an individual who belongs or is believed to belong to a group that the receiving government has a pattern of subjecting to persecution or torture; who has been tortured in the past by the receiving government authorities; or who faces a risk of abuse outside of detention, e.g. by private actors.
- Do not conduct transfers for the purpose of interrogation by receiving government authorities which are known to use torture or ill-treatment, or “renditions,” i.e. transfers outside of legal process.

### ***Set baseline requirements for the content of assurances***

- Include written, explicit guarantees of transferred individual’s rights to access a lawyer, embassy staff and family.
- Guarantee conditions of detention: prompt and independent medical examinations, no incommunicado detention, and physical conditions in cells that meet international standards.

### ***Submit to judicial review***

- Provide the individual subject to transfer the terms of assurances, the government’s protocol for post-return monitoring, and information about the charges he may face in the receiving country.
- Provide the individual an opportunity to describe individualized risk factors and challenge the reliability of assurances through agency process and court proceedings.
- Amend US law to clarify that courts can review Convention Against Torture claims in immigration, extradition and military detention cases.

### ***Establish systematic monitoring***

- Require receiving governments to agree to a broad monitoring mandate—including the monitoring team’s authority to conduct regular and unannounced visits—and to ensure that, in practice, the team’s access is unimpeded.
- Design a monitoring protocol based on international monitoring standards, including private interviews, observation of conditions that signify or precede abuse, full investigation and documentation of possible abuse, and independent medical and psychological examinations of detainees.
- Train monitoring teams to conduct effective interviews with detainees, detect abuse, anticipate detaining authorities’ obstructions and to intervene on detainees’ behalf.

# RECOMMENDATIONS

## Transparency & Accountability

*The US government should make public its assurances policy and past cases of abuse:*

- Describe assurances policy and address human rights concerns in congressional hearings or other public fora, including standards for negotiating assurances, post-return monitoring, and remedial actions taken in cases of alleged abuse
- Make publicly available the August 2009 report of the Special Task Force on Interrogation and Transfers
- Make publicly available the annual coordinated report on assurances by the inspectors general of the Departments of State, Defense and Homeland Security and engage with non-governmental groups during the assurances review process
- Publicly acknowledge and investigate past cases of abuse in transfers pursuant to assurances, with the aim of providing redress to victims and identifying necessary reform, including countries to which individuals should not be sent due to past breached assurances.

*The US government should institutionalize reforms and restrict agency decision-making authority:*

- Promulgate regulations to implement the Special Task's forces recommendations—codify the State Department's role in negotiating and assessing assurances, and prohibit other agencies from conducting a transfer without consulting the high-level State Department officials
- Adopt inter-agency standards on assurances, including on the specificity of guarantees, monitoring and circumstances under which assurances-based transfers should not be pursued
- Implement UN Convention Against Torture obligations and the Foreign Affairs Restructuring and Reform Act of 1998, promulgate and make public regulations governing transfers by the Department of Defense and Central Intelligence Agency
- For immigration and extradition cases, promulgate regulations describing the circumstances under which assurances are ordinarily inappropriate, e.g., with regard to receiving governments with records of systematic torture
- For immigration cases, establish a presumption against the resort to assurances unless there are compelling reasons for removal, e.g., the deportee poses a danger to the community.
- For immigration cases, amend regulations on termination of deferral of removal based on assurances to provide a pre-termination hearing and promulgate regulations limiting the use of assurances in summary removal proceedings
- For Guantánamo detainees, establish rules against their repatriation without consent.

## Ruling Out the Use of Diplomatic Assurances

*The US government should not seek to transfer individuals based on diplomatic assurances unless it has exhausted alternatives, including, as appropriate, transfer to a third country, prosecution in the US or supervised release.*

*The US government should not conduct transfers based on assurances in circumstances where they are likely to be ineffective, including where:*

- [Receiving Government & Country Conditions Factors](#)
  - Torture is practiced systematically, i.e. it is “habitual,” including where it is the “the consequence of factors which the Government has difficulty in controlling” or “[i]nadequate legislation which in practice allows for the use of torture” (see Part I, Ch. 2)



## RECOMMENDATIONS

- The receiving government refuses to provide minimum guarantees set out in these recommendations, including guarantees of post-return monitoring and provision of information about charges and investigation the individual faces upon transfer
- There are credible allegations that the receiving government has previously breached assurances and relevant country conditions have not changed substantially.

### • Individual Risk Factors

- The individual to be transferred belongs or is believed to belong to a group that has been subjected to persecution or torture by receiving government authorities, including individuals at high risk of abuse during interrogation due to actual or imputed knowledge
- The individual has previously been subjected to torture by receiving government authorities
- The individual faces a risk of abuse by forces beyond the government's control, including "rogue" police forces or private actors
- The individual faces a risk of abuse outside of detention, e.g., where the individual faces a risk of being disappeared or subject to extrajudicial killing.

### • Type of Transfer

- The individual is transferred for the purpose of interrogation by receiving government authorities which are known to routinely use torture or ill-treatment
- The transfer occurs outside legal process, i.e. rendition, with no opportunity for the transferee to provide information about his individual risk factors or challenge the reliability of assurances.

## Contents of Guarantees Against Abuse

Assurances should consist of written, explicit guarantees, including:

### • Rights of the transferred individual:

- prompt access to a lawyer, embassy/consular staff, notification to family members or other outside contacts
- before transfer, notice of charges and the basis of any investigation or detention he faces on transfer, and the identity of the receiving government authorities with jurisdiction over his detention or interrogation.

### • Conditions of interrogation: recording of all interrogation sessions and the identity of persons present

- Conditions of detention:
- prompt and independent medical examination
- no incommunicado detention or detention at undisclosed places
- physical conditions in cells and interrogation rooms—including sanitation, food, light and temperature—which meet international standards.

### • Guarantees of post-return monitoring and access (see below)

## Pre-Transfer Process and Accountability in Individual Cases

*Before the transfer, the individual facing transfer should be provided information relating to assurances—including the content of assurances, the authorities providing the assurances, relevant elements of the negotiations and post-return monitoring arrangements—which enable him to meaningfully contest the reliability of the assurances and provide information to the US government about the risk of abuse based on his individual circumstances; and, post-transfer, to call on the US and receiving government officials to fulfill the terms of the assurances, including by conducting monitoring.*

*Information provided to the individual before the transfer should include:*

- Charges he may face, whether he will be investigated or detained on return and the receiving government authorities with jurisdiction over his detention or interrogation
- The terms of the assurances, including guarantees concerning detention and interrogation conditions
- The government's protocol for post-return monitoring, including the anticipated timing of initial and follow-up visits.

*After receiving this information, the individual should have an opportunity to describe individualized risk factors and challenge the reliability of assurances through a formal agency process and court proceedings. Relevant government agencies should:*

- In immigration cases, notify the individual of the agency's intent to secure assurances and provide her an opportunity to respond; provide the text of assurances and other information to the reviewing immigration court and appellate courts; stop asserting jurisdictional bars to appellate court review in deferral of removal cases
- In extradition and Guantánamo transfer cases, stop asserting the rule of non-inquiry or related bars to judicial review; provide process at the agency level, including an opportunity to describe individualized risk and challenge the reliability of assurances
- In Afghan detainee transfers, provide process at the agency level, particularly, an opportunity to challenge repatriations of non-Afghan nationals.
- Never conduct transfers outside of legal processes, i.e. renditions, since these procedural safeguards could not be applied.

*The US should amend the Foreign Affairs Restructuring and Reform Act or promulgate regulations to make clear that US courts have jurisdiction to review claims under the Convention Against Torture. The amended law or regulations should clarify that:*

- In immigration cases, courts of appeal have jurisdiction to review Convention Against Torture claims when the government terminates deferral of removal, notwithstanding the 30-day filing deadline for petitions for review of final orders of removal
- In extradition cases, habeas courts have jurisdiction to review Convention Against Torture claims once the Secretary of State certifies the extradition
- In Guantánamo and military detention cases, courts have jurisdiction to review Convention Against Torture claims.

## Monitoring Post-Return Treatment

*The US government should establish requirements to enable effective monitoring: a broad mandate and a robust practice protocol. The mandate and protocol should be designed to ensure that: (1) in its preventive function, the monitoring team deters abuse by the fact of its existence and prevents abuse by actively anticipating potential problems; (2) in its protective function, the monitoring team promptly responds to problems and where necessary, intervenes on behalf of detainees. Monitoring parameters should include:*

- Authority to make regular and unannounced visits to the detainee, including a prompt initial visit and follow-up visits
- Authority to conduct visits in a manner that, to the extent possible, protects the detainee against reprisal (e.g. through private interviews), anticipates future abuse through observation of conditions, and enables investigation and documentation of possible abuse, including through access to all areas of the detention facility where interrogation or confinement may occur, access to facility personnel, and access to all documentation concerning persons deprived of their liberty (e.g., the detention log, complaint or incidence register and medical records)
- Independence and competence of monitoring team, including appropriate training and inclusion of medical personnel

- Authority to make recommendations and engage in dialogue with detaining authorities about conditions.

Assurances should include explicit guarantees that receiving government authorities will:

- Ensure that the monitoring team is, in practice, granted access to exercise the powers under the mandate
- Notify all detention facility staff of the mandate of the monitoring team
- Ensure no reprisal is taken against detainees or facility staff in relation to a monitoring visit.

In Afghan detention and transfer operations, the US government should adopt parameters articulated in the UK decision (R) *Evans v. Secretary of State for the Defence Department* (2010):

- Monitoring as an Express Condition for Transfer: Expressly condition transfers to Afghan authorities on a US monitoring team being given “access to each transferee on a regular basis, with the opportunity for a private interview on each occasion”
- Monitoring in Practice: Ensure that each transferee “in practice visited and interviewed in private on a regular basis”
- Halting Transfers if Assurances Breached: “[C]onsider the immediate suspension of further transfers if full access is denied at any point without an obviously good reason...or if a transferee makes allegations of torture or serious mistreatment by NDS staff which cannot be reasonably and rapidly dismissed as unfounded.”

## PART I. US TRANSFER AND ASSURANCES PRACTICES

**THE US USES ASSURANCES IN A VARIETY OF SITUATIONS**, including deportation, extradition, renditions to justice and so-called “extraordinary renditions,” repatriations of Guantánamo Bay detainees, and transfers of detainees held in Afghanistan. But little is known about the scope and nature of its use of assurances.

Chapter 1 describes the US government’s failure to disclose information about assurances practice, including whether recently recommended reforms have been adopted. Chapter 2 describes what is known about current and past practice, including governing US law and the role of the US State Department. It also describes concerns arising from each transfer context: Guantánamo transfers, Afghan transfers, extradition and deportation, and renditions. US policy on judicial review and monitoring is described in Part III of the report.

### Chapter 1: US Government Resistance to Disclosure & the Prospect for Reform

*With some exceptions, the US government has refused to disclose its standards for the use of assurances and its practices, including its reforms—an approach at odds with the Obama administration’s commitment to transparency and the practice of US allies.*

#### **2009 Inter-Agency Task Force Recommendations**

The Obama administration initially signaled an interest in reforming transfer practices, and established an interagency task force on transfer and interrogation in January 2009.<sup>1</sup> But more than a year since the task force issued its August 2009 report and recommendations, the government has not published any version of the report or announced any steps to implement its recommendations.

1. The task force was created pursuant to Exec. Order No. 13,491, 74 Fed. Reg. 4,893 (Jan. 22, 2009). It includes officials “from law enforcement, the US Intelligence Community, and the Department of Defense.” Press Release, US Dep’t of Justice, Special Task Force on Interrogations and Transfers Policies Issues Its Recommendations to the President, (Aug. 26, 2009), available at <http://www.justice.gov/opa/pr/2009/August/09-ag-835.html> [hereinafter DOJ Task Force Press Release].

One reason so little is known about assurances is that the US government under both the Bush and Obama administrations has sought to avoid any external constraints, and whether to disclose that use.

The little that is known about the task force's recommendations come from a short August 2009 press release by the Department of Justice. On monitoring, the task force recommended that agencies obtaining assurances "insist on a monitoring mechanism, or otherwise establish a monitoring mechanism, to ensure consistent, private access to the individual who has been transferred, with minimal notice to the detaining government." The task force also recommended that the State Department "be involved in evaluating assurances in all cases." The press release noted "a series of recommendations that are specific to immigration proceedings and military transfer scenarios" but provided no further information. The press release also described "classified recommendations that are designed to ensure that, should the Intelligence Community

participate in or otherwise support a transfer, any affected individuals are subject to proper treatment."<sup>2</sup> However, the press release did not describe a timeline for these improvements.

In its August 2010 report to the UN Human Rights Council, the US government noted that it was "developing practices and procedures that will ensure the implementation of [the] Task Force recommendations."<sup>3</sup> The Human Rights Institute is only aware of one recommendation that is currently being implemented: that the Inspectors General of the Departments of State, Defense and Homeland Security "prepare annually a coordinated report on transfers conducted by each of their agencies in reliance on assurances."<sup>4</sup> In October 2010, the Human Rights Institute learned that these agencies were reviewing assurances practice in preparation for the report, focusing on four issues: the process of obtaining assurances; the content of assurances; monitoring and enforcement of assurances; and post-transfer treatment of individuals. However, the Human Rights Institute was unable to determine when the coordinated report would be published and whether it would be made public.

### **Benefits and Costs of US Non-Disclosure**

One reason so little is known about assurances is that the US government under both the Bush and Obama administrations has sought to avoid any external constraints, and whether to disclose that use.

This approach is manifested in various ways:

- *Citing Executive Prerogative and Avoiding Oversight:* Even in the face of congressional inquiries, the government has provided next to no information about its minimum standards and protocols for negotiating assurances, monitoring returned individuals and responding to allegations of abuse, citing the delicacy of diplomatic relations and the importance of confidential negotiations.<sup>5</sup> This has stymied human rights' advocates' efforts to engage the Obama administration in fruitful discussion about needed changes, while undermining the Obama administration's message of transparency.

2. *Id.*

3. See Human Rights Council, National report submitted in accordance with paragraph 15 (a) of the annex to Human Rights Council resolution 5/1: United States of America, UN Doc. A/HRC/WG.6/9/USA/1 ¶85 (2010) [hereinafter US report to the UN Human Rights Council].

4. *Id.*

5. See, e.g., *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), available at [www.fas.org/irp/congress/2008\\_hr/rendition.pdf](http://www.fas.org/irp/congress/2008_hr/rendition.pdf) [hereinafter Statement of John Bellinger].

- *Couching Practice in Policy, Not Law*: Under US and international law, the US is bound not to transfer any individual in its custody to another government's custody if it is more likely than not that the individual will be tortured. Under the Bush administration, the government argued that this legal obligation does not apply outside of its borders, for instance, to detainees held in Guantánamo and Afghanistan.<sup>6</sup> The Obama administration has failed to make clear its position, although it has recognized that the prohibition on torture and other cruel, inhuman or degrading treatment applies extraterritorially.<sup>7</sup> This unwillingness to explicitly accept international legal obligations suggests the government's willingness to take advantage of Bush-era "legal black hole" and exceptionalism arguments. In Guantánamo, extradition and deportation cases involving assurances, the government has eschewed judicial review (see Part III Ch. I), crafting a void of due process for individuals who fear torture but face transfer based on assurances.
- *Refusing to Acknowledge Failures in Assurances and the Necessity of Reform*: The US government has declined to acknowledge past breaches of assurances and has refused any redress to victims, in both litigation and congressional inquiries. Although not a focus of this report, these positions undermine the government's commitment to reform. They represent a parting of ways with allies that, to some extent, have responded to past abuse by building safeguards into assurances practices.

### **Effect of 2010 WikiLeaks on US Government Secrecy**

In November and December 2010, as this report went to publication, the website WikiLeaks and coordinating media outlets announced that they would be publishing more than 250,000 diplomatic cables from US embassies and the State Department.

Several released cables show that the US rightly resisted Chinese and Tunisian diplomatic pressure to repatriate their nationals from Guantánamo, based on concerns that the detainees would be mistreated. One cable shows that the US ambassador to Tunisia feared repatriating a Tunisian national from Guantánamo in light of credible reports that an already repatriated detainee was abused. He also rejected Tunisia's claims that the International Committee of the Red Cross had access to Tunisian prisons.<sup>8</sup>

US resistance to repatriation provoked China's ire. According to one cable, a Chinese diplomat reportedly called US refusal to repatriate the detainees "a slap in the face."<sup>9</sup> Another cable reports that the German government was "ready to discuss taking Guantánamo detainees" but not one of the Chinese detainees because of "expected negative reaction of the Chinese government."<sup>10</sup> Cables also show that Chinese and Tunisian diplomats pressured other foreign governments not to accept their nationals for resettlement.<sup>11</sup>

6. Former Attorney General Alberto Gonzales, argued that "when the US Senate gave its advice and consent to ratify the Convention against Torture in 1994, it made a reservation by which the United States defined the prohibited 'cruel, inhuman or degrading treatment' as meaning the ill-treatment prohibited by the Fifth, Eighth or Fourteenth Amendments to the US Constitution." According to Gonzales, since the Supreme Court has recognized that "aliens interrogated by the U.S. outside the United States enjoy no substantive rights under the Fifth, Eighth, and 14th Amendment," the US has no obligation to apply the Convention to aliens outside of US territory. See *Confirmation Hearing on the Nomination of Alberto R. Gonzales to be Attorney General of the United States: Hearing before the Committee on the Judiciary, 109th Cong., 121 (2005)*. Additionally, John Bellinger, former Legal Advisor to the Secretary of State, argued that the Convention's prohibition on "cruel, inhuman or degrading treatment or punishment which do not amount to torture" in Article 16 does not apply to territories outside the formal jurisdiction of the United States, regardless of whether the US exercises "de-facto control" of a territory. See John Bellinger, U.S. Delegation Oral Response to CAT Committee Questions (May 5, 2006), available at <http://www.state.gov/g/drl/rls/68561.htm>; see also US Written Response to Questions Asked by the UN Committee Against Torture, April 28, 2006, <http://www.state.gov/g/drl/rls/68554.htm> (arguing that the Convention Against Torture and its implementing legislation do not cover the transfer of non-citizens held outside the US in the "war on terror") [hereinafter US Response to Committee Against Torture].

7. See US Report to the UN Human Rights Council, *supra* note 3, ¶86 (2010).

8. US Embassy in Tunisia, *GOT Asks Europeans Not to Take Tunisian Guantanamo Detainees*, Ref. ID 09TUNIS415 (June 23, 2009; released Nov. 30, 2010) [hereinafter US Embassy in Tunisia cable].

9. US Embassy in Bishkek, *Chinese Ambassador Flustered by Kyrgyz Allegations*, Ref. ID 09BISHKEK135 (Feb. 13, 2009, released Nov. 30, 2010).

10. US Embassy in Berlin, *National Security Advisor Heugsen on Afghanistan*, Ref. ID 09BERLIN1433 (Nov. 12, 2009, released Nov. 29, 2010).

11. See US Embassy in Tunisia cable, *supra* note 8; *US Embassy in Beijing, Beijing-Based 5-5 Chief of Mission on DPRK, GTMO Uighurs, Sino-Japan Relations, Dalai Lama*, Ref. ID 09BEIJING1247 (May 9, 2009; released Nov. 29, 2010) ("Ambassador Schaefer said China had not officially demarched Germany but had warned Germany that accepting any Uighur detainees would 'put enormous pressure on Beijing and a heavy burden on bilateral relations'").

It is too early to draw extensive conclusions from the cables released by WikiLeaks or determine the broader ramifications of the leak itself. But the Chinese cables suggest that the US publicly stated concerns for Chinese detainees made their resettlement harder. The cables underscore the sensitivity of foreign governments to any implication that their human rights records are not strong. What remains unclear is whether judicial review of assurances would make any difference to foreign governments. The Tunisian government appears to have been provoked despite the US government's refusal to officially acknowledge in court that Tunisia's human rights record precluded repatriation.

Although the costs to foreign relations cannot be readily discerned, the US government's stand against repatriating the Chinese detainees was correct. It demonstrates the government's commitment to ending the legacy of Guantánamo: not just closing the facility, but safeguarding the treatment of detainees wrongly imprisoned there. The publication of the leaks may only have heightened China's displeasure. Nevertheless, with its position against disclosure on Guantánamo transfers now undermined by the leaks, the government should take the opportunity to defend and explain its decision and larger policy. It should also commit to a systematic approach, so that safeguarding against torture is not a matter of individual diplomats' laudable ability to resist diplomatic pressure, but a less fallible policy.

### Wikileaks cable regarding transfer of Tunisian detainees from Guantanamo

SUBJECT: GOT ASKS EUROPEANS NOT TO TAKE TUNISIAN GUANTANAMO  
DETAINEES

Classified By: Ambassador Robert F. Godec for reasons 1.4 (b) and (d)

-----

SUMMARY

-----

¶1. (S/NF) A senior MFA official convoked the German, Italian and Spanish Chiefs of Mission June 19 to inform them the GOT wants the Tunisian detainees in Guantanamo Camp returned home. According to the European COMs, the implicit message was that their governments should not accept the US request to take Tunisian detainees. The COMs have informed their capitals, but have no response yet. In a meeting June 22, a small group of Ambassadors (including the German and Italian COMs) discussed the MFA demarches. Among the Ambassadors, views differed on the risks to Tunisian prisoners, but some said there is a possibility of torture or mistreatment for anyone accused of terrorism. End Summary.

-----

EUROPEANS DEMARCHED

-----

¶2. (S) Following FM Abdallah's meeting on Guantanamo detainees with Ambassador Godec on June 18 (Ref A), the MFA convoked German Ambassador Horst-Wolfram Kerll, Italian Ambassador Antonio D'Andria and Spanish Charge Santiago Miralles Huete to separate meetings on June 19.

¶3. (S) In the meetings, MFA Secretary of State for Maghreb, Arab and African Affairs Abdelhafidh Hergeum delivered a demarche similar to that given to Ambassador Godec, specifically:

- Tunisia wants its citizens in Guantanamo returned,
- Tunisia does not torture and has signed the Convention Against Torture,
- Tunisia's image would suffer if the detainees were sent to other countries.

**Wikileaks cable on Tunisia (continued)**

The implicit message from Hergeum, according to the European COMs, was that their countries should not agree to the US request to accept Tunisian detainees. The three officials have informed their capitals but have no response. According to the German Ambassador, the Tunisian Ambassador in Berlin has delivered the same demarche to the German MFA.

-----  
**AMBASSADORS' MEETING**  
 -----

¶4. (S) On June 22, Ambassador discussed the GOT demarche with Ambassador Kerll, Ambassador D'Andria, UK Ambassador Chris O'Connor, French Ambassador Serge Degallaix, and Canadian Ambassador Bruno Picard. Ambassador Godec reviewed the Foreign Minister's demarche with the German and Italian Ambassadors then detailing the demarches they had received.

¶5. (S/NF) The Canadian Ambassador noted the GOT has offered, as evidence that it does not torture, the case of Imam Said Jaziri who was repatriated from Canada to Tunisia despite allegations that he would be mistreated. The Canadian Ambassador said the comparison between Jaziri and the Guantanamo detainees is "crap", explaining that Jaziri was a petty criminal and not accused of terrorism. The Canadian government reviewed Jaziri's case carefully and decided he could be transferred since he did have links with terrorism. The Canadian decision, Picard suggested, might well have been otherwise if Jaziri had been accused of terrorism.

¶6. (S/NF) The Italian Ambassador said Italy had had few problems with individuals they had transferred to Tunisia. The Italians have been in contact with their families and lawyers and have not heard any serious complaints. Why, he asked, would the GOT want to mistreat or torture transferred Guantanamo detainees?

¶7. (S/NF) Ambassador Godec noted that there are credible reports of one of the first two transferees being mistreated, including information from the lawyer, the family and statements in open court. Moreover, there are credible reports of Ministry of Interior officials mistreating detainees and prisoners in other cases. He added that contrary to GOT claims, the ICRC cannot visit all Tunisian prisons as it does not have access to non-notified MOI facilities. The UK Ambassador opined that the GOT uses torture as a form of punishment.

¶8. (S/NF) The Canadian Ambassador said the GOT's statements that it does not torture are "bullshit." The Canadian Ambassador (protect) said he had direct, first hand evidence of torture/mistreatment of a prisoner that lasted several months. The Canadian and German Ambassadors agreed that anyone in Tunisian prisons on terrorism charges is at risk of mistreatment or torture.

¶9. (S/NF) The Ambassadors concluded the discussion with several noting that Tunisian diplomatic assurances regarding appropriate treatment of prisoners is of value, but that a follow-up mechanism is required to ensure commitments are kept.

-----  
**COMMENT**  
 -----

¶10. (S/NF) The GOT clearly and strongly wants the Tunisian detainees in Guantanamo returned home. As we suggested in Ref A, Washington agencies may wish to consider whether

**Wikileaks cable on Tunisia (continued)**

to offer to return the Tunisian detainees if the GOT agrees to permit US access to the first two transferees and ongoing access to any future transferees. Such an understanding would need to include a mechanism to address the problems that may arise. While there is no absolute guarantee against mistreatment, such an understanding would provide transferees additional protection. Whether the GOT would accept such an arrangement is another matter. We are not optimistic, but it is worth considering. If Washington decides to continue with efforts to transfer the Tunisian detainees to third countries, we need to officially inform the GOT at a high-level and soon.

Godec

**US Government's "Case-by-Case" Approach**

Concomitant with US government officials' refusal to disclose details about assurances is their assertion that they take a "case-by-case" approach: the government determines whether assurances are sufficient based on the risk of torture for the particular individual, in the particular country.<sup>12</sup> The 2005 comments of Julie Finley, US ambassador to the Organization for Security and Co-operation in Europe, exemplify the government's pattern of asserting that assurances are used only where they can be reasonably relied upon, while failing to describe specific parameters for their use:

*[T]he United States reserves the use of assurances for a very small number of cases where it can reasonably rely on such assurances that the individuals would not be tortured. If, taking into account all relevant information, including any assurances received, the United States believes that a person more likely than not will be tortured if returned to a foreign country, the United States would not approve the return of a person to that country....[A]ssurances are not appropriate in every case, and assurances standing alone may not provide a clear answer to the careful, case-by-case determination of whether it is more likely than not that the individual will be tortured upon return to another country. In appropriate cases, however, reliable and credible assurances may enable the United States to remove, extradite, or otherwise return persons to another country consistent with U.S. obligations and policy relating to the Torture Convention.<sup>13</sup>*

This approach does not differ fundamentally from other countries', but US officials depart from their foreign government counterparts by leaving completely unknown numerous critical factors: the basis for seeking assurances, the negotiation process, the typical content of assurances, whether and how affected persons will be permitted to challenge the assurances, and what monitoring takes place after transfer.

One indication that these factors vary based on whether the government has a tenable alternative—continued detention, release or transfer of the individual to a country where torture is unlikely—arises from the increased use of assurances for Guantánamo transfers. In 2006, as the Bush administration began acceding to pressure to close the Guantánamo Bay detention facility, it moved to a policy "of requiring

12. In litigation related to Guantanamo repatriations and transfers from Afghanistan, US government officials have stated that "decisions are made on a case-by-case basis, taking into account the particular circumstances of the transfer, the country, and the detainee concerned, as well as any assurances received from the receiving government." Declaration of Sandra L. Hodgkinson (July 9, 2008), Respondents' Reply to Petitioners' Memorandum in Opposition to Motion to Dismiss For Lack Jurisdiction (with attached exhibits) *Al Najjar v. Gates*, No. 1:08-cv-02143 at 13 (Jan. 5, 2009), available at <http://sites.google.com/a/ijnetwork.org/maqaleh-v-gates/test-joint-appendix> [hereinafter Hodgkinson Declaration].

13. Julie Finley, Ambassador for the United States Mission to the Organization for Security and Co-operation in Europe, Statement in Response to the Address by the UN Special Rapporteur on Torture, Mr. Manfred Nowak (Dec. 22, 2005), available at [http://osce.usmission.gov/media/pdfs/2005-statements/response\\_novak\\_12\\_22\\_05.pdf](http://osce.usmission.gov/media/pdfs/2005-statements/response_novak_12_22_05.pdf).



less formal assurances” for transfers out of Guantánamo.<sup>14</sup> The US government has since used assurances in every Guantánamo transfer case.<sup>15</sup>

The US government’s approach of discretion and non-disclosure is unnecessary and at odds with other countries’ practices (see Part III, Ch. I). Disclosure and accountability are especially important because, as the next chapter describes, US law provides the government vast discretion in utilizing assurances, but it has sometimes failed to adequately assess the risk of torture or ill-treatment for individuals subject to transfer.

### Chapter 2: Assurances in US Law & Practice

- *US law unequivocally prohibits transferring individuals to places where they are more likely than not to be tortured. Assurances are mentioned only in immigration regulations.*
- *The State Department has a lead role in negotiating and evaluating assurances, and in the past it has failed to adequately assess their reliability.*
- *In various contexts—transfers out of the Guantánamo Bay detention facility, transfers in Afghanistan, extradition, deportations and renditions—US officials have a wide discretion on the use of assurances and much is unknown about the negotiating process, the content of guarantees and post-return monitoring.*

#### US Law on Transfer & Assurances

The US ratified the UN Convention Against Torture in 1994.<sup>16</sup> US obligations on transfer are implemented in the 1998 Foreign Affairs Reform and Restructuring Act (FARRA).<sup>17</sup> FARRA describes an unequivocal policy against return where there is a substantial risk of torture, regardless of the kind of transfer undertaken or where it occurs:

“It shall be the policy of the United States not to expel, extradite or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.”<sup>18</sup>

Under FARRA, all relevant federal agencies are required to adopt regulations to implement this policy.<sup>19</sup> But FARRA does not reference assurances. The only agency regulations that explicitly reference assurances are in the immigration context.

#### *US Regulations Referencing Assurances*

Agencies have only promulgated regulations to implement FARRA for extradition and deportation. In extradition cases, regulations require the US Department of State to consider “allegations relating to torture” and the Secretary of State may “surrender the fugitive subject to conditions.”<sup>20</sup>

---

14. A US government official at an “experts meeting” hosted at Case Western Reserve University indicated that formerly, government policy was that “assurances had to take the form of an international agreement.” We did not find any other indications that US assurances were ever that formalized, except perhaps in extradition agreements. Tyler Davidson & Katheleen Gibson, *Security Detention: Experts Meeting on Security Detention Report*, 40 Case W. Res. J. Int’l L. 323, 353 (2009).

15. Declaration of Pierre-Richard Prosper, War Crimes Ambassador, Sherif el-Mashad, et al. v. Bush, February 25, 2005, Annex I, Tab 2, Second Periodic Report of the U.S. to the Committee Against Torture, May 6, 2005.

16. The US ratified the Convention Against Torture subject to several declarations, reservations and understandings, including that it is not self-executing and requires domestic legislation to take effect. See Sen. Exec. Rpt. No. 101-30, Resolution of Advice and Consent to Ratification (1990), reprinted at <http://thomas.loc.gov/cgi-bin/ntquery/z?trtyys:100TD00020>; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Preamble, 1465 UNT.S.85 (Dec. 10, 1984) [hereinafter *Convention Against Torture*].

17. Foreign Affairs Reform and Restructuring Act, 8 U.S.C. § 1231 (1998).

18. *Id.* at §1231(a).

19. Act of Oct. 21, 1998, Pub. L. 105-277, § 2242(b) (Oct 21, 1998).

20. 22 C.F.R. § 95.3(b).

Immigration regulations prohibit deporting an individual “under circumstances that violate [provisions related to threats to life or freedom] or Article 3 of the Convention Against Torture.”<sup>21</sup> The regulations explicitly contemplate assurances against torture, providing that “[t]he Secretary of State may forward to the Attorney General [now Secretary of Department of Homeland Security] assurances that the Secretary has obtained from the government of a specific country that an alien would not be tortured there if the alien were removed to that country.”<sup>22</sup> The Secretary of the Department of Homeland Security, in consultation with the Secretary of State, determines whether the assurances are sufficiently reliable to permit the transfer, consistent with US obligations under the Convention Against Torture.<sup>23</sup>

There are no publicly available Department of Defense or CIA regulations implementing the FARRA obligation, although literature on the CIA references “rules” against sending Al Qaeda suspects to the risk of torture without assurances.<sup>24</sup> The US government has indicated that it will apply FARRA to Guantánamo transfers as a matter of policy, and that it may seek assurances to ensure returned individuals are not subjected to torture.<sup>25</sup>

The promulgated regulations leave much to agency discretion, including when it is appropriate to seek assurances. A 2007 congressional inquiry illustrated this void, describing the US’s “double standard” in failing to seek assurances to facilitate the extradition or deportation of Luis Posada Carriles to Venezuela, where he is wanted for blowing up a Cuban civilian airliner in protest against the Castro regime in Cuba. The State Department had declined to seek assurances or otherwise act, even after Venezuelan officials publicly offered assurances that he would be treated humanely if transferred. The hearing compared the failure to extradite Carriles with the government’s transfer of Canadian-Syrian national Maher Arar based on assurances and his subsequent torture, which is described below.<sup>26</sup>

### **US State Department Role in Negotiating & Evaluating Assurances**

Although its role is for the most part not defined under US law, the US State Department has been the principal player in negotiating and assessing assurances since at least 2005.<sup>27</sup>

The State Department acts on requests from other agencies, to which it provides recommendations: the Department of Homeland Security, in deportations; the Department of Defense, in Guantánamo transfers; and, the CIA, in renditions, to an unknown extent. For Afghan Detainee Transfers, the Department of Defense’s Joint Task Force 435 takes a lead role, and the State Department’s involvement is unclear. In 2009, the Special Task Force on Interrogations and Transfers recommended establishing and clarifying procedures to ensure that no transfer occurs without the State Department’s involvement.<sup>28</sup>

21. 8 C.F.R. § 235.8(b)(4).

22. 8 C.F.R. § 208.18(c).

23. See 8 C.F.R. §§ 208.17-18.

24. Congressional Research Service, RL 32890, *Renditions: Constraints Imposed by Law*, 9 (2009) (noting that CIA regulations on renditions are not publicly available but would need to comply with FARRA requirements); see, e.g., Bob Woodward, *Obama’s Wars* 91-92 (2010).

25. See Declaration of Joseph Benkert, Principal Deputy Assistant Secretary of Defense for Global Security Affairs, Department of Defense, executed on June 8, 2007, ¶ 6, *In re Guantanamo Bay Detainee Litigation*, Case No. 1:05-cv-01220 (D.D.C. 2007) [hereinafter Declaration of Joseph Benkert] (“[I]t is the policy of the United States...not to repatriate or transfer... [Guantanamo detainees] to other countries where it believes it is more likely than not that they will be tortured”); Second Periodic Report of the US to the Committee Against Torture, submitted May 6, 2005 indicating the US seeks assurances from foreign governments to which Guantanamo detainees are transferred) [hereinafter 2nd US Period Report].

26. ‘Diplomatic Assurances’ on Torture: A Case Study of Why Some Are Accepted and Others Rejected: *Hearing Before the Subcommittee on International Organizations, Human Rights and Oversight, US House of Representatives Committee on Foreign Affairs*, 110th Congress, 1st Sess., 138 (Nov. 15, 2007), available at [http://foreignaffairs.house.gov/hearing\\_notice.asp?id=927](http://foreignaffairs.house.gov/hearing_notice.asp?id=927).

27. Prior to 2005, the State Department reportedly was not consulted in extraordinary renditions cases. Its role in Guantanamo transfers evolved and became more standardized over time. See Statement of John Bellinger, *supra* note 5, at 19 (“To the best of my knowledge, the Department has not been asked by other agencies to provide assurances from foreign countries in the type of situation described above”).

28. See DOJ Task Force Press Release, *supra* note 1.

### Negotiating Assurances

There is little to no public information about the State Department's protocol for negotiating assurances. In extradition and deportation cases, US embassies have exchanged assurances over cable with foreign governments.<sup>29</sup>

For Guantánamo cases, more details are known. The State Department's Special Envoy for the Closure of the Guantánamo Bay Facilities leads diplomatic efforts to negotiate resettlement and repatriation of Guantánamo detainees. In these cases, negotiations on assurances against torture occur alongside negotiations for post-transfer security arrangements; indeed, torture assurances are only one part of the larger conversation about post-transfer responsibilities of the US and the receiving government authorities.<sup>30</sup> According to former State Department official Vijay Padmanabhan, the bilateral negotiations occur in foreign state capitals or in Washington, D.C., with Department of Defense officials negotiating post-transfer security arrangements and State Department officials evaluating assurances against torture.<sup>31</sup> "Assurances themselves often represent a culmination of many conversations between the US and others," another former official told the Human Rights Institute, "and there are many cases where the majority of those conversations are about more than just humane treatment of the individual in question."<sup>32</sup>

There is no indication that the State Department requires every assurances agreement to make specific guarantees, such as particular monitoring mechanisms or renunciation of certain interrogation techniques. In a 2007 affidavit, Ambassador-at-Large for War Crimes Clint Williamson said that "in every case in which continued detention or other security measures" by the receiving government are "foreseen," the US seeks "the assurance of humane treatment and treatment in accordance with the international obligations of the foreign government accepting transfer."<sup>33</sup> According to Padmanabhan, the State Department officials would go into negotiations with language they wanted, including a reference to the UN Convention Against Torture if the country was a party to it, but ordinarily compromised. They would not compromise, however, on some guarantee of access to the returnee, by the ICRC or US personnel.<sup>34</sup>

### Evaluating Assurances

The State Department also has a leading role in evaluating assurances. It makes the initial recommendation on the reliability of the assurances to the other government agencies with decision-making authority.

In June 2008, then-Legal Adviser to the Secretary of State John Bellinger described the State Department's evaluation of assurances. Emphasizing that the State Department evaluates assurances on a "case-by-case basis," he described three main factors for assessing the risk of torture and the reliability of assurances for a particular receiving country:

- "[T]he extent to which torture may be a pervasive aspect of its criminal justice, prison, military or other security system;
- the ability and willingness of that country's government to protect a potential returnee from torture;
- and the priority that government would place on complying with an assurance it would provide to the United States government (based on, among other things, its desire to maintain a positive bilateral relationship with the United States government)."<sup>35</sup>

29. Statement of John Bellinger, *supra* note 5, at 21.

30. See Guantanamo Review Task Force, Final Report (Jan. 22, 2010) available at [http://media.washingtonpost.com/wp-srv/nation/pdf/GTMOtaskforcereport\\_052810.pdf?sid=ST2010052803890](http://media.washingtonpost.com/wp-srv/nation/pdf/GTMOtaskforcereport_052810.pdf?sid=ST2010052803890).

31. Human Rights Institute interview with Vijay Padmanabhan, former Attorney-adviser in the Office of the Legal Adviser, US Department of State, New York, N.Y. (Feb. 11, 2010) [hereinafter Interview with Vijay Padmanabhan].

32. Human Rights Institute Interview with former Obama administration official, name withheld, N.Y., N.Y. (Jan. 20, 2009).

33. Declaration of Clint Williamson, Ambassador-at-Large for War Crimes Issues, Department of State office of War Crimes Issues, executed on July 7, 2008, In Sharaf Al Sanani, et al. V. Gates, Case No. 08-5515 (D.C. Cir. 2010) (on file with Human Rights Institute)[hereinafter Declaration of Clint Williamson].

34. Interview with Vijay Padmanabhan, *supra* note 31.

35. Statement of John Bellinger, *supra* note 5, at 15.

Although Bellinger described a rigorous and standardized process for evaluating assurances in 2008, in two recent cases there are indications that the State Department failed to exercise such scrutiny.

- Recent “political or legal developments” in the receiving country that “would provide context for the assurances provided”
- The receiving country’s “track record in complying with similar assurances previously provided to the US or another country”
- The receiving country’s “capacity and incentives to fulfill its assurances.”<sup>37</sup>

Bellinger’s first two factors track the European Court of Human Rights’ analysis of assurances in the landmark case *Chahal v. UK*, which held that the UK had breached its obligations in accepting assurances from India, given the pervasive level of torture there and the Indian government’s limited ability to control its security forces.<sup>36</sup> The third factor is also one on which the UK has repeatedly relied in justifying its attempted deportations to countries with known records of torture and abuse (see Part II, Ch. 3).

Bellinger also described additional factors for evaluating assurances:

- The official providing the assurance, including her “identity, position or other relevant information”
- The “judicial and penal conditions and practices” of the receiving country

#### CASE STUDY: STATE DEPARTMENT EVALUATION OF ASSURANCES FROM INDIA & SYRIA

Although Bellinger described a rigorous and standardized process for evaluating assurances in 2008, in two recent cases there are indications that the State Department failed to exercise such scrutiny. Although these cases may be outliers—the government’s failure to disclose its analysis in other cases makes it difficult to tell—they raise questions about the sufficiency and regularity of the State Department’s evaluations of assurances.

##### Extradition of Barapind to India: State Department’s Risk Assessment Failure

In 2006, the Human Rights Institute and the ACLU filed Freedom of Information Act requests with several US agencies, including the State Department, seeking information about the US government’s process of evaluating assurances. Released documents include an exchange between high-level US State Department officials and Indian diplomats regarding the 2006 extradition of Kulbir Singh Barapind, a Sikh separatist who feared torture by local police, by whom he had previously been tortured (see Appendix II).

The exchange reveals that US State Department officials failed to fully investigate the risk of abuse, including an earlier alleged breach of assurances and the feasibility of post-return monitoring. In one memo, US embassy officials admitted that they were “unable authoritatively to confirm” whether Kamaljit Kaur and Sukhminder Sandhu, individuals extradited based on assurances in 1997 who were from the same region as Barapind, were tortured. In fact, the two individuals had signed affidavits describing their torture by Indian police, and Barapind’s attorneys had raised the issue with the State Department.

Although portions of the documents were redacted, it also appears that the embassy failed to verify whether monitoring had in fact occurred after the 1997 extradition.

36. See *infra* note 266 and accompanying text.

37. Statement of John Bellinger, *supra* note 5, at 17.

The documents also reveal that the State Department’s analysis disregarded Barapind’s individual risk factors. For instance, the State Department’s analysis did not address whether the police officers who previously tortured Barapind still held positions of authority. It also did not assess whether the central government authorities giving the assurances had the ability to supervise or control the state police. Instead, the State Department relied on the existence of Indian laws prohibiting torture—laws that were in place when Barapind was previously tortured.<sup>38</sup>

### Barapind Diplomatic Cable

*The cable below sent by the U.S. embassy in Delhi demonstrates a failure on the part of the US government to follow up on previous transfers. The cable, regarding the 2006 extradition of Kulbir Singh Barapind, reveals that the US failed to monitor the post transfer treatment of the Sandhus, both of whom signed affidavits claiming they were tortured by Indian police. Despite this, the US government agreed to accept assurances from the Government of India for Barapind.*

11. (SBU) Mission is keenly aware of the culture of torture and extrajudicial punishment in Indian jails, as we have outlined in successive Human Rights Reports, furthermore, Mission has been unable authoritatively to confirm whether the Sandus were tortured by Indian police officials after their extradition.

### Removal of Arar to Syria: State Department’s Failure to Raise Issue of Risk

In the 2002 Maher Arar case, the State Department failed to play any significant role. In summary proceedings described further below, Arar was removed from the US and ultimately transferred to the custody of Syrian intelligence officials, who had apparently provided assurances to the US government, but who reportedly subjected Arar to torture. Although the content of the assurances remains unknown, one US government official has testified that the government based Arar’s removal on assurances which were “ambiguous regarding the source or authority purporting to bind the Syrian government.”<sup>39</sup>

The State Department has denied any involvement in the case,<sup>40</sup> but a 2010 report by the Office of Inspector General (OIG) of the Department of Homeland Security indicates the US Department of Justice consulted with at least one official, then-Deputy Secretary of State Richard Armitage, who failed to raise concerns about Arar’s treatment, or assurances—either their sufficiency or their existence.

Armitage, whom the Office of Inspector General interviewed, reported that he had a “brief—only two to three minutes, and casual” conversation about Arar with the Deputy Attorney General Larry Thompson, who asked whether Armitage had any “foreign policy objections” to removing Arar to Syria. Armitage reported that he replied “no” and that his “only concern was whether Mr. Arar was a United States citizen.” Armitage added that “Syria was helping us with Al Qaida.” Armitage reported that Deputy Attorney General Thompson did not ask that he provide diplomatic assurances.

The Office of Inspector General also interviewed then-Deputy General Thompson, who recalled the brief phone call, saying: “[W]hat I was doing was following the procedure that I had usually followed in terms of dealing with my colleagues...which was to call them and let them know what might be going on at Justice that might be of interest to their agency.” In the Office of Inspector General’s redacted report, there is no

38. See ACLU, Documents Reveal US Knowingly Transfers Detainees to Countries That Torture (Nov. 18, 2008), <http://www.aclu.org/national-security/documents-reveal-us-knowingly-transfers-detainees-countries-torture>; see also Email to Human Rights Institute from Sukhman Dhami, Co-director, Ensaaf (Nov. 18, 2010) (on file with Human Rights Institute) [hereinafter Email from Sukhman Dhami].

39. US Department of Homeland Security Inspector General Report OIG-08-18, ‘The Removal of a Canadian Citizen to Syria’: Joint Hearing before the Committee on the Judiciary and Committee on Foreign Affairs 110th Cong, 101, 196, (June 5, 2008) (testimony of Richard L. Skinner, Office of the Inspector General, US Department of Homeland Security) transcript available at [http://www.fas.org/irp/congress/2008\\_hr/arar.html](http://www.fas.org/irp/congress/2008_hr/arar.html).

40. See *supra* note 27.

indication that Thompson reported any objection raised by Armitage or others at the State Department.<sup>41</sup>

In sum, at least one senior State Department official was consulted, he failed to raise any objection to Arar's removal based on the risk of torture, including on the unreliability of assurances.

### **Transfer Decision-Making by US Agencies**

Different US agencies possess the authority to transfer an individual pursuant to assurances, depending on the context.

In extraditions, transfer decision-making authority lies within the State Department, with the Secretary of State. Once a US judicial officer finds a fugitive extraditable, the Secretary or Deputy Secretary of State decides whether to surrender the individual, considering, among other issues, whether the person facing extradition from the US “is more likely than not” to be tortured in the country requesting extradition. Surrender may be conditioned on the requesting country's provision of specific assurances on torture and fair trial protections.<sup>42</sup> Various State Department Bureaus (including the Bureau of Democracy, Human Rights and Labor (DRL)), and the relevant regional bureau, country desk or US embassy, assist the Secretary in evaluating the risk of torture.<sup>43</sup>

Under US regulations governing deportation cases, the State Department forwards assurances to the Department of Homeland Security. The Secretary of Homeland Security, in consultation with the Secretary of State, determines whether the assurances are sufficiently reliable to allow the individual's removal consistent with Article 3 of the UN Convention Against Torture.<sup>44</sup>

The State Department's role is the same in transfers out of Guantánamo, but it is not legally codified. In practice, the Department of States' Office of War Crimes Issues seeks and, in consultation with other State Department officials, evaluates the reliability of assurances. The Department of Defense is not legally obligated to follow the State Department's recommendations. However, multiple former officials told the Human Rights Institute that the Department of Defense had never transferred an individual against the recommendation of the State Department, though it may have done so where the State Department raised some concerns without raising complete opposition against the transfer.<sup>45</sup>

### **Assurances in Transfers from Guantánamo**

As of December 2010, there are 33 detainees at Guantánamo who have been cleared for transfer by unanimous decision of the interagency Guantánamo Review Task Force, but who cannot be repatriated to their country of origin due to fear of persecution or torture.<sup>46</sup> (More than 520 detainees have been released or transferred since 2002.<sup>47</sup>)

41. See Office of Inspector General, “The Removal of a Canadian Citizen to Syria,” Addendum to OIG-08-18 (Mar 2010), available at [http://www.dhs.gov/xoig/assets/mgmt/rpts/OIGa\\_08-18\\_Mar10.pdf](http://www.dhs.gov/xoig/assets/mgmt/rpts/OIGa_08-18_Mar10.pdf).

42. Statement of John Bellinger, *supra* note 5; 22 C.F.R. § 95 (2010).

43. Declaration of Samuel M. Witten, then-Assistant Legal Adviser for Law Enforcement and Intelligence in the Office of the Legal Adviser of the US Department of State, *Cornejo-Barreto v. Seifert*, No.01-cv-662-AHS, ¶ 4 (C.D. Cal. Oct.2001) [hereinafter Declaration of Samuel M. Witten]; 22 C.F.R. § 95.3(a).]

44. 8 C.F.R. § 208.18(c) (2010).

45. Interview with Vijay Padmanabhan, *supra* note 31; Human Rights Institute interview with former State Department official, New York, NY (Jan. 27, 2010); Human Rights Institute interview with current US official (details withheld).

46. See Exec. Order No. 13,492, 74 Fed. Reg. 4,897 (Jan 22, 2009) (ordering closure of detention facilities at Guantanamo “as soon as practicable and no later than 1 year from the date of this order”). See also Press Release, Department of Defense, Detainee Transfers Announced, No. 358-10 (May 4, 2010); Andy Worthington, The Irrelevance of WikiLeaks' Guantanamo Revelations, Andy Worthington.co.uk, (Dec. 1, 2010, <http://www.andyworthington.co.uk/2010/12/01/the-irrelevance-of-wikileaks-guantanamo-revelations/>).

47. See Press Release, United States Department of Justice, United States Transfer Three Guantanamo Bay Detainees to Georgia, (Mar. 23, 2010). Detainees have been transferred to Albania, Algeria, Afghanistan, Australia, Bangladesh, Bahrain, Belgium, Bermuda, Chad, Denmark, Egypt, Georgia, France, Hungary, Iran, Iraq, Ireland, Italy, Jordan, Kuwait, Libya, Maldives, Mauritania, Morocco, Pakistan, Palau, Portugal, Russia, Saudi Arabia, Slovakia, Somalia, Spain, Sweden, Switzerland, Sudan, Tajikistan, Turkey, Uganda, United Kingdom and Yemen. *Id.*

For these remaining detainees, the government has two options: to continue pressing a third country to accept the detainees for resettlement, a difficult process that delays closing Guantánamo, or to repatriate them—at times, against their will—on the basis of assurances of humane treatment and other protections.

### **Past Assurances-Based Guantánamo Transfers**

At least since 2005, the US government has solicited assurances in the transfer of every individual from Guantánamo, even to countries with relatively good human rights records, like the UK.<sup>48</sup> The government touts assurances as an element of its policy against transfer or repatriation of Guantánamo detainees to countries “where it believes it is more likely than not that they will be tortured.”<sup>49</sup>

**At least since 2005, the US government has solicited assurances in the transfer of every individual from Guantánamo**

For example, Spain provided the US assurances when it transferred Guantánamo detainee Hamed Abderrahman Ahmed for prosecution in Spanish courts (see Appendix III). A US embassy diplomatic cable released by WikiLeaks in November 2010 described “the terms of that transfer [which] Spanish authorities agreed to”:

- “Be prepared to detain, investigate, and prosecute Abderrahaman, while treating him humanely;
- Share with [US] authorities any information developed during the investigation;
- Provide reasonable notice of any decision to release or transfer Abderrahaman;
- Conduct surveillance of Abderrahaman following his release, and share any relevant information with the US; and,
- Provide US officials access to Abderrahaman if necessary.”<sup>50</sup>

Whether the cable is indicative of the typical guarantees the US receives is unknown. Detainees’ attorneys are ordinarily barred from divulging specific information about assurances.

### **RULING OUT REPATRIATIONS**

The US government has declined to transfer detainees to some countries due to human rights conditions there or reports of mistreatment to previously returned detainees. In July 2010, an unnamed Obama administration official reportedly told the Washington Post that these countries include China, Syria, Tunisia and Uzbekistan.<sup>51</sup> A former government official told the Human Rights Institute that the US ruled out transfers to China and Russia as early as 2006.<sup>52</sup> The US also refused to repatriate Uighur detainees to China based on concerns of mistreatment, despite diplomatic tension and difficulty in finding governments willing to resettle them (see Part I, Ch. 1).

### **ABUSE OF REPATRIATED GUANTÁNAMO DETAINEES DESPITE ASSURANCES**

Publicly, the government has refused to acknowledge cases of breached assurances, including its failure to ensure that post-return monitoring occurred. In June 2008, then-Legal Adviser John Bellinger testified before Congress that in 99 percent of the Guantánamo cases, “the diplomatic assurances have been fine.” He admitted there had been “allegations” of “mistreatment” in “a small handful of five or so” cases.<sup>53</sup> But

48. Declaration of Pierre-Richard Prosper, War Crimes Ambassador, *Sherif el-Mashad, et al. v. Bush*, February 25, 2005, Annex I, Tab 2, 2nd US Periodic Report, *supra* note 25.

49. Declaration of Joseph Benkert, *supra* note 25, at ¶ 3.

50. US Embassy in Madrid, “Court Frees ‘Spanish Taliban,’” Ref. ID 06MADRID1914 (June 28, 2006; released Nov. 30, 2010).

51. Peter Finn, *Six detainees would rather stay at Guantánamo Bay than be returned to Algeria*, Washington Post, July 10, 2010.

52. Human Rights Institute interview with former official (name and date withheld).

53. Statement of John Bellinger, *supra* note 5, at 13.

by that time, the State Department knew or should have known of several cases where assurances failed to prevent the torture of transferred Guantánamo detainees.

In the following cases, while the terms of the transfers are unknown, the US almost certainly sought assurances of humane treatment consistent. A boilerplate declaration, submitted in several Guantánamo cases, indicates that the US seeks assurances of humane treatment “in every transfer case” where “continued detention or other security measures” by the receiving government are “foreseen.”<sup>54</sup> Nevertheless, there are credible reports that these detainees were abused.

**Tajikistan:** Mokit Vohidov and Rukhniddin Sharopov were repatriated to Tajikistan in March 2007 and, within months, convicted and sentenced to 17 years for “serving as mercenaries in Afghanistan” and “illegal border crossing.” At an August 2007 court hearing, both reported that they were tortured into confessing.<sup>55</sup> Lending credence to their allegations, the Tajik government has a record of subjecting alleged “Islamists” to torture and ill-treatment in detention.<sup>56</sup> Vohidov and Sharopov’s trials were reportedly so swift that they had little or no time to prepare their case, including by arguing that the evidence did not show that they were involved in combat or acts of terrorism, making their sentences disproportionate.<sup>57</sup> Even putting aside their claims of torture, the US should not have repatriated the detainees in light of what the State Department has called “harsh and life threatening” prison conditions.<sup>58</sup> Nevertheless, the US has failed to foreclose the option of sending another Guantánamo detainee, Umar Abdulayev, to Tajikistan.

**Tunisia:** The US repatriated Abdullah al-Hajji Ben Amor and Lufti Lagha to Tunisia in 2007. A cable released by WikiLeaks reports that in a June 2009 meeting of a “small group of Ambassadors,” US ambassador to

Publicly, the government has refused to acknowledge cases of breached assurances, including its failure to ensure that post-return monitoring occurred.

Tunisia Robert Godec acknowledged “credible reports of one of the first two transferees being mistreated, including information from the lawyer, the family and statements in open court.” Godec also said that contrary to the Tunisian government’s claims, the ICRC could not visit all Tunisian prisons. The UK ambassador said that the Tunisian government used “torture as a form of punishment” and the Canadian ambassador called Tunisia’s claims that it does not torture “bullshit.” According to the cable, “Canadian and German Ambassadors agreed that anyone in Tunisian prisons on terrorism charges is at risk of mistreatment or torture.”<sup>59</sup> Since the 2007 returns, Albania and Slovakia have each taken

one Tunisian detainee for resettlement, two Tunisian detainees were sent to Italy for prosecution, and six Tunisian detainees remain at Guantánamo.<sup>60</sup>

54. Declaration of Clint Williamson, *supra* note 33, ¶6.

55. Human Rights Institute interview (details withheld).

56. See Amnesty International, *Tajikistan-2008 Human Rights Report* (2008), <http://www.amnesty.org/en/region/tajikistan/report-2008#>.

57. Dabiri Kabir, Daler Gufronov & Parvina Khamidova, *Review Urged for Ex-Guantanamo Tajiks*, Institute for War & Peace Reporting (RCA Issue 618), (June 23, 2010).

58. US State Department, “2007 Country Report on Human Rights Conditions—Tajikistan,” <http://www.state.gov/g/drl/rls/hrrpt/2007/100621.htm>.

59. US Embassy in Tunisia cable, *supra* note 8; Human Rights Watch, *Ill-Fated Homecomings: A Tunisian Case Study of Guantanamo Repatriations* (Sept. 4, 2007).

60. See N.Y. Times, *The Guantanamo Docket: Citizens of Tunisia*, <http://projects.nytimes.com/guantanamo/country/tunisia>.



**Russia:** In 2007, Human Rights Watch documented credible allegations of abuse and harassment by multiple returnees to Russia.<sup>61</sup> According to Human Rights Watch, US officials admitted that they had made no effort to monitor the treatment of the seven detainees repatriated to Russia in 2004, two of whom later reported that they were tortured and all of whom said that Russian authorities harassed them.<sup>62</sup>

The US has also repatriated detainees to other countries with records of prisoner abuse, including Afghanistan, Algeria, Chad, Iraq, Saudi Arabia, and Yemen.<sup>63</sup> However, under the Obama administration, the US has opted to resettle detainees from Egypt, Libya, Syria, Tunisia and Uzbekistan, rather than repatriate them.<sup>64</sup>

### **Ongoing Cases: Forced Repatriations Without Judicial Review?**

A January 2010 interagency Guantánamo Review Task Force report said that “[t]he State Department is engaged in ongoing discussions for the remaining detainees who cannot be repatriated due to post-transfer treatment concerns and is on track to find resettlement countries for most if not all of the detainees in this category.”<sup>65</sup>

Nevertheless, some of the remaining Guantánamo detainees are at risk of being repatriated based on assurances, despite their opposition to transfer.<sup>66</sup> Under the Obama administration, the government has generally been receptive to evidence provided by attorneys for Guantánamo detainees who oppose repatriation due to risk of mistreatment. But if the US government pursues the transfer despite detainee opposition, it could conceivably conduct the repatriation without submitting to judicial review of the torture risk or the reliability of the assurance.

This due process void stems from recent Supreme Court and appellate court decisions suggesting that US courts will not block government decisions to repatriate detainees against their will, based on concerns about executive prerogative (see Part III, Ch. 2).<sup>67</sup> Blame should also be put on the Obama administration’s Justice Department, which has refused to foreclose the option of repatriation even in cases where there is credible evidence of the risk of abuse, including reports of abuse to already repatriated Guantánamo detainees. While the jurisprudence continues to develop, it appears that in cases where judges find continued detention unlawful, they can urge the government to pursue resettlement in a third country, but cannot issue orders actually preventing transfers.

Some of the remaining Guantánamo detainees are at risk of being repatriated based on assurances, despite their opposition to transfer.

### **CASE STUDY: FORCED REPATRIATIONS TO ALGERIA**

In July 2010, the Supreme Court refused to block the transfers of two Algerians: Farhi Saeed Bin Mohammed, who had not been transferred at the time of publication, and Abdul Aziz Naji, who was repatriated that month.<sup>68</sup>

61. See Human Rights Watch, *The “Stamp of Guantanamo”: The Story of Seven Men Betrayed by Russia’s Diplomatic Assurances to the United States* (Mar. 28, 2007).

62. Neither Russia nor the US disclosed the terms of the assurances on which the repatriations were based. Human Rights Watch, *The “Stamp of Guantanamo,” supra* note 61, at 3, 13.

63. Guantanamo Review Task Force, *supra* note 28.

64. Journalist Andy Worthington has reported on each of these resettlements. See Andy Worthington, *Guantanamo Algerian Returns Home; Will Obama Suspend Future Transfers*, [AndyWorthington.co.uk](http://www.andyworthington.co.uk), (July 29, 2010), available at <http://www.andyworthington.co.uk>.

65. *Id.*

66. See Daphne Eviatar, *Pressure to Close GTMO Puts Some Prisoners at Risk*, *Washington Independent* (Oct. 1, 2009), available at <http://washingtonindependent.com/61891/pressure-to-close-gtmo-puts-some-prisoners-at-risk>.

67. See *Munaf v. Geren*, 553 U.S. 674 (2008), discussed *infra* Part III, Ch. 1.

68. See Lyle Denniston, *Curb on Judges’ Power Stands*, *SCOTUSblog*, July 16, 2010, 7:44 pm, available at <http://www.scotusblog.com/2010/07/curb-on-judges-power-stands/> (discussing *Mohammed v. Obama*, Order in Pending Case 10A52 and Naji).

Bin Mohammed and Naji feared mistreatment by both government authorities and extremists. As D.C. District Court Judge Gladys Kessler noted in a temporary order barring bin Mohammed's transfer, which was later overturned by an appellate court:

*Because [Bin Mohammed] has been designated an "enemy combatant," he greatly fears retribution by the Algerian authorities and that he will be formally charged under the Algerian Penal Code, tortured, convicted, and very possibly executed by the Algerian Government. He has claimed that he will be caught between the Algerian Government, which will brand him as an international terrorist, and armed domestic terrorists, who oppose the existing government, often pressure individuals to join their ranks, and retaliate violently when such individuals refuse. Petitioner has made clear that he would rather suffer continued confinement in Guantánamo Bay than be placed in the control of the Algerian Government.*

An unnamed Obama administration official reportedly told the Washington Post that the Algerian government had provided assurances that repatriated Guantánamo detainees "would not be mistreated." He added:

*We take some care in evaluating countries for repatriation. In the case of Algeria, there is an established track record and we have given that a lot of weight. The Algerians have handled this pretty well: You don't have recidivism and you don't have torture.<sup>69</sup>*

In court, the government's discussion of the assurances was characteristically oblique. A declaration by Daniel Fried, Special Envoy on Guantánamo, stated that Algeria had provided assurances that any Guantánamo Bay detainee transferred would receive "humane treatment...in accordance with the international obligations of the foreign government accepted transfer."<sup>70</sup>

"[T]his Court has an obligation to ensure there is real substance behind the[se] conclusory phrases," Judge Kessler wrote in an order requiring Fried to testify about his declaration in a closed hearing. "As is well known there is no better mechanism than interrogation by competent counsel to achieve that goal."<sup>71</sup>

In hearings "swamped in secrecy," Kessler's orders barring Mohammed's transfer were essentially overturned by the D.C. Court of Appeals, and Fried was never forced to testify.<sup>72</sup> The Supreme Court sided with the D.C. Court of Appeals, in what the legal blog SCOTUSblog called "the first indication that the Supreme Court will not allow federal judges to interfere with government controls on who leaves or stays at Guantánamo Bay."<sup>73</sup>

The Supreme Court also failed to block the transfer of Abdul Aziz Naji, who was transferred in July 2010 over the objection of his attorneys. Naji had filed an asylum application in Switzerland that was pending, and indicated that he would rather stay at Guantánamo than be transferred to Algeria, where he feared abuse by government and non-government forces. Naji was held in detention for a week after his return, and later put on "judicial control," which requires him to regularly report to police pending a further decision in his case. He has not reported being abused in detention or subsequently.<sup>74</sup>

As UN experts Manfred Nowak (then-Special Rapporteur on Torture) and Martin Scheinin (Special Rapporteur on the Protection of Human Rights while Countering Terrorism) noted, these may have been the first involuntary transfers of Guantánamo detainees by the Obama administration. "We are extremely worried that the lives of two Algerian detainees could be put in danger without a proper assessment of the risks they could face if returned against their will to their country of origin," the experts said. "While

69. Finn, *supra* note 48.

70. Denniston, *supra* note 57.

71. Farhi Saeed bin Mohammed v. Obama, Civil Action No. 05-1347 (D.D.C. June 10, 2010), available at <http://www.scotusblog.com/wp-content/uploads/2010/06/Kessler-on-Fried-hearing-6-10-10.pdf>.

72. Andy Worthington, *Obama and US Courts Repatriate Algerian from Guantanamo Against His Will; May Be Complicit in Torture*, AndyWorthington.co.uk, July 21, 2010, available at <http://www.andyworthington.co.uk>.

73. Denniston, *supra* note 69.

74. See Press Release, Center for Constitutional Rights, *Algerian Former Detainee Released to Family* (Jul. 27, 2010), available at <http://ccrjustice.org/newsroom/press-releases/algerian-former-detainee-released-family>.

we appreciate the efforts of the authorities to close the Guantánamo detention facility, the risk assessment should be a meaningful and fair process, and the courts should be part of it.”<sup>75</sup>

At least three other Guantánamo detainees are still at risk of being transferred to Algeria: Saeed bin Mohammed, Nabil Hadjarab, Motai Saib and Djamel Ameziane.<sup>76</sup> According to Ameziane’s lawyers, “[t]he stigma of having spent time at Guantánamo would alone be enough put him at risk of being imprisoned if he is returned.”<sup>77</sup> US officials have reportedly expressed concern about repatriating a fourth Algerian national, Ahmed Belbacha, who was sentenced in absentia to 20 years in prison.<sup>78</sup>

### Assurances in Transfers in Afghanistan

In Afghanistan, the US’s obligation not to transfer an individual where there is a risk of torture is implicated in three contexts: battlefield transfers, in which the US detains an individual for a short period before transferring him to Afghan custody; transfers of Afghan nationals held for longer periods at US-run facilities; and transfers of non-Afghan nationals held for longer periods at US-run facilities.

The majority of US military forces are assigned to the International Security Assistance Force (ISAF), which operates as the North Atlantic Trade Organization (NATO) mission in Afghanistan. The US and other ISAF military forces, comprised of allies including the UK, Canada, Denmark and the Netherlands, have picked up thousands of individuals in Afghanistan. Under ISAF rules, ISAF forces must transfer these individuals to the National Directorate Service (NDS), an Afghan intelligence agency, despite its record of torture.<sup>79</sup> These “battlefield transfers” are discussed in the first part of this section. Non-ISAF US forces, known as US Forces-Afghanistan (USFOR-A), can also transfer apprehended individuals to its Detention Facility in Parwan, discussed in the second part of this section.

### Battlefield Transfers

ISAF rules require military forces to transfer battlefield detainees to the Afghan intelligence agency NDS within 96 hours; the US, UK and Canada have declared caveats permitting them to transfer detainees within 14 days.<sup>80</sup> Allied governments, journalists and human rights organizations have investigated numerous allegations of abuse in regard to individuals transferred by the UK, Denmark and Canada to the NDS

“While we appreciate the efforts of the authorities to close the Guantánamo detention facility, the risk assessment should be a meaningful and fair process, and the courts should be part of it.”

— UN experts Manfred Nowak and Martin Scheinin

75. UN Office of the High Commissioner for Human Rights, *UN rights experts on torture and counter-terrorism concerned about fate of Guantánamo detainees* (July 21, 2010) available at <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10224&LangID=E>.

76. For a discussion of the Algerian detainees’ opposition to repatriation, see Andy Worthington, *supra* note 61.

77. Canadian Council for Refugees, *Djamel Ameziane: Algerian Guantánamo Refugee in Need of Refugee Protection*, available at [www.ccrweb.ca/eng/media/documents/amezianeprofile.pdf](http://www.ccrweb.ca/eng/media/documents/amezianeprofile.pdf).

78. Posting of Peter Finn, *A Detainee Goes Home, Against His Will*, Washington Post: Checkpoint Washington Blog, [http://voices.washingtonpost.com/checkpoint-washington/2010/07/a\\_detainee\\_goes\\_home\\_against\\_h.html](http://voices.washingtonpost.com/checkpoint-washington/2010/07/a_detainee_goes_home_against_h.html), July 19, 2010.

79. See Department of Defense Bloggers Roundtable with Robert Harward, Commander, Joint Task Force 435, *dodlive.mil* (Jan. 27, 2010), available at [http://www.defense.gov/Blog\\_files/Blog\\_assets/20100127\\_Harward\\_transcript.pdf](http://www.defense.gov/Blog_files/Blog_assets/20100127_Harward_transcript.pdf) (“ISAF and US forces operating under ISAF this year alone captured just under 2,000. Those 2,000 go through a short period of detention by ISAF, up to 96 hours, and then they’re turned over to Afghan security – be it NDS, APA, ANP.”)

80. Vice Admiral Robert Harward, Commander of Joint Task Force 435 & US Ambassador to Afghanistan Hans Klemm, Department of Defense News Briefing (Aug 5, 2010), available at <http://www.defense.gov/Transcripts/Transcript.aspx?TranscriptID=53002> [hereinafter Briefing with Harward and Klemm]; Human Rights Institute interview with human rights researcher (name withheld), New York, NY (Nov. 12, 2010).

(see Part II, Ch. 3 & 4).<sup>81</sup> Prompted by these investigations, these countries have sought bilateral agreements and access to transferred detainees. In contrast, the fate of US transferees has not been significantly reported on and little is known about protections the US has sought from the NDS. While the US government has hinted at the existence of a similar bilateral agreement in litigation, unlike its allies, the US has not made the agreement publicly available.<sup>82</sup>

In 2007, the US joined Canada, the UK, the Netherlands, Norway and Denmark in signing an exchange of letters with the Afghan government intended to establish a common approach to battlefield transfers. The letters provide that officials from each government should have access to Afghan detention facilities “to the extent necessary to ascertain the location and treatment of any detainee transferred by that government to the Government of Afghanistan” and, on request, access to interview any transferred detainee in private. The letters guarantee the same access for organizations described in other bilateral agreements, including the ICRC, UN human rights bodies and the Afghan Independent Human Rights Commission. The Afghan National Security Advisor signed the letters on behalf of the government of Afghanistan, adding that the NDS would issue written instructions to all of its provincial offices informing them of visiting procedures.<sup>83</sup>

The US has also participated in the Copenhagen Process, a series of meetings among government officials from 28 countries intended to formulate a common framework for handling detainees in international military operations, including conditions for the transfer of prisoners to the local authorities or to other countries.<sup>84</sup> Some human rights advocates have expressed concern that the process undercuts existing norms that already govern the detention and transfer operations. The Danish government, which is leading the effort, has emphasized that its objective is to make the existing legal framework “more comprehensive, well-known and feasible to apply in practice.”<sup>85</sup>

As of winter 2010, the US was pursuing a bilateral agreement with the Afghan government about a new monitoring arrangement, expected to be in place within months.<sup>86</sup> At the time of publication, details about the new agreement were not publicly available.

There are a number of safeguards the US could pursue for detainee transfers, drawing especially from *R (Evans) v. Secretary of State for Defence*, a June 2010 UK appellate court decision. In *R (Evans)*, the court required the UK to expressly condition transfers to the NDS on the UK being given “access to each transferee on a regular basis, with the opportunity for a private interview on each occasion.” It mandated that the UK conduct interviews with each transferred detainee “in private on a regular basis” and that the UK consider suspending transfers “if full access is denied at any point without any good reason” (see Part II, Ch. 3).

As described in the Human Rights Institute report *U.S. Monitoring of Detainee Transfers in Afghanistan: International Standards and Lessons from the UK & Canada*, during suspension periods the US could develop the capacity of NDS personnel at facilities to which the US transfers detainees and engage with NDS authorities about specific steps to improve detention conditions and ensure full monitoring access. In the interim, it could transfer detainees to the Afghan National Detention Facility, which already holds individuals captured in counter-insurgency operations and has humane conditions.<sup>87</sup> The US could also consider

81. See *infra* Part II, Ch. 3 (UK) and 4 (Canada).

82. Responding to a challenge to its decision to transfer an individual to Afghan custody, US Department of Justice lawyers noted “on-going diplomatic arrangements with the Government of Afghanistan regarding its presence there, including arrangements regarding the transfer of Afghan citizens detained by the United States.” Respondents’ Opposition to Petitioner’s Motion for an Order Requiring Respondents to Provide 30 Days’ Advance Notice of any Proposed Transfer of Petitioner Rohullah from Bagram, *Ruzatullah v. Rumsfeld*, No. 06-CV-01707 (GK) (D.D.C. Aug. 24, 2007).

83. See *Queen in re: Maya Evans v. Sec’y of State for Defence*, [2010] EWHC 1445 (Q.B.) (U.K.).

84. See Thomas Winkler, *The Copenhagen Process on Detainees: A Necessity*, *Nordic Journal of International Law* 78 (2010), 489-498.

85. Thomas Winkler, Acting Legal Adviser, Ministry of Foreign Affairs, Denmark, *The Copenhagen Process on the Handling of Detainees in International Military Operations* (Sept. 4, 2008) in *International Humanitarian Law: Human Rights and Peace Operations* 244 (Gian Luca Beruto ed., 2008).

86. Human Rights Institute interview with human rights researcher (name withheld), in New York, NY (September 3, 2010).

87. See Testimony of Andrea Prasow, senior counterterrorism counsel, Human Rights Watch, Special Committee on the Canadian Mission in Afghanistan, Parliament of Canada (May 5, 2010).

holding detainees it would ordinarily transfer to the NDS at the US Detention Facility at Parwan; with the anticipated facility transfer in 2011 (described below), those individuals could be transferred to Afghan custody subject to the condition that they would not be handed to the NDS until it met human rights standards for detention.

As recognized by General Stanley McChrystal, then-head of ISAF forces, in an August 2009 report, it is in US strategic interest to support the development of rights-respecting Afghan institutions:

*Afghanistan must develop detention capabilities and operations that respect the Afghan people. A failure to address [Afghan government] capacity in this area presents a serious risk to the mission.*<sup>88</sup>

Continuing transfers to the NDS without establishing safeguards against abuse undermines US efforts to break the perceptual link between the US and torture, and win Afghan “hearts and minds.”

### **Transfers Out of Longer-Term Afghanistan Detention**

A second group of individuals detained by the US are not immediately transferred to Afghan custody, but face the prospect of transfer either to their home countries or, eventually, to Afghan authorities.<sup>89</sup> There are some indications that the US has used assurances in these transfers, but details are unknown.

The process for such individuals begins at field detention sites, where the USFOR-A (non-ISAF US forces) may hold individuals detained by its ISAF forces for up to 14 days. US authorities assess whether the individuals should be released, transferred to Afghan authorities or sent to Parwan if they are “involved in the fight and [are] a threat to Afghan or coalition forces.”<sup>90</sup>

These individuals and those picked up by non-ISAF US forces are detained at the US Detention Facility in Parwan, located near Kabul, Afghanistan, which currently holds more than 1,000 individuals.<sup>91</sup> The Parwan facility was opened in 2009 to replace the Bagram Theater Internment Facility,<sup>92</sup> which had grown notorious for US

**“Afghanistan must develop detention capabilities and operations that respect the Afghan people. A failure to address [Afghan government] capacity in this area presents a serious risk to the mission.”**  
— *General Stanley McChrystal, former head of US forces in Afghanistan*

88. NATO International Security Assistance Force, *Commander’s Initial Assessment*, Aug. 30, 2009), available at [http://media.washingtonpost.com/wp-srv/politics/documents/Assessment\\_Redacted\\_092109.pdf](http://media.washingtonpost.com/wp-srv/politics/documents/Assessment_Redacted_092109.pdf) (calling for transfer of long-term detention operations to Afghan authorities).

89. For a history of US detention operations in Afghanistan since 2001, see Lt. Colonel Jeff A. Bovarnick, *Detainee Review Boards in Afghanistan: From Strategic Liability to Legitimacy*, The Army Lawyer (Department of the Army Pamphlet) 27-50-445, at 9 (June 2010).

90. Briefing with Harward and Klemm, *supra* note 80.

91. As of October 2010, the number of Afghans held at Parwan was reportedly more than 1,100. See Rachel Reid, *Are Review Boards for Suspected Afghan Insurgents Fair*, L.A. Times (Oct. 20, 2010). In January 2010, the US government released the names of 635 detainees held at Bagram as of September 2009, but withheld other vital details such as their citizenship, where they were apprehended and how long they were held. More recently, the government said that it had “less than 1,000 at any given time” in military custody. See Press Briefing, International Security Assistance Force, Brig. Gen. Mark Martins Provides an Update on Detainee Operations (June 16, 2010) transcript available at <http://www.isaf.nato.int/article/transcripts/transcript-opening-statement-for-isaf-news-briefing-with-joint-task-force-435-on-detainee-operatio.html>.

92. See US Central Command, *New Task Force Assumes Control of Detainees Operations in Afghanistan* (Jan. 8, 2010), available at <http://www.centcom.mil/en/news/new-task-force-assumes-control-of-detainee-operations-in-afghanistan>. (estimating 750 detainees in US custody in Afghanistan at the time of Joint Task Force-435’s creation, in January 2010).

prisoner abuses first reported in 2005.<sup>93</sup> (In May 2010 and October 2010, respectively, the BBC and Open Society Foundations separately reported that the US government runs a screening facility at Bagram Air Base where prisoners are subjected to sleep deprivation and other mistreatment; individuals may be kept at the screening facility for short periods before being released or transferred to Parwan).<sup>94</sup>

Department of Defense Joint Task Force-435 oversees the new facility and Afghan detainee operations generally, and has established a new detention review process. Detainee Review Boards, convened within sixty days of an individual's transfer to Parwan, may order the release of a detainee to the "custody" of village communities through *shuras*, or local councils.<sup>95</sup> They may also order that the individual be transferred to Afghan authorities for prosecution. Third-party nationals may be repatriated or referred to third countries for prosecution. Finally, the review boards can recommend that the individual continue to be detained at Parwan.<sup>96</sup> As discussed below, however, the US plans to eventually transfer the Parwan facility, and the Afghan nationals held there, to Afghan authorities.

### Parwan Facility Transfer

The US expects to transfer the Parwan facility to the Afghan Ministry of Defense some time in 2011, which will in turn transfer it to the Ministry of Justice.<sup>97</sup> The US government has trained more than 400 Afghan military police to staff the transferred facility and a larger complex,<sup>98</sup> which it has promoted as ultimately "becom[ing] Afghanistan's central location for the pre-trial detention, prosecution and post-trial incarceration of national security suspects."<sup>99</sup> In light of the poor condition of the Afghan criminal justice system, human rights advocates worry that after the facility is transferred, detainees will face a risk of abuse, prolonged pre-trial detention and the possibility of unfair trials.<sup>100</sup> In an apparent answer to these concerns, at least 100 detainees were reportedly scheduled for trial under the Afghan criminal legal system at the Parwan facility's Justice Center in 2010, with the US providing training and resources to judges and prosecutors.<sup>101</sup>

In publicly touting its plan to transfer the facility, the US government has not alluded to plans to seek guarantees of humane treatment of the detainees on an individual or group basis before the final facility handover. But in 2005, under the Bush administration, the US government reportedly negotiated a confidential diplomatic agreement with Afghan authorities to transfer detainees (then held at Bagram) if the Afghan government gave written assurances that it would treat the detainees humanely and abide by

93. See Tim Golden, *In US Report, Brutal Details of 2 Afghan Inmates' Deaths*, N.Y. Times, May 20, 2005.

94. Hilary Andersson, *Red Cross Confirms 'Second Jail' at Bagram, Afghanistan*, BBC News, May 11, 2010, available at <http://news.bbc.co.uk/2/hi/8674179.stm>; Open Society Foundations, *Confinement Conditions at a US Screening Facility on Bagram Air Base*, Policy Brief No. 3 (2010); Human Rights Institute interview with human rights researcher (name withheld), New York, NY (Nov. 12, 2010).

95. See Soraya Sarhaddi Nelson, *All Things Considered: Afghan Detainees Make an Uneasy Journey Home*, National Public Radio broadcast (Mar. 23, 2010). For a discussion of continuing deficiencies of the detainee review boards, see Andrea Prasow, *The Bagram Detainee Review Boards: Better, But Still Falling Short*, Jurist, June 1, 2010, available at <http://jurist.org/forum/2010/06/bagram-detainee-review-boards-show-improvement-but-still-fall-short.php>. As of July 2010, more than 150 Parwan detainees have been released after signing a pledge to renounce violence. See US Central Command, *Former detainees released to families, tribal elders* (July 21, 2010) available at <http://www.centcom.mil/en/news/former-detainees-released-to-families-tribal-elders>.

96. From September 2009 to June 2009, the review boards recommended that 64 percent of detainees be held for continued detention, 14 percent for release, 11 percent for transfer to the Afghan National Defense Forces (pending criminal prosecution), 1 percent for repatriation and 1 percent for "third-country prosecution." Bovarnick, *supra* note 89.

97. US Central Command, *Afghan ministers accept responsibility of Parwan detention facility* (January 10, 2010), <http://www.centcom.mil/news/afghan-ministers-accept-responsibility-of-parwan-detention-facility>; US Dep't of Defense, *Media Shoots Imagery at Afghan Detention Facility* (August 30, 2010), available at <http://www.defenceiq.com/article.cfm?externalid=3081>.

98. Briefing with Harward and Klemm, *supra* note 80.

99. US Dep't of Defense, *supra* note 97.

100. See Human Rights First, *Fixing Bagram: Strengthening Detention Reforms to Align with US Strategic Priorities 9* (November 2009); see also Afghan Independent Human Rights Commission, *The Situation of Detention Centers and Prisons in Afghanistan*, (June 2010) available at [http://www.aihrc.org.af/2010\\_eng/Eng\\_pages/Reports/Thematic/rep\\_25\\_jun\\_2010.pdf](http://www.aihrc.org.af/2010_eng/Eng_pages/Reports/Thematic/rep_25_jun_2010.pdf).

101. US Central Command, Petraeus, *Officials Discuss Transfer of Detainee Ops* (July 26, 2010), available at <http://www.centcom.mil/en/news/petraeus-officials-meet-to-discuss-transfer-of-detainee-operations>.

elaborate security conditions. Reportedly, the agreement also specified that the US would finance the rebuilding of an Afghan prison block and help equip and train an Afghan guard force—a reference to the now-completed Afghan National Detention Facility.<sup>103</sup>

#### FOREIGN NATIONALS DETAINED IN AFGHANISTAN

According to the US government, it currently holds fewer than 50 non-Afghan detainees at the Parwan facility, 75 percent of whom are Pakistani nationals.<sup>104</sup> The US initially detained some of these foreign nationals outside of Afghanistan, transferring them to Bagram (and, perhaps more recently, to the Parwan facility) instead of Guantanamo Bay, possibly to evade public scrutiny and judicial review of detention decisions.<sup>105</sup> Additionally, in March 2010 the US government reportedly considered proposals to maintain a facility at Bagram to hold non-Afghan nationals newly captured outside Afghanistan. The proposal cited the lack of alternative sites of detention, and raised the prospect of an increasing number of foreign nationals in Afghan detention.<sup>106</sup>

The Afghan government has signaled an unwillingness to hold non-nationals when it takes over the Parwan facility.<sup>107</sup> Accordingly, at least some of the foreign nationals the US detains in Afghanistan will be repatriated or, as a second option, prosecuted at Parwan.<sup>108</sup> In litigation, the US government and human rights lawyers have suggested that the assurances process in Guantánamo cases, described above, applies similarly to repatriations of foreign nationals in Afghanistan. But it has also indicated that the details of the Afghan transfer process are classified.<sup>109</sup>

The Afghan government has signaled an unwillingness to hold non-nationals when it takes over the Parwan facility.

#### TRANSFERS TO THE AFGHAN NATIONAL DETENTION FACILITY

In litigation, the US government has reiterated that it has “entered into a diplomatic arrangement with Afghanistan whereby a significant percentage of the Afghan detainees at Bagram are expected to be transferred to the Government of Afghanistan.”<sup>110</sup> Rather than the Parwan facility transfer, this likely refers to the transfer of more than 150 detainees from the old Bagram facility to the Afghan National Detention Facility, otherwise known as Block D of Afghanistan’s Pol-e Charkhi prison. Conditions are reportedly better there than in other Afghan prisons due to US training of personnel.<sup>111</sup> Whether the US secures assurances of humane treatment before making these transfers is also unknown, and government litigation filings suggest details are classified.<sup>112</sup>

103. *Id.*

104. Briefing with Harward and Klemm, *supra* note 80.

105. See generally *Maqaleh v. Gates*, 605 F.3d 84 (D.C. Cir. 2010) (considering habeas petitions of third-country nationals held in Afghanistan and noting petitioners’ argument that the US could transfer individuals to detention facilities in active conflict zones to evade judicial review, but dismissing it as unsupported by the evidence); Karen Greenberg, *Obama’s Guantánamo?*, Salon.com, March 9, 2009, <http://www.salon.com/news/opinion/feature/2009/03/09/bagram> (noting the lesser public scrutiny of detention operations in Afghanistan, relative to scrutiny of Guantanamo detentions).

106. David S. Cloud & Julian E. Barnes, *US May Expand Use of Its Prison in Afghanistan*, L.A. Times, (Mar. 21, 2010), available at <http://articles.latimes.com/2010/mar/21/world/la-fg-afghan-prison21-2010mar21>.

107. Spencer Ackerman, *Military Denies Having a Secret Afghan Torture Jail*, Wired.com, (Aug. 24, 2010), <http://www.wired.com/dangerroom/2010/08/military-denies-having-a-secret-afghan-torture-prison/> (reporting that “All Martins says about [foreign nationals] is that the US is ‘committed to not having the Afghans deal with them alone.’”).

108. *Id.*

109. See Declaration of Colonel Charles A. Tennison, Motion to Dismiss for Lack of Jurisdiction First Amended Petition for Writ of Habeas Corpus, *Maqaleh v. Gates*, No. 1:06-cv-01669 (Sept. 15, 2008), available at <http://sites.google.com/a/ijnetwork.org/maqaleh-v-gates/test-joint-appendix> [hereinafter Declaration of Colonel Charles A. Tennison].

110. See Brief for Respondents-Appellants at 57, *Maqaleh v. Gates*, Case No. 09-5265 (Sept. 14, 2009), available at <http://sites.google.com/a/ijnetwork.org/maqaleh-v-gates/home/l.Maqaleh-RespondentsOpeningBrief.pdf?attredirects=0&d=1>.

111. See Joanne Mariner, *After Guantánamo*, Findlaw.com, (Feb. 27, 2008), <http://writ.news.findlaw.com/mariner/20080227.html>.

112. See Declaration of Colonel Charles A. Tennison, *supra* note 109.

## Assurances in Extradition & Deportation Cases

According to the government, the US has used assurances in deportation and extradition cases rarely—fewer than 20 times between 1994, the year Congress ratified the UN Convention Against Torture, and 2004.<sup>113</sup> But the government’s assertion of authority to use assurances without providing individuals an opportunity to challenge them is a troubling departure from established norms of immigration law and could lead to erroneous denials of protection from deportation.

The government’s assertion of authority to use assurances without providing individuals an opportunity to challenge them is a troubling departure from established norms of immigration law.

### Limited Use in Extradition

Reportedly, the US government has rarely relied on assurances against torture in extradition cases.<sup>114</sup>

According to then-Legal Adviser John Bellinger in 2008, extradition cases “generally do not pose legitimate concerns about torture,” since such transfers occur pursuant to extradition treaties, which the US signs only after reviewing its potential treaty partner’s human rights record.<sup>115</sup>

In cases where there is a risk of torture, judicial review is foreclosed by the “rule of non-inquiry” (see Part III Ch. I). Under the rule, US courts considering an extradition do not evaluate an individual’s risk of torture on return: the final decision is left to the Secretary of State.<sup>116</sup> In the absence of judicial review, the State Department is the sole evaluator of the assurances, with no external check on its prerogative.<sup>117</sup>

### Evolving Use in Deportation Cases

The US government has expansive authority to use assurances to deport individuals to countries with questionable human rights records, although it has exercised it rarely. Regulations prohibit the government from removing an individual under circumstances that violate Article 3 of the Convention Against Torture.<sup>118</sup> However, they also provide that the Secretary of State may forward diplomatic assurances to the Department of Homeland Security, triggering a special process and an end to the ordinary course of immigration proceedings: “Once assurances are provided [by the Secretary of State], the alien’s claim for protection under the Convention Against Torture shall not be considered further by an immigration judge, the Board of Immigration Appeals, or an asylum officer.”<sup>119</sup> In the government’s comments on the interim

113. Statement of John Bellinger, *supra* note 5.

114. However, the US has long sought assurances of fair trial protections in extradition cases. See *infra* Part II, Ch. I.

115. Statement of John Bellinger, *supra* note 5, at 16. For details on the US extradition process, see Center for Human Rights and Global Justice, *Beyond Guantánamo: Transfers to Torture One Year After Rasul v. Bush*, 5-6 (New York: NYU School of Law, 2005).

116. See John T. Parry, *International Extradition, the Rule of Non-Inquiry and the Problem of Sovereignty*, Bos. U. L. Rev. (forthcoming October 2010).

117. *Id.*

118. See *supra* note 21 and accompanying text.

119. In full, the regulation states: “(1) ... [t]he Secretary of State may forward to the Attorney General assurances that the Secretary has obtained from the government of a specific country that an alien would not be tortured there if the alien were removed to that country. (2) If the Secretary of State forwards assurances described in paragraph (c)(1) of this section to the Attorney General for consideration by the Attorney General or her delegates under this paragraph, the Attorney General shall determine, in consultation with the Secretary of State, whether the assurances are sufficiently reliable to allow the alien’s removal to that country consistent with Article 3 of the Convention Against Torture. The Attorney General’s authority under this paragraph may be exercised by the Deputy Attorney General or by the Commissioner, Immigration and Naturalization Service, but may not be further delegated. (3) Once assurances are provided under paragraph (c)(2) of this section, the alien’s claim for protection under the Convention Against Torture shall not be considered further by an immigration judge, the Board of Immigration Appeals, or an asylum officer.” 8 C.F.R. § 1208.18(c). Although the regulations refer to the Attorney General, due to re-organization of immigration agencies, assurances are forwarded to the Secretary of the Department of Homeland Security.



## PART I. US TRANSFER AND ASSURANCES PRACTICES

regulation, adopted in 1999 after the passage of FARRA, the government noted, “[i]t is anticipated that these cases will be rare.”<sup>120</sup>

The regulations require that high-level officials assess and determine the sufficiency of assurances—a procedural requirement that may limit how frequently the government uses assurances. The regulations require the Attorney General (now, the Secretary of the Department of Homeland Security) to consult with the Secretary of State on whether the assurances are sufficiently reliable, and authority to order the removal cannot be delegated to low-level officials.<sup>121</sup> According to the government, “the rule ensures that cases involving the adequacy of diplomatic assurances...will receive consideration at senior levels...which is appropriate to the delicate nature of the diplomatic undertaking to ensure that an alien is not tortured in another country.”<sup>122</sup>

Otherwise, as the Third Circuit has noted, the governing regulation “provides no limitations on when diplomatic assurances may be invoked, either in terms of particular categories of aliens, or the status of an alien’s Convention Against Torture claims in the adjudicatory process.”<sup>123</sup> This suggests the government could use assurances on a broad scale, to deport any individual otherwise eligible for protection, even if that individual did not pose a danger to US security. In a departure from the humanitarian principles and sense of fair play underlying the US asylum system and US law implementing the Convention Against Torture, individuals who have established that they face a real risk of torture could lose protection based on the promise of the very foreign government authorities whom they have just proven to be substantially likely to torture them.

In practice, the US government has used assurances in two known contexts: deferral of removal and summary removal. Both contexts illustrate the danger that assurances can be used to undermine the full risk analysis envisioned by US law and ordinarily undertaken by US immigration officers and courts.

### TERMINATING DEFERRAL OF REMOVAL

Assurances can be used to end the protection of individuals under “deferral of removal,” a form of relief available to individuals who are ineligible for refugee status but who are not deported due to the risk of torture.<sup>124</sup> Under the statute and regulations, the government can terminate “deferral of removal” at any time based on diplomatic assurances, without providing the individual any opportunity to review and challenge the assurances.<sup>125</sup> The government could even remove an individual in the process of challenging their removal through a petition for review to a court of appeals, unless that court has stayed removal.<sup>126</sup> Under US law, individuals do not have the right, at any stage, to examine written assurances or learn the level at which they were negotiated, or the content of the assurances, including what safeguards they include and whether they provide for post-return monitoring.<sup>127</sup>

---

120. See *Implementation of the Convention Against Torture*, Regulations Concerning the Convention Against Torture, 64 Fed. Reg. 8478 [FR 9-99] (Feb. 19, 1999) [hereinafter Federal Register, Regulations Concerning the Convention Against Torture].

121. See *supra* note 119. The regulation refers to high-level officials in the Department of Justice.

122. Federal Register, Regulations Concerning the Convention Against Torture, *supra* note 120.

123. *Khouzam v. Attorney General*, 549 F.3d 235, 243 (3d Cir. 2008).

124. Individuals ineligible for asylum who could nevertheless receive deferral of removal include asylum-seekers who did not meet the one-year filing deadline for their asylum applications or who filed a previous unsuccessful application and now face a risk based on new or changed circumstances. It also includes individuals who are barred from asylum due to their persecution of others or involvement in terrorism-related activity. Finally, individuals who have been convicted of an aggravated felony are ineligible for asylum and individuals convicted of a “particularly serious crime” are ineligible for withholding of removal. See 8 USC. §§ 1158(a)(2), (b)(2); 8 USC §1231(a)(4)-(6).

125. 8 C.F.R. § 1208.17 provides that: “At any time while deferral of removal is in effect, the Attorney General may determine whether deferral should be terminated based on diplomatic assurances forwarded by the Secretary of State pursuant to the procedures in §1208.18(c).” See also *supra* note 119.

126. See, e.g., *Hussain v. Mukasey*, 510 F.3d 739, 742 (7th Cir. 2007).

127. See *Khouzam v. Att’y General*, 549 F.3d 235, 243 (3rd Cir. 2008).

The US government has exploited the lack of explicit legal requirements, using assurances to terminate individuals' deferrals of removal without providing them an opportunity to review and contest the assurances. For instance, the government terminated the deferral of removal of Sami Khouzam, a Coptic Christian, based on assurances from Egypt that it received in February 2004. It did not inform Khouzam of the termination of his status—and his loss of protection—until May 2007, three days before he was arrested and detained in preparation for imminent removal. In 2008, the Third Circuit Court of Appeals held that by failing to provide Khouzam any opportunity to challenge his removal, the government violated his due process rights.<sup>128</sup>

In 2002, Nabil Soliman was deported pursuant to assurances without the benefit of judicial review of either the assurances or his due process claim. Although the government had notified Soliman it was considering his removal based on assurances, it rejected his requests to review assurances from Egypt.<sup>129</sup> Soliman filed an emergency motion to prevent his assurances-based removal with the 11th Circuit Court of Appeals, which dismissed it for lack of jurisdiction.<sup>130</sup> Five days later, Soliman was deported. Upon his arrival at the Cairo airport, he was immediately taken into Egyptian custody. He was held incommunicado for seven weeks before being transferred to the notorious Tora prison, where he was allowed contact with his family and attorney.<sup>131</sup> The US embassy was apparently unable to monitor his treatment, with embassy spokesperson Philip Frayne stating: “I can’t say with complete confidence that he hasn’t been [tortured], but we don’t have firsthand evidence to the contrary.”<sup>132</sup>

### SUMMARY REMOVAL

Section 235(c) of the Immigration and Nationality Act authorizes the US government to remove an “arriving alien” on the basis of undisclosed evidence, and without administrative or judicial review, if the Attorney General (now the Secretary of the Department of Homeland Security) determines that he is inadmissible on security-related grounds, including participation in certain terrorism-related activity.<sup>133</sup> However, even in these proceedings, an individual may not be removed “under circumstances that violate...Article 3 of the Convention Against Torture.”<sup>134</sup>

128. *Id.*

129. Mark Dow, *American Gulag 225-26* (Univ. of California Press 2004).

130. The 11th Circuit found it did not have jurisdiction to review Soliman’s claims relating to assurances, interpreting US law as precluding it from reviewing a claim under the Convention Against Torture except in a petition for review from a final order of removal. The 11th Circuit’s interpretation places individuals like Soliman in an impossible situation: a petition for review of a final order of removal must be filed within thirty days of the final removal order, but the government can choose to terminate deferral of removal at any time. Thus, the government can avoid any chance of judicial review of assurances by waiting until after the 30-day petition for review filing deadline to pursue a removal based on assurances. *Soliman v. US*, 296 F.3d 1237, 1241-42 (7th Cir. 2002). In contrast, the Third Circuit reviewed Khouzam’s challenge to assurances, interpreting the government’s termination of deferral as a final order of removal. See *Khouzam*, 549 F.3d at 247-48.

131. *American Gulag*, *supra* note 129, at 226; Amnesty International, *Further information on UA/118/02 – Forcible return/fear of torture or ill-treatment*, AI Index MDE 12/032/2002 (Sept. 18, 2002).

132. *American Gulag*, *supra* note 129, at 226.

133. See 8 USC. § 1225(c) (“If the Attorney General-(i) is satisfied on the basis of confidential information that the alien is inadmissible under subparagraph (A) (other than clause (ii)), (B), or (C) of section 212(a)(3), and (ii) after consulting with appropriate security agencies of the United States Government, concludes that disclosure of the information would be prejudicial to the public interest, safety, or security, the Attorney General may order the alien removed without further inquiry or hearing by an immigration judge”); 8 C.F.R. § 235.8(b)(3) (“Unless the written decision contains confidential information, the disclosure of which would be prejudicial to the public interest, safety, or security of the United States, the written decision shall be served on the alien. If the written decision contains such confidential information, the alien shall be served with a separate written order showing the disposition of the case, but with the confidential information deleted”).

134. 8 C.F.R. § 235.8(b)(4) (“The Service shall not execute a removal order under this section under circumstances that violate section 241(b)(3) of the Act or Article 3 of the Convention Against Torture. The provisions of part 208 of this chapter relating to consideration or review by an immigration judge, the Board of Immigration Appeals, or an asylum officer shall not apply”); 8 C.F.R. § 208.18(d) (“With respect to an alien terrorist or other alien subject to administrative removal under section 235(c) of the Act who requests protection under Article 3 of the Convention Against Torture, the Service will assess the applicability of Article 3 through the removal process to ensure that a removal order will not be executed under circumstances that would violate the obligations of the United States under Article 3”).

The government has used section 235(c) proceedings relatively rarely, conducting summary removal proceedings more often under section 240 of the Immigration and Nationality Act, which permits administrative hearings at which counsel may be present.<sup>135</sup> But section 235(c) is notable for its potential misuse, including removal of individuals without a full assessment of whether they are at risk of torture. The most notorious case of such abuse is the 2002 removal of Maher Arar, described earlier in this chapter. Arar, a Syrian-Canadian national, was detained by US authorities while in transit through John F. Kennedy airport in New York, en route to his home in Canada. The government used section 235(c) proceedings to bypass any administrative hearing on Arar's removal, including on the question of whether he was a member of Al Qaeda, as alleged, or whether assurances procured from Syrian officials were sufficient to protect him from abuse.<sup>136</sup>

Instead, according to Office of Inspector General (OIG) of the Department of Homeland Security reports, the government removed Arar even after "conclud[ing] that Arar was entitled to protection from torture and that returning him to Syria would more likely than not result in his torture." The OIG also found that "the validity of the assurances to protect Arar appears not to have been examined."<sup>137</sup> US Representative Bill Delahunt, in a 2008 hearing on the OIG's report, articulated questions arising from these findings: "How could it be that the OIG found that the [government] appropriately followed procedures with respect to the Convention Against Torture when the assurances were ambiguous regarding the source or authority?... What kind of procedures permit assurances that aren't even examined?"<sup>138</sup>

### **Assurances in Arar**

Maher Arar, a Syrian born Canadian, was detained by the US Government at JFK airport in New York while flying home from vacation. The US government transferred Arar to Syria his ever gaining access to a court, and despite his repeated entreaty that he would be tortured there. The US government later justified Arar's transfer by referencing "diplomatic assurances"—though it has never disclosed what they said or who gave them. Arar later testified:

*"Throughout the interrogation, I asked again and again for a lawyer. They just continued questioning me. They wanted to know why I did not want to go back to Syria. I told them that I would be tortured there. ... They told me that, based on classified information, that they could not reveal to me and because I knew a number of men in Canada, including Abdullah Almalki and Ahmad Abou El Maati, they had decided to deport me to Syria. ... I said again that I would be tortured there. I was extremely disoriented and emotional. I kept crying but they did not really seem to care. Then the lady just flipped a couple of pages and read a part of the document telling me that they were not the office that deals with the Torture Convention."*

A 2008 Office of Inspector General report shows that the US government transferred Arar despite concluding that he faced torture, based on apparently unexamined diplomatic assurances:

*"We reviewed the process that INS used to determine Arar's protection needs under CAT. The INS concluded that Arar was entitled to protection from torture and that returning him to Syria would more likely than not result in his torture. ... However, the validity of the assurances to protect Arar appears not to have been examined."*

### **USING ASSURANCES TO PROLONG PRE-REMOVAL DETENTION**

The government has also invoked assurances to continue detaining individuals ordered removed who

135. See 8 USC. § 1229a.

136. See generally Office of Inspector General, Department of Homeland Security, "The Removal of a Canadian Citizen to Syria," 22, OIG-08-18 (March 2008).

137. *Id.*

138. *Joint Hearing on US Department of Homeland Security Inspector General Report OIG-08-18: The Removal of a Canadian Citizen to Syria Before the Committee on the Judiciary and Committee on Foreign Affairs* (opening statement of Chairman Delahunt) (June 5, 2008).

have been granted relief under the Convention Against Torture. In *Zadvydas v. Davis*, the Supreme Court held that an individual detained pending deportation is entitled to be released if, after six months, “there is no significant likelihood of removal in the reasonably foreseeable future.”<sup>139</sup> Claiming that it is in the process of negotiating assurances, the government can argue that removal is reasonably foreseeable for individuals subject to detention on security grounds. In this way, the government can invoke the possibility of assurances to justify its continued detention of an individual for years, bypassing *Zadvydas*, despite immigration law’s low threshold of proof for pre-removal detention based on security. For example, the government continued to detain Uzbek asylum-seeker Bekhzod Yusupov after he won his claim for deferral of removal under the Convention Against Torture, claiming to be seeking assurances from Uzbek authorities, despite their record of using torture in similar cases.<sup>140</sup>

### POSSIBLE REFORM: INFORMAL OPPORTUNITY TO RESPOND TO ASSURANCES

In a recent case, the government has signaled a change in tactics, providing counsel for immigrant detainees with a copy of written assurances and a limited opportunity to challenge them. In September 2008, the State Department received written diplomatic assurances from the Rwandan government concerning three Rwandan nationals it had earlier extradited to the US (see Appendix I). The US government had charged the men in connection with the March 1999 kidnapping, murder and rape of American tourists in Uganda. Once the men were brought to the US, it became clear that they had been tortured by security forces in Rwanda; US prosecutors abandoned the case. Now, the US is trying to transfer the men back to Rwanda, although they were subjected to torture by government officials in the past and claim to fear being tortured on their return. In 2009, in a break from past practice, the Department of Homeland Security provided attorneys for the men with a copy of the assurances and 21 days to respond. With a challenge to the men’s continued detention pending, the Department of Homeland Security has yet to decide whether to pursue their removal based on assurances.<sup>141</sup>

The government’s willingness to provide limited agency process to the men may be an attempt to avoid a due process challenge, should it pursue their deportation. However, the assurances themselves are also a significant departure from past known practice: they include the right of the US embassy or an agreed-upon third party to make unannounced visits during any period in which the men are in custody.<sup>142</sup>

On the other hand, the government’s pursuit of assurances to return the three Rwandan nationals is ill-conceived in light of the acknowledged past torture by Rwandan authorities. Pursuit of assurances in such circumstances is at odds with humanitarian grounds and the US immigration law principle that a past experience of persecution gives rise to a well-founded fear of future persecution (although the immigration statute applies the presumption only in asylum claims, not Convention Against Torture claims).<sup>143</sup>

### Known Failures of US Assurances in Extradition and Deportation

The government’s expansive authority to use extradition and deportation is cause for concern in light of its failure to acknowledge that in the few cases it has pursued, assurances have sometimes failed.

139. *Zadvydas v. Davis*, 533 US 678 (2001).

140. The US government later abandoned its attempt to deport Yusupov to Uzbekistan based on the likely unreliability of assurances. A US court ordered Yusupov released from detention in 2006, subject to severely difficult conditions of supervision. Yusupov’s appeal from the Board of Immigration Appeals’ decision finding him a danger to US security is pending. See *Yusupov v. Att’y Gen.*, 518 F.3d 185 (3d Cir. 2008); Amended Brief of Amicus Curiae Columbia Law School Human Rights Institute in Support of Petitioner and Remand, *Yusupov v. Att’y Gen.*, Dkt. No. 09-3032 (3d Cir. 2008).

141. See *Francois Karake v. US Department of Homeland Security*, 09-CV-2092-RMU (D.D.C. 2009); Human Rights Institute interview with Matthew Scarlato & Ryan Tisch, Attorneys for Francois Karake, January 29, 2010 [hereinafter Interview with Karake attorneys].

142. See John D. Negroponte, *Letter to Paul A. Schneider, Deputy Secretary of Homeland Security* (Sept. 19, 2008) (copy on file with Human Rights Institute).

143. US immigration law is more generous than international refugee law, providing that an applicant for asylum who has established a claim of past persecution is entitled to a rebuttable presumption that she has a well-founded fear of future persecution. See 8 USC. § 1101(a)(42) (2009); 8 C.F.R. § 208.13 (2010).

In his June 2008 testimony before Congress, then-Legal Adviser John Bellinger said that in the 20 or fewer deportation and extradition cases for which the US secured assurances since 1994, he was not aware of “any mistreatment of any of the individuals who were either removed under the immigration rules or who were extradited... [where] we relied on diplomatic assurances.”<sup>144</sup>

To the contrary, there are cases in which extradited or removed individuals have been abused, dating several years prior to Bellinger’s testimony. For example, in 1997, Daya Singh Sandhu and Kamaljit Kaur Sandhu were extradited to India based on assurances. In court affidavits, they alleged that Indian police officers tortured them after they returned. In 2008, the Human Rights Institute and the ACLU received documents pursuant to a FOIA request showing that the US State Department considered the Sandhus’ alleged abuse in determining whether to extradite another Indian national in 2006.<sup>145</sup>

Curiously, at the same 2008 congressional hearing at which Bellinger denied any knowledge of alleged mistreatment to individuals extradited pursuant to assurances, he specifically cited India as a country from which it was appropriate to seek assurances, stating: “We have had to seek assurances with respect to countries that would surprise you, like Mexico or India, because they have had isolated cases of mistreatment.”<sup>146</sup> In fact, rather than being isolated, torture by the Indian police is a notoriously widespread practice.<sup>147</sup>

Bellinger’s testimony is also remarkable for its failure to acknowledge the abuse of Canadian national Maher Arar, which US officials have characterized as a lawful removal under US immigration laws, rather than an extraordinary rendition.<sup>148</sup>

### Sandhu Assurances

US embassy officials admitted they were “unable authoritatively to confirm” whether Kamaljit Kaur Sandhu and Sukminder Sandhu were tortured after they were extradited to India in 1997 based on assurances. In the affidavit below, Kamaljit describes the violation of these assurances experienced by both individuals once returned:

*During our asylum and extradition proceedings, in our statements, pleadings, and written testimony, we repeatedly expressed our fears that if we were sent back to India, we would again be subjected to torture and repression. According to my understanding, on the basis of my repeatedly expressed fears of torture, diplomatic assurances were obtained that I would be protected from torture and repression. Despite these assurances, after my return to India, I was tortured... [In police custody] my interrogation would start at 6 AM and continue without interruption for the next three days. I was not allowed to sleep at all... If I would fall asleep, they would pour cold water over my face, even though it was the winter, and awaken me.*

144. Bellinger continued:

So we are probably talking about less than 20 cases overall since the Convention Against Torture was ratified. And this is not just this administration; this is going back to the previous administration that has relied on assurances... In none of those cases are we aware that there was any mistreatment of any of the individuals who were either removed under the immigration rules or who were extradited pursuant to a certificate by the Secretary of State on which we relied on diplomatic assurances.

Statement of John Bellinger, *supra* note 5, at 11-12.

145. See ACLU, Documents Released Under the ‘Diplomatic Assurances’ FOIA (Nov. 18, 2008), <http://www.aclu.org/national-security/documents-released-under-diplomatic-assurances-foia> (includes affidavit of Kamaljit Kaur Sandhu); see also Email from Sukhman Dhami, *supra* note 36.

146. Statement of John Bellinger, *supra* note 5, at 37-38.

147. See generally Human Rights Watch, *Broken System: Dysfunction, Abuse and Impunity in the Indian Police* (2009).

148. See *Rendition to Torture: the Case of Maher Arar: Joint Hearing Before the Subcomm. on International Organizations, Human Rights, and Oversight of the H. Comm. on Foreign Affairs and the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. (2007); Office of the Inspector General, Department of Homeland Security, *The Removal of a Canadian Citizen to Syria*, OIG-08-18 (Mar. 2008) (on file with Human Rights Institute).

## **Renditions to Justice & “Extraordinary Renditions”**

The US has also conducted renditions—transfers outside of legal process—but the frequency of these practices and their legal basis is unclear.<sup>149</sup>

### ***Assurances in Renditions to Justice***

In a “rendition to justice,” US authorities direct or perpetrate the kidnapping of an individual for the purpose of bringing him to a country where he can be criminally prosecuted. The US has conducted these renditions since at least the 1980s, and by the mid-1990s, under the Clinton administration, they were reportedly “becoming [a] routine... activity.”<sup>150</sup> Then-CIA director George Tenet testified in 2002 that the CIA had “rendered 70 terrorists to justice” before the September 11th attacks.<sup>151</sup>

According to one former US official, under the Clinton administration the CIA sought assurances that al-Qaeda leaders delivered to foreign government authorities for criminal prosecution would be treated according to their laws. Former CIA official Michael Scheuer testified before Congress in 2007:

*President Clinton and his national security team directed the CIA to take each captured al-Qaeda leader to the country which had an outstanding legal process for him... CIA warned the President and his National Security Council that the U.S. State Department had and would identify the countries to which the captured fighters were being delivered as human rights abusers. In response, President Clinton and his team asked if CIA could get each receiving country*

*to guarantee that it would treat a person according to its own laws. This was no problem, and we did so. I have read and been told that Mr. Clinton, Mr. Berger and Mr. Clarke have said, since 9/11, that they insisted that each receiving country treat the rendered person it received according to U.S. legal standards. To the best of my memory, that is a lie.<sup>152</sup>*

**There [were] no qualms at all about sending people to Cairo and kind of joking up our sleeves about what would happen to those people in Cairo—Egyptian prison.**

Scheuer also testified that “there was much more consideration under the Bush administration about how to handle these people than there was under the Clinton administration.” According to Scheuer, “[t]here [were] no qualms at all about sending people to Cairo and kind of joking up our sleeves about what would happen to those people in Cairo—Egyptian prison.”<sup>153</sup>

149. Congressional Research Service, *supra* note 24 (“Little publicly available information from government sources exists regarding the nature and frequency of US renditions to countries believed to practice torture, or the nature of any assurances obtained from them before rendering a person to them. To what extent US agencies have legal authority to engage in renditions remains unclear.”). See also Center for Human Rights and Global Justice, NYU School of Law, *On the Record: US Disclosures on Rendition, Secret Detention and Coercive Interrogation* (2008).

150. Benjamin Wittes, *Law and the Long War: The Future of Justice in the Age of Terror* 26-27 (2008) (quoting Richard Clarke, National Security Council’s counterterrorism adviser).

151. George Tenet, Director of Central, Statement to the Intelligence Joint Committee Inquiry into Terrorist Attacks Against the United States (Oct. 17, 2002), available at [http://www.fas.org/irp/congress/2002\\_hr/101702tenet.html](http://www.fas.org/irp/congress/2002_hr/101702tenet.html).

152. *Extraordinary Rendition in U.S. Counterterrorism Policy: The Impact on Transatlantic Relations*, Foreign Aff. Comm., US House of Representatives (April 17, 2007) (testimony of Michael F. Scheuer, Former Chief, Bin Laden Unit, Central Intelligence Agency).

153. *Id.*

**Assurances in Extraordinary Renditions**

An “extraordinary rendition” is the transfer of an individual without legal process for the purpose of interrogation or detention. US authorities have perpetrated these kidnappings or assisted foreign officials in doing so. Individuals have been held in secret US-run facilities, delivered to foreign authorities, or held in camps ostensibly run by foreign authorities but directed and funded by the US government.<sup>154</sup>

In January 2009, President Obama directed the CIA to close its secret detention facilities.<sup>155</sup> US officials have also stated, on and off the record, that though the US will continue renditions, it will not send individuals to countries known to conduct abusive interrogations<sup>156</sup>—a claim also made by Bush administration Secretary of State Condoleezza Rice.<sup>157</sup>

Some Obama administration officials have indicated that the US will only conduct renditions to facilitate prosecution of terrorism suspects, not renditions for interrogation and detention purposes.<sup>158</sup> But while secret detention sites run exclusively by the CIA have been shut down, there are reports that CIA is directing and funding the interrogation of terrorism suspects in new sites that are operated by foreign authorities.<sup>159</sup>

Under the Bush administration, the US government openly contended that it would seek assurances, where appropriate, that individuals subject to rendition will not be tortured.<sup>160</sup> The Obama administration has been somewhat less forthright about the role of assurances in renditions. In August 2009, the Special Interagency Task Force on Interrogation and Transfer issued recommendations on “transfers pursuant to intelligence authorities” but did not make details public.<sup>161</sup> The New York Times reported that Obama administration officials, who insisted on remaining unidentified, said they would “operate more openly and give the State Department a larger role in assuring that transferred detainees would not be abused.” Moreover, the unnamed officials indicated that no detainees would be sent to countries known to conduct abusive interrogations.<sup>162</sup>

At his confirmation hearing, CIA director Leon Panetta spoke less obliquely to Congress about the role of assurances. He indicated that while rendition to “black sites” would no longer take place, assurances would be sought for renditions for “purposes of questioning”:

*There is a second kind of rendition where individuals are turned over to a country for purposes of questioning. And it is my understanding that—and I want to clear up the record on this—that*

154. See Center for Human Rights and Global Justice, NYU School of Law, *On the Record: US Disclosures on Rendition, Secret Detention and Coercive Interrogation* (2008).

155. See Exec. Order No. 13,491, 74 Fed. Reg. 4,893, (Jan. 22, 2009) (“The CIA shall close as expeditiously as possible any detention facilities that it currently operates and shall not operate any such detention facility in the future”).

156. “The emphasis will be on ensuring that individuals will not face torture if they are sent overseas,” an unnamed US official told the New York Times in August 2009. David Johnston, *US Says Rendition to Continue, but With More Oversight*, N.Y. Times (Aug. 25, 2009). See also Human Rights First, *Blueprint for the Special Task Force on Interrogation and Transfer Policies* (Apr. 2009), available at <http://www.humanrightsfirst.org/pdf/090504-LS-interrogation-blueprint.pdf> (citing Testimony of Leon Panetta, Senate Select Comm. on Intelligence, Executive Nomination, 111th Cong., 1st session, Feb. 5, 2009; Testimony of Eric Holder, Senate Committee on the Judiciary, 111th Cong., 1st sess., January 15, 2009; Testimony of David Kris, Senate Select Comm. on Intelligence, 111th Cong., 1st sess., March 10, 2009).

157. Condoleezza Rice, US Sec’y of State, Remarks Upon Her Departure for Europe (Dec. 5, 2005) [hereinafter Remarks of Condoleezza Rice], available at <http://2001-2009.state.gov/secretary/rm/2005/57602.htm>.

158. “[S]ome may go to other countries to face charges that they have in those countries, but they’re not shipped in the dark of night to be tortured,” Press Secretary Robert Gibbs told reporters in August 2009. Robert Gibbs, White House Press Sec’y, Press Briefing (Aug. 31, 2009), available at <http://www.whitehouse.gov/the-press-office/briefing-white-house-press-secretary-robert-gibbs-83109>.

159. See Anand Gopal, *Obama’s Secret Prisons*, The Nation (Feb. 15, 2010).

160. See Remarks of Condoleezza Rice, *supra* note 157.

161. DOJ Task Force Press Release, *supra* note 1.

162. David Johnston, *US Says Rendition to Continue, but With More Oversight*, N.Y. Times (Aug. 25, 2009).

*there were efforts by the CIA to seek and to receive assurances that those individuals would not be mistreated, and that they did receive those assurances....[U]sing renditions, we may very well direct individuals to third countries. I will seek the same kind of assurances that they will not be treated inhumanely. I intend to use the State Department to assure that those assurances are, in fact, implemented and stood by those countries.<sup>163</sup>*

Earlier at his confirmation hearing, Panetta had implied that in the past, the CIA had sent people to foreign countries for interrogation using techniques that “violate our own standards.” In *Obama’s Wars*, Bob Woodward reports that Panetta’s statement prompted a conversation between Michael Hayden, CIA director under the Bush administration from the 2006 onward, and an unnamed “senior [intelligence] officer still undercover” about whether assurances were used in those cases. Woodward reports that, after Panetta’s initial statement, Hayden phoned the senior officer:

*Hayden: “You watching TV?...Okay, no bullshit, have you ever—?”*

*Senior officer: “No.”*

*Hayden: “You have always sought assurances?”*

*Senior officer: “Absolutely”*

*Hayden: “And beyond the assurances, you used all the tools available to an espionage agency to ensure they’re living up—“*

*Senior officer: “All the time.”*

*Hayden: “I’m not talking your watch. I’m talking about forever.”*

*Senior officer: “Forever.”<sup>164</sup>*

Beyond suggesting that the US never purposefully sent an individual to be interrogated with the use of torture, Woodward’s account of the conversation implies that the US has rigorously monitored whether countries humanely treated rendition victims. But as the next section explores, human rights experts are skeptical of assurances precisely because of their clandestine use in rendition cases, regardless of claims of robust monitoring.

163. Sen. Feinstein Holds a Hearing on the Nomination of Leon Panetta to be Director of the CIA, Day Two, Congressional Quarterly 6 (Feb. 6, 2009).

164. Bob Woodward, *Obama’s Wars* 91-92 (2010).



# PART II. TRANSNATIONAL GUIDANCE ON DIPLOMATIC ASSURANCES

**KEY HUMAN RIGHTS EXPERTS AND TRIBUNALS** have expressed skepticism about the reliability of assurances, and articulated circumstances under which they should not be used. But this non-categorical approach has left the door open to experimentation, including by the UK and Canada, which, like the US, have used assurances in deportations and transfers in Afghanistan. Their experiences demonstrate both the persistent deficiencies of using assurances and the feasibility of better practice by the US.

## Chapter 1: The Development of Diplomatic Assurances Against Torture in International Law & Practice

- Diplomatic assurances are not contemplated by international human rights law prohibiting torture, but have long been used in related contexts.
- Among human rights experts and tribunals, revelations about the role of assurances in extraordinary renditions contributed to skepticism about their reliability and concern about their mis-use to circumvent human rights law.

International human rights law unequivocally prohibits states from transferring an individual to a place where he is at a real risk of torture or ill-treatment.<sup>165</sup> Such transfer is also prohibited under international humanitarian law, albeit in different terms.<sup>166</sup> Governments also have a range of positive obligations to prevent, discourage and avoid facilitating torture, stemming from the UN Convention Against Torture and the customary norm prohibiting torture.<sup>167</sup>

165. Several human rights treaties and declarations specifically prohibit *refoulement*, or transfer where there is a real risk of torture. See Convention Against Torture, *supra* note 16, art. 3; Organization of American States, American Convention on Human Rights art. 22(8), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123; Declaration on Territorial Asylum, G.A. Res. 2312 (XXII), art. 3(1), 22 UN GAOR Supp. No. 16, UN Doc. A/6716 (Dec. 14, 1967). International refugee law also prohibits transfer to the risk of persecution. See Convention Relating to the Status of Refugees, *adopted* July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137, (entered into force Apr. 22, 1954) and 1967 Protocol to the Convention Relating to the Status of Refugees art. 32 & 33, *opened for signature* Jan. 31, 1967, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967). Human rights bodies have also found that the prohibition on *refoulement* is implicit in the European Convention on Human Rights and the International Covenant on Civil and Political Rights. See Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, *opened for signature* Nov. 4, 1950, Europ. T.S. No. 5, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953) [hereinafter European Convention on Human Rights]; International Covenant on Civil and Political Rights, art. 7, *opened for signature* Dec. 16, 1996, 999 U.N.T.S. 171 (entered into force Mar. 3, 1976) [hereinafter ICCPR].

166. Article 45(4) of the Fourth Geneva Convention provides: “In no circumstances shall a protected person be transferred to a country he or she may have reason to fear persecution for his or her political opinions.” Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 45(4), Aug. 12, 1949, 6 U.S.T. 3516, 75 UNT.S. 287 (entered into force Oct. 21, 1950) [hereinafter Fourth Geneva Convention]. Article 12 of the Third Geneva Convention provides: “Prisoners of war may only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention.” Geneva Convention Relative to the Treatment of Prisoners of War art. 12, Aug. 12, 1949, 6 U.S.T. 3316, 75 UNT.S. 135 (entered into force Oct. 21, 1950) [hereinafter Third Geneva Convention]. This provision is mirrored in article 45(3) of the Fourth Geneva Convention, applicable to aliens in the territory of a party to an international armed conflict. See Fourth Geneva Convention, *supra*, at art. 45(3). Protocol II of the Geneva Convention, which applies during non-international armed conflicts, contains the humanitarian principle that detaining authorities bear certain responsibilities for released detainees. See Second Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 UNT.S. 609 (entered into force Dec. 7, 1978) [hereinafter Protocol II]. See Cordula Droeger, Transfers of Detainees: Legal Framework, Non-Refoulement and Contemporary Challenges, 90 Int’l Rev. of the Red Cross 669, 676 (Sept. 2008). An emerging customary international humanitarian law norm requires countries to protect those repatriated or released at the close of hostilities from transfers to a risk of persecution. See Margaret L. Satterthwaite, *The Legal Regime Governing Transfers of Persons in the Fight Against Terrorism*, in *Counter-Terrorism Strategies, Human Rights and International Law* (forthcoming 2010) (citing Customary International Humanitarian Law, Rule 128, H. Gasser, *Protection of the Civilian Population*, in *The Handbook of International Humanitarian Law*, 237, 323 (D. Fleck ed., 2008)).

167. See E.C. Gillard, *There’s No Place Like Home: States’ Obligations in Relation to Transfer of Persons*, 90 Int’l Rev. of the Red Cross 703 (Sept. 2008).

These torture prohibitions do not specifically address whether the use of diplomatic assurances is lawful. But countries have long used assurances in extradition and related contexts.<sup>168</sup> In extradition negotiations, countries have sought assurances of fair trial protections, against imposition of the death penalty, against prosecution for additional crimes, and against torture and ill-treatment.<sup>169</sup> The European Court of Human Rights and European domestic courts have upheld extraditions based on assurances against imposition of the death penalty.<sup>170</sup> For instance, in a March 2010 decision, the European Court of Human Rights directed the UK government to negotiate assurances with the Iraqi government to ensure that the death penalty would not be applied to detainees it transferred to Iraqi custody.<sup>171</sup>

The US has used assurances in many contexts, including assurances against the prosecution of asylum-seekers it repatriates to Haiti and assurances for fair trial protections of US military personnel prosecuted in foreign jurisdictions.<sup>172</sup>

While human rights advocates have criticized assurances for not being legally binding, governments routinely make non-binding bilateral agreements to take or refrain from specific future actions—agreements they fully expect to be fulfilled.<sup>173</sup> In the context of torture, human rights fact-finding and monitoring bodies have long sought such promises from governments before conducting investigations or monitoring missions, and in an attempt to shield from reprisal individuals who have been previously tortured and who remain in detention.<sup>174</sup>

These practices may partially explain why key human rights experts and tribunals initially accepted and even encouraged the use of assurances against torture. Opinion turned with the emergence of horrific and credible cases of torture following rendition, during which the malfeasant role of assurances became clear.

### **Initial Acceptance of Assurances**

Prior to 2004, some human rights experts encouraged states to solicit assurances if they were intent on conducting transfers to states with poor human rights records. For instance, in 1996 Special Rapporteur on Torture Nigel Rodley encouraged Canada to seek assurances if it insisted on deporting a failed asylum-

168. A chilling example of early use is a 1942 transfer of about 35,000 Jews from Slovakia to Poland. The Slovakian government received assurances from a German official that the Jews would be humanely treated. When Slovakia pressed for permission for a delegation to visit the areas where the Jews were supposedly transferred, a German official revealed that most were no longer alive. See Testimony of SS-Hauptsturmfuehrer Dieter Wisliceny, Twenty-Sixth Day, Thursday, 1/3/1946, Part 30, in *Trial of the Major War Criminals before the International Military Tribunal* vol. IV 355 (Nuremberg: IMT, 1947), available at <http://www.fpp.co.uk/Auschwitz/Wisliceny/atIMT030146.html> (Proceedings: 12/17/1945-1/8/1946. Official text in the English language.).

169. See UN High Commissioner for Refugees, Office of the UN High Commissioner for Refugees Note on Diplomatic Assurances and International Refugee Protection ¶ 2 (2006), <http://www.unhcr.org/refworld/docid/44dc81164.html>; see also Ivan Anthony Shearer, *Extradition in International Law* (1971).

170. See, e.g., *Einhorn v. France*, Appl. No. 7155/01 (2001); *Venezia v. Ministero di Grazia e Giustizia*, Judgment No. 223, 79 Rivist di Dirritto Internazionale 815 (1996).

171. See *Al Saadoon v. United Kingdom*, App. No. 61498/08 (March 2, 2010); see also *infra* note 257 and accompanying text.

172. See Agreement on Migrants-Interdiction, US-Haiti, Sept. 23, 1981, 33 U.S.T. 3559, 3560. The US has also sought assurances of fair trial protections in Status of Forces Agreements concerning the prosecution of US military personnel in foreign jurisdictions. The US Senate ratified one NATO Status of Forces Agreement subject to the understanding that American representatives were to observe trials of US military personnel and report any non-compliance with fair trial guarantees to the commanding officer, who was required to then “request the Department of State to take appropriate action to protect the rights of the accused.” See *Holmes v. Laird*, 459 F.2d 1211 (D.C. Cir. 1972). For other examples of long-standing use of assurances by the US, see Parry, *supra* note 116, at n.70.

173. See Oscar Schachter, *The Twilight Existence of Nonbinding International Agreements*, 71 Am. J. Int’l L. 296, 299 (1977) (“Governments may enter into precise and definite engagements as to future conduct with a clear understanding shared by the parties that the agreements are not legally binding”).

174. See Current Developments, Belgrade Minimal Rules of Procedure for International Human Rights Fact-finding Missions, adopted at 59th Conference of the International Law Association, August 1980, 75 Am. J. Int’l L. 163, 164 (1981) (“The fact finding mission shall in advance require that the state concerned to provide adequate guarantee of non-retaliation against individual petitioners, witnesses and their relatives.”); Manfred Nowak, *Fact-Finding on Torture and Ill-Treatment and Conditions of Detention*, 1 J. Hum. Rts. Prac. 101, 106 (2009) (describing his practice of asking governments to agree to terms of reference “that must also contain assurances that detainees, victims, and witnesses who choose to speak to me are not subject to any reprisals”).

seeker to Algeria.<sup>175</sup> In response to Rodley’s urgent appeal, Canadian officials argued that seeking assurances would be inappropriate since Algeria was already a party to the international conventions prohibiting torture, including the UN International Covenant on Civil and Political Rights and UN Convention Against Torture. Rodley responded by noting the widespread use of assurances against torture, calling them “perfectly appropriate”:

*[I]n the case of an individual who is to be sent to a country where he fears torture and where the latter reportedly occurs, it is perfectly appropriate and not uncommon to seek relevant assurances from the Government in question. The intent in seeking such assurances was not to call into question the commitment of the receiving Government to fulfill its treaty obligations, but rather to make that Government aware of the concerns that have been expressed with respect to the case and thereby to reduce the potential risk to the deported person.<sup>176</sup>*

Rodley’s successor as UN Special Rapporteur, Theo Van Boven, initially adopted the approach of his predecessor, urging in his report to the UN General Assembly in 2002 that “in all appropriate circumstances, before extraditing persons under terrorist or other charges” states seek “an unequivocal guarantee to the extraditing authorities that the persons concerned will not be subjected to torture or any other form of ill-treatment, and that a system to monitor the treatment of such persons has been put into place to ensure that they are treated with full respect for their human dignity.”<sup>177</sup>

While it did not encourage the use of assurances, the UN Committee Against Torture, charged with monitoring state compliance with the UN Convention Against Torture and adjudicating complaints against individual states, weighed assurances as a positive factor in its first case on the issue, *Attia v. Sweden*, in November 2003.<sup>178</sup> The complainant, facing deportation from Sweden to Egypt, alleged a risk of detention and torture by Egyptian authorities expecting her to possess valuable information about her husband, who had previously been convicted in absentia for terrorist activity. Two years prior to Attia’s complaint filing, Sweden had deported Attia’s husband (rendition victim Ahmed Agiza<sup>179</sup>) based on written assurances against torture and the death penalty from a senior-level Egyptian official (see Appendix I). Swedish officials had visited Attia’s husband in prison in Egypt multiple times and reported he did allege abuse.

The Committee found that Attia did not have a substantial risk of being tortured, basing its decision foremost on her failure to allege a personal risk, beyond her familial ties. But the Committee also cited assurances as a positive factor, stating without elaboration: “In light of the passage of time, the Committee is also satisfied by the provision of guarantees against abusive treatment, which also extend to the complainant and are, at the present time, regularly monitored by the State party’s authorities in situ.”<sup>180</sup>

In contrast, the European Court of Human Rights rejected assurances against torture in a 1996 case,

175. “In view of all the circumstances the Special Rapporteur appealed to the Government not to deport Saadi Bouslimani or, if he were to be deported, to seek, and take measures to ensure compliance with, assurances from the Government of Algeria that he would not be subjected to torture or any other ill-treatment.” Special Rapporteur on *Torture, Question of the Human Rights of all Persons Subjected to Any Form of Detention or Imprisonment, in Particular: Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* para. 45-46, UN Doc. E/CN.4/1997/7/Add.1 (Dec. 20, 1996) (by Nigel S. Rodley).

176. *Id.* ¶ 46.

177. Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Interim Report of the Special Rapporteur on Torture* ¶ 35, UN Doc. A/57/173 (July 2, 2002) (by Theo van Boven).

178. See Convention Against Torture, *supra* note 16, art. 22. The Committee Against Torture has considered three individual petitions involving transfers to another State where the individual faced a risk of torture and the use of diplomatic assurances: *Attia v. Sweden*, UN Committee Against Torture, UN Doc. CAT/C/31/D/199/2002 (Nov. 24, 2003); *Agiza v. Sweden*, UN Committee Against Torture, UN Doc. CAT/C/34/D/233/2003 (May 24, 2005); and *Pelit v. Azerbaijan*, UN Committee Against Torture, UN Doc. No. CAT/C/38/D/281/2005 (June 5, 2007). The latter two cases are discussed below. In addition, in *IJR v. Australia* the Committee Against Torture found no breach of Article 3 where a complaint alleged a risk of solitary confinement and the death penalty, despite US assurances. The Committee found that the claims were of a general nature and the US could be counted on not impose the death penalty. See *IJR v. Australia*, UN Committee Against Torture, UN Doc. No. CAT/C/41/D/316/2007, ¶¶ 2.6, 2.7, & 7.5 (Nov. 26, 2008).

179. See *infra* note 187 and accompanying text.

180. *Attia v. Sweden*, *supra* note 178, ¶¶ 12.3-13.

*Chahal v. UK*, based on a more scrutinizing assessment of their value. The Court had previously upheld transfers based on assurances related to the death penalty, reasoning that the government officials providing assurances could effectively guarantee that the penalty would not be sought. In contrast, in *Chahal* the Court reasoned that the Indian federal authorities providing assurances against abuse might be unable to control rogue actors at the local level who could abuse the complainant (see Appendix I).<sup>181</sup> After *Chahal*, proponents of assurances argued that the case reflected that assurances might be unreliable in rogue actor situations, but were otherwise generally effective.<sup>182</sup>

### Chahal Assurances

In *Chahal v. UK*, the European Court of Human Rights rejected the assurances India provided to the UK for Karamjit Singh Chahal, a Sikh activist. The UK received assurances in 1992 and 1995 in the form of a letter from the central Indian government to the UK Home Secretary:

*“We have noted your request to have a formal assurance to the effect that, if Mr Karamjit Singh Chahal were to be deported to India, he would enjoy the same legal protection as any other Indian citizen, and that he would have no reason to expect to suffer mistreatment of any kind at the hands of the Indian authorities. I have the honour to confirm the above.”*

The European Court concluded that the assurances were insufficient in light of a major torture problem among Indian police:

*Although the Court does not doubt the good faith of the Indian Government in providing the assurances mentioned above, it would appear that, despite the efforts of that Government, the [National Human Rights Commission] and the Indian courts to bring about reform, the violation of human rights by certain members of the security forces in Punjab and elsewhere in India is a recalcitrant and enduring problem.*

### Renditions: A Turning Point

By 2004, a series of revelations about US-directed renditions and torture had recast the debate on assurances from the question of their effectiveness to whether they should be rejected on principle as a thin veil for US outsourcing of torture.

“Assurances are part of a wink-nudge game,” declared a St. Petersburg Times (Florida) columnist in late 2003, citing a series of stories by the Washington Post’s Dana Priest. Priest’s stories revealed that assurances were US officials’ purported legal justification for the transfer of Maher Arar, whose 2002 summary deportation and subsequent abuse is described in Part I Chapter 2 of this report.<sup>183</sup> In media accounts,

181. See *Chahal v. UK*, 23 Eur. Ct. H.R. 413 (1996); *Aylor-Davis v. France*, App. No. 22742/93 (January 1994).

182. See, e.g., *Attia v. Sweden*, *supra* note 178, ¶ 4.12 (“The caselaw thus suggests that guarantees may be accepted where the authorities of the receiving State can be assumed to have control of the situation.”)

183. Robyn E. Blumner, *Delivering People in the Hands of Torturers*, St. Petersburg Times (Florida), Nov. 15, 2003, at 7D; see also DeNeed L. Brown & Dana Priest, *Deported Terror Suspect Details Torture in Syria: Canadian’s Case Called Typical of CIA*, Washington Post, Nov. 5, 2003, at A01; Dana Priest, *Top Justice Aide Approved Sending Suspect to Syria*, Washington Post, Nov. 19, 2003, at A28; Dana Priest, *Man Was Deported After Syrian Assurances*, Washington Post, Nov. 20, 2003, at A24.

Arar's case was prototypical of a new phenomenon of "outsourcing torture," in which US officials privately acknowledged that the government sought assurances knowing that they would not be honored, and that torture would likely result.<sup>184</sup>

### **Assurances in the "Global Spider's Web" of US-sponsored Abuse**

Over time, assurances became closely associated with a "global spider's web" of practices, as European Parliament member Dick Marty put it in a 2006 report, consisting of US-sponsored targeting, capture, interrogation and abuse across a network of detention facilities worldwide.<sup>185</sup>

As the story of US torture at the Abu Ghraib prison in Iraq broke in May 2004,<sup>186</sup> so too did the story of the rendition and torture of Ahmed Agiza and Mohammed Alzery, asylum-seekers in Sweden who were transferred to Egypt in 2001 based on assurances, and subsequently subjected to electric shocks and beatings.<sup>187</sup> Agiza and Alzery brought complaints to the UN Committee Against Torture and the UN Human Rights Committee, the treaty monitoring body of the the International Covenant on Civil and Political Rights, (ICCPR), both of which found that Sweden breached its human rights obligations; the Committee Against Torture found specifically egregious Sweden's failure to disclose that Agiza had complained of his abuse to visiting Swedish officials.<sup>188</sup>

**By 2004, a series of revelations about US-directed renditions and torture had recast the debate on assurances from the question of their effectiveness to whether they should be rejected on principle as a thin veil for US outsourcing of torture.**

At the same time, controversy over European complicity in US renditions was brewing. In 2005, the Washington Post published allegations that the CIA had held terrorism suspects in covert detention sites in eastern Europe, prompting Council of Europe investigations.<sup>189</sup> In 2006, a European Parliament investigation committee proposed a parliamentary resolution dubbing diplomatic assurances "incompatible" with "the obligation to protect against, investigate and sanction," and calling for "a common position ruling out the acceptance of mere diplomatic assurances from third countries as a basis for any legal extradition provision, where there are substantial

184. See, e.g., Jane Mayer, *Outsourcing Torture*, *The New Yorker*, Feb. 14, 2005, at 106; Danielle Knight, *Outsourcing a Real Nasty Job*, *US News & World Rep.*, May 23, 2005, at 34; Dan Isaacs, *US Suspects 'Face Torture Overseas'*, *BBC News*, Jun. 14, 2005, <http://news.bbc.co.uk/2/hi/americas/4088746.stm>.

185. Committee on Legal Affairs and Human Rights, European Parliamentary Assembly, *Alleged Secret Detentions and Unlawful Inter-state transfers of detainees involving Council of Europe member states*, Draft report – Part II (Explanatory memorandum), AS/Jur (2006) 16 Part II (June 7, 2006).

186. See Rebecca Leung, *Abuse of Iraqi POWs by GIs Probed*, 60 Minutes II (Apr. 28, 2004), <http://www.cbsnews.com/stories/2004/04/27/60II/main614063.shtml> (television program that first publicly disclosed photos of abuse); *Howard Appalled by Photographs of Iraqi Prisoners*, *Australian Associated Press*, Apr. 30, 2004; Conor O'Clery, *US General Suspended Over Alleged Abuse of Prisoners*, *Irish Times*, Apr. 30, 2004; *Torturas en la misma cárcel de Saddam*, *La Vanguardia* (Spain), Apr. 29, 2004.

187. Agiza and Alzery had fled Egypt and sought asylum in Sweden after Alzery was charged and Agiza was convicted in absence of participation in a forbidden organization that advocated armed opposition to the government. See *The Broken Promise*, TV4 (Sweden), May 17, 2004, transcript available at <http://www.statewatch.org/news/2004/may/Sweden.pdf>; See *Agiza v. Sweden*, UN Comm. Against Torture, ¶¶ 2.3-2.8, UN Doc. CAT/C/34/D/233/2003 (May 24, 2005); *Alzery v. Sweden*, Human Rights Comm., ¶¶ 3.1-3.15, UN Doc. CCPR/C/88/D/1416/2005 (Nov. 10, 2006).

188. *Agiza v. Sweden*, UN Committee Against Torture, ¶ 13.10, UN Doc. CAT/C/34/D/233/2003 (May 24, 2005). For further discussion, see *infra* Part III, Ch. 2 ("Case Study: Sweden's Transfer of Ahmed Agiza & Mohammed Alzery").

189. See Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, *Washington Post*, Nov. 2, 2005, at A1.

While some advocates privately debated whether to suggest basic requirements for reliable assurances, other advocates insisted that taking such a position would undermine the advocacy message that assurances should be rejected wholesale.

grounds for believing that individuals would be in danger of being subjected to torture or ill-treatment.”<sup>190</sup> While the European Parliament did not pass the resolution, in early 2007 it adopted the Committee’s report, which strongly indicted US counterterrorism practices, including European complicity in abuse. Still, parliamentary members were far from unified: 382 voted in favor, 256 against, and 74 abstained.<sup>191</sup>

### **Greater Caution on Assurances Urged by UN Experts**

Growing evidence of a connection between assurances and renditions coincided with greater caution in the treatment of assurances by key UN experts. In September 2004, then-Special Rapporteur on Torture Theo van Boven reported

“instances where there were strong indications that diplomatic assurances were not respected.” Acknowledging his earlier position that governments should secure assurances before extraditing individuals, he expressed new concern that assurances were “becoming a politically inspired substitute” for the absolute prohibition on transfer to torture.<sup>192</sup> A UN High Commission for Human Rights expert committee on counterterrorism reported that “[u]nlike assurances on the use of the death penalty or trial by a military court, which are readily verifiable, assurances against torture and other abuse require constant vigilance by competent and independent personnel.”<sup>193</sup>

The next Special Rapporteur on Torture, Manfred Nowak, went further, calling assurances “unreliable and ineffective in the protection against torture and ill-treatment.” “[T]he very fact that such diplomatic assurances are sought is an acknowledgement that the requested State, in the opinion of the requesting State, is practicing torture,” Nowak argued in December 2005.<sup>194</sup>

Nowak’s wholesale rejection, while couched in the language of assurances’ ineffectiveness, hinted at a normative discomfort with assurances which UN High Commissioner Louise Arbour spelled out that same month, in a speech on Human Rights Day:

*The fact that some Governments conclude legally non-binding agreements with other Governments on a matter that is at the core of several legally-binding UN instruments threatens to*

190. See Temporary Committee on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners, *Report on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners*, European Parliamentary Session Document A6-0020/2007, at ¶¶ G, 21 (Jan. 30, 2007), available at <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A6-2007-0020&language=EN>; Resolution on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners, Eur. Parl. Doc. P6\_TA(2007)0032 (Feb. 14, 2007), ¶ G, available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P6-TA-2007-0032+0+DOC+PDF+V0//EN>.

191. Press Release, European Parliament, CIA Activities in Europe: European Parliament Adopts Final Report Deploing Passivity from Some Member States (Feb. 14, 2007), <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+IM-PRESS+20070209IPR02947+0+DOC+XML+V0//EN>.

192. Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc. A/59/324 (Sept. 4, 2004), ¶ 31 (“The issue arises of whether the practice of resorting to assurances is not becoming a politically inspired substitute for the principle of non-refoulement which, it must not be forgotten, is absolute and non-derogable . . .”).

193. Robert K. Goldman, Report to the Economic and Social Council on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, UN High Commission for Human Rights, UN Doc. E/CN.4/2005/103 (Feb. 7, 2005), ¶ 56.

194. Special Rapporteur on Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment, *Civil and Political Rights, Including the Question of Torture and Detention: Report of the Special Rapporteur on the Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 31(b) U.N. Doc. E/CN.4/2006/6 (Dec. 23, 2005) (by Manfred Nowak).

*empty international human rights law of its content. Diplomatic assurances basically create a two-class system among detainees, attempting to provide for a special bilateral protection and monitoring regime for a selected few and ignoring the systemic torture of other detainees, even though all are entitled to the equal protection of existing UN instruments.*<sup>195</sup>

### **“Reject Rather Than Regulate” Human Rights Position on Assurances**

Nowak’s and Arbour’s positions were exactly the kind of categorical rejection, both on practical and normative levels, that advocates at major human rights organizations like Human Rights Watch and Amnesty International increasingly sought. Human Rights Watch began publishing reports in 2004 cataloging cases of breached diplomatic assurances and arguing that they proved that assurances were “inherently unreliable”;<sup>196</sup> other prominent organizations followed suit.<sup>197</sup> While some advocates privately debated whether to suggest basic requirements for reliable assurances, other advocates insisted that taking such a position would undermine the advocacy message that assurances should be rejected wholesale—the “reject rather than regulate” position.<sup>198</sup> In one joint statement, leading organizations argued that “[d]eveloping guidelines for the ‘acceptable’ use of inherently unreliable and legally unenforceable assurances ignores the very real threat they pose to the integrity of the absolute prohibition against torture and other ill-treatment.”<sup>199</sup>

Some human rights advocates continue to renounce assurances as part of the multi-pronged attack on the absolute ban of torture, likening it to government attempts to sanction “coercive interrogation techniques” and use material obtained under torture as evidence in criminal proceedings.<sup>200</sup> In a 2010 report, Amnesty International argued that the international human rights system is “fundamentally undermined when states seek to circumvent it with non-binding, bilateral promises not torture.”<sup>201</sup> Key human rights organizations continue to urge governments to abandon the concept of assurances altogether, rather than reform their practice.<sup>202</sup>

### **Attempts to Develop Guidelines on Assurances**

To date, no coalition of human rights groups has reached consensus on guidelines for assurances, nor have UN or Council of Europe bodies. The most notable attempt of a human rights body came in 2005, when the Council of Europe’s Steering Committee for Human Rights assigned a group of specialists to study

195. Press Release, UN High Commissioner for Human Rights Louise Arbour, Statement on Human Rights Day: On Terrorists and Torturers, (Dec. 7, 2005), available at <http://www.unhcr.ch/hurricane/hurricane.nsf/0/3B9B202D5A6DCDBCC12570D00034CF83?opendocument>.

196. See Human Rights Watch, *Empty Promises: Diplomatic Assurance No Safeguard Against Torture* (2004); see also Amnesty International, United States, *The Threat of a Bad Example: Undermining International Standards as ‘War on Terrorism’ Detentions Continue* (2003).

197. See, e.g., Joint Statement by Amnesty International, Association for the Prevention of Torture, Human Rights Watch, International Commission of Jurists, International Federation of Action by Christians for the Abolition of Torture, International Federation for Human Rights, International Helsinki Federation for Human Rights, and World Organisation Against Torture, *Call for Action Against the Use of Diplomatic Assurances in Transfers to Risk of Torture and Ill-treatment* (May 12, 2005); Amnesty International, *Letter to 2005 UN Commission on Human Rights*, (Mar. 14 – Apr. 22, 2005) (“These violations and efforts to circumvent the absolute prohibition of refoulement through the use of ‘diplomatic assurances’ are matters of serious concern”); Press Release, ACLU, ACLU Disappointed with House Passage of So-Called ‘Intelligence Reform’ Bill; Measure Expands Patriot Act, Appeases Anti-Immigrant Lobby (October 4, 2004) (criticizing an amendment to US law that would permit transfers based on “meaningless ‘diplomatic assurances’”).

198. See Amnesty International, Human Rights Watch and International Commission of Jurists, *Reject Rather than Regulate: Call on Council of Europe Member States Not to Establish Minimum Standards for the Use of Diplomatic Assurances in Transfers to Risk of Torture and Other Ill-treatment*, IOR 61/024/2005 (Dec. 2, 2005).

199. See Joint Statement by Amnesty International et al., *supra* note 197.

200. See Ben Ward, Human Rights Watch, *Diplomatic Assurances Against Torture*, Address at Law Society =/Aire Centre Conference on Torture and Terrorism, at 180 (Feb. 1, 2006), available at <http://www.ejp.icj.org/IMG/UKHRWSubmission2.pdf>.

201. Amnesty International, *Dangerous Deals: Europe’s Reliance on ‘Diplomatic Assurances’ Against Torture* 9, AI Index EUR 01/012/2010 (2010).

202. For instance, in June 2008 several organizations wrote a letter to the Danish government urging it to “abandon altogether these unreliable and unenforceable agreements.” “Persisting in such attempts,” they wrote, “rather than focusing all efforts on achieving actual and demonstrable reduction in the overall risk of torture and other ill-treatment in the countries in question as required by international law, undermines respect for human rights, and for the framework of multilateral human rights treaties.” Amnesty International, Human Rights Watch, International Commission of Jurists and Redress, *Letter to Lene Espersen, Minister for Justice, Denmark* (2008), available at [http://www2.ohchr.org/english/bodies/hrc/docs/ngos/ICJ\\_Denmark\\_93.pdf](http://www2.ohchr.org/english/bodies/hrc/docs/ngos/ICJ_Denmark_93.pdf).

assurances and consider whether minimum standards for their use should be formulated in a legal instrument. The specialists group collected responses from UN and Council of Europe human rights organs, NGOs and national governments—the latter two groups offered conflicting accounts of policies and experiences with assurances, as might be expected given the use of assurances in covert and extralegal transfers.<sup>203</sup>

Reflecting the impasse, the Council of Europe specialists' group ultimately recommended against adoption of a common instrument on assurances. It cited the practical difficulty of formulating standards, given the divergent contexts in which assurances were used, the limited national practice on which to draw, and the limited efficacy of broadly termed standards. The group also worried that in the long run, such an instrument could “be seen as weakening the absolute nature of the prohibition of torture or as a Council of Europe legitimization of the use of diplomatic assurances.” Worse, it could “be seen as an inducement to resort to diplomatic assurances, when in fact states currently make very little use of them.”<sup>204</sup>

Human rights groups also declined, as a coalition, to develop guidelines on assurances. In October 2004, the Human Rights Institute and the Jacob Blaustein Institute for the Advancement of Human Rights convened major NGOs, academics and international organizations such as the International Committee of the Red Cross, the UN High Commissioner for Refugees, the UN Special Rapporteur on Torture, and the UN Independent Expert on Terrorism and Human Rights. The meeting sought to lay out minimum standards for the use of diplomatic assurances, without endorsing their use. But some of the participants worried that guidelines would further encourage the use of assurances. Human Rights Watch, in particular, objected strongly. The Human Rights Institute and Blaustein Institute eventually distributed draft guidelines without additional endorsement.<sup>205</sup>

## Chapter 2: Recent Guidance from the UN & European Court of Human Rights

*Some UN experts and bodies and the European Court of Human Rights have assessed assurances on a case-by-case basis. They have delineated key factors in determining assurances' reliability:*

- level of abuse in the receiving country, particularly whether torture rises to the level of “systemic”
- specificity of terms in assurances
- post-return monitoring arrangements
- transparency in decision-making, including providing the text of assurances to reviewing bodies

### Assurances As a Legal Black Hole or a “Relevant Consideration”

Underlying the skepticism about assurances is a concern that rather than implementing or complementing human rights standards, assurances circumvent them. Critics of assurances rightly point out that assurances are not explicitly recognized by any of the major human rights instruments on torture, or mentioned in their negotiating histories.

203. The Council of Europe's Steering Committee for Human Rights created the Group of Specialists on Human Rights and the Fight Against Terrorism in November 2001 in response to 9/11. In 2005, the Group was asked to “consider the appropriateness of a legal instrument, for example a recommendation on minimum requirements/standards of such diplomatic assurances, and, if need be, present concrete proposals.” The Group agreed on general principles but failed to reach agreement on the weight and reliability of assurances, dividing into four sub-groups: (1) those who considered assurances to be inherently unreliable; (2) those who believed that assurances could be effective and should be given significant weight; (3) those who were unwilling to reject diplomatic assurances in principle for all future cases, but did not believe assurances were in practice necessarily effective; (4) those who found it difficult to arrive at a firm position on the issue because the countries they represented had never used assurances. Group of Specialists on Human Rights and the Fight Against Terrorism, Meeting Report, Doc. No. DH-S-TER(2006)(005) Appendix III, ¶ 5 (Apr. 3, 2006), available at [http://www.coe.int/t/e/human\\_rights/cddh/3\\_committees/06.%20terrorism%20\(dh-s-ter\)/meeting%20reports/2006\\_005\\_en.asp#TopOfPage](http://www.coe.int/t/e/human_rights/cddh/3_committees/06.%20terrorism%20(dh-s-ter)/meeting%20reports/2006_005_en.asp#TopOfPage) [hereinafter DH-S-TER Report].

204. *Id.* at ¶ 17(iii) and (iv).

205. Positions of the Jacob Blaustein Institute for the Advancement of Human Rights and Columbia University Law School's Human Rights Clinic on Minimum Standards and Guidelines on the Use of Diplomatic Assurances, submitted to the Group of Specialists on Human Rights and the Fight Against Terrorism, Steering Committee for Human Rights, DH-S-TER (2005)17 (Dec. 6, 2005), available at [http://www.coe.int/t/e/human\\_rights/cddh/](http://www.coe.int/t/e/human_rights/cddh/).



Article 3 of the Convention Against Torture prohibits refoulement, or the expulsion, return or extradition of a person to a state “where there are substantial grounds for believing that he would be in danger of being subjected to torture.”<sup>206</sup> It contains no exception based on the victim’s conduct; it is also non-derogable, meaning that governments are required to abide by its terms even during a declared state of emergency.<sup>207</sup> The International Covenant on Civil and Political Rights also prohibits torture and cruel, inhuman or degrading treatment or punishment;<sup>208</sup> the Human Rights Committee, which monitors state party implementation of the Covenant, has interpreted the Covenant as prohibiting

transfer that exposes individuals to the danger of torture and such ill-treatment.<sup>209</sup> Likewise, the European Court of Human Rights has interpreted the European Convention on Human Rights as prohibiting transfer where there is a “real risk” that returnees will suffer torture or inhuman or degrading treatment or punishment.<sup>210</sup>

Proponents argue that assurances are one factor in the analysis of whether an individual is at substantial risk of torture or ill-treatment.<sup>211</sup> Article 3 of the Convention Against Torture directs “the competent authorities” to examine “all relevant considerations” in considering the likelihood of abuse.<sup>212</sup> Some human rights advocates argue that rather than being a relevant consideration under the Convention Against Torture, assurances enable governments to “neglect and evade their legal obligations.”<sup>213</sup> Assurances provide a facile justification for conducting transfers in a “legal black hole”: without accountability to any court or even established standards of international law. This claim is vindicated by past abusive practice, such as the use of assurances in extraordinary renditions.

However, assurances do not exist beyond the reach of human rights principles: taken together, the work of UN experts, UN human rights bodies and the European Court of Human Rights delineates standards on when assurance should not be used. Although they are not binding customary law principles, these standards should guide governments seeking to formulate rights-respecting transfer policy.

**Assurances do not exist beyond the reach of human rights principles: taken together, the work of UN experts, UN human rights bodies and the European Court of Human Rights delineates standards on when assurance should not be used.**

206. Convention Against Torture, *supra* note 16, art. 3.

207. See UN Committee Against Torture, General Comment No. 2, ¶ 1, UN Doc. CAT/C/GC/2 (Jan. 24, 2008) (“Since the adoption of the Convention Against Torture, the absolute and non-derogable character of this prohibition has become accepted as a matter of customary international law.”).

208. ICCPR, *supra* note 165, art. 7.

209. See UN Human Rights Committee, General Comment No. 20, ¶ 9 (Mar. 10, 1992); UN Human Rights Committee, General Comment No. 31, ¶ 12, UN Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004).

210. See European Convention on Human Rights, *supra* note 165, art. 3; *Soering v. UK*, Application No. 14038/88, ¶ 88 (European Court of Human Rights July 7, 1989).

211. See, e.g., Congressional Research Service, *supra* note 24, at 10.

212. Convention Against Torture, *supra* note 16, art. 3. The risk determination is based on what the authorities knew, or should have known, at the time of the transfer. *Agiza v. Sweden*, ¶ 13.2, UN Doc. CAT/C/34/D/233/2003 (UN Comm. Against Torture May 24, 2005). In *Agiza*, the Committee added that “[s]ubsequent events are relevant to the assessment of the State party’s knowledge, actual or constructive, at the time of removal.” *Id.* This suggests that although the focus of the assessment is on the State’s knowledge at the time of removal, the fact that an individual was in fact subjected to torture may bear on the Committee’s assessment.

213. Amnesty International, *Dangerous Deals*, *supra* note 201 at 9; see also Committee on International Human Rights, Association of the Bar of the City of New York & Center for Human Rights and Global Justice, New York University School of Law, *Torture by Proxy: International Domestic Law Applicable to “Extraordinary Renditions”* 8 (2004), available at <http://www.chrgj.org/docs/TortureByProxy.pdf> (“[A]lthough diplomatic assurances arguably fall under a ‘grey area’—neither envisioned nor prohibited by the international treaties to which the United States is a party—as currently implemented, they violate the strict letter and the object and purposes of these treaties.”).

### **Perspective of UN Experts and Bodies**

With a few exceptions, UN experts and bodies have taken awkwardly intermediate positions on assurances. They have stressed that assurances themselves do not release countries from their human rights obligations, a common-sense proposition that provides little guidance on whether or how assurances can help countries meet their obligations.<sup>214</sup> At the same time, taken together, the body of statements by UN experts and bodies presents an unmistakably cautious view, proscribing transfers to countries where torture is practiced systematically and expressing concern where there is no strong mechanism for post-return monitoring or where the governments have not disclosed details of the assurances.

#### **UN Expert Opinion on Assurances:**

In 1996, then- UN Special Rapporteur on Torture Sir Nigel Rodley recommended seeking assurances against torture from receiving countries. As more information on assurances practice and reports of violated assurances emerged, opinion of Special Rapporteurs and UN High Commissioners for Human Rights (UN HCHR) evolved to a more critical view of assurances.

1996 Sir Nigel Rodley (UN Special Rapporteur on Torture 1993–2001)

*“In view of all the circumstances the Special Rapporteur appealed to the Government not to deport Saadi Bouslimani or, if he were to be deported, to seek, and take measures to ensure compliance with, assurances from the Government of Algeria that he would not be subjected to torture or any other ill-treatment.”*

2001 Theo van Broven (UN Special Rapporteur on Torture 200–2004)

*“In all appropriate circumstances, before extraditing persons under terrorist or other charges” states should seek “an unequivocal guarantee to the extraditing authorities that the persons concerned will not be subjected to torture or any other form of ill-treatment, and that a system to monitor the treatment of such persons has been put into place to ensure that they are treated with full respect for their human dignity.”*

2005 Manfred Nowak (UN Special Rapporteur on Torture 2004–2010)

*“[D]iplomatic assurances with regard to torture are nothing but attempts to circumvent the absolute prohibition of torture and refoulement, and that rather than elaborating a legal instrument on minimum standards for the use of diplomatic assurances, the Council of Europe should call on its member States to refrain from seeking and adopting such assurances with States with a proven record of torture.”*

2005 Louise Arbour (UN HCHR 2004–2008)

*“The fact that some Governments conclude legally non-binding agreements with other Governments on a matter that is at the core of several legally-binding UN instruments threatens to empty international human rights law of its content. Diplomatic assurances basically create a two-class system among detainees, attempting to provide for a special bilateral protection and monitoring regime for a selected few and ignoring the systemic torture of other detainees, even though all are entitled to the equal protection of existing UN instruments.”*

2009 Navanethem Pillay (UN HCHR 2008–2012)

*“Some states have made use of diplomatic assurances and other forms of diplomatic agreements to justify the return or irregular transfer of individuals suspected of terrorist activities to countries where they may face a real risk of torture or other serious human rights abuse. There is a clear need to stop this practice, shed light on it, and hold perpetrators of torture accountable.”*

214. The UN General Assembly and UN Human Rights Council have reiterated in successive resolutions since 2006 that diplomatic assurances “do not release States from their obligations under . . . the principle of non-refoulement.” See UN General Assembly Resolution 60/148, ¶ 8, UN Doc. A/RES/60/148 (Feb. 21, 2006); UN General Assembly Resolution 62/124, ¶ 12, UN Doc. A/RES/62/148 (Mar. 4, 2008); UN General Assembly Resolution 63/166, ¶ 15, UN Doc. A/RES/63/166 (Feb. 19, 2009); UN Human Rights Council Resolution 8/8, ¶ 6(d) (June 18, 2008).

### **Assurances as a Factor in the Risk of Torture Analysis**

Many UN bodies and experts have simultaneously emphasized that assurances should be used with “caution” and that, in some circumstances, they may be a factor in determining whether a given transfer would put a government in breach of its human rights obligations.

Most significantly, the UN Human Rights Committee and UN Committee Against Torture, charged with both assessing individual complaints and considering State Parties’ reports on treaty compliance, have urged governments to use assurances with “great caution.”<sup>215</sup> But they have also sometimes treated assurances as a “relevant consideration” in the risk of torture analysis, along with other factors such as the general situation of human rights in the receiving country and particular vulnerabilities of the returnee.<sup>216</sup> For instance, in finding that Sweden breached its Convention Against Torture obligations in transferring Ahmed Agiza to Egypt, the Committee against Torture considered that “the practice of torture in Egypt is widespread, and that individuals charged with political offenses such as Mr. Agiza face an enhanced risk of being subjected to such torture.”<sup>217</sup> Egypt’s diplomatic assurances “provided no mechanism for their enforcement.” “The natural conclusion from these combined elements” was that “the complainant was at a real risk of torture in Egypt.”<sup>218</sup>

### **Unreliability of Assurances Where Torture is Systematic**

At the same time, UN bodies and officials have articulated a threshold at which assurances cannot mitigate the risk of torture, that is, implicitly, where assurances cannot be a “relevant consideration” in the risk of torture analysis: where torture is practiced systematically in the receiving country.<sup>219</sup>

The UN Committee Against Torture has called on the US to “only rely on ‘diplomatic assurances’ in regard to States which do not systematically violate the Convention’s provisions.”<sup>220</sup> Likewise, the UN Special Rapporteur on Torture has emphasized that “diplomatic assurances should not be resorted to” where there is a “systematic practice of torture,” which encompasses torture as a State policy and as a practice by public authorities over which the government has no effective control.<sup>221</sup>

This requirement significantly narrows the range of countries for which assurances may be used. As recent UN Special Rapporteur on Torture Manfred Nowak has noted, “assurances are sought usually

215. See, e.g., UN Committee Against Torture, *Conclusions and Recommendations of the Committee Against Torture: Georgia*, ¶ 11, UN Doc. CAT/C/GEO/CO/3 (July 25, 2006).

216. The UN Human Rights Committee in *Alzery* articulated this approach, stating it would “consider all relevant elements, including the general situation of human rights in a State” and the “existence of diplomatic assurances, their content and the existence and implementation of enforcement mechanisms.” *Alzery v. Sweden*, ¶ 11.3, UN Doc. CCPR/C/88/D/1416/2005 (UN Human Rights Comm. Nov. 10, 2006).

217. *Agiza v. Sweden*, ¶ 13.4, UN Doc. CAT/C/34/D/233/2003 (UN Committee Against Torture May 24, 2005).

218. *Id.* (emphasis added).

219. According to the UN Committee Against Torture:

[T]orture is practised systematically when it is apparent that torture cases reported have not occurred fortuitously in a particular place or at a particular time, but are seen to be habitual, widespread and deliberate in at least a considerable part of the territory of the country in question. Torture may in fact be of a systematic character without resulting from the direct intention of a Government. It may be the consequence of factors which the Government has difficulty in controlling, and its existence may indicate a discrepancy between the policy as determined by the central Government and its implementation by the local administration. Inadequate legislation which in practice allows room for the use of torture may also add to the systematic nature of this practice.

See UN Committee Against Torture, *Report of the Committee Against Torture: Addendum*, ¶ 39, UN Doc. A/48/44/Add.1, cited in UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 36, UN Doc. A/59/324 (Sept. 1, 2004) [hereinafter UN Special Rapporteur van Boven 2004 Report].

220. UN Committee Against Torture, *Conclusions and Recommendations of the Committee Against Torture: United States*, ¶ 21, UN Doc. CAT/C/USA/CO/2 (July 25, 2006).

221. UN Special Rapporteur van Boven 2004 Report, *supra* note 219, ¶ 37.

**If a government cannot control actors which routinely commit torture, assurances which would otherwise be honored can provide no additional protection.**

from States where the practice of torture is systematic.”<sup>222</sup> Put another way, “it is in the nature of diplomatic assurances against torture that they will be sought from States only where it is judged that the returned individual would otherwise be likely to be subject to torture, given the widespread or systematic use of torture in that State, either in general or against particular classes of individuals.”<sup>223</sup> The requirement that assurances not be used where torture is systematic is a logical limit. Where torture is systematic, that is, “habitual” or “widespread,” “[i]t may be the

consequence of factors which the Government has difficulty in controlling,” e.g., rogue security forces or police.<sup>224</sup> If a government cannot control actors which routinely commit torture, assurances which would otherwise be honored can provide no additional protection.

In receiving countries where the level of torture does not rise to “systematic,” there may still be a “consistent pattern of gross, flagrant or mass violations.” The Convention Against Torture cites such a “pattern” as an important factor for competent authorities to consider in assessing the risk of torture, and the UN Committee Against Torture has found that, while not decisive, it can strengthen risk of torture claims.<sup>225</sup> By the same token, the existence of such a “pattern” would weaken the claim that assurances provide an adequate safeguard against torture or ill-treatment.

### **Specific Guarantees**

Another factor in the reliability of assurances is the specificity of their terms. In 2004, then-Special Rapporteur Theo Van Boven’s report to the General Assembly included a list of safeguards, some of which he recommended be “explicitly included in the assurances to be obtained,” that reflect international human rights norms and standards. These recommendations include:

- prompt access to a lawyer
- recording of all interrogation sessions and of the identity of all persons present
- prompt and independent medical examination
- forbidding incommunicado detention or detention at undisclosed places.<sup>226</sup>

Van Boven emphasized that specific guarantees were necessary to ensure that assurances were not “empty gestures.”<sup>227</sup>

### **Importance of Effective Monitoring**

UN experts and bodies have repeatedly cited the lack of effective monitoring as a key reason why assurances are inadequate, but have divided over whether effective monitoring is possible. Recent Special Rapporteur Manfred Nowak has expressed skepticism about the effectiveness of any post-return monitoring.<sup>228</sup> However, his predecessor Theo van Boven emphasized in 2004 that at a minimum, an effective

222. UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 51, UN Doc. A/60/316 (Aug. 30, 2005) (emphasis added).

223. European Commission, Response to Question Tabled by Baroness Sarah Ludford, Agenda item 7 of the Subcommittee on Human Rights of the European Parliament, PE402.663v01-00 (Feb. 28, 2008), cited in Open letter from Amnesty International et al. to Lene Espersen, Danish Minister for Justice (June 18, 2008).

224. See UN Committee Against Torture, *supra* note 219 and accompanying text.

225. Convention Against Torture, *supra* note 16, art. 3(2); see *Mutombo v. Switzerland*, Communication No. 13/1993, ¶ 9.4, UN Doc. CAT/C/12/D/013/1993 (UN Committee Against Torture Apr. 27, 1994).

226. UN Special Rapporteur van Boven 2004 Report, *supra* note 219, ¶ 41.

227. *Id.* at ¶ 40.

228. See *infra* note 500.

system requires that monitoring be “prompt, regular and include private interviews.” It should be conducted by “[i]ndependent persons or organizations” who regularly report to authorities of the sending and receiving countries.<sup>229</sup> More detailed requirements for adequate monitoring can be drawn from UN statements in related contexts of prevention and investigation of torture (see Part III Ch. 2).

Monitoring also figures prominently in UN human rights bodies’ consideration of individual cases. For instance, in *Alzery v. Sweden*, the Human Rights Committee emphasized the lack of any monitoring or enforcement mechanism for the assurances Sweden received from Egypt, chiding Sweden for failing to establish anything “outside the text of the assurances themselves which would have provided for effective implementation.”<sup>230</sup> Likewise, the Committee Against Torture has concluded that assurances which “provided no mechanism for their enforcement, did not suffice to protect against [the] manifest risk [of torture].”<sup>231</sup>

### **Transparency as Marker of Reliability**

Transparency in the process of obtaining and assessing assurances is also a critical factor, as emphasized repeatedly by the UN Committee Against Torture. In its most recent report on the US, the Committee cited “the secrecy of [assurances] procedures including the absence of judicial scrutiny,” and called on the US to “establish and implement clear procedures for obtaining such assurances, with adequate judicial mechanisms for review.”<sup>232</sup>

Lack of transparency casts a pall on assurances-based transfers, prompting skepticism even where other issues, like post-return monitoring, are somewhat addressed. For instance, in June 2007, the Committee Against Torture held in *Pelit v. Azerbaijan* that Azerbaijan had breached its human rights obligation in transferring an individual to Turkey based on assurances, even though the assurances provided for monitoring which had in fact occurred.<sup>233</sup> Among other factors, the Committee cited Azerbaijan’s failure to provide the text of the assurances to the Committee or explain why it had disregarded the individual’s refugee status.<sup>234</sup> Azerbaijan also conducted the transfer despite the Commission’s order that the transfer be halted while the case was pending. The Committee concluded “that the manner in which the State party handled the complainant’s case amounts to a breach of her rights.”<sup>235</sup>

### **Perspective of the European Court of Human Rights**

The European Court of Human Rights has considered far more individual cases involving assurances than any other international or regional human rights body.<sup>236</sup> Its jurisprudence reflects many of the same concerns voiced by UN officials and bodies, at times with greater specificity and nuance. The European Court has cultivated a framework for considering assurances on a case-by-case basis, assessing in particular the

229. UN Special Rapporteur van Boven 2004 Report, *supra* note 219, ¶ 41.

230. *Alzery v. Sweden*, Communication No. 1416/2005, ¶ 11.5, UN Doc. CCPR/C/88/D/1416/2005 (UN Human Rights Committee Nov. 10, 2006).

231. *Agiza v. Sweden*, Communication No. 233/2003, ¶ 13.4, UN Doc. CAT/C/34/D/233/2003 (UN Committee Against Torture May 24, 2005).

232. UN Committee Against Torture, *Conclusions and Recommendations of the Committee Against Torture: United States*, ¶ 21, UN Doc. CAT/C/USA/CO/2 (July 25, 2006).

233. *Pelit v. Azerbaijan*, Communication No. 281/2005, UN Doc. CAT/C/38/D/281/2005 (UN Committee Against Torture June 5, 2007).

234. *Id.* at ¶ 11.

235. *Id.*

236. The European Court considers individual complaints alleging that member States have violated the Convention for the Protection of Human Rights and Fundamental Freedoms, the central human rights legal instrument in the European system. Article 3 of the European Convention absolutely prohibits torture and inhuman or degrading treatment or punishment; it contains no exception for states of emergency or based on the victim’s conduct, including participation in terrorist violence. See European Convention on Human Rights, *supra* note 165, art. 3; *Shamayev v. Georgia & Russia*, App. No. 36378/02, ¶ 335 (Eur. Ct. H.R. 2005); *Chahal v. United Kingdom*, App. No. 22414/93, ¶ 79 (Eur. Ct. H.R. 1996); *Ireland v. United Kingdom*, App. No. 5310/71, ¶ 163 (Eur. Ct. H.R. 1978). The European Court has interpreted Article 3 as prohibiting *refoulement*, or transfer of individuals to a place where there is a “real risk” that they will suffer torture or inhuman or degrading treatment or punishment. See, e.g., *Soering v. UK*, App. No. 14038/88, ¶ 88 (Eur. Ct. H.R. 1989).

human rights record of the receiving government. While its repeated rejection of assurances suggests a basic distrust of assurances, in two recent cases the European Court assessed assurances as positive factors, underscoring that the Court does not regard assurances as *per se* ineffective. This has left the door open for European countries to experiment.

### **Saadi v. Italy’s Framework for Assurances**

The European Court outlined its framework for assessing assurances in the 2008 case *Saadi v. Italy*. In *Saadi*, the European Court considered Italy’s deportation of Nassim Saadi to Tunisia, where a military court had sentenced him in absentia to twenty years’ imprisonment for membership in a terrorist organization operating abroad in time of peace and for incitement to terrorism.<sup>237</sup> At Italy’s request, Tunisia had provided a written assurance that it was prepared to accept the transfer of Tunisians “in strict conformity with the national legislation in force and under the sole safeguard of the relevant Tunisian statutes”; that “the Tunisian laws in force guarantee and protect the rights of prisoners in Tunisia and secure to them the right to a fair trial”; and that “Tunisia has voluntarily acceded to the relevant international treaties and conventions.”<sup>238</sup> The Court found these assurances insufficiently specific, and concluded that Italy’s deportations would violate Article 3 of the European Convention if carried out.<sup>239</sup>

Under the Court’s framework, the applicant bears the initial burden of establishing the existence of a real risk of torture. The Court will consider assurances as part of the government’s rebuttal evidence, that is, whether assurances reduce the applicant’s already established risk of torture. But assurances, merely by their terms, cannot satisfy torture concerns. Sending governments are required to look beyond the word of the receiving government and examine its actions and human rights record.<sup>240</sup>

### **Beyond “Systematic Torture”: Poor Human Rights Record As An Indicator of Unreliability**

While the UN Committee Against Torture regards a “systematic level of torture” as a threshold point after which assurances cannot provide protection, the European Court has implied a somewhat lower threshold, emphasizing that “assurances are not in themselves sufficient... where reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the [European] Convention.”<sup>241</sup> (It has also rejected assurances based on the systematic level of torture in the receiving country, mirroring the Committee Against Torture’s calculus.)<sup>242</sup>

In a dozen cases concerning removal of individuals from Italy to Tunisia, the European Court has emphasized Tunisia’s pattern of abuse against terrorism suspects—“numerous and regular cases of torture and ill-treatment meted out to persons accused under the 2003 Prevention of Terrorism Act”—without characterizing the level of torture as “systematic.”<sup>243</sup>

237. See *Saadi v. Italy*, App. No. 37201/06, ¶ 29 (Eur. Ct. H.R. 2008). At the time of the European Court of Human Rights’ decision, Italian criminal proceedings on various charges, including conspiracy to commit acts of violence in States other than Italy with the aim of spreading terror, were pending against Saadi. *Id.* at ¶¶ 11-28.

238. *Id.* at ¶ 54. Tunisia has ratified the ICCPR and the UN Convention Against Torture. *Id.* at ¶ 111.

239. *Id.*

240. According to the European Court, the sending government should assess assurances based on “the circumstances prevailing at the material time.” *Id.* at ¶ 148. If the individual in question has not yet been transferred, the “material time” is the time of the proceedings before the European Court. If the individual has already been removed, the “material time” is the time of removal. *Id.* at ¶ 133 (citing *Chahal*, *supra* note 236 at ¶¶ 85-86; *Venkadajalasarma v. Netherlands*, App. No. 58510/00, ¶ 63 (Eur. Ct. H.R. 2004)).

241. See *Klein v. Russia*, App. No. 24268/08, ¶ 55 (Eur. Ct. H.R. 2010).

242. *Garayev v. Azerbaijan*, App. No. 53688/08, ¶ 74 (Eur. Ct. H.R. 2010) (rejecting Uzbek assurances; holding that “[g]iven that the practice of torture is described by reputable international human rights reports as being systematic, the Court is not persuaded that the assurances from the Uzbek authorities offered a reliable guarantee against the risk of ill-treatment”); *Khaydarov v. Russia*, App. No. 21055/09 (Eur. Ct. H.R. 2010) (rejecting Tajik assurances on same reasoning).

243. See *Saadi*, *supra* note 237, ¶ 143; *Sellem v. Italy*, App. No. 12584/08 (Eur. Ct. H.R. 2009); *Cherif v. Italy*, App. No. 1860/07 (Eur. Ct. H.R. 2009); *Soltana v. Italy*, App. No. 37336/06 (Eur. Ct. H.R. 2009); *Darraj v. Italy*, App. No. 11549/05 (Eur. Ct. H.R. 2009); *C.B.Z. v. Italy*, App. No. 44006/06 (Eur. Ct. H.R. 2009); *Bouyahia v. Italy*, App. No. 46792/06 (Eur. Ct. H.R. 2009); *Ben Salah v. Italy*, App. No. 38128/06 (Eur. Ct. H.R. 2009); *Abdelhedi v. Italy*, App. No. 2638/07 (Eur. Ct. H.R. 2009); *O. v. Italy*, 37257/06 (Eur. Ct. H.R. 2009); *Hamraoui v. Italy*, App. No. 16201/07 (Eur. Ct. H.R. 2009); *Ben Khemais v. Italy*, App. No. 246/07 (Eur. Ct. H.R. 2009).

Against the specific pattern of abuse, the Court has repeatedly rejected as insufficient Tunisia’s recitation of generally applicable legal protections, such as respect for the dignity of all persons, the right to a fair trial, the right to have private visits with family members and an attorney, and the right to medical care. It has also rejected the sufficiency of positive indicators, like Tunisia’s ratification of the Convention Against Torture and its recognition of the UN Committee Against Torture’s competence to hear individual complaints.<sup>244</sup>

### **Specificity of Assurances as a Factor**

The European Court has repeatedly rejected assurances based on their lack of specificity, reasoning that vaguely worded guarantees do not provide protection against torture. In a 2009 case the Court faulted assurances that “d[id] not specifically exclude that the applicant would be subjected to treatment contrary to Article 3,” although they noted the applicant would not face the death penalty and that “his rights and lawful interests in the course of criminal proceedings would be adequately protected.”<sup>245</sup>

The European Court’s preferred level of specificity of assurances extends beyond requiring an explicit reference to torture or Article 3 of the Convention. For instance, in another recent case, the European Court “question[ed] the value of assurances” that were “vague and lacked precision,” although the assurances at issue specifically guaranteed that the individual would not be subjected to “tortures [sic], inhuman or degrading treatment or punishment.”<sup>246</sup>

At the same time, where torture is widespread, assurances specifically referencing protection against torture are no more reliable. For instance, in the 2008 case *Ismoilov v. Russia, Uzbekistan* proffered assurances that the applicants would be provided with fair legal process and not be subjected to the death penalty, persecution, torture, or inhuman or degrading treatment or punishment.<sup>247</sup> Citing *Chahal and Saadi*, the European Court declared that “[g]iven that the practice of torture in Uzbekistan is described by reputable international experts as systematic . . . the Court is not persuaded that the assurances from the Uzbek authorities offered a reliable guarantee against the risk of ill-treatment.”<sup>248</sup> Likewise, the Court rejected assurances specifically making reference to Article 3 of the European Convention and protection from torture and ill-treatment in a case involving Ukraine’s proposed extradition of a Turkmen national to Turkmenistan.<sup>249</sup>

### **Ongoing & Future Assurances Cases in the European Court**

In two recent cases, the European Court assessed assurances as positive factors. This could suggest a distancing from its renditions-era skepticism of assurances.<sup>250</sup>

244. See *Sellem*, ¶ 18; *Cherif*, ¶ 26; *Abdelhedi*, ¶ 17; *Ben Salah*, ¶ 14; *Bouyahia*, ¶ 16; *C.B.Z.*, ¶ 17; *Darraj*, ¶ 35; *Hamraoui*, ¶ 15; *O.*, ¶ 18; *Soltana*, ¶ 20; *Ben Khemais*, ¶ 27, *supra* note 243.

245. *Kaboulov v. Ukraine*, App. No. 41015/04, ¶¶ 113, 34 (Eur. Ct. H.R. 2009). See also *Muminov v. Russia*, App. No. 42502/06, ¶ 122 (Eur. Ct. H.R. 2008).

246. *Klein*, *supra* note 241, ¶ 16.

247. *Ismoilov v. Russia*, App. No. 2947/06, ¶ 31 (Eur. Ct. H.R. 2008) (reviewing July 2005 assurances that “the applicants would not be subjected to the death penalty, torture, violence or other forms of inhuman or degrading treatment or punishment”; that “[t]heir rights of defence would be respected and they would be provided with counsel”; that “the Uzbek authorities had no intention of persecuting the applicants out of political motives, on account of their race, ethnic origin, or religious or political beliefs”; that the “intention [of Uzbek authorities] was to prosecute the applicants for the commission of particularly serious crimes”).

248. *Id.* at ¶ 127.

249. *Soldatenko v. Ukraine*, App. No. 2440/07, ¶¶ 16, 20 (Eur. Ct. H.R. 2008) (holding that assurances guaranteeing the applicant “had never been and would never be discriminated against on the grounds of social status, race, ethnic origin or religious beliefs,” noting the abolition of the death penalty and stating that “the requirements of Article 3 of the Convention on Human Rights and Fundamental Freedoms will be fulfilled in respect of N.I. Soldatenko, he will not be subjected to torture, inhuman or degrading treatment or punishment after extradition; in case of necessity he will be provided with appropriate medical treatment and medical assistance; the right to fair judicial consideration of his criminal case will be secured to him”).

250. The European Court signaled willingness to accept diplomatic assurances as early as the 2005 *Shamayev* case. See *Shamayev*, *supra* note 236. One human rights expert has interpreted *Shamayev* as showing “that the practice of the court itself is to accept diplomatic assurances.” Olivier De Schutter, *International Human Rights Law: Cases, Materials, Commentary* 285 (Cambridge University Press, 2010). However, *Shamayev* could be distinguished from more recent cases: the applicants had already been transferred and there was evidence that they were treated humanely, and the case pre-dated the *Saadi* framework, including the Court’s approach of reviewing assurances as rebuttal evidence against an already established risk of torture.

The circumstances were procedurally distinct, which perhaps enabled the Court to avoid explaining its seeming departure. In the 2009 case *Gasayev v. Spain*, the European Court emphasized the existence of post-return monitoring arrangements in declining to enjoin an extradition to Russia. The Prosecutor General of Russia had guaranteed private visits to the applicant for Spanish diplomatic personnel and that detention conditions would meet standards under Article 3 of the Convention.<sup>251</sup> In declining to enjoin the extradition, the Court cited these assurances and Russia's status as contracting party to the European Convention, although it had discounted the latter factor in a previous case regarding transfer to Russia.<sup>252</sup>

The European Court also assessed assurances positively in *Boumediene and Others v. Bosnia and Herzegovina*, concerning Bosnia-Herzegovina's transfer of six individuals to Guantánamo based on US assurances against torture, inhumane treatment, and the death penalty. For procedural reasons, the question was whether Bosnia-Herzegovina fulfilled its duties arising from domestic law—not the European Convention.<sup>253</sup> The European Court considered the assurances as evidence that Bosnia and Herzegovina was “taking all possible steps to the present date to protect the basic rights of the applicants” as required by Bosnian domestic law, and concluded that the application for protection was manifestly unfounded.<sup>254</sup> Like *Gasayev*, the *Boumediene* decision conspicuously failed to discuss relevant problems in the receiving government's human rights record, such as abuse at Guantánamo.<sup>255</sup>

Moreover, in recent cases outside of the torture context, the European Court has made gestures toward the reliability of assurances, even where the receiving government has a record of flouting international human rights standards.

In July 2010, in *Babar Ahmad v. UK*, the European Court considered the extradition of terrorism suspects to the US based on assurances (in the form of a diplomatic note) that they would not be treated as enemy combatants. In an admissibility (not merits) decision, the European Court commented that it was appropriate to presume the good faith of the US based on its “long history of respect for democracy, human rights and the rule of law,” despite recent US practice, for instance, of detaining individuals as enemy combatants after unsuccessful attempts at criminal prosecution.<sup>256</sup>

In a March 2010 decision, the European Court held that the UK had breached its European Convention obligations by, among others things, failing to secure “binding assurances” that two individuals whom UK forces captured in Iraq and transferred to Iraqi authorities for criminal prosecution would not be subjected to the death penalty. The European Court directed the UK to take remedial measures including

---

251. *Gasayev v. Spain*, App. No. 48514/06 (Eur. Ct. H.R. 2009). In response to requests for assurances from Spain, the Prosecutor General of Russia guaranteed that the UN Committee Against Torture would be able to have private visits with the applicant, that the detention conditions would meet the requirements of Article 3, and that capital punishment would not be imposed. Subsequently, the UN Committee Against Torture indicated that visiting and monitoring the applicant was not within its mandate, and the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) also declined to do so. Spanish diplomatic personnel in Moscow agreed to monitor, and the applicant was extradited. *Id.*

252. See *Shamayev*, *supra* note 236.

253. The European Court considered whether the application was “manifestly unfounded” because Bosnia and Herzegovina had fulfilled its duty, arising out of domestic decisions, to take all possible steps to protect the individuals' basic rights. The Court declined to reach the issue of whether it had jurisdiction to apply the European Convention, including Article 3 prohibiting *refoulement*, where the transfer occurred prior to the Convention's entry into force for Bosnia and Herzegovina. *Boumediene and Others v. Bosnia and Herzegovina*, App. Nos. 38703/06, 40123/06, 43301/06, 43302/06, 2131/07, 2141/07, ¶¶ 50, 62 (Eur. Ct. H.R. 2007).

254. *Id.* at ¶ 67. The Court did not apply Article 3, as it declined to resolve the issue of whether it had jurisdiction over Bosnia and Herzegovina notwithstanding the fact that the applicants were transferred to US custody before the entry into force of the European Convention of Human Rights with respect to Bosnia and Herzegovina. See *id.* at ¶ 62.

255. The European Court referenced, but did not discuss, a Council of Europe Parliamentary Assembly resolution addressing US rendition programs and alleged abuse at Guantanamo. See *id.* at ¶ 53.

256. See *Ahmad v. United Kingdom*, App. Nos. 24027/07, 11949/08, 36742/08, ¶¶ 101, 104-109 (Eur. Ct. H.R. 2010) (finding part of the applicants' claims admissible).



seeking post-transfer assurances against abuse, but did not comment on whether such assurances could have legal force or what mechanisms could sufficiently render assurances “binding.”<sup>257</sup>

### **Guidance & the Door Left Open: Experimentation by European Countries**

It is difficult to square the European Court’s positive assessment of assurances with the Court’s repeated rejection of assurances in the Italy-Tunisia cases. One possible interpretation is that *Gasayev* and *Boumediene* underscore the European Court’s case-by-case approach, enunciated in Saadi, and the lack of decisive criteria. The European Court’s upcoming terms may be more instructive.<sup>258</sup>

Ultimately, despite the European Court’s repeated rejection of assurances in several instances, this case-by-case approach leaves the door to experimentation for European countries in assurances-based transfers, particularly where they can claim that their practice reflects lessons learned from the acknowledged abuses of past renditions, and a process fundamentally more careful and oriented in the rule of law.

In recent years, human rights groups have noted signs that some European countries are considering renewed or new assurances use. In 2008, Denmark, which had previously opposed the use of diplomatic assurances against torture and ill treatment, reportedly “appeared to signal a new willingness to contemplate reliance on assurances.”<sup>259</sup> In 2009, Human Rights Watch reported that Germany was considering immigration regulations that would require the government to consider seeking assurances to expel any deportable terrorism suspect.<sup>260</sup> In 2008, Human Rights Watch reported that Switzerland was seeking assurances in several extradition cases, although it had opposed assurances in 2005 and 2006.<sup>261</sup>

As European countries contemplate increasing coordination of migration policy, including apprehension and prosecution of terrorism suspects, they may reconsider adopting a common position on assurances ostensibly reflective of the European Court’s jurisprudence.<sup>262</sup> The UK may become the model, as it has taken a lead in advocating for assurances and crafting the appearance of systematized use. But as the next chapter describes, although the UK’s approach is more progressive than the US’, it fails to address key concerns raised by the European Court and UN bodies and officials.

257. See *Al-Saadoon*, *supra* note 171, at ¶ 171 (“For the Court, compliance with their obligations under Article 3 of the Convention requires the Government to seek to put an end to the applicants’ suffering as soon as possible, by taking all possible steps to obtain an assurance from the Iraqi authorities that they will not be subjected to the death penalty”).

258. In *El-Masri v. Macedonia*, App. No. 39630/09, the European Court will assess Macedonia’s transfer of Khaled El-Masri to the CIA, knowing he would be transferred to Afghanistan and detained without charge. In *Othman v. United Kingdom*, App. No. 8139/09, the European Court will consider the UK’s system of deportation with assurances, described *infra* Part II Chapter 3.

259. Open letter from Amnesty International to Lene Espersen, Denmark Minister for Justice (June 18, 2008), available at <http://www.amnesty.org/library/asset/EUR18/004/2008/en/e849d6e3-4113-11dd-a280-615aa3eb3c6f/eur180042008eng.pdf>.

260. See Human Rights Watch, Letter to the German Government Regarding Diplomatic Assurances (July 21, 2009), available at <http://www.hrw.org/en/news/2009/07/21/letter-german-government-regarding-diplomatic-assurances>.

261. See Human Rights Watch, Universal Periodic Review of Switzerland (May 4, 2008), <http://www.hrw.org/en/news/2008/05/04/universal-periodic-review-switzerland>. See also Reply Letter to the Swiss Government, Regarding the Swiss Government’s Use of Diplomatic Assurances Against Torture for Extraditions to Turkey (June 27, 2007), available at <http://www.hrw.org/en/news/2007/06/27/reply-letter-swiss-government> (citing an April 2007 letter from Swiss authorities indicating the government’s acceptance of the use of diplomatic assurances in extradition cases, but not in ordinary returns cases); Human Rights Watch, Letter to the Swiss Government Regarding Diplomatic Assurances (Dec. 14, 2006) (citing opposition expressed by the Swiss representative to the Human Rights Council in September 2006, and by the Swiss delegation to the Group of Specialists on Human Rights and the Fight Against Terrorism, *supra* note 203, in December 2005 and March 2006).

262. The Group of Specialists on Human Rights and the Fight Against Terrorism, described in Part I Ch. I, noted in its final activity report that “[c]ertain experts could envisage further consideration to be given at a later stage to the appropriateness of a legal instrument, particularly once the European Court of Human Rights had ruled on these issues.” DH-S-TER Report, *supra* note 203, ¶ 18.

## Chapter 3: Lessons from the UK

- Like the US, the UK turned to assurances-based deportation as the “best of a bad set of options,” as detention without charge and deportation despite the risk of torture were foreclosed by court decisions.
- The UK argues that assurances used in deportation cases are reliable due to extensive public and judicial scrutiny. Its experience demonstrates the feasibility and advantages of transparency. But reports returned individuals’ reports of abuse reveal the persistent inadequacies of assurances.
- In Afghanistan, the UK has transferred almost 500 detainees to an Afghan intelligence agency known for abuse. In June 2010, a UK court ordered the UK to expressly condition transfers on full access to monitor detainees and to consider suspending transfers if there are credible allegations of abuse or Afghan authorities block UK access.

### UK Deportation with Assurances

The British government has characterized “deportation with assurances” as a “key tool for disrupting terrorist activity while ensuring compliance with its international human rights obligations.”<sup>263</sup> Among European states, it leads advocacy for the use of assurances to deport or extradite terrorism suspects to states with questionable human rights records—a practice it has a history of attempting.<sup>264</sup>

### Evolution of UK Deportation Policy

The UK’s assurances policy evolved in response to early rejection of its practices by the European Court of Human Rights and UK domestic courts.

### CHAHAL V. UK: ASSURANCES FROM INDIA

According to observers, the UK began contemplating the use of assurances against torture in the early 1990s.<sup>265</sup> During that time, the UK sought to deport Sikh activist Karamjit Singh Chahal based on assurances from the Indian government that “he would enjoy the same legal protection as any other Indian citizen” and “would have no reason to expect to suffer mistreatment of any kind at the hands of the Indian authorities.”<sup>266</sup> In the 1996 decision *Chahal v. UK*, the European Court of Human Rights held that these assurances did not provide an “adequate guarantee of safety” because while the Indian government had provided them in “good faith” and attempted reform more generally, human rights violations by security forces were a “recalcitrant and enduring problem” and Chahal’s high profile as an alleged Sikh separatist put him at increased risk.<sup>267</sup> (The European Court also criticized the UK for failing to provide Chahal an opportunity to challenge the government’s evidence, prompting the UK to create the Special Immigration Appeals Commission, described below.<sup>268</sup>)

### YOUSSEF V. HOME OFFICE: ASSURANCES FROM EGYPT

In 1999, the UK government internally deliberated over whether to accept weak diplomatic assurances

263. Human Rights Committee, *Replies to the List of Issues (CCPR/C/GBR/Q/6) to be Taken up in Connection the Consideration of the Sixth Periodic Report of the Government of the United Kingdom of Britain and Northern Ireland*, ¶ 87, UN Doc. No. CCPR/C/GBR/Q/6/Add.1 (Jun. 18, 2008); see also Joint Committee on Human Rights of the U.K. Parliament, Nineteenth Report, 2005-6, at 97-98 (U.K.), available at <http://www.publications.parliament.uk/pa/jt200607/jtselect/jtrights/157/15702.htm>.

264. In 2005 and 2006 the UK advocated that the Council of Europe develop guidelines for the “appropriate” use of assurances, which it ultimately refused to do. The UK is also leading an effort, with a group of G6 interior ministers (from France, Italy, Spain, Poland, and Germany), for broader EU endorsement of assurances. See *Joint Declaration by the Ministers of Interior of G6 States*, Sopot, Poland, (Oct. 18, 2007) (“The G6 Governments will initiate and support continued exploration of the expulsion of terrorists and terrorist suspects, seeking assurances through diplomatic understandings”). The UK may have “played a role” in Italy’s use of assurances to deport a terrorism suspect to Tunisia. See Julia Hall, *Mind the Gap: Diplomatic Assurances and the Erosion of the Global Ban on Torture* in Human Rights Watch, *World Report 2008*.

265. See Human Rights Watch, *Not the Way Forward: The UK’s Dangerous Reliance on Diplomatic Assurances 7* (Oct. 2008). For a discussion on earlier iterations of diplomatic assurances, particularly in the extradition context, see Eric Metcalfe, *The False Promise of Assurances Against Torture*, 6 *Justice Journal*, no. 1 (May 2009).

266. *Chahal v. United Kingdom*, App. No. 70/1995/576/662, ¶ 37 (Nov. 15, 1996).

267. *Id.* at ¶¶ 104-106.

268. See *id.* at ¶¶ 153-154. See Special Imm. Appeals Comm. Act, 1997, c. 68 (U.K.); House of Commons, Constitutional Affairs Committee, *The Operation of the Special Immigration Appeals Commission (SIAC) and the use of Special Advocates*, Seventh Report of Session 2004-05, vol. 1, ¶ 5 (U.K.).

for the transfer to Egypt of four terrorism suspects, then detained in the UK. The UK initially sought several assurances from Egypt, including that UK officials and independent medical personnel would be able to monitor the returnees' treatment. The Egyptian authorities rejected the assurances as infringing on Egyptian sovereignty and later indicated that they wanted to avoid a potentially embarrassing public discussion of Egypt's human rights record in UK courts. The Home Secretary, charged with making the deportation decision, faced pressure from the office of Prime Minister Tony Blair to pursue the deportations despite Egypt's rejection of monitoring, and to take "whatever assurances the Egyptians are willing to offer."<sup>269</sup>

Both Blair's office and the Home Secretary's believed that domestic courts would reject any transfer based on weak assurances, as court disclosures show. But the Prime Minister's office was also concerned with avoiding political blame for the release of the four individuals in the UK, which, under UK law, would be the only alternative to their deportation. The Prime Minister's office advocated "tak[ing] our chance with the courts" because "[i]f the courts rule that the assurances we have are inadequate, then at least it will be the courts, not the Government, who will be responsible for releasing the four from detention."<sup>270</sup> Ultimately, the suspects were released from detention and a UK court found that their detention was unlawful once UK officials were unable to obtain stronger assurances.<sup>271</sup>

### **Youssef Assurances**

In 1999 the UK deliberated over whether to accept weak assurances for the transfer of terrorism suspects to Egypt. An exchange sent from then Prime Minister Tony Blair's office reveals a questionable commitment on the part of the Prime Minister to preventing the torture of the detainees upon transfer to Egypt. The exchange illustrates the danger that without minimum requirements for assurances, sending government's may be tempted to accept "whatever assurances" they can get, even if they are insufficient to protect against torture:

*The Prime Minister has reflected further on this difficult issue. He is also aware of the strong advice from our Embassy in Cairo, yourselves and SIS that we should not revert to President Mubarak to seek a full set of assurances from the Egyptians. However, the Prime Minister is not content simply to accept that we have no option but to release the four individuals. He believes that we should use whatever assurances the Egyptians are willing to offer, to build a case to initiate the deportation procedure and to take our chance in the courts. If the courts rule that the assurances we have are inadequate, then at least it would be the courts, not the government, who would be responsible for releasing the four from detention. **The Prime Minister's view is that we should now revert to the Egyptians to seek just one assurance, namely that the four individuals, if deported to Egypt, would not be subjected to torture. Given that torture is banned under Egyptian law, it should not be difficult for the Egyptians to give such an undertaking. He understands that additional material will need to be provided to have a chance of persuading our courts that the assurance is valid. One possibility would be for HMG to say that we believed that, if the Egyptian government gave such an assurance, they would be sufficiently motivated to comply with it.** We would need some independent expert witness to back that up.*

*You and the Embassy are best placed to advise the best route to securing such an assurance. I should be grateful if you were to put that in hand. Assuming that you choose a route other than a letter from the Prime Minister to President Mubarak, we can hold that card in reserve until we see how the Egyptians respond to our simplified request.*

*Meanwhile, we should continue to take action to keep the four Egyptians in detention. The Prime Minister will wish to know if there is an imminent risk of the courts obliging us to release them.*

269. *Youssef v. Home Office* [2004] EWHC 1884 (QB), ¶ 38 (Eng.).

270. *Id.*

271. *Id.* at ¶ 78-81.

The Prime Minister's office advocated "tak[ing] our chance with the courts" because "[i]f the courts rule that the assurances we have are inadequate, then at least it will be the courts, not the Government, who will be responsible for releasing the four from detention."

### POST-9/11 PRESSURE TO DEPORT TERRORISM SUSPECTS

After the 9/11 attacks, the UK introduced controversial new counterterrorism measures, including the detention of foreign terrorism suspects without charge, based on a declared state of emergency.<sup>272</sup> At the same time, the UK government internally deliberated over whether to deport terrorism suspects based on assurances. After opposing assurances-based deportation in the immediate aftermath of 9/11, in 2003 the Foreign & Commonwealth Office agreed that "specific and credible assurances" could be useful and approached several countries for assurances negotiations.<sup>273</sup> During this period, UK courts rejected assurances in at least one case, the extradition of a Chechen national to Russia.<sup>274</sup>

In January 2005, the Home Secretary told parliament that the government was pursuing a new model of assurances: memoranda of understanding.<sup>275</sup> Providing renewed impetus for deportation were a UK House of Lords decision ruling that detention without charge of terrorism suspects was incompatible with the European Convention on Human Rights and the July 7, 2005 London Tube attacks.<sup>276</sup>

### Current UK Practice

Since 2004, the UK has negotiated written assurances with five countries: Jordan, Libya and Lebanon in 2005, Algeria in 2006 and Ethiopia in 2008 (see Appendix I).<sup>277</sup> It is seeking them with other countries in

272. See Anti-Terrorism Crime and Security Act, 2001, c. 24, § 23 (U.K.). The UK government declared a state of emergency to enable its derogation from Article 5(1) of the European Convention on Human Rights (ECHR), which limits the state's detention powers. See ECHR, Article 15 (permitting parties to derogate from Convention obligations "to the extent strictly necessary by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.").

273. See *Y v. Sec'y of State for the Home Department* [2006] EWCA (Civ), 1223 ¶¶220, 330 (Eng.).

274. *Government of the Russian Federation v. Akhmed Zakaev*, Bow Street Magistrates' Court, Decision of Hon. T. Workman, Nov. 13, 2003, available at <http://www.tjetjenien.org/Bowstreetmag.htm>.

275. House of Commons Hansard 26 Jan. 2005 Col 307 (U.K.).

276. The House of Lords ruled that the Anti-terrorism, Crime and Security Act 2001, which permitted detention without charge of foreign terrorism suspects, and the derogation from Article 5 of the European Convention on Human Rights which underpinned it, were discriminatory and disproportionate, and therefore incompatible with the UK's Human Rights Act. See *A & Others v. Secretary of State for the Home Department* [2004] UKHL 56; *Y v. Sec'y of State*, SC/36/2005, ¶ 222 (June 28, 2006) (Special Imm. Appeals Comm.) (Eng.) (noting that the UK government's attempt to negotiate assurances with Algeria "were given a fresh impetus" by the House of Lords decision); David Bonner and Ryszard Cholewinski, "The Response of the UK Legal and Constitutional Orders" in *Terrorism and the Foreigner: A Decade of Tension around the Rule of Law in Europe 160* (Anneliese Baldaccini & Elspeth Guild eds., 2007).

277. See Memorandum of Understanding regulating the Provision of Undertakings in Respect of Specified Persons to Deportation, U.K.-Jord., Aug. 10, 2005, 999 UNT.S. 171 (UK-Jordan MoU); Memorandum of Understanding Between The General People's Committee For Foreign Liaison and International Cooperation of the Great Socialist people's Libyan Arab Jamahiriya and the Foreign and Commonwealth Office of the United Kingdom of Great Britain and Northern Ireland Concerning the Provision of Assurances in Respect of Persons Subject to Deportation, U.K.-Libya, Oct. 18 2005 (UK-Libya MoU); Memorandum of Understanding Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Lebanese Republic Concerning the Provision of Assurances in Respect of Persons Subject to Deportation, Dec. 23, 2005 (UK-Lebanon MoU); July 2006 Exchange of Letters Between the President of the People's Democratic Republic of Algeria and the Prime Minister of the Government of the United Kingdom of Great Britain and Northern Ireland (UK-Algeria Exchange of Letters); and Memorandum of Understanding Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Federal Democratic Republic of Ethiopia Concerning the Provision of Assurances in Respect of Persons Subject to Deportation, Dec. 12, 2008 (UK-Ethiopia MoU) (all on file with Human Rights Institute).

the Middle East and North Africa region.<sup>278</sup> These assurances, stylized as “memoranda of understanding” (MoU) or, in the case of Algeria, an “exchange of letters,” are intended to reflect “political commitments” and are not meant to be legally binding.<sup>279</sup>

### RECEIVING COUNTRIES: AN EXPANDING LIST

While the UK has negotiated an MoU with Lebanon, it has recently pursued deportations only to Libya, Jordan, Algeria and Ethiopia. These countries have poor human rights records but improving diplomatic relationships with the UK. The UK argues that assurances with these countries are effective because they have effective control over their security forces.<sup>280</sup> The UK has also recently attempted to secure assurances from Pakistan to deport two terrorism suspects.<sup>281</sup>

According to the Foreign & Commonwealth Office, the UK does not intend to “deploy assurances in many cases” but rather “in a small minority of cases in which prosecution is not an option and the individual cannot otherwise be deported.”<sup>282</sup> However, in July 2010 the Home Office indicated that the government was attempting to “extend the process of DWA [deportation with assurances] to other countries as useful and in the public interest” in light of the “increasing number of nationalities where the need to deport is actually an operational requirement.”<sup>283</sup>

Compared to the US government, the UK has provided a wealth of information about its use of assurances in a bid to legitimize the practice.

### UK TOUTING OF TRANSPARENCY AS A SAFEGUARD

Compared to the US government, the UK has provided a wealth of information about its use of assurances in a bid to legitimize the practice, which might otherwise be associated with rendition or alleged complicity in torture. The UK’s disclosure about the content of assurances, post-return monitoring and allegations of post-return abuse—and the UK courts’ extensive scrutiny of assurances, including their rejection of Libyan assurances in 2007 based on political circumstances there—did not prevent the UK, in 2008, from securing an MoU with Ethiopia.<sup>284</sup>

The UK argues that scrutiny by UK courts creates the incentive to use assurances conservatively, as “[i]t is clearly not in [the government’s] interest to lose cases.”<sup>285</sup> Additionally, the UK argues that public scrutiny, particularly by human rights groups, means that “allegations of a breach... would inevitably attract considerable publicity and damage,” and is accordingly a “safeguard against breach.”<sup>286</sup>

On the other hand, the UK’s public investment decreases its incentive to acknowledge abuse. As the Special Immigration Appeals Commission has noted, the “political cost” of a receiving government “going back

278. Comments by the Government of the United Kingdom of Great Britain and Northern Ireland to the Conclusions and Recommendations of the Committee Against Torture, CAT/C/CR/33/3, at ¶ 56, UN Doc. CAT/C/GBR/CO/4/Add.1 (June 8, 2006); House of Lords *Hansard* 1 Jun. 2009 Col WA42 (U.K.).

279. Kate Jones, *Deportations with Assurances: Addressing Key Criticisms*, 57 *International and Comparative Law Quarterly* 183, 184 (2008) (based on oral presentation at the Foreign and Commonwealth Office Legal Advisers’ Academic Seminar).

280. *Id.* at 190.

281. See *Abid Nasser et al. v. Sec’y of State*, SC/77/80/81/82/83/09, ¶ 36 (May 2010) (Special Imm. Appeals Comm.) (Eng.).

282. Jones, *supra* note 279, at 184.

283. See *House of Lords Hansard* 13 Jul 2010 Col 644-51 (U.K.).

284. See *AS and DD v. Sec’y of State* [2008] EWCA Civ 289 (Eng.) (rejecting Libyan assurances and analyzing Libyan political situation and record on torture); UK-Ethiopia MOU, *supra* note 277.

285. Jones, *supra* note 279, at 193.

286. *Id.* at 188.

on its word would be significant: it would wreck the deportation of assurances program upon which [the UK] relies to deal with non-citizens who are believed to pose a threat to national security.”<sup>287</sup>

Moreover, transparency about aspects of assurances policy distracts from troubling government secrecy in other key respects, such as the UK’s failure in deportation proceedings to disclose details and evidence concerning the individual’s alleged links to terrorism and risk of torture or ill-treatment.<sup>288</sup> Since 2005, the government has also declined to discuss the details of MoU negotiations except in closed proceedings, even while citing the negotiations as evidence of the receiving government’s likelihood to comply with assurances.<sup>289</sup>

### **Guarantees in UK Assurances**

The UK government argues that assurances “provide protection that is more specific than international human rights agreements,” and thus “provide an additional level of protection over and above international human rights instruments.”<sup>290</sup> In fact, the assurances consist of somewhat detailed fair trial and death penalty guarantees, but they do not specifically reference torture and ill-treatment or detention standards. Some of the assurances provide for monitoring by third parties.

### **GUARANTEES OF “HUMANE TREATMENT”**

The UK government has stated that these assurances are discussed at the “‘highest level’, ie between Heads of State or heads of Government,” with “[d]etailed discussions at Ministerial and operational level.”<sup>291</sup> Each MoU affirms that receiving governments will “comply with their human rights obligations under international law” and that returnees will be treated in a “humane and proper manner.” They uniformly state that if arrested, detained or imprisoned, returnees will be afforded “adequate accommodation, nourishment, and medical treatment” but do not reference specific international standards.

The Jordan, Lebanon and Libya agreements state that returned individuals will be treated “in accordance with internationally accepted standards” while the Ethiopia agreement, negotiated most recently, states that treatment will be “in accordance with national and international obligations of the receiving state.”<sup>292</sup> None of the agreements specifically refer to international human rights guidelines on interrogation practices or safeguards such as videotaping interrogations.

The Algerian exchange of letters is far more generic than the MoUs with Jordan, Lebanon, Libya and Ethiopia, lacking any reference to humane treatment. The letters affirm the “absolute commitment of our two governments to human rights and fundamental freedoms, such as...the right to be informed of the reasons for one’s arrest or detention, the right to the presumption of innocence, to assistance of legal counsel, and the right to a fair hearing and public hearing by a competent and impartial court.”<sup>293</sup>

287. *XX v. Secretary of State*, SC/61/2007, ¶ 22 (Sept. 10, 2010) (Special Imm. Appeals Comm.) (Eng.).

288. The trial-level UK court, the Special Immigration Appeals Commission, may operate in closed sessions from which the deportee and his legal counsel are excluded. The deportee is represented by a Special Advocate, a security-cleared, government-appointed lawyer so hampered by court rules that, according to critics, he is essentially “taking blind shots at a hidden target.” *Roberts v. Parole Board* [2005] UKHL at ¶ 59, quoted in Eric Metcalfe, *The Future of Counter-terrorism and Human Rights* 12, Justice (Sept. 2007), available at <http://www.justice.org.uk/images/pdfs/futurecounterterrorismmandhumanrights.pdf>. The Commission has broad discretion to classify material and portions of its decisions are not publicly released. See Special Immigration Appeals Commission (Procedure) Rules, 2002, No. 1034 (U.K.).

289. See, e.g., *BB v. Sec’y of State*, SC/39/2005 ¶ 17 (Dec. 5, 2006) (Special Imm. Appeals Comm.) (Eng.).

290. Joint Committee on Human Rights, House of Lords and House of Commons, *Government Response to the Committee’s Nineteenth Report of this Session: The UN Convention Against Torture (UNCAT), 2005-2006*, H.L. Paper 276.

291. Jones, *supra* note 279, at 187.

292. UK-Jordan MoU, UK-Lebanon MoU, UK-Libya MoU, UK-Ethiopia MoU, *supra* note 277.

293. UK-Algeria Exchange of Letters, *supra* note 277.

In addition to the exchange of letters, transfers to Algeria are usually based on notes verbale from the Algerian Ministry of Justice. Although they refer to particular individuals, the notes verbale are almost identical in their substantive terms. They reiterate the rights described in the exchange of letters and add that the returnee has the right to notify a relative of his arrest or detention, be examined by a doctor, appear before a court charged with deciding the legality of arrest and detention, and that his “human dignity will be respected under all circumstances.”<sup>294</sup> In one case, the notes verbale specified the Algerian authorities who would arrest and detain the returnee.<sup>295</sup>

### MONITORING GUARANTEES

The MoUs provide for the nomination of monitoring bodies by the UK and receiving state. The bodies are charged with monitoring implementation of the assurances in the MoU and any additional specific assurances for any returnee who is subject to detention, trial or imprisonment. The MoUs also specify that returnees who are not detained will have “unimpeded access” to the monitoring body.<sup>296</sup> The access that monitoring bodies have to detained returnees varies.

**FIGURE I. VARYING ACCESS AND VISITATION BY MOU MONITORING BODIES**

RECEIVING STATE	INITIAL CONTACT AND VISIT	FREQUENCY OF VISITS	PRIVATE ACCESS	MEDICAL EXAM
<b>Libya</b>	Returnee is entitled to “contact [the body] promptly” and “meet a representative of the monitoring body within one week” of initial arrest or detention.	Generally, unspecified “regular visits”; during any period before trial, they are permitted at least once every three weeks	Visits “will include the opportunity for private interviews”	“If the representative of the monitoring body considers a medical examination of the person is necessary, he will be entitled to arrange for one or to ask the authorities of the receiving state to do so”
<b>Jordan</b>	No time specified; if arrested or detained within three years of return, returnee is “entitled to contact, and then have prompt and regular visits” from the body representative	Visits are permitted “at least once a fortnight”	Visits “will include the opportunity for private interviews”	Not specified
<b>Lebanon</b>	If arrested within three years of return, returnee is entitled to contact the body “promptly, and in any event within 48 hours”	Generally, unspecified “regular visits”; during any period before trial they are “permitted at least once a week”	Visits “will include the opportunity for private previews with the person”	“If the representative of the monitoring body considers a medical examination of the person is necessary, he will be entitled to arrange for one or to ask the authorities of the receiving state to do so”
<b>Ethiopia</b>	If arrested, detained or imprisoned within 3 years of the date of his return, returnee is entitled to contact the body “promptly, and in any event within 48 hours, a representative of the monitoring body”	Unspecified “regular visits”	Not specified but “in the even an allegation of ill-treatment, the monitoring body will have access to the person without delay”	Not specified

294. See, e.g., *U v. Sec’y of State*, SC/32/2005, ¶ 12 (May 14, 2007) (Special Imm. Appeals Comm.) (Eng.).

295. *Y, BB, & U v. Sec’y of State*, SC/32/36/39/2005, ¶ 17 (Nov. 2, 2007) (Special Imm. Appeals Comm.) (Eng.).

296. The terms of this guarantee vary. See UK-Lebanon MoU (“The person will have unimpeded access to the monitoring body for three years after his return”); UK-Jordan MoU (“[T]he receiving state will not impede, limit, restrict or otherwise prevent access by a returned person to the consular posts of the sending state during normal working hours”); UK-Libya MoU (“The deported person will have unimpeded access” to the monitoring body if not detained); UK-Ethiopia MoU (same as Libya MoU), *supra* note 277.

The MoUs with Libya, Jordan and Lebanon specify that monitors will have the opportunity to conduct private interviews. The Ethiopia MoU, negotiated most recently in 2008, does not guarantee private access but, unlike the other MoUs, it expressly provides for access to individuals alleging ill-treatment “without delay.”<sup>297</sup> According to the UK, these monitoring arrangements draw on the Optional Protocol to the UN Convention Against Torture and the recommendations of Theo van Boven, then Special Rapporteur on Torture, in a September 2004 report.<sup>298</sup> While the MoUs’ guarantees of private access do reflect van Boven’s recommendations, they omit his more detailed recommendations related to monitoring, including that all interrogation sessions and the identity of all persons present be recorded, and that prompt and independent medical examination be provided.<sup>299</sup> However, unpublished “terms of reference” of the monitoring bodies may specify greater responsibilities.

Human rights groups have criticized the chosen monitoring bodies as lacking political independence and competence to investigate torture or ill-treatment: the Ethiopian monitor is a “government-sponsored organization whose members are appointed by the ruling party-dominated Ethiopian parliament”; the Libyan monitor is headed by Colonel Qadaffi’s son; and the Jordanian monitor is a “for-profit company” that has never carried out or sought to carry out detention inspections.<sup>300</sup>

The Foreign & Commonwealth Office contends that it has “invested considerable resources” to strengthen the capacity of the monitoring bodies, “including facilitating workshops and trainings in international human rights law, forensic medicine and recognizing signs of torture.”<sup>301</sup>

How the bodies have operated so far is unknown. According to the MoUs, the monitoring bodies make reports to both the UK and the receiving state, except in the case of Jordan, for which only UK receives reports. The UK has not publicly discussed the frequency or quality of these reports.

Rather than the systematized monitoring described by the UK government, only ad hoc monitoring by the UK embassy in Algeria has occurred.<sup>302</sup>

### **UK Decision-making & Judicial Review**

Several UK governmental agencies are involved in assurances policy and decision-making, including the Home Office, Ministry of Defense, Foreign & Commonwealth Office and Department of Constitutional Affairs.<sup>303</sup> The Foreign & Commonwealth Office coordinates negotiation of assurances agreements, post-return monitoring and capacity-building of monitoring organizations.<sup>304</sup> The Home Office, in consultation with the Foreign & Commonwealth Office, makes deportation decisions, and has wide discretion to

297. UK-Ethiopia MoU, *supra* note 277.

298. See Jones, *supra* note 279, at 187; Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT), G.A. Res. A/RES/57/199, June 22, 2006 [reprinted in 42 I.L.M. 26 (2003)]; Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Theo van Boven, UN Doc. No. A/59/324 (Sept. 1, 2004).

299. Van Boven, *supra* note 298, at ¶ 41.

300. See Human Rights Watch, *UK: Ethiopian ‘Assurances’ No Guarantee Against Torture* (2009); Intervention Submitted by Amnesty International, Human Rights Watch, and JUSTICE, *Othman v United Kingdom*, App. No. 8139/09, Eur. Ct. H.R. (Oct. 2009).

301. United Kingdom Foreign & Commonwealth Office, *Annual Report on Human Rights* 16 (2008).

302. See Y, BB, & U v. Sec’y of State, SC/32/36/39/2005 (Nov. 2, 2007) (Special Imm. Appeals Comm.) (Eng.).

303. The UK’s *non-refoulement* obligations derive from Article 3 of the Convention Against Torture, *supra* note 5, Article 33 of the UN Refugee Convention and 1967 Protocol and Article 7 of the International Covenant on Civil and Political Rights. Domestic implementation of the *non-refoulement* principle is guided by the European Court of Human Rights’ jurisprudence interpreting Article 3 of the ECHR as prohibiting the transfer of an individual to a country where he will face a real risk of torture or inhuman or degrading treatment. See *Chahal v. United Kingdom*, 23 Eur. Ct. H.R. 413 (1996). The European Convention of Human Rights is given force in UK law by the Human Rights Act of 1998.

304. United Kingdom Foreign & Commonwealth Office, *Annual Report on Human Rights*, 14-16 (2008).



remove an alien if doing so would be “conducive to the public good.”<sup>305</sup> It is unclear whether the Foreign & Commonwealth Office has “veto power” over deportations based on assurances.

UK courts review deportation decisions involving assurances. The Special Immigration Appeals Commission is the trial-level UK court charged with considering deportations based on national security grounds or on classified evidence.<sup>306</sup> The Commission’s decisions can be appealed to the Court of Appeals and Supreme Court on legal but not factual grounds. Higher UK courts review the Commission’s assessment of assurances, as an aspect of its *non-refoulement* determination, in an extremely limited manner because it is regarded as “essentially a question of fact.”<sup>307</sup> Deportation decisions can ultimately be appealed to the European Court of Human Rights.<sup>308</sup>

In evaluating assurances, UK courts assess whether the UK can transfer<sup>309</sup> an individual consistent with Article 3 of the European Convention of Human Rights, that is, whether there are substantial grounds for believing that there would be a real risk of torture upon an individual’s transfer. UK courts interpret “substantial grounds” as requiring a “proper evidential basis for concluding that there was such a real risk.”<sup>310</sup>

### SPECIAL IMMIGRATION APPEALS COMMISSION’S EVALUATION OF ASSURANCES

The Commission has rejected the sufficiency of assurances from Libya, while upholding several deportations to Algeria and, in single cases, to Jordan and Ethiopia.<sup>311</sup> The Commission has listed four conditions for finding assurances reliable:

- the terms of the assurances must be such that, if they are fulfilled, the person returned will not be subjected to treatment contrary to Article 3
- the assurances must be given in good faith
- there must be a sound objective basis for believing that the assurances will be fulfilled;
- fulfillment of the assurances must be capable of being verified.<sup>312</sup>

UK courts have also emphasized the importance of the individualized circumstance creating vulnerability to abuse.<sup>313</sup>

305. See Immigration Act, 1971 c. 77, §3(5)(b) (Eng.); *Sec’y of State for the Home Dep’t v. Rehman* [2001] UKHL 47, ¶ 8 (“There is no definition or limitation of what can be ‘conducive to the public good’ and the matter is plainly in the first instance and primarily one for the discretion of the Secretary of State”).

306. The Commission has jurisdiction to review deportation decisions when the Secretary of State of the Home Department certifies that his decision was made wholly or partly in reliance on information which should not be made public (a) in the interests of national security; (b) in the interests of the relationship between the United Kingdom and another country; or (c) otherwise in the public interest. Nationality, Immigration and Asylum Act 2002, c. 41, §§ 97, 2(1) (Eng.).

307. *RB & U (Algeria) and OO (Jordan) v. Secretary of State* [2009] UKHL 10, ¶¶ 73, 236. These courts review the Commission’s decisions with deference as a specialist tribunal.

308. The UN Committee Against Torture cannot review individual petitions regarding the UK, which did not accept the right of individual petition under Article 22 of the Convention Against Torture, *supra* note 16, on signature. It is also not subject to individual communications-based examination by the Human Rights Committee, since it has not ratified the First Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 16, 1999, 999 UNT.S. 302.

309. UK courts are also obliged to consider whether there is a “real risk” that the individual would suffer a “flagrant breach” of other European Convention rights, in particular the Article 5 right to liberty or Article 6 right to fair trial. See *EM (Lebanon) v. Sec’y of State* [2008] UKHL 64.

310. *AS & DD v. Sec’y of State for the Home Dep’t*, [2008] EWCA Civ 289, ¶ 24 (citing *Saadi v. Italy*, *supra* note 237).

311. For a complete list of Commission decisions, see Special Immigration Appeals Commission, Outcomes, <http://www.siac.tribunals.gov.uk/outcomes.htm>.

312. *BB v. Sec’y of State for the Home Dep’t*, SC/39/2005, ¶ 5 (Special Imm. Appeals Comm.) (Eng.). The Commission has termed the first two conditions “axiomatic.” As a result, Commission decisions engage in only a cursory analysis of the text of the assurances. The Commission does not attribute any weight to a state’s unwillingness to provide more specific guarantees, even with regard to the UK’s access to the returnee and monitoring arrangements.

313. A Court of Appeals characterized *Chahal* as being based on its “analysis of the facts of the case and of the particular vulnerability of Mr Chahal, rather than by the application of any rule of law or thumb.” *MT (Algeria) v. Sec’y of the State*, [2007] EWCA Civ 808, ¶ 127. The Commission’s decision upholding the transfer of notorious terrorism suspect Abu Qatada to Jordan emphasizes that he is at reduced risk of ill-treatment given his high profile. See *Othman (aka Abu Qatada) v. Sec’y of State*, [2008] EWCA Civ 290, ¶¶ 354-357.

In practice, the Commission's decisions turn on the receiving state's record on torture, its susceptibility to international pressure (particularly from the UK)—although the latter factors is not reflected in UN or European Court of Human Rights jurisprudence.<sup>314</sup>

The Commission has shown some willingness to conduct searching analyses of government claims, notably, in declining to defer to the UK government's characterization of country conditions.<sup>315</sup> For example, in *DD and AS v. Sec'y of State*, the Commission declined to defer to a Foreign & Commonwealth officer's testimony that a breach of assurances by Libya would be “well nigh unthinkable.”<sup>316</sup> The Commission emphasized that, while the Libyan government had taken steps to improve its relationship with the UK, it is largely impervious to public shaming and diplomatic pressure, as shown in the trial of Bulgarian nurses charged with deliberately infecting children with HIV.<sup>317</sup> It closely scrutinized the UK-Libyan diplomatic relationship, citing its short length as a crucial weakness.<sup>318</sup> It also focused on whether the negotiators had effective control of other government authorities—a concern the European Court raised in *Chahal*—and whether future conditions might lead the government to renege on its commitment.<sup>319</sup>

### COMMISSION'S FAILURE TO CONSIDER THE RISK THAT TORTURE MAY BE CONCEALED

A major flaw in the Commission's decision-making is its failure to recognize the ease with which torture can be concealed, in assessing both the risk of torture and past returnees' allegations of abuse.

#### Evaluating the Risk of Abuse Where Monitoring is Inadequate

In several cases, the Commission has scrutinized and found inadequate the monitoring mechanisms set up by MoUs, but nonetheless sustained transfers based on the receiving government's interest in honoring the assurances (and maintaining its relationship with the UK).<sup>320</sup> The Commission's analysis in these cases fails to acknowledge the ease with which receiving governments could simply conceal torture or ill-treatment.

For example, in September 2010, the Commission sustained the deportation of “XX,” an Ethiopian national whom the UK government had accused of being an “Islamist extremist” and receiving terrorist training in Somalia. The Commission acknowledged that the nominated domestic monitoring body, the Ethiopia Human Rights Commission, was not politically independent and that the Ethiopian government had blocked the access of other non-governmental organizations, including the ICRC, to detention facilities. But the Commission reasoned that the Ethiopian government could only perceive “XX” as a threat to Ethiopian interests “based on a chain of reasoning so stretched as to be fanciful.” To the contrary, the Ethiopian government was “generally rational” and would find it “in its interests to ensure that the assurances are fulfilled” and its relationship with the UK maintained. But this risk analysis neglects the reality

314. The political realities in a country matter more than the precise terminology of the assurances, and with the bilateral relationship, are the key to whether or not the assurances would be effective.” *Othman*, [2008] EWCA Civ 290, ¶ 496. See also *DD and AS v. Secretary of State*, SC/42 and 50/2005, ¶ 319 (Apr. 27, 2007) (Special Imm. Appeals Comm.) (Eng.) (“the assessment of the value and effectiveness of assurances is a less a matter of their text... and more a matter of the domestic political forces which animate a government and of the diplomatic and other pressures which may impel its performance of its obligations, or lead to quick discovery and redress for any breach”).

315. See *Othman*, [2008] EWCA Civ 290, ¶¶ 339-341 (noting that the Commission makes its “own appraisal” and rejecting government's argument that the Commission should “tread lightly” on issue of “diplomatic relations”); but see *Y v. Sec'y of State*, SC/36/2005, ¶¶ 324-326 (noting that while constitutional deference in relation to safety on return “had no place,” the government had “particular expertise”).

316. *DD and AS v. Sec of State*, SC/42 and 50/2005, ¶¶ 320, 371 (Apr. 27, 2007) (Special Imm. Appeals Comm.) (Eng.).

317. *Id.* at ¶ 364-365.

318. “There is not yet the range of contacts or years of experience of dealing with each other at many different and friendly levels, or the depth of other links between Libya and the UK which would make the diplomatic path predictable, and the operation of the bilateral relationship clearly understood. The scope for misunderstandings, counter-measures, and bargaining are greater than they would be with a longer friendly diplomatic relationship.” *Id.*, ¶ 370.

319. *Id.* at 371.

320. See, e.g., *Y v. Sec'y of State*, SC/36/2005, ¶ 355 (June 28, 2006) (Special Imm. Appeals Comm.) (Eng.) (declining to attribute any significance to Algeria's refusal to provide assurances on monitoring); *XX v. Sec'y of State*, SC/61/2007 (Sept. 10, 2010) (Special Imm. Appeals Comm.) (Eng.) (upholding deportation although Ethiopian monitoring body was “not an independent body”).

## PART II. TRANSNATIONAL GUIDANCE ON DIPLOMATIC ASSURANCES

that Ethiopian authorities could interrogate and torture “XX” without risking exposure of its actions, given the absence of sufficient monitoring by the chosen body or other groups.<sup>321</sup>

Likewise, the Commission has repeatedly upheld transfers to Algeria despite the lack of formal monitoring,<sup>322</sup> and Algeria’s refusal to grant access to foreign third-party monitors.<sup>323</sup> The Commission emphasized that the need for monitoring varies based on the “level of human rights abuses,” which is decreasing in Algeria due to the “dramatic decline in terrorist violence, which was so much the progenitor of human rights abuses.”<sup>324</sup> The Commission failed to acknowledge the systemic nature of torture: while political climate may have some effect on the incidence of torture, an interrogator or guard culture of abuse is likely to be impervious such change, especially in the absence of accountability mechanisms like formal monitoring.

### Case Study: Ignoring Dynamics of Torture in Evaluating Claims of Breached Assurances of “Q” and “H”

The Commission has also demonstrated an ignorance or disregard for the nature of torture in discounting allegations of abuse to past returnees. In a series of cases, the Commission upheld transfers to Algeria while dismissing evidence of abuse to other returnees, “Q” and “H,” who had voluntarily withdrawn their appeals based on Algeria’s assurances to the UK government or themselves.

“Q” and “H” returned to Algeria in January 2007 after the Algerian government told the men that they would benefit from amnesty measures, were not wanted in Algeria, and at worst would be detained for a few days.<sup>325</sup> The Algerian government also gave written assurances to the UK government that “H” was not being sought or investigated, but was suspected of belonging to an armed organization operating abroad, and that he would be examined by the competent police department under supervision of the State Prosecutors Office.<sup>326</sup>

**Treatment of “Q” and “H” on Return:** Contrary to the Algerian government’s representations, “Q” and “H” were detained and charged on their return. “H” was detained days after his return<sup>327</sup> by the Algerian intelligence agency Département du Renseignement et de la Sécurité (DRS), held incommunicado for 12 days, and eventually charged with “participation in a terrorist network operating abroad.” Based on reports from the family of “H”, his UK attorneys reported that that he was held in pre-trial detention in a cell 4 meters by 3 meters with four other detainees and that he could hear the screams of people being tortured in nearby cells. The DRS pressured him to sign an incriminating investigative report that they told him was merely procedural. According to his UK attorneys, Algerian attorneys visited “H” in detention several times and reported that his responses were “consistent with those given... by detainees who have been tortured.”<sup>328</sup>

“Q” was also detained by the DRS shortly after his return. His Algerian attorney reported that while detained, “Q” heard the screams of people being tortured around him and signed an incriminating statement.

321. See *XX v. Sec’y of State*, SC/61/2007 (Sept. 10, 2010) (Special Imm. Appeals Comm.) (Eng.).

322. The Commission attributes Algeria’s failure to provide monitoring assurances to Algeria’s assessment that “bilateral monitoring agreements [are] a public slur on its record” rather than “a desire to inflict or protect those who might inflict such ill-treatment.” *Y v. Sec’y of State*, SC/36/2005, ¶ 335 (Sept. 29, 2006) (Special Imm. Appeals Comm.) (Eng.).

323. The Commission argued that informal NGO monitoring would be a rigorous and sufficient safeguard, the citing human rights groups’ interest in the case. See *Y v. Sec’y of State*, SC/36/2005, ¶ 383 (Sept. 29, 2006) (Special Imm. Appeals Comm.) (Eng.). But Algerian authorities repeatedly denied UK-based attorney Gareth Peirce permission to visit returnee “H” in prison and the necessary type of visa. The Commission dismissed these denials as not “sinister” and due to “instinctive prickliness and habitual slowness of Algerian bureaucracy.” See *U v. Sec’y of State*, SC/32/2005, ¶ 36 (May 14, 2007) (Special Imm. Appeals Comm.) (Eng.); *Y, BB, & U v. Sec’y of State*, SC/32/36/39/2005, ¶ 17 (Nov. 2, 2007) (Special Imm. Appeals Comm.) (Eng.).

324. *Y v. Sec’y of State*, SC/36/2005, ¶¶ 338, 340 (Sept. 29, 2006) (Special Imm. Appeals Comm.) (Eng.).

327. However, the Commission concluded that no individual assurances to the UK government, as opposed to the returnees, were broken. It stated, without elaboration that there was “no relevant assurance in the case of ‘H.’” *U v. Sec’y of State*, SC/32/2005, ¶ 27 (May 14, 2007) (Special Imm. Appeals Comm.) (Eng.).

328. *Id.* at ¶ 25.

In May 2007, UK attorneys submitted to the Commission an April 2007 letter from “Q” alleging that he was tortured and beaten in a police station and a corroborative letter from “Q”’s sister.<sup>329</sup>

**Commission’s Rejection of Abuse Report:** Evaluating these reports of abuse in subsequent cases, the Commission rejected them as unproven, and sustained new transfers to Algeria based on reasoning that ignores the dynamics of torture and ill-treatment.<sup>330</sup>

The Commission discounted the reports of abuse as coming from “campaigning lawyers in Algeria, whose views are clearly hostile to those of the Algerian government” and “whose credibility has not been the subject of a reasoned judgment by a British court.”<sup>331</sup> However, the Commission’s implicit demand for more definitive evidence is unreasonable given foreign nationals’ limited access to Algerian detainees and the lack of formal monitoring. It also appears disingenuous given the Commission’s summary dismissal of primary evidence, i.e. the letter from “Q” alleging his mistreatment. The Commission’s characterization of the letter as “entirely unspecific and coming very late in the day” ignores the practical obstacles to a still-detained individual providing details or evidence of his torture.<sup>332</sup>

As countervailing evidence, the Commission relied on statements by the detainees’ families to the UK embassy indicating that the detainees were in relatively good health and did not report any problems.<sup>333</sup> The Commission also dismissed the April 2007 letter from “Q’s” sister as inconsistent with her earlier reports to the UK embassy.<sup>334</sup> It failed to acknowledge that the returnees’ families may have feared reprisal if they reported ill-treatment—even though the UK attorneys for “Q” and “H” had already raised reprisal concerns, reporting that they could not provide further details on the treatment of “Q” and “H” unless the Commission could provide a “cast iron assurance” that the details would not be passed on to the Algerian authorities and noting “serious concerns for the safety of third parties.”<sup>335</sup>

The Commission also noted that “Q” and “H” had apparently failed to make allegations to their local magistrates.<sup>336</sup> But given their continuing detention, “Q” and “H” likely feared retaliation if they reported ill-treatment.

### Evidence of Abuse of UK Returnee “Q”

This letter from “Q,” submitted to Special Immigration Appeals Commission by his sister, was dismissed by the Commission despite clear allegations of mistreatment:

*“Dear Sir Oslly. To SIAC court my name [Q] former long lartin detainee I rhite you this wourd to let you no that my life here in Algeria in danger first I was torture betaine humiliation in police station.*

*Second here in Serkadji prison life here like slave. Algerian otority thay give a garanty but thay brook the agreement. So Mr. judj Oslly stop deportation to Algeria in end I wont let you no that eneythink happen to ... here in Algeria Britich otority responsstable for life*

*Thanks you  
Detainee Q.”*

329. *U v. Sec’y of State*, SC/32/2005, Addendum (May 14, 2007) (Special Imm. Appeals Comm.) (Eng.).

330. The Commission found that the abuses had not been proven on a balance of probabilities. *Id.* at ¶¶ 33, 35.

331. *Id.* at ¶ 34.

332. *Id.* at Addendum.

333. *Id.* at ¶¶ 25, 34.

334. *Id.* at Addendum.

335. *Id.* at ¶ 28 & Addendum.

336. *Id.* at ¶ 19, 34.

**Relying on Flawed Evidence Against Abuse:** The Commission gave countervailing weight to a note verbale from the Algerian government. In response to letters from the UK government noting the allegations of ill-treatment, the Algerian government had stated that both men had signed statements saying they had been treated with respect and had not received ill-treatment, and noted corroborative medical certificates. The Commission concluded that together with the family statements, the note verbale indicated that “whatever happened to them in pre-charge detention, they had not been seriously ill-treated.”<sup>337</sup> This reasoning is striking for its failure to recognize that in where torture and ill-treatment are widespread, government officials routinely issue denials in collusion with medical personnel.

The Commission also found the report of two consultants from the International Centre for Prison Studies who had inspected part of the detention facilities where “Q” and “H” were held to have “greater significance” than the reports of abuse. The consultants did not meet with the returnees and “did not carry out a full prison inspection or inspect the part of the prison in which H was held”—disregarding basic principles of torture monitoring (see Part III, Ch. 2). The Commission’s reliance is especially dubious given the generality of the consultants’ assessment: that the prison was “scrupulously clean,” “medical facilities were good,” and “there was no impression of the prisoners being cowed,” although “prison discipline was excessive.”<sup>338</sup>

### **UK Detainee Transfers in Afghanistan**

The UK is a member of the International Security and Assistance Forces (ISAF) in Afghanistan. Like the US ISAF force, the UK military transfers individuals it apprehends to the National Directorate of Security (NDS), an Afghan intelligence agency (see Part I, Ch. 2). As of October 2010, it had transferred about 480 individuals.<sup>339</sup> UK transferees are held at the NDS facility in Lashkar Gah; others are held at the NDS facility investigatory branch facility in Kabul (“Department 17”) Kabul and at facility in Kandahar.<sup>340</sup>

Torture by the NDS is reportedly “widespread and widely known.”<sup>341</sup> UN reports have expressed concerns about reports of torture and “disappearances” after arrest by NDS officials.<sup>342</sup> Amnesty International has reported receiving “repeated reports of torture and other ill-treatment of detainees by the NDS from alleged victims and their relatives, as well as a range of organizations including UN agencies.”<sup>343</sup>

### **UK Assurances with Afghanistan**

The UK signed a memorandum of understanding with Afghan authorities in 2006 and an exchange of letters between multiple countries, including the US, and the Afghan government in 2007 (see Part I, Ch. 2; Appendix IV). Together, these documents provide that UK and Afghan personnel will observe basic principles of international human rights law, including the prohibition on torture and cruel, inhumane or degrading treatment. On monitoring, the documents provide that UK personnel would have “full access to question” to transferees and access for the ICRC and Afghan Independent Human Rights Commission.

However, in 2009, the then-head of the NDS, Amrullah Saleh, complained that the agency had no obligations under the MoU or Exchange of Letters, which were signed by the Minister of Defence.<sup>344</sup>

337. *Id.* at ¶ 34.

338. *Y, BB, & U v. Sec’y of State*, SC/32/36/39/2005, ¶ 18 (Nov. 2, 2007) (Special Immigration Appeals Commission) (Eng.).

339. See UK Foreign and Commonwealth Office, “The UK’s Foreign Policy towards Afghanistan and Pakistan,” Foreign Affairs Committee, UK Parliament, Session 2010-11, available at <http://www.publications.parliament.uk/pa/cm201011/cmselect/cmfa/ff/writev/afpak/afpak01.htm>.

340. See *Evans, R (on the application of) v. Secretary of State for Defence*, [2010] EWHC 1445 (Admin), ¶ 28.

341. Andrea Prasow, senior counterterrorism counsel at Human Rights Watch, *Afghan Torture Is No Secret*, National Post (May 4, 2010).

342. In 2007, the UN Secretary General urged the Afghan government to investigate “inhumane treatment and torture of detainees by the authorities, and in particular by the National Directorate for Security.” Report of the UN Secretary General, “The situation in Afghanistan and its implications for international peace and security” report of the Secretary-General, S/2007/555, (Sept. 21, 2007), ¶ 87; see also UN High Commissioner for Human Rights, “High Commissioner for Human Rights Concludes Visit to Afghanistan” (Nov. 20, 2007).

343. Amnesty International, *Detainees transferred to torture: ISAF complicity?* 29 (2007).

344. See *Evans, R (on the application of) v. Secretary of State for Defence*, [2010] EWHC 1445 (Admin), ¶¶ 91-108.

In March 2010, Saleh signed a letter drafted by UK officials describing steps the NDS would take to ensure UK access to transferees. The letter sets out guarantees including:

- Notification: the NDS will “notify the British Embassy in Kabul promptly of any allegations of ill-treatment” (presumably, made to the NDS) by UK-Afghan transferees
- Afghan investigations: The NDS will “investigate promptly” any allegation made to British Armed Forces or, presumably, made to the NDS, and will “keep the British Armed Forces informed of the process and outcome.”<sup>345</sup>

In addition to AIHRC and ICRC monitoring, UK personnel monitor UK transferees at NDS facilities in Kandahar, Kabul and Lashkar Gah. Royal Military Police staff have ordinarily conducted monitoring, although UK embassy officials may join visits in Kabul. In 2010, the UK established a “Detainee Oversight Team” headed by a Force Provost Marshall and consisting of a Royal Military Police officer, legal adviser and unspecified “medical support.”<sup>346</sup>

### **Abuse Following UK Transfers & Obstructions of UK Monitoring**

Much of what is known about UK monitoring comes from *R (Evans) v. Secretary of State for Defence*, a June 2010 UK appellate court decision considering whether the UK’s practice of transferring captured individuals to the NDS complied with the UK’s obligation under Article 3 of the European Convention not to transfer detainees where there is a real risk of torture or other ill-treatment.<sup>347</sup>

**One UK transferee said he was electrocuted and hung from the ceiling for three days.**

Several UK transferees alleged abuse. Allegations made in 2009 about treatment at the NDS facility in Kabul known as Department 17 include an account by one prisoner that he was beaten frequently for more than two months and an account by another that he was electrocuted and hung from the ceiling for three days. The UK government accepted that these and some other allegations “may have substance.”<sup>348</sup>

Without making “definite conclusions” about the allegations, the UK court expressed concern about the effectiveness of the UK’s monitoring of transferred detainees, including: UK

personnel’s access to facilities, tracking of detainees, and ability to conduct private interviews.<sup>349</sup>

### **LIMITED ACCESS TO NDS FACILITIES**

The UK’s ability to conduct regular monitoring visits has at various times been compromised. In some cases, UK officials have been stymied by security risks and a dramatically increasing number of detainees. At the Lashkar Gah facility, for a six-month period in 2009 and 2010, each individual was questioned only about once every eight weeks.

NDS officials also obstructed the UK’s access. Although Saleh’s March 2010 letter said that he would inform NDS staff of the UK’s guarantee of access, in April 2010, NDS officials denied UK personnel access to the Lashkar Gah facility. On one occasion, a high-ranking NDS official denied the authority of Saleh’s letter and said “that he would tell the [UK officials] how the detainees were and there was no need to see

345. See *id.* at ¶¶ 129-131

346. *Id.* at ¶ 186; UK Foreign and Commonwealth Office, “The UK’s Foreign Policy towards Afghanistan and Pakistan,” Foreign Affairs Committee, UK Parliament, Session 2010-11, available at <http://www.publications.parliament.uk/pa/cm201011/cmselect/cmfaff/writtev/afpak/afpak01.htm>.

347. See *Evans, R (on the application of) v. Secretary of State for Defence*, [2010] EWHC 1445 (Admin), ¶ 236-37 (discussing government’s acceptance of court review of “compliance with the policy on well-established legal principles” and thus avoiding legal issues of standing or applicability of the European Convention). The case was decided by the Divisional Court, made up of Court of Appeal judge Lord Justice Richards and High Court judge Justice Cranston.

348. *Id.* at ¶¶ 202-208, 263.

349. *Id.* at ¶ 309.

them.”<sup>350</sup> In Kabul, the NDS refused access to UK transferees for a period in 2008, prompting the UK to put a moratorium on new transfers that has since been lifted, although it has not made new transfers.<sup>51</sup>

### EFFECTIVENESS OF INTERVIEWS

At Lashkar Gah, the UK’s ability to conduct private interviews with transferees has reportedly been limited. The UK has reported conducting group interviews, sometimes in communal areas and other times through a hatch in a cell door, with guards out of earshot.<sup>352</sup>

The UK court in (*R*) *Evans* emphasized that private visits were essential. It cited allegations of abuse by UK-transferees made once they were away from the NDS (in the custody of the Ministry of Justice)—when the same detainees had been interviewed at an NDS facility, they had not made any allegations, perhaps due to fear of retaliation.<sup>353</sup>

### MISSING TRANSFEREES

Transferees have “disappear[ed] within the system” due to poor record-keeping by Afghan authorities.<sup>354</sup> The NDS sometimes transfers detainees between NDS facilities and fails to report it, a practice which effectively circumvents the UK’s moratorium on transfers to particular NDS facilities. For instance, in late 2008, NDS officials at “Department 17” (the investigating branch in Kabul) refused UK personnel access to transferees. When an agreement was reached in February 2009, but before the UK arranged a visit, UK transferees were moved to the NDS facility at Pol-i-Charki prison. After the UK and NDS reached an agreement in February 2009, but before the UK arranged a visit, UK transferees were moved to the NDS facility at Pol-i-Charki prison. When interviewed, they alleged abuse during the period when the NDS had obstructed UK access.<sup>355</sup>

### UK MORATORIUMS ON TRANSFER

The UK has placed moratoriums on particular NDS facilities on the basis of the NDS’s refusal to grant access for monitoring and reports of abuse.

- *NDS “Department 17” in Kabul*: In December 2008, the UK put a moratorium on transfers to NDS Kabul due to a refusal of access to that facility. There were also allegations of abuse to UK-transferees. The UK court in (*R*) *Evans* found that the moratorium should be kept in place, notwithstanding the NDS’s dismissal of the head of the Kabul facility, because there remained a “real risk” of torture to UK-transferees.
- *NDS Kandahar*: The UK imposed a moratorium on transfers in mid-2009 based on allegations of abuse by UK-transferees who had been detained at Kandahar but subsequently transferred to Pol-i-Charki prison.<sup>356</sup> The UK lifted the moratorium in February 2010 but has not made any new transfers. The UK court in (*R*) *Evans* approved of that “precautionary approach,” noting Canadian reports of abuse occurring there. Nevertheless, as described below, it concluded that UK-transferees could be sent there subject to specific safeguards.

### **Conditioning Transfers on Adequate monitoring: (*R*) *Evans v. Secretary of State for Defence***

In (*R*) *Evans*, the UK court concluded that while the moratorium on transfers to NDS Kabul should be maintained, UK-captured detainees could be transferred to NDS facilities at Kandahar and Lashkar Gah if

350. *Id.* at ¶ 155.

351. *Id.* at ¶¶ 165-168. However, the UK did transfer one “high profile” individual in January 2010, to whom its access was initially blocked. See *id.* at ¶ 168.

352. *Id.* at ¶ 306-308

353. *Id.* at ¶ 308.

354. See *id.* at ¶¶ 171-183.

355. *Id.* at ¶ 302.

356. *Id.* at ¶ 32-37.

existing safeguards were strengthened:

- *Monitoring as an Express Condition for Transfer:* The UK government must expressly condition transfers on the UK monitoring team being given “access to each transferee on a regular basis, with the opportunity for a private interview on each occasion”
- *Monitoring in Practice:* Each transferee “must in practice be visited interviewed in private on a regular basis”
- *Halting Transfers if Assurances Breached:* The UK government “must consider the immediate suspension of further transfers if full access is denied at any point without an obviously good reason...or if a transferee makes allegations of torture or serious mistreatment by NDS staff which cannot be reasonably and rapidly dismissed as unfounded.”<sup>357</sup>

As the time of publication, the effects of the June 2010 decision were not clear. At a minimum, the UK court’s judgment reflects the importance of strong monitoring, with specific assurances carried out in practice, in reducing the risk of torture. The US should adopt these parameters and, in practice, conduct robust monitoring reflective of the international standards described in the next section.

## Chapter 4: Lessons from Canada

- *Like the United States, Canada has attempted to use assurances in deportation, extradition and custodial transfers of military detainees—across contexts, Canada’s experience shows the danger of pursuing transfers despite the receiving authority’s record of torture*
- *In the deportation context, Canada’s attempts to deport terrorism suspects to countries with records of torture incited Canadian courts to carry out more searching review than they ever had before, effectively foreclosing deportation with assurances as a policy option, at least for a time.*
- *In Afghanistan, the Canadian government’s assurances effort also backfired, in a far more disturbing way: despite attempts at reform, including securing an assurance of unfettered access to monitor detainee treatment, several detainees were tortured.*

### Inciting Stronger Judicial Review of Deportations with Assurances

Like many European countries, Canada has long sought assurances against the death penalty in extraditing criminal suspects—since 2001, these assurances have been “constitutionally required.”<sup>358</sup> Before 9/11, the Canadian government sometimes sought assurances against “abusive or unfair treatment” alongside death penalty assurances.<sup>359</sup> Canadian courts ordinarily deferred to the executive’s judgment of the reliability of assurances, noting the receiving government’s interest in maintaining the integrity of extradition treaties and diplomatic relations.<sup>360</sup>

### Security Certificates and the Debate on Indefinite Detention or Transfer to Torture

Although there are multiple ways the government can pursue deportations of individuals considered to be national security threats, over the last decade it has used “security certificates.”<sup>361</sup> Certificates permit

357. *Id.* at ¶ 320.

358. Canada ended capital punishment in 1976. See House of Commons Bill C-84, 33rd Parl. (1976) (enacted). In 2001, the Supreme Court held that “[i]n the absence of exceptional circumstances, which we refrain from trying to anticipate, assurances in death penalty cases are always constitutionally required.” *United States of America v. Burns*, [2001] 1 S.C.R. 283, 2001 SCC 7 (Can.) at ¶ 65.

359. See, e.g., *United States of Mexico v. Hurley*, 35 O.R.3d 481 (1997) (Ontario Court of Appeal) (assurances against “abusive or unfair treatment” where an openly gay man was extradited to Mexico); *Argentina v. Mellino*, [1987] 1 S.C.R. 536 (Can.).

360. See *Mellino*, 1 S.C.R. 536 at ¶ 47–48 (emphasizing that courts should be “extremely circumspect” in their review of assurances and extradition decisions, noting the executive’s “pre-eminent position in matters of external relations”); *Hurley*, 35 O.R. 3d 481 at ¶ 31 (emphasizing that “these conditions will be taken very seriously by Mexico in that Mexico will also want to maintain the integrity of the Treaty and a positive political relationship with Canada”).

361. The government may also use regular immigration proceedings to detain and deny entry to a foreign national or permanent resident on national security grounds. See *Immigration and Refugee Protection Act*, 2001 S.C., ch. 27 § 55; Craig Forcese, *National Security Law: Canadian Practice in International Perspective* 567-68 (2007).



immediate and ongoing detention of non-citizens whom the government believes to pose a danger to Canadian security, until a court approves their deportation or orders their release.<sup>362</sup>

A federal court reviews each security certificate in a closed hearing where the individual is represented by a “special advocate”; the government claims it seeks security certificates only where these procedures are necessary to safeguard sensitive information.<sup>363</sup>

Most security certificate cases stall on the question of whether the government properly determined that the individual poses a danger to Canadian security, that is, whether the security certificate was properly issued. Assurances come into play after the government wins on the security certificate question, when an individual seeks protection from deportation based on a substantial risk of death, torture or cruel and unusual treatment or punishment.<sup>364</sup> The government may seek assurances to mitigate these risks.<sup>365</sup> But under Canadian law, the government can deport an individual even if the assurances are inadequate or non-existent, if the danger he poses to security is higher than the risk of torture he faces if deported.<sup>366</sup>

In 2002, the Canadian high court in *Suresh v. Canada* upheld this balancing test—despite its incongruence with international human rights standards—and at the same time provided guidance on seeking reliable assurances (see below).<sup>367</sup> The Court’s failure to set definite limits on the use of assurances left the door open for government experimentation.

### **Push-Back Against Assurances: Judicial Scrutiny and Stalled Deportations**

While *Suresh* appeared to vindicate the Canadian government’s pursuit of assurances-based transfers, over the next several years its efforts to deport terrorism suspects based on security certificates were stymied by the lower courts, in what could be characterized as a judicial push-back. A handful of security certificate cases against terrorism suspects have taken the government years to litigate and led to repeated criticism by human rights groups.<sup>368</sup> Some observers suspect the government will abandon the mechanism.<sup>369</sup>

362. See Immigration and Refugee Protection Act, 2001 S.C., ch. 27, §§ 33, 77-85; *Jaballah v. Canada* (Minister of Citizenship and Immigration), [2003] 4 F.C. 345 (Can.). A federal court reviews the detention within 48 hours and thereafter every six months to determine whether there is “an objective basis [that the person is a danger] . . . which is based on compelling and credible information.” *Charkaoui v. Canada* (Citizenship and Immigration), [2007] 1 S.C.R. 350, 2007 SCC 9, ¶ 39 (Can.).

363. Canada Border Services Agency, Facts Sheet: Keeping Canada Safe, (2009), available at <http://www.cbsa-asfc.gc.ca/media/facts-faits/055-eng.html>.

364. See Immigration and Refugee Protection Act, 2001 S.C., ch. 27 § 34.

365. In 2005, a government official described the process for seeking and assessing assurances: “Before seeking assurances, there would be a determination of whether what would be sought might be reliable and credible. . . . The decision to seek assurances is made, in the first instance, by a committee of a number of departments, including Foreign Affairs Canada, the Canada Border Services Agency and Citizenship and Immigration Canada. When the assurances are received, they are assessed by the delegate of the Minister of Immigration.” “[A]ssurances are not used systematically,” i.e. in cases “[w]hen it is possible to determine, based on other information, that the individual is not at substantial risk of torture.” Testimony of Daniel Therrien, Acting Assistant Deputy Attorney General, Proceedings of the Special Senate Committee on the Anti-terrorism Act, Parliament of Canada, Nov. 14, 2005.

366. See Immigration and Refugee Protection Act, 2001 S.C., ch. 27, §§ 77, 81 (security certificate process), 112 et seq. (limited protection from removal based on risk of torture).

367. *Suresh* stated that the government should “generally decline to deport refugees where on the evidence there is a substantial risk of torture,” but declined to “exclude the possibility that in exceptional circumstances, deportation to face torture might be justified, either as a consequence of the balancing process mandated by § 7 of the *Charter*,” or under exceptional circumstances “such as natural disasters, the outbreak of war, epidemic and the like.” See *Suresh v. Canada* (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 3, 2002 SCC 1, ¶ 78 (Can.). The UN Committee Against Torture and Human Rights Committee criticized *Suresh* as inconsistent with Canada’s international human rights obligations. See UN Committee Against Torture, Conclusions and Recommendations of the Committee Against Torture: Canada, UN Doc. No. CAT/C/CR/34/CAN (2005) at ¶ 4, UN Human Rights Committee, Concluding Observations of the Human Rights Committee: Canada, UN Doc. No. CCPR/C/CAN/CO/5 (2006) at ¶ 15.

368. See *infra* note 389 and accompanying text.

369. See, e.g., Crislin Scmitz, *Special Advocates Predict no More Security Certificates*, *The Lawyers Weekly*, July 16, 2010. The government has called security certificates “inherited” and assured that “no new security certificates have been issued by our government as long-term control instruments.” Michelle Shepard & Tonda MacCharles, *Man Hounded by Ottawa Loses ‘Terrorist’ Tag at Last*, *TheStar.com*, Dec. 15, 2009 (quoting Public Safety Minister Peter Van Loan).

While *Suresh* appeared to vindicate the Canadian government's pursuit of assurances-based transfers, over the next several years its efforts to deport terrorism suspects based on security certificates were stymied by the lower courts.

### DETAINING TERRORISM SUSPECTS PENDING REMOVAL TO THE RISK OF TORTURE

Most of the government's losses stemmed from its failure to prove the security threat allegedly posed. But the courts' intensified scrutiny of government claims was likely a response to the grave situation created by the government's assertion of authority to detain terrorism suspects until their removal and to transfer them to countries with poor human rights records.

The detention of five men of Arab origin for several years, pending litigation, created the untenable specter of indefinite detention without charge, on the basis of secret, untested evidence.<sup>370</sup> The lower courts eventually "lost their will to hold these suspected terrorists in jail."<sup>371</sup>

The courts may also have been wary of sustaining the government's cases because that potentially meant green-lighting deportation despite an acknowledged and significant risk of torture, a result antithetical to the Canadian Charter of Fundamen-

tal Freedoms even if technically permitted under *Suresh*.<sup>372</sup> The Canadian high court's 2007 decision in *Charkaoui*, setting new limits on the government's ability to rely on secret evidence in these cases, could be considered the ultimate rebuke to the government for its aggressive pursuit of these deportations.<sup>373</sup>

In the wake of *Charkaoui* and revelations of Canadian complicity in extraordinary renditions, the Special Senate Committee on the Anti-Terrorism Act published a report in 2007 endorsing the use of assurances only where the government can ensure "that there will be an effective means of monitoring the individual's return, including the ability to access the necessary information to ascertain whether or not the individual is being tortured."<sup>374</sup> The Committee emphasized that the government should not deport an individual unless it "fully believe[d]" that it would be able to determine whether he would be properly treated on return.<sup>375</sup> However, the report did not spur new legislation on assurances.

370. For a discussion of the "emerging Federal court unease (express in practice, and sometimes in prose) with indefinite security-certificate detention," see Forcese, *supra* note 362, at 573. The security certificate process has led to prolonged detention, often in solitary confinement. For instance, Hassan Almrei was detained for more than seven years as the government sought to deport him, before a Canadian court ordered him released in January 2009. See British Columbia Civil Liberties Association, National Security, Curbing the Excess to Protect Freedom and Democracy, for the House of Commons Subcommittee on Public Safety and National Security & Senate Special Committee on the Anti-Terrorism Act, October 2005, 76; See Paul Copeland, How Canada's Highest Court has Given Security Certificates a Red Light, Jan. 2, 2009, <http://www.yorku.ca/robarts/projects/canada-watch/obama/pdfs/Copeland.pdf>; see also Human Rights Committee, Concluding Observations of the Human Rights Committee: Canada, UN Doc. No. CCPR/C/CAN/CO/5 (2006), ¶ 14.

371. Editorial, *Deportation and Torture*, *Globe & Mail* (Toronto, Canada), Feb. 23, 2009.

372. For a discussion of the incompatibility of the Charter of Rights and Freedoms with *Suresh* and transfer to torture, see Forcese, *supra* note 362, at 572-73.

373. *Charkaoui* led the government to withdraw some secret evidence rather than disclose it, further complicating the government's efforts in security certificate cases. According to the director of the Canadian Intelligence Service, "We were faced with a pretty fundamental dilemma: to disclose information that would have given would-be terrorists a virtual road map to our tradecraft and sources; or to withdraw that information from the case, causing a security certificate to collapse. We chose the path that would cause the least long-term damage to Canada." Remarks by Richard B. Fadden, Director, Canadian Security Intelligence Service, to the Canadian Association for Security and Intelligence Studies (CASIS) Annual International Conference, October 10, 2009, available at <http://www.csisscrs.gc.ca/nwsrm/spchs/spch29102009-eng.asp>.

374. See Special Senate Committee on the Anti-terrorism Act, *Fundamental Justice in Extraordinary Times* (2007) 128, available at [www.senate-senat.ca/anti-t.asp](http://www.senate-senat.ca/anti-t.asp).

375. *Id.* at 111.

## CANADIAN COURT SCRUTINY OF ASSURANCES

Judicial pushback against the government's deportation attempts manifested in heavy scrutiny of assurances in the only two recent assurances-based deportation cases in Canada, *Mahjoub v. Canada* and *Sing v. Canada*, decided in 2006 and 2007, respectively. In both cases, the lower courts cited UN guidance in rejecting the government's analysis of the risk of torture and assurances. Previously, courts had generally deferred to the government's assessment of death penalty and mistreatment assurances in the extradition context, and in *Suresh* the Supreme Court reiterated that lower courts should "adopt a deferential approach" to government assessments of the torture risk, setting aside only "patently unreasonable" government decisions.<sup>376</sup> But in these two cases, the lower courts conducted a searching analysis of assurances, invoking the *Suresh* guidelines on reliable assurances to halt the government's deportation attempts. In *Suresh*, the Supreme Court had suggested that the government consider particular factors in evaluating the reliability of assurances:

- the human rights record of the government giving the assurances
- the government's record in complying with its assurances
- the capacity of the receiving government to fulfill the assurances, particularly where there is doubt about the government's ability to control its security forces.<sup>377</sup>

The Supreme Court also directed the Minister of Citizenship and Immigration to provide written reasons for her decision that "articulate and rationally sustain," her findings on the risk of torture and, if applicable, assurances.<sup>378</sup> *Suresh* also suggested that individuals be given an opportunity "to present evidence and make submissions as to the value of [written] assurances."<sup>379</sup> At the same time, *Suresh* emphasized that lower courts could not reweigh the factors considered by the Minister, intervening only if the Minister's decision is "not supported by the evidence or fails to consider the appropriate factors"—a standard of patent unreasonableness.<sup>380</sup>

The lower courts in *Mahjoub and Sing* applied the *Suresh* guidelines to find the government's assurances analysis insufficient, sending the cases back to the Minister of Immigration and Citizenship for a stronger articulation of the rationale for relying on assurances. In both cases, the courts scrutinized the text of the assurances, which the government provided in full in *Sing* (see Appendix I) and in substantial part in *Mahjoub*. Like the European Court and UN human rights bodies, the Canadian courts emphasized that the egregious record of torture in the receiving countries heightened the government's responsibility to carefully assess the assurances. Both courts also faulted the government for failing to consider the effect of its failure to procure monitoring assurances.

In *Mahjoub*, the government sought to deport a terrorism suspect based on assurances that he would be accorded his "constitutional rights" and "human rights protections" from Egyptian intelligence.<sup>381</sup> The government's reliance on assurances was a gamble. UN figures had expressed clear disapproval of Egyptian assurances for Ahmed Agiza (see Part II, Ch. I) and former UN Special Rapporteur on Torture Theo van Boven advocated that Mahjoub not be returned without a monitoring mechanism in place.<sup>382</sup>

Casting the *Suresh* factors as a "cautious framework for analysis of the trustworthiness of assurances given by a foreign government," the federal court faulted the government for relying on assurances while

376. *Suresh* [2002] 1 S.C.R. 3 at ¶ 29 (Can.).

377. *Id.* at ¶ 125.

378. *Id.* at ¶ 126.

379. *Id.* at ¶ 123.

380. *Id.* at ¶ 32.

381. *Mahjoub v. Canada*, [2007] 4 F.C.R. 247, 2006 F.C. 1503 at ¶ 95 (Can.).

382. *Id.* at ¶ 95.

ignoring evidence of Egypt's poor human rights record.<sup>383</sup> Indeed, the government had relied on Sweden's defense of Egypt's torture and assurances record before the Committee Against Torture in Agiza, while dismissing the Committee's ultimate finding of a systemic level of torture in Egypt—a maneuver the court found “perverse.”<sup>384</sup> The Court also noted that the assurances themselves were vague and contained no guarantees about monitoring. The only specific reference in the assurances was to the “Human Rights Charter”—a document that does not exist.<sup>385</sup>

In *Sing*, a federal court considered the deportation of two Chinese nationals, not terrorism suspects, wanted in China on conspiracy and smuggling charges. In addition to assurances against capital punishment, the Chinese ambassador to Canada gave assurances referencing China's status as a party to the UN Convention Against Torture and “relevant Chinese laws,” according to which the two nationals would “not be subject to torture or other cruel, inhuman or degrading treatment or punishment” after their repatriation, including during the period of investigation of their charges, their trial and during any term of imprisonment.<sup>386</sup>

As in *Mahjoub*, the *Sing* court faulted the government for failing to give sufficient weight to China's egregious torture record. While the government acknowledged that record, it focused on the personal notoriety of the two Chinese nationals as a safeguard and incentive for the Chinese government to comply with the assurances.<sup>387</sup> The court held that the government should have instead considered whether assurances, under any circumstances, could suffice given China's record on torture. It also should have considered, in accordance with the UN Special Rapporteur's guidance on minimum requirements for assurances, what effect the lack of monitoring mechanism would have on the safety of the two nationals on return.<sup>388</sup>

### **An Alternative to Assurances: Supervised Release of Terrorism Suspects Sought for Deportation**

Canada's use of supervised release of terrorism suspects undercuts the claim that assurances-based deportation is the “best of a bad set of options.” In each of Canada's five security certificate cases since 9/11, the courts eventually ordered the individuals released with intensive supervision.<sup>389</sup> As justification for release, the courts cited the reduced security threat posed by individuals who had been in detention for years and who were, thanks to litigation, publicly recognizable.<sup>390</sup>

Supervised release has proven costly,<sup>391</sup> publicly unpopular and temporary—courts eventually ordered two suspects released without supervision and invalidated their security certificates.<sup>392</sup> It also severely

383. *Id.* at ¶ 87. The court reasoned that under *Suresh*, “[a] government with a poor human rights record would normally require closer scrutiny of its record of compliance with assurances.” Moreover, if the government had previously breached assurances, “additional conditions, such as monitoring mechanisms or other safeguards which may be strongly recommended by international human rights” might be necessary. *Id.*

384. *Id.* at ¶ 94.

385. *Id.* at ¶¶ 89, 95.

386. *Sing v. Canada*, [2008] 2 F.C.R. 3, 2007 F.C. 361 at ¶ 90 (Can.).

387. *Id.* at ¶ 138.

388. *Id.* at ¶¶ 140-43.

389. A court ordered Hassan Almrei released with supervision in January 2009 and later that year—more than eight years after his arrest—a court ordered his supervision lifted and declared his security certificate “unreasonable.” See *In the Matter of Hassan Almrei*, 2009 F.C. 1263 (Can.). In 2005, a federal court ordered Adil Charkaoui released with supervision and in 2009, a court ordered him released and rejected his security certificate following the government's withdrawal of secret evidence. See *Charkaoui (Re)*, 2009 F.C. 1030 (Can.). Mohamed Harkat and Mahmoud Jaballah continue to be under supervised release pending litigation while Mohammad Mahjoub requested to be detained, citing the burden of intrusive supervision on his family. See *Harkat (Re)*, [2009] F.C.J. No. 1204 (Can.) (sustaining some conditions on release of Harkat); *Jaballah (Re)*, [2009] F.C.J. No. 812; *Canada (Minister of Citizenship and Immigration) v. Mahjoub*, [2009] F.C.J. No. 556 (Can.) (confirming Mahjoub's return to detention).

390. See, e.g., *Charkaoui (Re)*, 2005 F.C. 248 (Can.) (finding any threat posed by Charkaoui to be “neutralized” by his period of detention and notoriety).

391. Supervision of each terrorism suspect by the domestic intelligence agency CSIS has reportedly cost nearly CAD \$600,000. See Editorial, *Deportation and Torture*, *Globe & Mail* (Toronto, Canada), Feb. 23, 2009.

392. See *Charkaoui (Re)*, 2005 F.C. 248 (Can.).

limits the liberty and privacy of individuals whom the government has still not charged with a crime, including house arrest except under supervision, no access to mobile phones or computers, and wearing extremely cumbersome security bracelets. But in security terms, supervised release has been effective: there are no reports that any of the five individuals has been involved in any terrorist activity, although it is possible that the government has kept such reports to itself. Surveillance of terrorism suspects under supervised release, subject to civil liberties-based restrictions, could also yield evidence supporting criminal prosecution.<sup>393</sup>

### **Failures in Monitoring: Canada's Custodial Transfers in Afghanistan**

Canada has transferred hundreds of detainees picked up in Afghanistan—243 individuals between 2006 and 2008.<sup>394</sup> Canada's experience illustrates the need for robust and systematic monitoring of transferred detainees.

From 2002 to 2005, Canadian military forces in Afghanistan transferred apprehended individuals to US custody.<sup>395</sup> In 2005, prompted by reports of abuse in US-run facilities, Canada began to transfer new detainees to the National Directorate of Security (NDS)—an Afghan intelligence agency known for its use of torture.<sup>396</sup>

### **Canada-Afghan Monitoring Guarantees**

In December 2005, the Canadian Chief of Defense Staff signed a memorandum of understanding (MoU) with the Afghan Minister of Defense (see Appendix IV).<sup>397</sup> Unlike agreements by other ISAF member states, Canada's agreement did not permit it directly monitor transferees, and instead provided access for the Afghan Independent Human Rights Commission (AIHRC) and International Committee of the Red Cross (ICRC).<sup>398</sup>

Canada's use of supervised release of terrorism suspects undercuts the claim that assurances-based deportation is the "best of a bad set of options."

393. For a discussion of surveillance and criminal prosecution as an alternative to security certificates in the Canadian context, see Craig Forcese, "Catch and Release: A Role for Preventive Detention without Charge" in *Canadian Anti-Terrorism Law*, July 2010, 15-26. For a discussion in the US context, see Human Rights First, *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts* (2008).

394. Government of Afghanistan Backgrounder: Canadian Forces Release Statistics on Afghanistan Detainees (2010) available at: [http://www.afghanistan.gc.ca/canada-afghanistan/news-nouvelles/2010/2010\\_09\\_22b.aspx?lang=eng](http://www.afghanistan.gc.ca/canada-afghanistan/news-nouvelles/2010/2010_09_22b.aspx?lang=eng).

395. See Alex Neve, Secretary General of Amnesty International (Canada), *Responsibility of the Canadian State under International Law and in Canadian Law: Charter Review, Public Inquiries, and Civil Liability Lawsuits*, Nathanson Center Special Forum on the Canadian Mission in Afghanistan, Feb. 8, 2010 (transcript available at [http://nathanson.osgoode.yorku.ca/wp-content/uploads/2010/09/Special-Forum-on-Detainees\\_Session-I\\_Neve\\_edit-Feb-28-2010.pdf](http://nathanson.osgoode.yorku.ca/wp-content/uploads/2010/09/Special-Forum-on-Detainees_Session-I_Neve_edit-Feb-28-2010.pdf)).

396. Recent disclosures suggest that the Canadian intelligence agency CSIS interrogated individuals detained by Canadian forces in Afghanistan, and directed that some individuals be transferred to National Directorate of Security (NDS), apparently for further questioning. See *CSIS reviews role in Afghan detainee interrogations*, The Canadian Press, Aug. 2, 2010, <http://www.ctv.ca/CTVNews/Canada/20100802/csis-afghan-detainees-100802/>.

397. Arrangement for the Transfer of Detainees Between the Government of Canada and the Government of the Islamic Republic of Afghanistan (Can.—Afg.), December 18, 2005, available at <http://www.afghanistan.gc.ca/canada-afghanistan/assets/pdfs/Dec2005.pdf>.

398. See Letter from Professor Michaels Byers, Canada Research Chair in Global Politics and International Law, University of British Columbia & Professor William A. Schabas OC, Director, Irish Centre for Human Rights, to Luis Moreno-Ocampo, Prosecutor, International Criminal Court, April 25, 2007, available at <http://nathanson.osgoode.yorku.ca/events/special-forum-on-the-canadian-mission-in-afghanistan/special-forum-background-materials/>.

A May 2007 supplemental MoU included several new monitoring guarantees (see Appendix IV):

- Unrestricted access: Canadian personnel, as well as that of the AIHRC, will have “full and unrestricted access” to detention facilities where transferees are held
- Limited location: Detainees will be held in “a limited number of facilities” to “facilitate ongoing access and capacity building projects” by the Canadian and Afghan governments
- Private interviews: Canadian and AIHRC personnel will “upon request, be permitted to interview detainees in private, without Afghan authorities present”
- Notification: Canada will be “notified of any material change of circumstances regarding the detainee including any instance of alleged improper treatment”
- Corrective action: The Afghan government will “investigate allegations of abuse and mistreatment and prosecute in accordance with national law and internationally applicable legal standards,” and inform Canada, the AIHRC and ICRC of “steps it is taking to investigate such allegation and any corrective action taken”
- Informing Afghan prison authorities: The Afghan government will “ensure that all prison authorities under its jurisdiction are advised” of the 2005 and 2007 MoU provisions.

### **Ineffective Canada-Afghan Monitoring in Practice**

Investigations by the Canadian parliament, military police complaints commission and media have revealed NDS abuse of Canadian transferees.<sup>399</sup> In November 2009, then-secretary of Canada’s Kabul embassy Richard Colvin provided key documents and testimony to Canadian parliament suggesting a devastating gulf between the MoUs’ guarantees and the reality on the ground.<sup>400</sup>

Colvin testified that in practice, neither the AIHRC or ICRC could alert Canada to abuse or effectively monitor detainees: the AIHRC had “very limited capacity” and was not granted access to NDS prisons, making it “quite useless”; and the ICRC’s own confidentiality rules did not permit it to report to the Canadian government on Afghan prisons.<sup>401</sup>

The ICRC’s effectiveness was also compromised by the Canadian military’s failure to notify it of transfers promptly. Unlike the UK and the Dutch, which notified the ICRC immediately or within 24 hours, the Canadians had an “extremely slow” six-step process that, according to Colvin, took up to two months. As a result, during the first crucial days of their NDS detention, detainees were not monitored. Colvin testified that “the likelihood is that all the Afghans we handed over were tortured.”<sup>402</sup>

The Canadian embassy in Kabul recommended the government “take responsibility for our own detainees, monitor them ourselves, and establish a robust, aggressive and well-resourced monitoring mechanism.”<sup>403</sup> But even if after the May 2007 supplemental MoU, monitoring was irregular and under-resourced, and abuse continued. According to Colvin:

*[T]o monitor effectively, we needed new resources, at a minimum one full-time officer, to conduct the monitoring. . . . Instead, for the first five months of our new detainee regime, monitoring was done by a succession of officers, some of whom were in the field on short visits of only a couple of weeks. There was too little capacity and not enough continuity. The result was that despite the new MOU, some of our detainees continued to be tortured after they were transferred.*<sup>404</sup>

399. For a catalogue of documentary evidence, see *The Documents We’ve Seen*, InsidePoliticsBlog (March 8, 2010), <http://www.cbc.ca/politics/insidepolitics/2010/03/the-documents-weve-seen.html>.

400. Testimony of Richard Colvin, First Secretary, Embassy of Canada to the United States, Special Committee on the Canadian Mission in Afghanistan, House of Commons, 40th Parliament, No. 15 (2nd Session) (Nov. 18, 2009).

401. Testimony of Richard Colvin, *supra* note 400, at 2.

402. *Id.* at 3.

403. *Id.* at 4.

404. Testimony of Richard Colvin, *supra* note 400, at 4.

In October 2007, the Canadian government finally assigned a dedicated monitor to the National Directorate of Security detainees in Kandahar. Within weeks, “he found incontrovertible evidence of torture,” Colvin testified:

*An Afghan in NDS custody told him that he had been tortured, showed him the marks on his body, and was able to point to the instrument of torture, which had been left under a chair in a corner of the room by his interrogator.*<sup>405</sup>

The Federal Court of Canada found the allegations of abuse to transferred detainees to be highly credible and disturbing:

*[C]omplaints included allegations that detainees were kicked, beaten with electrical cables, given electric shocks, cut, burned, shackled, and made to stand for days at a time with their arms raised over their heads. While it is possible that these complaints were fabricated, it is noteworthy that the methods of torture described by detainees are consistent with the type of torture practices that are employed in Afghan prisons, as recorded in independent country condition reports, including those emanating from DFAIT (Foreign Affairs and International Trade Canada). Moreover, in some cases, prisoners bore physical signs that were consistent with their allegations of abuse. In addition, Canadian personnel conducting site visits personally observed detainees manifesting signs of mental illness, and in at least two cases, reports of the monitoring visits describe detainees as appearing ‘traumatized.’*<sup>406</sup>

### **Richard Colvin’s Testimony on Canadian Monitoring**

“It’s very hard to protect people. You need a very rigorous, aggressive monitoring system. I think you could probably create that, but you’d really have to let them know that the second anything happened, you’d be knocking on the door of President Karzai, if need be, and there would be consequences for them. You’d have to be in there, maybe not every day but certainly every week. You’d also need to have relationships with them where you could get access. There are all kinds of caveats you’d have to meet first.”

### **Ending Detainee Transfers and Acknowledging the Failure of MoUs**

Canada has intermittently suspended transfers to the NDS based on allegations of abuse. For instance, it suspended transfers for a period in 2009 after an NDS official boasted to Canadian military officials that his organization was able to “torture” or “beat” prisoners during the course of its investigations. The NDS official, whom Canadian military officials believed to be a reliable source, made the admission despite the more than 250 prison visits Canadian monitors had made to date.<sup>407</sup>

Canadian authorities’ basis for repeatedly resuming transfers despite evidence of ongoing abuse may be faulty. In a May 2010 hearing of the Military Police Complaints Commission, Brigadier-General Guy Laroche, a senior military official, said that after the November 2007 halting of detainee transfers based on interviews with tortured detainees, a video camera in an NDS interrogation room was installed, and transfers resumed in February 2008. “Clearly, the installation of one video camera is incapable of preventing systemic, widespread abuse,” the British Columbia Civil Liberties Association wrote on its blog following the hearing. “We’re incredulous that senior military officials would rely on such a paltry mechanism for the protection fundamental human rights.”<sup>408</sup>

Allegations of abuse despite monitoring underscore the need for ISAF member states to consider alternatives to transfer to the NDS or accelerated capacity-building of NDS personnel. Canadian human rights advocates have advised that Canada detain apprehended individuals themselves or jointly with other ISAF member forces, and train local authorities so that in the long-term, transfers can take place without putting individuals at risk of torture.<sup>409</sup> For a discussion and recommendations, see the Human Rights Institute report *U.S. Monitoring of Detainee Transfers in Afghanistan: International Standards and Lessons from the UK & Canada* (Dec. 2010).

405. *Id.* at 4; *Amnesty International and BCCLA v. Chief of the Defence Staff*, 2008 F.C. 162 at ¶¶ 95-98 (Can.).

406. *Amnesty International and BCCLA v. Chief of the Defence Staff*, *supra* note 405, ¶¶ 85-87.

407. See Murray Brewster, *Afghan Officer Boasted to Military About Torturing Prisoners*, *The Canadian Press* (Sept. 8, 2010), available at <http://www.thestar.com/news/world/afghanistan/article/858275--afghan-officer-boasted-to-military-about-torturing-prisoners>.

408. Although the hearings were closed to the public and media, lawyers from the British Columbia Civil Liberties Association were present. See British Columbia Civil Liberties Association, *Brigadier-General Laroche: We Had Evidence That Detainees Were Abused and Transferred*, BCCLA National Security Blog (May 11, 2010), <http://nationalsecurity.bccla.org/2010/05/11/brig-gen-laroche-we-had-evidence-that-detainees-were-abused-and-tortured/>.

409. See, e.g., Andrea Prasow, *Afghan Torture Is No Secret*, *National Post*, May 4, 2010.

# PART III. INSTITUTIONALIZING REFORM: APPLYING TRANSNATIONAL GUIDANCE TO US PRACTICE

## Chapter 1: Transparency & Accountability

- The US government has often evaded public and judicial scrutiny of assurances, citing its need to safeguard US interests by keeping details secret.
- This policy against disclosure and accountability undercuts the international human rights principle of redress and, when national security is cited, implies that abusive practices may be ongoing.
- The US should follow the examples of the UK and Canada, which show the feasibility and advantages of disclosing details of assurances to the public and courts.

### Limited US Court Oversight

US courts have repeatedly held that they have limited or no ability to review the claims of individuals asserting that they are at risk of torture in assurances-based transfers, in all but a small category of cases.

### **Transfer to Torture Claims in Military Detainee Cases**

US courts have interpreted the Supreme Court's 2008 decision in *Munaf v. Geren* as precluding them from issuing a writ of habeas corpus to prevent the transfer of an individual in military custody who claims to be at a risk of torture. Their rationale is that courts are not entitled to second-guess the executive branch's determination about the risk of torture.<sup>410</sup>

In *Munaf*, the Supreme Court held that a US court could not enjoin the government from transferring two US nationals to Iraqi authorities. The two men allegedly committed crimes in Iraq and were detained there. The court reasoned that “[t]o allow United States courts to intervene in an ongoing foreign criminal proceeding and pass judgment on its legitimacy seems at least as great an intrusion as the plainly barred collateral review of foreign convictions.”<sup>411</sup> According to one interpretation of *Munaf*, Iraq's foreign sovereignty and the US's role were decisive factors. That would limit *Munaf*'s application to Guantánamo and Afghan detention cases.<sup>412</sup>

But in dicta, *Munaf* also suggested that the judiciary was not suited to “second-guess” the executive's determinations on the risk of torture, including those based on assurances. The Court reasoned that reviewing these determinations “would require federal courts to pass judgment on foreign justice systems and undermine the Government's ability to speak with one voice.”<sup>413</sup> In fact, courts routinely perform such review in the immigration context, considering claims under both the UN Convention Against Torture and the Immigration and Nationality Act regarding the likelihood of torture or persecution in a given country, and assessing the government's arguments to the contrary.<sup>414</sup>

Nevertheless, in 2009 the D.C. Court of Appeals held in *Kiyemba II*, a Guantánamo case, that under *Munaf* lower courts “may not question the Government's determination that a potential recipient country is not likely to torture a detainee.”<sup>415</sup> Accordingly, in several cases the D.C. Circuit has held that to satisfy

410. See *Munaf v. Geren*, 553 U.S. 674 (2008).

411. *Id.* at 699.

412. See, e.g., Parry, *supra* note 116.

413. See *Munaf*, 553 U.S. at 702.

414. As the Third Circuit has noted, “we routinely evaluate the justice systems of other nations in adjudicating petitions for review of removal orders.” *Khouzam v. Attorney General*, 549 F.3d 235, 253 (3d Cir. 2008).

415. See *Kiyemba v. Obama*, 561 F.3d 509, 514 (D.C. Cir. 2009).



court review, the government need only state, without elaboration, that it will not transfer “an individual in circumstances where torture is likely to result.”<sup>416</sup> (On distinct reasoning, the D.C. Court of Appeals has foreclosed torture claims by detainees at Bagram airbase, holding that as a threshold matter, US courts do not have jurisdiction to consider their habeas petitions).<sup>417</sup>

*Kiyemba II* and subsequent decisions effectively foreclose risk of torture claims for individuals held in US military detention, with some exceptions. In *Munaf* the Supreme Court left open the possibility of review if the government decides to transfer an individual despite an acknowledged likelihood of torture, stating, “this is not a more extreme case in which the Executive has determined that a detainee is likely to be tortured but decides to transfer him anyway.”<sup>418</sup> The court implicitly recognized that the humanitarian imperative against torture should limit its deference to the executive. It might be willing to impute “constructive knowledge” of the torture risk where the government attempts a transfer to a notoriously abusive government. US courts might also enjoin transfers conducted “to evade judicial review of Executive detention decisions,”<sup>419</sup> but proving purposeful evasion might be impossible. Finally, courts might enjoin a transfer conducted to facilitate a foreign government’s detention of an individual “on behalf of the United States.”<sup>420</sup> As of December 2010, several cases were pending which test the D.C. Circuit’s interpretation of *Munaf*.<sup>421</sup>

### **Transfer to Torture Claims in Deportation & Extradition Cases**

Lower US courts have interpreted the Foreign Affairs Restructuring and Reform Act (FARRA), which implements US obligations under the UN Convention Against Torture, as precluding judicial review of many claims under the Convention. FARRA states that a petition for review of a final order of removal is the “sole and exclusive means for judicial review of any cause or claim” under the Convention.<sup>422</sup>

In immigration cases, FARRA can be interpreted as preventing judicial review of assurances for individuals who won deferral of removal in their immigration proceedings but later face new government attempts to deport them based on assurances, since a petition for review must be filed within 30 days of the end of immigration proceedings (see Part I, Ch. 2). However, the Third Circuit Court of Appeals has held that FARRA does not preclude review in such cases.<sup>423</sup>

The US government has argued that FARRA precludes judicial review of claims that transfer to countries where an individual may be tortured violates an individual’s due process rights; the Second Circuit Court of Appeals declined to reach the issue in the renditions case *Arar v. Ashcroft*, calling it a “vexed question.”<sup>424</sup>

In extradition cases, courts of appeal are split on whether FARRA precludes judicial review of claims that an extradition would violate Article 3 of the Convention Against Torture. The Third and Ninth Circuits

416. *Id.* at 516-17 (Kavanaugh, J., concurring); see, e.g., Mohammed v. Obama, D.C. Cir. No. 10-5218 (Order of July 8, 2010) (on file with Human Rights Institute); Naji v. Obama, D.C. Cir. No. 10-5191 (Order of July 16, 2010), *Paracha v. Obama*, D.C. Cir. No. 05-5334 (Order of Sept. 3, 2010), *Khadr v. Obama*, D.C. Cir. No. 08-5233 (Order of Sept. 3, 2010) (on file with Human Rights Institute). See also *supra* note 68 and accompanying text.

417. See *Al Maqaleh v. Gates*, 605 F.3d 84 (D.C. Cir. 2010).

418. See *Munaf*, 533 U.S. at 702; see also *Kiyemba v. Obama*, 605 F.3d 1046, 1050 n.4 (J. Rogers, concurring) (D.C. Cir. 2010).

419. See *Al Maqaleh*, 605 F.3d at 98.

420. See *Kiyemba*, 561 F.3d at 515 n.7; *id.* at 524-26 (Griffith, J., dissenting).

421. *Abdah v. Obama* seeks *en banc* D.C. Circuit review of *Kiyemba II*. See Petition for Initial En Banc Hearing, *Abdah v. Obama*, No. 05-5224 (D.C. Cir. Aug. 23, 2010) (on file with Human Rights Institute). There are also pending petitions for certiorari before the Supreme Court which question *Kiyemba II*’s holdings on transfer. See Petition for a Writ of Certiorari, *Mohammed v. Obama*, No. 10-746 (Nov. 5, 2010); Petition for a Writ of Certiorari, *Khadr, et al. v. Obama*, No. 10-751 (Dec. 2, 2010). At the time of publication, the Supreme Court was considering the certiorari petition for *Kiyemba II*, but the petition’s focus is whether courts have the authority to order the release of Uighur detainees into the US. See Petition for Writ of Certiorari, *Kiyemba v. Obama*, No. 10— (Dec. 8, 2010).

422. See 8 U.S.C. § 1251(a)(4) (2006).

423. See *Khouzam*, 549 F.3d at 235.

424. See *Arar v. Ashcroft*, 585 F.3d 559, 569-70 (2d Cir. 2009).

have held that courts have habeas jurisdiction to hear Convention Against Torture claims through the Administrative Procedures Act—which places requirements on agencies to comply with statutes, including FARRA—once the Secretary of State has decided to certify the extradition in the face of torture allegations. But the Fourth Circuit has held that FARRA precludes such claims.<sup>425</sup>

### **US Rationales for Resisting Court Disclosure**

The executive branch of the US government has for the most part failed to disclose information about assurances policy, evading questions in congressional hearings and declining to release government reports reviewing assurances practice (see Part I, Ch. I). In litigation, pushed to reveal details on particular transfer decisions, the executive has argued that judicial scrutiny would jeopardize US foreign policy interests and its ability to negotiate assurances in future cases.

**A 2005 declaration argues that “[j]udicial review... could negatively affect our ability to succeed in the war on terrorism.”**

“[T]he delicate diplomatic exchange that is often required in [assurances negotiations] cannot occur effectively except in a confidential setting,” according to a 2005 State Department declaration.<sup>426</sup> Moreover, “[a]ny judicial decision to review a transfer decision... or the diplomatic dialogue with a foreign government concerning the terms of the transfer could seriously undermine foreign relations.”<sup>427</sup>

A July 2008 US Department of Defense declaration claims disclosure would discourage receiving governments from providing assurances by virtue of the “chilling effects of making [diplomatic] discussions public.” Court disclosure could also “adversely affect the relationship of the United States with other countries, and impede our country’s ability to obtain vital cooperation from concerned governments with respect to military, law enforcement, and intelligence efforts [related to] the war on terrorism.”<sup>428</sup> A 2005 declaration argues that “[j]udicial review... could negatively affect our ability to succeed in the war on terrorism.”<sup>429</sup>

### **Overstatement in US Arguments Against Judicial Review**

Claims that judicial review or disclosure of assurances undercut US counterterrorism operations by damaging bilateral relations are overstated on several counts.

### **DIPLOMATIC INCENTIVES AND US BARGAINING POWER**

It is difficult to envision a receiving government ending its counterterrorism relationship with the US, and losing such benefits, due to a court’s scrutiny of its human rights record in a single or even a series of cases. A more plausible argument is that court scrutiny is one of several factors that would diminish a receiving government’s interest in a transfer. But while US relations with receiving governments are in some cases fragile, the incentives for cooperation are high, including trade deals and aid. The 2010 WikiLeaks cables on Guantánamo detainees’ resettlement are illustrative. They include details of US bargaining with

425. See Parry, *supra* note 116 (citing *Cornejo-Barreto v. Seifert*, 218 F.3d 1004 (9th Cir. 2000); *Hoxha v. Levi*, 465 F.3d 554, 565 (3d Cir. 2006), *Cornejo-Barreto v. Seifert*, 389 F.3d 1307 (9th Cir. 2004) (en banc); *Mironescu v. Costner*, 480 F.3d 664, 673-77 (4th Cir. 2007)).

426. Declaration of Pierre-Richard Prosper, *supra* note 15, at ¶ 10. A 2001 declaration has nearly identical terms. See Declaration of Samuel M. Witten, *supra* note 43.

427. Declaration of Pierre-Richard Prosper, *supra* note 15, at ¶ 12; see also Declaration of Samuel M. Witten, *supra* note 43, at ¶ 13 (“A judicial decision overturning a determination made by the Secretary after extensive discussions and negotiations with a requesting State could seriously undermine our foreign relations.”).

428. Hodgkinson Declaration, *supra* note 12, at ¶ 8; see also Declaration of Joseph Benkert, *supra* note 25, at ¶ 8.

429. Declaration of Matthew C. Waxman, *Sherif el-Mashad, et al. v. Bush*, February 25, 2005, Annex I, Tab I, Second Periodic Report of the U.S. to the Committee Against Torture, submitted May 6, 2005, ¶ 8.

foreign governments to accept the detainees in exchange for US help in obtaining International Monetary Fund assistance, meetings with President Obama and, in the case of 17 Uighers, an “incentive package” of USD \$3 million. Despite these incentives, some foreign governments refused to resettle Guantánamo detainees, showing the difficulty and fragility of transfer negotiations.<sup>430</sup> Nevertheless, the leaks underscore that the negotiating power of the US, backed by its financial and political strength, is considerable. Generally, the US has stronger diplomatic leverage than Canada, the UK and several European countries, yet these countries have subjected assurances to judicial scrutiny (see below).

### THE PRECEDENT OF US JUDICIAL REVIEW & CRITICISM OF FOREIGN GOVERNMENTS' HUMAN RIGHTS RECORDS

It is true that court scrutiny of a transfer can lead to diplomatic tension, as it did, for instance, following US court refusals to permit the extradition of Irish Republican Army figures to the UK.<sup>431</sup> But arguments against judicial review or disclosure conflate revealing delicate negotiations with judicial review of transfer decisions. Judicial review might require that the government provide the text of assurances and some information about their circumstances, such as the identity of the receiving government authorities providing them, but it would not necessarily require disclosure of the full course of negotiations.

Judicial review of an assurances-based transfer would require the court to publicly assess the receiving government's human rights record, but US courts already do that in immigration cases involving asylum and protection under the Convention Against Torture. They consider whether receiving governments will live up to their international and domestic legal obligations on torture. They weigh foreign government officials' assertions against human rights reports to the contrary. Moreover, the US already publicly condemns foreign governments for their records on torture in annual State Department reports.

The US government has also claimed that judicial review of transfer decisions would “harm the United States' efforts to press other countries to act more expeditiously in bringing terrorists and their supporters to justice.”<sup>432</sup> Ironically, the US's secrecy and refusal to subject assurances to judicial review may discourage European countries from transferring terrorism suspects to US custody, in light of the possibility that the suspect could subsequently be transferred, on the basis of assurances, to a country where he would face a risk of abuse.<sup>433</sup>

### Feasibility & Advantages of Greater Disclosure & Judicial Review

The experiences of the UK and Canada undercut US arguments against the feasibility of disclosure and accountability.

#### **UK Disclosure and Scrutiny by Domestic Courts**

The UK government touts its disclosure on judicial review of assurances as a critical marker of assurances' reliability (see Part II, Ch. 3). It has disclosed information about its negotiations, decision-making and post-return monitoring in court, at press conferences, in parliamentary proceedings, publicly released government reports and journal articles. According to the UK, its publicly proclaimed investment in assurances increases its incentive to ensure they are honored. Disclosure leads the government to use assurances conservatively, in cases where it believes them to be especially strong, to avoid the political and legal consequences of a breach.<sup>434</sup> Public scrutiny makes receiving governments more likely to honor assurances, including on guarantees of access for third party monitors.

430. See Charlie Savage & Andrew W. Lehren, *Cables Depict Coaxing By U.S. in Bid to Clear Guantanamo's Prison*, N.Y. Times, Nov. 30, 2010, at A1.

431. See, e.g., *IRA Extradition U-turn 'a Disgrace'*, BBC News, October 10, 1998, available at [http://news.bbc.co.uk/2/hi/events/northern\\_ireland/latest\\_news/190578.stm](http://news.bbc.co.uk/2/hi/events/northern_ireland/latest_news/190578.stm).

432. Declaration of Clint Williamson, Ambassador-at-Large for War Crimes Issues, Department of State office of War Crimes Issues, executed on June 8, 2007, In re Guantanamo Bay Detainee Litigation, Case No. 1:05-cv-01220 (D.D.C. 2007) ¶ 12.

433. See *Saadi v. Italy*, App. No. 37201/06 at ¶ 148 (Eur. Ct. H.R. 2008), available at <http://www.echr.coe.int/ECHR/EN/hudoc> (finding that even where the receiving State provides assurances satisfying the sending State, the Court has the “obligation to examine whether such assurances provided, in their practical application, a sufficient guarantee that the [individual to be transferred] would be protected against the risk of treatment prohibited by the Convention.”)

434. Jones, *supra* note 279, at 184-185.

UK courts' close examination of assurances—and their outright rejection of assurances from Libya—undercuts the US's claims that such scrutiny would harm foreign relations and doom future assurances negotiations.

UK courts' close examination of assurances—and their outright rejection of assurances from Libya—undercuts the US's claims that such scrutiny would harm foreign relations and doom future assurances negotiations. In 2007, a UK court rejected Libyan assurances. It questioned the credibility of Libyan leader Colonel Qadhafi and the assigned monitoring body's political independence.<sup>435</sup> Whatever the diplomatic fall-out, the UK nevertheless maintains strong relations with Libya, having signed five bilateral agreements on a host of matters in 2008.<sup>436</sup> Moreover, even after the release of several UK court decisions closely examining assurances from 2005 to 2008, the UK was able to secure an assurances agreement with Ethiopia.<sup>437</sup> In fact, according to the UK, "the course of negotiations [with Ethiopia] was smooth when compared with similar negotiations with other governments."<sup>438</sup>

### **European Court of Human Rights Scrutiny**

Arguments against the feasibility of judicial review are also undercut by the European Courts of Human Rights' repeated scrutiny of assurances. The European Court encourages countries to provide

it with the text of assurances and the circumstances of their negotiation.<sup>439</sup> For example, the European Court reviewed extensive diplomatic notes and other exchanges between the governments of Bosnia and Herzegovina and the US in *Boumediene* (see Part II, Ch. 2). Based on its review of the exchanges, the European Court concluded that Bosnia was "taking all possible steps to the present date to protect the basic rights of the applicants" as required by its domestic law.<sup>440</sup>

Altogether, the Court has reviewed dozens of assurances cases, examining the text of assurances, the identity of the authorities providing the assurances, the course of negotiations and post-return monitoring arrangements.

435. *DD and AS v. Sec of State* (SC/42 and 50/2005, 27 April 2007), discussed *supra* Part II, Chapter 3.

436. See Foreign and Commonwealth Office, *Bill Rammell signs five agreements with Libya* (November 17, 2008), available at <http://www.fco.gov.uk/en/newsroom/latestnews/?view=PressS&id=9289010>. Retrieved 2008-11-18.

437. See Ethiopia MoU, discussed Part II, Chapter 3.

438. *XX v. Sec'y of State*, *supra* note 321, ¶ 21.

439. See, e.g., *Ryabikin v. Russia*, ¶ 119 (Eur. Ct. H.R. 2008) (finding a breach of Article 3 where Russia claimed that Turkmenistan provided written assurances but failed to submit them to the Court).

440. *Boumediene and Others v. Bosnia and Herzegovina*, *supra* note 253, ¶ 67. The Court did not apply Article 3, as it declined to resolve the issue of whether it had jurisdiction over Bosnia and Herzegovina; the applicants were transferred to US custody before the entry into force of the European Convention with respect to Bosnia and Herzegovina. See *id.*, ¶ 62.

**FIGURE 2: EUROPEAN COURT SCRUTINY OF ASSURANCES BETWEEN VARIOUS COUNTRIES**

SENDING COUNTRY (RESPONDENT BEFORE COURT)	RECEIVING COUNTRY
Ukraine	Kazakhstan <sup>441</sup> Belarus <sup>442</sup> Turkmenistan <sup>443</sup>
Russia	Uzbekistan <sup>444</sup> Tajikistan <sup>445</sup>
Italy	Tunisia <sup>446</sup>
Spain	Russia <sup>447</sup>
United Kingdom	India <sup>448</sup> Jordan <sup>449</sup>
Azerbaijan	Uzbekistan <sup>450</sup>
Bosnia-Herzegovina	United States <sup>451</sup>

441. *Kaboulov*, *supra* note 245 ¶ 113.

442. *Koktysh v. Ukraine*, no. 43707/07, ¶¶ 16, 19 (Eur. Ct. H.R. 2009) (July 2007 assurances that “Koktysh I.G. would be tried only for the crimes he was extradited for, and he would not be sentenced to the death penalty”; October 2007 assurances that the applicant would not be tortured, subjected to ill-treatment or discriminated against, would be given a fair trial, and if necessary, would be given medical assistance and treatment).

443. *Soldatenko*, *supra* note 249, ¶ 20 (April 2007 assurances noting the abolition of the death penalty and stating: “the requirements of Article 3 of the Convention on Human Rights and Fundamental Freedoms will be fulfilled in respect of N.I. Soldatenko, he will not be subjected to torture, inhuman or degrading treatment or punishment after extradition; - in case of necessity he will be provided with appropriate medical treatment and medical assistance; - the right to fair judicial consideration of his criminal case will be secured to him”).

444. *Ismoilov*, *supra* note 247; *Muminov*, *supra* note 245, ¶ 12.

445. *Khaydarov v. Russia*, *Application no. 21055/09*, 20 May 2010; *Khodzhayev v. Russia*, *Application no. 52466/08*, May 12, 2010.

446. *Saadi v. Italy*, *supra* note 237; *Sellem c. Italie*, *supra* note 244; *Cherif c. Italie*, *supra* note 244; *Soltana c. Italie*, *supra* note 244; *Darraji c. Italie*, *supra* note 244; *C.B.Z. c. Italie*, *supra* note 244; *Bouyahia c. Italie*, *supra* note 244; *Ben Salah c. Italie*, *supra* note 244.

447. *Gasayev v. Espagne*, *supra* note 251.

448. *Chahal*, *supra* note 266.

449. *Othman*, *supra* note 258 (pending).

450. *Garayev v. Azerbaijan*, App. No. 53688/08 (June 10, 2010).

451. *Boumediene*, *supra* note 253.

### **Feasibility of Disclosure through Non-Judicial Mechanisms**

Commission-style and parliamentary inquiries are another avenue for government disclosure on transfer and assurances practice. Government disclosure in these settings establishes errors in past decision-making and builds political support for necessary reform.

Like the US government, the Canadian and UK governments have sought to withhold information on national security grounds in litigation on detention and transfer. But recent developments in both countries show the feasibility and potential benefits of disclosure outside of courts.

#### ***Canadian Disclosure on Maher Arar Rendition***

While the case against US officials who directed Canadian national Maher Arar's transfer stalled in US courts, Canadian inquiries have revealed crucial details of what happened. These disclosures provided impetus for reforms in intelligence-sharing and other practices.

For instance, a 2006 commission of inquiry report outlined how the actions of Canadian officials contributed to the torture of Maher Arar.<sup>452</sup> The Canadian government adopted some of the commission's recommendations, including:

- restricting intelligence-sharing that may contribute to the use of torture;
- developing a protocol “to provide for coordination and coherence across government in addressing issues that arise when a Canadian is detained in another country in connection with terrorism-related activity,” including “political accountability for the course of action adopted”; and,
- training for consular officials on conducting interviews in prison settings to “to be able to make the best possible determination of whether torture or harsh treatment has occurred”<sup>453</sup>

Canada's handling of the Arar case also demonstrates the close relationship between disclosure and accountability measures. In June 2010, the Royal Canadian Mounted Police, which had been directly implicated by the commission of inquiry, announced that its four-year investigation into the Arar would provide evidence supporting criminal prosecution of foreign officials.<sup>454</sup>

#### ***Potential Disclosure in UK Commission of Inquiry***

The UK's steps toward a full accounting of the complicity in mistreatment of terrorism suspects may prove a powerful example of the feasibility of non-judicial accountability mechanisms. In July 2010, the UK announced the creation of a commission of inquiry to investigate allegations of UK involvement in the mistreatment of detainees held outside the UK. Human rights advocates are pressing the government to conduct inquiry hearings publicly and permit the participation and testimony of victims. The UK government may have mixed motives for creating the inquiry, such as to allay public concerns and justify its unwillingness to disclose evidence in court proceedings. But the inquiry has the potential to help identify practices that facilitate abuse of detainees and recommend policies to prevent future abuse.<sup>455</sup>

### **Designing Better Disclosure & Accountability Mechanisms in the US**

The US should follow these examples by disclosing more information about its assurances policy, investigating past abuse, and committing to a fair process for review of transfer cases.

452. See Report of the Events Relating to Maher Arar: Analysis and Recommendations – Volume 3; A New Review Mechanism for the RCMP's National Security Activities, Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar (2006).

453. See Report of the Standing Committee on Public Safety and National Security, “Review of the Findings and Recommendations Arising from the Iacobucci and O'Connor Inquiries,” 40th Parliament, 2nd Session, June 2009, at 6-8.

454. See Colin Freeze and Steven Chase, *Arar working with RCMP as it probes his overseas torture*, *Globe and Mail* (June 14, 2010).

455. See Letter from Aire Center et al. to Sir Peter Gibson, *Re Inquiry into alleged UK involvement in the mistreatment of detainees held abroad*, September 8, 2010, available at [http://www.reprieve.org.uk/2010\\_09\\_12\\_letter\\_from\\_ngos\\_re\\_inquiry](http://www.reprieve.org.uk/2010_09_12_letter_from_ngos_re_inquiry).

**Greater US Disclosure on Assurances & Past Abuse**

The UN Committee Against Torture has objected to “the absence of judicial scrutiny” over assurances and “secrecy” of US transfer procedures. It has urged the US to establish “adequate judicial mechanisms for review.”<sup>456</sup>

US government resistance to investigations into past abuse and unwillingness to publicly disclose the outcomes of investigations has negative repercussions. While the US government has lauded the international human rights principle of redress to victims of abuse and encouraged other countries to hold abusers accountable, it appears unwilling to apply the principle to its own practices, undercutting both the principle and US credibility on human rights.<sup>457</sup> Moreover, resistance to disclosure, especially when national security is cited, implies that abusive practices may be ongoing. The US should pursue a full investigation of past abuse to identify key problems in assurances policy and necessary improvement.

Resistance to disclosure, especially when national security is cited, implies that abusive practices may be ongoing.

Moreover, the US government can signal a commitment to transparency and accountability by disclosing information about current and future policy. To begin, the US should make public any measures it has taken to improve assurances and transfer practices. The announcement would make clear its interest in institutionalizing reform. US officials should describe key parameters of US assurances policy in congressional hearings, and answer questions about assurances practice in press conferences, public speaking engagements or academic journals, as UK officials have done.<sup>458</sup>

If improvements to assurances practice are not legally codified in an executive order or agency regulations, disclosure and public discussion may help such improvements “stick.” A future administration would be compelled to provide some public explanation for its reason for departing from the publicly known reform.

**Stronger Review of US Transfer Decisions**

The executive or Congress should adopt measures to ensure fair review of transfer decisions, including assurances, in immigration, extradition and military detainee cases.

US courts are better suited than executive agencies to provide fair process and to assess assurances. Courts of appeal routinely assess the risk of torture in immigration cases, systematically drawing on US State Department reports, evaluating media and human rights reports and making decisions based on an inevitably incomplete set of information. Part of what gives legitimacy to judicial decisions on the risk of torture is the structured opportunity for exchange on complicated questions of fact and law, through oral argument and full legal briefings.<sup>459</sup>

In immigration cases, immigration judges are the most suitable decision-makers given their wealth of experience in asylum cases, assessing the question of whether individuals are at risk of torture and persecution. The US government took steps in the right direction in the case of three Rwandan nationals (see Part I, Ch. 2). In August 2009, the US government shared with the individuals’ attorneys the text of the assurances of humane treatment and post-return access it received from the Rwandan government and provided them 21 days to respond with comments.<sup>460</sup>

456. UN Committee Against Torture, Conclusions and recommendations of the Committee Against Torture: United States, UN Doc. No. CAT/C/USA/CO.2 (2006) at ¶ 21.

457. See generally International Center for Transitional Justice, “After Torture: US Accountability and the Right to Redress,” August 2010.

458. See *supra* Part II, Ch. 3.

459. See Parry, *supra* note 116, at 35.

460. Interview with Karake attorneys, *supra* note 142

In military detention cases, judicial review is also appropriate notwithstanding recent Supreme Court and D.C. Court of Appeals decisions to the contrary. For Guantánamo cases, US courts can exercise the flexibility and competence in assessing detainees' transfer claims. They have already done so in the Guantánamo habeas cases. They have developed their expertise in considering classified information. They have also crafted suitable remedies, granting the government flexibility in deciding what diplomatic measures are appropriate to ensure an individual's release.<sup>461</sup>

## Chapter 2: Systematic Post-return Monitoring

- There are indications that the US lacks standard requirements on monitoring, including required guarantees of access and a protocol for post-return monitoring.
- In known cases of abuse following assurances-based transfer, monitoring was conducted in an ad hoc manner, without a pre-determined protocol or sufficient resources.
- International standards for monitoring of places of detention could aid US officials in anticipating problems and formulating a clear monitoring protocol applicable to diverse situations.

For proponents, monitoring is the linchpin of assurances: monitoring detects breaches of assurances, and deters breach in the first place since detaining authorities know they are being watched. But critics sharply dispute the notion that monitoring can detect or protect against torture where it is endemic, routinely denied and concealed.<sup>462</sup> Yet in other contexts where torture has proven an intractable risk, like police interrogation, rights advocates have pursued intrusive monitoring and other mechanisms to reduce the risk of torture. Likewise, while monitoring of assurances is not a sufficient protection against torture or ill-treatment, an institutionalized and intrusive system of monitoring would be a vast improvement over ad hoc monitoring, which appears to be current US practice.

While monitoring of assurances is not a sufficient protection against torture or ill-treatment, an institutionalized and intrusive system of monitoring would be a vast improvement over ad hoc monitoring

### US Monitoring Practices

The US government has indicated that it often seeks some monitoring guarantee.<sup>463</sup> Left unknown are whether the US has specific requirements for the monitoring assurances it will accept, or a uniform monitoring protocol for officials who oversee or conduct monitoring, including a method for responding to allegations of abuse.

### Seeking Guarantees of Monitoring—A Lack of Baseline Requirements?

In August 2009, the Special Task Force on Interrogations and Transfer Policies recommended that assurances include a monitoring mechanism “to ensure consistent, private access to the individual who has been transferred, with minimal advance

461. Human Rights First & The Constitution Project, *Habeas Works: Federal Courts' Proven Capacity to Handle Guantánamo Cases 17-18*, 25 (Jun. 2010).

462. See Amnesty International, Human Rights Watch, & International Commission of Jurists, *supra* note 198.

463. Ashley Deeks, Council on Foreign Relations, *Avoiding Transfer to Torture 33* (June 2009) (“Because the United States does not make public the assurances it receives, it is difficult to know the scope of the monitoring mechanisms it has negotiated to date.”).



notice to the detaining government.”<sup>464</sup> The US State Department would secure the monitoring arrangement, and monitoring could be conducted either by US embassy officials or a third party.<sup>465</sup>

The government’s characterization of this monitoring recommendation as a potential improvement is the best indication that, in the past, the US has not always secured monitoring arrangements meeting these requirements.<sup>466</sup> US government officials have otherwise been remarkably glib. In 2008, then-State Department Legal Advisor John Bellinger indicated that the US ordinarily seeks monitoring mechanisms, and compared US practice to other countries’, stating: “[W]e all try to work out the same sets of assurances with monitoring mechanisms.”<sup>467</sup> But Bellinger did not indicate whether the US will conduct a transfer even if it fails to secure monitoring arrangements. It may depend on the type of transfer contemplated.

### MONITORING GUARANTEES IN GUANTÁNAMO TRANSFERS

US government declarations submitted in the Guantánamo cases imply that the State Department monitors transfers of Guantánamo detainees who are detained by foreign government authorities after transfer. A typically oblique 2008 declaration states that the State Department “has the tools to obtain and evaluate assurances of humane treatment...and where appropriate to follow up with receiving government on compliance with those assurances.”<sup>468</sup>

While US officials have not publicly disclosed monitoring arrangements, former State Department official Vijay Padmanabhan told the Human Rights Institute that for individuals transferred out of Guantánamo Bay, “[a]ll agreements have a monitoring mechanism . . . [it is] a sine qua non of assurances.”<sup>469</sup> The decision of whether to accept a particular monitoring mechanism, or lack thereof, is taken on a case-by-case basis. Padmanabhan told the Institute that in negotiating assurances, the State Department had been unwilling to compromise on obtaining some form of access to the returned individual, including via the ICRC.<sup>470</sup> But another official indicated that deals often stumbled on the issue of monitoring because receiving States were unwilling to accept monitoring as a “strict condition,” particularly monitoring by a third-party.<sup>471</sup>

A cable report by the US embassy in Tunisia, released through WikiLeaks, is illustrative. While most of the report consists of statements by ambassadors about Tunisia’s record of abuse generally and against an already repatriated Guantánamo detainee, the cable suggests possible monitoring terms for new repatriations:

*Washington agencies may wish to consider whether to offer to return the [remaining] Tunisian detainees if the [government of Tunisia] agrees to permit US access to the first two transferees and ongoing access to any future transferees. Such an understanding would need to include a mechanism to address the problems that may arise. While there is no absolute guarantee*

---

464. DOJ Task Force Press Release, *supra* note 1 (explaining that the Special Task Force “made several recommendations aimed at improving the United States’ ability to monitor the treatment of individuals transferred to other countries. These include a recommendation that agencies obtaining assurances from foreign countries insist on a monitoring mechanism, or otherwise establish a monitoring mechanism, “to ensure consistent, private access to the individual who has been transferred, with minimal advance notice to the detaining government.”).

465. “The improvement on the process is the task force calls on the State Department to establish a kind of monitoring mechanism that allows us to be able to make sure, after the prisoner has been transferred, that he is not – he or she is not being abused. And this is – the details of this will have to be worked out. I mean, this is something that perhaps an embassy could do, perhaps a third party could do. But this is one of the tasks that fall under the State Department.” Ian Kelly, US State Dep’t Spokesman, Daily Press Briefing (Aug. 25, 2009), available at <http://www.state.gov/r/pa/prs/dpb/2009/aug/128344.htm>.

466. *Id.*

467. In 2008, then-State Department Legal Advisor John Bellinger testified: “[I]f there is a question about a human rights record in the country and we do decide to seek diplomatic assurances, then there are a number of mechanisms that we can use to follow up . . . I talk to a number of countries around the world, all of whom face the same problem, the Brits and others, who have individuals in their countries whom they want to expel or deport, and we all try to work out the same sets of assurances with monitoring mechanisms, sir.” Testimony of John Bellinger, *supra* note 5, at 19 (emphasis added).

468. Williamson Declaration, *supra* note 33.

469. Interview with Vijay Padmanabhan, *supra* note 45.

470. *Id.*

471. Human Rights Institute interview with former State Department official, New York, NY (Jan. 27, 2010).

*against mistreatment, such an understanding would provide transferees additional protection. Whether the [government of Tunisia] would accept such an arrangement is another matter. We are not optimistic, but it is worth considering.*<sup>472</sup>

The cable report implies that, in the 2007 repatriation of two Tunisian nationals from Guantánamo, the US in fact failed to secure a guarantee of access—thus the need to secure it in a subsequent negotiation. Since the 2007 repatriations, the US has not repatriated any Tunisian detainees from Guantánamo.<sup>473</sup> This could stem from the US government’s inability to secure monitoring guarantees; however, the government may also have simply concluded that the risk of abuse was too high.

### MONITORING GUARANTEES IN AFGHANISTAN DETENTION AND TRANSFERS

The US secured a guarantee of access to detainees picked up by US ISAF forces and transferred to the Afghan intelligence agency NDS through a 2007 exchange of letters (see Part I, Ch. 2). The letter grants access to Afghan detention facilities “to the extent necessary to ascertain the location and treatment of any detainee transferred by that government to the Government of Afghanistan” and, on request, access to interview any transferred detainee in private. The letters guarantee the same access for organizations described in other bilateral agreements, including the ICRC, UN human rights bodies and the Afghan Independent Human Rights Commission.<sup>474</sup> US monitoring guarantees for detainees custodially transferred by virtue of the eventual Parwan facility transfer, as well as non-Afghan nationals repatriated from Parwan, are unknown.

### MONITORING GUARANTEES IN EXTRADITION CASES

In extraditions, the US considers whether to seek monitoring guarantees “on a case-by-case basis, based on the circumstances of a particular case.”<sup>475</sup> One known case illustrates this approach. When India sought the extradition of Kulbir Singh Barapind in 2006, US officials appeared to regard a guarantee of monitoring critical, given that “[t]here is no doubt that torture generally remains a problem for Indian law enforcement.”<sup>476</sup> State Department officials noted that the reliability of Indian assurances “could be further increased by establishing a program of monitoring of his situation by one or more human rights NGOs, or Embassy staff.”<sup>477</sup> The State Department further recommended that:

*[t]he National and State Human Rights Commissions should be able to visit Barapind in prison. Assuming Barapind is also permitted to have contact with NGO activists, they will help ensure that abuses, if they occur, are aired in the Indian media.*<sup>478</sup>

Ultimately, the Indian Ministry of External Affairs provided a diplomatic note that guaranteed that “the US Government will be informed about the status” of Barapind’s trial, and that “US officials on request shall have access to the person extradited during trials in India.”<sup>479</sup>

472. US Embassy in Tunisia cable, *supra* note 8.

473. See *supra* note 59 and accompanying text.

474. See *supra* note 83 and accompanying text.

475. Declaration of Samuel M. Witten, *supra* note 43, ¶ 10 (“As with the issue of assurances, the decision whether to seek a monitoring arrangement is made on a case-by-case basis, based on the circumstances of a particular case, which could include the identity of the requesting State, the nationality of the fugitive, the groups or persons that might be available to monitor the fugitive’s condition, the ability of such groups or persons to provide effective monitoring, and similar considerations.”).

476. Action Memo from John Bellinger to the Deputy Sec’y of State, Subject: Whether to Extradite Kulvir Singh Barapind to India 10 (2006), available at <http://www.aclu.org/national-security/documents-released-under-diplomatic-assurances-foia>.

477. Telegram from American Embassy in New Delhi to Secretary of State in Washington, D.C. ¶ 8 (Feb. 9, 2006) (quoting text of Indian Ministry of External Affairs Diplomatic Note T-413/11/2004 (Apr. 27, 2006)).

478. *Id.* at ¶ 9.

479. Telegram from American Embassy in New Delhi to US Secretary of State in Washington, D.C. ¶ 2 (Mar. 30, 2006) (quoting text of Indian Ministry of External Affairs Diplomatic Note T-413/11/2004 (Mar. 28, 2006)) (“Once Mr. Barapind is extradited to India, the US Government will be informed about the status of the criminal trial against him for the alleged offenses in accordance with the provisions of the Indo-US Extradition Treaty. Article 21 of the Treaty provides for consultation in connection with the procession of individual cases and improving procedures for the implementation of the Treaty . . . As regards access on a reciprocal basis, it is clarified that the US officials on request shall have access to the person extradited during trial in India, and on extradition of a person from India to USA, the Indian officials on request shall be provided access to the person extradited during his trial in the United States of America, irrespective of his or her nationality.”).

### MONITORING GUARANTEES IN IMMIGRATION CASES

In the immigration context, US officials have not publicly described a policy of seeking post-return monitoring. But in one recent case, the US government secured extensive monitoring guarantees from the Rwandan government for three Rwandan nationals who had previously been tortured by Rwandan security officials. The written assurances specified that the Rwandan government would grant the US embassy or an agreed third party access to the individuals in question, “whether or not previously announced . . . during any period in which they are in official custody”<sup>480</sup> in Rwanda.

Overall, the oblique government statements on assurances suggest that US officials determine on a case-by-case basis whether a given monitoring arrangement is sufficient for a particular detainee, based on his particular circumstances, conditions in the receiving country, and the reliability of the receiving government authorities. This approach is not necessarily at odds with international standards. But the danger is that without baseline requirements, US officials may be tempted to accept less robust monitoring guarantees than necessary, to appease sensitive foreign governments.

#### *Carrying Out Monitoring – Ad Hoc Approach of the US?*

The Human Rights Institute was unable to learn whether in practice US officials follow a specific monitoring protocol which, for instance, would specify how soon after return monitors would visit a detainee, how frequently visits would occur, how often medical examinations would occur and what form monitoring would take once a detainee is released. Former and current officials describe a range of possible activities monitors may undertake, rather than a minimum set of activities they must take to verify the safety of individuals.<sup>481</sup>

According to one account, US monitoring of assurances, at least in renditions, has relied on intelligence surveillance. In *Obama’s Wars*, Bob Woodward reports a conversation between Michael Hayden, CIA director under the Bush administration from 2006 onward, and an unnamed “senior officer still undercover” about a then-incoming CIA director Leon Panetta’s statement at his confirmation hearing that the US would no longer send people to foreign countries for interrogation using techniques that “violate our own standards.” The senior officer told Hayden that the US had “absolutely” sought assurances from foreign governments that renditions victims would not be abused. When asked Hayden asked whether the US “used all the available tools to an espionage agency” to monitor the assurances, the senior officer responded “all the time.” According to Woodward, “available tools” referred to “spies and communications intercepts from phones, computers and room microphones to ensure foreign intelligence services were torture the suspected terrorists.”<sup>482</sup>

Beyond this alleged intelligence surveillance, the State Department has taken the lead role in monitoring. Known cases suggest a troubling failure to anticipate problems like obstruction of access to the returned individual, abide by basic guidelines for effective monitoring, or determine the scope of monitoring before the transfer.

---

480. *Karake et al. v. United States Department of Homeland Security*, No. 09-cv-02082-RMU, Document 2-7 (filed Nov. 5, 2009), text of assurances ¶ 3 (on file with Human Rights Institute).

481. According to former State Department official Ashley Deeks: “[M]onitoring mechanisms . . . might include guarantees that the transferring state’s officials will have access to the detention facility, or they may designate an independent body, jointly chosen by the transferring and receiving states, to visit the individual and monitor his environment, trial (if he is being prosecuted), and medical condition. Sometimes the transferring state will give the detainee’s family contact numbers for its embassy in the receiving state.” Deeks, *supra* note 463, at 10. Similarly, then-State Department Legal Advisor John Bellinger testified: “the Department may obtain arrangements by which US officials or an agreed upon third party will have physical access to the individual . . . in the custody of the foreign State for purposes of verifying the treatment he or she is receiving. In addition, . . . we . . . pursue any credible report and take appropriate action if we have reason to believe that those assurances will not be, or have not been, honored.” See Testimony of John Bellinger, *supra* note 5.

482. See Woodward, *supra* note 164 and accompanying text.

**CASE STUDY: MONITORING THE RETURN OF GUANTÁNAMO DETAINEES TO TAJIKISTAN**

A cable report of a US embassy visit to repatriated Guantanamo detainee Rkniddin Saropov shows that US officials flouted basic rules of torture monitoring so that, to report abuse, Saropov would have had to put himself at risk of retaliatory abuse by his captors.<sup>483</sup>

The US transferred Saropov and another Guantánamo detainee, Muqit Vohidov, to Tajik authorities in March 2007 despite Tajikistan’s life-threateningly poor prison conditions, the frequency of torture by security officials and known problems in its trial system (see Part I, Ch. 2). Within months of their return, Vohidov and Saropov were convicted and sentenced to 17 years in a labor camp. At an August 2007 court hearing, they said they were tortured into confessing.<sup>484</sup>

**US officials’ monitoring method left Sharopov little chance of reporting abuse without risking retaliation.**

In December 2009, US embassy staff visited Saropov in a Ministry of Justice pre-trial detention facility in Dushanbe, Tajikistan, presumably to monitor his treatment. There was ample cause for US embassy officials to closely scrutinize Saropov for signs of abuse: beyond Tajikistan’s record of abuse and Saropov’s earlier statement that he was tortured, Tajik authorities had denied the US embassy access to Saropov for three months, from its initial request in August 2009 until December 9, 2009. During that time he was transferred from the general prison population to a pre-trial detention facility, where detainees are generally at greater risk of abuse during interrogation.<sup>485</sup> Despite

the warning signs, the US embassy dismissed the obstruction of access as merely “lengthy and confusing for all concerned” and accepted without question the Tajik authorities’ explanation that the transfer was due to Saropov’s attempted escape from prison.<sup>486</sup>

It is impossible to verify whether US officials missed signs of recent abuse or inhumane conditions—the Tajik government has denied the International Committee of the Red Cross access to Ministry of Justice facilities,<sup>487</sup> where Saropov was then detained. What is clear is that the US officials’ monitoring method left Sharopov little chance of reporting abuse without risking retaliation.

Instead of conducting a private interview, US embassy staff interviewed Saropov in the “presence” of “his captors”—prison officials whom Saropov may have feared retaliation from, if he reported abuse (although it is unclear whether they were within hearing distance). They also conducted the interview in an administrative office instead of Saropov’s own cell, where they could have observed signs of inhumane treatment or conditions. They failed to conduct a medical or psychological exam, which might have caught signs of abuse Saropov was forced to conceal in the presence of Tajik prison officials.

The US officials observed that Saropov was “animated” and “appeared to be in good health.” The cable report implies that they asked leading questions, prompting Saropov to “casually agree[ ] that his actual conditions of confinement were reasonable in the context of Tajikistan and no different from those of other prisoners” (emphasis added)—a “cross-examination” style of questioning that would diminish his opportunity to voice abuse.<sup>488</sup>

483. US Embassy in Dushanbe, “Access to Former Guantanamo Detainee Rahmiddin,” Ref. ID 09DUSHANBE8558 (Dec. 10, 2009) (on file with Human Rights Institute) (hereinafter Dushanbe Embassy cable).

484. Human Rights Institute interview (details withheld).

485. US State Department, Bureau of Democracy, Human Rights and Labor, 2007 Country Reports on Human Rights Practices Report—Tajikistan (March 11, 2008), <http://www.state.gov/drl/rls/hrrpt/2007/100621.htm>.

486. Dushanbe Embassy cable, *supra* note 483.

487. US State Department, Bureau of Democracy, Human Rights and Labor, 2009 Country Reports on Human Rights Practices Report—Tajikistan, <http://www.state.gov/drl/rls/hrrpt/2009/sca/136094.htm>.

488. Office of the High Commissioner for Human Rights, Professional Training Series No. 7: Training Manual on Human Rights Monitoring, chap. IX ¶ 34 (2001).

Still, the cable report reveals that Sharopov may have tried to communicate abuse, putting himself in danger of retaliation. He “referred to his detention at Guantánamo as ‘a sanatorium’”—implicitly comparing Guantánamo to his current detention facility. Evasive or indirect answers to questions, under the circumstances, would have been Sharopov’s only way of communicating that he faced abuse or inhumane conditions.

### CASE STUDY: MONITORING THE THREATS TO BARAPIND SINGH

In the Barapind case, described above, US officials apparently visited Barapind when he was in custody, as provided for in assurances from the Indian government. Barapind was not tortured. However, after Barapind was released from detention in India, US embassy officials were unclear about their continuing obligation to monitor Barapind’s safety, asking his lawyers if they knew. After Barapind reported being followed by plainclothes and uniformed police, Barapind’s lawyers raised concerns with the US embassy that the Indian police were targeting Barapind for an extrajudicial “encounter killing.”<sup>489</sup> As Barapind’s US attorney Sukhman Dhami told the Human Rights Institute in an email: “We contacted the US embassy to report our concerns, and they said they had no continuing obligation now that Barapind was released, and then eventually just started avoiding our calls.”<sup>490</sup>

### ADEQUACY OF US MONITORING TEAMS?

It is unknown whether US monitors, whether embassy staff or a third party, receive appropriate training on how to conduct effective monitoring.<sup>491</sup> The US has not described standardized requirements for an acceptable third-party monitoring body, or a prescribed monitoring protocol such a body would be required to follow. The US has also not described under what circumstances it finds it appropriate for third parties to act as monitors, instead of US embassy staff. Former Legal Adviser John Bellinger has explained that once assurances against ill-treatment are sought, “there are a number of mechanisms that [the United States] can use to follow up. One of them may be to have the State Department be able to visit a person when he is returned if he is incarcerated. It may be to have a third party, an NGO, a human rights organization.”<sup>492</sup> If there are no standard parameters for choosing a monitor, such as political and financial independence from the receiving government or experience monitoring, there is nothing to prevent receiving government authorities from selecting a monitor they expect to be less scrutinizing.

Credible anti-torture monitoring organizations have refused to monitor US assurances-based transfers. While former State Department attorney Vijay Padmanabhan told the Human Rights Institute that “in many instances” the ICRC acted as a monitor for Guantánamo transfers,<sup>493</sup> another former official told us that for the receiving governments “[US officials] are most worried about,” the ICRC would be reluctant to play a monitoring role and their efficacy would be limited because “they don’t have a sufficient relationship” with governments in such states.<sup>494</sup> The frequency with which the US government seeks to partner with domestic human rights organizations to monitor the implementation of diplomatic assurances is unknown.

### The Need for Monitoring Protocols and Requirements

Some US officials have acknowledged that the US’s monitoring mechanisms are not sufficient to prevent abuse of returned individuals. For instance, in 2005 then-CIA Director Porter Goss acknowledged that the US does “have a responsibility of trying to ensure that [returned individuals] are properly treated,”

489. In an “encounter killing,” police kill the individual but falsely claim they acted in self-defense or to prevent the individual from fleeing arrest. See Human Rights Watch, *Broken System: Dysfunction, Abuse and Impunity in the Indian Police* 86 (2009).

490. Email from Sukhman Dhami, US attorney for Kulbir Singh Barapind (Nov. 8, 2010) (on file with Human Rights Institute).

491. However, one former official told us that the US State Department’s Democracy, Rights and Labor desk sent “an email to the human rights officers at embassies to follow up” on transfers pursuant to assurances. Interview with Vijay Padmanabhan, *supra* note 43.

492. Testimony of John Bellinger, *supra* note 5.

493. Interview with Vijay Padmanabhan, *supra* note 45.

494. Human Rights Institute interview with former State Department official, New York, NY (Jan. 27, 2010).

but added “once they’re out of [US] control, there’s only so much we can do.”<sup>495</sup> In 2005, then-US Attorney General Alberto Gonzales has echoed that sentiment, saying the US “can’t fully control what that [receiving] country might do. We obviously expect a country to whom we have rendered a detainee to comply with their representations to us.”<sup>496</sup> Gonzales continued, “If you’re asking me ‘Does a country always comply?’, I don’t have an answer to that.”<sup>497</sup> The Washington Post has reported retired CIA officers admitting that assurances are “virtually impossible” to monitor.<sup>498</sup> US officials have also emphasized that once an individual is transferred, that person is entirely in the custody and control of the receiving government, and they cannot be responsible for what may happen to him.<sup>499</sup>

Curiously, the attitude of these US officials mirrors that of human rights advocates, including outgoing UN Special Rapporteur on Torture Manfred Nowak: monitoring does not enable sending governments to control or even have an accurate sense of what occurs once an individual is returned.<sup>500</sup> This inherent deficiency should caution the US against transferring an individual to authorities that routinely practice torture, no matter how robust the monitoring arrangement.

Yet some deficiencies in monitoring stem from specific, remediable flaws, i.e. the failure of sending countries to establish competent monitoring bodies, with clear protocols for responding to allegations of abuse and mandates to carry out systematic visits. Indeed, the UN Committee Against Torture has countenanced the possibility of a more effective monitoring mechanism, recommending that the US establish “clear procedures” for securing assurances and “effective post-return monitoring arrangements” in its 2006 report on the US.<sup>501</sup>

The case studies below describe abuse following assurances-based transfers by foreign governments. Before transferring individuals, the sending governments failed to establish a monitoring protocol to address issues such as timing of initial visits, investigative techniques and interventions with detaining authorities. Instead, monitors reacted in an ad hoc manner or failed to act, resulting in abuse to returned individuals.

495. Director Goss’s statement read in part: “I would require safeguards, if that captive were going back, either as a non-interrogee or as an interrogee. If that individual is being returned to a nation, a judgment should be made that nothing beyond, I would say, due process punishment, if that is deserved, would happen to that individual, even though they may not have the same standards in that nation. As you know, many nations will claim their citizens back. And we have a responsibility of trying to ensure that they are properly treated. And we try and do the best we can to guarantee that. But, of course, once they’re out of our control, there’s only so much we can do. But we do have an accountability program for those situations.” Hearing Before the United States Senate Select Committee on Intelligence: Current and Projected National Security Threats to the United States, 109 Cong. 1, 81 (Feb. 16, 2005), available at <http://intelligence.senate.gov/threats.pdf> (Statement of Porter Goss, CIA Dir.).

496. Dana Priest, *CIA’s Assurances On Transferred Suspects Doubted*, Wash. Post, Mar. 17, 2005, at A1 (quoting Former US Attorney General Alberto Gonzales).

497. *Id.*

498. *Id.* Priest quotes a retired CIA officer as stating that “[t]hese are sovereign countries . . . They are not going to let you into their prisons.” Priest also quotes former Assistant Secretary of State for Near Eastern Affairs and president of the Middle East Institute Edward S. Walker Jr. as stating, “[o]nce they are in the jurisdiction of another country, we have no rights to follow up.”

499. See Declaration of Joseph Benkert, *supra* note 24, ¶ 5 (“In all such cases of transfer for continued detention, investigation, and/or prosecution, as appropriate, as well as situations in which the detainee is transferred for release, the detainee is transferring entirely to the custody and control of the other government, and once transferred, is no longer in the custody and control of the United States; the individual is detained, if at all, by the foreign government pursuant to its own laws and not on behalf of the United States.”).

500. “Diplomatic assurances cannot be and are often not securely monitored; even the best monitoring mechanisms (e.g. ICRC, CPT) are no guarantee against torture.” Manfred Nowak, *Report of Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Addendum: Study on the phenomena of torture, cruel, inhuman or degrading treatment or punishment in the world, including an assessment of conditions of detention*, ¶ 243, UN Doc. A/HRC/13/39/Add.5 (Feb. 5, 2010).

501. UN Committee Against Torture, *Conclusions and Recommendations – United States of America*, UN Doc. CAT/C/USA/CO/2 (July 25, 2006).

**Case Study: Canada's Custodial Transfers to the Afghan NDS**

Canada's military transfers of individuals to Afghan authorities led to widespread abuse despite detainee transfer MoUs that granted detention monitoring access the ICRC and, later, to the Canadian embassy and a domestic human rights body (see Part I, Ch. 4).

The ineffectiveness of the monitoring provisions in these MoUs demonstrates the importance of defining monitoring protocols and authority before transfers occur. The domestic human rights body assigned to monitor detention conditions, the Afghan Independent Human Rights Commission, found its access to facilities blocked by detaining authorities. The Canadian embassy did not have the resources to conduct effective monitoring. Instead of a full-time officer familiar with the risk factors of abuse generally and specifically in regard to Afghan detaining authorities, monitoring was conducted by "a succession of officers, some of whom were in the field on short visits of only a couple of weeks."<sup>502</sup>

Aspects of the Canadian embassy's monitoring protocol were at odds with international standards on effective monitoring. For example, it was standard operating procedure for Canadian monitors not to ask detainees when and where their alleged torture had occurred and instead to seek this information by questioning prison authorities, who could be expected to deny and attempt to conceal abuse.<sup>503</sup>

Additionally, Canadian embassy officials did not have authority to intervene to protect detainees or challenge Afghan authorities when it became clear that detainees were being abused. Instead, the Canadian government directed its embassy to not report allegations of abuse, suggesting that even if the Canadian embassy was politically independent as a hypothetical matter, in practice its ability to conduct monitoring was politically compromised.<sup>504</sup>

**Richard Colvin's Testimony on Canadian Monitoring**

If post-return monitoring of detainees is to be effective, it cannot take place on an ad hoc basis, but requires a dedicated monitor making regular visits. In his testimony, Richard Colvin former secretary of Canada's Kabul embassy, reveals that not only was there no effective monitoring in place despite the Canadian-Afghanistan MOU, but the Canadian government also disregarded the high risk of torture faced by detainees transferred to the NDS.

*"Instead, for the first five months of our new detainee regime, monitoring was done by a succession of officers, some of whom were in the field on short visits of only a couple of weeks. There was too little capacity and not enough continuity. The result was that despite the new MOU, some of our detainees continued to be tortured after they were transferred.*

*It was only in October 2007 that DFAIT's senior leadership finally sent a dedicated monitor to Kandahar. Within weeks, he found incontrovertible evidence of continued torture. An Afghan in NDS custody told him that he had been tortured, showing him the marks on his body, and was able to point to the instrument of torture, which had been left under a chair in a corner of the room by his interrogator.*

*Up to that point, we had done what we could to monitor in Kandahar, and also once in Kabul, the existing pool of detainees, at least those we could locate. Canadian officials interviewed numerous Afghans who gave very credible allegations of torture and who still had, in several cases, marks on their bodies. But they'd all been tortured before May 3, when the new MOU came into force. The late October 2007 case was, I believe, the first instance after May 3 that we became aware of. However, because our monitoring regime was ineffectual, there may well have been other cases.*

*October 2007 was 17 months after the PRT first informed senior officials in the Canadian Forces and DFAIT about the very grave dangers facing our detainees after transfer. In other words, for a year and a half after they knew about the very high risk of torture, they continued to order military police in the field to hand our detainees to the NDS. As far as I know, Canada, even today, continues to transfer detainees to the NDS in Kandahar."*

502. Testimony of Richard Colvin, *supra* note 400400, at 4.

503. See Craig Scott, Moral and Legal Responsibility with Respect to Alleged Mistreatment of Transferred Detainees in Afghanistan, Presentation to the House of Commons Special Committee on the Canadian Mission in Afghanistan (Feb. 11, 2010).

504. See *id.* at 11; see generally Testimony of Richard Colvin, *supra* note 400400.

### Case Study: Sweden's Transfer of Ahmed Agiza & Mohammed Alzery

Inadequacy of monitoring was a central issue in Sweden's notorious transfer of asylum-seekers Ahmed Agiza and Mohammed Alzery to Cairo in December 2001 based on assurances from Egyptian authorities.<sup>505</sup> The Swedish government's apparently weak monitoring mandate illustrates the importance of establishing authority for prompt and regular visits, and a protocol for responding to abuse.

Prior to the transfer, Egyptian authorities had agreed to permit the Swedish embassy to visit Agiza and Alzery in prison, but this guarantee did not specify the timing of the first visit, the regularity of subsequent visits or the kinds of examinations of the detainees permitted. The UN Human Rights Committee found that the Swedish embassy did not begin visits until five weeks after the transfer, "neglecting altogether a period of maximum exposure to risk of harm."<sup>506</sup>

The Human Rights Committee also found that the Swedish embassy's visits did not reflect international standards on monitoring. The embassy did not insist on interviewing the detainees in private, to protect them from reprisal. The embassy monitoring team did not include medical or forensic professionals trained to detect and document abuse, "even after substantial allegations of ill-treatment emerged."<sup>507</sup>

In these circumstances, monitoring was unlikely to detect abuse and actually endangered Agiza and Alzery, as they attempted to communicate abuse despite the presence of prison staff and the possibility of retaliation. The Swedish ambassador report of his March 2002 monitoring interview with Alzery and Agiza is illustrative:

*At the next meeting none of the men spoke out about the torture. They did however give signals and indications that something was not right: I therefore wanted to ask: Had they been tortured or maltreated since my last visit? [Agiza] replied evasively that it would be good if I could come as often as possible. I then asked him to take off his shirt and undershirt and turn around. No signs of maltreatment were visible. [Agiza] then explained that there were no marks on his body. One of the Egyptian officials observed afterwards that [Agiza] was clearly trying to hint by means of his evasive formulations that he had in fact been maltreated, without coming out and saying so directly . . . . [Agiza and Alzery] both avoided answering my question concerning their daily routine. In conclusion I asked whether there was anything else they wished to say to me. The answer was a hope that I would come back soon, along with the comment that "it's hard being in prison." In summary, nothing emerged to change my judgment from my first visit that [Agiza and Alzery] are doing reasonably well under the circumstances. There was nothing to suggest torture or ill treatment.<sup>508</sup>*

In fact, Agiza and Alzery reported in their Committee Against Torture and Human Rights Committee complaint that in the months leading up to the March 2002 visit, they were subjected to electric shocks; Alzery said doctors had put ointment on his skin afterwards so that he did not scar.<sup>509</sup>

505. See *Agiza v. Sweden*, UN Comm. Against Torture, UN Doc. CAT/C/34/D/233/2003 (May 24, 2005).

506. *Alzery v. Sweden*, UN Human Rts. Comm. at ¶11.5, UN Doc. CCPR/C/88/D/1416/2005 (Nov. 10, 2006).

507. *Id.*; see also *Agiza v. Sweden*, UN Comm. Against Torture at ¶¶ 4.14-4.15, UN Doc. CAT/C/34/D/233/2003 (May 24, 2005) ("[The] situation has been monitored by the Swedish embassy in Cairo, mainly by visits approximately once every month. As of [June 2003], there had been seventeen visits. On most occasions, visitors have included the Swedish Ambassador, and several on other visits a senior official from the Ministry of Foreign Affairs . . . . According to the embassy, these visits have over time developed into routine, taking place in the prison superintendent's office and lasting an average 45 minutes.")

508. *Alzery*, *supra* note 506, at ¶13.15.

509. *Id.*; *Agiza*, *supra* note 507, at ¶2.8.



The monitoring arrangement contained no provision whereby the Swedish authorities could intervene if they suspected abuse. In fact, Agiza and Alzery reportedly alleged that they were beaten by prison guards as early as the Swedish officials' first official visit, but they failed to act.<sup>510</sup> The Human Rights Committee concluded that the "procurement of diplomatic assurances, which, moreover, provided no mechanism for their enforcement, did not suffice to protect against this manifest risk" of torture and ill-treatment.<sup>511</sup>

### **Aide-Memoire from the Government of Sweden to the Government of Egypt**

For reasons of national security the Kingdom of Sweden has the intention not to grant these persons residence permit in Sweden. The basis for that is the men's known connections and involvement in terrorist activities in view of what is known of their previous activities.

Sweden therefore wishes to repatriate the above-mentioned persons to the Arab Republic of Egypt.

It is the understanding of the Government of the Kingdom of Sweden that will be awarded a fair trial in the Arab Republic of Egypt. It is further the understanding of the Government of the Kingdom of Sweden that these persons will not be subjected to inhuman treatment or punishment of any kind by any authority of the Arab Republic of Egypt and further that they will not be sentenced to death or if such a sentence has been imposed that it will not be executed by any competent authority of the Arab Republic of Egypt. Finally it is the understanding of the Government of the Kingdom of Sweden that the wife and children of Ahmed Hussein Mustafa Kamil Agiza will not in anyway be persecuted or harassed by any authority of the Arab Republic of Egypt.

Cairo 12 December 2001

### **Lessons from Human Rights Monitoring Bodies and International Standards**

In these and other cases, assurances-based monitoring mechanisms have been plainly at odds with international standards on monitoring places of detention. Although assurances-based monitoring cannot provide the same benefits as preventive monitoring mechanisms, the US should consider these standards in formulating clear requirements for post-return monitoring.

### ***Development of Torture Prevention and Protection Bodies***

Current protocols for monitoring draw from the long-standing work of the ICRC.<sup>512</sup> The ICRC's monitoring mandate, set out in the Geneva Conventions, is to visit prisoners of war and others to ensure they are treated humanely. As international and regional human rights systems developed their own

---

510. Human Rights Watch, *Black Hole: The Fate of Islamists Rendered to Egypt* 31 (May 2005), available at [www.hrw.org/en/node/11757/section/8](http://www.hrw.org/en/node/11757/section/8) (Human Rights Watch reported that a confidential Swedish government memorandum discussing Mr. Agiza's first visit by Swedish embassy officials includes allegations "that [Mr. Agiza and Mr. Alzery] were repeatedly beaten by prison guards, denied necessary medication, blindfolded during interrogations, and were threatened with reprisals against family members if they did not cooperate with the interrogations and provide the information.").

511. *Alzery v. Sweden*, UN Human Rts. Comm. at ¶11.5, UN Doc. CCPR/C/88/D/1416/2005 (Nov. 10, 2006); see also *Agiza v. Sweden*, UN Comm. Against Torture at ¶13.4, UN Doc. CAT/C/34/D/233/2003 (May 24, 2005) (Committee Against Torture holding that "the State party's expulsion of the complainant was in breach of Article 3 of the Convention. The procurement of diplomatic assurances, which, moreover, provided no mechanism for their enforcement, did not suffice to protect against this manifest risk").

512. See Amnesty International, *Optional Protocol to the Convention Against Torture: Time to take a stand on the prevention of Torture*, IOR 51/006/2001 15-16 (Sept. 2001).

monitoring mechanisms in the last several decades, they modeled the ICRC's practice, seeking authority to visit any place of detention and conduct private interviews with detainees.<sup>513</sup>

Standards were also developed through campaigns to systematically prevent torture through monitoring of detention conditions.<sup>514</sup> The most significant recent developments in anti-torture monitoring are the Optional Protocol to the Convention Against Torture (OPCAT) and European Convention for the Prevention of Torture, both of which establish monitoring bodies with expansive authority to carry out visits: the Sub-Committee to the Committee Against Torture ("OPCAT Subcommittee") and the European Committee for the Prevention of Torture ("European CPT").<sup>515</sup> The OPCAT also requires state parties to designate domestic bodies with authority to carry out regular visits and describes the kind of membership, training and resources necessary for an effective monitor.<sup>516</sup>

The creation of these monitoring bodies—and positions such as the UN Special Rapporteur on Torture, the Organization of American States' Special Rapporteur on the Rights of Persons Deprived of Freedom, and most recently the African Commission on Human and Peoples' Rights' Committee for the Prevention of Torture in Africa<sup>517</sup>—reflects a growing consensus that monitoring and systems of visitation play a critical role in the prevention of torture.<sup>518</sup>

### **Prevention vs. Protection: The Relevance of Preventive Monitoring Standards to Assurances**

The aim of many anti-torture monitoring mechanisms is principally preventive, not protective: monitors seek to identify conditions that lead to torture and mistreatment and recommend measures to prevent

513. Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), art. 126, Aug. 12, 1949, 75 UNTS 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), art. 143, Aug. 12, 1949, 75 UNTS 287.

514. Since at least the 1970s, monitoring of detention conditions has formed an important part of torture prevention campaigns. See Malcom Evans & Rod Morgan, *Preventing Torture: A Study Of The European Convention For The Prevention Of Torture And Inhuman Or Degrading Treatment Or Punishment* 106-117 (1998).

515. The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, which came into force in 1989, establishes the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, mandated to "by means of visits, examine the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of such persons from torture and from inhuman or degrading treatment or punishment." Every state party must permit visits to "any place within its jurisdiction where persons are deprived of their liberty by a public authority." European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, art.2, ETS No. 126 (1987), available at <http://www.cpt.coe.int/EN/documents/ecpt.htm>.

516. See OPCAT, *supra* note 298, at art. 18. For a discussion of the specific guarantees and criteria the OPCAT describes for "national preventive mechanisms," see Association for the Prevention of Torture, *Monitoring Places of Detention: A Practical Guide* 46-54 (Apr. 2004).

517. For a comprehensive list of international and regional bodies focused on detention or torture, see *id.* at 41-43 (April 2004). In the Americas, the Special Rapporteur on the Rights of Persons Deprived of Freedom has been appointed since 2004. See Resolution of the General Assembly of the OAS on the Study of the Rights and the Care of Persons Under any Form of Detention or Imprisonment OAS Doc. AG/RES. 2037 (June 8, 2004). The African Commission on Human and Peoples' Rights ("African Commission") created a Special Rapporteur on Prison and Conditions of Detention in 1996, with a mandate to "examine the situation of persons deprived of their liberty within the territories of States Parties to the African Charter on Human and Peoples' Rights." In 2002, the African Commission adopted *Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa* and established a follow-up committee in 2004. In 2009, the African Commission created the Committee for the Prevention of Torture in Africa, charged with giving effect to the guidelines and the prohibition on torture. See Resolution on the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines), 32nd Sess., (Oct. 23, 2002); Resolution on the Change of Name of the "Robben Island Guidelines Follow-up Committee" to the "Committee for the Prevention of Torture in Africa", Res. ACHPR/Res158(XLVI)09 (Nov. 25, 2009).

518. See Antonio Cassese, *Current Development: A New Approach to Human Rights: the European Convention for the Prevention of Torture*, 83 Am. J. Int'l L. 128, 129-30 (1989).

future abuse.<sup>519</sup> In contrast, assurances-based monitoring is oriented toward short-term protection in particular cases. But even intrusive and regular monitoring by the ICRC has failed to deter and protect against torture, as illustrated recently by abuse in detention facilities in Iraq and Guantánamo despite the ICRC's presence.<sup>520</sup> Where abuse is practiced routinely and with impunity, the perpetrators are skilled at concealing abuse and are not deterred by the possibility of detection.<sup>521</sup> In such cases, even robust monitoring is unlikely to protect against torture in a particular case.<sup>522</sup>

Moreover, the preventive approach to torture envisions multiple layers of long-term monitoring—judicial inspections, internal investigations and ongoing external monitoring—rather than the kind of short-term and case-specific monitoring that would follow an assurances-based transfer.<sup>523</sup> Assurances-based monitoring cannot substitute for or provide the same benefits as preventive monitoring mechanisms. Perversely, it is precisely the absence of such institutionalized monitoring mechanisms that leads sending countries to seek anti-torture assurances.

Nevertheless, the work of preventive monitoring bodies is instructive. First, it reflects that internationally, governments are increasingly receptive to intrusive monitoring, which would once have been rejected as an infringement upon state sovereignty.<sup>524</sup> For instance, while none of the countries in the Middle East and North Africa region, where assurances-based transfers often occur, have signed OPCAT, some have established national human rights institutions with torture monitoring roles. Jordan even invited the UN Special Rapporteur on Torture to conduct a country visit in 2006.<sup>525</sup>

Correspondingly, negotiators seeking robust assurances can cite the precedent of these existing monitoring bodies, answering receiving governments' concerns about intrusiveness by pointing to their own

Negotiators can suggest that rather than reflecting distrust, robust monitoring assurances simply mirror international standards for monitoring places of detention.

519. See Manfred Nowak & Walter Suntinger, *International Mechanisms for the Prevention of Torture, in Monitoring Human Rights in Europe* 145 (Arie Bloed et al. eds., 1993) at 146, 165 (“[S]hort-term prevention is essentially different from the preventive functions of the body established by a treaty providing for a system of visits. Prevention for the latter means the working of the environment and, in the final consequence, the eradication of the causes leading to torture”); see also OPCAT, *supra* note 298, at art. 11 (mandate of Subcommittee on Prevention); Penal Reform International, *The Role of Independent Monitoring in the Prevention of Torture and Inhuman or Degrading Treatment* (Mar. 2010) (distinguishing between “protective visits” and “preventive visits” although “existing practice at international, regional and national levels, can be seen to blur the distinction”).

520. Othman v. United Kingdom, Application No. 8139/09, Intervention Submitted by Amnesty International, Human Rights Watch, and Justice, ¶ 27 (May 2006) (referencing the ICRC's experience in Iraq and Guantanamo Bay where torture and ill-treatment were inflicted extensively even though the ICRC was conducting regular visits).

521. “[O]fficials that engage in torture or other ill-treatment are often skilled at preventing any visible manifestations, and are typically capable of ensuring, through threats of reprisal, that no complaints would be heard by visiting monitors.” *Id.*

522. For instance, UN High Commission Louise Arbour has stated: “Some have postulated that diplomatic assurances could work if effective post-return monitoring mechanisms were put in place. Based on the long experience of international monitoring bodies and experts, it is unlikely that a post-return monitoring mechanism set up explicitly to prevent torture and ill-treatment in a specific case would have the desired effect. These practices often occur in secret, with the perpetrators skilled at keeping such abuses from detection. The victims, fearing reprisal, often are reluctant to speak about their suffering, or are not believed if they do.” Louise Arbour, Chatham House, *In Our Name and On Our Behalf* (Feb. 15, 2006), available at [http://www.chathamhouse.org.uk/files/3375\\_ilparbour.pdf](http://www.chathamhouse.org.uk/files/3375_ilparbour.pdf).

523. See Background Paper, Independent Monitoring of Human Rights in Places of Detention, Regional seminar for the Middle East and North Africa, Jordan, 3-6 September 2007 in 19 *Torture J.* (2009).

524. See Manfred Nowak & Walter Suntinger, *International Mechanisms for the Prevention of Torture, in Monitoring Human Rights in Europe* 145, 147 (Arie Bloed et al. eds., 1993).

525. See Background Paper, Independent Monitoring of Human Rights in Places of Detention, *supra* note 523.

willingness to subject themselves to monitoring by the ICRC, the OPCAT Subcommittee and the European CPT. Furthermore, negotiators can suggest that rather than reflecting distrust, robust monitoring assurances simply mirror international standards for monitoring places of detention.

Second, the work of monitoring bodies is important because—along with international and regional human rights guidelines on investigating allegations of torture<sup>526</sup>—it illustrates the basic requirements any monitoring mechanism should meet to effectively detect abuse and investigate allegations.

### **Minimum Requirements for Effective Anti-Torture Monitoring**

Based on the practices and standards of existing anti-torture monitoring bodies, the US should establish minimum requirements for assurances-based monitoring mechanisms. The guiding principle for these requirements is that a monitoring body should be able to: (1) in its preventive function, deter abuse by the fact of its existence and prevent abuse by actively anticipating potential problems; and (2) in its protective function, promptly respond to problems and where necessary, intervene on behalf of detainees.<sup>527</sup>

To effect these purposes, the assigned monitor should have a broad mandate set out in the assurances, terms of reference or official authorization from relevant authorities in the receiving country. The monitor should also act according to a pre-determined protocol describing steps to effectively carry out the mandate. In sum, the mandate (set out in the assurances) and protocol (shared internally) should include:

- Authority to make regular and unannounced visits to the detainee, including a prompt initial visit and follow-up visits;
- Authority to conduct visits in a manner that, to the extent possible, protects the detainee against reprisal (e.g. through private interviews), anticipates future abuse through observation of conditions, and enables investigation and documentation of possible abuse, including through access to all areas of the detention facility where interrogation or confinement may occur, access to facility personnel, and access to all documentation concerning persons deprived of their liberty (e.g., the detention log, complaint or incidence register and medical records);
- Independence and competence of monitoring team, including appropriate training and inclusion of medical personnel; and
- Authority to make recommendations and engage in dialogue with detaining authorities about conditions.

To effect the mandate, the receiving government authorities should make explicit guarantees regarding monitoring:

- Ensure that the monitoring team is, in practice, granted access to exercise the powers under the mandate;
- Notify all detention facility staff of the mandate of the monitoring team;
- Ensure no reprisal is taken against detainees or facility staff in relation to a monitoring visit.

The following subsections describe the importance and feasibility of each of these parameters.

### **AUTHORITY FOR REGULAR AND UNANNOUNCED VISITS**

Former UN Special Rapporteur on Torture Nigel Rodley has called regular inspection of places of

526. Investigatory guidelines, such as the UN Istanbul Protocol, focus on the documentation of torture and other abuse, a precursor to effective investigation, reporting and prosecution. But they also describe the conditions necessary for monitors to detect abuse and evaluate allegations. See Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 55/89, UN Doc. HR/P/PT/8/Rev.1 (Aug. 9, 1999) (“The documentation methods contained in this manual are also applicable to other contexts, including human rights investigations and monitoring.”).

527. The Association for the Prevention of Torture describes the functions that monitoring visits fulfill as including prevention, direct protection through in situ visits and documentation of conditions to form a basis of judgment and justify recommendations. See Association for the Prevention of Torture, *supra* note 516, at 28.

detention “one of the most effective preventive measures against torture.”<sup>528</sup> Indeed, the principal purpose of both the OPCAT Subcommittee and European CPT is to carry out a system of visits to prevent torture. These and other monitoring bodies have a “strong deterrent effect” against abuse by virtue of their authority to inspect places of detention, at times without prior announcement.<sup>529</sup>

Assurances-based monitoring cannot replace or claim the same benefits as regular and permanent systems of visitation. But like such systems, assurances-based monitoring visits, if conducted regularly and in response to problems as they arise, can impact detaining authorities’ behavior.

To be effective, an assurances-based monitor should, like many international, regional and national monitoring bodies, have authority to make both regular and unannounced visits. Unannounced visits are an important way for monitors to detect torture or ill-treatment. As UN Special Rapporteur on Torture Manfred Nowak has noted, unannounced visits enable monitors to “formulate a distortion-free picture of the conditions in a facility.” Were a monitor to announce every visit in advance, “there might be a risk that existing circumstances could be concealed or changed.”<sup>530</sup> According to the UN Office of the High Commissioner of Human Rights, visits focused on the protection of particular individuals, unlike visits aimed at prevention of torture generally, “do not usually involve prior notice to any authority.”<sup>531</sup> On the other hand, regular visits enable monitors to develop their understanding of conditions and, as described below, engage in an ongoing dialogue with detaining authorities, putting them in the position to press for improvements or raise concerns.

Negotiators may balk at the task of procuring authority for regular and unannounced visits by an assurances-based monitor. But a monitor with less authority might be ineffective at detecting abuse. It may even inadvertently provide cover for abusive conditions. The UN guidelines on effective investigation of torture, the Istanbul Protocol, note this danger in the general context of monitoring for abuse:

*[Visits] can in some cases be notoriously difficult to carry out in an objective and professional way, particularly in countries where torture is still being practiced. . . . In some cases, one visit without a repeat visit may be worse than no visit at all. Well-meaning investigators may fall into the trap of visiting a prison or police station, without knowing exactly what they are doing. They may obtain an incomplete or false picture of reality . . . They may give an alibi to the perpetrators of torture, who may use the fact that outsiders visited their prison and saw nothing.*<sup>532</sup>

528. Nigel Rodley, Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, Sir Nigel Rodley, UN Doc. A/56/156, ¶ 39 (July 3, 2001). This observation was restated by the next Special Rapporteur Theo van Boven. See Theo van Boven, Report of the Special Rapporteur on the Question of Torture submitted in accordance with Commission resolution 2002/38, UN Doc. E/CN.4/2003/68, ¶ 26 (Dec. 17 2002).

529. Manfred Nowak, UN Special Rapporteur on Torture, Report of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment to the General Assembly, UN Doc. A/61/259, ¶ 72 (Aug. 14, 2006).

530. While the Special Rapporteur on Torture visits countries by invitation only, he will accept an invitation only upon “an express agreement by the Government” to cooperate, including by granting him “freedom of inquiry” to visit any place of detention with or without prior notice. See Manfred Nowak, Report of the Special Rapporteur on the question of torture to the Commission on Human Rights 62nd Session, UN Doc. E/CN.4/2006/6, ¶ 22-23 (Dec. 23, 2005).

531. Office of the High Commissioner for Human Rights, Training Manual on Human Rights Monitoring, *supra* note 488, chap. IX ¶ 96.

532. Istanbul Protocol, *supra* note 526, ¶ 128.

Well-meaning investigators  
may fall into the trap of  
visiting a prison or police  
station, without knowing  
exactly what they are doing.  
They may obtain an incomplete  
or false picture of reality . . . .  
They may give an alibi to the  
perpetrators of torture.

— *Istanbul Protocol*

## Prompt visits can further mitigate the risk of torture and abuse by breaking the incommunicado nature of early detention.

By the same token, monitors should have freedom of movement within a detention facility, to gain an accurate and comprehensive sense of detention conditions. OPCAT, the European Convention on the Prevention of Torture and the UN Special Rapporteur on Torture all require that detaining authorities provide monitors freedom of movement within facilities.<sup>533</sup>

Monitors should also have the authority to visit a returned individual promptly after transfer. The risk of abuse during the period of incommunicado detention following transfer is high.<sup>534</sup> Reflecting this heightened risk, international standards require that individuals have the opportunity to notify family members and meet with

consular authorities promptly after they are detained.<sup>535</sup> Prompt visits can further mitigate the risk of torture and abuse by breaking the incommunicado nature of early detention. As evinced by UN and Council of Europe standards on detention, immediate visits and prompt medical examinations are important to establish whether an individual is later tortured or subjected to adverse detention conditions.<sup>536</sup>

Furthermore, monitors should have the authority to make follow-up visits soon after the initial visit. According to an ICRC expert, “systematic follow-up is imperative to ensure the prisoners’ safety after the visit,” particularly if the authorities learn that the detainee complained of mistreatment during the initial visit.<sup>537</sup> Prompt follow-up visits may detect the concealment of conditions during the first visit, and can help chart progress or deterioration of conditions.<sup>538</sup>

### MANNER OF VISITS

International standards on the manner in which monitoring visits are conducted reflect the importance of protecting detainees from reprisal, fully investigating potential abuse and preventing a deterioration of detention conditions.

#### Private Interviews

Monitors should conduct detainee interviews privately and confidentially to reduce the risk of reprisal against a detainee who reports abuse. UN fact-finding bodies routinely include the requirement for a private interview in their terms of reference, and the OPCAT and European Convention for the Prevention of Torture both explicitly require that state parties facilitate visits by providing the “opportunity to have private interviews.”<sup>539</sup>

533. See OPCAT, *supra* note 298, at art. 14(1) (“Unrestricted access” for the Subcommittee on Prevention) and art. 20(c) (“Access to all places of detention and their installations and facilities” for national preventive mechanisms); European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *supra* note 515, art. 8(2); Report of the Special Rapporteur on the question of torture, Commission on Human Rights 62nd Session, UN Doc. E/CN.4/2006/6 (23 December 2005).

534. Evans and Morgan, *supra* note 514, at 260.

535. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, GA Res. 47/173, Principle 16, UN Doc. A/RES/43/173 (Dec. 9, 1988); Principles on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions, ECOSOC Res. 1989, UN Doc. E/1989/89 ¶ 6 (May 12, 1989); Declaration of the Protection of All Persons from Enforced Disappearance, GA Res. 47/133, UN Doc. A/47/49, art. 10(2) (Dec. 18, 1992).

536. See Standard Minimum Rules for the Treatment of Prisoners, ECOSOC Res. 633C (XXIV), UN Doc. A/CONF/611, rule 24 (1955); European Prison Rules, Council of Europe Committee of Ministers Res. (87)3 (Feb. 12, 1987) [hereinafter UN Standard Minimum Rules].

537. Marina Staiff, ICRC Medical Coordinator for Detention-related Activities, *Visits to detained torture victims by the ICRC (I): Management, documentation, and follow-up*, 10 *Torture J. I* (2000).

538. See Background Paper, Independent Monitoring of Human Rights in Places of Detention, *supra* note 523.539.

539. Manfred Nowak & Elizabeth McArthur, *The United Nations Convention Against Torture: A Commentary*, 1047 (Oxford University Press 2008). The UN guidelines on investigation of torture, the Istanbul Protocol, also emphasize that detainees be interviewed and examined in private, without police or other law enforcement officials, as a “procedural safeguard.” See Istanbul Protocol, *supra* note 526, ¶ 124.

Where only one detainee is interviewed—as may often be the case in deportation cases, but not in larger scale military transfers—private interviews may not actually reduce the risk of reprisal against a detainee, since detaining authorities would know which detainee made allegations of ill-treatment.<sup>540</sup> Assurances should include an explicit guarantee that no reprisal is taken against detainees or facility staff in relation to a monitoring visit.

Private interviews are also necessary for effective monitoring. For detainees who have been subjected to violence and repeated interrogation by detaining authorities, “the absolute certainty that no information—no allegation, no complaint—provided by them in the course of an interview will be reported to the authorities without their express permission” is necessary to establish a relationship of trust, which in turn is critical to making interviews a way of detecting abuse.<sup>541</sup>

### Prevention-Oriented Visits

Monitors should assess not just whether a detainee has been abused but also whether “there are specific conditions or circumstances that are likely to degenerate into torture or inhuman or degrading treatment or punishment.”<sup>542</sup> International standards on detention conditions reflect the multitude of circumstances that may lead to abuse or themselves amount to abuse. Monitors should consider:

- The detainee’s access to medical care, including a medical exam to document signs of torture;<sup>543</sup>
- The training of personnel in direct contact with the detainee and the use of physical restraints;<sup>544</sup>
- Disciplinary methods used against detainees, including solitary confinement;<sup>545</sup>
- The detainee’s ability to communicate a complaint of mistreatment, including by communication with outsiders such as embassy staff or lawyers;<sup>546</sup> and
- Physical conditions in cells and interrogation rooms, including sanitation, food, light and temperature.<sup>547</sup>

540. See Letter from Human Rights Watch to British Foreign Secretary Miliband on Diplomatic Assurances with Ethiopia (Sept. 17, 2009).

541. Staiff, *supra* note 537.

542. European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *1st General Report*, No. CPT/Inf (91) 3, ¶¶ 45-46 (Feb. 20, 1991).

543. Medical exams should be conducted promptly after transfer and whenever necessary. Detainees are entitled to adequate medical, psychological and dental care. See UN Standard Minimum Rules, *supra* note 536, Rule 22, 24 and 25; Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UN GA Res. 43/173, Principle 24, UN Doc. A/43/49 (Dec. 9, 1988) [hereinafter “UN Detention Principles”]; European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 3rd General Report, No. CPT/Inf (93) 12, ¶¶ 33 (June 4, 1993). “Prisoners should be able to approach the health care service on a confidential basis, for example, by means of a message in a sealed envelope.” See CPT, 3rd General Report, *supra* note 542, ¶¶ 34; see also Association for the Prevention of Torture, *supra* note 516, at 192-193 (arguing that denial of access to medical care can amount to ill-treatment).

544. For standards on the use of physical restraints on detainees, see UN Standard Minimum Rules, *supra* note 536, Rule 33-34; European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *2nd General Report*, No. CPT/Inf (92) 3, (Apr. 13, 1992). For a discussion of standards relating to training of prison staff, see Association for the Prevention of Torture, *supra* note 516, at 207-213.

545. Solitary confinement can constitute inhuman or degrading treatment, or torture, if applied for an extended period of time or repeated. See UN Detention Principles, *supra* note 543, Principle 7; Human Rights Committee, General Comment 20: Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment; (Mar. 10, 1992). Individuals held in solitary confinement should be granted requests for medical attention without delay. See European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *2nd General Report*, *supra* note 544, ¶¶ 56; Association for the Prevention of Torture, *supra* note 516, at 108-109.

546. Detainees should have access to a mechanism to make complaints regarding treatment to prison or other official authorities. See UN Detention Principles, *supra* note 543, Principle 33; UN Standard Minimum Rules, *supra* note 536, Rule 36; Association for the Prevention of Torture, *supra* note 516, at 51. Detainees should also have access to counsel. See UN Detention Principles Principle 18, UN Standard Minimum Rules, *supra* note 536, Rule 39. Foreign detainees should have access to diplomatic or consular representation. See UN Standard Minimum Rules for the Treatment of Prisoners, *supra* note 536, Rule 38; Vienna Convention on Consular Relations, 596 U.N.T.S. 8638-8640 art. 36 (Apr. 24, 1963).

547. Monitors should examine whether detainees have access to natural light, fresh air and adequate temperatures, and whether security measures depriving detainees of these conditions are justified or threatening to detainees’ health. See UN Standard Minimum Rules for the Treatment of Prisoners, *supra* note 536, Rule 10, 11, 19, 26; European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *11th General Report*, No. CPT/Inf (2001) 16 (Sept. 3, 2001); Association for the Prevention of Torture, *supra* note 516, at 144-145. Detainees should be provided adequate, wholesome food and drinking water. See UN Standard Minimum Rules for the Treatment of Prisoners *supra* note 536, Rule 20.

Monitors should fully investigate and, to the extent feasible, document abuse, with a methodology informed by international detention and torture standards.

#### Investigation and Documentation

Monitors should fully investigate and, to the extent feasible, document abuse, with a methodology informed by international detention and torture standards.

Investigation and documentation are critical both to determining the veracity of allegations and building a case for any actions the monitoring team seeks to recommend to the detaining authorities or others. Where detainees allege abuse, monitors should initiate investigations promptly.<sup>548</sup> They should aim to identify the perpetrators and the circumstances under which abuse occurred. Accordingly, the monitor should take steps to secure evidence concerning the incident, identify and interview victims, seize instruments which may be used in ill-treatment and, to the extent possible, gather forensic evidence.<sup>549</sup> Monitoring officials like the UN Special Rapporteur on Torture include forensic ex-

perts on their teams for this purpose, and request that they be permitted to bring tools for documenting evidence of torture, including photo equipment.<sup>550</sup> Detainees should have access to medical examinations to corroborate claims of abuse.<sup>551</sup>

#### INDEPENDENCE AND TRAINING OF MONITORING PERSONNEL

Assigned monitors, whether embassy staff, a domestic organization or other party, should have the necessary training, independence and resources to conduct effective monitoring.

##### Personnel

Requiring that personnel meet basic requirements for training, expertise and professional experience is critical since inspections take place behind closed doors and are not susceptible to external oversight. Even if a specific monitoring protocol is established, monitors will necessarily exercise broad discretion, particularly in regard to how to respond to the detaining authorities' efforts to block their access or conceal abuse.<sup>552</sup>

Personnel should include multiple individuals competent to assess and document allegations of abuse. A dedicated team of monitors, such as the UK's Detainee Oversight Team charged with monitoring detainee transfers in Afghanistan, should include medical professionals and specialists in human rights and humanitarian law.<sup>553</sup> Personnel from ethnic or regional backgrounds similar to that of the detainees may be better able to establish relationships of trust.<sup>554</sup>

##### Training

Individuals who are not specifically trained on torture monitoring may overlook signs of abuse and, in an interview, misinterpret a detainee's reticence or confusion. Personnel should be familiar with international

548. See European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 14th General Report, ¶ 35, No. CPT/Inf (2004)28 (Sept. 21, 2004), Istanbul Protocol, *supra* note 526, ¶¶ 14, 83, 179.

549. See European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 14th General Report, *supra* note 548, ¶ 33.

550. See Manfred Nowak, Fact-Finding on Torture and Ill-Treatment and Conditions of Detention, I J. of Human Rts. Practice 101, 106 (2009).

551. See Istanbul Protocol, *supra* note 526, ¶ 123.

552. See Evans & Morgan, *supra* note 514, at 144-45 (describing the importance of the "ethos" of the CPT Committee as determining how it will "respond collectively to the operational practicalities encountered during visits").

553. Association for the Prevention of Torture, *supra* note 516, at 51. As of 2010, the UK's Detainee Oversight Team in Afghanistan consisted of military personnel and anticipated the addition of a policeman, a lawyer and medical support. See Evans, R (on the application of) v Secretary of State for Defence [2010] EWHC 1445 (Admin) [186] (June 25, 2010), ¶ 186.

554. See Association for the Prevention of Torture, *supra* note 516, at 71.



standards on detention and indicators of abuse in the environment or detainee's demeanor. They should also have operational training, such how to conduct private interviews and interact with detaining authorities.<sup>555</sup> The Office of the High Commissioner of Human Rights' "Training Manual on Human Rights Monitoring" and the UN Istanbul Protocol describe interview and documentation techniques that reduce the risk of reprisal against an interviewee and enable monitors to effectively assess allegations.<sup>556</sup> The Council of Europe National Preventive Mechanisms Project is also developing operational training programs to facilitate an exchange of expertise between monitors and share best practices.<sup>557</sup>

### Monitoring by Domestic Bodies

Depending on their political and financial independence from the receiving government, domestic bodies may be more effective at monitoring than the embassy staff of a sending country. Domestic bodies may have a stronger understanding of the local environment, may anticipate detaining authorities' obstructions or delays, and be in a better position to communicate with families and other outsiders who possess information about detention conditions.<sup>558</sup> On the other hand, non-governmental bodies may encounter greater difficulty in securing unrestricted access to detention facilities, notwithstanding assurances.<sup>559</sup>

If a domestic body in the receiving country is the assigned monitor, it should have "functional independence" from the receiving government, an attribute so important that the OPCAT requires states to guarantee it for the national monitoring bodies they are obligated to establish.<sup>560</sup> Functional independence of domestic monitoring bodies requires both that they are capable of acting independently and that they will be perceived as independent of state authorities, according to the Association for Prevention of Torture's review of relevant guidelines and practices. If the monitoring body is a governmental organ, it should have an independent and strong founding basis, such as establishment through the Constitution or an act of Parliament. It should also enjoy practical separation from the executive and judicial authorities, including the ability to draft its own rules and procedures without interference.<sup>561</sup> International norms on fact-finding by non-governmental organizations suggest that to ensure their independence, personnel should not be added or removed, except for reasons of incapacity or gross misbehavior, once a mission begins.<sup>562</sup>

Individuals who are not specifically trained on torture monitoring may overlook signs of abuse and, in an interview, misinterpret a detainee's reticence or confusion.

Even if a monitor is non-governmental, independence may be an issue since, in many receiving countries, non-governmental organizations will be dependent on the government for funding or simply for authority to operate openly.

555. *Id.*, 72-73.

556. See UN Office of the High Commissioner of Human Rights, *supra* note 531; Istanbul Protocol, *supra* note 526.

557. See European National Preventive Mechanism against torture (NPM) Project, <http://unipd-centrodirittiumani.it/attivita/European-National-Preventive-Mechanism-against-torture-NPM-Project/458>.

558. See Association for the Prevention of Torture, *supra* note 516, at 26-27.

559. *Id.* at 40.

560. OPCAT, *supra* note 298, art. 18 ("The State Parties shall guarantee the functional independence of the national preventive mechanisms as well as the independence of their personnel").

561. See Association for the Prevention of Torture, *supra* note 516, at 49-51.

562. See Thomas M. Franck, *Belgrade Minimal Rules of Procedure for International Human Rights Fact-finding Missions*, 75 Am. J. of Int' L. 1, ¶¶ 6-8 (Jan. 1981); see also Istanbul Protocol, *supra* note 526, ¶ 82 ("[Personnel] must be independent of any suspected perpetrators and the institutions or agencies they may serve.")

Monitors should not confine themselves to identifying specific risks, but should make recommendations to improve or end conditions that facilitate torture.

Any domestic monitoring body should have financial autonomy, which includes funding and resources sufficient to carry out its work and the ability to define and propose its budget independently.<sup>563</sup>

#### INTERVENTIONS

Effective prevention also requires that monitors intervene to protect detainees at risk, where possible.<sup>564</sup> This protective role has precedent in the ICRC's work and that of other international and regional human rights bodies.<sup>565</sup> In their protective capacity, monitors can "make representations to the responsible authorities (with evidence that makes clear what was done, but without indicating to which individual it was done, or with evidence citing individual accounts) in order to make it stop."<sup>566</sup>

Monitors should not confine themselves to identifying specific risks, but should make recommendations to improve or end conditions that facilitate torture.<sup>567</sup> For instance, national preventive mechanisms mandated under OPCAT "make recommendations to the relevant authorities with the aim of improving the treatment and the conditions of the persons deprived of their liberty," which competent authorities are required to consider.<sup>568</sup>

Regular monitoring visits provide an ongoing opportunity to communicate with detaining authorities about detention conditions.<sup>569</sup> According to an ICRC expert, the ICRC's "regular and thorough visits to a place of detention can have a direct impact on the treatment of those held there, provided that open dialogue can be maintained with the authorities in charge."<sup>570</sup>

563. See Association for the Prevention of Torture, *supra* note 516, 50-52; see also Principles Relating to the Status of National Institutions (Paris Principles), GA Res. 48/134, Principle 2 (Dec. 20, 1983) (emphasizing the need for funding that enables the national human rights institution "to have its own staff and premises, in order to be independent of the Government and not subject to financial control").

564. "Effective prevention requires intervention to protect those at risk. Rarely can this be done on an individualized basis, though if a specific risk is known, that risk can be averted." Malcolm Evans, member of the OPCAT Subcommittee, Legal Measures to Prevent Torture and Ill-treatment, cited in Penal Reform International, *The Role of Independent Monitoring in the Prevention of Torture and Inhuman or Degrading Treatment* (Mar. 2010).

565. See Office of the High Commissioner of Human Rights, *supra* note 531, chap. IX, ¶¶ 86-90 (describing summary reports by UN agencies raising concerns about issues such as adequacy and condition of detention facilities); ¶ 101 (describing ICRC's "[s]tandard practice" of conducting multiple interviews with detaining authorities and preparing confidential report on conclusions and understandings established during the visit).

566. Staiff, *supra* note 537.

567. "[V]isits create the opportunity for independent experts to examine, at first hand, the treatment of prisoners and detainees and the general conditions of detention.... Many problems stem from inadequate systems which can easily be improved through regular monitoring." Nowak, *supra* note 529, ¶ 72.

568. OPCAT, *supra* note 298, Art. 19-20.

569. "By carrying out regular visits to places of detention, the visiting experts usually establish a constructive dialogue with the authorities concerned in order to help them resolve problems observed." Nowak, *supra* note 529, ¶ 72.

570. Staiff, *supra* note 537.

# APPENDICES

## I. ASSURANCES IN DEPORTATION & RENDITION CASES

### APPENDIX I: US-RWANDA: KARAKE ASSURANCES

REPUBLIC OF RWANDA

Kigali, on 15/06/08  
N<sup>o</sup> 0541/02-01-08



MINISTRY OF JUSTICE

H. E. The Ambassador,  
Embassy of United States of  
America  
**RWANDA**

RE: GOVERNMENT OF RWANDA ASSURANCES ON BWINDI DEFENDANTS

H. E. Ambassador,

The Government of Rwanda would like to make the following guarantees and assurances in respect to the Bwindi defendants named:

1. Leouldas Bimemyimana
2. Gregoire Nyaminani
3. Francois Karake

1. The Government of Rwanda will provide Messrs. Bimemyimana, Nyaminani and Karake with all legal and procedural guarantees provided for under the Rwanda Constitution, Rwanda law, and Rwanda's international legal obligations, including as party to the International Covenant on Civil and Political Rights, and in accordance with the provisions of Article 7.

2. The Government further guarantees that strict adherence to the principle of due process will be fully respected to the letter in accordance with Rwanda Laws and on the basis of International Law and international standards.

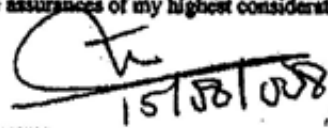
3. The Government of Rwanda will grant access upon request; whether or not previously announced, to the U.S. Embassy and/or an agreed upon third party to visit Messrs. Bimemyimana, Nyaminani and Karake during any period in which they are in official custody.

**APPENDIX I: US-RWANDA - KARAKE ASSURANCES**

4. The Government understands that the circumstances may require the sharing of such assurances with U.S. court, with the Bwindi defendants and their representatives, and/or as part of a public record of proceedings.

Please accept the assurances of my highest consideration.

Yours sincerely,



**Tharcisse Karugarama  
Minister of Justice/Attorney General**



**APPENDIX I: US-RWANDA - KARAKE ASSURANCES**

REPUBLIQUE DU RWANDA  
REPUBLIC OF RWANDA

Kigali, 18 / 01 / 2008  
N° 08 / D11 / ATGR / CAB



PARQUET GENERAL DE LA REPUBLIQUE  
OFFICE OF THE PROSECUTOR GENERAL OF THE REPUBLIC  
**B.P. 1328 KIGALI**

Cheryl J. Sim  
Chargé d'Affaires a.i  
**Embassy of the United States of America**

Assurances of the Office of the Prosecutor General on BWINDI Defendants Léonidas BIMENYIMANA, Grégoire NYAMINANI and François KARAKE.

I, Martin NGOGA, Prosecutor General of the Republic of Rwanda, offer the following guarantees and assurances in respect to the BWINDI defendants named above.

- A. Making reference to and endorsing the Assurances and Guarantees conveyed by Minister of Justice and Attorney General Tharcisse KARUGARAMA, the Office of the Prosecutor General will not introduce into evidence in any prosecution any statement made by Msrs. BIMENYIMANA, NYIRAMINANI and KARAKE obtained between 2001 and 2003 by Rwandan or United States officials.
- B. Investigation and prosecution of the three named defendants will be conducted in accordance with the Rwandan Constitution, Rwandan law, and Rwanda's

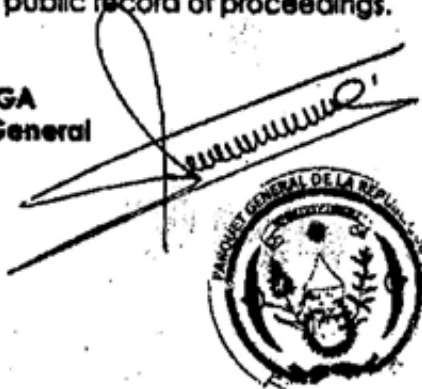


**APPENDIX I: US-RWANDA - KARAKE ASSURANCES**

international legal obligations, including as a party to the International Covenant on Civil and Political Rights, and in accordance with the provisions of Article 7.

C. The Office of the Prosecutor General understands that circumstances may require the sharing of such assurances with a U.S. court, with the BWINDI defendants and their representatives, and/or as part of a public record of proceedings.

**Martin NGOGA**  
Prosecutor General



**APPENDIX I: UK - LIBYA MOU****MEMORANDUM OF UNDERSTANDING BETWEEN THE GENERAL PEOPLE'S COMMITTEE FOR FOREIGN LIAISON AND INTERNATIONAL CO-OPERATION OF THE GREAT SOCIALIST PEOPLE'S LIBYAN ARAB JAMAHIRIYA AND THE FOREIGN AND COMMONWEALTH OFFICE OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND CONCERNING THE PROVISION OF ASSURANCES IN RESPECT OF PERSONS SUBJECT TO DEPORTATION****Application and Scope**

A request for assurances under this Memorandum may be made by the sending state in respect of any citizen of the receiving state, any stateless person who was habitually resident in the receiving state, or any third-country national whom the receiving state is prepared to admit.

Such requests will be submitted in writing either by the British Embassy in Tripoli to the General People's Committee for Foreign Liaison and International Co-operation or by the People's Bureau of the Great Socialist People's Libyan Arab Jamahiriya in London to the Foreign and Commonwealth Office. The state to which the request is made will acknowledge receipt of the request within 5 working days.

A final response to a such a request will be given promptly in writing by the Foreign Secretary in the case of a request made to the United Kingdom, or by the Secretary of the General People's Committee for Foreign Liaison and International Co-operation in the case of a request made to Libya.

To assist a decision on whether to request assurances under this Memorandum, the receiving state will inform the sending state of any penalties outstanding against a person to be deported, and of any outstanding convictions or criminal charges pending against him and the penalties which could be imposed.

Requests under this Memorandum may include requests to the receiving state for further specific assurances. It will be for the receiving state to decide whether to give such further assurances.

The United Kingdom and the Great Socialist People's Libyan Arab Jamahiriya will comply with their human rights obligations under international law regarding a person in respect of whom assurances are given under this Memorandum. The assurances set out in the following paragraphs (numbered 1-9) will apply to such a person, together with any further specific assurances provided by the receiving state.

An independent body ("the monitoring body") will be nominated by both sides to monitor the implementation of the assurances given under this Memorandum, including any specific assurances, by the receiving state. The responsibilities of the monitoring body will include monitoring the return of, and any detention, trial or imprisonment of, the person. The monitoring body will report to both sides.

**Assurances**

1. Where, before his deportation, a person has been tried and convicted of an offence in the receiving state in absentia, he will be entitled to a re-trial for that offence on his

**APPENDIX I: UK - LIBYA MOU**

return.

2. In cases where the person may face the death penalty in the receiving state, the receiving state will, if its laws allow, provide a specific assurance that the death penalty will not be carried out. In any case, where there are outstanding charges, or where charges are subsequently brought, against the person in respect of an offence allegedly committed before his deportation, the authorities of the receiving state will utilise all the powers available to them under their system for the administration of justice to ensure that, if the death penalty is imposed, the sentence will not be carried out.

3. If arrested, detained or imprisoned following his deportation, the deported person will be afforded adequate accommodation, nourishment, and medical treatment, and will be treated in a humane and proper manner, in accordance with internationally accepted standards.

4. If the deported person is arrested or detained, he will be informed promptly by the authorities of the receiving state of the reasons for his arrest or detention, and of any charge against him. The person will be entitled to consult a lawyer promptly.

5. If the deported person is arrested or detained, he will be brought promptly before a civilian judge or other civilian official authorised by law to exercise judicial power in order that the lawfulness of his detention may be decided.

6. The deported person will have unimpeded access to the monitoring body unless they are arrested, detained or imprisoned. If the person is arrested, detained or imprisoned, he will be entitled to contact promptly a representative of the monitoring body and to meet a representative of the monitoring body within one week of his arrest, detention or imprisonment. Thereafter he will be entitled to regular visits from a representative of the monitoring body in co-ordination with the competent legal authorities. Such visits will include the opportunity for private interviews with the person and, during any period before trial, will be permitted at least once every three weeks. If the representative of the monitoring body considers a medical examination of the person is necessary, he will be entitled to arrange for one or to ask the authorities of the receiving state to do so.

7. The deported person will be allowed to follow his religious observance following his return, including while under arrest, or while detained or imprisoned.

8. If the deported person is charged with an offence he will receive a fair and public hearing without undue delay by a competent, independent and impartial civilian court established by law. The person will be allowed adequate time and facilities to prepare his defence, and will be permitted to examine or have examined the witnesses against him and to call and have examined witnesses on his behalf. He will be allowed to defend himself in person or through legal assistance of his own choosing, or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.

9. Any judgment against the deported person will be pronounced publicly, but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in



**APPENDIX I: UK - LIBYA MOU**

the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

**Withdrawal**

Either participant may withdraw from this Memorandum by giving 6 months notice in writing to the diplomatic mission of the other.

Where one or other participant withdraws from the Memorandum any assurances given under it in respect of a person will continue to apply in accordance with its provisions.

**Signature**

This Memorandum of Understanding represents the understandings reached upon the matters referred to therein between the Great Socialist People's Libyan Arab Jamahiriya and the United Kingdom of Great Britain and Northern Ireland.

Signed in duplicate at Tripoli on 18 October 2005 in the English and Arabic languages, both texts having equal validity.

Abdulati Ibrahim Obeidi,  
Acting Secretary for European Affairs,  
Secretariat for Foreign Liaison and International Co-operation, Tripoli  
For the Great Socialist People's Libyan Arab Jamahiriya

Anthony Layden  
HM Ambassador  
British Embassy, Tripoli  
For the United Kingdom of Great Britain and Northern Ireland

**APPENDIX I: UK - LIBYA MOU**

**MEMORANDUM OF UNDERSTANDING BETWEEN THE GOVERNMENT OF  
THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND  
AND THE GOVERNMENT OF THE LEBANESE REPUBLIC  
CONCERNING THE PROVISION OF ASSURANCES IN RESPECT  
OF PERSONS SUBJECT DEPORTATION**

**Application and Scope**

A request for assurances under this Memorandum may be made by the sending state in respect of any citizen of the receiving state, any stateless person who was habitually resident in the receiving state, or any third-country national whom the receiving state is prepared to admit.

Such requests will be submitted in writing either by the British Embassy in Beirut to the Ministry of the Interior or by the Lebanese Embassy in London to the Home Office. The Government to which the request is made will acknowledge receipt of the request within 5 working days.

A final response to a such a request will be given promptly in writing by the Home Secretary in the case of a request made to the United kingdom, or by the Ministry of Justice in the case of a request made to Lebanon.

To assist a decision on whether to request assurances under this Memorandum. The receiving state will inform the sending state of any penalties outstanding against a person, and of any outstanding convictions or criminal charges pending against him and the penalties which could be imposed.

Requests under this Memorandum may include requests to the receiving state for further specific assurances.

The Governments of the United Kingdom and of the Lebanese Republic will comply with their human rights obligations under international law regarding a person in respect of whom assurances are given under this Memorandum. The assurances set out in the following paragraphs (numbered 1-7) will apply to such a person, together with any further specific assurances provided by the receiving state.

**APPENDIX I: UK - LIBYA MOU**

An independent body will be nominated by both Governments to monitor the implementation of the assurances given under this Memorandum, including any specific assurances, by the receiving state (“the monitoring body”). The responsibilities of the monitoring body will include, but are not limited to, monitoring the return of, and any detention, trial or imprisonment of, the person. The monitoring body will report to both Governments.

**Assurances**

- 1 If arrested, detained or imprisoned following his deportation, the person will be afforded adequate accommodation, nourishment, and medical treatment, and will be treated in a humane and proper manner, in accordance with internationally accepted standards.
2. If the person is arrested or detained, he will be informed promptly by the authorities of the receiving state of the reasons for his arrest or detention, and of any charge against him. The person will be entitled to consult a lawyer promptly.
- 3 If the person is arrested or detained, he will be brought promptly before a judge or other official authorized by law to exercise judicial power in order that the lawfulness of his detention may be decided.
4. The person will have unimpeded access to the monitoring body for three years after his return except at any time when he is arrested, detained or imprisoned. If the person is arrested, detained or imprisoned in respect of matters occurring before or within three years after the date of his return, he will be entitled to contact promptly, and in any event within 48 hours, a representative of the monitoring body. Thereafter he will be entitled to regular visits from a representative of the monitoring body. Such visits will include the opportunity for private previews with the person and, during any period before trial, will be permitted at least once a week. If the representative of the monitoring body considers a medical examination of the person is necessary, he will be entitled to arrange for one or to ask the authorities of the receiving state to do so.
- 5 The person will be allowed to follow his religious observance following his return, including while under arrest, or while detained or imprisoned.

**APPENDIX I: UK - LIBYA MOU**

6. If the person is charged with an offence he will receive a fair and public hearing without undue delay by a competent, independent and impartial tribunal, properly constituted by law. The person will be allowed adequate time and facilities to prepare this defence, and will be permitted to examine or have examined the witnesses against him and to call and have examined witnesses on his behalf. He will be allowed to defend himself in person or through legal assistance of this own choosing, or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.
7. Any judgment against the person will be pronounced publicly, but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

**Withdrawal**

Either Government may withdraw from this Memorandum by giving 6 months notice in writing to the Embassy of the other government.

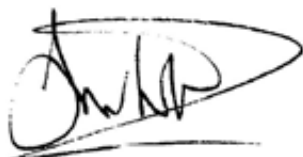
Where one or other Government withdraws from the Memorandum any assurances given under it in respect of a person will continue to apply in accordance with its provisions.

**Signature**

This Memorandum of Understanding represents the understandings reached between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Lebanese Republic upon the matters referred to therein.

Signed in duplicate at *Beirut* on *23 December 2005* in the English and Arabic languages, both texts having equal validity.

**For the Government of the  
United Kingdom of Great Britain  
And Northern Ireland**



**For the Government of the  
Lebanese Republic**

**APPENDIX I: UK - LIBYA MOU****Side letter**

Today we have signed a Memorandum of Understanding (MOU) on behalf of our two Governments regulating the provision of undertakings in respect of persons prior to deportation. Signature of the MOU reflects the British Government's strong wish to strengthen co-operation with the Lebanese Government to counter the threat of international terrorism. The content of the MOU also reflects the British Government's intention to respect its international and domestic human rights obligations and responsibilities and Lebanese law and sovereignty.

During our discussions on the MOU we agreed that it would be right to exchange letters on the use of the death penalty on which, for constitutional reasons, the Lebanese Government has been unable to give an undertaking in the MOU itself. The MOU and this letter set out the joint understanding of our two Governments on this issue.

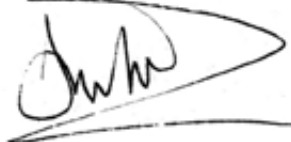
The British Government is opposed to the use of the death penalty in all circumstances. We would not return a person to Lebanon if that person faced significant risk of the death penalty on return. If a person returned to Lebanon is, at any time after his return, subsequently sentenced to death, the British Government would consider asking the Lebanese Government to commute the sentence.

The Lebanese Government has indicated that it would be open to the Lebanese Government to give a specific assurance in relation to a particular case within the limits of the Lebanese Constitution. Such specific assurances being sought by either Government is recognized in the MOU itself (5<sup>th</sup> paragraph under application and scope). The British Government records here that it may well seek a specific assurance on this issue in relation to particular cases.

In our discussions, both Governments have recognized the vital importance of appointing independent bodies capable of monitoring the execution of the undertakings given under the MOU, including any specific assurances given in particular cases. Our discussions continue on the identity and specific terms of reference of these bodies.

The MOU requires the two Governments to consult closely on the circumstances and identity of those who might be subject to its provisions. The British Government attaches considerable importance to maximum transparency and timely consultation. The MOU also provides for the two Governments to seek assurances specific to individual cases, in addition to the issue of the death penalty described in this letter. The British Government considers this provision an important means of meeting the counter-terrorism and human rights objectives which underpin the MOU.

**For the Government of the  
United Kingdom of Great Britain  
And Northern Ireland**



**For the Government of the  
Lebanese Republic**



**APPENDIX I: UK - JORDAN MOU**

British Embassy -  
Amman

Abdoun  
PO Box 87  
Amman 11118  
Jordan

10 August 2005

HE Mr Awni Yervas  
Minister of Interior  
Amman

Today we have signed a Memorandum of Understanding (MOU) on behalf of our two Governments regulating the provision of undertakings in respect of persons prior to deportation. Signature of the MOU reflects the British Government's strong wish to strengthen co-operation with the Government of Jordan to counter the threat of international terrorism. The content of the MOU also reflects the British Government's intention to respect its international and domestic human rights obligations and responsibilities and Jordanian law and sovereignty.

During our discussions on the MOU we agreed that it would be right to exchange letters on the use of the death penalty on which, for constitutional reasons, the Government of Jordan has been unable to give an undertaking in the MOU itself. This letter, and the Government of Jordan's formal response to it, set out the joint understanding of our two Governments on this issue.

The British Government is opposed to the use of the death penalty in all circumstances. We would not return a person to Jordan if that person faced significant risk of the death penalty on return. If a person returned to Jordan is, at any time after his return, subsequently sentenced to death, the British Government would consider asking the Jordanian Government to commute the sentence.

**APPENDIX I: UK - JORDAN MOU**



The Government of Jordan has indicated that it would be open to the Government of Jordan to give a specific assurance in relation to a particular case. Such specific assurances being sought by either Government is recognised in the MOU itself (7<sup>th</sup> paragraph under application and scope). The British Government records here that it may well seek a specific assurance on this issue in relation to particular cases.

In our discussions, both Governments have recognised the vital importance of appointing independent bodies capable of monitoring the execution of the undertakings given under the MOU, including any specific assurances given in particular cases. Our discussions continue on the identity and specific terms of reference of these bodies.

The MOU requires the two Governments to consult closely on the circumstances and identity of those who might be subject to its provisions. The British Government attaches considerable importance to maximum transparency and timely consultation. The MOU also provides for the two Governments to seek assurances specific to individual cases, in addition to the issue of the death penalty described in this letter. The British Government considers this provision an important means of meeting the counter-terrorism and human rights objectives which underpin the MOU.

Pat Phillips  
Chargé d'Affaires a.i.

**APPENDIX I: UK - JORDAN MOU****MEMORANDUM OF UNDERSTANDING BETWEEN THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AND THE GOVERNMENT OF THE HASHEMITE KINGDOM OF JORDAN REGULATING THE PROVISION OF UNDERTAKINGS IN RESPECT OF SPECIFIED PERSONS PRIOR TO DEPORTATION****Application and Scope**

This arrangement will apply to any person accepted by the receiving state for admission to its territory following a written request by the sending state under the terms of this arrangement.

Such a request may be made in respect of any citizen of the receiving state who is to be returned to that country by the sending state on the grounds that he is not entitled, or is no longer entitled, to remain in the sending state according to the immigration laws of that state.

Requests under this arrangement will be submitted in writing either by the British Embassy in Amman to the Ministry of the Interior or by the Jordanian Embassy in London to the Home Office. Where a request is made under the terms of this arrangement, the department to which it is made will acknowledge receipt of the request within 5 working days.

A response to a request under the terms of this arrangement may be given verbally, but must be confirmed in writing within 14 days by the Home Secretary, in the case of a request made to the United Kingdom, or by the Minister of Interior in the case of a request made to the Hashemite Kingdom of Jordan before any return can take place.

To enable a decision to be made on whether or not to return a person under this arrangement, the receiving state will inform the sending state of any penalties outstanding against the subject of a request, and of any outstanding convictions or criminal charges pending against him and the penalties which could be imposed.

Requests under this arrangement may include requests for further specific assurances by the receiving state if appropriate in an individual case.

**Understandings**

It is understood that the authorities of the United Kingdom and of Jordan will comply with their human rights obligations under international law regarding a person returned under this arrangement. Where someone has been accepted under the terms of this arrangement, the conditions set out in the following paragraphs (numbered 1-8) will apply, together with any further specific assurances provided by the receiving state.



**APPENDIX I: UK - JORDAN MOU**



1. If arrested, detained or imprisoned following his return, a returned person will be afforded adequate accommodation, nourishment, and medical treatment, and will be treated in a humane and proper manner, in accordance with internationally accepted standards.
2. A returned person who is arrested or detained will be brought promptly before a judge or other officer authorised by law to exercise judicial power in order that the lawfulness of his detention may be decided.
3. A returned person who is arrested or detained will be informed promptly by the authorities of the receiving state of the reasons for his arrest or detention, and of any charge against him.
4. If the returned person is arrested, detained or imprisoned within 3 years of the date of his return, he will be entitled to contact, and then have prompt and regular visits from the representative of an independent body nominated jointly by the UK and Jordanian authorities. Such visits will be permitted at least once a fortnight, and whether or not the returned person has been convicted, and will include the opportunity for private interviews with the returned person. The nominated body will give a report of its visits to the authorities of the sending state.
5. Except where the returned person is arrested, detained or imprisoned, the receiving state will not impede, limit, restrict or otherwise prevent access by a returned person to the consular posts of the sending state during normal working hours. However, the receiving state is not obliged to facilitate such access by providing transport free of charge or at discounted rates.
6. A returned person will be allowed to follow his religious observance following his return, including while under arrest, or while detained or imprisoned.
7. A returned person who is charged with an offence following his return will receive a fair and public hearing without undue delay by a competent, independent and impartial tribunal established by law. Judgment will be pronounced publicly, but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
8. A returned person who is charged with an offence following his return will be allowed adequate time and facilities to prepare his defence, and will be permitted to examine or have examined the witnesses against him and to call and have examined witnesses on his behalf. He will be allowed to defend himself in person or through legal assistance of his own choosing, or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.

**APPENDIX I: UK - JORDAN MOU****Withdrawal**

Either government may withdraw from this arrangement by giving 6 months notice in writing to the Embassy of the other government.

Where one or other government withdraws from the arrangement, the terms of this arrangement will continue to apply to anyone who has been returned in accordance with its provisions.

**Signature**

This Memorandum of Understanding represents the understandings reached between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Hashemite Kingdom of Jordan upon the matters referred to therein.

Signed in duplicate at Amman on 10 August 2005 in the English and Arabic languages, both texts having equal validity

Pat Phillips

For the Government of the  
United Kingdom of Great Britain  
and Northern Ireland

10 August 2005

For the Government of the  
Hashemite Kingdom of Jordan



Handwritten signature in Arabic script, likely belonging to a representative of the Hashemite Kingdom of Jordan.

**APPENDIX I: UK - ETHIOPIA MOU AND MONITORING AGREEMENT**

MEMORANDUM OF UNDERSTANDING  
BETWEEN  
THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN  
AND NORTHERN IRELAND  
AND  
THE GOVERNMENT OF THE FEDERAL DEMOCRATIC  
REPUBLIC OF ETHIOPIA  
CONCERNING THE PROVISION OF ASSURANCES IN  
RESPECT OF PERSONS SUBJECT TO DEPORTATION

Application and Scope

A request for assurances under this Memorandum may be made by the sending state in respect of any citizen of the receiving state who is suspected or convicted of activities which may constitute a threat to national security.

Such requests will be submitted in writing by the British Embassy in Addis Ababa to the Ministry of Foreign Affairs or by the Ethiopian Embassy in London to the Home Office. The Government to which the request is made will acknowledge receipt of the request within 5 working days.

A final response to such a request will be given promptly in writing, by the Home Secretary in the case of a request made to the United Kingdom, or by the Minister of Foreign Affairs in the case of a request made to Ethiopia.

To assist a decision on whether to request assurances under this Memorandum, the receiving state will inform the sending state of any penalties outstanding against a person, and of any outstanding convictions or criminal charges pending against him and the penalties which could be imposed.

The Governments of the United Kingdom and of Ethiopia will comply with their human rights obligations under international law regarding a person in respect of whom assurances are given under this Memorandum. The assurances set out in the following paragraphs (numbered 1-8) will apply to such a person, together with any further specific assurances which may be provided by the receiving state.

Further assurances may be sought in particular in relation to a member of the armed forces facing trial before a court martial to whom assurances 3 and 7 do not apply.

An independent body ("the monitoring body") will be nominated in each country by both Governments to monitor the implementation of assurances given, including any specific assurances which may be given, under this Memorandum by the receiving state. The responsibilities of the monitoring body will include, but are not limited to, monitoring the return of, and any detention, trial or imprisonment of, the person. All findings of the monitoring body will be made available to both Governments. The methods to be employed by the monitoring body will be agreed between the two Governments and the monitoring body concerned with a view to ensuring effective verification of the assurances.

AA

ADSW

**APPENDIX I: UK - ETHIOPIA MOU AND MONITORING AGREEMENT**Assurances

1. If arrested, detained or imprisoned following his deportation, the person will be afforded adequate accommodation, nourishment, and medical treatment, and will be treated in a humane and proper manner, in accordance with the national and international obligations of the receiving state.
2. If the person is arrested or detained, he will be informed promptly by the authorities of the receiving state of the reasons for his arrest or detention, and of any charge against him. The person will be entitled to consult a lawyer promptly.
3. If the person is a civilian and is arrested or detained, he will be brought promptly before a civilian judge or other civilian official authorised by law to exercise judicial power in order that the lawfulness of his detention may be decided.
4. Any person who is detained but who at the end of a court-supervised investigation is not charged with an offence, or is found not guilty of any offence, will be released promptly.
5. The person will have unimpeded access to the monitoring body unless they are arrested, detained or imprisoned. If the person is arrested, detained or imprisoned within 3 years of the date of his return, he will be entitled to contact promptly, and in any event within 48 hours, a representative of the monitoring body. Thereafter he will be entitled to regular visits from a representative of the monitoring body and, in the event of an allegation of ill-treatment, the monitoring body will have access to the person without delay.
6. The person will be allowed to follow his religious observance following his return, including while under arrest, or while detained or imprisoned.
7. If the person is a civilian and is charged with an offence he will receive a fair and public hearing without undue delay by a competent, independent and impartial civilian tribunal established by law. The person will be allowed adequate time and facilities to prepare his defence, and will be permitted to examine or have examined the witnesses against him and to call and have examined witnesses on his behalf. He will be allowed to defend himself in person or through legal assistance of his own choosing, or, if he has not sufficient means to pay for legal assistance, to be given legal assistance free when the interests of justice so require.
8. Any judgment against the person will be pronounced publicly, but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

Entry into effect and withdrawal

This Memorandum will come into effect on signature.

Either Government may withdraw from this Memorandum by giving 6 months notice in writing to the Embassy of the other government.

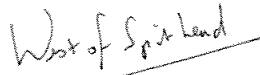
Where one or other Government withdraws from the Memorandum any assurances given under it, including specific assurances, in respect of a person will continue to apply in accordance with its provisions.

**APPENDIX I: UK - ETHIOPIA MOU AND MONITORING AGREEMENT**

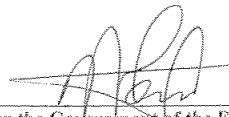
Signature

This Memorandum of Understanding represents the understandings reached between the Government of the United Kingdom of Great Britain and Northern Ireland and the Federal Democratic Republic of Ethiopia upon the matters referred to therein.

Signed in duplicate at Addis Ababa on 12 December 2008 in the English language.



For the Government of the United  
Kingdom of Great Britain and  
Northern Ireland



For the Government of the Federal  
Democratic Republic of Ethiopia

**APPENDIX I: UK - ALGERIA EXCHANGE OF LETTERS**

10 DOWNING STREET  
LONDON SW1A 2AA

11 July 2006

THE PRIME MINISTER

Dear President Bouteflika,

We have today agreed an exchange of letters which reflects our shared intent to strengthen cooperation with the Algerian Government with a view to dealing jointly with the threat from crime in all its forms, and in particular international terrorism.

The British Government is firmly committed to implementing this Exchange of Letters in accordance with its obligations under international law and under UK domestic law, in particular as regards its own responsibilities on human rights.

Similarly, the British Government welcomes the Algerian Government's commitment to implement this Exchange of Letters in accordance with its legal obligations under international and national law, and in particular the provisions of the Algerian Constitution.

Thus, this Exchange of Letters underscores the absolute commitment of our two governments to human rights and fundamental freedoms such as the *freedom of movement and the right of abode, the right to take legal action, the right to be informed of the reasons for one's arrest or detention, the right to the*

**APPENDIX I: UK - ALGERIA EXCHANGE OF LETTERS**

- 2 -

presumption of innocence, to the assistance of legal counsel, and the right to a fair hearing and public hearing by a competent and impartial court.

The British Government takes note of the Algerian position on the question of the death penalty, which is: "while the death penalty is indeed provided for by Algerian legislation as an extreme penalty for serious offences, the fact remains that the legislature is gradually introducing amendments to the criminal law with a view to removing the death penalty, in stages, from the legal system.

Furthermore, in judicial practice, the death penalty is rarely imposed by the courts and, since 1993, has been the subject of a moratorium.

This approach is reflected on the legislative front by the absence of any reference to the death penalty in the texts of laws enacted since 1995."

For its part, the British Government affirms that it is opposed to the use of the death penalty in any circumstances and would not return an individual to Algeria if that person were at significant risk of being subjected to such a penalty.

Finally, the British Government notes that, in particular in cases relating to questions of internal security, it may, depending on the circumstances, wish to request special assurances from the competent authorities of the Algerian Government.

**APPENDIX I: UK - ALGERIA EXCHANGE OF LETTERS**

- 3 -

Mr President, we are, I am convinced, committed to implementing the four agreements on cooperation in the legal, judicial and consular fields which have been signed by our governments with a view to strengthening our common fight against crime in all its forms, and in particular international terrorism.

Please accept, Sir, the expression of my highest consideration.

Yours sincerely,  
Tony Blair

His Excellency Mr Abdelaziz Bouteflika



**APPENDIX I: UK - ALGERIA EXCHANGE OF LETTERS**

In the Name of God the Merciful the Compassionate  
[emblem]

**People's Democratic Republic of Algeria  
The President**

11 July 2006

**His Excellency, the Prime Minister  
of the Government of the United  
Kingdom of Great Britain and  
Northern Ireland**

Dear Prime Minister,

I have the honour to acknowledge receipt of your letter of today's date and would assure you of the Algerian Government's approval of its contents. The text of your letter reads as follows:

"We have today agreed an Exchange of Letters, which reflects our shared intent to strengthen cooperation with the Algerian Government with a view to dealing jointly with the threat from crime in all its forms, and in particular international terrorism.

The British Government is firmly committed to implementing this Exchange of Letters in accordance with its obligations under international law and under UK domestic law, in particular as regards its own responsibilities on human rights.

Similarly, the British Government welcomes the Algerian Government's commitment to implement this Exchange of Letters in accordance with its obligations under international and national law, and in particular the provisions of the Algerian Constitution.

Thus, this Exchange of Letters underscores the absolute commitment of our two governments to human rights and fundamental freedoms, such as the freedom of movement and the right of abode, the right to take legal action, the right to be informed of the reasons for one's arrest or detention, the right to the presumption of innocence, to

## APPENDIX I: UK - ALGERIA EXCHANGE OF LETTERS

the assistance of legal counsel and the right to a fair and public hearing by a competent and impartial court.

The British Government takes note of the Algerian position on the question of the death penalty, which is: “while the death penalty is indeed provided for by Algerian legislation as an extreme penalty for serious offences, the fact remains that the legislature is gradually introducing amendments to the criminal law with a view to removing the death penalty, in stages, from the legal system.

Furthermore, in judicial practice, the death penalty is rarely imposed by the courts and, since 1993, has been the subject of a moratorium.

This approach is reflected on the legislative front by the absence of any reference to the death penalty in the texts of laws enacted since 1995.”

For its part, the British Government affirms that it is opposed to the use of the death penalty in any circumstances and that it would not return an individual to Algeria if that person were at significant risk of being subjected to such a penalty.

Finally, the British Government notes that, in particular in cases relating to questions of internal security, it may, depending on the circumstances, wish to request special assurances from the competent authorities of the Algerian Government.

Mr President, we are, I am convinced, committed to implementing the four agreements on cooperation in the legal, judicial and consular fields which have been signed by our governments with a view to strengthening our common fight against crime in all its forms, and in particular international terrorism”.

Please accept, Prime Minister, the expression of my highest consideration.

Abdelaziz Bouteflika  
[signed]

Drawn up in Algiers on 14 Jumada II 1427H, corresponding to 10 July 2006

**APPENDIX I: UK - INDIA CHAHAL ASSURANCES**

CONSEIL DE L'EUROPE COUNCIL OF EUROPE COUR  
EUROPÉENNE DES DROITS DE L'HOMME EUROPEAN COURT OF  
HUMAN RIGHTS

THIRD SECTION

**CASE OF CHAHAL v. THE UNITED KINGDOM**

*(Application no. 70/1995/576/662)*

JUDGMENT

STRASBOURG

36. Mr Chahal applied for judicial review of this decision, but then requested a postponement on 4 June 1992, which was granted.

37. In a letter dated 2 July 1992, the Home Secretary informed the applicant that he declined to withdraw the deportation proceedings, that Mr Chahal could be deported to any international airport of his choice within India and that the Home Secretary had sought and received an assurance from the Indian Government (which was subsequently repeated in December 1995) in the following terms:

“We have noted your request to have a formal assurance to the effect that, if Mr Karamjit Singh Chahal were to be deported to India, he would enjoy the same legal protection as any other Indian citizen, and that he would have no reason to expect to suffer mistreatment of any kind at the hands of the Indian authorities.

I have the honour to confirm the above.”

38. On 16 July 1992 the High Court granted leave to apply for judicial review of the decisions of 1 June 1992 to maintain the refusal of asylum and of 2 July 1992 to proceed with the deportation. An application for bail was rejected on 23 July (the European Court of Human Rights was not provided with details of this ruling).

**APPENDIX I: CANADA-CHINA: SING ASSURANCES**

App. I.d: from *Sing v. Canada*, [2008] 2 F.C.R. 3, 2007 F.C. 361 Note No. 085/01 (dated May 2, 2001)

The Embassy of the People's Republic of China in Canada presents its compliments to the Department of Foreign Affairs and International Trade Canada and has the honour to respond to Assistant Deputy Minister Caron's letter of April 27, with the following information.

Lai Changxing is the chief criminal suspect of the mega smuggling case in Xiamen of China's Fujian Province. He fled to Canada after the case was detected. It is of great importance for China's efforts to fight against corruption and smuggling to have him repatriated to China for a trial by the competent Chinese judicial departments.

The Chinese side has noted the judicial practice of Canada relating to death penalty in repatriating criminal suspects. In view of this, the Chinese Government undertakes that after his repatriation to China, the Chinese appropriate criminal court will not sentence Lai Changxing to death for all the crimes he may have committed before his repatriation. The Supreme People's Court, the highest judicial organ in China, has decided to that effect and the appropriate criminal court in charge of the alleged smuggling and bribery case will be adequately informed of this decision and will abide by it.

In accordance with the above decision and Article 199 of the Criminal Procedure Law of the People's Republic of China which stipulates that "death sentences shall be subject to approval by the Supreme People's Court", the appropriate criminal court will not sentence him to death and even if it does, the verdict will not be approved by the Supreme People's Court, therefore, he will not be executed in any case if returned to China.

At the same time, China is a state party to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. According to the provisions of the relevant Chinese laws, during the period of investigation and trial of Lai after his repatriation and, if convicted, during his term of imprisonment, Lai will not be subject to torture and other cruel, inhuman or degrading treatment or punishment.

Zeng Mingna, Lai's wife, is also a suspect involved in the same smuggling case. She fled with Lai to Canada. If Zeng is repatriated to China, the abovementioned commitments will be equally applicable to her.

The Embassy of the People's Republic of China avails itself of this opportunity to renew to the Department of Foreign Affairs and International Trade Canada the assurances of its highest consideration.

**APPENDIX I: SWEDEN-EGYPT : AGIZA ASSURANCES**

20/01/2003 15:33 08-303031

FONDEN MÄNSKL RÄTTIG



REGERINGSKANSLIET

Ministry for Foreign Affairs

UD-FMIR / Avdelning Nytt År  
 2001-12-11  
 Ad. act. / *[Signature]*

ARKIVEXEMPLAR

**HEMLIG**  
 enl. 2 kap. 1 §  
 sekretesslagen (1980:100)  
 2001-12-11  
 UTRIKESDEPARTEMENTET

UTRIKESDEPARTEMENTET  
 INK 2001-12-13  
 DNR 10 101 025 100

AIDE-MEMOIRE

The following two persons, who are citizens of the Arab Republic of Egypt, the latter together with his family, have applied for asylum in the Kingdom of Sweden.

- 1.
2. Ahmed Hussein Mustafa Kamil Agiza, born 8 November 1962, resident of the village Abou Kir, Al-Sharqiyah, born in the municipality of Bansieuf.  
 Wife: Hanan Fouad Abd El Khalek Attia, born 13 July 1964.  
 Children: Mustafa Kamil, Muhammad, born 27 November 1987  
 Mustafa Kamil, Usama, born 3 September 1988 or 1989  
 Mustafa Kamil, Husein, born 27 October 1991  
 Mustafa Kamil, Batoul, born 8 November 1995  
 Mustafa Kamil, Kinana, born 21 September 2001

For reasons of national security the Kingdom of Sweden has the intention not to grant these persons residence permit in Sweden. The basis for that is the men's known connections and involvement in terrorist activities in view of what is known of their previous activities.

Sweden therefore wishes to repatriate the above-mentioned persons to the Arab Republic of Egypt.

Ifvilles av postexo				Avs datum	Sign
Avsant med					
<input type="checkbox"/> Sv kurrir	<input type="checkbox"/> Gult kurrir	<input type="checkbox"/> Luftpost	<input type="checkbox"/> Vanlig post		

**APPENDIX I: SWEDEN-EGYPT : AGIZA ASSURANCES**

28/01/2003 15:33 00-303031

FONDEN MÄNSKL RÄTTIG

SIDA 21

2(2)

It is the understanding of the Government of the Kingdom of Sweden that the above-mentioned persons will be awarded a fair trial in the Arab Republic of Egypt. It is further the understanding of the Government of the Kingdom of Sweden that these persons will not be subjected to inhuman treatment or punishment of any kind by any authority of the Arab Republic of Egypt and further that they will not be sentenced to death or if such a sentence has been imposed that it will not be executed by any competent authority of the Arab Republic of Egypt. Finally it is the understanding of the Government of the Kingdom of Sweden that the wife and children of Ahmed Hussein Mustafa Kamil Agiza will not in anyway be persecuted or harassed by any authority of the Arab Republic of Egypt.

Cairo, 12 December 2001

*12 December 2001*

*Bevilligat av S2 FUNDATIONEN till en/om  
för den utövande säkerhetsjägaren  
Egypten*

*/sk*

2 1

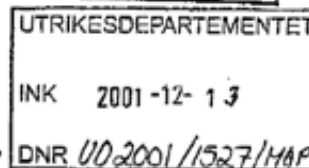
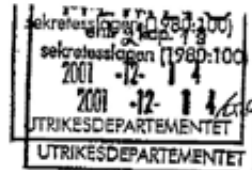
14  
/sk

**APPENDIX I: SWEDEN-EGYPT : AGIZA ASSURANCES**

20/01/2003 15:33 08-303031

MÄNSKL RÄTTIG

SIDA 22



Arab Republic of Egypt  
General Intelligence Service

**Aide - Memoire**

With reference to your aide memoire dated 12 December 2001 ,  
concerning repatriation of the following Egyptian citizens :

- Ahmed Hussein Mustafa Kamil Agiza .
- Hanan Fouad Abd El Khalek Attia ( wife of the latter , together  
with her children ( Muhammad , Usama , Husein , Batoul ,  
Kinana)

We , herewith , assert our full understanding to all items of this  
memoire, concerning the way of treatment upon repatriate from your  
government , with full respect to their personal and human rights .  
This will be done according to what the Egyptian constitution, and  
law stipulates .

We will appreciate repatriation as soon as possible. Procedures of the  
process will be discussed upon your reply.

Please accept our regards.

Yours sincerely ,  
Maj . Gen .

GIS Chief

**APPENDIX I: ITALY-TUNISIA : ASSURANCES**

12/3/2010

Cable Viewer

tags #cablegate and a hash containing the reference ID e.g. #09TUNIS415.

KEEP US STRONG!

Reference ID	Created	Released	Classification	Origin
09TUNIS415	2009-06-23 15:03	2010-11-30 16:04	SECRET//NOFORN	Embassy Tunis

VZCZCKYZ0000

OO RUEHWEB

DE RUEHTU #0415/01 1741549

ZNY SSSSS ZZH

O 231549Z JUN 09

FM AMEMBASSY TUNIS

TO RUEHC/SECSTATE WASHDC IMMEDIATE 6474

RUEAWJA/DEPARTMENT OF JUSTICE WASHDC IMMEDIATE

RUEKJCS/SECDEF WASHINGTON DC IMMEDIATE

INFO RUCNMGH/MAGHREB COLLECTIVE IMMEDIATE

RUEHRL/AMEMBASSY BERLIN IMMEDIATE 0186

RUEHMD/AMEMBASSY MADRID IMMEDIATE 0546

RUEHRO/AMEMBASSY ROME IMMEDIATE 0804

S E C R E T TUNIS 000415

NOFORN

SIPDIS

STATE:NEA/MAG (SWILLIAMS, MNARDI, MHAYES)

ALSO FOR DRL:KMCGEENEY, S/WIC:ARICCI

PASS DOD/OSD:ALIOTTA, DOJ/ODAG:MSTRANSKY

E.O. 12958: DECL: 06/23/2019

TAGS: PHUM PREL KDRG PTER TSSUBJECT: GOT ASKS EUROPEANS NOT TO TAKE TUNISIAN GUANTANAMO  
DETAINEES

REF: A. TUNIS 407

B. TUNIS 339C. TUNIS 32D. 08 TUNIS 1137 AND PREVIOUS

Classified By: Ambassador Robert F. Godec for reasons 1.4 (b) and (d)

-----

SUMMARY

-----

1. (S/NF) A senior MFA official convoked the German, Italian and Spanish Chiefs of Mission June 19 to inform them the GOT wants the Tunisian detainees in Guantanamo Camp returned home. According to the European COMs, the implicit message was that their governments should not accept the US request to take Tunisian detainees. The COMs have informed their capitals, but have no response yet. In a meeting June 22, a small group of Ambassadors (including the German and Italian COMs) discussed the MFA demarches. Among the Ambassadors, views differed on the risks to Tunisian prisoners, but some said there is a possibility of torture or mistreatment for

C:/.../Wikileaks Tunisia DA\_files.htm



**APPENDIX I: ITALY-TUNISIA : ASSURANCES**

12/3/2010

Cable Viewer

anyone accused of terrorism. End Summary.

-----  
 EUROPEANS DEMARCHED  
 -----

¶2. (S) Following FM Abdallah's meeting on Guantanamo detainees with Ambassador Godec on June 18 (Ref A), the MFA convoked German Ambassador Horst-Wolfram Kerll, Italian Ambassador Antonio D'Andria and Spanish Charge Santiago Miralles Huete to separate meetings on June 19.

¶3. (S) In the meetings, MFA Secretary of State for Maghreb, Arab and African Affairs Abdelhafidh Hergeum delivered a demarche similar to that given to Ambassador Godec, specifically:

- Tunisia wants its citizens in Guantanamo returned,
- Tunisia does not torture and has signed the Convention Against Torture,
- Tunisia's image would suffer if the detainees were sent to other countries.

The implicit message from Hergeum, according to the European COMs, was that their countries should not agree to the US request to accept Tunisian detainees. The three officials have informed their capitals but have no response. According to the German Ambassador, the Tunisian Ambassador in Berlin has delivered the same demarche to the German MFA.

-----  
 AMBASSADORS' MEETING  
 -----

¶4. (S) On June 22, Ambassador discussed the GOT demarche with Ambassador Kerll, Ambassador D'Andria, UK Ambassador Chris O'Connor, French Ambassador Serge Degallaix, and Canadian Ambassador Bruno Picard. Ambassador Godec reviewed the Foreign Minister's demarche with the German and Italian Ambassadors then detailing the demarches they had received.

¶5. (S/NF) The Canadian Ambassador noted the GOT has offered, as evidence that it does not torture, the case of Imam Said Jaziri who was repatriated from Canada to Tunisia despite allegations that he would be mistreated. The Canadian Ambassador said the comparison between Jaziri and the Guantanamo detainees is "crap", explaining that Jaziri was a petty criminal and not accused of terrorism. The Canadian government reviewed Jaziri's case carefully and decided he could be transferred since he did have links with terrorism. The Canadian decision, Picard suggested, might well have been otherwise if Jaziri had been accused of terrorism.

¶6. (S/NF) The Italian Ambassador said Italy had had few problems with individuals they had transferred to Tunisia. The Italians have been in contact with their families and lawyers and have not heard any serious complaints. Why, he asked, would the GOT want to mistreat or torture transferred Guantanamo detainees?

C:/.../Wikileaks Tunisia DA\_files.htm

**APPENDIX I: ITALY-TUNISIA : ASSURANCES**

12/3/2010

Cable Viewer

7. (S/NF) Ambassador Godec noted that there are credible reports of one of the first two transferees being mistreated, including information from the lawyer, the family and statements in open court. Moreover, there are credible reports of Ministry of Interior officials mistreating detainees and prisoners in other cases. He added that contrary to GOT claims, the ICRC cannot visit all Tunisian prisons as it does not have access to non-notified MOI facilities. The UK Ambassador opined that the GOT uses torture as a form of punishment.

8. (S/NF) The Canadian Ambassador said the GOT's statements that it does not torture are "bullshit." The Canadian Ambassador (protect) said he had direct, first hand evidence of torture/mistreatment of a prisoner that lasted several months. The Canadian and German Ambassadors agreed that anyone in Tunisian prisons on terrorism charges is at risk of mistreatment or torture.

9. (S/NF) The Ambassadors concluded the discussion with several noting that Tunisian diplomatic assurances regarding appropriate treatment of prisoners is of value, but that a follow-up mechanism is required to ensure commitments are kept.

-----  
COMMENT  
-----

10. (S/NF) The GOT clearly and strongly wants the Tunisian detainees in Guantanamo returned home. As we suggested in Ref A, Washington agencies may wish to consider whether to offer to return the Tunisian detainees if the GOT agrees to permit US access to the first two transferees and ongoing access to any future transferees. Such an understanding would need to include a mechanism to address the problems that may arise. While there is no absolute guarantee against mistreatment, such an understanding would provide transferees additional protection. Whether the GOT would accept such an arrangement is another matter. We are not optimistic, but it is worth considering. If Washington decides to continue with efforts to transfer the Tunisian detainees to third countries, we need to officially inform the GOT at a high-level and soon.  
Godec

C:/.../Wikileaks Tunisia DA\_files.htm

# APPENDICES

## II. ASSURANCES IN EXTRADITION CASES

### APPENDIX II: US-INDIA : BARAPIND ASSURANCES

UNCLASSIFIED

UNCLASSIFIED

 eiion  
 RELEASED IN PART  
 B6

Michel K Gulari 04/04/2006 01:39:24 PM From DBInbox: Search Results

Cable Text:UNCLASSIFIED  
TELEGRAM

March 30, 2006

To: SECSTATE WASHDC - PRIORITY

Action: SCA

From: AMEMBASSY NEW DELHI (NEW DELHI 2171 - PRIORITY)

TAGS: CJAN, CVIS, ECRM, PGOV, PRUM, PREL, PTER, IN

Captions: SIPDIS, SENSITIVE

Subject: FOLLOW-UP ON BARAPIND EXTRADITION ASSURANCES

Ref: A. STATE 33728 B. NEW DELHI 994 C. STATE 6905 D. 05 NEW  
DELHI 9513 E. 12/01/05 POMPER EMAIL TO POST ATTACHING  
CAT SUBMISSION F. 05 NEW DELHI 4449

1. (SBU) Summary: On March 29, 2006, Post received MEA Diplomatic Note T-413/11/2004 answering questions posed in USG Diplomatic Note 06/254/POL, dated March 7, 2006, regarding the extradition to India of Kulbir Singh Barapind. The full text of the GOI response is included below, as well as the name and contact information for Embassy POC for any post-extradition follow-up (per Ref A). We include here additional context regarding the significant positive changes since 1997 (i.e. post-Sandhu extradition) in the Indian political landscape regarding the treatment of Sikhs that should also be taken under careful consideration as this issue moves forward. End Summary.

## GOI Response to Ref A Follow-Up Questions

2. (U) With reference to the requested extradition of Kulbir Singh Barapind (referred to in the Indian note as Kulbir Singh Kulbeera aka Barapind) and USG obligation under the Convention Against Torture, the MEA has provided the following diplomatic note:

Begin text of MEA Diplomatic Note T-413/11/2004, dated 28 March 2006:

The Ministry of External Affairs presents its compliments to the Embassy of the United States of America in New Delhi and with reference to their Note Verbale No. 06/254/Pol dated 7th March 2006 regarding Mr. Kulbir Singh Kulbeera aka Barapind, has the honour to reiterate, as conveyed in this Ministry's note dated 6th February 2006, that Mr. Kulbir Singh Kulbeera aka Barapind on extradition to India, will be dealt with in accordance with the law. He will be entitled to all the rights of defence, protection and remedies available and shall not be subjected to torture, as defined in the Convention against Torture and other Cruel, Inhuman or Degrading treatment or Punishment, 1984.

As we conveyed in the Note Verbale dated 6th February 2006, India as a signatory to the Torture Convention has a good faith obligation not to act against the objectives and purposes of the Convention. Indian criminal law prohibits the use of force or causing hurt to extort confession. The judicial decisions have interpreted the law to cover not only the physical hurt but the mental derangement/sufferings also. Persons violating these provisions are subject to prosecution and imprisonment.

Once Mr. Barapind is extradited to India, the US Government will be informed about the status of the criminal trial against him for the Alleged offenses in accordance with the

UNITED STATES DEPARTMENT OF STATE UNCLASSIFIED

**APPENDIX II: US-INDIA : BARAPIND ASSURANCES**

UNCLASSIFIED

UNCLASSIFIED

provisions of the Indo-US Extradition Treaty. Article 21 of the Treaty provides for consultation in connection with the processing of individual cases and improving procedures for the implementation of the Treaty.

As for information concerning the old cases of Daya Singh Sandhu and Kamaljit Kaur Sandhu, this Ministry would obtain the requisite details from the concerned Indian authorities and convey to the esteemed Embassy in due course.

As regards access on a reciprocal basis, it is clarified that the US officials on request shall have access to the person extradited during trial in India, and on extradition of a person from India to USA, the Indian officials on request shall be provided access to the person extradited during his trial in the United States of America, irrespective of his or her nationality.

The Ministry of External Affairs avails itself of this opportunity to renew to the Embassy of the United States of America in New Delhi the assurances of its highest consideration.

End Text.

(NOTE: The GOI reference to USG Note Verbale No. 06/254/Pol dated 7th March 2006 corresponds with Ref C. End Note.)

Initial Assessment of GOI Response

3. (SBU) The GOI response appears to Post to answer most of the questions posed in Ref A. We note that the GOI response does not explicitly mention coordination with Punjab authorities to ensure Barapind's humane treatment, except to reiterate in the first two paragraphs that Indian law provides for his humane treatment and that persons violating this law are subject to prosecution and imprisonment. The GOI response for the first time notes that mental suffering falls under this rubric.

4. (SBU) The Indian response also did not specifically answer whether Barapind would be held in judicial remand upon his return to India, whether his trial would be held in Punjab, whether he would be held in Punjab prior to and during his trial, or where he would be incarcerated if convicted. The response does note in the third paragraph that the USG "will be informed about the status of the criminal trial against him," however.

5. (SBU) We also note the GOI indicated in its response that it would obtain and convey to us information regarding the post-extradition treatment of the Sandhus.

Embassy POC

6. (U) Per Ref A Para 6, Embassy POC will be Poloff Howard Madnick. Poloff will be with the Embassy until July, at which time a replacement POC will be selected. Contact information:

-- e-mail: [redacted]  
 -- work phone: 91-11-2419-8657  
 -- mobile phone: [redacted]

Sandhu Case Not Necessarily a Barometer for Barapind

7. (SBU) The most glaring difference that distinguishes the 1997 Sandhu extradition from the Barapind extradition request is the changed political climate in Punjab. The insurgency that spawned police-excesses was dying out in the mid-1990s; as of 2006 "the Punjab militancy" is a historical event, and the passage of time has reduced the intense operating environment. Many new human rights cases today are filed by the alleged victims of long-past abuses. Although the courts

UNCLASSIFIED

225

**APPENDIX II: US-INDIA : BARAPIND ASSURANCES**

UNCLASSIFIED

UNCLASSIFIED

have been slow in clearing the historical case load, reports of truly new abuse cases are a small fraction compared to those lodged during the height of the insurgency. Moreover, Indian society's treatment of Sikhs has returned to the harmony and respect of the past, with Sikhs occupying senior positions throughout government and society.

8. (SBU) Another important difference to consider is that the Sandhu case proceeded relatively swiftly; the Indian government requested extradition in 1994 and it was executed in 1997 (Ref E). The Barapind extradition process has proceeded more deliberately, having begun with the Indian government request for extradition in September 1997. Mission believes the time and effort the Indian government has invested in retrieving Barapind -- and the prospect of US cooperation on future extraditions -- will also help protect Barapind's human rights.

Improved Conditions for Sikhs

9. (SBU) Conditions for Sikhs began to improve in the mid-1990s and progress has been rapid during the past five years. In order to answer Department of Homeland Security questions regarding the current treatment of Sikhs in India, Embassy New Delhi investigators have worked in Punjab and other Indian states for years to determine the validity of Sikh asylum applications; to date, we have been unable to substantiate a single such claim. Conditions since the mid-1990s have improved so dramatically that there have been no legitimate grounds for such asylum seekers since that period. Many legitimate asylum seekers who applied before that period and had already been settled in the US and other countries have since returned to India and re-assimilated into Indian society. Indeed, recent press announcements have highlighted the cases of "wanted terrorists" who have since assumed leading positions in the Punjab business community.

Signatory to Convention Against Torture

10. (U) India signed the UN Convention against Torture and other Cruel, Inhuman or Degrading treatment or Punishment (Convention Against Torture or CAT) in October 1997, less than a year after the Sandhus were extradited, and nearly 10 years ago. Although not yet ratified, the Indian government recognizes that "as a signatory, India has good-faith obligation not to act against the objectives and purposes of the Convention" (Ref B).

High Profile, High Visibility, High-Accountability

11. (SBU) Mission is keenly aware of the culture of torture and extrajudicial punishment in Indian jails, as we have outlined in successive Human Rights Reports; furthermore, Mission has been unable authoritatively to confirm whether the Sandhus were tortured by Indian police officials after their extradition. However, [redacted] who lost several relatives to Sikh terrorists in the 1980s-90s -- told us "no one will touch (Barapind)" because his case is considered high profile (in part because of the extradition) and also because of the strength of human rights activists in Punjab (Ref D). Mission understands this will be the first extradition to India from the US since 2000. Mission also notes the continuing Indian press coverage of Abu Salem, who was extradited from Portugal last year for his alleged role as the principal suspect in the March 12, 1993 Mumbai bombings that killed 250 and injured more than 700. If Barapind is extradited, particularly after the Abu Salem extradition and the recent (and extensively media covered) historic visit of President Bush, Mission expects extensive and long-running media coverage will contribute to guaranteeing good behavior on the part of Barapind's jailers.

UNCLASSIFIED

226

**APPENDIX II: US-INDIA : BARAPIND ASSURANCES**

UNCLASSIFIED

UNCLASSIFIED

12. (SBU) We are similarly encouraged by the most recent terrorism case involving Sikh suspects, the May 2005 Delhi cinema bombings (Ref F). Mission believes the high visibility of the case helped ensure that police officers in Delhi, Haryana, and Punjab maintained professional standards. The investigation into the cinema bombings was marked only by arrests, not by extrajudicial killings or other police excesses.

National Human Rights Commission Maturing  
-----

13. (SBU) India's National Human Rights Commission -- the entity created in 1993 and tasked by law "for better protection of human rights" -- was a nascent organization when the Sandhus were extradited in 1997, but now has over a decade of experience in investigating and assessing human rights violations in India. Their mandate includes both positive human rights violations and "negligence in the prevention of such violation," according to the Protection of Human Rights Act (1993). GOI assurances aside, the NHRC is legally empowered to visit prisoners "in any jail or any other institution under the control of the State Government" for this purpose. Their senior officers are empowered to "enter any building where the Commission has reason to believe that any document relating to the subject matter of the inquiry may be found, and may seize any such document." The NHRC is an active organization that operates independently of the government and has loudly criticized some government institutions and actions.

Changed India-US Macro Dynamic  
-----

14. (SBU) Finally, the contours of the India-US relationship have dramatically improved over those in 1997. From a narrow and emerging relationship, we now have a broad-based and deep-rooted bilateral agenda on a range of issues, including counter-terrorism, which was lacking in 1997. Furthermore, the Barapind extradition -- if it is to transpire -- will do so after not one but two US Presidential visits since the Sandhus were extradited. The GOI would be interested in maintaining and furthering these relations, including for future extraditions, and would be more vigilant about not allowing any missteps that could lead to a reversal of relations either on extraditions specifically or on the India-US relationship more broadly.

15. (U) Visit New Delhi's Classified Website:  
<http://www.state.gov/p/aa/newdelhi>  
MULFORD

Additional Addressees:  
None

cc:  
AMCONSUL CALCUTTA  
AMCONSUL CHENNAI  
AMCONSUL MUMBAI  
DEPT OF JUSTICE WASHDC  
NSC WASHDC

Distribution:

TEDS908  
ACTION SCA-00

INFO	LOG-00	AID-00	ACQ-00	CA-00	CIAB-00	INL-00	DODE-00
EH-00	UTED-00	VCI-00	TEDE-00	INR-00	IO-00	JUSE-00	
L-00	VCIE-00	NSAR-00	ISN-00	NSCR-00	OIC-00	CMB-00	
FA-00	FM-00	PRS-00	P-00	SCT-00	ISNE-00	SP-00	
SE-00	STR-00	TRSE-00	T-00	VO-00	IIP-00	PMB-00	
PRM-00	DRL-00	G-00	SAS-00	/000M			

UNCLASSIFIED

227

**APPENDIX II: US-INDIA : BARAPIND ASSURANCES**

UNCLASSIFIED

UNCLASSIFIED

-----AF023B 301519Z /03  
P 301238Z MAR 06  
FM AMEMBASSY NEW DELHI  
TO SECSTATE WASHDC PRIORITY 1956  
INFO AMCONSUL CALCUTTA  
AMCONSUL CHENNAI  
AMCONSUL MUMBAI  
DEPT OF JUSTICE WASHDC  
NSC WASHDC

UNCLAS NEW DELHI 002171

SENSITIVE  
SIPDIS

L FOR SPOMPER AND MQUILIANI  
DRL FOR CCOMPOHOVO

E.O. 12958: N/A  
TAGS: CJAM, CUIS, FTER, FREL, KCRM, PARM, PGOV, IN  
SUBJECT: FOLLOW-UP ON BARAPIND EXTRADITION ASSURANCES

REP: A. STATE 33728  
B. NEW DELHI 994  
C. STATE 6905  
D. 05 NEW DELHI 9513  
E. 12/01/05, POMPER EMAIL TO POST ATTACHING CAT  
SUBMISSION  
F. 05 NEW DELHI 4449

---

End Cable Text

Michel K Gullari 04/04/2006 01:39:24 PM From DBInbox: Search Results

UNCLASSIFIED

# APPENDICES

## III. ASSURANCES IN GUANTANAMO CASES

### APPENDIX III: US-SPAIN - ASSURANCES

Reference ID	Created	Released	Classifi
06MADRID1914	2006-07-28 11:11	2010-11-30 12:12	SECRE

VZCZCXRO3816  
 PP RUEHAG  
 DE RUEHMD #1914/01 2091105  
 ZNY SSSSS ZZH  
 P 281105Z JUL 06  
 FM AMEMBASSY MADRID  
 TO RUEHC/SECSTATE WASHDC PRIORITY 0384  
 INFO RUCNMEM/EU MEMBER STATES COLLECTIVE PRIORITY  
 RUEHLA/AMCONSUL BARCELONA PRIORITY 1994  
 RUCNFB/FBI WASHDC PRIORITY  
 RUEKJCS/SECDEF WASHDC PRIORITY  
 RUEAWJA/DEPT OF JUSTICE WASHDC PRIORITY  
 RUEAIIA/CIA WASHDC PRIORITY

S E C R E T SECTION 01 OF 03 MADRID 001914

SIPDIS

SIPDIS

E.O. 12958: DECL: 07/25/2016  
 TAGS: PTER PGOV PREL SF  
 SUBJECT: COURT FREES "SPANISH TALIBAN"

REF: A. 2005 MADRID 3528  
 FB. TD-314/09169-05

MADRID 00001914 001.2 OF 003

Classified By: A/DCM Kathleen Fitzpatrick; reasons 1.4 (B) a

¶1. (C) Summary. The Spanish Supreme Court announced July 24 that it had annulled the six-year prison sentence handed down in September by Spain's National Court against accused terrorist Hamed Abderrahaman Ahmed, known in the media as the "Spanish Taliban." Abderrahaman, a Spanish national captured in Afghanistan by U.S. forces and held at Guantanamo until being turned over to Spanish authorities in February 2004, was immediately released from prison. The Supreme Court found that Spanish prosecutors could not use any evidence collected during their interview with Abderrahaman while he was being held at Guantanamo under conditions the Court termed "impossible to explain, much less justify." The Court threw out other evidence collected against Abderrahaman prior to his capture in Afghanistan and determined that prosecutor had skewed Abderrahaman's testimony to incriminate him. This finding had an immediate effect on the case of Lahcen Ikassrien, a Moroccan national and former Guantanamo detainee transferred to Spanish custody in July 2005. Prosecutors announced their recommendation to release Ikassrien on bail while awaiting trial on terrorism charges, while



**APPENDIX III: US-SPAIN - ASSURANCES**

Abderrahaman's attorney said he would sue the U.S. Government for suffering allegedly suffered by Abderrahaman during his incarceration in Guantanamo. Spanish officials involved in the Abderrahaman case expressed disappointment in his release, but also said that he was not particularly dangerous and dismissed him as a threat. This ruling does not indicate a reduction in counter-terrorism cooperation by Spanish law enforcement officials, but the Supreme Court's decisions will clearly have to be taken into account as we pursue improved judicial cooperation with Spain. The Spanish judicial branch carefully guards its hard-won independence, meaning it will not shy away from rulings that cut across Spanish Government (or USG) objectives. End Summary.

//BACKGROUND//

¶2. (S) According to sentencing documents, Abderrahaman established contacts with al-Qa'ida elements in the Spanish enclave of Ceuta and, in August 2001, traveled to Afghanistan for religious and military training in Kandahar. When the U.S. invaded Afghanistan in the wake of the September 11 attacks, Abderrahaman fled to Pakistan, where he was reportedly captured by the Pakistani military, who turned him over to U.S. forces. Abderrahaman was transferred to Guantanamo, where he was held until he was turned over to Spanish authorities in February 2004 in response to a request by magistrate Baltasar Garzon, who wanted to investigate Abderrahaman in connection with the trial of al-Qa'ida cell leader Imad Eddin Barakat Yarkas. Under the terms of that transfer, Spanish authorities agreed to:

- Be prepared to detain, investigate, and prosecute Abderrahaman, while treating him humanely;
- Share with USG authorities any information developed during the investigation;
- Provide reasonable notice of any decision to release or transfer Abderrahaman;
- Conduct surveillance of Abderrahaman following his release, and share any relevant information with the U.S.; and,
- Provide U.S. officials access to Abderrahaman if necessary.

¶3. (S) Garzon released Abderrahaman on bail in July 2004, finding that Spanish National Police interrogations of Abderrahaman while he was being held in Guantanamo could not be used as evidence. However, the National Police had previous wiretap evidence linking Abderrahaman to Barakat Yarkas as well as what they viewed as incriminating statements by Abderrahaman to police investigators following his release from Guantanamo. In early 2005, a confidential police assessment shared with USG officials concluded that Abderrahaman had the "mental maturity of a 12-year-old," was "naive and foolish," and did not seem to comprehend the gravity of his detention in Guantanamo. But the report also noted Abderrahaman's consistent statements to Spanish police that he wanted to "go fight with the Chechens and kill Russians." (REF B). Police provided this information to prosecutors and to the National Court, which found

MADRID 00001914 002.2 OF 003

Abderrahaman guilty in September 2005 of "membership in a terrorist organization." The case was then automatically transferred to the Supreme Court to either overturn or

**APPENDIX III: US-SPAIN - ASSURANCES**

confirm the sentence.

//SUPREME COURT THROWS OUT CONVICTION//

¶4. (U) The Supreme Court overturned Abderrahaman's conviction on the basis that the National Court had allowed prosecutors to use inadmissible evidence to establish Abderrahaman's guilt and that prosecutors had improperly translated Abderrahaman's incriminating testimony. Specifically, the Supreme Court found that testimony obtained by Spanish police investigators during the course of interviews of Abderrahaman in Guantanamo could not be used in court because the "interrogations, euphemistically called "interviews," took place under unequal circumstances because (the defendant) was in detention" at the time of the interrogations. Further, the Supreme Court finding stated that "although it is not for (this Court) to issue a pronouncement regarding the situation of those held in indefinite detention, we must state that, as Ahmed was held in detention under the authority of the U.S. military since he was turned over (to the U.S.) on an undetermined date, all information obtained under such conditions must be declared totally null and nonexistent." The Court did go on to pronounce its position on Guantanamo, criticizing the detention of "hundreds of people, among them Ahmed, without charges, without rights, without controls, and without limits," a situation the Court termed "impossible to explain, much less justify."

¶5. (U) Just as damaging to the prosecution's case was the Court's decision to throw out telephone intercepts incriminating Abderrahaman obtained during the course of the Barakat Yarkas investigation and long before Abderrahaman's detention in Afghanistan. The judges found that the intercepts had been obtained improperly (NOTE: the Supreme Court had already ruled against allowing the intercepts during its review of the convictions of Barakat Yarkas cell members). The Supreme Court also determined that prosecutors had improperly translated Abderrahaman's statements and had omitted exculpatory evidence, such as Abderrahaman's declaration that he did not belong to al-Qa'ida and had not received military training. The Court criticized prosecutors for omitting a document "signed in Guantanamo by Abderrahaman before being turned over to Spanish authorities," a document in which U.S. authorities allegedly acknowledged that Abderrahaman was not a member of al-Qa'ida. On this basis, the Supreme Court found that the case against Abderrahaman failed to meet the minimum standards established by the European Court of Human Rights for a finding of "guilty beyond a reasonable doubt."

¶6. (C) Legat contacted Eduardo Fungairino, currently the head of an anti-terrorism office assigned to the Supreme Court and formerly the chief of the National Prosecutor's office, on July 25 for his insights into the Abderrahaman decision. Fungairino (strictly protect) dismissed the Supreme Court decision as "facile and populist." He said that while he acknowledged errors on the part of National Court prosecutors in the case (and the legal problems generated by the circumstances at Guantanamo), in his view the Supreme Court ignored evidence of Abderrahaman's terrorist training in Pakistan and Afghanistan, activities that are clearly criminal under Spanish law. Fungairino indicated that one consolation, in his view, was that Abderrahaman did not represent a serious threat, echoing police assessments that Abderrahaman was a pawn in events beyond his understanding (see para 3).

//ABDERRAHAMAN PLANS TO SUE USG//

**APPENDIX III: US-SPAIN - ASSURANCES**

¶7. (U) In a July 25 press conference organized by Abderrahaman attorney Marcos Garcia Montes, Abderrahaman told reporters that he hoped to gain employment as a truck driver and claimed that his vision had degraded so much during his detention in Guantanamo that he was unfit for other employment. Garcia Montes said that he planned to file a "multimillion dollar suit" against the U.S. Government for damages, including post-traumatic stress and vision loss on the part of his client. The attorney told reporters that Abderrahaman's suffering had been such that he could no longer recall specific elements of his detention in Guantanamo, nor of his time in Pakistan and Afghanistan. Abderrahaman roundly denied ever having been a terrorist and insisted that his prior references to himself as a "martyr" referred to his treatment in detention. Prompted by his

MADRID 00001914 003.2 OF 003

attorney, Abderrahaman related his alleged mistreatment in U.S. detention, including the presence of a powerful lightbulb in his cell that impeded sleep and threats that he would never see his family again. Abderrahaman said he planned to write a book about his experiences.

//IKASSRIEN ALSO TO BE RELEASED//

¶8. (U) Following the Supreme Court decision in the Abderrahaman case, National Court prosecutors announced that they would support the release on bail of Moroccan national Lahcen Ikassrien, who was transferred to Spain from Guantanamo in July 2005 and held in preventive detention since his arrival. This comes less than a month after prosecutors filed formal charges against Ikassrien, seeking an eight-year prison term on charges of membership in a terrorist organization. The case against Ikassrien is based on three police interviews with him when he was being held at Guantanamo (by the same investigators who interviewed Abderrahaman) and on telephone intercepts developed in the course of the Barakat Yarkas investigation, the same evidence thrown out in the Abderrahaman case. (NOTE: According to press reports, the Spanish police intercepts place Ikassrien in Istanbul, Turkey in November 2000 along with suspected terrorists Amer Azizi and Said Berraj. In a separate intercept, Ikassrien requested assistance with documentation from al-Qa'ida cell leader Barakat Yarkas). Prosecutors have maintained that Ikassrien's own testimony since his transfer from Guantanamo incriminates him since he has acknowledged traveling to Afghanistan to "collaborate with the Islamist regime." That is disputed by court observers who say that Ikassrien's statements to the National Court have been substantially less incriminating than those of Abderrahaman.

¶9. (U) Ikassrien's attorney has already homed in on Guantanamo as key to his client's defense, focusing on Ikassrien's alleged mistreatment while in US custody. The attorney's request claims that "while Ikassrien was in Guantanamo, he was gassed, beaten, mistreated, and insulted, and subject to repeated inspections, during which the military officials undertaking the inspections would damage or destroy (Ikassrien's) books, especially the Koran." Ikassrien's attorney also alleges that his client was forcibly injected with a substance that led to severe itching that continues to affect him.

//COMMENT//

¶10. (C) Spanish counter-terrorism legislation was designed over three decades to combat ETA, a group with a defined structure, doctrine, and modus operandi. Police,

**APPENDIX III: US-SPAIN - ASSURANCES**

prosecutors, and magistrates working on investigations of the far more amorphous cells of Islamist extremist have struggled to develop evidence sufficient to meet the high threshold set by the Spanish Supreme Court. This was reflected in an earlier decision by the Supreme Court to reverse the convictions of several Barakat Yarkas cell members and to reduce Barakat Yarkas' sentence on the basis that prosecutors had not proved his connection to the September 11 attacks in the U.S. (USG observers of the trial noted that the evidence on the September 11 connection was indeed weak). Clearly, in the Abderrahaman case the Supreme Court was also eager to use this case as a platform to criticize U.S. detainee policies in Guantanamo. While this sentiment has not influenced Spanish police to reduce their close collaboration with the U.S. in fighting terrorism, we must take it into account as we pursue increased judicial cooperation with Spain in terrorism cases. The Spanish judiciary carefully guards its independence (a major achievement of the post-Franco era) and has not shied from taking decisions that cut across the objectives of the Spanish Government.

AGUIRRE

# APPENDICES

## IV. ASSURANCES IN AFGHAN DETAINEE TRANSFERS

### APPENDIX IV: UK -AFGHAN MOU

MEMORANDUM OF UNDERSTANDING  
BETWEEN  
THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND  
NORTHERN IRELAND  
AND  
THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF  
AFGHANISTAN  
CONCERNING  
TRANSFER BY THE UNITED KINGDOM ARMED FORCES TO AFGHAN  
AUTHORITIES OF PERSONS DETAINED IN AFGHANISTAN.  
CONTENTS

Paragraph No	Heading
	INTRODUCTION
PARA 1	DEFINITIONS
PARA 2	PURPOSE AND SCOPE
PARA 3	RESPONSIBILITY OF PARTICIPANTS
PARA 4	ACCESS TO DETAINEES
PARA 5	RECORD KEEPING AND NOTIFICATION OF CHANGE
PARA6	USE OF THE DEATH PENALTY
PARA 7	DURATION AND TERMINATION

#### INTRODUCTION

This Memorandum of Understanding records the arrangement reached between the Government of the United Kingdom of Great Britain and Northern Ireland (“the United Kingdom”) and the Government of the Islamic Republic of Afghanistan (“Afghanistan”), hereinafter referred to jointly as the Participants, in the event of a transfer by the United Kingdom Armed Forces to Afghan authorities of persons detained in Afghanistan.

HAVING REGARD to the need to respect basic standards of international human rights law such as the right to life, and the prohibition against torture and cruel, inhumane and degrading treatment:

## APPENDIX IV: UK -AFGHAN MOU

HAVING ACCEPTED the MOU for UK Forces deployed in Afghanistan dated 30 September 2005:

HAVE REACHED the following understandings:

### PARAGRAPH 1 – DEFINITIONS

1.1 For the purposes of this Memorandum the following definitions apply:

- a. “United Kingdom Armed Forces” (UK AF) means the Armed Forces of the United Kingdom of Great Britain and Northern Ireland when deployed to the territory of the Islamic Republic of Afghanistan. The term includes all military personnel together with their ships, aircraft, vehicles, stores, equipment, communications, ammunitions, weapons and provisions together with the civilian components of such forces, as well as all air, sea and surface movement resources, together with their supporting services, required to deploy the forces mentioned above;
- b. “Area of Operations” means the sovereign territory of the Islamic Republic of Afghanistan including its airspace;
- c. “Detention” refers to the right of UK forces operating under ISAF to arrest and detain persons where necessary for force protection, self-defence, and accomplishment of mission so far as is authorised by the relevant UNSCRs.

### PARA 2 – PURPOSE AND SCOPE

2.1 The purpose of this Memorandum is to:

- Establish the responsibilities, principles and procedures in the event of the transfer by the UK AF to Afghan authorities of persons detained in Afghanistan.
- Ensure that Participants will observe the basic principles of international human rights law such as the right to life and the prohibition on torture and cruel, inhumane and degrading treatment pertaining to the treatment and transfer of persons by the UK AF to Afghan authorities and their treatment.

### PARA 3 – RESPONSIBILITIES OF PARTICIPANTS

3.1 The UK AF will only arrest and detain personnel where permitted under ISAF Rules of Engagement. All detainees will be treated by UK AF in accordance with applicable provisions of international human rights law. Detainees will be transferred to the authorities of Afghanistan at the earliest opportunity where suitable facilities exist. Where such facilities are not in existence, the detainee will either be released or transferred to an ISAF approved holding facility.

3.2 The Afghan authorities will accept the transfer of persons arrested and detained by the UK AF for investigation and possible criminal proceedings. The Afghan authorities will

**APPENDIX IV: UK -AFGHAN MOU**

be responsible for treating such individuals in accordance with Afghanistan's international human rights obligations including prohibiting torture and cruel, inhumane and degrading treatment, protection against torture and using only such force as is reasonable to guard against escape. The Afghan authorities will ensure that any detainee transferred to them by the UK AF will not be transferred to the authority of another state, including detention in another country, without the prior written agreement of the UK.

**PARA 4 – ACCESS TO DETAINEES**

4.1 Representatives of the Afghan Independent Human Rights Commission, and UK personnel including representatives of the British Embassy, members of the UK AF and others as accepted between the Participants, will have full access to any persons transferred by the UK AF to Afghan authorities whilst such persons are in custody. The International Committee of the Red Cross and Red Crescent (ICRC) and relevant human rights institutions with the UN system will be allowed to visit such persons.

4.2 UK personnel, including members of the UK AF will have full access to question any persons they transfer to the Afghan authorities whilst such persons are in custody.

**PARA 5 – RECORD KEEPING AND NOTIFICATION OF CHANGE**

5.1 The UK AF will notify the ICRC and the Afghan Independent Human Rights Commission, normally within 24 hours, and if not, as soon as possible after of when a person has been transferred to Afghan authorities. The Afghan authorities will be responsible for keeping an accurate account of all persons transferred to them by the UK AF, including, but not limited to; a record of any seized property, the detainee's physical condition following initial detention, record of transfer to an alternative holding facility and record of any prosecution status. Records should be available upon request.

5.2 The United Kingdom will be notified prior to the initiation of criminal proceedings involving persons transferred by the UK AF and prior to the release of a detainee. The United Kingdom will also be notified of any material change of circumstance regarding the detainee including any instance of alleged improper treatment.

**PARA 6 – USE OF THE DEATH PENALTY**

6.1 No person transferred by the UK AF to Afghan authorities will be subject to the execution of the death penalty.

**PARA 7 – DURATION AND TERMINATION**

7.1 This Memorandum will have effect upon the date of the later signature by the relevant authorities and will remain in effect unless terminated by mutual consent or by either Participant giving not less than six months' notice in writing to the other Participant.

7.2 In the event that this Memorandum is terminated, the relevant provisions will continue to be applied in respect of any matters not resolved at the time of termination.

**APPENDIX IV: UK -AFGHAN MOU**

7.3 Any dispute concerning the interpretation or application of this Memorandum of Understanding will be resolved exclusively by negotiations between the Participants.

The foregoing record represents the understandings reached between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Islamic Republic of Afghanistan upon the matters referred to therein.

Signed in Kabul on 23 April 2005, in duplicate in English and Dari languages. For the purposes of interpretation the English version is authoritative.<sup>78</sup>

For the Secretary of State for  
Defence for the Government  
of the United Kingdom of  
Great Britain and Northern  
Ireland

For the Minister of Defence  
for the Government of the  
Islamic Republic of  
Afghanistan



**APPENDIX IV: CANADA- AFGHAN : MOU 2005**

**ARRANGEMENT  
FOR THE TRANSFER OF DETAINEES  
BETWEEN  
THE CANADIAN FORCES  
AND  
THE MINISTRY OF DEFENCE OF THE ISLAMIC REPUBLIC OF  
AFGHANISTAN**

**THE CANADIAN FORCES and THE MINISTER OF DEFENCE OF THE ISLAMIC REPUBLIC OF AFGHANISTAN (the “Participants”),** have consented to the following Arrangement:

1. This arrangement establishes procedures in the event of a transfer, from the custody of the Canadian Forces to the custody of any detention facility operated by the Islamic Republic of Afghanistan of any detainee in the temporary custody of the Canadian Forces in Afghanistan.
2. “Detainee” means any person, other than a Canadian national, whose initial capture and detention, for whatever reason, occurred at the hands of members of the Canadian Forces.
3. The Participants will treat detainees in accordance with the standards set out in the Third Geneva Convention.
4. The International Committee of the Red Cross will have a right to visit detainees at any time while they are in custody, whether held by the Canadian Forces or by Afghanistan. Visits may be delayed by a Detaining Power only as an exceptional and temporary measure for reasons of imperative military necessity.
5. The Afghan authorities will accept (as Accepting Power) detainees who have been detained by the Canadian Forces (the Transferring Power) and will be responsible for maintaining and safeguarding detainees, and for ensuring the protections provided in Paragraph 3 above, to all such detainees whose custody has been transferred to them.
6. Detainees who are wounded or sick will be cared for by the Detaining Power at first instance. Sick or wounded detainees will not be transferred as long as their recovery may be endangered by the journey, unless their safety, or the safety of others, imperatively demands it. Arrangements to transfer wounded or sick detainees will be expedited in order to reduce risk to their health or facilitate medical treatment.
7. The Participants will be responsible for maintaining accurate written records accounting for all detainees that have passed through their custody. Such written records should, at a minimum, contain personal information (as far as known or indicated), gender, physical description and medical condition of the detainee, and, subject to security considerations, the location and circumstances of capture. Such written records will be available for inspection by the International Committee of the Red Cross upon request. Copies of all records relating to the

**APPENDIX IV: CANADA- AFGHAN : MOU 2005**

detainee will be transferred to any subsequent Accepting Power should the detainee be subsequently transferred. The originals of all records will be retained by the Transferring Power.

8. A Detaining Power, can be either a Transferring or Accepting Power, and will be a Power which detains the detainee for any period of time beyond that reasonably required between initial capture and transfer. The Detaining Power will be responsible for classification of detainee's legal status under international law. Should any doubt exist whether a detainee may be a Prisoner of War, the detainee will be treated humanely, at all times and under all circumstances, in a manner consistent with the rights and protections of the Third Geneva Convention, even if subsequently transferred to the custody of an Accepting Power.
9. Where there is doubt as to which Participant is the Detaining Power, all Participants will be jointly responsible for and have full access to all persons detained (and any records concerning their treatment) until the Detaining Power has by mutual agreement been determined by the Participants.
10. Recognizing their obligations pursuant to international law to assure that detainees continue to receive humane treatment and protections to the standards set out in the Third Geneva Convention, the Participants, upon transferring a detainee, will notify the International Committee of the Red Cross through appropriate national channels.
11. Participants recognize the legitimate role of the Afghan Independent Human Rights Commission within the territory of Afghanistan, including in regard to the treatment of detainees, and undertake to cooperate fully with the Commission in the exercise of its role.
12. No person transferred from the Canadian Forces to Afghan authorities will be subject to the application of the death penalty.
13. At the request of one of the Participants, the Participants will consult on the implementation of this arrangement.

Signed in duplicate in Kabul, on the 18<sup>th</sup> of December, 2005, in the English , French, Dari and Pashto languages, all texts being equally valid. For the purposes of interpretation, the English language version of this Arrangement is authoritative.

Minister of Defence

Chief of the Defence Staff

---

Abdul Raheem Wardak  
Minister

---

R. J. Hillier  
General  
Chief of Defence  
for the Minister of Defence

**APPENDIX IV: CANADA- AFGHAN : MOU 2007**

**ARRANGEMENT  
FOR THE TRANSFER OF DETAINEES  
BETWEEN  
THE GOVERNMENT OF CANADA  
AND  
THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF  
AFGHANISTAN**

**A2**


**THE GOVERNMENT OF CANADA and THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF AFGHANISTAN (the “Participants”)**, have consented to the following Arrangement:

1. The following supplements the Arrangement for the Transfer of Detainees Between the Canadian Forces and the Ministry of Defence of the Islamic Republic of Afghanistan of December 18, 2005, which continues in effect.
2. Representatives of the Afghanistan Independent Human Rights Commission (AIHRC), and Canadian Government personnel, including representatives of the Canadian Embassy in Kabul and others empowered to represent the Government of Canada will have full and unrestricted access to any persons transferred by the Canadian Forces to Afghan authorities while such persons are in custody. In addition to the International Committee of the Red Cross (ICRC), relevant human rights institutions with the UN system will be allowed access to visit such persons.
3. The Government of Canada will be notified prior to the initiation of proceedings involving persons transferred by the Canadian Forces and prior to the release of the detainee. The Government of Canada will also be notified of any material change of circumstances regarding the detainee including any instance of alleged improper treatment.
4. The Afghan authorities will be responsible for treating such individuals in accordance with Afghanistan's international human rights obligations including prohibiting torture and cruel, inhuman or degrading treatment, protection against torture and using only such force as is reasonable to guard against escape.
5. The Afghan authorities will ensure that any detainee transferred to them by the Canadian Forces will not be transferred to the authority of another state, including detention in another country, without the prior written agreement of the Government of Canada.
6. Records required to be maintained by paragraph 7 of the December 2005 Arrangement will also be available for inspection by officials of the Government of Canada and the AIHRC on request.

**APPENDIX IV: CANADA- AFGHAN : MOU 2007**

7. In order to facilitate ongoing access and capacity building projects by the Government of Canada, the Afghan Government will hold detainees transferred by Canadian Forces in a limited number of facilities.
8. The AIHRC and officials of the Government of Canada will have full and unrestricted access to detention facilities where detainees transferred by Canadian Forces are held.
9. During such access, representatives will, upon request, be permitted to interview detainees in private, without Afghan authorities present.
10. In the event that allegations come to the attention of the Government of Afghanistan that a detainee transferred by the Canadian Forces to Afghan authorities has been mistreated, the following corrective action will be undertaken: the Government of Afghanistan will investigate allegations of abuse and mistreatment and prosecute in accordance with national law and internationally applicable legal standards; the Government of Afghanistan will inform the Government of Canada, the AIHRC and the ICRC of the steps it is taking to investigate such allegations and any corrective action taken.
11. The Government of Afghanistan and the Government of Canada will cooperate closely to maximize capacity building activities directed towards improving the Afghanistan corrections and justice systems.
12. The Government of Afghanistan will ensure that all prison authorities under its jurisdiction are advised of the provisions of the December 2005 Arrangement and of this Arrangement.
13. This Arrangement may be amended at any time by mutual written consent of the Participants.

Signed in duplicate in Kabul, on the 3<sup>rd</sup> day of May, 2007, in the English and Dari languages, all versions being valid. For the purposes of interpretation, the English language version of this Arrangement is authoritative.



H.E. Abdul Rahim Wardak  
Minister of Defence



Arif Lalani  
Ambassador of Canada

**APPENDIX IV: US-AFGHAN EXCHANGE OF LETTERS**Koninkrijk  
der NederlandenGovernment  
of Canada    Gouvernement  
du Canada

+ United States

\_\_\_\_\_2007

**ACCESS TO    DETAINEES TRANSFERRED TO THE GOVERNMENT OF AFGHANISTAN**

This letter seeks to set forth a common approach, in principle, of all the undersigned concerning the provisions of the bilateral arrangements (Memoranda of Understanding, exchange of letters) between the Governments of Canada, [Denmark], the Netherlands, [Norway,] the United Kingdom and the United States with the Government of Afghanistan regarding access to individuals detained by their forces and transferred to the custody of the Afghan authorities. This letter is without prejudice to any of the provisions of the aforementioned bilateral arrangements.

It is the understanding of the undersigned that the aforementioned bilateral arrangements are to be interpreted as permitting officials from each undersigned government (including officials from our respective Embassies, members of our armed forces, and others duly authorized to represent our governments) to enjoy access to Afghan detention facilities to the extent necessary to ascertain the location and treatment of any detainee transferred by that government to the Government of Afghanistan. On request, an official from one of the undersigned governments may interview in private any detainee transferred by that government to the custody of Afghan authorities. Access to Afghan facilities is to be permitted to organizations that are already afforded access under that government's bilateral arrangements with the Government of Afghanistan including, where applicable, the International Committee of the Red Cross and Red Crescent (ICRC), relevant human rights institutions within the UN system, and the Afghan Independent Human Rights Commission (AIHRC).

We kindly request you to confirm this understanding.

Sir Sherard Cowper-Coles KCMG LVO.....  
HM Ambassador  
British Embassy, Kabul

Ambassador  
United States of America

Arif Lalani  
Ambassador  
Canadian Embassy, Kabul

**APPENDIX IV: US-AFGHAN EXCHANGE OF LETTERS**

Hans Blankenberg.....  
Ambassador  
Embassy of the Netherlands, Kabul

Jens Haarlov.....  
Chargé d'affaires  
Embassy of Denmark, Kabul

Jan Erik Leikvang.....  
Ambassador  
Embassy of Norway, Kabul

**DRAFT LETTER IN REPLY [TO BE EXCHANGED ON SAME DAY]**

On behalf of the Government of the Islamic Republic of Afghanistan, I acknowledge the content of the letter of [date] received from the Ambassadors of .....

and the Chargé d'Affaires of ..... and confirm the understandings set forth therein.

The Government of Afghanistan agrees to address any AIHRC recommendations for improvements, and to notify the AIHRC and relevant Embassies of the actions taken.

The NDS will issue a written instruction to all its sub-offices (provincial offices) informing them of the access and visiting procedures as outlined above.

In **PROMISES TO KEEP** the Human Rights Institute at Columbia Law School describes the need for institutional reform in US policy on transferring individuals to the risk of torture on the basis of “diplomatic assurances”: promises of humane treatment and access to verify conditions.

**THE US GOVERNMENT HAS FAILED TO ARTICULATE KEY PARAMETERS OF ITS ASSURANCES POLICY** and whether they are being followed, despite the Obama administration’s commitment to transparency and reform. Instead of disclosing practice, the government has generally asserted that it does not send people to be tortured. This opaque defense, eerily reminiscent of the Bush administration’s too often empty renunciations of torture, comes with a failure to establish any known legal constraints on assurances practice. Even assuming the current administration’s best intentions, institutional reform is crucial; without it, the door is left open to a reversion to abusive practice under an administration less committed to human rights principles.

**THE US SHOULD ADOPT CRUCIAL REFORMS** reflecting international human rights principles, drawing on a vast catalogue of findings, analyses and jurisprudence from UN experts and bodies and the European Court of Human Rights. It should rule out the use of assurances where torture is systematic or where the receiving government has a record of abuse against terrorism suspects.

**THE EXPERIENCES OF THE UK AND CANADA, KEY US ALLIES, SHOW THAT GREATER TRANSPARENCY AND ACCOUNTABILITY TO COURTS IS FEASIBLE** and potentially advantageous. On the other hand, their experiences reveal persistent failings in assurances-based transfers, including decision-makers’ failures to consider the clandestine nature of torture and ill-treatment in evaluating the reliability of assurances and allegations of past abuse.

**KNOWN CASES SUGGEST THAT THE US APPROACH TO VERIFYING WHETHER TORTURE HAS OCCURRED IS AD HOC AND INSUFFICIENT.** The US should adopt standards reflecting the work of torture prevention monitoring bodies and the International Committee of the Red Cross, but acknowledge that monitoring may be insufficient to protect against abuse, especially where torture is routinely practiced with impunity.