

## **Still at Risk: Diplomatic Assurances No Safeguard Against Torture**

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\*Under each case title is the sending country and the receiving or requesting country; for example, Sweden expelled Ahmed Agiza and Mohammed al-Zari to Egypt. In some cases, the sending country attempted to return a person based on diplomatic assurances, but a court prohibited the return, ruling that the assurances were not an adequate safeguard against torture; for example, the Netherlands attempted to extradite Nuriye Kesbir to Turkey.

## Executive Summary

*The Security Council calls upon states to cooperate fully in the fight against terrorism...in order to find, deny safe haven and bring to justice, on the basis of the principle to extradite or prosecute, any person who supports, facilitates [or] participates in...the commission of terrorist acts or provides safe havens.*

- United Nations Security Council Resolution 1566

*States must ensure that any measures taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law.*

- United Nations Security Council Resolution 1566

The global effort to apprehend, interrogate, and prosecute persons suspected of involvement in terrorist activities is a vital project. It is incumbent on states to work individually and collectively to ensure that such persons, if proven guilty, are brought to justice. It is also incumbent on them, however, to ensure that basic rights are upheld.

There is substantial evidence that in the course of the global “war on terrorism,” an increasing number of governments have transferred, or proposed sending, alleged terrorist suspects to countries where they know the suspects will be at risk of torture or ill-treatment. Recipient countries have included Egypt, Syria, Uzbekistan, and Yemen, where torture is a systemic human rights problem. Such transfers have also been effected or proposed to countries such as Algeria, Morocco, Russia, Tunisia, and Turkey, where members of particular groups—Islamists, Chechens, Kurds—are routinely singled out for the worst forms of abuse.

Because the international ban on torture is absolute and transfers to risk of torture are patently illegal, many sending governments have sought “diplomatic assurances” from the receiving country that the suspects would not be tortured or ill-treated upon return. In contexts where torture is a serious and persistent problem, or there is otherwise reason to believe that particular individuals will be targeted for torture and ill-treatment, diplomatic assurances do not and cannot prevent torture. Sending countries that rely on such assurances are either engaging in wishful thinking or using the assurances as a figleaf to cover their complicity in torture and their role in the erosion of the international norm against torture. The practice should stop.

The use of diplomatic assurances against torture is a global phenomenon, with sending countries in North America and Europe leading the charge. The issue of diplomatic

assurances against torture gained notoriety recently when U.S. officials acknowledged a large number of transfers of suspects to countries where torture is a serious human rights problem, claiming that U.S. authorities regularly sought and received diplomatic assurances of humane treatment from receiving governments prior to the transfers. In an increasing number of those cases, the suspects have credibly alleged that they were tortured.

But the problem is much broader. The Canadian government's "security certificate" regime permits deportations of alleged terror suspects to places where they are at risk of torture. To stem criticism in some of these cases, the government has sought assurances against torture from receiving states such as Morocco and Egypt. The December 2001 expulsions of two Egyptian asylum seekers from Sweden based on assurances against torture caused a national scandal after the men alleged that they had been tortured and ill-treated in Egyptian custody. The government of the United Kingdom recently proposed securing assurances against torture to transfer terrorist suspects to Algeria and Morocco, countries where persons labeled "terrorist" are routinely targeted for abusive treatment, including torture. Governments in the Netherlands, Austria, Germany and Georgia have also sought assurances to effect extraditions to countries such as Turkey and Russia, where terrorism suspects are at heightened risk of abusive treatment in detention.

The picture is not entirely bleak. As described below, some cases involving the reliability and sufficiency of assurances have come before courts in several different jurisdictions and some courts already are drawing the line and upholding the ban on sending people to torture. Still, there is great confusion even in the current court cases, reflecting insufficient appreciation of the dynamics of torture and of the hollow-shell that diplomatic assurances represent when applied in situations where there is a risk of torture and ill treatment.

This report draws on new research collected over the past year and from Human Rights Watch's April 2004 report *"Empty Promises:" Diplomatic Assurances No Safeguard against Torture* to illustrate the bankruptcy of existing rationalizations for the use of diplomatic assurances in the torture context.<sup>1</sup> It summarizes applicable international law, details the practical reasons why diplomatic assurances cannot be relied on in the torture context, and analyzes new cases from a number of jurisdictions in which courts have addressed the issue or are currently grappling with it.

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<sup>1</sup> Human Rights Watch Report, *"Empty Promises:" Diplomatic Assurances No Safeguard against Torture*, April 2004 [online] <http://hrw.org/reports/2004/un0404/> (retrieved March 20, 2005).

This report begins with a summary of relevant law. The ban against torture is absolute and there is a concomitant absolute prohibition against sending persons—no matter what their crime or suspected activity—to a place where they would be at risk of torture or cruel, inhuman or degrading treatment or punishment (the *nonrefoulement* obligation). Every international treaty that addresses the issue is unambiguous on this point.

Because of the prominence diplomatic assurances have assumed in the counter-terrorism context, moreover, an increasing number of authoritative human rights experts have addressed the issue. All have expressed alarm that governments are using assurances to circumvent their most fundamental human rights obligations.

Significantly, sending states request assurances only when there is a perceived need. We have found that governments attempting to secure assurances against torture or ill-treatment seek such guarantees only from authorities in states where torture is systemic, where torture and ill-treatment are recalcitrant or endemic abuses, or where members of a particular ethnic, racial, religious, political, social, or other identifiable group are targeted and routinely tortured. We have yet to come across a case where assurances have been sought from a country in which torture and ill-treatment were not acknowledged human rights problems.

The second part of this report explains why diplomatic assurances cannot provide effective protection against torture and ill-treatment in such circumstances. First, they are based on trust that the receiving state will uphold its word when there is no basis for such trust. Governments in states where torture is a serious human rights problem almost always deny such abusive practices. It defies common sense to presume that a government that routinely flouts its obligations under international law can be trusted to respect those obligations in an isolated case. And indeed, as already noted, there is an increasing number of cases in which allegations of torture are emerging after individuals are returned based on such assurances.

Second, post-return monitoring mechanisms, on which some governments have relied to ensure compliance with diplomatic assurances, have proven no guarantee against torture. Torture is practiced in secret and its perpetrators are often expert at keeping such abuses from being detected. Post-return monitoring schemes often lack many basic safeguards, including private interviews with detainees without advance notice to prison authorities and medical examinations by independent doctors. Many detainees will refuse to speak of abusive treatment in any event due to fear of retribution from prison authorities.

Third, when diplomatic assurances fail to protect returnees from torture as they so often do, there is no way to hold the sending or receiving governments accountable. Diplomatic assurances have no legal effect and the person who they aim to protect has no recourse if the assurances are breached.

The final part of this report analyzes specific cases. This section begins with the United States due to its pervasive use of diplomatic assurances in rendition and immigration cases, and to effect returns of detainees from Guantánamo Bay. It does not address all rendition cases where evidence of torture has surfaced, but focuses on those where assurances have been a confirmed feature of the controversy. The next section on Canada details the use of assurances in both national security cases and asylum cases, an indication that their use in that country is also becoming routine. The final section on Europe documents an alarming and growing trend toward securing diplomatic assurances against torture and ill-treatment to effect extraditions, deportations, and expulsions, despite Europe's claim to having the most advanced human rights protection system in the world.

The cases illustrate that individual protection is consistently sacrificed to state interest, that even well-intentioned monitoring under diplomatic auspices is ineffectual, and that, in the end, sending and receiving states have a common interest in pretending assurances are meaningful rather than verifying that they actually are.

The cases also show that, in the last year, diplomatic assurances have emerged as an important issue for national governments and courts, and for public debate. Some governments put significant effort into securing and refining diplomatic assurances to avoid the perception that they are in breach of their human rights obligations. They are trying to perfect an inherently flawed device. In other cases, governments have resorted to patently unreliable assurances merely to facilitate a return, with little concern for the abusive practices of the government proffering the assurances, to give the veneer of compliance with international law.

Once a sending government acknowledges that a risk of torture exists in a specific country, it is incumbent upon it to refuse to transfer a person to that country. Sending governments cannot bypass this rule by securing unreliable and unenforceable diplomatic assurances against torture. Receiving governments must establish a verifiable record of compliance with international norms against torture to build confidence that they will not torture and ill-treat people upon return. Such confidence cannot and should not be gained from a simple offering of untrustworthy assurances.

## The Legal Prohibition against Returns to Risk of Torture and Ill-Treatment

International law is clear: torture and cruel, inhuman or degrading treatment or punishment (hereinafter “ill-treatment”) are prohibited absolutely, in all situations and at all times, as is the transfer of any person under any circumstances to a place where he or she would be at risk of such abuse.<sup>2</sup>

### ***International Law***

The absolute prohibition against torture and ill-treatment has been much discussed in the wake of revelations in April 2004 of detainee mistreatment at Abu Ghraib prison by U.S. military and intelligence personnel.<sup>3</sup> Far less public discussion has been dedicated to the concomitant and equally absolute prohibition against returning or transferring a person to a place where he or she would be at risk of torture and ill-treatment.<sup>4</sup> The prohibition against torture and ill-treatment, including the ban on such transfers, is absolute and permits no exceptions. The ban applies to every person, in times of armed conflict, disturbances, emergencies, or peace, no matter what past or current military or personal status obtains or what crimes or activities a person is suspected of having committed. States cannot derogate from or “opt out” of this obligation. The prohibition against torture is enshrined in numerous major international and regional human rights treaties as detailed below.<sup>5</sup> Authoritative interpretations of anti-torture provisions in key treaties indicate that the prohibition against torture and ill-treatment includes the *nonrefoulement* obligation, even where that obligation is not expressly stated.

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<sup>2</sup> The word “transfer” includes any process leading to the involuntary return of a non-national either to his or her country of origin or to a third country, including by deportation, removal, expulsion, extradition, rendition, or other transfer from the custody of one government to the custody of another government.

<sup>3</sup> See, Human Rights Watch Report, *The Road to Abu Ghraib*, June 2004 [online] <http://www.hrw.org/reports/2004/usa0604/> (retrieved March 1, 2005).

<sup>4</sup> While much has been written about renditions by the U.S. of terrorist suspects to third countries for interrogation (see U.S. section below), there is far less discussion about the full range of transfers—deportation, removal, expulsion, extradition—and how many states in North America and Europe are using powers under both counter-terrorism and immigration laws to transfer alleged terrorist suspects and national security threats to their home or third countries. As documented below, many such transfers occur on the basis of reliance by the sending state on diplomatic assurances against torture and ill-treatment from the receiving state, which often has a well-documented record of torture.

<sup>5</sup> For the purposes of this paper, the word “torture” when used alone includes cruel, inhuman, or degrading treatment or punishment in conformity with the U.N. Human Rights Committee’s General Comment No. 20 (1992), which states: “In the view of the Committee, States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*. States parties should indicate in their reports what measures they have adopted to that end.”

## *U.N. Convention against Torture*

The generally accepted definition of torture appears at article 1 of the United Nations Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (Convention against Torture):

[T]orture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain is inflicted by or at the acquiescence of a public official or other person acting in an official capacity.<sup>6</sup>

Under the convention, it is expressly prohibited to transfer a person to a country where he or she would be at risk of torture. The ban thus maintains logical consistency: states cannot torture and cannot circumvent this obligation by sending people to governments that will. The obligation not to send a person to a place where he or she would be at risk of torture is clearly articulated in article 3:

1. No State shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture...
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations, including where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant, or mass violations of human rights.

In *Tapia Paez v. Sweden*, the Committee against Torture, authorized under the convention to consider individual cases, stated that the test of article 3 is absolute: “Whenever substantial grounds exist for believing that an individual would be in danger of being subjected to torture upon expulsion to another State, the State party is under obligation not to return the person concerned to that State. The nature of the activities in which

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<sup>6</sup> One-hundred and thirty nine states have ratified the Convention against Torture, including all of the states referenced in this report as sending states: Austria, Canada, Georgia, Germany, Netherlands, Sweden, United Kingdom and United States. The Convention against Torture has also been ratified by all the countries referenced herein to which people have been transferred or have been threatened with transfer, including Algeria, China, Egypt, Morocco, Russia, Syria, Tunisia, Turkey, Uzbekistan, and Yemen.

the person concerned engaged cannot be a material consideration when making a determination under article 3 of the Convention.”<sup>7</sup>

### *International Covenant on Civil and Political Rights*

The International Covenant on Civil and Political Rights (ICCPR), ratified by 154 states, provides in article 7 that “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”<sup>8</sup> The Human Rights Committee, which oversees implementation by national governments of the ICCPR, has interpreted the Convention’s torture prohibition to include the *nonrefoulement* obligation: “In the view of the Committee, State parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*.”<sup>9</sup>

Moreover, in March 2004, the Human Rights Committee adopted General Comment No. 31 on ICCPR article 2 (concerning nondiscrimination) regarding “The Nature of the General Legal Obligation Imposed on States Parties to the Covenant.” Paragraph 12 reads in part:

... the article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 [right to life] and 7 [torture or cruel, inhuman or degrading treatment] of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed. The relevant judicial and administrative authorities should be made aware of the need to ensure compliance with the Covenant obligations in such matters.<sup>10</sup>

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<sup>7</sup> *Tapia Paez v. Sweden*, Communication No. 39/1996, April 28, 1997.

<sup>8</sup> ICCPR, article 7.

<sup>9</sup> U.N. Human Rights Committee General Comment No. 20 (1992).

<sup>10</sup> General Comment No. 31, CCPR/C/21/Rev.1/Add.13, March 26, 2004 (adopted on March 29, 2004) [online] [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.C.21.Rev.1.Add.13.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.21.Rev.1.Add.13.En?Opendocument) (retrieved March 31, 2005). ICCPR article 2 reads: “Each State party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

It is important to note that such “irreparable harm,” in accordance with ICCPR article 7, expressly includes cruel, inhuman, or degrading treatment or punishment.

### *1951 Convention Relating to the Status of Refugees*

The *nonrefoulement* obligation is also a core principle of international refugee law. The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol (Refugee Convention) require that no state “shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”<sup>11</sup>

Unlike the Convention against Torture and ICCPR, the prohibition against *refoulement* under the Refugee Convention is not absolute and exceptions to its protections are permitted in very narrow circumstances.<sup>12</sup> Any person excluded from refugee status or continuing protection from *refoulement* as a result of any one of these exceptions, however, retains the right to claim protection from return or transfer to risk of torture or ill-treatment under other international instruments and customary international law.

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<sup>11</sup> 1951 Convention Relating to the Status of Refugees, article 33 [online] <http://www.ohchr.org/english/law/refugees.htm> (retrieved March 18, 2005); 1967 Protocol Relating to the Status of Refugees [online] <http://www.ohchr.org/english/law/protocolrefugees.htm> (retrieved March 18, 2005).

<sup>12</sup> A person seeking refugee status can be excluded from such status based on article 1F, which states that “the provisions of the Convention shall not apply to any person with respect to whom there are serious reasons for considering that a) He has committed a crime against peace, a war crime, or a crime against humanity...b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; c) He has been guilty of acts contrary to the purposes and principles of the United Nations.”

“The only exception to the principle of *refoulement* in the Refugee Convention is found in 33(2):

Article 33. Prohibition of expulsion or return (“*refoulement*”)

1. No Contracting State shall expel or return (“*refouler*”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

A refugee may be expelled on grounds of national security or public order in accordance with article 32, but not to a place where his or her life or freedom would be threatened, whether that be his/her country of origin or a third state:

Article 32. Expulsion

1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority...

## *International Humanitarian Law*

International humanitarian law prohibits torture and ill-treatment of all combatants and civilians, in all circumstances of international and non-international armed conflict. The Geneva Conventions explicitly permit the transfer of prisoners of war (POWs) and civilians only to states that are parties to the conventions and willing to comply with the protections codified in them. The human rights norm against torture and ill-treatment, including *refoulement* to such abuse, continues to apply in all situations of armed conflict.

The Third Geneva Convention, article 13, states that “Prisoners of war must at all times be humanely treated. Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited, and will be regarded as a serious breach of the present Convention.”<sup>13</sup> Article 17 provides that: “No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever.” The Convention includes an express provision at article 12 regarding the transfer of a POW to a third state and requires that the receiving state be a party to the convention and fully protect the rights of POWs, including the prohibition against torture and ill-treatment.<sup>14</sup>

The Fourth Geneva Convention prohibits the torture and ill-treatment of civilians.<sup>15</sup> The convention also prohibits the unlawful transfer or deportation of civilians to states not party to the convention and requires the receiving state to ensure that the rights codified in the convention are applied to all transferred civilians.<sup>16</sup> Significantly, the convention states that: “In no circumstances shall a protected person [including civilians] be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs.”<sup>17</sup> Article 147 specifically classifies torture and

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<sup>13</sup> Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, article 13 [online] <http://www.unhcr.ch/html/menu3/b/91.htm> (retrieved March 17, 2005).

<sup>14</sup> *Ibid.* Article 12 states: “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. When prisoners of war are transferred under such circumstances, responsibility for the application of the Convention rests on the Power accepting them while they are in its custody.”

<sup>15</sup> Convention Relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949. 6 U.S.T. 3516, 75 U.N.T.S. 287 [online] <http://www.icrc.org/ihl.nsf/0/6756482d86146898c125641e004aa3c5?OpenDocument> (retrieved March 17, 2005). Article 31 prohibits coercive interrogation and article 32 prohibits physical suffering, including torture and corporal punishments.

<sup>16</sup> *Ibid.*, article 45.

<sup>17</sup> *Ibid.*

inhumane treatment, and the unlawful deportation or transfer of protected persons, including civilians, as “grave breaches” or war crimes under the convention.<sup>18</sup>

Article 3, common to all of the Geneva Conventions, applies to detained civilians in internal conflict and prohibits cruel treatment, torture, and “outrages against personal dignity, in particular humiliating or degrading treatment.”<sup>19</sup> Although Common Article 3 does not expressly address the transfer of detainees, the prohibition against inhumane treatment applies “in all circumstances” and “at any time and in any place whatsoever.”<sup>20</sup> Common Article 3 is taken as a *de minimus* standard that states the customary international law imperative of humane treatment in all situations of conflict, even those that might arguably fall short of the threshold of the Geneva Conventions and their Protocols.<sup>21</sup>

### *Customary International Law*

The prohibition against torture and ill-treatment has risen to the level of *jus cogens*, that is, a peremptory norm of international law. As such it is considered part of the body of customary international law that binds all states, whether or not they have ratified the

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<sup>18</sup> Article 147 states that “Grave breaches...shall be those involving any of the following acts, if committed against persons or property protected by the present Convention; willful killing, torture or inhumane treatment, including biological experiments, willfully causing great suffering or serious injury to body or to health, unlawful deportation or transfer or unlawful confinement of a protected person...”

<sup>19</sup> Ibid. Article 3 reads: In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;  
(b) taking of hostages;  
(c) outrages upon personal dignity, in particular humiliating and degrading treatment...

<sup>20</sup> Ibid.

<sup>21</sup> Jean S. Pictet, ed. *Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Geneva: International Committee of the Red Cross, 1958), Art. 3.1.A, p. 36:

Does this mean that Article 3 is not applicable in cases where armed strife breaks out in a country, but does not fulfil any of the above conditions...? We do not subscribe to this view. We think, on the contrary, that the scope of application of the article must be as wide as possible....What Government would dare to claim before the world, in a case of civil disturbances which could justly be described as mere acts of banditry, that, Article 3 not being applicable, it was entitled to leave the wounded uncared for, to torture and mutilate prisoners and take hostages?

See also, Association of the Bar of the City of New York and Center for Human Rights and Global Justice at NYU School of Law, *Torture by Proxy: International and Domestic Law Applicable to “Extraordinary Renditions,”* October 2004, p. 65 and fn. 355, sources cited therein [online]  
[http://www.abcny.org/pdf/report/Torture%20by%20Proxy%20-%20Final%20\(PDF\).pdf](http://www.abcny.org/pdf/report/Torture%20by%20Proxy%20-%20Final%20(PDF).pdf) (retrieved March 9, 2005)

treaties in which the prohibition against torture is enshrined. Many governments, human rights experts, and legal scholars have also affirmed that the prohibition against *refoulement*, derivative of the absolute ban on torture and from which no derogation is permitted, shares its *jus cogens* character.<sup>22</sup> The U.N. Special Rapporteur on Torture has stated that “The principle of non-refoulement is an inherent part of the overall absolute and imperative nature of the prohibition of torture and other forms of ill-treatment.”<sup>23</sup>

The norm against torture, moreover, is undoubtedly one of the “basic rights of the human person” that partake of an *erga omnes* character, that is, it is one in which all states have a legal interest in ensuring its protection.<sup>24</sup> The *erga omnes* character of the norm signals that states have a right to pursue remedies for its violation collectively as well as individually. Torture is a grave breach of the Geneva Conventions, which require states parties to “search for” persons committing such crimes regardless of their nationality and bring them to justice in their own courts.<sup>25</sup> It is moreover a crime of universal jurisdiction, and can also constitute a crime against humanity or a war crime under the jurisdiction of the International Criminal Court.<sup>26</sup> Implicit in such a general right of enforcement and remedy on the part of the whole international community is the principle that states also have an obligation not to facilitate violations, either by their

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<sup>22</sup> See, Elihu Lauterpacht and Daniel Bethlehem, “The Scope and Content of the Principle of Non-refoulement,” June 20, 2001 [online] [http://www.unhcr.ch/cgi-bin/texis/vtx/home/+lwwBmeDyXM\\_wwwxwwwwwwwwwFqA72ZR0gRfZntFqrpGdBnqBAFqA72ZR0gRfZncFqeWlQtDaZpoDodDadDaBrnalqdpnawDmagdDBnDBadhaBrna7GoDqopcnadhaNdDe2Rqxhd1cnMnDBaDzmxwwwww/opendoc.pdf](http://www.unhcr.ch/cgi-bin/texis/vtx/home/+lwwBmeDyXM_wwwxwwwwwwwwwFqA72ZR0gRfZntFqrpGdBnqBAFqA72ZR0gRfZncFqeWlQtDaZpoDodDadDaBrnalqdpnawDmagdDBnDBadhaBrna7GoDqopcnadhaNdDe2Rqxhd1cnMnDBaDzmxwwwww/opendoc.pdf); Rene Bruin and Kees Wouters, “Terrorism and the Non-Derogability of Non-Refoulement,” *International Journal of Refugee Law*, Volume 15 No. 5 (2003), section 4.6 [The *jus cogens* nature of nonrefoulement]; Jean Allain, “The Jus Cogens Nature of Nonrefoulement,” *International Journal of Refugee Law*, Vol. 13 (2001), p. 538; David Weissbrodt and Isabel Hörtreitere, “The Principle of Non-refoulement: Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non-refoulement Provisions of Other International Human Rights Treaties,” *Buffalo Human Rights Law Review*, Vol. 5 (1999).

<sup>23</sup> Report of the Special Rapporteur on Torture Theo van Boven to the General Assembly, A/59/324, August 23, 2004, paras. 25-29, [online] <http://daccessdds.un.org/doc/UNDOC/GEN/N04/498/52/PDF/N0449852.pdf?OpenElement> (retrieved March 7, 2005).

<sup>24</sup> *Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment*, I.C.J. Reports 1970, p. 32, para. 33. Although the *Barcelona Traction* case did not specifically enumerate torture, it is widely accepted that the prohibition against torture and cruel, inhuman, or degrading treatment is a norm of such fundamental importance and universal acceptance that it falls into this class of obligations, and moreover, is a crime of universal jurisdiction. See, for example, *Restatement of the Law (Third): The Foreign Relations Law of the United States* (The American Law Institute: Washington, D.C.) 1986 at § 702 Comment (o) and M. Cherif Bassiouni, “International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*,” *Law & Contemp. Prob.*, 25 (1996), pp. 63, 68.

<sup>25</sup> See, e.g. arts. 146 and 147 to the Convention Relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949. 6 U.S.T. 3516, 75 U.N.T.S. 287 [online] <http://www.icrc.org/ihl.nsf/0/6756482d86146898c125641e004aa3c5?OpenDocument> (retrieved March 17, 2005).

<sup>26</sup> Rome Statute of the International Criminal Court, 1998, arts. 7(1)(f); 8(2)(ii); 8(2)(c)(i-ii); see also the International Law Commission’s Draft Code of Crimes Against the Peace and Security of Mankind, at articles 8 and 9, 1996 [online] <http://www.un.org/law/ilc/texts/dccomfra.htm> (retrieved March 31, 2005). This foundational document for the Rome Statute laid out torture as a crime of universal jurisdiction to which every state is obliged to extend its criminal jurisdiction regardless of where or by whom the crime was committed

own agents or agents of another state. Transferring individuals to states where they are at risk of torture and prohibited ill-treatment, under the rationale of unreliable diplomatic assurances, flies in the face of this principle.

## **Regional Human Rights Law**

The general prohibition against torture is enshrined in a number of regional human rights treaties, including the African Charter on Human and Peoples' Rights<sup>27</sup> and the American Convention on Human Rights.<sup>28</sup> The focus of this report is on the law and jurisprudence in the Council of Europe region, governed by the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) since all of the sending states referenced in this report and in the "Empty Promises" report, with the exceptions of the U.S. and Canada, are in Europe.

## **European Convention on Human Rights**

Article 3 of the European Convention on Human Rights (ECHR) states that "No person shall be subjected to torture or to inhuman or degrading treatment or punishment." It is in the case law of the European Court of Human Rights (which considers potential violations of the ECHR) that the prohibition against *refoulement* is recognized to derive from the general and absolute prohibition against torture. The *Soering* case established the general principle that the *nonrefoulement* obligation attaches to article 3.<sup>29</sup> The case of *Chahal v. United Kingdom*, however, remains the standard regarding the absolute prohibition against *refoulement* and against reliance on diplomatic assurances as a safeguard against torture and ill-treatment upon return.<sup>30</sup> The court ruled in *Chahal* that the return to India of a Sikh activist, suspected of involvement in terrorism, would violate the United Kingdom's obligations under ECHR article 3, despite diplomatic

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<sup>27</sup> Article 5: "Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited."

<sup>28</sup> Article 5: "No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person." Article 22(8) of the American Convention also contains the *nonrefoulement* obligation: "In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions." The Inter-American Convention on Torture also includes an express prohibition on *refoulement* at article 13: "Extradition shall not be granted nor shall the person sought be returned when there are grounds to believe that his life is in danger, that he will be subjected to torture or to cruel, inhuman or degrading treatment, or that he will be tried by special or ad hoc courts in the requesting state."

<sup>29</sup> *Soering v. United Kingdom*, 1/1989/161/217, July 7, 1989 [online] <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbk&action=html&highlight=soering%20%7C%20v.%20%7C%20united%20%7C%20kingdom&sessionid=1273279&skin=hudoc-en> (retrieved March 1, 2005).

<sup>30</sup> *Chahal v. United Kingdom*, 70/1995/576/662, November 15, 1996 [online] <http://www.worldlii.org/int/cases/IHRL/1996/93.html> (retrieved March 1, 2005).

assurances proffered by the Indian government that Chahal would not suffer mistreatment at the hands of the Indian authorities. The court noted:

[T]he United Nations' Special Rapporteur on Torture has described the practice of torture upon those in police custody [in India] as "endemic" and has complained that inadequate measures are taken to bring those responsible to justice. . .The NHRC [Indian National Human Rights Commission] has also drawn attention to the problems of widespread, often fatal, mistreatment of prisoners and has called for a systematic reform of the police throughout India. . .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 NHRC 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. . .Against this background, the Court is not persuaded that the above assurances would provide Mr. Chahal with an adequate guarantee of safety.<sup>31</sup>

The court thus established the standard that diplomatic assurances are an inadequate guarantee for returns to countries where torture is "endemic," or a "recalcitrant and enduring problem," as well as reaffirming the *nonrefoulement* obligation in European human rights law.

### ***The Nexus between the Nonrefoulement Obligation and Diplomatic Assurances***

Since April 2004, a number of eminent independent human rights experts have expressed alarm regarding the threat that reliance on diplomatic assurances poses to the integrity of the global ban on torture and on states' *nonrefoulement* obligation under international and regional law.

#### ***Council of Europe Commissioner for Human Rights***

Council of Europe Commissioner for Human Rights Alvaro Gil-Robles expressed concern in July 2004 about the Swedish government's actions in the summary expulsions of two Egyptian asylum seekers in December 2001 following assurances against torture

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<sup>31</sup> Ibid., paras. 104-105.

from the Egyptian authorities.<sup>32</sup> Gil-Robles stated that it is particularly important in cases where risk of torture is elevated that “proceedings leading to expulsion are surrounded by appropriate legal safeguards, at the very least a hearing in a judicial instance and right to appeal. Contrary proceedings clearly risk violating articles 3, 6, and 13 of the European Convention [on Human Rights].”<sup>33</sup> Moreover, Gil-Robles stated that the men’s cases “clearly illustrate the risks of relying on diplomatic assurances:”<sup>34</sup>

The weakness inherent in the practice of diplomatic assurances lies in the fact that where there is a need for such assurances, there is clearly an acknowledged risk of torture or ill-treatment. Due to the absolute nature of the prohibition of torture or inhuman or degrading treatment, formal assurances cannot suffice where a risk nonetheless remains...When assessing the reliability of diplomatic assurances, an essential criteria must be that the receiving state does not practice or condone torture or ill-treatment, and that it exercises effective control over the acts of non-state agents. In all other circumstances it is highly questionable whether assurances can be regarded as providing indisputable safeguards against torture and ill-treatment.<sup>35</sup>

### *U.N. Special Rapporteur on Torture*

In his September 2004 report to the United Nations General Assembly,<sup>36</sup> Theo van Boven, the outgoing special rapporteur on torture, expressed concern that reliance on diplomatic assurances is a “practice that is increasingly undermining the principle of non-refoulement.”<sup>37</sup> He questioned “whether the practice of resorting to assurances is not becoming a politically inspired substitute for the principle of non-refoulement, which...is absolute and nonderogable.”<sup>38</sup> In his conclusions, the Special Rapporteur stated that, as a baseline, in circumstances where a person would be returned to a place where torture is systematic, “the principle of non-refoulement must be strictly observed and diplomatic assurances should not be resorted to.”<sup>39</sup> He also noted that if a person is

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<sup>32</sup> Report by Mr. Alvaro Gil-Robles, Commissioner from Human Rights, on His Visit to Sweden, April 21-23, 2004. Council of Europe, CommDH(2004)13, July 8, 2004, at [http://www.coe.int/T/E/Commissioner\\_H.R/Communication\\_Unit/Documents/pdf.CommDH\(2004\)13\\_E.pdf](http://www.coe.int/T/E/Commissioner_H.R/Communication_Unit/Documents/pdf.CommDH(2004)13_E.pdf) (retrieved February 22, 2005).

<sup>33</sup> *Ibid.*, p. 9, para. 19. Article 3 provides for the absolute ban on torture and cruel, inhuman or degrading treatment; article 6 for fair trial guarantees; and article 13 for appropriate remedies for violations of the ECHR.

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*

<sup>36</sup> Report of the Special Rapporteur on Torture Theo van Boven to the General Assembly, August 23, 2004, paras. 30-42.

<sup>37</sup> *Ibid.*, para. 30.

<sup>38</sup> *Ibid.*, para. 31.

<sup>39</sup> *Ibid.*, para. 37.

a member of a specific group that is routinely targeted and tortured, this factor must be taken into account with respect to the *nonrefoulement* obligation.<sup>40</sup>

The current special rapporteur on torture, Manfred Nowak, echoed van Boven's conclusion against the use of assurances for returns to countries where torture is systematic in one of his first public statements on the issue:

In the situation that there's a country where there's a systematic practice of torture, no such assurances would be possible, because that is absolutely prohibited by international law, so in any case the government would deny that torture is actually systematic in that country, and could easily actually give these diplomatic assurances, but the practice then shows that they are not complied with. And there's then no way or very, very little possibility of the sending country to actually—as soon as the person is in the other country—to make sure that this type of diplomatic assurances are complied with.<sup>41</sup>

Nowak's statement not only categorically rejects the use of assurances to countries where torture is systematic, it highlights some of the most obvious flaws inherent in enforcing such guarantees in any case where they might be used, including perfunctory denials by the receiving state and the inability of the sending state to monitor effectively for torture after a person is transferred to an abusive state.

### ***U.N. Independent Expert on the Protection of Human Rights and Fundamental Freedoms While Countering Terrorism***

The United Nations Independent Expert on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Robert K. Goldman, has also described as “troubling” states' increased reliance on diplomatic assurances to effect transfers of terrorist suspects.<sup>42</sup> In a February 2005 report, Goldman notes that “the mere fact that such assurances are sought is arguably a tacit admission by the sending State that the transferred person is indeed at risk of being tortured or ill-treated.”<sup>43</sup>

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<sup>40</sup> *Ibid.*, para. 39.

<sup>41</sup> BBC Radio 4, *Today Programme*, [What would it mean for terrorist suspects if the government did get its Prevention of Terrorism Bill through parliament?], March 4, 2005, at 8:30 [online] [http://www.bbc.co.uk/radio4/today/listenagain/zfriday\\_20050304.shtml](http://www.bbc.co.uk/radio4/today/listenagain/zfriday_20050304.shtml) (retrieved March 18, 2005).

<sup>42</sup> U.N. Commission on Human Rights, Report of the Independent Expert on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, E/CN.4/2005/103, February 7, 2005, para. 56, p. 19 [online] <http://www.ohchr.org/english/bodies/chr/docs/61chr/E.CN.4.2005.103.pdf> (retrieved February 18, 2005).

<sup>43</sup> *Ibid.*

Invoking Theo van Boven's 2004 General Assembly report (see above), the independent expert details the problems associated with reliance on assurances: compliance with such guarantees cannot be verified in the same manner as assurances in death penalty cases;<sup>44</sup> diplomatic assurances against torture are not legally binding and include no sanctions for any breach; and post-return monitoring is often frustrated by lack of access to detention facilities and denials of requests for independent monitoring by doctors or lawyers.<sup>45</sup> He also comments on the dynamics of torture and how learning of violations "is further frustrated by the fact that persons subjected to torture are often reluctant to speak about the abuse out of fear of further torture as retribution for complaining."<sup>46</sup>

The independent expert also quotes the special rapporteur's conclusion regarding reliance on diplomatic assurances to effect returns to countries where torture is systematic: "in circumstances where a person would be returned to a place where torture is systematic, 'the principle of nonrefoulement must be strictly observed and diplomatic assurances should not be resorted to.'"<sup>47</sup> In his own conclusions, the independent expert states:

Given the absolute obligation of States not to expose any person to the danger of torture by way of extradition, expulsion, deportation, or other transfer, diplomatic assurances should not be used to circumvent the nonrefoulement obligation.<sup>48</sup>

## **Diplomatic Assurances are No Safeguard against Torture**

Diplomatic assurances—formal representations on the part of one government to another—are legally unenforceable though not always without political effect. When diplomatic assurances are made against torture or ill-treatment by states with a record of such abuse, they particularly lack credibility and effect. The damage is wrought not only

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<sup>44</sup> For information regarding the distinction between assurances against the death penalty and assurances against torture, see "Empty Promises," p. 3, footnote 2 and pp. 18-19. In general, monitoring a government's compliance with assurances that it will not execute the death penalty is easier than monitoring compliance with assurances against torture, which is illegal and practiced in secret. As well, the death penalty is rarely carried out immediately after a person's return, thus any potential breach of the assurances (e.g. sentencing a person to the death penalty despite assurances to the contrary) can be identified and addressed before the human rights violation occurs. In cases where diplomatic assurances are proffered as a guarantee of protection against torture, however, sending states run the unacceptable risk of being able to identify a breach, if at all given the secrecy surrounding torture, only after torture or ill-treatment has already occurred.

<sup>45</sup> Report of Independent Expert, p. 20, para. 57.

<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid.*, p. 20, para. 59.

<sup>48</sup> *Ibid.*, p. 20, para. 61.

by the state with the record of abuse. The state that solicits such dubious representations undermines the absolute prohibition against *refoulement* and gives tacit sanction to the other state's policies and practices of torture. The arguments below illustrate why diplomatic assurances are an unreliable and ineffective safeguard against torture and prohibited ill-treatment.

### ***The Limits of Diplomacy***

Diplomacy entails the tactful management of foreign relations to promote the overall interests of the state. Human rights may be one of those interests, but it is seldom the only one, and as a consequence diplomacy cannot be an exclusive and reliable lever for human rights protection.

The tender arts of negotiation and compromise that characterize diplomacy can undermine straightforward and assertive human rights protection. The fundamental right to be free from torture, however, is not negotiable or permitting of compromise.

Diplomats are often quite candid that their top priority is to ensure friendly relations with other states, sometimes at the expense of confronting governments about possible human rights violations, including about breaches of pre-agreed diplomatic assurances. For example, when the former Swedish Ambassador to Egypt was asked why he let five weeks lapse before visiting two Egyptians expelled in December 2001 from Stockholm to Cairo following diplomatic assurances, he replied that the Swedes could not have visited the men immediately because that would have signaled a lack of trust in the Egyptian authorities.<sup>49</sup> The men were held incommunicado in police custody and subsequently credibly claimed that they had been brutally mistreated in the course of those five weeks (see section on Sweden below).

Likewise, the Canadian government has been criticized for its "so-called silent diplomacy" on behalf of Omar Khadr, a child detainee at Guantánamo Bay.<sup>50</sup> According to the Canadian Department of Foreign Affairs, when stories of mistreatment at Guantánamo Bay first surfaced, the Canadian government sought and received assurances of humane treatment for Khadr from the U.S. authorities.<sup>51</sup> But Khadr's

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<sup>49</sup> In an interview on Swedish television, former Swedish Ambassador to Egypt Sven Linder stated: "What do you think [would] have happened if I had come rushing in after four or five days and demanded to see those people? It had been to signal from the start that we don't trust you Egyptians." See Swedish TV 4 *Kalla Fakta Program*, May 17, 2004, English transcript [online] <http://hrw.org/english/docs/2004/05/17/sweden8620.htm> (retrieved March 1, 2005).

<sup>50</sup> Michelle Shephard, "A Spectacular Failure: Canada has Done Nothing for Teen Jailed, Tortured at Guantanamo Bay; Lawyers: Ottawa's 'So-Called Silent Diplomacy' Has Failed to Change Plight of Omar Khadr," *Toronto Star*, February 10, 2005.

<sup>51</sup> *Ibid.*

allegations of abusive treatment in detention—including being shackled in painful positions, threatened with rape, and being used as a “human mop” after he urinated on the floor during an interrogation—have led his lawyers to conclude that “Canada was more interested in helping the Americans get information from Khadr than confirming his well-being.”<sup>52</sup>

Inter-state dynamics at the diplomatic level are by their very nature delicate, and diplomats often invoke the need for “caution” and “discretion” in diplomatic representations and negotiations. As a result, serious human rights issues—even those involving the absolute prohibition against torture—are often subordinated to diplomatic concerns. For example, in the case of Hani El Sayed Sabaei Youssef (see section on United Kingdom below), British Prime Minister Tony Blair expressed concern regarding the diplomatic fallout as a result of Home Office demands for watertight diplomatic assurances against torture and unfair trial as a *quid pro quo* for Youssef’s return. Blair’s Private Secretary detailed those concerns in an April 1999 letter to the Home Office stating, “[W]e are in danger of being excessive in our demands of the Egyptians... why [do] we need all the assurances proposed by the F[oreign] C[ommonwealth] O[ffice] and Home Office Legal advisers. Can we not narrow down the list of assurances we require?”<sup>53</sup>

There is also a profound lack of transparency in the process of seeking and securing assurances at diplomatic level, often in the interest of preserving foreign relations, that puts the person subject to return at a serious disadvantage in terms of challenging the adequacy and reliability of the guarantees. For example, in an October 2001 statement, a United States Department of State legal advisor argued that seeking, securing, and monitoring diplomatic assurances must be done on a strictly confidential basis, with no public or judicial scrutiny, in order not to undermine foreign relations and to reach “acceptable accommodations” with the requesting state (see section on United States below).<sup>54</sup>

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<sup>52</sup> Colin Perkel, “Canada ‘Complicit’ in Detention of Khadr,” *Toronto Star*, February 9, 2005. Khadr’s lawyer, Muneer Ahmad of American University in Washington, D.C., uncovered a “litany of abuses” during four days of meetings with Khadr in November 2004. *Ibid.*

<sup>53</sup> *Youssef v. The Home Office*, High Court of Justice, Queen’s Bench Division, Case No: HQ03X03052 [2004] EWHC 1884 (QB), July 30, 2004, para. 18 [online] [http://www.courtservice.gov.uk/judgmentsfiles/j2758/youssef-v-home\\_office.htm](http://www.courtservice.gov.uk/judgmentsfiles/j2758/youssef-v-home_office.htm) (retrieved March 1, 2005).

<sup>54</sup> Written Declaration of Samuel M. Witten, Assistant Legal Adviser for Law Enforcement and Intelligence in the Office of the Legal Adviser of the U.S. Department of State, *Cornejo-Barreto v. Seifert*, United States District Court for the Central District of California Southern Division, Case No. 01-cv-662-AHS, October 2001, paragraphs 11-13 [online] <http://www.state.gov/documents/organization/16513.pdf> (retrieved March 1, 2005).

With respect to diplomatic assurances against torture, diplomacy alone provides no guarantee against maltreatment.

### ***Trusting States to Honor Unenforceable Assurances***

International agreements between and among states have a generally high level of compliance.<sup>55</sup> The diplomatic and monetary consequences of non-compliance often provide the necessary incentive for states to comply with their obligations under these agreements.<sup>56</sup> Human rights treaties and international agreements dealing with human rights protections, however, often lack that incentive. As one commentator has remarked:

[T]he major engines of compliance that exist in other areas of international law are for the most part absent in the area of human rights. Unlike the public international law of money, there are no "competitive market forces" that press for compliance. And, unlike in the case of trade agreements, the costs of retaliatory noncompliance are low to nonexistent, because a nation's actions against its own citizens do not directly threaten or harm other states. Human rights law thus stands out as an area of international law in which countries have little incentive to police noncompliance with treaties or norms.<sup>57</sup>

Diplomatic assurances against torture represent a set of "understandings" agreed in principle between two governments. They have no legal effect and the person who they aim to protect has no recourse if the assurances are breached.

Moreover, the governments involved in negotiating the assurances have little or no incentive to monitor for and highlight a breach of diplomatic assurances against torture or ill-treatment. In some cases, sending governments want the receiving state to use prohibited interrogation techniques against a person to extract information. In other cases, the sending state simply wants the receiving state to take responsibility for warehousing a suspect who is considered a national security threat in the sending state.

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<sup>55</sup> See, Jose E. Alvarez, "Why Nations Behave," 19 Mich. J. Int'l L. 303, Winter 1998. Alvarez quotes the now famous claim by international legal scholar Louis Henkin that "It is probably the case that almost all nations observe almost all principles of international law and almost all of their obligations all the time." Louis Henkin, *How Nations Behave*, (Columbia University Press, 2d ed., 1979), p. 47.

<sup>56</sup> See Beth A. Simmons, "Money and the Law: Why Comply with the Public International Law of Money?" 25 Yale J. Int'l L. 323 (2000).

<sup>57</sup> Oona Hathaway, "Do Human Rights Treaties Make a Difference?" 111 Yale L.J. 1935 (June 2002), p. 1938. Hathaway also quotes Louis Henkin, who admitted that "The forces that induce compliance with other law ... do not pertain equally to the law of human rights." Henkin, *How Nations Behave*, p. 235 in Hathaway, p. 1938.

In either situation, a sending government that discovers a breach of the assurances would have to acknowledge a violation of its own *nonrefoulement* obligation.

A receiving government also has little incentive to abide by assurances against torture and ill-treatment. All of the receiving states identified in this report routinely violate their legally binding human rights treaty obligations by employing torture to effect state policy.<sup>58</sup> They obviously believe that there is little to gain from observing those legal obligations. It is unlikely that governments that practice torture unconstrained by international legal commitments will rein in abuse on the basis of non-binding assurances.

Indeed, states that torture routinely accompany their flagrant violations with insistent denials of abuse, often despite overwhelming evidence to the contrary. Such denials also obtain in individual cases of abuse despite diplomatic assurances of protection. For example, amidst serious and credible allegations that the two Egyptian men expelled from Stockholm to Cairo in December 2001 were tortured, the Egyptian authorities simply issued a blanket denial that torture or ill-treatment had occurred. The Egyptian government “refuted the allegations [of torture] as unfounded” and communicated to the Swedish authorities that the Egyptian authorities were “of the opinion that further investigations are not necessary.”<sup>59</sup> The Swedish government appears to have little recourse in the face of such denials. When Maher Arar, a Syrian-Canadian binational, credibly alleged that he had been tortured in Syria after his transfer there by U.S. and Jordanian operatives following assurances from the Syrians, the Syrian authorities simply claimed that his allegations were not true—and the U.S. government accepted the Syrian denial of torture at face value (see section below on the United States).<sup>60</sup> Taking the word of a government that routinely lies about torture only reinforces the value of denial over admission and correction.

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<sup>58</sup> Many states that continue to employ torture have ratified the Convention against Torture and other instruments that outlaw torture and ill-treatment, yet their governmental authorities often deny the existence of such abuses. These states, as documented in *“Empty Promises”* and this report, include Algeria, China, Egypt, Morocco, Philippines, Russia (primarily in the case of ethnic Chechens perceived to be involved in terrorism or the armed conflict in Chechnya), Sri Lanka, Syria, Tunisia, Turkey, Uzbekistan, and Yemen.

<sup>59</sup> Letter to Human Rights Watch from Hans Dahlgren, State Secretary for Foreign Affairs, Swedish Ministry for Foreign Affairs, September 20, 2004, copy on file with Human Rights Watch. Failing to commence an investigation into credible allegations of torture is itself a violation of article 12 of the Convention against Torture, which reads: “Each state Party shall ensure that its competent authorities proceed to a prompt and impartial investigation, wherever there is reasonable ground to believe that an act of torture has been committed in any territory under its jurisdiction.”

<sup>60</sup> The U.S. government “has officially welcomed statements by the Syrian government that Mr. Arar was not tortured.” See Congressional Record, Case of Maher Arar, February 10, 2004, pp. S781-S785 [online] [http://www.fas.org/irp/congress/2004\\_cr/s021004.html](http://www.fas.org/irp/congress/2004_cr/s021004.html) (retrieved March 12, 2005).

All of the texts of diplomatic assurances collected by Human Rights Watch reiterate the receiving country's existing treaty obligations—ones that they already routinely flout and routinely deny violating—as the basis for illustrating that they can be trusted to comply with non-legally binding diplomatic assurances when it comes to the treatment of the one individual in question.<sup>61</sup> For example, in January 2005, a Dutch court ruled that assurances from Turkey “added nothing” to the protection of a former PKK operative threatened with extradition because the guarantees merely restated Turkey's currently existing human rights obligations, which Turkey had not observed in general with respect to eradicating torture on the ground (see section below on The Netherlands). None of the assurances provide for a mechanism to challenge a breach of the assurances or any other remedy for a credible allegation that the agreement had been broken. Thus, if one or the other of the states involved violates the assurances, it literally has nothing to lose.<sup>62</sup>

### ***The Tacit Acceptance of Torture***

Most governments openly admit that they seek diplomatic assurances from states where torture is a serious problem. The phenomenon of one state requesting that another make an exception to its general policy of employing torture with respect to just one individual has deeply disturbing implications. Asking for the creation of such an island of protection comes dangerously close to accepting the ocean of abuse that surrounds it.<sup>63</sup> In a December 2004 decision, a U.S. immigration judge eloquently articulated the potential fallout from appearing to sanction torture when he stated:

In light of the incontrovertible evidence of record, returning respondent to Yemen at this time where he is likely to be detained and tortured not only would be in abrogation of this country's commitments under the U.N. Torture Convention, but could also be construed as sanctioning Yemen's use of torture by its security forces thereby bringing the United States into disrepute in the international community.<sup>64</sup>

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<sup>61</sup> See section below containing case summaries.

<sup>62</sup> A striking example of a breach of trust allegedly underpinning diplomatic assurances occurred in the European Court of Human Rights case of *Shamayev, et al. v. Russia and Georgia*. Despite proffering diplomatic assurances directly to the European Court guaranteeing that a court delegation would have access to the Chechen detainees once they were returned to Russia, the Russian authorities subsequently denied the delegation access to the men. See “*Empty Promises*,” p. 24.

<sup>63</sup> Thanks to Yuval Ginbar, legal advisor to Amnesty International, for this observation.

<sup>64</sup> *In the Matter of Ashraf al-Jailani*, Executive Office for Immigration Review (EOIR), U.S. Immigration Court, York, Pennsylvania, File #A 73 369 984, December 17, 2004, p. 14, copy on file with Human Rights Watch.

The international community's efforts to promote compliance with human rights norms are generally addressed at the level of the overall system of protection. The human rights community advocates for changes to the laws, policies, and practices that facilitate abuses such as torture—and many governments worldwide have joined that effort. If the international community as a whole were to endorse assurances to protect one person, it would be perceived as ignoring those systematic failings, neglecting the obligation to address the endemic nature of the problem, and providing abusive governments with a device to falsely flaunt their human rights credentials without having to abide by their general legal obligations on torture.

### ***The Limits of Post-Return Monitoring***

The vast majority of written diplomatic assurances contain no provision for independent monitoring of a person after he or she is returned. Some governments that secure diplomatic assurances, however, also arrange with the receiving government to conduct post-return monitoring, either by diplomatic personnel or an independent monitoring body. For example, the Swedish government made such arrangements with the Egyptian authorities after the two Egyptian men were returned, and the International Committee of the Red Cross (ICRC) visited a man extradited from Austria to Dagestan, Russia based on such assurances (see Sweden and Austria sections below). By arranging for such monitoring, governments argue that they have provided the returned person with an additional measure of safety.

Thus, post-return monitoring is meant to serve as both a disincentive and an accountability mechanism: 1) the receiving government allegedly would not breach the assurances because of fear that the sending government's monitors would detect the abuse and 2) in the event of allegations or actual abuse, the sending government could hold the receiving government accountable for breaches of the assurances. These arguments, however, are based on a set of false assumptions.

### ***False: Torture is Easy to Detect***

Torture is illegal, criminal activity. It is practiced in secret, with the complicity of prison and detention facility staff and medical personnel, including physicians.<sup>65</sup> Indeed, monitoring by the ICRC at Abu Ghraib prison was often frustrated by the actions of prison staff. The U.S.'s own internal investigations into abuses at the prison confirm this

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<sup>65</sup> See for example, Robert Jay Lifton, MD, "Doctors and Torture," *New England Journal of Medicine*, Vol. 351, No. 5, July 29, 2004, pages 415-416 [online] <http://content.nejm.org/cgi/content/full/351/5/415> (retrieved March 1, 2005).

by detailing how some detainees were moved by military guards at the prison to hide them from a visiting ICRC delegation.<sup>66</sup>

Torture often occurs within a highly sophisticated system specifically designed to keep abuses from being detected. Advanced forms of torture—for example, electric shock—are virtually undetectable to an untrained eye. Other forms of torture that often go undetected include submersion in water, sexual violence, and various forms of psychological torture. Untrained diplomatic staff attempting to monitor a detainee would be unlikely to detect anything but the most obvious signs of physical torture.

Moreover, persons subjected to torture are often reluctant to speak about the torture they have suffered out of fear of further abuse as retribution for complaining. Often this fear emanates from threats by the abusers directed at the detainee or at a detainee's family members. For example, according to the ICRC, one detainee interrogated at a facility in the vicinity of Camp Cropper in Iraq alleged that he had been hooded; cuffed with flexicuffs; threatened with death; urinated on; kicked in the head, groin and lower back; had a baseball inserted into his mouth; and was deprived of sleep for four consecutive days. When the detainee threatened to complain to the ICRC, he was beaten more.<sup>67</sup> According to Ahmed Agiza's family members, he was threatened with more abuse after he revealed to Swedish embassy officials that he had been tortured in Egyptian custody after being expelled from Sweden following assurances against torture from the Egyptian authorities (see section below on Sweden).<sup>68</sup>

Human Rights Watch's research reveals that pre-agreed monitoring schemes subsequent to returns based on diplomatic assurances lack sufficient safeguards to ensure that torture is detected, including video and audio recording of all interrogations in the presence of a lawyer; expert monitors, trained in detecting signs of both physical and psychological torture and ill-treatment; meetings with a detainee in total privacy; routine

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<sup>66</sup> Major General Antonio M. Taguba, "Article 15-6 Investigation of the 800<sup>th</sup> Military Police Brigade," Part Two: Findings and Recommendations, para. 33, pp. 26-27, February 2004, [online] [http://www.npr.org/iraq/2004/prison\\_abuse\\_report.pdf](http://www.npr.org/iraq/2004/prison_abuse_report.pdf) (retrieved February 24, 2005). The report concluded that "This maneuver was deceptive, contrary to Army Doctrine, and in violation of international law." Ibid.

<sup>67</sup> International Committee of the Red Cross, *Report on the Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq during Arrest, Internment and Interrogation*, February 2004, para. 34 [online] <http://www.derechos.org/nizkor/us/doc/icrc-prisoner-report-feb-2004.pdf> (retrieved March 1, 2005).

<sup>68</sup> Swedish NGO Foundation for Human Rights and Swedish Helsinki Committee for Human Rights, "Alternative Report to 'Comments by the Government of Sweden on the Concluding Observations of the Human Rights Committee' (CCPR/CO/74/SWE)," July 4, 2003, p. 25, para. 104, copy on file with Human Rights Watch: "According to the families, the men were threatened with further torture if they told anyone what they had been subjected to. After the first visit when Agiza had complained of his treatment to the Swedish ambassador, he was subjected to cruel and inhuman treatment as soon as the ambassador had left the prison. As a consequence of this, he has subsequently chosen not to tell anything, according to his family."

forensic medical examinations by an independent physician not associated with the detention facility; confidentiality when transmitting allegations of torture so that the detainee and his or her family do not suffer further retribution for having spoken out; and the ability of the monitors to visit and have unhindered access to a detainee at any time, without having to provide advance notice.<sup>69</sup>

In the vast majority of countries where torture is a serious problem, these arrangements would be impossible (that is, they would never be approved or tolerated by the government or other actors responsible for acts of torture) thus making the project of designing an effective post-return monitoring scheme a highly dubious exercise. Indeed, in many of the countries of return referenced in this report, no independent monitoring of detention facilities is permitted, and often family members and lawyers are routinely denied access.

### ***False: Monitoring Provides an Accountability Mechanism***

The notion that post-return monitoring can serve as an accountability mechanism is also not borne out by our research. In instances where there is credible evidence of torture, the sending government will simply place blame on the receiving government as the party that has violated the assurances. For example, while the government of Sweden has stated its concern over breaches of the diplomatic assurances with Egypt, it remains insistent that it is Egypt's responsibility and that if torture did occur, the Swedish government is not responsible.<sup>70</sup> Moreover, in the face of Egyptian breaches of the assurances, the Swedish authorities appear to have very little influence with the Egyptian authorities in terms of persuading them to initiate an investigation into the torture allegations. In a December 2004 speech addressing the theme "Security under the Rule of Law," Minister of Foreign Affairs Laila Freivalds stated that although the Swedish

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<sup>69</sup> International standards for effective prison monitoring include: The United Nations Standard Minimum Rules for the Treatment of Prisoners (Standard Minimum Rules) [online] [http://www.unhchr.ch/html/menu3/b/h\\_comp34.htm](http://www.unhchr.ch/html/menu3/b/h_comp34.htm) (retrieved March 12, 2005); U.N. Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment (Body of Principles) [online] [http://www.unhchr.ch/html/menu3/b/h\\_comp36.htm](http://www.unhchr.ch/html/menu3/b/h_comp36.htm) (retrieved March 12, 2005); Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [To establish a system of visits undertaken by independent international and national bodies to places where people are deprived of their liberty; not yet in force.] [online] <http://www.unhchr.ch/html/menu2/6/cat/treaties/opcat.htm> (retrieved March 12, 2005); and the European Prison Rules [online] <http://www.uncjin.org/Laws/prisrul.htm> (retrieved March 12, 2005). See also U.N. Special Rapporteur on Torture, General Recommendations, E/CN.4/2003/68, para. (f) regarding prison monitoring and private visits [online] <http://www.unhchr.ch/html/menu2/7/b/torture/recommendations.doc> (retrieved March 19, 2005); and International Committee of the Red Cross, "How Visits by the ICRC can Help Prisoners Cope with the Effects of Traumatic Stress," Section on Private and Confidential Interviews with Prisoners, January 1, 1996 [online] <http://www.icrc.org/web/eng/siteeng0.nsf/iwpList302/219CF73383F594D2C1256B660059956E> (retrieved March 19, 2005).

<sup>70</sup> Human Rights Watch meeting with Swedish officials in the Ministry of Foreign Affairs, Stockholm, June 2, 2004. Notes on file with Human Rights Watch.

government has requested that the Egyptian government carry out a thorough and independent inquiry, “We have still not received a satisfying response to our request.”<sup>71</sup>

Indeed, the sending government has no incentive to find that torture or ill-treatment has occurred because by doing so it makes an admission that it has violated its own *nonrefoulement* obligation. In May 2004, Human Rights Watch obtained a classified report detailing the first post-return monitoring visit by Swedish diplomats to the two Egyptians expelled from Stockholm in December 2001.<sup>72</sup> The classified version of the report included allegations by the men that they had been physically abused by Swedish police officers, and had been seriously physically abused and ill-treated by Egyptian security police in the first five weeks of incommunicado detention upon return to Cairo. These allegations had been deleted from the publicly available version of the monitoring report. The Swedish authorities also did not make the classified version with the allegations of abuse available to various United Nations mechanisms examining the men’s cases.<sup>73</sup>

Moreover, the idea that confidential monitoring alone can exert sufficient pressure to forestall abuses is misguided. The April 2004 Abu Ghraib scandal further reveals the limits of confidential monitoring.<sup>74</sup> Although the ICRC had access to the Abu Ghraib prison, military and intelligence personnel deliberately obstructed monitors’ efforts to meet with and evaluate certain detainees. When the ICRC confidentially transmitted its concerns regarding the ill-treatment of some detainees, the United States government virtually ignored those complaints.

The challenges of monitoring for torture indicate that even the most expert monitors cannot provide the necessary safeguards against, and accountability for, acts of torture perpetrated in secrecy.

### ***The Principle: Diplomatic Assurances Undermine the Nonrefoulement Obligation***

Reliance upon diplomatic assurances signals an erosion of the absolute obligation not to return or transfer a person to a place where he or she is at risk of torture or ill-treatment.

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<sup>71</sup> Speech by Foreign Minister Laila Freivalds, “Security under the Rule of Law,” on the occasion of the visit to Stockholm of U.N. High Commissioner for Human Rights Louise Arbour, December 1, 2004, copy on file with Human Rights Watch.

<sup>72</sup> Copy on file with Human Rights Watch.

<sup>73</sup> One of the men’s lawyers subsequently forwarded a copy of the classified report to the U.N. Committee against Torture in August 2004.

<sup>74</sup> Human Rights Watch, *The Road to Abu Ghraib*, June 2004.

In seeking assurances against abusive conduct, governments acknowledge that a risk of torture and ill-treatment exists in the country of return. The risk derives from the fact that many receiving states have failed to implement effective measures to halt and prevent the torture of their own citizens and others within their jurisdiction, and to hold accountable those responsible for such abuses. It may also arise from the particular characteristics and circumstances of the person vulnerable to transfer.

Once a sending government acknowledges that a risk of torture exists in a specific country, it is incumbent upon its authorities to refuse to transfer a person to that country. If sending governments want to ensure that they are able to transfer suspects to any jurisdiction while respecting their *nonrefoulement* obligation, they should focus their energy on assisting receiving governments in reform efforts to eradicate torture and ill-treatment, rather than trying to bypass the rules by relying on assurances. Receiving governments can facilitate such transfers only by complying with their obligations under the Convention against Torture, the International Covenant on Civil and Political Rights, and customary law to prevent and halt acts of torture, and by implementing accountability mechanisms to address torture abuses. A verifiable record of compliance with international norms against torture by the receiving state is the most effective way to reduce the risk of torture and ill-treatment upon return, not an offering of unreliable and vague assurances.

## **Developments Regarding Diplomatic Assurances Since April 2004**

### ***North America***

#### ***United States***

Reliance on diplomatic assurances when transferring persons at risk of torture is an increasingly common practice by the United States. United States law permits the use of assurances in immigration cases, and authorities have disclosed that it is U.S. policy to seek them as well in so-called “extraordinary rendition” cases and to effect transfers of detainees from custody at Guantánamo Bay.

Since “*Empty Promises*” was finalized in April 2004, further evidence has come to light that the U.S. government is transferring persons suspected of terrorist activities to countries where torture is a serious human rights problem. Many such transfers take place without any procedural safeguards—that is, completely outside the law. These transfers, so-called “extraordinary renditions,” have occurred both from U.S. territory and from other countries, either by the direct seizure of foreign nationals on foreign territory by U.S. agents, or the transfer of foreign nationals to third countries by the host

authorities facilitated by the use of U.S. aircraft and/or personnel.<sup>75</sup> In February 2005, high-level U.S. officials defended this renditions program and claimed that it is U.S. policy to seek and secure assurances from the receiving state that a rendered person will be treated humanely upon return (see section Renditions and Assurances below). Persons subject to such renditions have no ability to challenge the legality of their transfers, including any assurances against torture or ill-treatment that the U.S. government may have been proffered by a receiving state.

The use of assurances against torture is expressly provided for in U.S. law only in immigration cases in which a person subject to removal raises a claim under the Convention against Torture.<sup>76</sup> According to the code of federal regulations (C.F.R.), 8 C.F.R. § 208.18(c), the secretary of state may secure assurances from a government that a person subject to return would not be tortured. In consultation with the secretary of state, the attorney general determines whether the assurances are “sufficiently reliable” to allow the transfer in compliance with the obligations of the United States under the Convention against Torture. Once assurances are approved, any claims a person has

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<sup>75</sup> See, CBS 60 Minutes, “CIA Flying Suspects to Torture?” March 6, 2005 [online] <http://www.cbsnews.com/stories/2005/03/04/60minutes/main678155.shtml> (retrieved March 7, 2005); Douglas Jehl and David Johnson, “Rule Change Lets C.I.A. Freely Send Suspects Abroad to Jails,” *New York Times*, March 6, 2005 [online] <http://www.nytimes.com/2005/03/06/politics/06intel.html> (retrieved March 7, 2005); Channel 4 TV (U.K.), “Torture: The Dirty Business,” (Part 3 of series on the U.S. government’s war on terror and the implications for the global ban on torture), March 1, 2005, post-production transcript on file with Human Rights Watch, [online] <http://www.channel4.com/news/microsites/T/torture/cases.html> (retrieved March 8, 2005); Jane Mayer, “Outsourcing Torture,” *The New Yorker*, February 7, 2005; Stephen Grey, “CIA Prisoners ‘Tortured’ in Arab Jails,” File on 4, BBC Radio, February 8, 2005 [online] [http://news.bbc.co.uk/1/hi/programmes/file\\_on\\_4/4246089.stm](http://news.bbc.co.uk/1/hi/programmes/file_on_4/4246089.stm) (retrieved February 15, 2005); Seymour Hersh, *Chain of Command: The Road from 9/11 to Abu Ghraib* (New York: Harper-Collins), September 2004.

<sup>76</sup> The Foreign Affairs Reform and Restructuring Act of 1998 (FARRA) is the implementing legislation that codifies the U.S.’s obligations as a party to the Convention against Torture. The legislation includes safeguards against transfer to a country where he or she is at risk of torture: “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.” FARRA §1242(a). Section 2242 (Public Law 105-277; 8 U.S.C. 1231 note) All types of transfers are thus covered by this provision, including extra-territorial renditions. As noted below, the regulations implementing the FARRA include provisions for diplomatic assurances only in immigration cases.

under the convention will not be given further consideration by U.S. authorities.<sup>77</sup> The reliability assessment of the assurances is not reviewable by a court.<sup>78</sup>

The U.S. government has also stated that it seeks and secures assurances against inhumane treatment before transferring detainees from Guantánamo Bay to their home countries or to third countries.<sup>79</sup> To date, the detainees have no right to challenge the reliability or sufficiency of such assurances before an independent tribunal.

## Case of Yemeni Detainees and Transfers from Guantánamo Bay

The inability to challenge assurances of fair treatment upon return has arisen in the context of returns of so-called “enemy combatants” from Guantánamo Bay. In March 2005, a group of Yemeni men currently in detention at Guantánamo Bay filed a motion for thirty days’ advance notice of any intention to remove them from U.S. custody to Yemen.<sup>80</sup> The men argued that in the event they were transferred directly to Yemeni authorities, they would be at risk of torture and ill-treatment in detention there, and sought notice in order to challenge their transfers on human rights grounds. They also argued that their currently pending petitions for *habeas corpus* in U.S. courts would become moot if they were transferred back to Yemen.

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<sup>77</sup> 8 C.F.R. § 208.18(c) - Diplomatic assurances against torture obtained by the Secretary of State.

(1) The 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...

(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.

<sup>78</sup> 8 C.F.R. § 208.18(c)(3)

<sup>79</sup> The Department of Defense General Counsel's Office has stated in the past that transfers within its purview, including the transfers of detainees from Guantánamo Bay back to their home countries or to third countries, only occur with assurances against torture. See letter from William J. Haynes II to Senator Patrick Leahy, June 25, 2003 [online] <http://www.hrw.org/press/2003/06/letter-to-leahy.pdf> (retrieved March 25, 2005): “Should an individual be transferred to another country to be held on behalf of the United States, or should we otherwise deem it appropriate, United States policy is to obtain specific assurances from the receiving country that it will not torture the individual being transferred to that country.” See also letter from William J. Haynes II to Kenneth Roth, Executive Director of Human Rights, April 2, 2003 [online] <http://www.hrw.org/press/2003/04/dodltr040203.pdf> (retrieved March 25, 2005): “If the war on terrorists of global reach requires transfer of detained enemy combatants to other countries for continued detention on our behalf, U.S. Government instructions are to seek and obtain appropriate assurances that such enemy combatants are not tortured.”

<sup>80</sup> United States District Court for the District of Columbia, *Mahmoad Abdah, et al. v. George W. Bush*, Civil Action No. 04-CV-1254 (HHK), March 1, 2005.

The U.S. government responded that it is U.S. policy not to send any detainee to a place where it is more likely than not that the detainee would be tortured upon return.<sup>81</sup> It also claimed that in cases where there was a risk of torture, the government sought and secured diplomatic assurances against such treatment.<sup>82</sup> The U.S. government argued, however, that none of the information regarding negotiations for transfers out of Guantánamo Bay should be made public, including information related to the reliability or sufficiency of assurances against torture, nor should it be subject to judicial review:

If the Court were to entertain petitioners' claims, it would inject itself into the most sensitive of diplomatic matters. Such judicial review could involve scrutiny of United States' officials judgments and assessments on the likelihood of torture in a foreign country, including judgments on the reliability of information and representations or the adequacy of assurances provided, and confidential communications with the foreign government and/or sources therein. Disclosure and/or judicial review of such matters could chill important sources of information and interfere with our ability to interact effectively with foreign governments. In particular, the foreign government in question [Yemen], as well as other governments, would likely be reluctant to communicate frankly with the United States in the future concerning

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<sup>81</sup> United States District Court for the District of Columbia, *Mahmoad Abdah, et al. v. George W. Bush*, Civil Action No. 04-CV-1254 (HHK), Respondents' Memorandum in Opposition to Petitioners' Motion for Order Requiring Advance Notice of any Repatriations or Transfers from Guantanamo, March 8, 2005, p. 4, copy on file with Human Rights Watch. This memorandum draws heavily from two affidavits appended to it: one from Pierre-Richard Prosper, U.S. Ambassador-at-Large for War Crimes, and Matthew C. Waxman, Deputy Assistant Secretary of Defense for Detainee Affairs in the U.S. Department of Defense. The ultimate approval for transfer of any Guantánamo detainee to the control of another government is made by a senior Department of Defense official, in consultation with the State Department and various other agencies. According to Prosper's affidavit, he has played a key role in maintaining diplomatic dialogue, including negotiating diplomatic assurances, with foreign governments whose nationals are detained at Guantánamo Bay. Copies of affidavits on file with Human Rights Watch.

<sup>82</sup> *Mahmoad Abdah, et al. v. George W. Bush, et al.*, Respondents' Memorandum in Opposition to Petitioners' Motion for Order Requiring Advance Notice of any Repatriations or Transfers from Guantanamo, p.4-6. The issue of seeking assurances against torture before transferring detainees back to their home countries has also arisen in the case of a group of Uighurs currently detained at Guantánamo Bay. The U.S. government had stated publicly that it would not send the Uighurs back to China, where they are at risk of torture. See Amnesty International, "USA: 'Double Jeopardy' for Some Guantánamo Detainees," September 30, 2004 [Closing an urgent action on behalf of Uighurs in detention at Guantánamo Bay after United States Secretary of State Colin Powell said that ethnic Uighurs in military custody at Guantánamo will not be sent back to China] [online] <http://web.amnesty.org/pages/usa-070104-a-action-eng> (retrieved March 13, 2005). On March 16, 2005, however, it was reported that a senior administration official stated that because European governments had refused to take the Uighurs for resettlement, the U.S. may be "forced to reconsider sending them back to China." The official stated that the Uighurs would be repatriated only upon receipt of "iron-clad" guarantees that they would not be tortured. Demetri Sevastopulo, "Uighurs Face Return to China from Guantanamo," *Financial Times*, March 16, 2005. See also Human Rights Watch Press Release, "U.S.: Don't Send Detainees Back to China," November 26, 2003 [online] <http://www.hrw.org/press/2003/11/us112603.htm> (retrieved March 13, 2005).

torture and mistreatment concerns. This chilling effect would jeopardize the cooperation of other nations in the war on terrorism.<sup>83</sup>

A U.S. federal judge issued a temporary restraining order (TRO) on March 12, 2005, forbidding the government from transferring the Yemeni detainees until a March 22, 2005 hearing on their motion for advance notice could be heard.<sup>84</sup> The judge noted that press reports indicated that transfers from Guantánamo were being planned,<sup>85</sup> but that U.S. authorities currently gave no advance notice regarding them. She ruled that the Yemeni detainees, who feared being transferred in the “dark of night”<sup>86</sup> directly into the hands of the Yemeni authorities for continued detention, could suffer irreparable harm if such transfers were effected.<sup>87</sup>

On March 29, 2005, a federal judge granted the Yemeni petitioners a preliminary injunction requiring the U.S. government to give him and the detainees’ attorneys thirty-days’ advance notice before any of the men could be removed from Guantánamo Bay.<sup>88</sup> The judge granted injunctive relief, in the main, because the men’s transfers to another nation would deprive the court of its jurisdiction over the men’s *habeas corpus* petitions, thereby effectively extinguishing those claims.<sup>89</sup> The judge stated that “The government’s invocation of sudden exigency requiring their transfer now cannot trump [the men’s] established due process rights to pursue their habeas action in federal court.”<sup>90</sup> The judge also noted that any alleged injury the government might suffer with respect to its efforts to negotiate detainee transfers with foreign governments, including seeking and securing assurances against inhumane treatment upon return, did “not outweigh the imminent threat facing [the men] with respect to the *entirety* of their claims before the court [emphasis in the original].”<sup>91</sup>

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<sup>83</sup> *Mahmoad Abdah, et al. v. George W. Bush, et al.*, Respondents’ Memorandum, pp. 15-16.

<sup>84</sup> *Mahmoad Abdah, et al. v. George W. Bush, et al.*, Temporary Restraining Order, Civil Action No. 04-1254 (HHK) (RMC), March 12, 2005, copy on file with Human Rights Watch. See also, Siobhan McDonough, “Judge Blocks Transfer from Cuba of 13 Yemeni Detainees,” *Associated Press*, March 14, 2005, p. A15.

<sup>85</sup> See, Douglas Jehl, “Pentagon Seeks to Shift Inmates from Cuba Base,” *New York Times*, March 11, 2005, p. 1.

<sup>86</sup> *Mahmoad Abdah, et al. v. George W. Bush, et al.*, Temporary Restraining Order (Quoting from Petitioners’ *Ex Parte* Motion for Temporary Restraining Order to Prevent Respondents from Removing Petitioners from Guantanamo until Petitioners’ Motion for Preliminary Injunction is Decided), p. 2.

<sup>87</sup> *Mahmoad Abdah, et al. v. George W. Bush, et al.*, Temporary Restraining Order, p. 9

<sup>88</sup> *Mahmoad Abdah, et al., v. George W. Bush, et al.*, Memorandum Opinion, Civil Action No. 04-1254 (HHK), March 29, 2005. See also “U.S. Judge Bars Transfer of 13 Guantanamo Detainees,” *Reuters*, March 29, 2005.

<sup>89</sup> *Mahmoad Abdah, et al., v. George W. Bush, et al.*, Memorandum Opinion, p. 9.

<sup>90</sup> *Ibid.*, p. 11, fn 5.

<sup>91</sup> *Ibid.*, p. 11

It remains unclear whether the U.S. government will be required at some point in the future to reveal information regarding assurances against torture from states to which Guantánamo detainees will be transferred. It is increasingly clear, however, that the U.S. government is limited in its ability to monitor and enforce any such assurances. On March 16, 2005, Pentagon spokesman Lieutenant Commander Flex Plexico admitted as much when he stated that although the government seeks assurances from countries that Guantánamo detainees will be treated humanely upon return, “[w]e have no authority to tell another government what they are going to do with a detainee.”<sup>92</sup>

### Update: Case of Maher Arar

The U.S. government has also refused to release any information regarding the assurances against torture it claims it received from Syria in the case of Maher Arar. In September 2002, U.S. authorities apprehended Arar, a dual Canadian-Syrian national, in transit from Tunisia through New York to Canada, where he has lived for many years.<sup>93</sup> After holding him for nearly two weeks, and failing to provide him with the ability to effectively challenge his detention or imminent transfer, U.S. immigration authorities flew Arar to Jordan, where he was driven across the border and handed over to Syrian authorities. The transfer was effected despite Arar’s repeated statements to U.S. officials that he would be tortured in Syria and his repeated requests to be sent home to Canada. The U.S. government has claimed that prior to Arar’s transfer, it obtained assurances from the Syrian government that Arar would not be subjected to torture upon return.<sup>94</sup>

Arar was released without charge from Syrian custody ten months later and has credibly alleged that he was beaten by security officers in Jordan and tortured repeatedly, often with cables and electrical cords, during his confinement in a Syrian prison.<sup>95</sup> The U.S. government has not explained why it sent Arar to Syria rather than to Canada, where he resides, or why it believed Syrian assurances to be credible in light of the government’s well-documented record of torture, including designation as a country where torture is a serious abuse by the U.S. Department of State’s 2001 (issued March 4, 2002) Country

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<sup>92</sup> “Freed Pakistanis Jailed at Home,” *Associated Press*, March 29, 2005.

<sup>93</sup> See, “*Empty Promises*”, pp. 16-17.

<sup>94</sup> Letter from Terry A. Breese, director, Office of Canadian Affairs, U.S. Department of State, to Stephen Rickard, Human Rights Executive Directors Working Group, in response to human rights groups’ concerns about the reliability of assurances from the Syrian government, November 26, 2003. Copy on file with Human Rights Watch. Human Rights Watch is a member of the Working Group. The letter stated: “Your letter notes the Secretary’s...statement regarding assurances that detainees will not be tortured. Attorney General Ashcroft has publicly stated that the United States Government received appropriate assurances from Syrian officials prior to Mr. Arar’s deportation.”

<sup>95</sup> Maher Arar’s complete statement to media, CanWest News Service, November 4, 2003. See also, CBS News, “His Year in Hell,” January 21, 2004 [online] <http://www.cbsnews.com/stories/2004/01/21/6011/main594974.shtml> (retrieved February 22, 2005).

Reports on Human Rights Practices.<sup>96</sup> It remains unclear whether the immigration regulations that should govern cases like Arar's were followed.

In November 2003, just days after Maher Arar was released from Syrian custody, President Bush claimed in a speech that instead of restoring national honor, the government of Syria had left "a legacy of torture, oppression, misery, and ruin."<sup>97</sup> In January 2005, the Bush administration named Syria as a country that actively sponsors terrorism and encouraged the Syrian government to "open the door to freedom."<sup>98</sup> As one commentator has noted:

From the U.S. perspective, Syria is led by a gangster regime that has among other things, sponsored terrorism, aided the insurgency in Iraq, and engaged in torture. So here's the question. If Syria is such a bad actor—and it is—why would the Bush administration seize a Canadian citizen at Kennedy Airport in New York, put him on an executive jet, fly him in shackles to the Middle East and then hand him over to the Syrians, who promptly tortured him?<sup>99</sup>

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<sup>96</sup> See United States Department of State Country Reports on Human Rights Practices for 2001: Syria published on March 4, 2002 [online] <http://www.state.gov/drl/rls/hrrpt/2001/nea/8298.htm> (retrieved March 29, 2005). Maher Arar was transferred to Syria in September 2002 and this report would have been an indicator at that time of Syria's torture practices. The report stated that "torture methods include administering electrical shocks; pulling out fingernails; forcing objects into the rectum; beating, sometimes while the victim is suspended from the ceiling; hyperextending the spine; and using a chair that bends backwards to asphyxiate the victim or fracture the victim's spine. In September [2001] Amnesty International published a report claiming that authorities at Tadmur Prison regularly torture prisoners, or force prisoners to torture one another. Although torture occurs in prisons, torture is most likely to occur while detainees are being held at one of the many detention centers run by the various security services throughout the country, and particularly while the authorities are attempting to extract a confession or information regarding an alleged crime or alleged accomplices... There have been reports that security personnel force prisoners to watch relatives being tortured in order to extract confessions." Subsequent Country Reports of 2002-2005 state that torture is an on-going serious human rights problem in Syria. For example, the 2005 State Department Country Reports on Human Rights Practices stated that torture in Syria is frequent and a common occurrence and documents the same torture methods as the 2001 report. It also states that "[t]orture was most likely to occur while detainees were being held at one of the many detention centers run by the various security services throughout the country, particularly while the authorities were attempting to extract a confession or information." See United States Department of State Country Reports on Human Rights Practices for 2004: Syria, published on February 28, 2005 [online] <http://www.state.gov/drl/rls/hrrpt/2004/41732.htm> (retrieved March 1, 2005).

<sup>97</sup> Remarks by the President George W. Bush on the Occasion of the 20th Anniversary of the National Endowment for Democracy, November 6, 2003 [online] <http://www.whitehouse.gov/news/releases/2003/11/20031106-2.html> (retrieved March 25, 2005).

<sup>98</sup> President George W. Bush, 2005 State of the Union Address, February 2, 2005 [online] [http://www.washingtonpost.com/wp-srv/politics/transcripts/bushtext\\_020205.html#syria](http://www.washingtonpost.com/wp-srv/politics/transcripts/bushtext_020205.html#syria) (retrieved February 22, 2005).

<sup>99</sup> Bob Herbert, "Our Friends, the Torturers," *New York Times*, February 18, 2005 [online] <http://www.nytimes.com/2005/02/18/opinion/18herbert.html?ex=1109653200&en=c5874c0077dd21bc&ei=5070> (retrieved February 22, 2005).

Despite numerous lawsuits and inquiries into the case, the U.S. government has consistently refused to answer that question and has declined to release any information regarding Arar's apprehension and transfer to Syria. The Bush administration has ignored numerous requests for a specific explanation regarding the reliability and credibility of Syrian diplomatic assurances, but former CIA counterterrorism official Vincent Cannistraro has remarked: "You would have to be deaf, dumb and blind to believe that the Syrians were not going to use torture, even if they were making claims to the contrary."<sup>100</sup>

Arar filed suit in U.S. Federal Court on January 22, 2004, alleging that U.S. officials and agents involved in his transfer violated the 5<sup>th</sup> amendment to the U.S. Constitution; the U.S. government's treaty obligations under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and the Torture Victim Protection Act of 1991.<sup>101</sup> In seeking to dismiss the lawsuit, the U.S. Department of Justice employed the rarely invoked "state secrets privilege"<sup>102</sup> and filed a motion in January 2005 stating that the release of any official information concerning Arar's transfer to Syria could jeopardize the intelligence, foreign policy, and national security interests of the United States.<sup>103</sup> The U.S. government claimed that the disclosure of classified information in the Arar case "reasonably could be expected to cause exceptionally grave or serious damage to the national security interests of the United States" and to its diplomatic relations.<sup>104</sup> It is disturbing that the U.S. appears to be using the "state secrets privilege" to shield governmental conduct from public scrutiny. A ruling on the Justice Department's motion is pending.

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<sup>100</sup> Shannon McCaffrey, "Canadian Sent to Syria Prison Disputes U.S. Claims against Torture," *Knight Ridder*, July 28, 2004 [online] <http://www.realcities.com/mld/krwashington/9264400.htm> (retrieved March 1, 2005). See also Dana Priest, "Man was Deported after Syrian Assurances," *Washington Post*, November 20, 2003, page A24: "Spokesmen at the Justice Department and the CIA declined to comment on why they believed the Syrian assurances to be credible."

<sup>101</sup> The full text of the Arar complaint can be found [online] [http://www.ccr-ny.org/v2/legal/september\\_11th/docs/ArarComplaint.pdf](http://www.ccr-ny.org/v2/legal/september_11th/docs/ArarComplaint.pdf) (retrieved February 22, 2005).

<sup>102</sup> The privilege is not enshrined in any one U.S. law, but arises from a series of precedents involving national security concerns. See Andrew Zajac, "Bush Wielding Secrecy Privilege to End Suits: National Security Cited against Challenges to Anti-Terror Tactics," *Chicago Tribune*, March 3, 2005, p. 1: "The use of the state secrets privilege, critics say, is part of President Bush's forceful expansion of presidential secrecy, including...curtailment of information on individuals rounded up in the war on terrorism."

<sup>103</sup> *Arar v. Ashcroft*, Declarations of James B. Comey, Acting Attorney General (January 18, 2005) and Tom Ridge, Secretary of the U.S. Department of Homeland Security (January 17, 2005), C.A. No. 04-CV-249-DGT-VVP [online] <http://www.fas.org/sgp/jud/arar-notice-011805.pdf> (retrieved February 21, 2005). According to the Department of Justice web site, "The state secrets privilege is well-established in federal law. It has been recognized by U.S. courts as far back as the 19th century, and allows the Executive Branch to safeguard vital information regarding the nation's security or diplomatic relations. In the past, this privilege has been applied many times to protect our nation's secrets from disclosure, and to require dismissal of cases when other litigation mechanisms would be inadequate. It is an absolute privilege that renders the information unavailable in litigation" [online] [http://www.usdoj.gov/opa/pr/2002/October/02\\_ag\\_605.htm](http://www.usdoj.gov/opa/pr/2002/October/02_ag_605.htm) (retrieved March 1, 2005).

<sup>104</sup> *Arar v. Ashcroft*, Declarations of Comey and Ridge, p.4, paras. 5-6.

The United States government has also flatly refused to cooperate with the Canadian commission of inquiry investigating the role of Canadian police and security organizations in Arar's apprehension and transfer by U.S. authorities.<sup>105</sup> In response to a June 2004 request from the Canadian inquiry's lead counsel for information and other forms of cooperation, William H. Taft, IV, the U.S. State Department legal adviser, wrote:

The United States government declines to provide documents in response to your request, or to provide statements by individuals involved in the case, or to facilitate witnesses appearing before the commission. We would note that as your inquiries focus on the actions of Canadian authorities, many of those questions should best be directed to the Government of Canada, rather than to the United States government.<sup>106</sup>

The U.S. Department of Homeland Security (DHS) Inspector General initiated an internal review of the Arar case in January 2004 to determine what role U.S. immigration officials played in Arar's apprehension and transfer.<sup>107</sup> The review will seek to answer the crucial question of why Arar was sent to Syria. Whether the DHS review will provide a complete picture of U.S. government conduct will depend in large part on whether the Inspector General can secure the cooperation of other arms of the U.S. government involved in handling Arar's case, in particular the Department of Justice and the Central Intelligence Agency (CIA).

## Renditions and Assurances: U.S. Acknowledges "No Control" Post-Transfer

While the DHS review offers some hope of revealing new information about the Arar case, the overall lack of transparency in the aftermath of Arar's release has reinforced

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<sup>105</sup> Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar [online] <http://www.ararcommission.ca/> (retrieved February 21, 2005). The Canadian inquiry has been riddled with delays and other problems. Few of the hearings have taken place in public. For national security reasons, the Canadian government has requested in-camera hearings and heavily redacted summaries of such hearings for public disclosure, giving rise to the criticism that the inquiry is not in fact a public one. See, for example, Commission of Inquiry Press Release, "Commission of Inquiry Blocked from Full Release of Documents; Government Raises New National Security Objections; Commissioner is Concerned that Public is being Denied Information in Arar Case," December 20, 2004 [online] [http://www.ararcommission.ca/eng/ReleaseFinal\\_dec20.pdf](http://www.ararcommission.ca/eng/ReleaseFinal_dec20.pdf) (retrieved February 22, 2005).

<sup>106</sup> Letter from William H. Taft, IV, Legal Adviser to the U.S. Secretary of State, to Paul Cavalluzzo, Lead Commission Counsel, Maher Arar Commission of Inquiry, September 16, 2004, copy on file with Human Rights Watch.

<sup>107</sup> Letter from Clark Kent Ervin, DHS Inspector General, to Hon. John Conyers, January 9, 2004, copy on file with Human Rights Watch.

concerns that diplomatic assurances are being used in some cases as justification to transfer persons suspected of having information regarding terrorism-related activities to countries where torture is routinely used, sometimes specifically to extract such information. A spate of U.S. government revelations in February and March 2005 regarding the U.S. renditions program indicates that those concerns are not unwarranted.

High-level U.S. administration officials have defended the practice of transferring detainees by rendition in the “war on terrorism” to other countries for interrogation, but have also insisted that in all such cases they seek assurances that the detainees will not be tortured. On February 16, 2005, Director of Central Intelligence Porter J. Goss testified before Congress and defended the CIA’s participation in such transfers.<sup>108</sup> Goss also admitted that the United States had a limited capacity to enforce diplomatic assurances against torture:

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.<sup>109</sup>

Newly-appointed U.S. Attorney General Alberto Gonzales also said in a March 2005 interview that the U.S. State Department and CIA secure assurances that detainees subject to transfer will be treated humanely upon return, but that once a detainee is in custody in another country, “We can’t fully control what that country might do. We obviously expect a country to whom we have rendered a detainee to comply with their representations to us... If you're asking me, 'Does a country always comply?' I don't have an answer to that.”<sup>110</sup>

These striking admissions by U.S. government officials acknowledge that once a detainee is transferred there is no way to enforce diplomatic assurances or fully guarantee a returnee’s safety. In response to Goss’s claim that assurances are “checked and double-checked” the *New York Times* concluded:

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<sup>108</sup> Testimony of the Director of Central Intelligence Porter J. Goss before the Senate Select Committee on Intelligence, “Global Intelligence Challenges 2005: Meeting Long-Term Challenges with a Long-Term Strategy,” February 16, 2005 [online] [http://www.cia.gov/cia/public\\_affairs/press\\_release/2005/pr02172005.html](http://www.cia.gov/cia/public_affairs/press_release/2005/pr02172005.html) (retrieved March 9, 2005)

<sup>109</sup> Tracy Wilkinson and Bob Drogin, “Missing Imam’s Trail Said to Lead from Italy to CIA; Prosecutors in Milan are Investigating Whether an Egyptian-born Suspected Militant was Spirited Away by the U.S. Using a Disputed Tactic,” *Los Angeles Times*, A-1, March 3, 2005. See also, Douglas Jehl and David Johnston, “Rule Change Lets C.I.A. Freely Send Suspects Abroad to Jails,” *New York Times*, March 6, 2005.

<sup>110</sup> Mark Sherman, “Gonzales: No Guarantee Captives aren’t Tortured,” *Associated Press*, March 8, 2005.

Those assurances are worthless, and the Bush administration surely knows it. In normal times, the governments of these countries have abysmal standards for human rights and humane treatment, and would have no problem promising that a prisoner wouldn't be tortured—right before he was tortured. And these are not normal times.<sup>111</sup>

The Bush administration, however, has continued to defend the practice of relying on assurances against torture, even from the government of Uzbekistan, a country in which torture is systematic.<sup>112</sup> At a press conference on March 16, 2005, President George W. Bush stated that one way to protect the American people and their friends from attack post-September 11 was “to arrest people and send them back to their country of origin with the promise that they won't be tortured.”<sup>113</sup> In response to a reporter's follow-up question, “. . . what is it that Uzbekistan can do in interrogating an individual that the United States can't?” the President simply responded, “We seek assurances that nobody will be tortured when we render a person back to their home country.”<sup>114</sup>

### No Effective Opportunity to Challenge Reliability of Assurances

The most glaring deficiency in U.S. law and policy lies precisely in the absence of express provision for procedural guarantees for the person subject to transfer, including any opportunity to challenge the credibility or reliability of diplomatic assurances before an independent judicial body. This deficiency applies with equal force to immigration cases, which are governed by the procedures set forth in federal regulations; to renditions outside of any legal framework, which lack even the basic and flawed process set forth in the immigration regulations; and to returns from any place of detention within U.S. jurisdiction or effective control, including Guantánamo Bay.

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<sup>111</sup> Editorial, “Torture by Proxy,” *New York Times*, March 8, 2005. See also Editorial, “Torture by Proxy,” *Los Angeles Times*, March 11, 2005, p. B-12: “The CIA says with a straight face that it gets those assurances before delivering suspects to jailers in Egypt, Syria, Saudi Arabia, Jordan and Pakistan—countries that have such abysmal human rights records that promises of decent treatment are a joke.” See also Dana Priest, “CIA's Assurances on Transferred Suspects Doubted; Prisoners Say Countries Break No-Torture Pledges,” *Washington Post*, March 17, 2005, p. A1.

<sup>112</sup> The 2004 U.S. Department of State Country Reports on Human Practices documents the following types of torture at the hands of the Uzbek authorities: suffocation, electric shock, rape and sexual abuse, beatings. The country report also referenced a February 2003 report by the U.N. Special Rapporteur on Torture, which concluded that torture or similar ill-treatment was systematic. See Report of the Special Rapporteur on Torture, Mission to Uzbekistan, E/CN.4/2003/68/add.2, February 3, 2003 [online] <http://daccessdds.un.org/doc/UNDOC/GEN/G03/107/66/PDF/G0310766.pdf?OpenElement> (retrieved March 19, 2005).

<sup>113</sup> Press Conference by the President, March 16, 2005 [online] <http://www.whitehouse.gov/news/releases/2005/03/20050316-2.html> (retrieved March 19, 2005).

<sup>114</sup> *Ibid.*

It is striking that the executive branch and intelligence services have sole discretion for seeking, securing, and determining the reliability and sufficiency of diplomatic assurances. The verification and reliability assessment required by the immigration regulations lies with the Secretary of State and Attorney General and is completely discretionary. In rendition cases, the State Department and CIA apparently are tasked with securing and evaluating assurances.<sup>115</sup> In returns from Guantánamo Bay, the Department of Defense, in consultation with the State Department and other government agencies, assumes that responsibility. Thus, although the reliability of assurances to protect against torture is central to determining whether a transfer is lawful, there is no provision for judicial review or other independent evaluation of assurances in any transfer effected by the U.S. government based on them. The executive branch essentially decides for itself whether its transfer of a person to the custody of another government is legal.<sup>116</sup>

Access to due process is a cornerstone of both U.S. law and international human rights standards. As the Association of the Bar of the City of New York has correctly pointed out:

[T]he unfettered discretion the Executive Branch exercises in seeking diplomatic assurances and making the unilateral decision to transfer an individual pursuant to those assurances leaves the individual with no due process protection or the safeguard of judicial oversight. This procedural shortcoming likely violates international law. The United States has an

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<sup>115</sup> Mark Sherman, "Gonzales: U.S. Won't Send Detainees to Torturers; Attorney General Alberto Gonzales Said the United States does not Send Detainees to Nations Allowing Torture, but Once They are Transferred, Can't Ensure Good Treatment," *Miami Herald*, March 8, 2005, p. 7: "Gonzales said the State Department and the CIA obtain assurances that people will be humanely treated. In the case of countries with a history of abusing prisoners, the United States 'would, I would think in most cases, look for additional assurances that that conduct won't be repeated.'" *Ibid*.

<sup>116</sup> The inability to challenge executive decisions regarding transfers to risk of torture based on diplomatic assurances has been played out in other fora as well. In October 2004, a majority of the twenty-five active judges in the Ninth Circuit Court of Appeals (San Francisco) voted to order a re-hearing of the *Cornejo-Barreto* case before an eleven-judge panel. A three-judge panel ruled previously in the case that federal judges had no authority to review an extradition proceeding for the possibility that an extraditee would be at risk of torture if returned to the country that issued the extradition warrant. That court ruled that authority to make such determinations regarding risk of torture lies exclusively with the secretary of state. Although the regulations that govern the implementation of the Convention against Torture in extradition cases contain no express provision for the use of diplomatic assurances against torture, such guarantees were a feature of this case and would presumably have been one of the aspects of the extradition proceeding that would have been reviewable for reliability and sufficiency if the appeals court had had an opportunity to rule that extradition proceedings can be challenged in federal court for compliance with the U.S.'s Convention against Torture obligations. See *Cornejo-Barreto v. Siefert*, 386 F.3d 938 (9<sup>th</sup> Cir., *en banc*, 2004). The case became moot when the foreign government seeking *Cornejo-Barreto's* extradition withdrew its request. See *Cornejo-Barreto v. Siefert*, 389 F3d 1307 (9<sup>th</sup> Cir. 2004).

obligation to provide detainees in its custody an effective opportunity to challenge the reliability and adequacy of diplomatic assurances.<sup>117</sup>

Moreover, neither U.S. policy nor the immigration law requires the executive to reject as inherently unreliable assurances from governments in countries where torture is a serious human rights problem or where specific groups are routinely targeted for torture and ill-treatment and a person subject to return based on assurances is a member of such group. Under current U.S. law and policy, the government could transfer or remove a person at high risk of torture or ill-treatment based on the simplest and vaguest of promises from governments that routinely violate the law.

### Legislative Initiatives

The Abu Ghraib torture scandal, the Arar case, “renditions” to torture, and revelations of torture and ill-treatment by U.S. forces in Afghanistan and at Guantánamo Bay have given rise to a public debate about the U.S.’s obligations under international law and the imperative to halt and prevent torture and ill-treatment at home and abroad. In this context, some lawmakers have proposed new legislation to address the prohibition against torture, including the absolute ban on returning a person to a place where he or she would be at risk of torture or ill-treatment. Several key proposals have addressed the ban on transfers to risk of torture and the issue of whether or not diplomatic assurances are an effective safeguard against torture and ill-treatment.

### 9/11 Recommendations Implementation Act

In September 2004, the Republican party leadership in the U.S. House of Representatives introduced a bill titled “9/11 Recommendations Implementation Act (H.R. 10),” intended to implement the recommendations of the U.S. 9/11 Commission. The bill would have authorized the U.S. government to deport non-citizens who it labeled as national security threats or criminal aliens to countries where they would be at grave risk of torture, in clear violation of the U.S.’s obligations under the Convention against Torture. Human rights groups, including Human Rights Watch, strongly opposed the bill, stating that it would violate the U.S.’s Convention against Torture

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<sup>117</sup> Association of the Bar of the City of New York and Center for Human Rights and Global Justice at NYU School of Law, *Torture by Proxy: International and Domestic Law Applicable to “Extraordinary Renditions,”* October 2004, p. 89 [online] [http://www.abcny.org/pdf/report/Torture%20by%20Proxy%20-%20Final%20\(PDF\).pdf](http://www.abcny.org/pdf/report/Torture%20by%20Proxy%20-%20Final%20(PDF).pdf) (retrieved March 9, 2005): “This obligation [to afford procedural guarantees] is grounded in Convention against Torture Article 3 (prohibiting torture and CID) and Article 2 (requiring state parties to implement judicial and administrative measures to prevent torture); and ICCPR Article 7 (prohibiting torture and CID) and Article 2(1) (interpreted by the Human Rights Committee as requiring state parties ‘to respect and to ensure’ ICCPR protections through prevention and provision of judicial or administrative review).” Ibid.

obligations and U.S. domestic law and have “immediate and damaging consequences.”<sup>118</sup> In the face of strong public criticism, the House Republican leadership amended this section of the bill and deleted the exemption from the Convention against Torture protection against *refoulement* to torture. Instead, they included a provision that retained the ban on removals that would violate the Convention against Torture, but added draconian detention provisions for certain classes of non-citizens who are granted this protection. These detention provisions lacked adequate standards and failed to provide for judicial review to safeguard against abuse.<sup>119</sup> The provisions were not included in the legislation that was eventually passed in January 2005.<sup>120</sup>

### Torture Outsourcing Prevention Act: Markey Bill

Representative Edward J. Markey, a member of the U.S. House of Representatives from the Democratic Party, has been a leading opponent of the practice of renditions in the U.S. Congress and has also argued that diplomatic assurances from abusive regimes are inherently unreliable. In February 2005, Markey introduced a bill entitled the “Torture Outsourcing Prevention Act (H.R. 952)”.<sup>121</sup> The bill reaffirms the absolute prohibition against torture and *refoulement* and states that “it is critically important for that all transfers of individuals to other countries occur with full due process of law and in conformity with the obligations of the United States under article 3 of the Convention against Torture.”<sup>122</sup> The bill specifically addresses the ineffectiveness of diplomatic assurances against torture:

The reliance on diplomatic assurances from a government that it will not torture or ill-treat a person returned to that government is an ineffective safeguard for protecting persons from torture or ill-treatment.

Assurances from a government known to engage in systematic torture are inherently unreliable. There is strong evidence that governments such as Egypt, Syria, and Uzbekistan have violated such assurances they have provided.<sup>123</sup>

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<sup>118</sup> Letter to members of the U.S. House of Representatives from Human Rights Watch, Amnesty International, Human Rights First, Physicians for Human Rights and other human rights groups asking members to oppose the offending provisions and have them struck from the bill, September 30, 2004, copy on file with Human Rights Watch.

<sup>119</sup> 9/11 Recommendations Implementation Act of 2004 (H.R. 10) [online] <http://thomas.loc.gov/cgi-bin/query/D?c108:1:/temp/~c108Qm13YF::> (retrieved April 6, 2005).

<sup>120</sup> Intelligence Reform and Terrorism Prevention Act of 2004, Public Law 108-458, January 7, 2005 [online] <http://thomas.loc.gov/cgi-bin/query/D?c108:4:/temp/~c1088oKsSS::> (retrieved March 29, 2005).

<sup>121</sup> Press Release, “Markey Introduces Bill to Prevent Outsourcing of Torture,” February 17, 2005 [online] [http://www.house.gov/markey/Issues/iss\\_human\\_rights\\_pr050217.pdf](http://www.house.gov/markey/Issues/iss_human_rights_pr050217.pdf) (retrieved February 23, 2005).

<sup>122</sup> Torture Outsourcing Prevention Act (H.R. 952), F:\M9\MARKEY\_017.XML, Sec. 2(14) [online] <http://www.theorator.com/bills109/hr952.html> (retrieved April 6, 2005).

<sup>123</sup> *Ibid.*, Sec. 2(15).

The bill would supplement the existing legal prohibition on returning individuals to countries where they are likely to be tortured by requiring the State Department to establish a list of countries that commonly use torture in detention and interrogation. It would prohibit U.S. officials or contractors from transferring any person in their custody to a country on the list, unless those transfers occur as part of an immigration or extradition proceeding where the individual has an opportunity to raise a Convention against Torture claim in a judicial forum, including the opportunity to challenge the reliability and sufficiency of any diplomatic assurances.

Under the bill, the Secretary of State could waive the prohibition if she could certify that a country on the list had “ended” the acts of torture and ill-treatment that were the basis for the inclusion of the country on the list and that there was a verifiable mechanism in place to ensure that any person transferred to said country would not be tortured or ill-treated. Written or oral assurances against torture from a government would not be sufficient to constitute such a verifiable mechanism. In all cases, the bill would prevent reliance on diplomatic assurances as the basis for determining that an individual is not at risk of torture.

To ensure compliance with these provisions, the bill would require the Secretary of Homeland Security to revise the immigration regulations implementing article 3 of the Convention against Torture:

...to ensure that written or verbal assurances made by a country that a person in immigration proceedings in the United States (including asylum proceedings) will not be tortured or subjected to cruel, inhuman or degrading if the person is removed by the United States to the country are not, standing alone, a sufficient basis for believing that the person would not be tortured or subjected to such treatment if the alien were removed to the country.<sup>124</sup>

It would also require the other government agencies to issue regulations regarding the responsibilities of U.S. government officials and contractors to comply with article 3 of the Convention against Torture both within and outside the U.S.

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<sup>124</sup> Ibid., p. 14.

Significantly, the bill would require the U.S. to allow a person subject to return based on assurances an opportunity to challenge the reliability of assurances in an independent judicial forum.<sup>125</sup> The bill would thus address the glaring absence of procedural guarantees to effectively challenge diplomatic assurances secured by the U.S. in its efforts to effect returns based on them.

On March 16, 2005, Rep. Markey proposed an amendment to a supplemental appropriations bill that prohibited any of the funds made available by the act to be used for any activities that would contravene the U.S.'s obligations under the Convention against Torture.<sup>126</sup> In his statement introducing the amendment, Markey directly referenced the U.S. renditions program and said:

The Administration maintains that it is in full compliance with the Convention against Torture. Compliance, they say, is guaranteed by the dubious practice of asking countries known to torture prisoners for “promises” that they will not torture *our* prisoners. These so-called “diplomatic assurances” then provide the cover for sending a suspect to that country to undergo interrogation. . . “[D]iplomatic assurances” not to torture are not credible, and the Administration knows it.”<sup>127</sup>

The amendment passed in the House of Representatives by an overwhelming majority of 420 to 2, and was an important first step in addressing the U.S. practice of handing people over to governments that torture.<sup>128</sup>

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<sup>125</sup> Ibid., pp. 12-13: The bill would require all U.S. agencies to promulgate regulations regarding “the process by which a person may raise and adjudicate in an independent judicial forum a claim that his or her transfer would be in violation of article 3 of the [Convention against Torture]...including the process by which the individual being transferred can challenge any diplomatic assurances received from the government to which the individual would be returned that the individual would not be subjected to torture or ill-treatment.”

<sup>126</sup> Amendment to H.R. 1268, as Reported, Offered by Mr. Markey of Massachusetts, F:\M9\MARKEY\_033.XML, March 15, 2005.

<sup>127</sup> Statement by Representative Edward J. Markey on Amendment to Stop Funds for the Outsourcing of Torture, March 15, 2005 [online] [http://www.house.gov/markey/Issues/iss\\_human\\_rights\\_st050315.pdf](http://www.house.gov/markey/Issues/iss_human_rights_st050315.pdf) (retrieved March 19, 2005).

<sup>128</sup> See, Human Rights Watch Statement by Wendy Patten, U.S. Advocacy Director, at the March 10, 2005 “Rally to Stop Renditions” convened by Rep. Markey [online] <http://hrw.org/english/docs/2005/03/10/usint10294.htm> (retrieved March 19, 2005). Human Rights Watch stated, “[W]e support efforts by the Congress, led by Rep. Markey in the House of Representatives, to put a stop to renditions to torture and, as part of that vital effort, to prevent the Bush administration from papering over its illegal conduct with diplomatic assurances from governments that torture.”

## Convention against Torture Implementation Act 2005: Leahy Bill

On March 17, 2005 Senator Patrick Leahy introduced the “Convention against Torture Implementation Act 2005 (S. 654)” in the U.S. Senate.<sup>129</sup> This legislation is similar in substance and scope to the Markey bill.

The bill would prohibit the transfer of any person in U.S. custody to a country that appeared on a designated list of states where torture was a serious human rights problem. It would also prohibit such a transfer where “there are otherwise substantial grounds for believing that the person would be in danger of being subjected to torture” even if the country of return did not appear on the designated list. The secretary of state could waive the prohibition if the acts that were the basis for a particular country’s inclusion on the list “have ended” and a verifiable mechanism was in place to ensure that a person transferred to that country would not be tortured. Transfers made through lawful extradition of immigration proceedings would not be subject to the list of countries, but would still have to meet the standard set forth in article 3 of the Convention against Torture in each individual case.

The U.S. would be prohibited from relying on diplomatic assurances as justification for any transfer of a person to another country:

(c) Assurances Insufficient—Written or verbal assurances made to the United States by the government of a country that persons in its custody or control will not be tortured are not sufficient for believing that a person is not in danger of being subjected to torture.

The Leahy bill would prohibit the use of diplomatic assurances as a sufficient safeguard against torture in immigration and extradition cases, as well as in rendition cases. In his statement in the Senate, Senator Leahy pointed to this provision of the bill as the most significant:

Most importantly, the bill closes the diplomatic assurances loophole. We would no longer accept assurances from governments that we know engage in torture. Our past reliance on diplomatic assurances is blatantly hypocritical. How can our State Department denounce countries for

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<sup>129</sup> Convention against Torture Implementation Act 2005 (S. 654), O:\DAV\DAV05197.xml, March 17, 2005 [online] <http://thomas.loc.gov/cgi-bin/query/D?c109:3:./temp/~c109YjXemX::> (retrieved March 25, 2005).

engaging in torture while the CIA secretly transfers detainees to the very same countries for interrogation?<sup>130</sup>

### Case of Ashraf al-Jailani

The case of Ashraf al-Jailani is emblematic of the impact that some of these positive legislative initiatives could have in the future. While most of the proposed legislation is keyed toward the phenomenon of renditions that occur outside U.S. territory, the bills also address the use of diplomatic assurances in ordinary immigration proceedings in the U.S. An immigration judge in the *al-Jailani* case ruled that returning a person to a risk of torture not only violates the U.S.'s Convention against Torture obligations, but could have far-reaching policy implications for creating the perception that the U.S. condones the practice of torture for countries fighting against terrorism. Disturbingly, the judge also found that securing credible diplomatic assurances against torture could be a condition for al-Jailani's return to Yemen, despite the country's well-documented and even admitted use of torture.

In December 2004 an immigration judge ruled that al-Jailani, a national of Yemen suspected by the Federal Bureau of Investigation (FBI) of terrorist activity, could not be removed to Yemen because his fears of torture and ill-treatment upon return were well-founded.<sup>131</sup> The decision recounted in some detail the voluminous credible evidence of Yemen's targeting of Islamists or suspected terrorists for especially abusive practices, including mass arrest; incommunicado detention; torture and ill-treatment in detention facilities with no independent oversight of conditions or practices therein; and denial of access by detainees to lawyers and independent courts.<sup>132</sup>

The judge also noted that Yemen admits that torture is a serious problem, but that Yemeni officials justify such abuses in light of the urgent need to combat terrorism.<sup>133</sup> Moreover, the judge took into account the May 2004 conclusions of the Committee against Torture regarding Yemen's "failure to address in adequate detail the practical

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<sup>130</sup> Statement of Senator Patrick Leahy on the Convention against Torture Implementation Act, March 17, 2005 [online] <http://leahy.senate.gov/press/200503/031705a.html> (retrieved March 19, 2005)

<sup>131</sup> *In the Matter of Ashraf al-Jailani*, Executive Office for Immigration Review (EOIR), U.S. Immigration Court, York, Pennsylvania, File #A 73 369 984, December 17, 2004, p. 14, copy on file with Human Rights Watch.

<sup>132</sup> The decision references the U.S. Department of State Country Reports on Human Rights Practices, Amnesty International and Human Rights Watch reports, and an April 2003 report by the U.S. Bureau of Citizenship and Immigration Services (BCIS) detailing human rights violations against those suspected as Islamic militants or associated with terrorist activity.

<sup>133</sup> *Al-Jailani*, p. 11.

implementation of the Torture Convention, and further failure to comply with the reporting guidelines of the Committee in this regard.”<sup>134</sup>

The judge, however, went further than merely assessing al-Jailani’s individual risk of torture or ill-treatment. He concluded that sending al-Jailani back would also have broader policy implications. Returning al-Jailani would not only violate the U.S.’s Convention against Torture obligations, “but could also be construed as sanctioning Yemen’s use of torture by its security forces thereby bringing the United States into disrepute in the international community.”<sup>135</sup>

Despite all this, the judge determined that assurances that al-Jailani would not be tortured would be sufficient to justify his removal to Yemen if they could be deemed credible. It is difficult to see how any assurances from a government with Yemen’s record of torture could be considered credible or reliable. But the loopholes noted above with respect to the U.S. regulations almost surely account for this apparently contradictory ruling. When the judge found that credible assurances would permit al-Jailani’s removal to Yemen, he was simply following the regulations that apply in immigration proceedings.<sup>136</sup> The executive branch’s discretion to secure and evaluate diplomatic assurances leave open the very real possibility that it would deem assurances from Yemen to be credible. Also, because al-Jailani enjoys no procedural rights in relation to diplomatic assurances under the regulations, he would not be entitled to challenge the assurances in a court.

Yemen not only routinely violates the prohibition against torture, but as noted in the *al-Jailani* decision, openly admits that it deems such abuses to be necessary in its efforts to combat terrorism. Under these circumstances, diplomatic assurances from the Yemeni authorities would be inherently unreliable and should not be acceptable as a safeguard against torture. Moreover, if the U.S. were to return al-Jailani to Yemen based on assurances, the policy considerations so eloquently articulated in the decision still obtain: accepting assurances for the protection of one person could be perceived as sanctioning Yemen’s abusive practices for the vast majority of persons vulnerable to torture and ill-treatment.

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<sup>134</sup> Ibid., p. 12: “The Committee faults Yemen for invoking any justification for using torture, including its fight against terrorism and difficulties associated with this serious problem. Of particular interest to this court is the Committee’s concern that Yemen has failed to establish a comprehensive definition of torture, and faulted the government for the lack of transparency in its detention centers operated by its security forces.”

<sup>135</sup> Ibid., p. 14

<sup>136</sup> 8 C.F.R. § 208.18(c)(3) - Diplomatic assurances against torture obtained by the Secretary of State.

The Department of Homeland Security has appealed the al-Jailani ruling. At the time of writing, it remained unclear if the U.S. government will seek assurances from the Yemeni authorities or if it will simply argue that al-Jailani would not be at risk of torture upon return, even in the absence of assurances.

### *Canada*

The Canadian government seeks and secures diplomatic assurances for returns in some cases where there is an acknowledged risk of torture, including for persons subject to “security certificates.” Such certification by the executive authorizes the government to detain a person—suspected of being a threat to the security of Canada—for an unspecified period without charge or trial; present secret evidence, not available to anyone except the government and a judge, in closed hearings to which detainees and their lawyers do not have access; and to deport him or her.<sup>137</sup> At the time of writing, there were several hearings and judicial reviews scheduled, and decisions pending, to determine the validity of some security certificate cases. Some of these procedures address the issue of whether security certificates in individual cases are “reasonable” and others review prior assessments of the risk of torture that detainees subject to security certificates might face if deported. Canadian courts have not yet been willing to permit the government to breach the absolute ban on *refoulement* in these particular cases.

Human rights groups and various segments of civil society have severely criticized the continuing use of security certificates, correctly pointing out that the process violates the prohibition against indefinite detention, internationally recognized procedural guarantees, and the absolute obligation not to send a person to a country where he or she would be at risk of torture.<sup>138</sup>

Prior to deportation, Canadian immigration authorities normally conduct a protection assessment to determine whether an individual would be at risk of torture upon return. However, if a security certificate is deemed “reasonable” by a judge, the ability to

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<sup>137</sup> Immigration and Refugee Protection Act 2001 (IRPA), Division 9 (sections 76-87) [online] <http://laws.justice.gc.ca/en/1-2.5/text.html> (retrieved March 2, 2005). The law does not expressly provide for the indefinite detention of foreign nationals suspected of posing a national security threat to Canada. The law permits the government to detain with the intention of deporting a suspect. A judge can release a suspect if a deportation cannot be effected within a reasonable time if the person does not pose a danger to national security. If a judge determines that a person would pose a threat to national security and deportation cannot be effected, then indefinite detention is a possibility given the loopholes in the law.

<sup>138</sup> See, Amnesty International Canada, “Take Action: Security Certificates, Time for Reform,” March 2005 [online] [http://www.amnesty.ca/take\\_action/actCertificates\\_300305.php](http://www.amnesty.ca/take_action/actCertificates_300305.php) (retrieved March 31, 2005). See also Letter from Amnesty International Canada to Minister of Public Safety Anne McLellan, March 31, 2004, in which Amnesty criticized the use of security certificates and “urges Canada to adopt a response to security concerns that does not result in violations of such fundamental human rights as the protections against arbitrary detention and torture.” Copy on file with Human Rights Watch.

successfully claim protection from deportation based on Canada's *nonrefoulement* obligations is significantly reduced. In the 2002 case of *Suresh v. Canada*, the Supreme Court of Canada acknowledged that international law bans absolutely returns to countries where there is a risk of torture, but in an extraordinary departure from that law, stated, "We do not exclude the possibility that in exceptional circumstances, deportation to face torture might be justified."<sup>139</sup>

Insofar as Canada is unable to deport a person where there are substantial grounds to believe he or she would be tortured on return, this is not because article 3 of the Convention against Torture directly constrains the actions of the Canadian government, but because the fundamental justice balance under s[ection] 7 of the [*Canadian*] *Charter [of Rights and Freedoms]* generally precludes deportation to torture when applied on a case-by-case basis. We may predict that it will rarely be struck in favour of expulsion where there is a serious risk of torture. However, as the matter is one of balance, precise prediction is elusive. The ambit of the exceptional discretion to deport to torture, if any, must await future cases.<sup>140</sup>

One can only assume that by securing assurances for controversial deportations, the Canadian government is seeking to avoid invoking the disturbing "exception" carved out by the *Suresh* court. The Canadian government has openly acknowledged that some persons subject to security certificates would be at risk of torture or ill-treatment upon return (see Charkaoui and Mahjoub cases below), thus triggering the *nonrefoulement* obligation. The government then seeks assurances from the receiving country, ostensibly to reduce the risk of abusive treatment. Diplomatic assurances, however, do nothing to mitigate that risk. As a result, relying on diplomatic assurances, an ineffective safeguard against torture, to effect such deportations in fact would place the Canadian government within the terms of the *Suresh* "exception" and would violate the absolute prohibition against torture and *refoulement*.

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<sup>139</sup> *Manickavasagam Suresh v. Minister of Citizenship and Immigration and the Attorney General of Canada (Suresh v. Canada)*, 2002, SCC 1. File No. 27790, January 11, 2002, para. 78 [online] [http://www.lexum.umontreal.ca/csc-scc/en/pub/2002/vol1/html/2002scr1\\_0003.html](http://www.lexum.umontreal.ca/csc-scc/en/pub/2002/vol1/html/2002scr1_0003.html) (retrieved February 25, 2005). In the April 2004 "Empty Promises" report, Human Rights Watch did not highlight security certificate cases. The *Suresh* case was featured in that report for what the judgment said about diplomatic assurances, namely "Where the Minister is relying on written assurances from a foreign government that a person would not be tortured, the refugee must be given an opportunity to present evidence and make submissions as to the value of such assurances." *Suresh* was granted a new deportation hearing after the court concluded that his original hearing did not provide the procedural safeguards necessary to protect his right not to be deported to a place, in this case India, where he was at risk of torture, including the opportunity to challenge the validity of diplomatic assurances. See "Empty Promises," pp. 18-19.

<sup>140</sup> *Suresh v. Canada*, para. 78.

Recent cases, however, indicate that despite the *Suresh* “exception,” the courts have been appropriately reluctant to permit the government to breach the absolute ban on torture, including the *nonrefoulement* obligation, even in cases where security certificates have been issued.

### Case of Adil Charkaoui

The government of Canada is currently holding four Arab men in prison without charge based on secret evidence under security certificates.<sup>141</sup> A fifth man, Adil Charkaoui, a Moroccan national, was released on bail on February 17, 2005, after a judge determined that any alleged imminent threat he posed to Canada—based on suspicions that he was associated with suspected terrorists—had been “neutralized” due to Charkaoui’s twenty-one month detention in prison.<sup>142</sup> Together the men constitute the so-called “secret trial five.”

Charkaoui’s release was a rare development as he is only the second person ever released while still subject to a security certificate. While the court imposed release conditions, such as regular reporting to the police, the decision is striking insofar as it determines that despite the security certificate, any potential danger Charkaoui presented had “eased with time.”<sup>143</sup>

### Denied Protection

While Charkaoui was still in custody, Canadian immigration officials and government authorities determined that he would be at risk of abusive treatment if deported. In August 2003, Canadian immigration authorities completed a pre-removal risk assessment confirming that Charkaoui would be at risk of torture, and possibly death, if returned to Morocco.<sup>144</sup> A “security review” conducted in August 2004 by the Immigration Intelligence Division of the Canadian Border Services Agency, however, concluded that the government should not grant protection to Charkaoui, labeling him a danger to the security of Canada.<sup>145</sup>

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<sup>141</sup> The four men and their countries of origin are: Mohammad Mahjoub (Egypt); Mahmoud Jaballah (Egypt); Hassan Almrei (Syria); and Mohamed Harkat (Algeria). Mahjoub has been in prison since June 2000, Jaballah since August 2001, Almrei since October 2001, and Harkat since December 2002.

<sup>142</sup> *In re Charkaoui*, [2005] CF 248, DES-3-03, February 17, 2005.

<sup>143</sup> The judge also noted that Charkaoui’s verbal agreement to abide by his bail conditions, coupled with numerous sworn statements from a variety of people from all walks of life who supported his release, gave the court an opportunity to evaluate its trust in him. *Ibid.*

<sup>144</sup> *Opinion sur les risques avant renvoi*, Adil Charkaoui, Dossier: 2948-DSC-40, ID: 3109 4479, Montreal, Quebec, August 21, 2003, copy on file with Human Rights Watch.

<sup>145</sup> *Décision ERAR dans le dossier de M. Charkaoui*, No. Dossier SSOBL: 3109 4479, Examen sécuritaire (RZTZ), Renseignement immigration, Agence des services frontaliers du Canada, Ottawa, Ontario, August 6, 2004, copy on file with Human Rights Watch.

The security review concluded that deportation proceedings could commence. The decision was based in large part on written assurances from Morocco that it would not torture or ill-treat Charkaoui upon return. The government acknowledged that some torture takes place in Morocco, but concluded it was not systematic. Discounting reports that the Moroccan authorities targeted persons labeled as terrorists or security threats for mistreatment, the government decided that Charkaoui was under no individual threat. Moreover, the government claimed that the assurances proffered by the Moroccan government were evidence that he would face no risk if sent back.

### **Morocco's Assurances**

The assurances themselves were of the most basic sort. In a letter to the Moroccan authorities dated February 18, 2004, the Canadian Ministry of Foreign Affairs explicitly identified Charkaoui as a “threat to the security of Canada,” and then posed three questions: 1) Will the government of Morocco ensure that Mr. Charkaoui is not tortured or subject to cruel, inhuman and degrading treatment, in conformity with Morocco’s obligations under the Convention against Torture?; 2) Will the government of Morocco confirm in writing that it will conform with its obligations under the International Covenant on Civil and Political Rights (ICCPR)?; and 3) Will the government of Morocco confirm in writing that Mr. Charkaoui will not be subject to the death penalty?<sup>146</sup>

The assurances from Morocco, dated April 18, 2004, stated that Charkaoui would receive fair treatment upon return, including protection against torture and ill-treatment, in accordance with the Moroccan constitution and international human rights treaties, including the ICCPR and the Convention against Torture. Thus, the Moroccan authorities simply restated that they would abide by their currently existing treaty obligations, which the Moroccan authorities, security officers, and police routinely violate in their dealings with suspected Islamic militants and those suspected of engaging in terrorist activities.

### **Morocco's Record of Abuse**

Adil Charkaoui’s protection assessment documents the record of abusive practices perpetrated by the Moroccan police and security service in the aftermath of the May 16, 2003 Casablanca bombings, including mass arrests, secret detentions, incommunicado detention, disappearances, lack of procedural guarantees, unfair trials, and torture and ill-

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<sup>146</sup> Copies of letters on file with Human Rights Watch (originals in French).

treatment.<sup>147</sup> In March 2004, Human Rights Watch submitted a letter on Charkaoui's behalf for use in the security review based on primary research undertaken in Morocco in January-February 2004. The letter concluded that Charkaoui would be at risk of torture and ill-treatment if returned to Morocco. A lengthy report issued by Human Rights Watch in October 2004, based on field research in Morocco, charged the government with "backsliding" on human rights progress and detailed serious rights abuses, including torture and ill-treatment, targeting suspected terrorists in violation of Morocco's international treaty obligations:

Morocco must do far more to reverse the deterioration in human rights that has occurred in the treatment of persons suspected of involvement in terrorist crimes. Given the pattern of human rights violations emanating from the crackdown on suspected Islamist militants and the application of the 2003 counter-terror law, Moroccan authorities should take immediate steps to bring all practices and laws into compliance with both the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and other Cruel Inhuman or Degrading Treatment or Punishment (CAT). Above all, law enforcement agents must be held accountable when they violate laws governing the detention and treatment of suspects.<sup>148</sup>

The United States Department of State Country Reports on Human Rights Practices, released on February 28, 2005, also contains details of torture, mistreatment, and denial of rights during the judicial process of detainees in the aftermath of the May 2003 terrorist attacks in Casablanca. The report states, "The Government [of Morocco] generally rejected these allegations" and "[t]here was no indication that the Government took any further action in response to claims of torture, made at the Court of Appeal in Fez, by 29 persons accused of terrorism, and reportedly judicial authorities refused to order any medical examinations."<sup>149</sup>

Assurances from the Moroccan government that it will comply with its international human rights obligations cannot be trusted in the face of substantial evidence to the contrary. The Canadian government cannot point to the Moroccan government's unconvincing promises as evidence of Canada's or Morocco's general commitment to

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<sup>147</sup> Charkaoui submitted evidence of such abuses from Human Rights Watch and Amnesty International, among other human rights groups.

<sup>148</sup> Human Rights Watch, *Morocco: Human Rights at a Crossroads*, October 2004 [online] <http://hrw.org/reports/2004/morocco1004> (retrieved March 1, 2005).

<sup>149</sup> U.S. Department of State Country Report on Human Rights Practices 2004: Morocco, February 28, 2005 [online] <http://www.state.gov/g/drl/rls/hrrpt/2004/41728.htm> (retrieved March 2, 2005).

human rights or concern for the individual safety and well-being of Adil Charkaoui. In order to deport Mr. Charkaoui to Morocco, the Canadian government would have to invoke the *Suresh* “exception” to the international ban on torture and *refoulement*, and send him back to the risk of torture. In fact, the August 2004 security review itself arrived at the very same conclusion. Anne Arnott, the minister’s delegate writing for the government, concluded that even if the government has underestimated the risk to Charkaoui, the “extraordinary danger” he constitutes to Canada’s security justifies sending him back to Morocco.<sup>150</sup>

In February 2005 the Canadian government acknowledged an outstanding Moroccan arrest warrant for Charkaoui. In light of this, Canadian immigration officials agreed to re-evaluate the August 2004 security review that concluded that Charkaoui could be deported.<sup>151</sup>

Hearings to determine whether Charkaoui’s security certificate is “reasonable” were held in February and March 2005. The hearings were suspended at the time of writing, pending issuance of the new risk assessment.

### Case of Mohamed Zeki Mahjoub

On February 1, 2005, a Canadian federal court ruled that the Canadian government was prohibited from deporting one of the “secret trial five”—Egyptian national Mohamed Zeki Mahjoub, a recognized refugee alleged to be a member of the Vanguard of Conquest, a faction of Egyptian al-Jihad al-Islamiya.<sup>152</sup> The judge in *Mahjoub* ruled that it was “patently unreasonable” for the government to deport Mahjoub when the minister’s delegate who made the determination did not have access to confidential information in the government’s dossier.<sup>153</sup> The court ruled that an independent and proper assessment of the risk Mahjoub posed to Canada’s security required a review of at least some of that information.

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<sup>150</sup> *Décision ERAR dans le dossier de M. Charkaoui*, p. 20: “Dans l’éventualité où j’aurais sous-estimé le risque auquel M. Charkaoui est confronté, je suis convaincu qu’il répond au critère établi dans l’arrêt *Suresh* et que le danger extraordinaire qu’il constitue pour la sécurité du Canada l’emporte sur le risque qu’il court advenant son retour au Maroc. Par conséquent, on ne doit pas lui permettre de rester au Canada.”

<sup>151</sup> Letter from the Canadian Department of Justice to the Canadian Federal Court in the Matter of Adil Charkaoui, March 14, 2005, stating that a new risk assessment would be conducted and Charkaoui would have a new opportunity to make submissions to the Minister’s delegate regarding his risk of torture or ill-treatment if returned to Morocco. Copy on file with Human Rights Watch. See also Sue Montgomery, “Canada Won’t Enforce Moroccan Arrest Warrant,” *The Montreal Gazette*, March 16, 2005, A2.

<sup>152</sup> *Mahjoub v. Canada (Minister of Citizenship and Immigration)* [2005] F.C.J. No. 173, January 31, 2005 [online] <http://decisions.fct-cf.gc.ca/fct/2005/2005fc156.shtml> (retrieved February 26, 2005).

<sup>153</sup> The delegate was appointed by the Minister of Citizenship and Immigration.

The judge determined that the issue of “whether circumstances would ever justify deportation to face torture” as per the *Suresh* “exception” must be decided on the basis of a proper evidentiary record, which did not exist in the *Mahjoub* case. The court therefore decided to remit the case for a redetermination. The judgement is nonetheless instructive on the issues of the delegate’s finding that Mahjoub would, in fact, be at risk of torture and ill-treatment if returned to Egypt, and the Canadian government practice of securing diplomatic assurances to justify deportations where there is an acknowledged risk of such abuse.

The delegate’s report stated that Mahjoub would be taken into custody immediately upon return to Egypt and subjected to a retrial for an April 1999 conviction *in absentia* for terrorist activities. The report concluded:

In consideration of the reports regarding human rights violations in Egypt towards members of VOC [Vanguards of Conquest] and AJ [al-Jihad], it is my opinion that on the balance of probabilities, Mr. Mahjoub could suffer ill-treatment and human rights abuses soon after he is detained.<sup>154</sup>

In light of this acknowledgement of Mahjoub’s risk of torture and ill-treatment, the Canadian government sought and secured diplomatic notes on three separate occasions, in which Egyptian officials confirmed that if returned, Mahjoub “would be treated in full conformity with constitutional and human rights laws.”<sup>155</sup> The court decision noted:

Mr. Mahjoub had argued that these assurances would not be respected, and submitted general reports concerning human rights abuses in Egypt, as well as reports from Amnesty International, Human Rights Watch, and an expert in Islamic law. The reports documented the experience of other Egyptians accused of similar terrorist activities who were sent back to Egypt from other countries and who, notwithstanding assurances, were subjected to alleged human rights abuses, ill-treatment and *incommunicado* detention.<sup>156</sup>

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<sup>154</sup> *Mahjoub v. Canada*, para. 30.

<sup>155</sup> *Ibid.*, para. 31.

<sup>156</sup> *Ibid.*, para. 32.

In a striking admission, the minister's delegate concluded that the reports "presented a credible basis for calling into question the extent to which the Egyptian government would honor its assurances."<sup>157</sup>

Those reports included information from Human Rights Watch and others regarding the December 2001 expulsion from Sweden of Ahmed Agiza, an Egyptian asylum seeker, who was subsequently held incommunicado, tortured and subjected to an unfair retrial upon return to Egypt. The Egyptian authorities had given the Swedish government assurances that Agiza would not be tortured and would be afforded a fair trial. The delegate in the *Mahjoub* case alleged that Mahjoub and Agiza were associates. Agiza was also tried *in absentia* in Egypt in April 1999 (see section below on Sweden).

Despite the government's admission of Mahjoub's risk of torture, the delegate determined that Mahjoub should not be allowed to remain in Canada because he posed an "extraordinary danger" to Canada's security and thus fell within the provisions of the *refoulement* exception to Canada's Immigration and Refugee Protection Act.<sup>158</sup>

In quashing the delegate's determination and sending the case back for redetermination with a view to establishing a proper evidentiary record, the judge in *Mahjoub* expressed skepticism about the *Suresh* "exception:"

The Supreme Court of Canada has left the issue open by not excluding the possibility that, in exceptional circumstances, such deportation may be justified, either as a consequence of the balancing process required by section 7 of the Charter or under section 1 of the Charter. There are, however, powerful indicia that deportation to face torture is conduct fundamentally unacceptable; conduct that shocks the Canadian conscience and therefore violates fundamental justice in a manner that can not be justified under...the Charter.<sup>159</sup>

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<sup>157</sup> *Ibid.*, para. 33.

<sup>158</sup> Section 115. [Principle of Non-Refoulement] (1) A protected person or a person who is recognized as a Convention refugee by another country to which the person may be returned shall not be removed from Canada to a country where they would be at risk of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion or at risk of torture or cruel and unusual treatment or punishment. Exceptions [to the Principle of Non-Refoulement] (2) Subsection (1) does not apply in the case of a person (a) who is inadmissible on grounds of serious criminality and who constitutes, in the opinion of the Minister, a danger to the public in Canada; or (b) who is inadmissible on grounds of security, violating human or international rights or organized criminality if, in the opinion of the Minister, the person should not be allowed to remain in Canada on the basis of the nature and severity of acts committed or of danger to the security of Canada.

[online] <http://laws.justice.gc.ca/en/1-2.5/> (retrieved February 26, 2005).

<sup>159</sup> *Mahjoub*, para. 64.

A decision on Mahjoub's application for bail was pending at the time of writing.

### Case of Lai Cheong Sing and Family

The use of diplomatic assurances in Canadian asylum cases is another disturbing development. Assurances have been sought in cases involving persons who do not have a security profile, but who were unsuccessful in their efforts to seek asylum.

The case of the Lai family illustrates the danger that the use of diplomatic assurances in terrorism or national security cases poses to a broader pool of people subject to forced return. Lai Cheong Sing, his wife Tsang Ming Na, and three children were excluded from refugee status in June 2002 on the ground that there were reasons to believe they had committed serious non-political offenses, namely bribery and smuggling, in Hong Kong and China prior to arrival in Canada in 1999.<sup>160</sup> In its ruling, the court overlooked substantial evidence that torture was pervasive in the Chinese criminal justice system and that persons interrogated in China regarding the Lai family's activities had been ill-treated. It also issued the controversial ruling, now on appeal, that China's assurances against torture did not have to be evaluated separately from its assurances against the death penalty.

The panel that made the decision to exclude the Lais from consideration for full refugee status did so based in part on assurances from the Chinese authorities that if returned, the Lais would not face the death penalty or torture; these assurances were assessed together and amounted to the following:

In accordance with...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 [Lai] 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 U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or

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<sup>160</sup> *Lai v. Minister of Citizenship and Immigration (Lai v. Canada)*, Federal Court of Canada, IMM-3194-02, 2004 FC 179, February 3, 2004 [online] <http://decisions.fct-cf.gc.ca/fct/2004/2004fc179.shtml> (retrieved February 26, 2005). The Lais were excluded from refugee status for the commission of serious non-political crimes outside the country of refuge prior to their admission to Canada.

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.<sup>161</sup>

In February 2004, the federal court dismissed the Lais application for judicial review of their refugee status determination and certified a set of questions for consideration by the federal court of appeal. The questions included: “When does there need to be an assessment of a foreign state’s assurance to avoid torture of refugee claimants separate from its assessment not to impose the death penalty?”<sup>162</sup>

The federal court concluded that since there was no persuasive evidence of torture or degrading treatment following return in cases similar to the Lais, the decision not to assess the assurances against torture separately was justified.<sup>163</sup> The Lais lawyers, however, argued that some of the persons interrogated by the Chinese authorities about the Lais were ill-treated and coerced into giving false information. They also argued that the *Suresh* case established that the sole criterion for the need for a separate assessment for assurances against torture is that the state “has engaged in illegal torture or allowed others to do so on its territory in the past.”<sup>164</sup> Because of the compelling nature of the evidence directly linked to the Lais and the general evidence that torture was routinely used to extract confessions in Chinese criminal proceedings, the court should have conducted a separate assessment of the Chinese government’s assurances against torture.

The *Suresh* court articulated the operational problems inherent in relying on assurances in torture risk cases:

A distinction may be drawn between assurances given by a state that it will not apply the death penalty (through a legal process) and assurances by a state that it will not resort to torture (an illegal process). We would signal the difficulty in relying too heavily on assurances by a state that it will refrain from torture in the future when it has engaged in illegal torture or allowed others to do so on its territory in the past. This difficulty becomes acute in cases where torture is inflicted not only with

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<sup>161</sup> *Lai v. Canada*, February 2004, para. 46.

<sup>162</sup> *Lai v. Canada*, Public Memorandum of Fact and Law of the Appellants, Federal Court of Appeal, IMM-3194-02, Court No. A-191-04, July 26, 2004, copy on file with Human Rights Watch.

<sup>163</sup> *Lai v. Canada*, February 2004, para. 50.

<sup>164</sup> *Ibid.*, para. 25.

the collusion but through the impotence of the state in controlling the behaviour of its officials. Hence the need to distinguish between assurances regarding the death penalty and assurances regarding torture. The former are easier to monitor and generally more reliable than the latter.<sup>165</sup>

The assurances against torture in the Lai case simply restate the government of China's currently existing treaty obligations. They should be assessed in a separate and rigorous manner, taking into account the distinct differences between determining the credibility and reliability of assurances against the death penalty and assurances against criminal activities amounting to torture and ill-treatment.

The Federal Court of Appeal heard the Lai appeal on March 14-15, 2005 in Vancouver. At the time of writing, a decision on the appeal was pending.

## **Europe**

### **Sweden**

#### **Update: Cases of Ahmed Agiza and Mohammed al-Zari**

The December 2001 transfers of asylum seekers Ahmed Agiza and Mohammed al-Zari<sup>166</sup> from Sweden to Egypt aboard a U.S. government-leased airplane remain among the most controversial cases involving the use of diplomatic assurances by a European government.<sup>167</sup> The cases provide the clearest illustration to date of the inherently flawed nature of diplomatic assurances and of post-return monitoring mechanisms.

Sweden expelled Agiza and al-Zari, suspected of terrorist activities, following written assurances from the Egyptian authorities that they would not be subject to the death penalty, tortured or ill-treated, and would receive fair trials. Swedish and Egyptian authorities also agreed on a post-return monitoring mechanism involving visits to the

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<sup>165</sup> Ibid., para. 124.

<sup>166</sup> For a discussion of the asylum and refugee protection dimension of the men's cases see Brian Gorlick, "The Institution of Asylum after September 11," in *Mänskliga Rättigheter: från forskningens frontlinjer*, Iustus Fölag, Uppsala, 2003, pp. 2-4.

<sup>167</sup> See, "Empty Promises", pp. 33-36. The so-called "torture plane"—a Gulfstream jet—upon which the men were transferred to Egypt has been spotted in numerous European, Middle Eastern and Asian countries. According to press reports and the jet's logs, which were acquired by journalists, the plane has also landed at Guantánamo Bay. See Dana Priest, "Jet is an Open Secret in Terror War," *Washington Post*, p. A1, December 27, 2004; and John Crewdson, "Mysterious Jet Tied to Torture Flights: Is Shadowy Firm Front for CIA?" *Chicago Tribune*, January 8, 2005.

men in prison. The men had no opportunity under Swedish law to challenge the legality of their expulsions or the reliability of the Egyptian assurances.

Agiza and al-Zari were held incommunicado for five weeks after their return. Despite monthly visits thereafter by Swedish diplomats, none of them in private, both men credibly alleged to their lawyers and family members—and, indeed, to Swedish diplomats as well (see below)—that they had been tortured and ill-treated in detention.<sup>168</sup> Agiza remains in prison to date after a patently unfair retrial in April 2004. Al-Zari was released without charge or trial in October 2003, remains under surveillance by Egyptian security forces, and reports regularly to the police. He is not permitted to speak with journalists or human rights groups.

When Human Rights Watch last reported on the cases in April 2004, many of the details of the men's transfers were still unknown. In May 2004, a Swedish television news program, *Kalla Fakta*, revealed that the two men were apprehended and physically assaulted by Swedish police; handed over to the custody of hooded U.S. operatives at Bromma airport who cut off the men's clothing and blindfolded, hooded, diapered, and drugged them; and then transported aboard a U.S. government-leased Gulfstream jet to Cairo.<sup>169</sup> The involvement of the U.S. in the men's transfers has since been confirmed by the Swedish government.<sup>170</sup>

### Call for International Investigation into the Men's Transfers

In the aftermath of these revelations, the Swedish government called for an "international inquiry" into the men's treatment. According to Laila Freivalds, Swedish Minister of Foreign Affairs, the Swedish government "has requested the Egyptian government that a thorough and independent inquiry, including international experts, is carried out regarding these allegations."<sup>171</sup> To date, the Egyptian authorities have denied the men's allegations and refused to commence an investigation. Inquiries from Human

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<sup>168</sup> The visits occurred roughly on a monthly basis. According to the Swedish government, twenty-five visits took place between January 2002 and December 1, 2004. See Speech by Swedish Minister of Foreign Affairs Laila Freivalds (Freivalds Speech), "Security under the Rule of Law," December 1, 2004, copy on file with Human Rights Watch.

<sup>169</sup> See, "The Broken Promise" (English Transcript), *Kalla Fakta*, Swedish TV4, May 17, 2004 [online] <http://hrw.org/english/docs/2004/05/17/sweden8620.htm> (retrieved March 3, 2005); "The Broken Promise, Part II" (English Transcript), May 24, 2004 [online] <http://hrw.org/english/docs/2004/05/24/sweden9219.htm> (retrieved March 3, 2005); "The Broken Promise, Part IV," (English Transcript), November 22, 2004 [online] <http://hrw.org/english/docs/2004/11/22/sweden10351.htm> (retrieved April 1, 2005).

<sup>170</sup> The Swedish security police released two memorandums in late May 2004 confirming the U.S.'s involvement in the transfers and the fact that the Swedish Ministry of Foreign Affairs was aware of U.S. involvement. Copies of memoranda on file with Human Rights Watch. Journalist Seymour Hersh has argued that the men's transfers were effected with the assistance of U.S. operatives in the Department of Defense-sponsored "special access program," a program that conducts counter-terrorism operations outside the bounds of U.S. and international law. See, Hersh, *Chain of Command*, pp. 53-55.

<sup>171</sup> Freivalds Speech, December 1, 2004.

Rights Watch regarding the men's treatment and Egypt's obligation under the Convention against Torture to commence an investigation into their torture allegations have gone unanswered.<sup>172</sup> The Swedish government has denied all responsibility for having abdicated on its *nonrefoulement* obligation and for putting the men directly in harm's way.

In May 2004, Human Rights Watch called for an international inquiry under the auspices of the U.N. High Commissioner for Human Rights (OHCHR) in order to "ensure...the necessary independence, expertise, and transparency."<sup>173</sup> The involvement of the three governments in the men's transfers raised serious concerns that only an international inquiry could get to the root of all three states' actions, including, but not limited to, the men's allegations of torture and ill-treatment. The Swedish government has said that it would cooperate with such an inquiry, but in a letter to Human Rights Watch conditioned such cooperation on Egypt's participation and the approval of both men.<sup>174</sup> In December 2004, however, Foreign Minister Laila Freivalds stated that "The Swedish government would welcome further efforts by the U.N. system to investigate the matter and stands ready to fully cooperate in such endeavors."<sup>175</sup>

### Torture Despite Assurances

Despite Egypt's well-documented record of systematic torture and failure to comply with its legally-binding international human rights treaty obligations, the Swedish government continues to assert that "[t]here were no substantial grounds for believing that they [Agiza and al-Zari] would be subjected to torture."<sup>176</sup> The government points to both the written assurances and the fact that Egypt subsequently agreed to post-return monitoring as evidence to support that belief. In this case, however, the inherent lack of reliability of assurances from Egypt, the general nature of the assurances themselves,<sup>177</sup> and the inadequate post-return monitoring mechanism are all indicative of

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<sup>172</sup> Human Rights Watch letter to President Hosni Mubarak, July 26, 2004, copy on file with Human Rights Watch.

<sup>173</sup> Human Rights Watch Press Release, "Sweden: Torture Inquiry Must be under U.N. Auspices: Independent Panel must Probe Abuses by Sweden, Egypt, and U.S. Operatives," May 27, 2004 [online] <http://hrw.org/english/docs/2004/05/27/sweden8621.htm> (retrieved March 3, 2005).

<sup>174</sup> Letter to Human Rights Watch from Hans Dahlgren, State Secretary for Foreign Affairs, September 20, 2004, copy on file with Human Rights Watch.

<sup>175</sup> Freivalds Speech, December 1, 2004.

<sup>176</sup> *Ibid.*

<sup>177</sup> In response to a December 12, 2001 letter from the Swedish government asking for assurances that the men would "not be subjected to inhuman treatment or punishment of any kind," not subjected to the death penalty, and afforded fair trials, the Egyptian authorities responded:

We, herewith, assert our full understanding to all the items of this memoire, concerning the way of treatment upon repatriate [sic] from your government, with full respect to their persons and human rights. This will be done according to what the Egyptian constitution, and law stipulates.

Copies of letters on file with Human Rights Watch.

the fact that the practice of reliance upon diplomatic assurances threatens the international ban on torture, including the *nonrefoulement* obligation.

Moreover, there is credible, and in some instances overwhelming, evidence that the assurances were breached. A confidential government memorandum detailing the first visit by Swedish diplomats with Agiza and al-Zari included information from the men that they had been brutalized by the Swedish police, blindfolded during interrogations in Cairo, placed in very small cells, denied necessary medication, beaten by prison guards on the way to and from interrogations, and threatened by interrogators with repression against family members if a confession was not forthcoming.<sup>178</sup> This passage was omitted from the censored version of the monitoring report that the government made available to the public, but the men's lawyers eventually were able to access the uncensored version.<sup>179</sup> Agiza and al-Zari have made serious allegations of torture, including electric shock, to family members and their Egyptian and Swedish lawyers.<sup>180</sup> In a December 2004 radio interview, Carl Henrik Ehrenkrona, chief legal adviser to the Swedish Ministry of Foreign Affairs, claimed that one reason for not communicating the men's torture allegations to the Egyptian authorities was to protect them from the Egyptian police (see text box.)<sup>181</sup>

The Swedish authorities claim that they have made twenty-five visits to the men.<sup>182</sup> They fail to note: that no visit was made until five weeks after the men were returned, during which time the men were held incommunicado; that no prison visits were conducted in private; and that advance notification to the prison authorities was required. The authorities also fail to acknowledge that the men have claimed that they were threatened with retribution if they complained about mistreatment. The inherent weaknesses of monitoring under such conditions are apparent (see Limits of Post-Return Monitoring section above).

### Unfair Trial Despite Assurances

The assurances of fair trial were likewise violated. In April 2004, Ahmed Agiza, convicted *in absentia* in Egypt in 1999, was retried in a military court, despite the fact that internationally-recognized procedural guarantees are significantly abridged in such

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<sup>178</sup> Copy of memorandum on file with Human Rights Watch.

<sup>179</sup> Human Rights Watch did not obtain the memo from the men's lawyers.

<sup>180</sup> Human Rights Center for the Assistance of Prisoners (Cairo), "Governmental Deportation: Egyptian Nationals as Islamic Activists," April 1, 2003, p. 6. See also Swedish NGO Foundation for Human Rights and Swedish Helsinki Committee for Human Rights, "Alternative Report to 'Comments by the Government of Sweden on the Concluding Observations of the Human Rights Committee,'" *op. cit.*, fn 56, p. 25, para. 101.

<sup>181</sup> Sveriges (Swedish) Radio, *Ekot Programme*, December 10, 2004, copy of transcript on file with Human Rights Watch. See text box on p. 64.

<sup>182</sup> Freivalds Speech, December 1, 2004.

tribunals. A trial monitor from Human Rights Watch attended all four of the trial's hearings. Swedish government representatives were denied access to the first two hearings.

Human Rights Watch documented a catalogue of fair trial violations in the course of Agiza's retrial, including the rights to a speedy trial and to a trial by a competent, independent and impartial tribunal.<sup>183</sup> The trial also violated Agiza's right to defend himself, including by adequate access to counsel and with adequate time and facilities to prepare the defense, his right to call and examine witnesses, and his right to appeal the verdict to an independent tribunal. Egyptian authorities relied upon secret evidence, which was not made available to Agiza's lawyers. Defense lawyers were not permitted adequate access to the case file, nor were they granted sufficient time to obtain documents and prepare materials critical to the defense. The defendant was not permitted sufficient time to consult with his lawyers, and was sometimes granted consultations of only ten to fifteen minutes immediately before commencement of a hearing. The court also refused the defense's request to allow witnesses to give testimony to counter the government's charges.

Although Agiza testified in the military court proceedings that he had been tortured in prison, the court permitted Agiza to be examined only by a prison doctor. The prison doctor's report indicated that Agiza had sustained physical injuries while in prison, but the court denied the defense's request for a forensic examination to establish how such injuries occurred and failed to commence an investigation into the torture allegations.

Agiza also testified in court that after having filed a formal complaint about the torture he suffered in Mazra`t Tora prison, he was transferred to another prison, Abu Za'bal, where he was put in "punitive isolation." He spent a total of forty-six days in Abu Za'bal before being transferred back to Mazra`t Tora. At the April 20 military court hearing, Agiza told his defense lawyers that an officer of the Egyptian security forces (*mabahith*) warned him after his hearing on April 13 not to mention his torture or ill-treatment again in court.

Agiza was convicted and sentenced to twenty-five years in prison for membership in an organization whose aim is to overthrow the Egyptian government by violent means. His was the first-ever retrial in Egypt of a person convicted in absentia by a military court.

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<sup>183</sup> Human Rights Watch Press Release, "Sweden Implicated in Egypt's Abuse of Suspected Militant: Egypt Violated Diplomatic Promises of Fair Trial and No Torture for Terrorism Suspect," May 5, 2004 [online] <http://hrw.org/english/docs/2004/05/05/egypt8530.htm> (retrieved March 3, 2005). All the details regarding the trial are from the Human Rights Watch monitor's notes, originals on file with Human Rights Watch.

Agiza does not have the right to challenge the decision, and only Egypt's President, Hosni Mubarak, can overturn the military court verdict. His sentence was subsequently reduced to fifteen years, apparently upon the intervention of the Swedish authorities.

One Swedish official told a Human Rights Watch representative that trials in military courts in Egypt can be fair.<sup>184</sup> This claim is all the more disturbing given the fact that the Swedish government itself has criticized military tribunals for violating procedural rights.<sup>185</sup> In a radio interview in December 2004, Swedish Prime Minister Göran Persson erroneously concluded that Agiza's trial "evidently was reliable" because al-Zari had been released by the same body. When reminded that al-Zari had never even been to trial, but was released in October 2003, Persson apologized.<sup>186</sup>

### Sweden's Responsibility

The Swedish government continues to claim that if there were any breaches of the assurances, responsibility lies solely with Egypt.<sup>187</sup> This claim ignores Sweden's absolute obligation not to return a person to a place where he or she would be at risk of torture or ill-treatment. In a telling interview on March 4, 2005, Hans Dahlgren, Sweden's State Secretary for Foreign Affairs stated:

Actually, we don't really know whether these guarantees have been adhered to by the Egyptian government. As you know, there have been accusations that they were broken. First of all, that both men have been subject to maltreatment, of the kind that would not be permissible under the guarantees that were given. However, the government of Egypt itself denies these allegations quite strongly.<sup>188</sup>

Dahlgren's admission of uncertainty is a stark reminder that diplomatic assurances are inherently unreliable and ineffective safeguards against torture and ill-treatment. In order to prove that no risk of torture or ill-treatment obtains, the Swedish authorities must be

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<sup>184</sup> In a June 2004 meeting with a representative of Human Rights Watch, one Swedish official from the Ministry of Foreign Affairs (MFA) claimed that "trials in military courts can be fair and trials in civilian courts can be unfair." Notes on file with Human Rights Watch.

<sup>185</sup> The Swedish government's own human rights reports have noted that special courts provide the Egyptian authorities with an opportunity to circumvent key rights provisions, including access to counsel and the right to appeal, that are provided in civilian courts. See Regeringskansliet Utrikesdepartementet, *Mänskliga rättigheter i Egypten 2004*, [Ministry of Foreign Affairs 2004 Report on Human Rights in Egypt], copy on file with Human Rights Watch.

<sup>186</sup> Swedish Radio, *Ekot* Program, December 25, 2004.

<sup>187</sup> Human Rights Watch meeting with MFA officials, June 2, 2004, noted on file with Human Rights Watch.

<sup>188</sup> BBC Radio 4, *Today Programme*, [What would it mean for terrorist suspects if the government did get its Prevention of Terrorism Bill through parliament?], March 4, 2005, at 8:30 [online] [http://www.bbc.co.uk/radio4/today/listenagain/zfriday\\_20050304.shtml](http://www.bbc.co.uk/radio4/today/listenagain/zfriday_20050304.shtml) (retrieved March 18, 2005).

able to state with absolute confidence that the diplomatic assurances have been honored. Apparently, the Swedish authorities cannot do so.<sup>189</sup>

A report released on March 22, 2005, by the Swedish Parliamentary Ombudsman, Mats Melin, leveled unusually harsh criticism at Swedish authorities for conducting an illegal operation in the course of expelling Agiza and al-Zari.<sup>190</sup> The report confirmed the presence at Bromma Airport of U.S. officials and operatives, some “in disguise.”<sup>191</sup> It faulted the Swedish Security service and airport police for “display[ing] a remarkable subordination to the American officials”<sup>192</sup> and “losing control of the situation”<sup>193</sup> thus relinquishing their responsibility to ensure that the men were treated in compliance with Swedish law and Sweden’s obligations under the European Convention on Human Rights (ECHR).<sup>194</sup> The Ombudsman concluded that the men’s treatment was inhumane and thus may indicate a violation of ECHR article 3.<sup>195</sup> Despite these findings of illegal criminal activity, the Ombudsman has not called for the prosecutions of the Swedish security service and police personnel involved in the illegal operation or possible violations of the ban on cruel, inhuman or degrading treatment or punishment.<sup>196</sup>

A separate investigation by the Committee on the Constitution regarding whether or not the expulsion operation violated Swedish constitutional law is currently underway.<sup>197</sup>

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<sup>189</sup> In an unfortunate turn of events, the European Court of Human Rights ruled in October 2004 that Mohammed al-Zari’s application against Sweden (alleging, among other things, that Sweden violated its *nonrefoulement* obligation under article 3 of the European Convention on Human Rights) was inadmissible on a procedural technicality. The Court ruled that al-Zari had not submitted his application within a reasonable time after the alleged violation had occurred. The court did not rule on the substance of the alleged violation.

<sup>190</sup> Chefsjustitieombudsmannen Mats Melin, *Avvisning till Egypten - en granskning av Säkerhetspolisens verkställighet av ett regeringsbeslut om avvisning av två egyptiska medborgare* [Expulsion to Egypt: A review of the execution by the Security Police of a government decision to expel two Egyptian citizens], Reference Number: 2169-2004, March 22, 2005, copy on file with Human Rights Watch.

<sup>191</sup> *Ibid.*, section 3.2.2

<sup>192</sup> *Ibid.*

<sup>193</sup> *Ibid.*, section 3.3

<sup>194</sup> *Ibid.*, section 3.2.2

<sup>195</sup> *Ibid.*

<sup>196</sup> Mattias Karen, “Security Police Broke Law Allowing Americans to Handle Extradition of Egyptians,” *Associated Press*, March 22, 2005.

<sup>197</sup> The Committee on the Constitution is investigating whether or not the government violated Swedish constitutional law. NGOs have not been invited to make formal presentations before the Committee on the Constitution. Members of the Swedish parliament from six parties have called for an international investigation under the auspices of the OHCHR, as well as a full and independent domestic inquiry. For information regarding the four fundamental laws that comprise Swedish constitutional law, see <http://www.riksdagen.se/english/work/constitution.asp>.

In May 2005, the Committee against Torture is scheduled to decide Agiza's application in which he claims that Sweden violated Convention against Torture article 3 by sending him back to Egypt and risk of torture.

Human Rights Watch reiterates its call for an independent, international investigation of the actions of all three governments involved under the auspices of the U.N. High Commissioner for Human Rights.

The exchange below between an interviewer from Swedish Radio's *Ekot* program and Carl Henrik Ehrenkrona, chief legal adviser to the Swedish Ministry of Foreign Affairs, is instructive. The interviewer begins by asking Ehrenkrona about the allegations of mistreatment put forward by Ahmed Agiza to Swedish authorities at the first monitoring visit in January 2002. It appears that the Swedish authorities had fears that if they communicated allegations of mistreatment to United Nations bodies, including the Committee against Torture, they would put the men at even greater risk and possibly damage diplomatic relations with the Egyptians. The original Swedish is included for verification purposes against the English translation (E is for Ehrenkrona, I is for Interviewer):

[Rättschef Carl Henrik Ehrenkrona förklarar hur tankegångarna gick.

Director-General for Legal Affairs Carl Henrik Ehrenkrona explains what the train of thought was.]

**E:** Om man sprider den typen av uppgifter så bedömdes det att de också kunna skada honom själv och dessutom skada förhållandet till Egypten. Det handlade helt enkelt om att Agiza fortfarande var under utredning och om det då spreds obekräftade uppgifter om att han skulle ha sagt att han hade blivit torterad eller utsatt för omänsklig behandling så kunde det vara negativt för honom själv.

**E:** It was thought that if one spreads information of this kind then it might not only cause damage to him but in addition cause damage to the relationship with Egypt. It was quite simply about Agiza still being under investigation and that if unconfirmed information about him having said that he had been tortured or exposed to inhuman treatment was spread, then it could be negative for him.

**I:** Varför skulle det vara negativt för honom själv?

**I:** Why would it be negative for him?

**E:** Därför att man kunde inte veta hur det skulle hanteras av den egyptiska polisen.

**E:** Because one could not know how this would be handled by the Egyptian police.

**I:** Varför inte då?

**I:** Why is that?

**E:** Det kunde man inte veta i den situationen. Det finns alltid en risk och och det fanns ingen anledning att utsätta en person för den risken.

**E:** One could not know in that situation. There is always a risk and there was no reason to expose a person to that risk.

**I:** Men Sverige hade ju fått en garanti om att han inte skulle torteras?

**I:** But Sweden had received guarantees that he would not be tortured?

**E:** Sekretessregeln är en sak och den säger att när det gäller uppgifter om utlänningar som kan vara till skada för dem, så får sådana uppgifter inte lämnas ut, det är huvudregeln i sekretesslagen.

**E:** The confidentiality rule is one thing and it says that when it concerns information about foreigners, that may be harmful to them, then such information must not be revealed, this is the main rule in the Secrecy Law.

**I:** Men ni hade ju fått garantier av Egypten att han inte skulle torteras. Trodde ni inte på de garantierna?

**I:** But you had received guarantees from Egypt that he would not be tortured. Did you not believe the guarantees?

**E:** Det handlar ju inte bara om att han kunde torteras. Det kunde ju vara till men för honom på annat sätt.

**E:** The matter was not only that he might be tortured. It could be damaging to him in other ways.

**I:** Så det var för att skydda honom mot de egyptiska myndigheterna som man inte skulle berätta att han hade berättat att han hade blivit torterad?

**I:** So it was to protect him against the Egyptian authorities that one should not reveal that he had said that he had been tortured?

**E:** Och för att dessutom inte riskera att komma i svårigheter med Egypten genom att sprida obekräftade uppgifter av det slaget.

**E:** And in addition not to risk getting into difficulties with Egypt by spreading unconfirmed information of such nature.

Sveriges Radio: *Ekot* Program, December 10, 2004, transcript on file with Human Rights Watch

## *United Kingdom*

### Foreign Nationals Formerly Subjected to Indefinite Detention without Charge

The issue of diplomatic assurances has also arisen in the context of the United Kingdom's attempts to develop alternatives to the indefinite detention of foreign nationals suspected of terrorism-related activity. Britain's highest court, the Law Lords, ruled in December 2004 that the indefinite detention without charge or trial of foreigners suspected of terrorism was incompatible with the U.K.'s Human Rights Act and the European Convention on Human Rights.<sup>198</sup>

As a result of the Lords ruling, the U.K. government announced a "twin track" set of alternatives to indefinite detention,<sup>199</sup> including recourse to "control orders" limiting the movement and activities of any person, foreigner or national, who is suspected of terrorist-related activities, and the use of diplomatic assurances to deport to their home countries foreign nationals who would be at risk of torture or ill-treatment upon return. The remaining foreign nationals in indefinite detention were released in March 2005, and immediately subject to control orders under the Prevention of Terrorism Act 2005.<sup>200</sup>

In its written submission to the Law Lords in the indefinite detention case, the government claimed that it had been "exploring the possibility of removing foreign nationals to states where there are fears of Article 3 treatment [sic]...with a view to establishing memoranda of understanding which could provide sufficient safeguards to allow return."<sup>201</sup> Charles Clarke, U.K. Home Secretary, made specific reference to the government's on-going efforts to secure diplomatic assurances against torture when he

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<sup>198</sup> See, Human Rights Watch Press Release, "U.K.: Law Lords Rule Indefinite Detention Breaches Rights," December 16, 2004 [online] <http://hrw.org/english/docs/2004/12/16/uk9890.htm> (retrieved February 28, 2005). Human Rights Watch and numerous intergovernmental and nongovernmental organizations had roundly criticized the U.K. for the indefinite detention provisions of its 2001 Anti-Terrorism Crimes and Security Act (ATCSA), passed in the aftermath of the September 11 attacks on the United States. See Human Rights Watch Briefing Paper, "Neither Just nor Effective: Indefinite Detention without Trial in the United Kingdom under Part 4 of the Anti-Terrorism, Crime and Security Act 2001," June 24, 2004 [online] <http://hrw.org/backgroundunder/eca/uk/index.htm> (retrieved February 28, 2005).

<sup>199</sup> See, Hansard (House of Common Debates), "Measures to Combat Terrorism," Statement of the Secretary of State for the Home Department (Mr. Charles Clarke), January 26, 2005, Column 307, [online] [http://www.parliament.the-stationery-office.co.uk/pa/cm200405/cmhansrd/cm050126/debtext/50126-04.htm#50126-04\\_spm0](http://www.parliament.the-stationery-office.co.uk/pa/cm200405/cmhansrd/cm050126/debtext/50126-04.htm#50126-04_spm0) (retrieved February 28, 2005).

<sup>200</sup> For Human Rights Watch's critique of these alternatives, see Human Rights Watch Briefing Paper, "Commentary on the Prevention of Terrorism Bill 2005," March 1, 2005 [online] <http://hrw.org/backgroundunder/eca/uk0305> (retrieved March 2, 2005).

<sup>201</sup> *A and Others v. Secretary of State for the Home Department*, Case for the Secretary of State [submission to House of Lords], September 13, 2004, p. 10, footnote 2.

announced the government's plans to replace indefinite detention to the House of Commons:

[Regarding] deportation with assurances. As the House knows, we have been trying for some time to address the problems posed by individuals whose deportation could fall foul of our international obligations by seeking memorandums of understanding with their countries of origin. We are currently focusing our attention on certain key middle-eastern and north African countries. I am determined to progress this with energy. My noble friend [Foreign Office Minister] Baroness Symons of Vernham visited the region last week. She had positive discussions with a number of countries, on which we are now seeking to build.<sup>202</sup>

In late February 2005, it was reported that Baroness Symons had traveled to Algeria, Morocco, and Tunisia to negotiate agreements for the return of terrorist suspects from the U.K. to those countries.<sup>203</sup> The U.K. government acknowledges that the men formerly held in indefinite detention would be at risk of torture if they were to be returned to their countries of origin.<sup>204</sup> In addition to their individual risk, the men come from countries where torture is a serious endemic problem. In some countries—Egypt, for example—torture is systematic. In other countries—Algeria, Morocco, and Jordan—persons suspected of terrorist activity or labeled as such are specifically targeted for abusive treatment, including torture. All of the countries routinely violate their international human rights obligations.

The process by which the U.K. will go about seeking and securing diplomatic assurances, and what procedural guarantees persons subject to return based on assurances will enjoy, remains unclear. In November 2004, the U.N. Committee against Torture expressed its concern at “the State party’s [U.K.] reported use of diplomatic assurances in the ‘refoulement’ context in circumstances where its minimum standards for such assurances, including effective post-return monitoring arrangements and appropriate due process guarantees followed [sic], are not wholly clear...”<sup>205</sup> The Committee requested that within one year, the U.K. provide it “with details on how many cases of extradition or removal subject to receipt of diplomatic assurances or

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<sup>202</sup> Hansard (House of Common Debates), “Measures to Combat Terrorism,” Statement of the Secretary of State for the Home Department (Mr. Charles Clarke), January 26, 2005], Column 307.

<sup>203</sup> Nick Fielding, “Foreign Office in Talks to Deport Terror Suspects,” *The Sunday Times (London)*, February 27, 2005, p. 8.

<sup>204</sup> All the men are subject to deportation orders in the U.K., and would have already been deported if it were not for the U.K.’s obligations under article 3 of the ECHR.

<sup>205</sup> See, Committee against Torture, “Conclusions and Recommendations: Fourth Periodic Report of the United Kingdom of Great Britain and Northern Ireland,” CAT/C/CR/33/3, December 10, 2004, section 4(d) [online] [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CAT.C.CR.33.3.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CAT.C.CR.33.3.En?OpenDocument) (retrieved March 2, 2005).

guarantees have occurred since 11 September 2001, what the State party's minimum contents are for such assurances or guarantees and what measures of subsequent monitoring it has undertaken in such cases."<sup>206</sup>

The government of the U.K. has openly acknowledged that all the men formerly subjected to indefinite detention are at risk of torture upon return. That admission led to the men's detentions in the first place; the U.K. authorities knew they could not derogate from the U.K.'s *nonrefoulement* obligation—and nothing has changed since then. Most of the governments in the detainees' home countries have a long history of practicing torture and there is a significant risk that the men will be tortured if they are returned, whatever promises their home governments may offer.<sup>207</sup>

### Case of Hani El Sayed Sabaei Youssef and Others

The U.K. government first proposed the use of assurances to deport suspected terrorists at risk of torture in their home countries in a February 2004 Home Office consultation paper. The paper claimed that the purpose of diplomatic assurances, termed "framework agreements," is "to protect the deportees' human rights following departure from the U.K."<sup>208</sup> Closer inspection of the U.K.'s record of seeking and securing assurances for returns to risk of torture, however, indicates that a detainee's safety post-return has not been a primary consideration. The July 2004 case of *Hani Youssef v. Home Office* offers an account of the sheer determination of the Prime Minister to send Mr. Youssef and three others to Egypt, despite clear evidence that their transfers, assurances included, would violate the U.K.'s *nonrefoulement* obligation.<sup>209</sup>

The High Court decision of July 2004 held that Mr. Youssef had been unlawfully detained after it was clear to the authorities that there was no possibility to return him to Egypt in conformity with the U.K.'s *nonrefoulement* obligation. The ruling revealed numerous disturbing details regarding the British government's attempts throughout 1999 to deport the men, all asylum seekers determined to have had a well-founded fear

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<sup>206</sup> *Ibid.*, Section 5(j).

<sup>207</sup> Human Rights Watch Press Release, "U.K.: Promises on Torture Don't Work," [online] <http://hrw.org/english/docs/2004/10/06/uk9459.htm> (retrieved February 28, 2005). See also, Human Rights Watch Briefing Paper, "Commentary on the Prevention of Terrorism Bill 2005," pp. 9-11.

<sup>208</sup> Home Office Discussion Paper, "Counter-Terrorism Powers: Reconciling Security and Liberty in an Open Society," para. 38, February 2004 [online] [http://www.homeoffice.gov.uk/docs3/CT\\_discussion\\_paper.pdf](http://www.homeoffice.gov.uk/docs3/CT_discussion_paper.pdf) (retrieved February 28, 2005).

<sup>209</sup> *Hani El Sayed Sabaei Youssef and The Home Office*, Case No: HQ03X03052, 2004 EWHC 1884 (QB), July 30, 2004 [online] [http://www.courtservice.gov.uk/judgmentsfiles/j2758/youssef-v-home\\_office.htm](http://www.courtservice.gov.uk/judgmentsfiles/j2758/youssef-v-home_office.htm) (retrieved February 28, 2005). For an excellent summary of the *Youssef* case, see Migration News Sheet, (Brussels: Migration Policy Group), December 2004, at pp. 13-14. See also, Statewatch, "U.K. Egyptian National 'Unlawfully Detained' after Intervention by Prime Minister," August-October 2004 [online] <http://www.statewatch.org/news/2004/nov/03blair.htm> (retrieved February 28, 2005).

of persecution should they be returned to Egypt.<sup>210</sup> The men were suspected of membership in al-Jihad al-Islamiya and involvement in terrorism-related activities. Most alarming was the repeated insistence of Prime Minister Tony Blair that diplomatic assurances against the torture of Mr. Youssef that might be sought from Egypt should be taken at face value based simply on Egypt's accession to the Convention against Torture and the fact that torture was prohibited under Egyptian law. Blair advocated that an entire package of assurances be narrowed down to one—a simple promise by the Egyptians not to torture the men upon return.<sup>211</sup>

Prime Minister Blair's eagerness to accept such guarantees—which, in the end, the Egyptian authorities refused to offer—was remarkable not only because of Egypt's proven record of systematic torture, but also because legal advisors in the Home Office (Interior Ministry) and Foreign and Commonwealth Office (FCO) repeatedly advised the Prime Minister that seeking and accepting such guarantees would clearly violate the U.K.'s obligations under article 3 of the European Convention on Human Rights. In a February 1999 memo, the Home Office warned that “there are a number of factors which suggest that assurances [from Cairo] would do little or nothing to diminish the Article 3 risk:”

The main problem is that the Egyptian authorities' record in the treatment of political opponents is, by any standards not good... In particular as you will see, abuse and torture are widespread despite the prohibition by the constitution of infliction of physical harm upon those arrested or detained. My first question therefore is whether in the face of this evidence, the Home Secretary might reasonably conclude that assurances from the Egyptians could be sufficiently authoritative and credible to diminish the Article 3 risk sufficiently to make removal to Egypt a realistic option.<sup>212</sup>

Despite this early and correct assessment (and continuing reservations by the Home Office about the dubious legality of deporting the men), the Prime Minister personally intervened on numerous occasions throughout 1999 (for example, in April, May and June) in an attempt to have the Home Office secure assurances from the Egyptian

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<sup>210</sup> Ibid., para. 8: The men “submitted plausible claims of harassment and torture at the hands of the Egyptian authorities. In refusing their applications we acknowledge that theirs were cases where the Secretary of State might ordinarily have granted asylum.” [emphasis in original High Court decision]

<sup>211</sup> Ibid., para. 38: “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.”

<sup>212</sup> Ibid., para. 8.

authorities. In a letter dated April 19, 1999, the Prime Minister's Private Secretary wrote: "In general, the Prime Minister's priority is to see these four Islamic Jihad members returned to Egypt. We should do everything possible to achieve it."<sup>213</sup>

The *Youssef* judgment includes details regarding negotiations with the Egyptian authorities, including that the Egyptians refused a number of assurances originally proposed by the U.K. to ensure respect for the men's right to be free from torture, and to have a fair trial and full procedural rights. In the midst of the exchanges, the Prime Minister's private secretary wrote that, "He [the Prime Minister] 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."<sup>214</sup>

The inherent weaknesses of post-return monitoring notwithstanding (see section above), the Prime Minister was even willing to forgo a weak assurance that the men's safety would be monitored after return: "There is no obvious reason why British officials need to have access to Egyptian nationals held in prison in Egypt, or why the four should have access to a UK-based lawyer. Can we not narrow down the list of assurances we require?"<sup>215</sup>

In the end, the Egyptian authorities refused to permit Mr. Youssef and the other men access to British officials once returned or to U.K.-based lawyers. The Foreign and Commonwealth Office (FCO) reported:

In the FCO's view there was no alternative to access by British officials. The ICRC had a permanent presence there but had been refused access to prisoners; it would not visit particular prisoners without a general agreement allowing it access to all prisoners and would not get involved in any process which could in any way be perceived to contribute to, facilitate, or result in the deportation of individuals to Egypt.<sup>216</sup>

The *Youssef* case illustrates an alarming disregard for the U.K.'s international and regional treaty obligations when seeking to remove from its territory foreign nationals suspected of terrorism. It depicts the very "end run" around the *nonrefoulement* obligation that Human Rights Watch has warned against in its reporting on diplomatic assurances.

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<sup>213</sup> *Ibid.*, para. 20.

<sup>214</sup> *Ibid.*, para. 38.

<sup>215</sup> *Ibid.*, para. 18.

<sup>216</sup> *Ibid.*, para. 26.

Prime Minister Blair's imperative to "get them back" signals a single-minded purpose: to remove the men at whatever cost, including threats to their fundamental human rights.<sup>217</sup> Securing the men's most fundamental human rights was not the purpose of attempts to secure diplomatic assurances. The assurances were simply a way of gaining "cover" should the government be questioned about violating the absolute ban on torture and *refoulement*.<sup>218</sup>

In the end, Hani Yousef and the three other men were not deported because the Egyptian authorities were unwilling to proffer the assurances, not because the U.K. government was unwilling to accept such inherently unreliable assurances.

## *The Netherlands*

### Case of Nuriye Kesbir

Diplomatic assurances from Turkey were the subject of a court decision in The Netherlands in January 2005. An appeals court there ruled on January 20, 2005 against the extradition of a woman who was an official of the Kurdish Workers' Party (PKK, now known as Kongra-Gel). The court concluded that diplomatic assurances could not guarantee that she would not be tortured or ill-treated upon return to Turkey.

Nuriye Kesbir, a PKK official and minority Yezidi Kurd, was subject to an extradition warrant from Turkey alleging that she had committed war crimes as a PKK military operative during the time she fought in the civil war in Turkey's southeast. In May 2004, a Dutch court determined that although her fears of torture and unfair trial in Turkey were not completely unfounded, there were insufficient grounds to halt the extradition. The court gave exclusive authority to the government to either grant or reject the extradition request, but advised the Dutch Minister of Justice to seek enhanced diplomatic assurances against torture and unfair trial from Turkey.<sup>219</sup>

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<sup>217</sup> The Prime Minister wrote "Get them back" across one letter from the Home Office informing the U.K. of the Egyptian authorities' negative response to on-going attempts to secure assurances. *Ibid.*, para. 15.

<sup>218</sup> The case of Metin Kaplan, a radical Muslim cleric, is also instructive. Kaplan, labeled a threat to national security, was deported from Germany to Turkey in October 2004. In May 2003, however, a German court halted his extradition based on human rights concerns, including the insufficiency of diplomatic assurances against torture and unfair trial from the Turkish authorities. In response to the judgement, the German authorities vowed that they would find a way to remove Kaplan and sought enhanced assurances from the Turkish government. See "*Empty Promises*," pp. 31-32. Kaplan lost a series of legal challenges to his subsequent deportation, but the German government justified Kaplan's removal by claiming that it had secured written assurances from the Turkish Foreign and Justice Ministries that Kaplan would get a fair trial. See "German Interior Ministry: 'Turkey Assured Us of Kaplan's Fair Trial,'" *Andalou Agency*, October 13, 2004 and Richard Bernstein, "Germany Deports Radical Long Sought by Turks," *New York Times*, October 13, 2004. Kaplan was taken into custody immediately upon return to Turkey. His trial on terrorism-related charges commenced in Turkey in December 2004 but was adjourned the same month until April 2005.

<sup>219</sup> *Advies inzake N. Kesbir*, Hoge Raad der Nederlanden, EXU 2002/518, 02853/02/U-IT, May 7, 2004, copy on file with Human Rights Watch. The Turkish authorities had offered written assurances in February 2004, but the

## Turkey's Record of Abuse

Numerous human rights bodies, including the U.N. Special Rapporteur on Torture,<sup>220</sup> intervened with the Dutch government on behalf of Kesbir. In three separate letters to the Dutch Minister of Justice, Human Rights Watch argued that torture in Turkey continues, affecting PKK detainees in particular; the Turkish authorities had not developed and implemented effective supervisory mechanisms to ensure that law enforcement officers on the ground—police, in particular—were observing recent legal reforms; and that as a woman, Kesbir would be at increased risk of torture and ill-treatment in the form of sexual violence.<sup>221</sup> Human Rights Watch also argued that any assurances from Turkey allegedly guaranteeing Kesbir's safety could not be trusted:

[T]orture and ill-treatment persist in Turkey—especially in cases where a detainee has been labeled a suspected terrorist—despite some recent improvements in law and practice. Torture continues as a result of Turkey's negligence in supervising and monitoring compliance with legal safeguards to prevent torture; indeed, such monitoring systems are either moribund or do not exist at all. As a result, Turkish authorities do not maintain effective control over those persons—police, gendarmes, and security forces—primarily responsible for on-going acts of torture in Turkey. Diplomatic assurances from Turkish officials that Ms. Kesbir would not be tortured or ill-treated could not be relied upon because the authorities offering such guarantees have not developed systems that actually control and hold accountable those forces that perpetrate such abuses.

Continuing irregularities in the system, such as denial of lawyers' access to detainees, failure to inform detainees' families of detentions, and problems with accessing and authenticating medical reports indicate a lack of transparency that undermines the reliability of any assurances that a person will not be tortured or ill-treated... In the face of such irregularities and continuing governmental passivity, diplomatic

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Supreme Court did not deem them sufficient. Letter from Consular Affairs Department, Legal Consular Affairs Division, Ministry of Foreign Affairs of the Netherlands to the Embassy of Turkey, Reference No. CJ/GJ-04/299, May 19, 2004, copy on file with Human Rights Watch.

<sup>220</sup> The Special Rapporteur on Torture sent an urgent and confidential communication calling on the Dutch authorities to secure "unequivocal guarantees," including a plan for effective and adequate post-return monitoring in the event that Kesbir were to be extradited.

<sup>221</sup> See, Human Rights Watch Letters to Piet Heit Donner, Dutch Minister of Justice, in the matter of Nuriye Kesbir, dated May 24, 2004 [online] <http://www.hrw.org/english/docs/2004/05/24/turkey10316.htm> (retrieved March 18, 2005); October 28, 2004 [online] <http://www.hrw.org/english/docs/2004/10/28/turkey10317.htm> (retrieved March 18, 2005), and December 17, 2004 [online] <http://www.hrw.org/english/docs/2004/12/17/turkey10318.htm> (retrieved March 18, 2005).

assurances from the Turkish authorities that Ms. Kesbir would not be tortured would be inherently unreliable.<sup>222</sup>

### Turkey's Assurances

In response to the May court decision, the Dutch authorities sought and received an additional letter of guarantee from the Turkish authorities stating that: “[T]here should be no question as to Turkey’s adherence to its obligations emanating from the international instruments that she is party to on issues that the Supreme Court has expressed its sensitivity.”<sup>223</sup> Apparently not satisfied with this response, the Dutch authorities requested an explicit confirmation that the rights deriving from Turkey’s human rights obligations be guaranteed in the specific case of Ms. Kesbir.<sup>224</sup> In a terse reply, the Turkish authorities complained that the Dutch authorities’ request for additional guarantees specific to Ms. Kesbir were “rather redundant and unnecessary,” but that “there should not be any doubt that she will receive a fair trial under the guarantee of the ECHR and enjoy the full rights emanating from the said Convention.”<sup>225</sup>

On September 7, 2004, the Dutch Minister of Justice decided to order Kesbir’s extradition based on the assurances. Kesbir immediately appealed and requested the Dutch Minister of Justice to justify the extradition decision in light of human rights concerns, including the reliability of Turkey’s assurances against torture and unfair trial. On November 8, 2004, a Dutch court halted Kesbir’s extradition. The court concluded that, despite some reforms, Turkey continued to breach human rights, and that the Dutch authorities should not have accepted as sufficient the general assurances offered by the Turkish authorities.

The Dutch government appealed, producing one additional assurance from the Turkish authorities stating that “Ms. Kesbir will be brought before the Turkish Court without delay in accordance with relevant laws and have the unimpeded right of access to her lawyers when extradited to Turkey.”<sup>226</sup> Human Rights Watch wrote in a December 2004 letter to Piet Hein Donner, Dutch minister of justice:

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<sup>222</sup> Human Rights Watch Letter to Piet Hein Donner, May 24, 2004.

<sup>223</sup> Letter from Embassy of Turkey to the Dutch Ministry of Foreign Affairs, Reference No. 2004/Lahey BE/7356, May 25, 2004, copy on file with Human Rights Watch.

<sup>224</sup> Letter from Consular Affairs Department, Legal Consular Affairs Division, Ministry of Foreign Affairs of the Netherlands to the Embassy of Turkey, Reference No. CJ/CG-04/399, July 12, 2004, copy on file with Human Rights Watch.

<sup>225</sup> Letter from Embassy of Turkey to the Dutch Ministry of Foreign Affairs, Reference No. 184, July 26, 2004, copy on file with Human Rights Watch.

<sup>226</sup> Letter from Embassy of Turkey to the Dutch Ministry of Foreign Affairs, Reference No. 2004/Lahey BE/15949, November 18, 2004, copy on file with Human Rights Watch.

[The assurances from Turkey] are so vague as to render them virtually meaningless. They merely paraphrase what is clearly provided for in existing Turkish law. The promise to facilitate Ms. Kesbir's appearance before a judge [upon return] has little or no bearing on what treatment she will receive at the hands of law enforcement officers once she is in detention, particularly given the absence of supervision of these officers for acts or torture and ill-treatment.<sup>227</sup>

### High Court Halts Extradition: Assurances not Sufficient

On January 20, 2005, the Dutch high court concluded that "torture in Turkey is not a thing of the past" and that Kesbir, as a woman and prominent PKK member, could not be extradited because she would be at increased risk of torture during her detention in Turkey.<sup>228</sup> Regarding the general assurances from Turkey, the court held:

[I]n view of the real risks that she [Kesbir] runs, there can only be a question of adequate assurances if concrete guarantees are given that the Turkish authorities will ensure that during her detention and trial, [Kesbir] will not be tortured or exposed to other humiliating practices by police officers, prison staff or other officials within the judicial system. None of the aforementioned assurances meets this requirement. These assurances imply no more than that [Kesbir] will be treated in accordance with the applicable human rights conventions and Turkish law. So not only do these assurances add nothing to the situation that would have prevailed without them...but they do not offer any solace for the above-mentioned problem that these laws and conventions apparently are not enforced at all times and in every respect.<sup>229</sup>

Nuriye Kesbir was released from custody on January 20, 2005. The Dutch government, however, appealed the High Court ruling halting her extradition to the Dutch Supreme Court (Hoge Raad). At the time of writing, Kesbir's asylum process had been suspended pending the outcome of the Supreme Court appeal.

The Kesbir decision comes at an important time in the history of Turkish-European Union (E.U.) relations. Turkey periodically seeks the extradition of Kurdish political

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<sup>227</sup> Letter from Human Rights Watch to Piet Hein Donner, December 17, 2004.

<sup>228</sup> *De Staat der Nederlanden (Ministerie van Justitie) tegen N. Kesbir*, Het Gerechtshof's Gravenhage, LJN: AS3366, 04/1595 KG, January 20, 2005.

<sup>229</sup> *Ibid.*, para. 4.4 (unofficial English translation on file with Human Rights Watch).

activists, former PKK operatives and officials, and Islamic militants in exile in Europe.<sup>230</sup> Governments of member states—particularly those in favor of Turkey’s accession to the E.U.—inclined toward honoring these extradition requests must take into consideration the continuing use of torture and ill-treatment against Kurds and PKK members, and the individual circumstances of any person subject to return to Turkey.<sup>231</sup> In doing so, E.U. member states must comply with their absolute obligation not to send any person, no matter what their past crimes or current status, to a country where she or he would still face a risk of torture and ill-treatment.

## *Austria*

### Case of Akhmed A.

The acceptance of general assurances of protection against torture was also an issue in the case of Akhmed A., a citizen from Russia’s southern republic of Dagestan, extradited in February 2004 from Austria to Russia.<sup>232</sup> The case also raises the troubling issue of the nexus between extradition and asylum as A. was extradited while his asylum claim in Austria was still pending.

Akhmed A. applied for asylum in Austria in February 2001, claiming that he would suffer persecution if returned. The claim was based on his ethnic origin (Kumücke) and prior ill-treatment suffered in detention in Moscow in 1995 based on accusations that he had assisted Chechen rebels while working for the police in Dagestan near the Chechen border.<sup>233</sup> His first claim was denied in June 2001, but A. lodged an appeal with the Independent Federal Asylum Review Board. In May 2003, while that appeal was still pending, Austrian authorities detained A. based on a Russian extradition request to face charges of abducting members of the Russian military and illegal weapons possession.<sup>234</sup>

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<sup>230</sup> See, for example, appeal on behalf of Remzi Kartal from Human Rights House, Oslo, Norway [online] <http://www.humanrightshouse.org/dllvis5.asp?id=2956> (retrieved February 28, 2005). Kartal, an official of Kongra-Gel, was detained in Germany in January 2005 pending an extradition request from Turkey. Kartal was released from custody on March 1, 2005, after a court determined that the Turkish authorities had not produced documentation to support the extradition request. See BBC Monitoring Service (Europe), “Kurdish Activist Kartal Released from German Prison,” March 2, 2005 [Excerpt from report by German-based Kurdish newspaper *Ozgur Politika* based on report from Mesopotamia News Agency’s Tulay Balci, “Abandon Policies Indexed to Turkey” March 2, 2005].

<sup>231</sup> See footnote above regarding the case of Metin Kaplan, deported from Germany to Turkey in October 2004. In the aftermath of Kaplan’s deportation to Turkey for trial on terrorism-related charges, the *Aksam* newspaper hailed the transfer as “A great gesture from Germany to Turkey as it tries to enter the E.U.” See Baris Atayman, “Turk Court Charges Cleric Extradited by Germany,” *Reuters*, October 13, 2004.

<sup>232</sup> Akhmed A. remains in detention and there have been claims of torture and ill-treatment. In order to maintain some measure of confidentiality, Human Rights Watch uses his first name only as an identifier.

<sup>233</sup> Human Rights Watch is grateful to Andrea Huber of Amnesty International Austria for her assistance with gathering information regarding the A. case. The factual information in this section, unless otherwise noted, comes from AI Austria’s dossier on the case.

<sup>234</sup> See, Amnesty International, “Europe and Central Asia: Summary of Concerns in the Region, January-June 2004,” September 1, 2004 [online] <http://web.amnesty.org/library/Index/ENGEUR010052004?open&of=ENG->

During the extradition proceedings, a Vienna court acknowledged that A. was at risk of torture and ill-treatment if returned to Russia, but held that the risk was mitigated because the Russian authorities gave diplomatic assurances that he would be fairly treated.<sup>235</sup> According to Amnesty International, the assurances were included in a letter from the Procurator General to the Austrian Ministry of Justice and stated simply:

We affirm that according to the norms of international law, all the rights required to present a defense will be available to Mr. A.; and he will not be subjected to torture, cruel, inhuman or degrading treatment or punishment (Article 3 ECHR and equivalent conventions of the United Nations, the Council of Europe and amending protocols).<sup>236</sup>

The court ordered that A.'s extradition could commence. His lawyers lodged an urgent appeal with the European Court of Human Rights, requesting that the court communicate an order for interim measures enjoining the Austrian authorities from extraditing A. until the court had an opportunity to review his application. Without explanation, the European Court declined to communicate a request for interim measures and A. was extradited to Russia on February 24, 2004.

A. is currently in detention in Dagestan. Amnesty International has expressed concern regarding inadequate monitoring of A. post-return.<sup>237</sup> The International Committee of the Red Cross has made one visit to A. in detention, but due to its confidentiality policy, cannot reveal its findings.<sup>238</sup> Thus, there is no independent, transparent mechanism to ensure that the Russian authorities are complying with the general assurances they proffered.

The fact that A.'s appeal on his asylum claim was still pending at the time of his extradition is a troubling feature of this case. According to Austrian asylum law, expulsion and deportation are not permitted during any stage of a pending asylum procedure. The Austrian Ministry of Justice, however, has determined that since the law does not expressly include the word "extradition," transfers resulting from an extradition procedure in the course of an asylum procedure are permissible. This interpretation runs

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AUT (retrieved February 28, 2005). See also, ITAR-TASS News Agency, "Russia Obtains Extradition from Austria of Soldiers' Kidnapping Suspect," February 24, 2004.

<sup>235</sup> The Vienna Higher Regional Court (Oberlandesgericht).

<sup>236</sup> Translation provided by Amnesty International Austria.

<sup>237</sup> Amnesty International, "Europe and Central Asia: Summary of Concerns in the Region, January-June 2004," September 1, 2004.

<sup>238</sup> ICRC Letter [confirming A.'s registration with the organization and the one visit to him], July 23, 2004, copy on file with Human Rights Watch.

contrary to the United Nations High Commissioner for Refugees' (UNHCR) conclusion that "in general, a refugee claim must be determined in a final decision before execution of any extradition order."<sup>239</sup> Otherwise, the extraditing state runs the risk of breaching the *nonrefoulement* obligation. As one analyst has emphasized:

Where an extradition request concerns an asylum seeker, the requested state will not be in a position to establish whether extradition is lawful unless the question of refugee status is clarified. The determination of whether or not the person concerned has a well-founded fear of persecution must therefore precede the decision on extradition. This does not of itself require the suspension of the extradition procedure. It does mean, however, that the decision on extradition should be made after the final determination on refugee status, even if extradition and asylum procedures are conducted in parallel.<sup>240</sup>

Certainly, once a person has been recognized as a refugee, extradition can be refused on the grounds that it would breach the *nonrefoulement* obligation (to which the only narrow exception in the Refugee Convention is article 33(2)). Furthermore, the absolute prohibition against the risk of torture remains a crucial ground for denial of an extradition request.

In A.'s case, the Austrian authorities relied on two ineffective and inadequate devices to circumvent their *nonrefoulement* obligation under international refugee and human rights law. First, in the course of the extradition proceedings, the Austrian court accepted woefully inadequate assurances from the Russian authorities as an alleged safeguard against A.'s risk of torture. The diplomatic assurances proffered by the Russian Procurator General simply reiterated Russia's existing legal obligations, which A. claimed the Russian authorities violated the first time they detained and ill-treated him. The Russian assurances thus cannot be considered an effective safeguard against torture and ill-treatment.

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<sup>239</sup> United Nations High Commissioner for Refugees, "Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees," para. 102 [online] [http://migration.ucdavis.edu/rs/printfriendly.php?id=130\\_0\\_3\\_0](http://migration.ucdavis.edu/rs/printfriendly.php?id=130_0_3_0) (retrieved March 2, 2005).

<sup>240</sup> Sibylle Kapferer, *The Interface between Extradition and Asylum*, Legal and Protection Policy Research Series, Department of International Protection, United Nations High Commissioner for Refugees, PPLA/2203/05, November 2003, para. 291 [online] <http://www.unhcr.ch/cgi-bin/texis/vtx/home/opendoc.pdf?tbl=PROTECTION&id=3fe84fad4&page=protect> (retrieved March 1, 2005).

Second, the Austrian authorities determined that A.'s asylum procedure was not an impediment to extradition. This closed off yet another avenue for A. to have his claims of fear of persecution, including risk or torture and ill-treatment, fully considered in Austria. In the end, A. was extradited to Russia without a full and fair asylum determination proceeding, in violation of his right to seek asylum—and on the basis of inadequate diplomatic assurances in violation of his right not to be sent back to a place where he would be at risk of torture or ill-treatment.

## *Turkey*

### Update: Mamatkulov and Askarov v. Turkey

In February 2005, the European Court of Human Rights' Grand Chamber issued a decision in the case of *Mamatkulov and Askarov v. Turkey*.<sup>241</sup> The two men were extradited from Turkey to Uzbekistan in 1999 based on assurances against torture and unfair trial from the Uzbek authorities. The men were transferred to Uzbekistan despite a request to the Turkish authorities from the European Court of Human Rights to delay the extraditions until the court had an opportunity to review the men's applications. The men's applications to the court alleged, among other things, that Turkey violated the ban on *refoulement* under article 3.

It was anticipated that the Grand Chamber might rule on the reliability and/or sufficiency of diplomatic assurances against torture from the government of Uzbekistan,<sup>242</sup> but the court determined that it did not have sufficient information before it to rule that article 3 of the ECHR had been violated.<sup>243</sup> The court did not engage in a discussion of the reliability or sufficiency of the assurances.

The decision was a landmark ruling, nonetheless, because it concluded that the European Court's request to Turkey to delay the men's extraditions was binding on Turkey. In the *Mamatkulov* case, the court determined that Turkey violated article 34, the right to individually petition the court, when its authorities ignored the court's request to stay the extraditions to Uzbekistan of Mamatkulov and Askarov pending the court's examination of their applications.

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<sup>241</sup> See, "Empty Promises", pp. 26-29.

<sup>242</sup> See Human Rights Watch and AIRE Center, *Amicus Curiae* Brief to the European Court of Human Rights in the Case of *Mamatkulov and Askarov v. Turkey*, January 28, 2004 [online] <http://hrw.org/backgroundunder/eca/turkey/eu-submission.pdf> (retrieved March 13, 2005).

<sup>243</sup> European Court of Human Rights Judgment, *Mamatkulov and Askarov v. Turkey*, February 4, 2005 [online] <http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=mamatkulov&sessionid=1559995&skin=hudoc-en> (retrieved March 20, 2005).

## Recommendations

### To All Governments

- Reaffirm the absolute nature of the obligation under international law not to expel, return, extradite, or otherwise transfer any person to a country where there are substantial grounds for believing that he or she would be in danger of being subjected to torture or cruel, inhuman, or degrading treatment or punishment (prohibited ill-treatment).
- Prohibit reliance upon diplomatic assurances against torture and ill-treatment if any of the following circumstances prevail in the receiving country:
  - there is substantial and credible evidence that torture and prohibited ill-treatment in the receiving country are systematic, widespread, endemic, or recalcitrant or persistent problems;
  - governmental authorities do not have effective control over the forces in their country that perpetrate acts of torture and prohibited ill-treatment;
  - the government consistently targets members of a particular racial, ethnic, religious, political or other identifiable group for torture or prohibited ill-treatment and the person subject to transfer is associated with that group;
  - in any case where there is a risk of torture or prohibited ill-treatment upon return directly related to a person's particular circumstances.
- Ensure that any person subject to transfer has the right prior to removal to challenge its legality before an independent tribunal. Any legal review must include an examination of the reliability of any diplomatic assurances provided by the receiving country. Persons subject to transfer must have access to an independent lawyer and a right of appeal with suspensive effect.
- Include in required periodic reports to the Committee against Torture, the Human Rights Committee, and other relevant international and regional monitoring bodies detailed information about all cases in which requests for diplomatic assurances against the risk of torture or other cruel, inhuman, or degrading treatment have been sought or secured in respect of a person subject to transfer.

**To the Government of the United States:**

- Cease accepting diplomatic assurances against torture to justify “renditions” on human rights grounds. Halt immediately the practice of rendering alleged terrorism suspects (via extradition, removal, or any other form of transfer) to countries where torture is a serious human rights problem. No such transfers should be effected from U.S. territory, diplomatic premises, or military bases, including from the U.S. Naval Base at Guantánamo Bay, Cuba. The U.S. government and all its agencies should not order, participate in, or facilitate such transfers under any circumstances from the territories of other countries.
- Reform U.S. law and policy to reflect a firm commitment to the government’s obligations under the Convention against Torture, including prohibiting the seeking and securing of diplomatic assurances for any transfer (rendition, extradition, removal, or any other transfer from custody, including from Guantánamo Bay) of any person to a country where there are substantial grounds for believing that such person would be in danger of being subjected to torture or cruel, inhuman, or degrading treatment or punishment.
- Repeal 8 C.F.R. §208.18(c) [Diplomatic Assurances against Torture by the Secretary of State], which provides for reliance upon diplomatic assurances against torture to remove from United States territory persons raising claims under the Convention against Torture in immigration proceedings without an effective opportunity to challenge the assurances in an independent judicial forum.
- Provide all persons subject to transfer (rendition, extradition, removal, or other transfer from custody, including from Guantánamo Bay) the ability to challenge the legality of the transfer, including the reliability of any diplomatic assurances, for compliance with the U.S.’s obligations under the Convention against Torture. The procedure governing such challenges should be specified in law and should provide for review in an independent forum prior to transfer.
- Cooperate in a full and transparent manner with the Canadian Commission of Inquiry into the Maher Arar case. Release information regarding interactions between U.S. and Canadian officials on this case and regarding the diplomatic assurances against torture secured by the U.S. government from the Syrian authorities, including the text of the assurances.

- Disclose information relevant to the Maher Arar case for scrutiny in his federal lawsuit against the U.S. government officials responsible for his transfer to Syria.
- Ensure that the “state secrets privilege” is not abused to limit court access to any information relevant to the assessment of the risk of torture or ill-treatment that a person might be subjected to upon transfer to another country.
- Support the establishment by the U.N. High Commissioner for Human Rights (OHCHR) of an international, independent inquiry into the cases of Ahmed Agiza and Mohammad al-Zari to investigate the respective roles of the Swedish, U.S., and Egyptian governments in possible human rights violations against the men. Cooperate in a full and transparent manner with any such international inquiry under the auspices of the OHCHR.
- Submit as a matter of urgency the U.S. government’s long overdue state report to the Committee against Torture including, but not limited to, detailed information regarding all cases where the U.S. government has ordered, participated in, or otherwise facilitated the transfer of a person to any country based on diplomatic assurances against torture.
- Enact legislation currently pending in the United States Senate (S. 654) and House of Representatives (H.R. 952) that prohibits the practice of rendition to torture and reliance upon diplomatic assurances to effect transfers to countries where torture is a serious human rights problem.

**To the Government of Canada:**

- Repeal as a matter of urgency Division 9 (sections 76-87) of the Immigration and Refugee Protection Act (IRPA), providing for the use of security certificates authorizing the government to detain and deport, based on secret evidence presented in *ex parte* hearings and without procedural guarantees, persons determined to be an imminent danger to Canada’s security, including potentially effecting such transfers to countries where a person would be at risk of torture or ill-treatment.
- Reform Canadian law and policy to reflect a firm commitment to Canada’s obligations under the International Covenant on Civil and Political Rights, Convention against Torture, and the fundamental legal freedoms enshrined in

sections 7-15 of the Canadian Charter of Rights and Freedoms, which prohibit arbitrary detention or imprisonment; provide internationally recognized procedural guarantees upon arrest and detention; guarantee freedom from torture and ill-treatment, including deportation to risk of such abuse; and prohibit discrimination.

- Prohibit reliance upon diplomatic assurances against torture or ill-treatment for the transfer of any person, no matter what his or her status, to a country where he or she is at risk of torture or ill-treatment, in accordance with the Canadian Charter of Rights and Freedoms and the Convention against Torture.
- Assure in the upcoming Canadian state report to the Committee against Torture for the May 2005 CAT session that the government of Canada will strictly observe in practice the absolute ban under article 3 of the convention on sending a person to a country where there are substantial grounds for believing that he or she would be in danger of being subjected to torture or to cruel, inhuman, or degrading treatment or punishment. Reform Canadian law accordingly.
- Submit detailed documentation to the Committee against Torture regarding any cases where the Canadian government has sought and secured diplomatic assurances against torture in order to expel, return, extradite, or otherwise transfer a person to a country where he or she would be at risk of such abuse.

**To the Government of Sweden:**

- Hold accountable all those security service and law enforcement officials who had decision-making authority or who participated in the transfers of Ahmed Agiza and Mohammad al-Zari as documented in the Parliamentary Ombudsman's March 2005 report, which concluded that the operation effecting the men's transfers was illegal and that the treatment the men were subjected to may have violated article 3 of the European Convention on Human Rights. Implement the recommendations in the Ombudsman's report to ensure that such illegal operations do not recur on Swedish territory.
- Reform the Swedish law to provide all persons subject to expulsion, return, extradition, or other transfer from Sweden with an effective opportunity prior to transfer to challenge the legality of the transfer, including the reliability of any diplomatic assurances against torture or cruel, inhuman, or degrading treatment or punishment, in an independent judicial forum with full procedural guarantees and the right to appeal.

- Cooperate in a full and transparent manner with the Committee against Torture in its May 2005 review of the individual application of Ahmed Agiza. Cooperate as well with any reviews of the men's cases by other U.N. human rights bodies, including the Human Rights Committee.
- Seek the good offices of the U.N. High Commissioner for Human Rights (OHCHR) in establishing an international, independent inquiry into the cases of Ahmed Agiza and Mohammad al-Zari to investigate the respective roles of the Swedish, U.S., and Egyptian governments in possible human rights violations against the men. Cooperate in a full and transparent manner with any such international inquiry under the auspices of the OHCHR.
- Establish a concomitant independent, comprehensive, and transparent national inquiry into the cases of Ahmed Agiza and Mohammad al-Zari as requested by members of six of the political parties represented in the Swedish parliament.
- Cooperate in a full and transparent manner with the ongoing investigation of the Committee on the Constitution into possible violations of Swedish constitutional law that may have occurred in the course of the transfers of Ahmed Agiza and Mohammad al-Zari.
- Press the Egyptian authorities to grant Ahmed Agiza a fresh trial in a civilian court subject to full procedural guarantees.
- Press the Egyptian government to end all restrictive measures aimed at prohibiting Mohammad al-Zari from moving freely within Egypt or leaving the country in recognition of the fact that Egyptian authorities have declared that he is not suspected of any crime and released him from detention in October 2003. Press the Egyptian authorities to ensure that al-Zari is not prohibited in any way, including by threats or harassment of him or his family members, from making complaints about the handling of his case and his treatment in detention before national and international bodies.

**To the Government of the United Kingdom:**

- Halt immediately all negotiations with the governments of Algeria, Tunisia, Morocco, and any other countries on "framework agreements" and diplomatic assurances in relation to torture or cruel, inhuman, or degrading treatment, designed

to facilitate the deportation of foreign nationals suspected of terrorism. Such persons include those foreign nationals currently subject to control orders under the Prevention of Terrorism Act 2005 and acknowledged by the U.K. government to be at risk of torture if returned to their home countries.

- Submit to the Committee against Torture within one year the details of all cases in which the U.K. authorities have sought or secured diplomatic assurances against torture in its efforts to deport or otherwise transfer terrorist suspects. Such reporting was requested in the Committee's 2004 Recommendations and Conclusions on the U.K.'s Fourth Periodic Report.

**To the Government of the Netherlands:**

- Abide by the Gerechtshof's-Gravenhage (Hague Court) decision of January 20, 2005 prohibiting the extradition of Nuriye Kesbir to Turkey based on insufficient diplomatic assurances against torture and ill-treatment from the Turkish authorities.

**To the Government of Austria:**

- Request that the Russian federal and Dagestani authorities facilitate the availability of independent information about Akhmed A.'s situation, including by ensuring regular access to him by legal representatives of his choosing, medical personnel and family members. Make representations to the Russian authorities if information suggests that the assurances proffered in respect of Akhmed A. are not being satisfied.
- Reform Austrian asylum law to prohibit the transfer, including by extradition, of an asylum seeker with a pending claim to another country. Such transfers, including extradition, should not be effected until a full and fair asylum determination procedure has been concluded.

**To the Government of the Russian Federation:**

- Ensure that all appropriate conditions exist for unhindered independent oversight of and reporting on the treatment of Akhmed A. at his place of detention in Dagestan. These conditions should include access to him by legal representative of his choosing, medical personnel, and family members.

**To the Government of Egypt:**

- Support the establishment by the U.N. High Commissioner for Human Rights (OHCHR) of an international, independent inquiry into the cases of Ahmed Agiza

and Mohammad al-Zari to investigate the respective roles of the Swedish, U.S., and Egyptian governments in possible human rights violations against Agiza and al-Zari. Cooperate in a full and transparent manner with any such international inquiry under the auspices of the OHCHR.

- Grant Ahmed Agiza a new trial in a civilian court with full procedural guarantees and in conformity with Egypt's obligations under the Convention against Torture regarding Agiza's allegations of torture.
- End all restrictive measures aimed at prohibiting Mohammad al-Zari from moving freely within Egypt or outside the country in recognition of the fact that Egyptian authorities have declared that he is not suspected of any crime and released him from detention in October 2003. Ensure that al-Zari is not prohibited in any way, including by threats or harassment to him or his family members, from making complaints about the handling of his case and his treatment in detention before national and international bodies.

**To the Government of Syria:**

- Cooperate in a full and transparent manner with the Canadian Commission of Inquiry into the case of Maher Arar.
- Provide to Maher Arar's Canadian and U.S. legal teams all relevant information related to his transfer and subsequent treatment in Syria, including the form and content of the diplomatic assurances against torture transmitted to the U.S. authorities.

**To United Nations Bodies:**

*To the Committee against Torture*

- Reaffirm at the May 2005 session of the Committee (and regularly thereafter) the absolute and non-derogable nature of the prohibition against torture and the corresponding absolute and non-derogable obligation not to expel, return, extradite or otherwise transfer any person to a country where there are substantial grounds for believing that he or she would be at risk of torture or cruel, inhuman, or degrading treatment or punishment (the ban on *refoulement*).

- Reaffirm in express terms that the absolute prohibition against torture and the prohibition against *refoulement* include the prohibition against cruel, inhuman, or degrading treatment or punishment.
- Reject any attempt to establish minimum standards for the use of diplomatic assurances against risk of torture and ill-treatment as incompatible with the obligation under article 3 of the Convention against Torture. Emphasize the inherently unreliable nature of diplomatic assurances and the fact that they are an ineffective safeguard against torture and ill-treatment in the circumstances described in the second recommendation of this report.
- Require that states' periodic reports to the Committee include detailed information about all cases in which requests for diplomatic assurances against the risk of torture or other cruel, inhuman or degrading treatment have been sought or secured in respect of a person subject to transfer.

*To the High Commissioner on Human Rights*

- Establish as a matter of urgency an international, independent inquiry into all aspects of the cases of Ahmed Agiza and Mohammed al-Zari, including investigating the respective roles and conduct of the Swedish, United States and Egyptian governments. Conduct the inquiry in a comprehensive manner and make the findings of the inquiry public.

*To the U.N. Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment*

- Reaffirm in all the rapporteur's activities and related documents that diplomatic assurances in relation to torture or cruel, inhuman, or degrading treatment are inherently unreliable and their use by states undermines the *nonrefoulement* obligation enshrined in article 3 of the Convention against Torture.
- Collect information in the course of relevant country visits on the situation of persons threatened with return or actually returned on the basis of diplomatic assurances against torture and ill-treatment.

*To the U.N. Independent Expert on Protection of human rights and fundamental freedoms while countering terrorism*

- Reaffirm in all the expert's activities and related documents that diplomatic assurances in relation to torture or cruel, inhuman, or degrading treatment are inherently unreliable and their use by states undermines the *nonrefoulement* obligation enshrined in article 3 of the Convention against Torture. Reaffirm that states' use of diplomatic assurances against risk of torture is incompatible with Security Council resolutions and official statements of the U.N. Secretary General and the U.N. High Commissioner for Human Rights requiring that counter-terrorism measures conform with states' obligations under international human rights, refugee, and humanitarian law.

*To the Counter-Terrorism Committee*

- Request from states information about compliance with the absolute ban on torture and *refoulement* in the extradition, deportation, removal or other transfer of persons suspected of involvement in terrorism, including reliance upon diplomatic assurances against torture to effect such transfers. Ensure that states comply fully with their obligations to respect human rights while countering terrorism in accordance with Security Council resolutions 1373, 1456, and 1566. Any information collected should be made public.

*To the United Nations High Commissioner for Refugees (UNHCR)*

- Undertake as a matter of urgency an analytical study on states' increasing reliance on diplomatic assurances against torture and ill-treatment to effect transfers of asylum seekers and refugees to places where they would be at risk of such abuse. Adopt clear legal and policy guidance for states on this practice.
- Require all UNHCR field offices to record and monitor cases in which refugees, asylum seekers, and persons excluded from refugee status based on national security grounds are subject to return or other transfer following reliance on diplomatic assurances against torture and ill-treatment. Intervene directly with the governments when it is clear that any such person would be at risk of torture and ill-treatment.
- Establish within the Department of International Protection (DIP) a focal point for urgent communications regarding any asylum seeker, refugee, or person excluded from refugee status on national security grounds subject to transfer based on diplomatic assurances against torture and ill-treatment.

## **To Council of Europe Bodies:**

### *To the Committee of Ministers*

- Decline to adopt the new European Convention on the Prevention of Terrorism unless and until Article 21 (“Discrimination Clause”) is revised in line with the wording contained in draft Article 18*bis*, point 2 in Opinion No.255 of the Parliamentary Assembly of the Council of Europe (PACE) on the draft Convention (“Grounds for refusing extradition or mutual legal assistance”): “States Parties shall refuse to comply with requests for extradition made in relation to the offences set forth in Articles 4-7 where there are substantial grounds for believing that complying with the request would result in the person concerned facing a real risk of:

(...)

c. being subjected to torture or to inhuman or degrading treatment or punishment.”

### *To the Parliamentary Assembly of the Council of Europe (PACE)*

- Deplore the failure of the CODEXTER experts group, in drafting the European Convention on Prevention of Terrorism, to follow the recommendation of the PACE in its opinion No.255 (2005) on the draft Convention, affirming the absolute *nonrefoulement* obligation in respect of extradition requests of persons facing a real risk of torture or inhuman or degrading treatment or punishment.
- Task the Committee on Legal Affairs and Human Rights to undertake a study into all cases to date where Council of Europe member states have sought or have been requested to provide diplomatic assurances against torture or cruel, inhuman, or degrading treatment or punishment in extradition, return, expulsion, or other transfer cases.

### *To the European Committee for the Prevention of Torture*

- Reaffirm the absolute nature of the *nonrefoulement* obligation in the course of confidential discussions with governments. Emphasize that diplomatic assurances in relation to torture or cruel, inhuman, or degrading treatment are inherently unreliable and that their use by states undermines the *nonrefoulement* obligation enshrined in article 3 of the European Convention on Human Rights.
- Collect information in the course of country visits on the situation of persons threatened with return based on diplomatic assurances against torture and ill-treatment and on the situation of persons who have been returned to the country of

visitation based on such assurances and the respective governments' compliance with the assurances.

*To the Council of Europe Commissioner for Human Rights*

- Continue to reaffirm that the state practice of seeking diplomatic assurances that a person will not be tortured or subjected to cruel, inhuman, or degrading treatment or punishment undermines the *nonrefoulement* obligation enshrined in article 3 of the European Convention on Human Rights.

**To Bodies of the Organization for Security and Co-operation in Europe:**

*To the Chairman-in-Office*

- Put forward for adoption at the 2005 Ministerial Conference a declaration reaffirming the absolute nature of the obligation under international law not to expel, return, extradite, or otherwise transfer any person to a country where there are substantial grounds for believing that he or she would be in danger of being subjected to torture or prohibited ill-treatment, consistent with the importance attached in the OSCE Copenhagen commitments (Article 16) to accession to and respect for the Convention against Torture.
- Actively promote the recognition that diplomatic assurances against torture and ill-treatment are unreliable and ineffective safeguards against torture and prohibited ill-treatment, and press OSCE participating states to give up their use.

*To the Secretary General and to the Director of the Office for Democratic Institutions and Human Rights (ODIHR)*

- Task the Action against Terrorism Unit of the OSCE Secretariat and the Anti-terrorism Coordinator at the ODIHR to monitor adherence by OSCE participating states to their *nonrefoulement* obligations, including any instances of recourse to diplomatic assurances, which should be reported to the Chairman-in-Office.
- Ensure that technical assistance to OSCE participating states in support of drafting anti-terrorism legislation and strengthening existing legislation directs states away from the use of diplomatic assurances against torture and ill-treatment. Emphasize through assistance in support of implementation of relevant U.N. Security Council resolutions, U.N. conventions and protocols the absolute nature of the *nonrefoulement* obligation.

**To European Union Bodies:**

*To the Counter-terrorism Coordinator*

- Reaffirm in all the Coordinator's activities and related documents, including in communications to the European Council, that diplomatic assurances in relation to torture or cruel, inhuman, or degrading treatment are inherently unreliable and do not provide an effective safeguard against abusive treatment. Reaffirm that the use of diplomatic assurances against risk of torture and ill-treatment undermines the *nonrefoulement* obligation enshrined in international law.

*To the European Parliament*

- Ensure that any draft resolution coming before the Parliament which refers to actions to combat terrorism makes appropriate reference to member states' absolute obligation not to expel, return, extradite, or otherwise transfer any person to a country where there are substantial grounds for believing that he or she would be in danger of being subjected to torture or cruel, inhuman, or degrading treatment or punishment (prohibited ill-treatment).

*To the European Commission*

- Include in the June 2005 progress report requested from the Commission and the Council's General Secretariat by the Brussels European Council of December 2004 the recommendation for a declaration that reliance upon diplomatic assurances against torture and ill-treatment is unacceptable in the circumstances described in the second recommendation of this report.

**To the Inter-American Commission on Human Rights:**

- Affirm the inherently unreliable nature of diplomatic assurances against torture and ill-treatment and recommend that all Organization of American States (OAS) member states desist from reliance upon such assurances.

## Acknowledgements

This report was researched and written by Julia Hall, counsel and senior researcher in the Europe and Central Asia division of Human Rights Watch. The report was edited by Rachel Denber, acting executive director in the Europe and Central Asia division of Human Rights Watch, Ben Ward, special counsel in the Europe and Central Asia division of Human Rights Watch, and Joseph Saunders, deputy program director for Human Rights Watch. Dinah PoKempner, general counsel for Human Rights Watch, provided legal review. Wendy Patten, advocacy director in the U.S. program of Human Rights Watch, reviewed and provided valuable comments on the section on the United States. Ian Gorvin, advocacy consultant to the Europe and Central Asia division of Human Rights Watch, contributed to and reviewed the recommendations. Joanna Weschler, United Nations advocacy director of Human Rights Watch, reviewed the United Nations recommendations. The manuscript was also reviewed by Joe Stork, Washington director of the Middle East and North Africa division of Human Rights Watch, and Ophelia Field, consultant in the Refugee Policy program of Human Rights Watch. In addition to the above-named staff members, others at Human Rights have directly contributed to our work on diplomatic assurances against torture, including Veronika Leila Szente Goldston, advocacy director in the Europe and Central Asia division of Human Rights Watch, and Diederik Lohman and Acacia Shields, senior researchers in the Europe and Central Asia division of Human Rights Watch. Victoria Elman, associate in the Europe and Central Asia division of Human Rights Watch, provided invaluable production support for this report.

Human Rights Watch gratefully acknowledges the contributions made to this report by a number of valued colleagues, including Andrea Huber, Amnesty International (Austria); Yuval Ginbar, Amnesty International Secretariat (London); Anna Wigenmark, Swedish Helsinki Committee; and Maitre Johanne Doyon (Montreal).