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"Empty Promises:"
Diplomatic Assurances No Safeguard against Torture

TABLE OF CASES

*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 United Kingdom attempted to extradite Akhmed Zakaev to Russia.

INTRODUCTION

Governments around the world have legitimate security concerns in the face of violent terrorist attacks. Some governments, however, are returning alleged terrorist or national security suspects to countries where they are at risk of torture or ill-treatment.[1] Governments have justified such acts by relying on diplomatic assurances—formal guarantees from the government in the country of return that a person will not be subjected to torture upon return.[2] States secure diplomatic assurances in advance of return and claim that by doing so, they comply with the absolute prohibition in international law against returning a person—no matter what his or her alleged crime or status—to a place where he or she would be at risk of torture or ill-treatment. Some states appear to be returning people based on diplomatic assurances with the knowledge that torture will be used upon return to extract information and confessions regarding terrorist activities and associations.[3] Governments sometimes also engage in post-return monitoring of persons they transfer, implying that such monitoring is an additional safeguard against torture.

The United Nations Security Council, however, requires that all measures to combat terrorism must conform with member states' international human rights obligations.[4] The absolute prohibition against torture, including the prohibition against returning a person to a place where he or she would be at risk of torture or ill-treatment, is a cornerstone of human rights protection.[5] There has long been consensus among states

[1] The word "return" 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, expulsion, extradition and rendition.

[2] Diplomatic assurances can also include guarantees against other forms of ill-treatment not rising to the level of torture, for a fair trial, or against application of the death penalty. While it is beyond the scope of this brief to discuss diplomatic assurances in the context of the death penalty, such assurances differ from the relatively novel practice of assurances against torture and ill-treatment in several respects. It is generally more straightforward to monitor a requesting state's compliance with assurances regarding the death penalty than with assurances against torture or ill-treatment as execution is a legal outcome, usually more immediately visible than torture or ill-treatment in detention, which by nature are illegal and practiced in secret. Thus, assurances against torture and ill-treatment should not be considered as a natural extension of the practice of securing assurances against execution. See section below on Canada for more on the distinction between the two.

[3] See, in particular, the section below on the United States.

[4] Security Council Resolution 1456 (2003) makes clear that: "States must ensure that any measure taken to combat terrorism complies 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," para. 6 [online] http://ods-dds-ny.un.org/doc/UNDOC/GEN/N03/216/05/PDF/N0321605.pdf?OpenElement (retrieved March 31, 2004).

[5] The prohibition against torture and ill-treatment, including the prohibition against returning a person to a country where he or she is at risk of torture or ill-treatment, is absolute and permits no exceptions; states cannot derogate from this obligation. The prohibition is enshrined in articles 1 and 3 of the U.N. Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT); article 7 of the International Covenant on Civil and Political Rights (ICCPR); article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR); article 5 of the American Convention on Human Rights (ACHR); and article 5 of the African Charter on Human and Peoples' Rights (Banjul Charter). The prohibition against torture has risen to the level of *jus cogens* and is a peremptory norm of international law. For the purposes of this paper, the word "torture" when used alone includes cruel, inhuman, or degrading treatment or punishment in conformity with the instruments noted above and 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

that the prohibition against torture is among the rights so fundamental to the preservation of human dignity that there can be no justification for their violation, even in a climate of fear generated by acts of terrorism. This widespread commitment to respect for human life and the rule of law stands in stark contrast to the disdain for these principles shown by terrorists.

The widespread or systematic use of torture in many of the countries to which people have been returned, indicates that diplomatic assurances and post-return monitoring are inadequate safeguards against torture and ill-treatment. In the vast majority of cases, states seek diplomatic assurances from governments in countries where torture is systematic or routinely practiced upon certain types of people—political dissidents, for example. In countries where torture is widespread, systematic, or where particular types of people are routinely tortured based on their race, ethnicity, religion, political opinions or other status, torture is practiced in secret, within the walls of prisons and detention facilities rarely open to scrutiny by independent, well-trained monitors. Prison guards and other prison personnel are trained in torture techniques that ensure such secrecy, including physical abuse that leaves few outward marks and intimidation tactics that frighten prisoners into silence about the abuse. Prison doctors and other medical personnel are often complicit in covering up any signs of torture. In such countries, governments routinely deny lawyers and family members confidential access or private visits with prisoners. As noted above, they also deny access to independent monitors, expert in detecting signs of torture. In some countries, where torture is widespread and endemic, state authorities may not have effective control over the forces perpetrating acts of torture. Indeed, governmental authorities in countries where torture is systematic routinely deny the existence of torture at all.

The dangers of relying on diplomatic assurances as a safeguard against torture are apparent. Where governments routinely deny that torture is practiced, despite the fact that it is systematic or widespread, official assurances cannot be considered reliable. The secrecy surrounding the practice of torture militates against effective post-return monitoring.

Governments are aware of the dynamics of torture noted above. Indeed, post-return monitoring per definition implies a fundamental distrust of the formal diplomatic assurances and lack of confidence in domestic mechanisms to hold perpetrators of torture accountable in the countries offering such assurances. Sending governments would no doubt argue that post-return monitoring is merely a failsafe, and that they would not return anyone whom they genuinely believed to be at risk. But when governments and international organizations dispatch monitors to observe elections or assess human rights they do so because they fear election fraud and human rights violations. It follows that the use of post-return monitoring in cases of returns involving

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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." Though the language of *non-refoulement* is most commonly associated with the 1951 Convention relating to the Status of Refugees and the 1967 Protocol relating to the Status of Refugees, the obligation of *non-refoulement* has much broader application vis-à-vis the CAT and other instruments referenced above, and thus applies to the return of any person at risk of torture or ill-treatment, not only refugees.

diplomatic assurances amounts to an acknowledgement that returnees are at risk of torture or ill-treatment.

Moreover, post-return monitoring of the sort required by the absolute prohibition against torture would necessarily involve constant vigilance from the date of return onward by persons expertly trained at detecting signs of torture and unfettered access without advance notice to prisons, police stations, and other places of detention. It would also require that monitors have the authority and political will to remedy the situation and seek accountability for the abusing government. Even if these conditions were attainable, any government undertaking such monitoring would gain nothing by acknowledging the receiving state's abuse other than its own admission of violating the norm against return.

Despite the problems associated with diplomatic assurances, some governments justify the practice of returns based on them as a requirement of their international obligations to combat terrorism. When Sweden made submissions to the U.N. Committee against Torture to explain its summary expulsion in December 2001 of two Egyptian asylum seekers suspected of terrorism-related acts, following diplomatic assurances of fair treatment from the Egyptian authorities, it invoked its responsibility under U.N. Security Council Resolution 1373 to "deny safe haven to those who finance, plan, support or commit terrorist acts, or themselves provide safe haven."[6] In a similar vein, after Georgia extradited five Chechens to Russia following Russian diplomatic assurances, despite a request from the European Court of Human Rights not to extradite, then-President Eduard Shevardnadze replied to criticism of the returns by stating that "International human rights commitments might become pale in comparison with the importance of the anti-terrorist campaign."[7]

Some U.N. human rights mechanisms have openly criticized the interpretation of Security Council Resolution 1373 relied on by Sweden, pointing to the subsequent Security Council Resolution 1456, which requires states to "ensure that any measure taken to combat terrorism complies with all their obligations under international law," and to "adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law."[8] In June 2003, Nigel Rodley, a member of the U.N. Human Rights Committee and former Special Rapporteur on Torture, appeared before the newly established Counter Terrorism Committee (CTC), the U.N. mechanism tasked with monitoring states' compliance with Resolution 1373, to remind the committee that Resolutions 1373 and 1456 must be taken together to ensure that Resolution 1373 did not become "an instrument for circumventing states' human

[6] See *Attia v. Sweden*, CAT/C/31/D/199/2002, November 24, 2003, para. 4.4 [online] http://www.unhchr.ch/tbs/doc.nsf/MasterFrameView/419f36fabc1ba168c1256df2002cb2f8?Opendocument (retrieved March 25, 2004).

[7] See International Helsinki Federation Appeal, "Violations of the Rights of Chechens in Georgia," December 23, 2002 [online] http://www.ihf-hr.org/viewbinary/viewhtml.php?doc_id=3500 (retrieved March 25, 2004).

[8] Security Council Resolution 1456 (2003), op. cit., para. 6.

rights obligations."[9] Significantly, Rodley expressed particular concern that in the course of reviewing Slovakia's first report, the CTC's follow-up questions, requesting clarification regarding expulsions and exclusion of persons from refugee status based on suspected links with terrorist groups,[10] "could be understood to be urging that State to overlook the principle that in no case should a person be sent to a territory where he or she faces torture or cruel, inhuman, or degrading treatment or punishment."[11] Rodley urged the CTC to pose questions to member states on the human rights dimensions of their reports to the Committee, as suggested in a 2002 memo issued by the U.N. High Commissioner for Human Rights to the CTC; and to seek human rights expertise "among the complement of expertise it [the CTC] has at its disposal."[12]

The use of diplomatic assurances is not well-documented and practice appears to vary among states, regions, and legal jurisdictions. Few jurisdictions expressly provide for the use of diplomatic assurances in law. Negotiations for securing diplomatic assurances are often conducted at a political level and are not transparent. In many countries, a person has no effective opportunity to challenge the reliability and adequacy of such assurances.

This report analyzes the use of diplomatic assurances by governments and commentary on their use from the U.N. system, North America, and the Council of Europe region. It includes Human Rights Watch's research on several cases that involve the use of diplomatic assurances. The report examines cases in which courts have ruled on the adequacy of such assurances, frequently finding that diplomatic assurances are not an effective safeguard against torture. The report highlights returns or proposed returns based on diplomatic assurances from Austria, Canada, Georgia, Germany, Sweden, Turkey, United Kingdom, and the United States to countries where torture is a serious or systematic human rights problem, including Egypt, Philippines, Russia, Sri Lanka, Syria, and Uzbekistan. This is not an exhaustive survey, but reflects relevant information available to Human Rights Watch indicating inherent problems and dangers with respect to the use of diplomatic assurances and how select legal systems have addressed the use of such assurances.

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[9] Security Council Counter-Terrorism Committee, Briefing by Sir Nigel Rodley, Vice Chairperson, U.N. Human Rights Committee, "Human Rights and Counter-Terrorism Measures," June 19, 2003, para. 3 [online] http://www.unhchr.ch/huricane/huricane.nsf/0/EE1AC683F3B6385EC1256E4C00313DF5?opendocument (retrieved March 25, 2004).

[10] Supplementary report of Slovakia to the CTC, July 2, 2002, pages 15, 20-21 [online] http://ods-dds-ny.un.org/doc/UNDOC/GEN/N02/479/33/IMG/N0247933.pdf?OpenElement (retrieved March 31, 2004).

[11] Security Council Counter-Terrorism Committee, Briefing by Sir Nigel Rodley, op. cit., para. 11.

[12] Ibid., paras. 10 and 11. Rodley refers to the Office of the High Commissioner for Human Rights (OHCHR), "Note to the Chair of the Counter-Terrorism Committee: A Human Rights Perspective on Counter-Terrorist Measures," September 23, 2002 [online] http://www.un.org/Docs/sc/committees/1373/ohchr1.htm (retrieved March 25, 2004) and OHCHR, "Further Guidance Note on Compliance with International Human Rights Standards," September 23, 2002 [online] http://www.un.org/Docs/sc/committees/1373/ohchr2.htm (retrieved March 25, 2004).

DIPLOMATIC ASSURANCES AND THE UNITED NATIONS SYSTEM

Several U.N. human rights mechanisms have commented on the use of diplomatic assurances in the context of member states' obligation not to return a person to a risk of torture or ill-treatment. These U.N. mechanisms have commented or deliberated on the circumstances in which diplomatic assurances can be used and what safeguards should be in place to ensure that, if used, they are effective in protecting the person in question from torture or ill-treatment upon return and throughout the duration of his or her stay in the country of return.

U.N. Special Rapporteur on Torture

In his February 2002 annual report to the Commission on Human Rights, the first in the immediate aftermath of the September 11, 2001, terrorist attacks in the United States, the Special Rapporteur on Torture concluded that "the legal and moral basis for the prohibition against torture and other cruel, inhuman, or degrading treatment or punishment is absolute and imperative and must under no circumstances yield or be subordinated to other interests, policies, and practices."[13] The Special Rapporteur's July 2002 interim report to the General Assembly, specifically focusing on the prohibition of torture in the context of counter-terrorism measures, reaffirms the absolute nature of the prohibition, and calls on states not to extradite anyone "unless the Government of the receiving country has provided an unequivocal guarantee to the extraditing authorities that the persons concerned will not be subjected to torture or any other forms of ill-treatment upon return, and that a system to monitor the treatment of the persons in question has been put into place with a view to ensuring that they are treated with full respect for their human dignity."[14]

The Special Rapporteur emphasizes a two-pronged approach to gauging the reliability of diplomatic assurances. Before a person may be returned, assurances must be "unequivocal," that is, leaving absolutely no doubt that no torture or ill-treatment will occur. Second, there must be a "system to monitor" the protection of the returned person from torture and ill-treatment. Such a systematic program of rigorous and on-going monitoring is created by advance agreement between the two states involved and will ascertain that the objective conditions exist—and will continue to exist—for protection against mistreatment. Any effective post-return monitoring system requires

[13] Report of the Special Rapporteur on Torture, Theo van Boven, to the United Nations Commission on Human Rights, 58th Session, E/CN.4/2002/137, February 26, 2002, para. 15.

[14] Interim report of the Special Rapporteur on Torture, Theo van Boven, to the General Assembly A/57/173, July 2, 2002. The Special Rapporteur's July 2003 report to the General Assembly states that both the U.N Human Rights Committee and the Committee against Torture have also recently reaffirmed the absolute nature of the principle of *non-refoulement* "and that expulsion of those suspected of terrorism to other countries must be accompanied by an effective system to closely monitor their fate upon return, with a view to ensuring that they will be treated with respect for their human dignity." Report by the Special Rapporteur on Torture, Theo van Boven, to the United Nations General Assembly, A/58/120, July 3, 2003, para. 15.

the good faith and the requisite logistical capacity of both governments to provide a reliable safeguard against the risk of torture.[15]

The Special Rapporteur thus creates the highest of bars to reliance on diplomatic assurances in the context of returns where a person would be in danger of torture or ill-treatment. This raises the question of whether diplomatic assurances can ever be an effective safeguard for returns to countries where the practice of torture is systematic, widespread or endemic. Some states, however, have invoked the Special Rapporteur's statements on the issue of diplomatic assurances to justify returns to countries that practice systematic torture or where torture is endemic. Sweden, for example, in a memorandum to the Human Rights Committee in May 2003 regarding the expulsions of two asylum seekers to Egypt,[16] supported its claim that Egypt's assurances were an adequate safeguard against torture by citing the Special Rapporteur's July 2002 interim report and formula for diplomatic assurances,[17] despite well-documented evidence that torture in Egypt is, in fact, widespread.[18]

This interpretation, however, is not supported by the Special Rapporteur's subsequent report dealing with one such country where torture is a serious and persistent problem, Uzbekistan. The Special Rapporteur's February 2003 report, finding that torture or other similar ill-treatment is "systematic" in Uzbekistan, relies on the following definition, currently in use by the U.N. Committee against Torture:

> Torture is practised systematically when it is apparent that torture cases reported have not occurred fortuitously in a particular place or at a

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[15] A recent experience of the Special Rapporteur himself would seem to illustrate the need for assurances made in good faith and the capacity to comply with those assurances. In his February 2003 report on the question of torture in Uzbekistan, the Special Rapporteur details his "aborted visit to Jaslyk [penal] colony." Despite indicating to the Uzbek authorities, upon whose invitation van Boven was in the country, that he required six hours to evaluate conditions in Jaslyk, "often cited for its hardship conditions and inhuman practices," the itinerary and plane scheduled for the Special Rapporteur and arranged by the Uzbek authorities left van Boven only two hours for his assessment. The Special Rapporteur thus refused to inspect the colony and instead discussed deaths in custody with its director and conducted a few confidential interviews with inmates. However, the Special Rapporteur "noted with concern that these confidential interviews were abruptly disrupted on several occasions by the government official accompanying the Special Rapporteur's delegation." The Special Rapporteur regretted that he was unable to carry out his visit to Jaslyk "in a satisfactory and comprehensive manner." See Report of the Special Rapporteur on Torture, Mission to Uzbekistan, E/CN.4/2003/68/add.2, February 3, 2003, para. 49 [online] http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/29d0f1eaf87cf3eac1256ce9005a0170/$FILE/G0310766.doc (retrieved March 31, 2004). The Special Rapporteur concluded by regretting that the mission's terms of reference (presumably agreed in advance) were not fully respected. Ibid., para. 60.

[16] Op. cit., footnote 6. See also section below on Sweden.

[17] Submission of the Swedish government to the U.N. Human Rights Committee ("Information requested by the Human Rights Committee from the Government of Sweden), May 6, 2003, on file with Human Rights Watch.

[18] In December 2002, the U.N. Committee against Torture expressed concerns regarding "the many consistent reports received concerning the persistence of the phenomenon of torture and ill-treatment of detainees by law enforcement officials [in Egypt]," "widespread evidence of torture and ill-treatment in administrative premises under the control of the State Security Investigation Department," and "the fact that victims of torture and ill-treatment have no direct access to the courts to lodge complaints against law enforcement officials." See Conclusions and Recommendations of the Committee against Torture on the Fourth Periodic Report of Egypt, CAT/C/CR/29/4, December 23, 2002 [online] http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CAT.C.CR.29.4.En?Opendocument (retrieved March 31, 2004).

> particular time, but are seen to be habitual, widespread and deliberate in at least a considerable part of the territory of the country in question. Torture may in fact be of a systematic character without resulting from the direct intention of a Government. It may be the consequence of factors which the Government has difficulty in controlling, and its existence may indicate a discrepancy between policy as determined by the central Government and its implementation by the local administration. Inadequate legislation which in practice allows room for the use of torture may also add to the systematic nature of this practice.[19]

This definition of "systematic" appears to preclude reliance on diplomatic assurances from countries where torture is systematic. The definition allows for two possibilities: 1) torture is state policy, and its practice is intended and sanctioned at the highest levels of government; 2) torture is practiced, but governmental authorities do not have effective control over the forces at local level that perpetrate acts of torture. In both cases, reliance on diplomatic assurances could not provide the guarantees necessary to meet the returning state's international obligations.

States where recourse to torture is a matter of state policy routinely deny the practice, often despite well-documented evidence that torture is, in fact, systematic. Assurances from such a state that a particular person would not be subject to torture if extradited or otherwise returned cannot therefore be considered as offered in good faith. For example, in his report on Uzbekistan, which illustrates the practice of systematic torture there with cases going back to 1992, the Special Rapporteur on Torture concludes that denials by Uzbek authorities that torture is systematic and sanctioned at the highest levels of authority are disingenuous:

> ...the Special Rapporteur has no doubt that the system of torture is condoned, if not encouraged, at the level of the heads of the places of detention where it takes place...If the top leadership of these forces and those politically responsible above them do not know of the existence of a system which the Special Rapporteur's delegation was able to discover in a few days, it can only be because of a lack of desire to know. Moreover, in light of the information repeatedly conveyed to the authorities by the Special Rapporteur himself, [U.N.] human rights monitoring bodies,...and NGOs, the lack of such awareness may well reflect an unwillingness to look too closely at the problem. The very hierarchical nature of the law enforcement bodies also makes it difficult

[19] Report of the Special Rapporteur on Torture, Mission to Uzbekistan, February 2003, op. cit., para. 68.

to believe that the top leadership of these forces is not aware of the situation...[20]

The Special Rapporteur's findings indicate that diplomatic assurances from any government that persistently denies systematic torture or fails to take measures to halt the practice cannot be deemed reliable, and thus cannot comprise an adequate safeguard against torture and ill-treatment.

In order to ensure that the Special Rapporteur's words are not misused to justify human rights violations, it is imperative that the Special Rapporteur reaffirm the absolute nature of the prohibition against returning a person to a risk of torture, and elaborate on the phenomenon of reliance on diplomatic assurances in a manner fully consistent with that absolute prohibition.[21]

U.N. Human Rights Committee

The U.N. Human Rights Committee has noted that the obligation not to return a person to a place where he or she would be at risk of torture is inherent in International Covenant on Civil and Political Rights (ICCPR) article 7. In its General Comment 20 (1992) on article 7, the committee said: "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."[22]

The Committee has also considered the link between the return of non-nationals and the prohibition against torture in its conclusions and recommendations on individual country reports, questioning the adequacy of such assurances as an effective safeguard. In its response to the Swedish government for expelling the two Egyptian asylum seekers in December 2001, the Committee expressed doubts about whether the

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[20] Ibid., para. 69.

[21] In his presentation to the CTC noted above, Rodley reaffirmed the absolute prohibition against returns to risk of torture, but also said: "Let me at once point out that this does not imply the granting of safe havens. Measures may be taken to ensure that, if returned, the person will not in fact be subjected to the feared violation. But those measures would need to be serious and effective." Security Council Counter-Terrorism Committee, Briefing by Sir Nigel Rodley, op. cit., para. 12. Assuming that this is a reference to securing diplomatic assurances, such a formulation for this alleged safeguard to torture is extremely vague—and thus open to various interpretations. The prohibition against torture is absolute and permits no exceptions. As such, any proposed safeguards must be fully articulated to ensure unequivocally that no violation will occur.

[22] General Comment No. 20 (1992), op. cit., para. 9. Moreover, in March 2004, the Human Rights Committee adopted General Comment No. 31 on ICCPR article 2 regarding "The Nature of the General Legal Obligation Imposed on States Parties to the Covenant." Paragraph 12 reads: ". . . 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 and 7 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," General Comment No. 31, CCPR/C/74/CRP.4/Rev.5, March 29, 2004.

assurances were adequate and whether Sweden had ensured there were "credible mechanisms" to monitor the men's treatment post-return:

> The Committee is concerned at cases of expulsion of asylum-seekers suspected of terrorism to their countries of origin. Despite guarantees that their human rights would be respected, those countries could pose risks to the personal safety and lives of the persons expelled, especially in the absence of sufficiently serious efforts to monitor the implementation of those guarantees (two visits by the embassy in three months, the first only some five weeks after the return and under the supervision of the detaining authorities). . .The State party should maintain its practice and tradition of observance of the principle of non-refoulement. When a State party expels a person to another State on the basis of assurances as to that person's treatment by the receiving State, it must institute credible mechanisms for ensuring compliance by the receiving State with these assurances from the moment of expulsion.[23]

Thus, the Human Rights Committee echoes the Special Rapporteur on Torture's reaffirmation of the absolute nature of the prohibition against sending a person to a country where he or she would be at risk of torture. Moreover, the Committee's reference to credible monitoring mechanisms from the date of expulsion highlights the inherent difficulties in developing post-return monitoring mechanisms that are adequate and effective, in order both to ensure that no violations occur and to hold abusive governments accountable if they do. If a person is tortured or ill-treated upon return, both governments should be held accountable, since both will have violated the prohibition against torture.

Likewise, in its 2002 conclusions on the report of New Zealand, the Committee expressed doubts about reliance on diplomatic assurances and recommended that the state party "strictly" observe its international obligations: "The Committee recognizes that the security requirements relating to the events of 11 September 2001 have given rise to efforts by New Zealand to take legislative and other measures to implement Security Council resolution 1373...The Committee...expresses its concern that the

[23] Human Rights Committee, Concluding Observations on the Fifth Periodic Report of Sweden, CCPR/C/74/SWE, April 24, 2002, para. 12. The failure of the Swedish government to effect any monitoring within the first five weeks of return is particularly disturbing. The International Committee of the Red Cross (ICRC), U.N., and other intergovernmental, nongovernmental, and humanitarian organizations, have concluded that detainees are most at risk for torture and ill-treatment within the first forty-eight hours of custody. See Human Rights Watch, "The Legal Prohibition against Torture" *A Human Rights Watch Q and A* March 2003 [online] http://www.hrw.org/press/2001/11/TortureQandA.htm (retrieved March 25, 2004). The Committee took the extraordinary step of requiring Sweden to report back to it in one year, instead of the standard five, regarding the steps the government took to ensure Egyptian compliance with the assurances and to offer evidence that the men were in fact not subject to treatment contrary to ICCPR article 7. The special session, held in July-August 2003, was closed. No public statements were issued by the Committee, but its annual report to the General Assembly made clear that it was not fully satisfied with the Swedish government's response and that the Committee had decided to pursue certain outstanding issues with respect to the cases. See Report of the Human Rights Committee to the General Assembly, A/58/40(Vol. I), November 1, 2003.

impact of such measures or changes in policy on New Zealand's obligations under the Covenant may not have been fully considered. The Committee is concerned about possible negative effects of the new legislation [and] the absence of monitoring mechanisms with regard to the expulsion of those suspected of terrorism to their countries of origin which, despite assurances that their human rights would be respected, could pose risks to the personal safety and lives of the persons expelled."[24] The Committee concluded that New Zealand should maintain its practice of "strictly observing the principle of non-refoulement."[25]

U.N. Committee against Torture

The U.N. Convention against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) explicitly prohibits the return of a person to a country where he or she would be in danger of torture.[26] In *Tapia Paez v. Sweden*, the Committee against Torture, authorized under the CAT to consider individual cases, stated that the test of article 3 of the Convention 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 the person concerned engaged cannot be a material consideration when making a determination under article 3 of the Convention."[27]

In the November 2003 case of Hanan Attia,[28] however, the Committee gave substantial deference to diplomatic assurances against torture, in particular where the suppression of international terrorism was at issue. This approach diverges from the other U.N. human rights mechanisms mentioned above and unfortunately threatens to undermine the principle that human rights obligations must be observed in all measures taken in the international effort to combat terrorism.

Hanan Attia, the wife of Ahmed Agiza, one of the Egyptians returned to Egypt by the Swedish government in December 2001, appealed her own pending return to the Committee against Torture. Her claim was based on the fact that the Egyptian government was preparing to try her husband on terrorism-related charges, and was likely to detain and torture her in an attempt to gain information about him. She also

[24] Human Rights Committee, Concluding Observations on the Fourth Periodic Report of New Zealand, CCPR/CO/75/NZL, August 7, 2002, para. 11.

[25] Ibid.

[26] CAT article 3 states: "No party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."

[27] *Tapia Paez v. Sweden*, Communication No. 39/1996, April 28, 1997.

[28] See *Attia v. Sweden*, CAT/C/31/D/199/2002, November 24, 2003 [online] http://www.unhchr.ch/tbs/doc.nsf/MasterFrameView/419f36fabc1ba168c1256df2002cb2f8?Opendocument (retrieved March 25, 2004).

presented information from family members and a Swedish journalist to the effect that her husband had been tortured and mistreated in prison, contrary to diplomatic assurances given to the Swedish government by the Egyptian authorities, and contrary to the impressions of Swedish diplomatic personnel who had interviewed him during visits. As described in more detail below (see section on Sweden), none of the visits made by Swedish diplomatic representatives to Agiza were held in private. Prison personnel, including the warden and guards, were always present.

The Committee's November 2003 decision that there was no violation of CAT article 3 in Hanan Attia's case relied heavily on visits by Swedish diplomatic representatives to Agiza, beginning nearly two years before it considered his wife's case; the fact that there had also been regular family visits in prison with Agiza; the alleged high level of the unnamed Egyptian official who presented assurances to Sweden; and the way in which the Swedish government impressed upon the Egyptian authorities that its conduct in this case would set a precedent for European cooperation with Egypt. The CAT decision also stated that Attia's case was based solely on her relationship with her husband, rejecting her claim based on the conclusion that Agiza's treatment in prison in Egypt was reported to be adequate.

There are many aspects of this decision that are troubling from a human rights perspective. The lack of privacy with the detainee during visits by Swedish representatives does not comport with the standards for prison visits to assess torture and ill-treatment applied by the International Committee of the Red Cross, nongovernmental organizations expert in prison issues, and the Special Rapporteur on Torture.[29] This fact, combined with the contrary accounts of relatives and a journalist who visited Agiza—supported by evidence provided by Amnesty International and other human rights organizations—raises serious questions about the reliability of the conclusions of Swedish representatives regarding Agiza's treatment. Given that the greatest risk of torture is generally in initial periods of detention, it is very troubling that five weeks elapsed before Agiza was first visited by Swedish officials. The Committee in the Attia decision never addresses such inconsistencies and lapses.

The Committee also failed to consider that unlike her husband, Attia—not pursued by the Egyptian authorities on suspicion of any criminal activity—would not be handed directly to authorities of the state, making monitoring of her whereabouts and condition more problematic. Moreover, the Swedish government's emphasis on its obligations to combat terrorism under Security Council Resolution 1373 allows an inappropriate inference that Agiza's alleged actions had some bearing on whether Attia's return is warranted. Finally, there was a disturbing lack of transparency, as the Committee granted Sweden's numerous requests to omit selected evidence from the record of the

[29] See 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 24, 2004); 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 24, 2004).

proceedings, including on the issue of allegations of torture and ill-treatment by Agiza and the Swedish government's response to such allegations.[30]

The fact that Egypt did not seek Attia's extradition nor lay criminal charges against her seems to have led the Committee to conclude she was at less risk than her husband, though in actual fact a potential witness may also be at great risk. The *Attia* decision also relies on Egypt's status as a state party to the Convention against Torture in its conclusion that Attia would not be at risk of torture upon return, implying that mere accession to U.N. human rights instruments guarantees compliance with the obligations enshrined therein.

Despite these weaknesses, the *Attia* decision essentially underscores some key elements of other U.N. treaty body jurisprudence pertaining to the prohibition against returning a person at risk of torture. The requirement of good faith behind the assurances is acknowledged, even though it is assumed to have been met in this case because of the high political level of negotiations and access to the prisoner granted to Swedish officials. The requirement of monitoring is also present, although again it is assumed to have been met, (despite unchallenged evidence that the monitoring visits were not held in private and were not confidential).

U.N. High Commissioner for Refugees

It is beyond the scope of this paper to consider the relationship between asylum and extradition. Recent research commissioned by the United Nations High Commissioner for Refugees (UNHCR), however, echoes the concern that diplomatic assurances are an inadequate safeguard for returns to countries where torture is a serious problem:

> Assurances by the requesting State that it will not expose the person concerned to torture, or to inhuman or degrading treatment or punishment, will not normally suffice to exonerate the requested state from its human rights obligations, particularly where there is a pattern of such abuses in the State seeking extradition. In such cases, the requested State is bound to refuse the surrender of the wanted person.[31]

This conclusion further reinforces the principle that the only absolute protection against irreparable and prohibited harm upon return, is not to return a person if there is any doubt at all that he or she would be at risk of torture or ill-treatment.

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[30] *Attia v. Sweden*, op. cit., paras. 4.5, 4.7, 4.14., and 9.4.

[31] 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. 137 [online] http://www.unhcr.ch/cgi-bin/texis/vtx/home/+swwBmeRKn9CwwwwnwwwwwwwhFqA72ZR0gRfZNtFqrpGdBnqBAFqA72ZR0gRfZNcFq35oxOccnaAwphnGnGDzmxwwwwwww/opendoc.pdf (retrieved March 31, 2004). This study is currently under consideration by UNHCR.

DIPLOMATIC ASSURANCES AND THEIR USE IN NORTH AMERICA

United States

Federal Law

The United States is one of the few legal systems that provides in law for the use of diplomatic assurances in the context of its obligations under the Convention against Torture (CAT). According to a federal regulation, 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 Attorney General, the Secretary of State will determine whether the assurances are "sufficiently reliable" to allow the return in compliance with CAT. Once assurances are approved, any claims a person has under the CAT will not be given further consideration by U.S. authorities.[32]

According to a February 1999 commentary by the U.S. Department of Justice, the nature, reliability, and verification of assurances would require "careful evaluation" before an alien's removal.[33] The determination to use diplomatic assurances is decided on a case-by-case basis, and may relate to the risk of torture or aspects of the requesting State's criminal justice system that protect against mistreatment, for example access to counsel.[34] The Secretary of State considers "the identity, position, or other information concerning the official relaying the assurances, and political or legal developments in the requesting State that would provide context for the assurances provided."[35] The State Department may also consider the diplomatic relations between the United States and the requesting country.[36]

When constructing diplomatic assurances, the State Department may require a monitoring or review mechanism to ensure compliance with the assurances. For instance, the State Department can ask human rights groups to monitor the condition of

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[32] 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.

[33] Regulations Concerning the Convention against Torture, 64 FR 8478, 8484, February 19, 1999.

[34] Written Declaration by 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, para. 8 [online] http://www.state.gov/documents/organization/16513.pdf (retrieved March 24, 2004).

[35] Ibid., para. 9.

[36] Ibid.

those extradited under a diplomatic arrangement.[37] The decision to implement a monitoring or review mechanism is also determined on a case-by-case basis. The factors considered include "the identity of the requesting State, the nationality of the fugitive, the groups or persons that might be available to monitor the fugitive's condition, the ability of such groups or persons to provide effective monitoring, and similar considerations."[38]

The deficits in the U.S. law lie in the discretionary nature of measures to verify the reliability of diplomatic assurances. There are no procedural guarantees for the returnee at all, including any opportunity to challenge the credibility or reliability of diplomatic assurances before an independent judicial body. Nor is there a requirement of a post-return monitoring mechanism or any guarantee that should there be such monitoring, it would be conducted by U.S. diplomatic or other officials following accepted practices of confidentiality.[39] There is also no clear requirement that the Secretary of State take into account the existence in the requesting state of a consistent pattern of gross, flagrant, or mass violations of human rights in conformity with the Convention against Torture article 3(2).

The Case of Maher Arar

The circumstances surrounding the case of Maher Arar raise serious concerns about U.S. practice with respect to reliance on diplomatic assurances as a safeguard against CAT violations. In September 2002, the U.S. government apprehended Arar, a dual Canadian-Syrian national, in transit from Tunisia through New York to Canada, where he has lived for many years. After holding him for nearly two weeks, U.S. immigration authorities flew him to Jordan, where he was driven across the border and handed over to Syrian authorities, despite his repeated statements to U.S. officials that he would be tortured in Syria and his repeated requests to be sent home to Canada. Prior to his transfer, the U.S. government obtained assurances from the Syrian government that Arar would not be subjected to torture.

Arar was released without charge from Syrian custody ten months later and has alleged that he was in fact tortured repeatedly, often with cables and electrical cords, during his confinement in a Syrian prison.[40] The U.S. government has not explained why it sent him to Syria rather than to Canada, where he resides; why it believed Syrian assurances to be credible in light of the government's well-documented record of torture, including

[37] Ibid. para. 10.

[38] Ibid.

[39] The government includes other groups, including human rights organizations, as possible post-return monitors. The acknowledgement of the independent nongovernmental sector and its inclusion is welcome. However, it cannot serve as a substitute for active and on-going involvement of the state that surrenders a person to a country based on diplomatic assurances. Many human rights groups are marginalized by governments in states that practice torture. Notwithstanding the inherent problems with post-return monitoring noted above, responsibility for securing access to governmental authorities and holding them accountable for compliance with diplomatic assurances must rest primarily with the surrendering government.

[40] Maher Arar's complete statement to media, CanWest News Service, November 4, 2003.

designation as a country that practices systematic torture by the U.S. Department of State's 2003 Country Reports on Human Rights Practices;[41] and why, in this case, it deemed that no post-return monitoring plan was required as a condition of return.[42]

On January 22, 2004, Maher Arar filed suit in U.S. Federal Court alleging violations of the Torture Victim Protection Act.[43] The U.S. Department of Homeland Security Inspector General has initiated a review of the Arar case.[44] The Canadian government will also hold a full public inquiry.[45]

The Arar case reinforces Human Rights Watch's concern that diplomatic assurances may be used to return persons suspected of having information about terrorism-related activities to countries where torture is routinely used, specifically to extract such information.[46] This concern is bolstered by the comments of former U.S. intelligence officials and sources within the U.S. administration who have stated publicly that they believe some transferred suspects are being tortured.[47]

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[41] "Spokesmen at the Justice Department and the CIA declined to comment on why they believed the Syrian assurances to be credible." Dana Priest, "Man was Deported after Syrian Assurances," *Washington Post*, November 20, 2003, page A24. See also United States Department of State Country Reports on Human Rights Practices for 2002: Syria, published in March 2003 [online] http://www.state.gov/g/drl/rls/hrrpt/2002/18289.htm (retrieved March 26, 2004).

[42] According to press reports, Imad Moustafa, the charge d'affaires at the Syrian Embassy in Washington, denied Arar was tortured. Dana Priest, "Top Justice Aid Approved Sending Suspect to Syria," Washington Post, November 19, 2003, page A28. Priest quotes Moustafa as saying, "... Syria had no reason to imprison Arar. He said U.S. intelligence officials told their Syrian counterparts that Arar was an al-Qaeda member. Syria agreed to take him as a favor and to win goodwill of the United States, he said." Ibid.

[43] The full text of the Arar complaint can be found [online] http://www.ccr-ny.org/v2/legal/september_11th/docs/ArarComplaint.pdf (retrieved March 26, 2004).

[44] Letter from Clark Kent Ervin, DHS Inspector General, to Hon. John Conyers, January 9, 2004, on file with Human Rights Watch.

[45] The terms of reference of the inquiry, issued in February 2004, can be found [online] http://www.psepc-sppcc.gc.ca/publications/news/20040205_e.asp (retrieved March 26, 2004).

[46] Gar Pardy, one of Canada's most senior diplomats at the time, stated that "The fact that you went looking for assurances, which is reflected here, tells you that even in the minds of the people who made this decision...I mean, there were some second thoughts." 60 Minutes II, "His Year in Hell," January 21, 2004 [online] http://www.cbsnews.com/stories/2004/01/21/60II/main594974.shtml (retrieved March 26, 2004).

[47] See Human Rights Watch, "United States: Alleged Transfer of Maher Arar to Syria, Letter to Department of Defense General Counsel Haynes Co-Signed by Amnesty International, The Center for Victims of Torture, International Human Rights Law Group, Lawyers Committee for Human Rights, Minnesota Advocates for Human Rights, Physicians for Human Rights, and RFK Memorial Center for Human Rights" *A Human Rights Watch Letter,* November 17, 2003 [online] http://www.hrw.org/press/2003/11/us-ltr111703.htm (retrieved March 26, 2004).

Canada

The Case of Manickavasagam Suresh

The inability of a person subject to involuntary return to challenge diplomatic assurances prior to return was addressed by Canada in a January 2002 decision. In Suresh v. Canada,[48] the Canadian Supreme Court expressed reservations about the reliability of diplomatic assurances as an adequate safeguard to the prohibition against torture, particularly in cases where a person is threatened with return to a country where torture is systematic. The court held that Manickavasagam Suresh, a Sri Lankan national subject to deportation on national security grounds, made a prima facie case in his first deportation hearing showing a substantial risk of torture if returned to Sri Lanka. 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 where he was at risk of torture, including the opportunity to challenge the validity of diplomatic assurances.[49]

With respect to the use of diplomatic assurances, the court stated that "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."[50] Moreover, the court distinguished the use of assurances in cases where there is a risk of torture from assurances given where a person subject to return may face the death penalty. The 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 the collusion but through the impotence of the state in controlling the behaviour of its officials. Hence the need to distinguish between

[48] *Manickavasagam Suresh v. The Minister of Citizenship and Immigration and the Attorney General of Canada (Suresh v. Canada)*, 2002, SCC 1. File No. 27790, January 11, 2002 [online] http://www.lexum.umontreal.ca/csc-scc/en/pub/2002/vol1/html/2002scr1_0003.html (retrieved March 26, 2004).

[49] The court noted that, at the time the case was decided, under section 53(1)(b) of Canada's Immigration Act regarding the review of decisions based on national security grounds and return to risk of torture, "there is no provision for a hearing, no requirement of written or oral reasons, no right of appeal—no procedures at all, in fact." Ibid., para. 117. The court determined that the U.N. Convention against Torture's explicit prohibition against deportation where there are "substantial grounds" for believing a person would be in danger of torture gave rise to a duty to provide procedural safeguards in national security cases where a person would be at risk of torture if returned: "Given Canada's commitment to the CAT, we find that ... the phrase "substantial grounds" raises a duty to afford an opportunity to demonstrate and defend those grounds." Ibid., para. 119.

[50] Ibid., para. 123.

> assurances regarding the death penalty and assurances regarding torture. The former are easier to monitor and generally more reliable than the latter.[51]

The court added guidelines for the assessment of the adequacy of assurances, including an evaluation of the human rights record of the government offering the assurances, the government's record in complying with its assurances, and the capacity of the government to fulfill the assurances, particularly where there is doubt about the government's ability to control its security forces.[52] The court's decision, however, upholds the principle that diplomatic assurances should not be relied upon when they are proffered by a state that practices torture or a state that does not have control over forces that perpetrate acts of torture.

The Case of Rodolfo Pacificador

In a subsequent case that does not explicitly refer to *Suresh*, the Court of Appeal for Ontario quashed the extradition order ("warrant of surrender") of Rodolfo Pacificador, suspected of the murder of a former provincial governor in the Philippines in 1986, and held that Philippine assurances of fair treatment were not reliable. In *Canada v. Pacificador*,[53] decided in August 2002, the Court of Appeal held that the Philippines' "criminal procedures have been interpreted and applied in this very prosecution in a manner that 'sufficiently shocks the conscience' that to surrender the appellant would violate his section 7 [Canadian Charter of Rights and Freedoms] right not to be denied life, liberty, and security of the person except in accordance with the principles of fundamental justice."[54]

While the decision not to surrender Pacificador is based, in the main, on fair trial concerns, including excessive delay and lengthy pre-trial detention, the presiding judge stated that "it is important to view this record as a whole,"[55] and included consideration of evidence that Pacificador's co-defendant had been tortured in detention in the Philippines.[56] Evidence of the co-accused's torture included subjection to electric shock and mock execution;[57] evidence not contradicted by the Canadian government.[58]

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[51] Ibid., para. 124.

[52] Ibid., para. 125.

[53] *Minister of Justice for Canada v. Rodolfo Pacificador (Canada v. Pacificador)*, Court of Appeal for Ontario, No. C32995, August 1, 2002.

[54] Ibid., para. 56. The Supreme Court of Canada has ruled that a Minister's surrender decision violates the Canadian Charter of Rights and Freedoms where the person subject to surrender would face a situation that is "simply unacceptable" or where the nature of the requesting country's criminal procedures or penalties "sufficiently shocks the conscience." *United States of America v. Allard and Charette*, 33 CCC (3d) 501 SCC, 1987; *R. v. Schmidt*, 333 CCC (3d) 193 SCC, 1987.

[55] Ibid., para. 53.

[56] Ibid.

[57] Ibid. para. 15.

The court stated in Pacificador: "The appellant makes serious allegations of political manipulation and fabrication of evidence, as well as allegations of appalling treatment of his co-accused during the lengthy pre-trial detention. No evidence has been led to dispute those allegations. At the very least, they establish a significant risk that the appellant will not be fairly treated upon his surrender."[59] The court concluded that the Philippines' authorities "failed to explain why the appellant's treatment on surrender will differ from that of his co-accused" and thus the assurances of fair treatment "failed to provide an adequate assurance that the delay and pre-trial detention of the appellant's co-accused would not be inflicted on the appellant as well."[60]

With respect to the Minister of Justice's reliance on Philippine assurances of fair trial and fair treatment, the court in Pacificador held that "when one looks at the record as a whole, the failure of the Philippines to provide acceptable explanations of what has gone on in the past or to provide adequate assurances about what might happen in the future, seriously undermines this fundamental element of the Minister's decision."[61]

[58] Ibid., para. 14.

[59] Ibid. para. 53.

[60] Ibid., para. 51.

[61] Ibid. para. 54. In February 2003, the Supreme Court of Canada dismissed the government's appeal in the *Pacificador* case.

DIPLOMATIC ASSURANCES AND THEIR USE IN EUROPE

The absence of any provision in regional law for the use of diplomatic assurances as a safeguard to European governments' obligation not to return a person at risk of torture, and the existing jurisprudence of the European Court of Human Rights with respect to their use, distinguishes the European regional system from policy and practice within the United Nations treaty monitoring system and in North American jurisdictions.

Regional Law and Policy

No European legal instrument expressly provides for reliance on diplomatic assurances as a safeguard against torture or ill-treatment in the context of extradition, deportation, or expulsion. For example, the European Convention on Extradition provides for the use of assurances, but only with respect to the death penalty.[62] The same Convention's Second Additional Protocol provides for the use of assurances to guarantee that a person who has been sentenced or subject to a detention order *in absentia* will have the right to a retrial in conformity with fair trial standards upon return.[63]

In January 2004, the European Arrest Warrant came into force in eight of the fifteen European Union member states.[64] The warrant applies to surrenders among E.U. member states only. The preamble to the E.U. framework decision adopting the warrant reaffirms the absolute nature of the prohibitions against the death penalty, torture, and returns to torture or ill-treatment.[65] The decision explicitly provides for the use of assurances only with respect to the opportunity of a retrial in cases of judgements or orders handed down *in absentia*, and for the review of life-sentences.[66]

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[62] Article 11: Capital Punishment states that: "If the offence for which extradition is requested is punishable by death under the law of the requesting Party, and if in respect of such offence the death-penalty is not provided for by the law of the requested Party or is not normally carried out, extradition may be refused unless the requesting Party gives such assurance as the requested Party considers sufficient that the death-penalty will not be carried out." European Convention on Extradition (1957) [online] http://conventions.coe.int/Treaty/en/Treaties/Html/024.htm (retrieved March 26, 2004).

[63] Article 3 states that: "When a Contracting Party requests from another Contracting Party the extradition of a person for the purpose of carrying out a sentence or detention order imposed by a decision rendered against him *in absentia*, the requested Party may refuse to extradite for this purpose if, in its opinion, the proceedings leading to the judgment did not satisfy the minimum rights of defence recognised as due to everyone charged with criminal offence. However, extradition shall be granted if the requesting Party gives an assurance considered sufficient to guarantee to the person claimed the right to a retrial which safeguards the rights of defence." Second Additional Protocol to the European Convention on Extradition (1978) [online] http://conventions.coe.int/Treaty/en/Treaties/Html/098.htm (retrieved March 26, 2004).

[64] The European Arrest Warrant (EAW) is intended eventually to replace the European Convention on Extradition and the extradition provisions of the European Convention on the Suppression of Terrorism in all the E.U. member states. On January 1, 2004, the EAW came into force in Belgium, Denmark, Finland, Ireland, Portugal, Spain, Sweden, and the U.K. See Council Framework Decision on a European Arrest Warrant, 2002/584/JHA, June 13, 2002.

[65] "No person should be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment." Ibid., preamble, para 13.

[66] Ibid., article 5.

Likewise, the Protocol amending the European Convention on the Suppression of Terrorism, opened for signature on May 15, 2003, includes a provision obliging Contracting States to seek assurances only if a person concerned risks being exposed to the death penalty.[67] It is of interest that the explanatory notes to the Protocol require the requested state to transmit its reasons for refusing extradition or return, but do not contemplate assurances of protection from torture in reply.[68]

Moreover, the guidelines elaborated by the Council of Europe's Group of Specialists on Human Rights and the Fight against Terrorism, adopted by the Committee of Ministers on July 15, 2002, reaffirm the absolute prohibition against torture in all circumstances "irrespective of the nature of the acts that the person is suspected of or for which he/she was convicted."[69] The guidelines also reaffirm the absolute nature of the prohibition on extradition to face such treatment: "[e]xtradition may not be granted when there is serious reason to believe that: i) the person whose extradition has been requested will be subjected to torture or to inhuman or degrading treatment or punishment."[70] No exceptions are permitted for either guideline.[71] The guidelines permit states to seek assurances that a person subject to surrender will not be subject to the death penalty, but no express provision is made for states to seek diplomatic assurances that a person subject to surrender will not be at risk for torture.[72]

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[67] Article 4.
1 The text of Article 5 of the Convention shall become paragraph 1 of this article.
2 The text of Article 5 of the Convention shall be supplemented by the following paragraphs:
"2. Nothing in this Convention shall be interpreted as imposing on the requested State an obligation to extradite if the person subject of the extradition request risks being exposed to torture.
3. Nothing in this Convention shall be interpreted either as imposing on the requested State an obligation to extradite if the person subject of the extradition request risks being exposed to the death penalty or, where the law of the requested State does not allow for life imprisonment, to life imprisonment without the possibility of parole, unless under applicable extradition treaties the requested State is under the obligation to extradite if the requesting State gives such assurance as the requested State considers sufficient that the death penalty will not be imposed or, where imposed, will not be carried out, or that the person concerned will not be subject to life imprisonment without the possibility of parole." Protocol amending the European Convention for the Suppression of Terrorism, Strasbourg 15.V.2003 [online] http://conventions.coe.int/Treaty/en/Treaties/Html/190.htm (retrieved March 26, 2004).

[68] "It is obvious that a State applying this article should provide the requesting State with reasons for its refusal to grant the extradition request. It is by virtue of the same principle that Article 18 paragraph 2 of the European Convention on Extradition provides that "reasons shall be given for any complete or partial rejection. . . " Draft Explanatory Report [online] http://conventions.coe.int/Treaty/EN/Reports/Html/090-rev.htm (retrieved March 26, 2004).

[69] Guideline IV, [online] http://www.coe.int/T/E/Human_rights/h-inf(2002)8eng.pdf (retrieved March 26, 2004).

[70] Ibid., Guideline XIII.

[71] Ibid., Guideline XV.

[72] Ibid., Guideline XIII(2)(i) and (ii). The same formula, obliging states to seek assurances with respect to the potential application of the death penalty, but making no similar provision for extraditions where a person is at risk of torture, is articulated in the Parliamentary Assembly of the Council of Europe resolution on combating terrorism and respect for human rights, Res. 1271(2002), January 24, 2002.

Jurisprudence of the European Court of Human Rights (ECHR)

Chahal v. United Kingdom

The European Court of Human Rights has addressed the issue of states' parties' reliance on diplomatic assurances as a safeguard against violations of states' obligations under article 3 (prohibition against torture) of the European Convention on Human Rights. In *Chahal v. United Kingdom*,[73] the court ruled that the return to India of a Sikh activist would violate the U.K.'s obligations under article 3, despite diplomatic assurances proffered by the Indian government that Chahal would not suffer mistreatment at the hands of the Indian authorities.[74] The court noted that:

> [T]he United Nations' Special Rapporteur on Torture has described the practice of torture upon those in police custody 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.[75]

The Chahal ruling is widely cited as an authoritative restatement by the court of the absolute nature of the prohibition against torture under the European Convention on Human Rights. Moreover, it establishes that diplomatic assurances are an inadequate guarantee where torture is "endemic," or a "recalcitrant and enduring problem" that results, in some cases, in fatalities. The court's acceptance that Indian assurances were given in good faith and that the government had embarked on reforms, but that serious abuses persisted, indicates that it took into account the credibility of the requesting government and whether the requesting government had effective control over the forces responsible for acts of torture.

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[73] *Chahal v. United Kingdom*, 70/1995/576/662, November 15, 1996 [online] http://www.worldlii.org/int/cases/IIHRL/1996/93.html (retrieved March 26, 2004).

[74] Ibid., para. 37.

[75] Ibid., paras. 104 and 105.

Shamayev and 12 Others v. Georgia and Russia

In the subsequent case of *Shamayev and 12 Others v. Georgia and Russia*,[76] the European Court of Human Rights scrutinized assurances from the Russian government. In August 2002, Georgian authorities detained thirteen Chechens who had illegally crossed the border from Chechnya. The Russian authorities requested the men's extradition, claiming they were suspected of involvement in militant activities. In October, the European Court communicated to the Georgian government a request that the men not be extradited before the court had an opportunity to review their cases.[77] The court can make such a request—for "interim measures"—when there is a concern that a return might result in irreparable harm to a petitioner, potentially undermining his or her ability to proceed with an individual application before the court.[78] Despite the court's request, five of the Chechens were extradited from Georgia to Russia on October 4.[79] The Russian authorities subsequently offered diplomatic assurances, including guarantees of unhindered access for the Chechens to appropriate medical treatment, to legal advice, and to the European Court of Human Rights itself. The Russian government also made assurances that the applicants would not be subject to the death penalty and that their health and safety would be protected.[80] However, these assurances, procured after the

[76] Application No. 36378/02, October 4, 2002.

[77] These "interim measures" were requested under Rule 39 of the Rules of Court which state that: "The Chamber or, where appropriate, its President may, at the request of a party or of any other person concerned, or of its own motion, indicate to the parties any interim measure which it considers should be adopted in the interests of the parties or of the proper conduct of the proceedings before it.... The Chamber may request information from the parties on any matter connected with the implementation of any interim measure it has indicated. See Registrar of the European Court of Human Rights, Shamayev and 12 Others v. Georgia and Russia, (application no. 36378/02), Press Release No. 486, October 10, 2002 [online] http://www.echr.coe.int/eng/press/2002/oct/chechensvgeorgia%26russia.htm (retrieved March 26, 2004).

[78] Rule 39 of the Rules of the Court provides for interim measures. According to the International Commission of Jurists:

> Interim or provisional measures are an institution of international procedural law recognized within the framework of international disputes. The object and purpose of these measures is to preserve the rights claimed by the parties to the procedure until the dispute is settled by the competent international organ, as well as to ensure the integrity and effectiveness of the decision on the merits, while avoiding that harm be done to the rights claimed by the parties *pendente litis*, which would annul the effects of the action taken by the competent organ. Interim or provisional measures enable the State concerned to fulfill its obligation and to conform to the final decision of the international organ and, if need be, to proceed to reparation of the principle fact, which includes restitution when this is possible.

See *Amicus Curiae* by the International Commission of Jurists relating to the Interim Measures of the European Court of Human Rights (46827/99 Mamatkulov and 46951/99 Abdurasuloviç v. Turkey), October 2001 [online] http://www.icj.org/news.php3?id_article=3228&lang=en (retrieved March 24, 2004).

[79] Registrar of the European Court of Human Rights, *Shamayev and 12 Others v. Georgia and Russia*, (application no. 36378/02), Press Release No. 552, November 6, 2002 [online] http://www.echr.coe.int/eng/press/2002/nov/shamayevrule39%282%29epress.htm (retrieved March 26, 2004).

[80] Registrar of the European Court of Human Rights, *Shamayev and 12 Others v. Georgia and Russia*, (application no. 36378/02), Press Release No. 601, November 26, 2002 [online] http://www.echr.coe.int/eng/press/2002/nov/shamayev26.11.2002.htm (retrieved March 26, 2004).

men had been returned against the court's request, functioned more in the way of a diplomatic afterthought than an actual safeguard.

The subsequent course of events is instructive with respect to the difficulties inherent in relying upon diplomatic assurances. In September 2003, the European Court declared the individual applications of the Chechens admissible, and organized fact-finding missions to both Georgia and Russia, notifying both governments of the pending visits.[81] The Russian government, however, notified the court on October 20, 2003, that the Stavropol Regional Court, within whose jurisdiction the five extradited Chechens were detained, refused to grant the European Court delegation access to the applicants.[82] The European Court issued a strongly worded reply, reminding the Russian government that:

> [T]he local court was contacted purely out of courtesy. The issue of access to the applicants is a matter of international law—in particular the European Convention on Human Rights, which, under Russian law, takes precedence over domestic law—and, therefore, falls to be decided solely by the European Court of Human Rights. The Court drew attention to Article 38 § 1 of the Convention, which provides that the State concerned is to furnish all necessary facilities for the effective conduct of any investigation undertaken by the Court. Moreover, Article 34 of the Convention requires the High Contracting Parties not to hinder in any way the effective exercise of the right of individual application.[83]

The Russian authorities' failure to comply with assurances it made to the European Court itself is a striking illustration of the fact that mere accession to regional or international human rights instruments is no guarantee that a state will comply with the obligations enshrined in those instruments, or even with express assurances given to the European Court of Human Rights in the course of pending proceedings. Moreover, it raises again the question of whether assurances should ever be accepted as an adequate safeguard against potential torture when proffered by a state where torture and ill-

[81] Registrar of the European Court of Human Rights, *Shamayev and 12 Others v. Georgia and Russia*, (application no. 36378/02), Press Release No. 455. September 19, 2003 [online] http://www.echr.coe.int/eng/press/2003/sept/decisionshamayev%28admissible%2919092003.htm (retrieved March 26, 2003). The Court can engage in its own fact-finding under Rule 42 Sec. 2 of its Rules of Procedure (measures for taking evidence).

[82] Registrar of the European Court of Human Rights, *Shamayev and 12 Others v. Georgia and Russia*, (application no. 36378/02), Press Release No. 528, October 24, 2003 [online] http://www.echr.coe.int/Press/Eng/query.idq?CiRestriction=528&CiScope=E%3A%5Cdata%5Cinternet%5Cechr%5CEng%5CPress&CiMaxRecordsPerPage=10&TemplateName=query&CiSort=rank%5Bd%5D&HTMLQueryForm=query.htm (retrieved March 26, 2004).

[83] Ibid.

treatment are designated as endemic or systematic by credible sources, yet are routinely denied or left unaddressed by the state in question.[84]
A delegation from the European Court of Human Rights did conduct a fact-finding mission to Georgia on February 23-25, 2004, to visit the Chechen detainees there.[85] The details of that mission have not been made public. The delegation plans a similar mission to Russia in June 2004, twenty-one months after the five Chechens were extradited.

Mamatkulov and Askarov v. Turkey

The case of *Mamatkulov and Askarov v. Turkey*,[86] currently pending before the Grand Chamber of the European Court of Human Rights, offers the court an opportunity to reaffirm the absolute nature of the prohibition against returning any person to a country where he or she would be at risk of torture or prohibited ill-treatment, despite the nature of their alleged crime and the offer of diplomatic assurances from a requesting government.

Rustam Mamatkulov and Abdurasulovic Askarov, nationals of Uzbekistan, were extradited from Turkey to Uzbekistan in March 1999 following diplomatic assurances from the Uzbek authorities that the men would not be subjected to the death penalty or torture, and that their property would not be confiscated.[87] The Uzbek authorities requested the extradition of Mamatkulov and Askarov based on allegations that the men—independent Muslims who were members of the Erk ("Freedom") Democratic Party of Uzbekistan, a banned opposition party—had been involved in terrorist-related activities against Uzbekistan, including involvement in a series of bombings in Tashkent in February 1999.[88]

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[84] The European Committee for the Prevention of Torture (CPT) has repeatedly expressed concern about the torture and ill-treatment of Chechens in the Russian Federation. See, for example, CPT, "Public Statement Concerning the Chechen Republic of the Russian Federation," July 10, 2003 [online] http://www.cpt.coe.int/documents/rus/2003-33-inf-eng.htm (retrieved March 24, 2004); see also, Human Rights Watch, *Welcome to Hell: Arbitrary Detention, Torture, and Extortion in Chechnya*, October 2000; *Swept Under: Torture, Forced Disappearances, and Extrajudicial Killings during Sweep Operations in Chechnya*, March 2002.

[85] Email communication from the European Court of Human Rights Registry to Human Rights Watch, March 23, 2004.

[86] Mamatkulov and Abdurasulovic [Askarov] v. Turkey, Application Nos. 46827/99 and 46951/99 respectively. The judgment in the first chamber was issued on February 6, 2003 [online http://hudoc.echr.coe.int/hudoc/ViewRoot.asp?Item=0&Action=Html&X=323155210&Notice=0&Noticemode=&RelatedMode=0 (retrieved March 26, 2004; hereinafter "First Chamber Decision"). The title of the first chamber decision incorrectly identified Abdurasulovic Askarov as "Abdurasulovic;" subsequent Court documents correctly identify him as Askarov. In April 2003, the Turkish government appealed the February 2003 decision to the Court's President, requesting that the case be referred to the Grand Chamber, to be considered de novo before the entire panel of ECHR judges. A public hearing before the Grand Chamber was held on March 17, 2004. See Registrar of the European Court of Human Rights, Mamatkulov and Askarov v. Turkey, Press Release No. 131, March 17, 2004 [online] http://www.echr.coe.int/eng/press/2004/mar/HearingMamatkukovvTurkey170304.htm (retrieved March 26, 2004). A final decision on the case is forthcoming.

[87] *Mamatkulov and Askarov*, First Chamber Decision, February 6, 2003, para. 29.

[88] Independent Muslims in Uzbekistan practice their faith outside of state-run mosques, and pray at home or otherwise shun state control in determining and practicing their religion.

Prior to the extraditions, the European Court of Human Rights requested that the Turkish government not extradite the men until the court had a chance to review their applications to the court.[89] Despite this request, the Turkish government extradited the men. Mamatkulov and Askarov, along with twenty other defendants, were tried together in June 1999, found guilty, and sentenced to twenty and eleven years' imprisonment respectively.

The men's applications to the European Court of Human Rights alleged that they were at risk of torture and ill-treatment at the time of return (ECHR article 3); that they were subject to unfair extradition proceedings in Turkey and would be subject to an unfair trial upon return to Uzbekistan (article 6); and that Turkey hindered their right to lodge individual applications with the European Court by ignoring the court's request not to extradite (article 34).

The court's first chamber issued a decision in February 2003, finding no violation of article 3, despite the fact that the repression, torture, and abuse of independent Muslims and Erk members at the hands of the Uzbek authorities was well-documented in materials submitted to the court.[90] Indeed, it was widely recognized that Uzbekistan practiced systematic torture, with a particular focus on independent Muslims and members of the Erk party. The court was aware, for example, that the Czech Republic had declined to extradite fellow Erk member Muhammed Solih to Uzbekistan. Solih had been tried and convicted *in absentia* by the Supreme Court of Uzbekistan for allegedly masterminding the Tashkent bombings in 1999. In a December 2001 decision, a Prague court denied the extradition request in part on the grounds that Solih would be at risk of torture if returned to Uzbekistan.[91]

Significantly, the first chamber in *Mamatkulov* relied heavily upon the diplomatic assurances (in the form of two letters) proffered by the Uzbek authorities. It also cited the fact that in October 2001—two and one half years after the men were returned—Turkish officials visited the men in prison and found them in good health with no

[89] The question of whether or not requests for interim measures are legally binding on states' parties to the European Convention on Human Rights is a key issue in this case. See *Amicus Curiae* by the International Commission of Jurists relating to the Interim Measures of the European Court of Human Rights (46827/99 Mamatkulov and 46951/99 Abdurasuloviç v. Turkey), October 2001[online] http://www.icj.org/news.php3?id_article=3228&lang=en (retrieved March 24, 2004).

[90] The Court had available to it materials on repression of independent Muslims and ERK party members in Uzbekistan documenting abuse and concern by Amnesty International and the United Nations.

[91] The decision stated:

> [Solih] will almost certainly face torture and illegal imprisonment by Uzbek judicial bodies, as well as possible threat of death. Independent international organizations documented the systematic use of torture methods by the Uzbek police, in particular when dealing with political prisoners. In accordance with this, by extraditing [Solih], the Czech Republic would violate Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms..."

Judgment of the Prague City Court, Judge Veronika Boháčková presiding, December 14, 2001, on file with Human Rights Watch. The Court was aware of this decision as it was featured in Amnesty International materials submitted by Mamatkulov's and Askarov's lawyer.

complaints about their treatment, and referred to medical certificates resulting from sporadic examinations by state-employed prison doctors in 2000 and 2001.[92] The court acknowledged, however, that "to date, the applicants' representatives have been unable to contact the applicants" in Uzbekistan to verify independently that they had not been subjected to abuse.[93] The court found no violation of articles 3 or 6, but did find Turkey in violation of article 34 for not honoring the court's request not to extradite the men before their European Court applications were reviewed. The court held that such requests for the application of interim measures were binding on states' parties to the European Convention on Human Rights.

The first chamber's reliance upon diplomatic assurances from the Uzbek government and its finding that the Turkish government's follow-up monitoring constituted an adequate safeguard against torture and ill-treatment are deeply disturbing. The decision does not conform with the court's own jurisprudence, enshrined in *Chahal*, that diplomatic assurances cannot be relied upon when offered by a government in a country where torture is endemic, or a recalcitrant and enduring problem—terms the Court applied to India, and that surely applied to Uzbekistan in 1999 and today.

Moreover, the material submitted by Turkey as evidence that the Uzbek authorities had in fact honored the assurances—one prison visit by Turkish officials more than two years after the men were returned and medical certificates from prison doctors employed by the state—cannot be considered adequate. These minimal follow-up monitoring measures fall far short of the U.N. Special Rapporteur's requirement of a post-return monitoring system that reinforces unequivocal guarantees that a person will not be subject to torture upon return and for the duration of his stay in the country of return.

In January 2004, Human Rights Watch, in cooperation with the London-based Association for Individual Rights in Europe (AIRE Centre), submitted an *amicus curiae* brief to the Grand Chamber,[94] which is currently considering the *Mamatkulov* case on appeal. In the brief, Human Rights Watch presented detailed primary evidence that the men were at considerable risk of torture upon return, including cases of torture of similarly situated independent Muslims and Erk members, torture and ill-treatment of the two men's co-defendants, and torture of family members of the men's co-defendants. Evidence was also submitted confirming the incommunicado detention of the men up to and during their trial, and the complicity of Uzbek prison doctors in covering-up acts of torture. Human Rights Watch, which was the only international nongovernmental observer at the June 1999 trial, also submitted a detailed firsthand account of the defendants' lack of access to their lawyers of choice and to family members, and evidence of coerced incriminating statements used in court. Human Rights Watch provided evidence of torture and ill-treatment of human rights defenders

[92] First Chamber Decision, paras. 34-35.

[93] Ibid., para. 36.

[94] See Human Rights Watch, "Mamatkulov and Askarov v. Turkey: Intervention Submitted by Human Rights Watch and the AIRE Centre," January 28, 2004 [online] http://hrw.org/backgrounder/eca/turkey/eu-submission.pdf (retrieved March 26, 2004).

interested in the trial and of similarly situated independent Muslims in the immediate aftermath of the trial.

Human Rights Watch also provided commentary and case studies illustrating the inherent unreliability of diplomatic assurances from a country like Uzbekistan. Despite routine denials by authorities, the practice of systematic torture in Uzbekistan is well-documented, including by the U.N. Special Rapporteur on Torture.[95] The *Mamatkulov* case underscores the absence of procedural guarantees that offer an effective opportunity to challenge diplomatic assurances; and the fact that post-return monitoring is all too often an ineffective and inadequate measure to ensure compliance with diplomatic assurances.

A final decision in *Mamatkulov and Askarov v. Turkey* is expected in 2004.

Examples of State Practice in the Council of Europe Region

There is no comprehensive study on the use of diplomatic assurances as a safeguard against extradition or return to torture or ill-treatment in the member states of the Council of Europe. A sampling of cases in the region, however, indicates that the judiciary often serves as an effective check on the use of diplomatic assurances as a safeguard against torture, and in key cases has held that such assurances are inadequate when proffered by a state with a well-documented record of torture and ill-treatment.

United Kingdom: The Case of Akhmed Zakaev

The credibility of diplomatic assurances proffered by the Russian authorities came under scrutiny in the U.K. courts in 2003. In *Russia v. Zakaev*, Bow Street Magistrates' Court in London considered Russia's extradition request for the surrender of Akhmed Zakaev, an envoy for the Chechen government in exile, for alleged crimes committed in Chechnya in 1995 and 1996.[96] The Deputy Minister responsible for the Russian prison system gave testimony in court that Zakaev would come to no harm whilst in detention in Russia.[97] The extradition request was considered within the context of the Extradition Act 1989 (c. 33), the U.K. legislation incorporating the European Convention on Extradition.[98] The Act requires that a person not be surrendered if he might ". . .be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his race,

[95] Report of the Special Rapporteur on Torture, Mission to Uzbekistan, E/CN.4/2003/68/add.2, February 3, 2003 [online] http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/29d0f1eaf87cf3eac1256ce9005a0170/$FILE/G0310766.doc (retrieved March 26, 2004).

[96] *The Government of the Russian Federation v. Akhmed Zakaev*, Bow Street Magistrates' Court, Decision of Hon. T. Workman, November 13, 2003 [online] http://www.tjetjenien.org/Bowstreetmag.htm (retrieved March 26, 2004).

[97] Ibid., page 7.

[98] The U.K. Extradition Act has since been amended. See Extradition Act 2003 [online] http://www.hmso.gov.uk/acts/acts2003/20030041.htm (retrieved March 26, 2004).

religion, nationality or political opinions."[99] The court thus undertook "an assessment of what might happen if [Zakaev] were returned" and to what extent those happenings could be attributed to his race, religion, nationality or political opinions.[100]

The U.K. court accepted that the trial process in Russia might be fair, but focused on "the conditions in which Mr. Zakaev would be likely to be detained and to consider whether they would have any prejudicial effect on his trial," in particular whether he would be at risk of torture if surrendered.[101] The court considered material from the European Committee for the Prevention of Torture and the U.N. Committee against Torture expressing concern about the continuing practice of torture and ill-treatment by Russian law enforcement officers operating in Chechnya.

In addition to testimony from former Russian officials about the specific vulnerability of Chechens in the Russian criminal justice system, including the increased risk to a near certainty that they will be tortured or ill-treated, the U.K. court heard evidence from a credible witness who said he made a statement, extracted under torture, to Russian authorities implicating Zakaev in the crimes of which he was accused. The court gave particular weight to this evidence stating that it was "clear, unequivocal and unshaken by cross-examination,"[102] and came to the "inevitable conclusion" that if the Russian authorities resorted to torturing a witness, "there is a substantial risk that Mr. Zakaev would himself be subject to torture;"[103] and that such treatment would be meted out as a consequence of Mr. Zakaev's nationality and political beliefs. With respect to Russian assurances that Mr. Zakaev would not be tortured, the U.K. court concluded:

> I am sure that he [Deputy Minister for Russian prisons] gave that assurance in good faith. I do, however, consider it highly unlikely that the Minister would be able to enforce such an undertaking, given the nature and extent of the Russian prison estate. I consider that such a guarantee would be almost impossible in any country with a significant prison population. I was also concerned as to the type of institution to which the defendant would be sent. Although the Minister indicated that he would be detained in a Ministry of Justice institution, another witness eventually confirmed that the decision could be taken by the Prosecutor who could choose to place Mr. Zakaev in an institution run by the FSB [Federal Security Service, which is active in Chechnya].[104]

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[99] 1989 Act at Article 6(1)(d).

[100] *Russia v. Zakaev*, page 7.

[101] Ibid.

[102] Ibid., page 10.

[103] Ibid. page 10.

[104] Ibid., page 7.

In refusing to accept Russian assurances, the court in *Zakaev* relied on the fact that torture is widespread in Russia; that Chechens, in particular, are more likely than not to be tortured; that the Russian government cannot have effective control over the vast prison system in such a manner as to guarantee that Zakaev will not be tortured; and that Russian guarantees of placement in a specific detention facility cannot be relied upon. Extradition was refused.

Germany: The Case of Metin Kaplan

A German court also recently rejected as insufficient diplomatic assurances offered by a government that used evidence procured by the torture of codefendants or witnesses in related criminal proceedings. In a 2003 decision, a German court ruled that a request from the Turkish government for the extradition of Metin Kaplan, the leader of a banned Islamic fundamentalist group, "Caliphate State," was politically motivated.[105] The court determined that the evidence on which the extradition warrant was based had been procured by the torture in detention of a group of Kaplan's followers, in violation of Article 15 of the Convention against Torture.[106] The court held that diplomatic assurances from the Turkish government that Kaplan's treatment and prosecution would conform with Turkey's human rights obligations would not provide Kaplan with "sufficient protection" against such violations.[107] Expressing concern about information extracted by torture and the independence of the Turkish State Security Court, the court stated in Kaplan that:

> ...Such formal guarantees in an extradition proceeding can only provide sufficient protection in favor of the persecuted person if their correct implementation through the institutions of the requesting state—in this case the independent Turkish judiciary—can reliably be expected. The latter is not the case here.[108]

German authorities claimed that the decision not to extradite Kaplan was "regrettable" and pointed to "the repeated expressly confirmed promises of the Turkish government

[105] Oberlandesgericht Duesseldorf, in the case of Metin Kaplan, 4Ausl (a) 308/02-147.203-204.03III, May 27, 2003. Kaplan's group was banned in Germany in the aftermath of the September 11 attacks in the United States. In December 2003, German police conducted a nationwide operation against Kaplan's followers, taking many into custody. Metin Kaplan was released after questioning. See "German Police in Nationwide Sweep against Islamists," Agence France Presse, December 11, 2003; "Turkey: German Police in Raid against Turkish Extremist Group," Global News Wire, December 15, 2003; and "Banned Turkish Islamist Group Reportedly Still Active in Germany," BBC Monitoring International Reports, February 16, 2004.

[106] Oberlandesgericht Duesseldorf, in the case of Metin Kaplan, op. cit., page 15. Article 15 of the CAT reads: "Each state party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made."

[107] Ibid., page 23.

[108] Ibid.

regarding the adherence to principles of the rule of law."[109] In a disturbing development, the government claimed that the court decision "does not stand in the way of expulsion, especially since the declarations of the Turkish government adequately guarantee that, after his expulsion to Turkey, Kaplan will not be subjected to treatment that violates the rule of law."[110] Minister of Interior Otto Schily claimed that "the right of a state to expel a foreigner in order to protect national security" should be the priority.[111]

The German government's response in the Kaplan case points to the essential role courts can play in interpreting a state's treaty obligations and evaluating the use of diplomatic assurances in light of those obligations. The German government's public statements raise serious concerns that it is actively attempting to circumvent the authority of its own judiciary. Subsequent news accounts revealed that Schily visited Ankara in September 2003 to secure enhanced assurances that Kaplan would get fair treatment upon return and that evidence extracted by torture would not be used in any proceedings again Kaplan.[112] The Turkish government declined to provide satisfactory assurances.[113] Kaplan remains in Germany.

Austria: The Case of Mohamed Bilasi-Ashri

In November 2001, the Court of Appeal in Vienna ordered the extradition to Egypt of Mohamed Bilasi-Ashri, who had been sentenced *in absentia* in Egypt to fifteen years of hard labor for alleged involvement in an Islamic extremist group.[114] The court considered Bilasi-Ashri's claim that he would be at risk for torture or ill-treatment and would not be given a fair trial upon return, but concluded that "Egypt was not a country where serious large scale violations of human rights could be considered an institutionalised everyday practice ...[t]hus there was no general obstacle to extradition."[115] The Court of Appeal dismissed evidence that members of Islamist groups in Egypt are frequently subjected to torture and ill-treatment, including electric shocks, beatings, burning and various forms of psychological abuse.[116] The court also

[109] Joint Statement German Federal Ministry of Interior and Ministry of Interior of North Rhine Westphalia, "Schily and Behrens Regret Decision of OLG Duesseldorf in Kaplan Case," Berlin, May 27, 2003.

[110] Ibid. The government was referring to immigration-related expulsion orders issued by the city of Cologne that Kaplan was challenging at the time. The government's statement also refers to the fact that Kaplan was challenging the removal of his refugee status in court as well.

[111] Ibid.

[112] German Minister Pursues 'Caliph of Cologne' Extradition in Turkey," Deutsch Welle, September 16, 2003 [online] http://www.deutschewelle.de/english/0,1003,1432_A_972238_1_A,00.html (retrieved March 26, 2004). Deutsch Welle also reported that Schily told the newsmagazine Der Spiegel that the Kaplan case could become "'a symbol for the weakness of our state' if it proves impossible to deport Kaplan." Ibid.

[113] "Germany, Turkey Fail to Agree on Extradition of Islamic Extremist," Deutsch Welle, September 17, 2003.

[114] Peter Finn, "Europeans Tossing Terror Suspects Out the Door," *Washington Post*, January 29, 2002, page A1.

[115] Descriptions of the Austrian court decision are taken from the European Court of Human Rights decision *Bilasi-Ashri v. Austria*, Application No. 3314/02, November 26, 2002, section A.5.

[116] Amnesty International, *Concerns in Europe*, July-December 2001 [online] http://web.amnesty.org/ai.nsf/Index/EUR010022002?OpenDocument&of=COUNTRIES\AUSTRIA (retrieved March 25, 2004).

determined that Bilasi-Ashri's pending asylum application did not preclude his extradition.[117]

Despite the surprising finding that Bilasi-Ashri's fear of torture was unfounded, however, the Court of Appeal in its ruling conditioned his extradition upon receiving diplomatic assurances from the Egyptian authorities that Bilasi-Ashri's conviction *in absentia* would be declared null and void, that he would be retried before an ordinary (civilian) criminal court and would not be persecuted or suffer restrictions upon his personal freedom.[118] On November 12, 2001 the Austrian Federal Minister of Justice approved the extradition, subject to the conditions set forth in the Court of Appeal decision, and added the condition that Bilasi-Ashri be permitted to leave Egyptian territory within forty-five days in the case of acquittal.

In spite of the requirement of diplomatic assurances, Amnesty International issued an "urgent action" on behalf of Bilasi-Ashri on January 4, 2002, stating that he would be at risk of torture or ill-treatment if returned.[119] Austrian authorities subsequently requested permission from the Egyptian government to visit Bilasi-Ashri upon Austria's request after his return to Egypt.[120] In March 2002, the United Nations High Commissioner for Refugees requested that Austria grant Bilasi-Ashri refugee status on the basis that he had a well-founded fear of persecution if returned.[121] In March and April 2002, the European Court of Human Rights requested that Austria not return Bilasi-Ashri until the Court reviewed his case. (Bilasi-Ashri had originally lodged his petition with the court in June 2000, but was subsequently detained pending extradition.)

The Egyptian authorities subsequently rejected the conditions laid out in the extradition order and Bilasi-Ashri was released from detention in Austria in August 2002. The fact that the extradition order required Egypt's compliance with articles 3 and 6 of the European Convention on Human Rights, and that the Egyptian authorities refused such compliance, indicate that Bilasi-Ashri's fears that he would be at risk of torture or ill-treatment and subject to an unfair trial were well-founded.

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[117] See Sibylle Kapferer, *The Interface between Extradition and Asylum*, UNHCR, op. cit., para. 29: "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 suspension of the extradition procedure. It does mean, however, that the decision of the extradition should only be made after the final determination on refugee status, even if extradition and asylum proceedings are conducted in parallel."

[118] *Bilasi-Ashri v. Austria*, section A.5.

[119] AI Index: Eur 13/001/2002, January 4, 2002 [online] http://web.amnesty.org/library/Index/ENGEUR130012002?open&of=ENG-AUT (retrieved March 26, 2004).

[120] *Bilasi-Ashri v. Austria*, section A.5.

[121] Ibid.

Sweden: The Cases of Ahmed Agiza and Mohammed al-Zari

Sweden's return of two Egyptian asylum seekers to Cairo in December 2001 illustrates well both the lack of reliability of diplomatic assurances and the difficulties of implementing an effective and adequate post-return monitoring system that ensures that the government of return complies with the terms of the diplomatic assurances.

Ahmed Agiza and Mohammed al-Zari, both Egyptian nationals who had sought asylum in Sweden, were expelled from Sweden and forcibly returned to Egypt on December 18, 2001. Their asylum applications were rejected, despite acknowledgement by the Swedish authorities that the two men had a well-founded fear of persecution in their home country. The men were excluded from refugee status based on secret evidence provided by the Swedish security police (Säpo) that the men were associated with Islamist groups responsible for terrorist acts.[122] The secret evidence against the men was not disclosed in full to either the men or their lawyers, and there was no right to appeal the expulsions, which were executed the very same day they were ordered.[123]

The expulsions followed diplomatic assurances by the Egyptian government that the men would not be subjected to torture or ill-treatment upon return, and that they would not be sentenced to death. Assurances were also given that the men would be afforded fair trials in Egypt, including a re-trial for Agiza, who had been tried and convicted *in absentia* by an Egyptian military court in April 1999.[124] Arrangements for the Swedish government to be granted access to monitor the trials and to visit the men in prison were not specified in the assurances, but apparently were agreed with the Egyptian authorities in advance.

Swedish authorities subsequently claimed that "[o]n the basis of these assurances the Government of Sweden made the assessment that the assurances obtained provided an adequate guarantee of safety in accordance with international law and that Sweden, thus, did not act in breach of its commitments under international law."[125] The men's

[122] The Swedish Aliens Act—Utlänningslagen (1989)—grants the government powers to decide on the expulsion of foreign citizens who are considered a national security threat, including asylum seekers with pending claims, although it explicitly prohibits the execution of such decisions in cases where the returnee may risk torture or the death penalty. See also Sibylle Kapferer, *The Interface between Extradition and Asylum*, op. cit., footnote 117, regarding the relationship between asylum and extradition.

[123] In connection with its decision to expel al-Zari and Agiza, the Swedish government also decided to return Agiza's wife, Hanan Attia, and her five children. Following an individual communication on her behalf to the U.N. Committee against Torture, however, and the Committee's subsequent request that the Swedish government delay deportation until it has had an opportunity to examine the case, the deportation was put on hold and Attia and her children remained in Sweden, pending the Committee's decision on her case. The CAT decision was issued in November 2003 finding no violation of CAT article 3 (see section on CAT and Hanan Attia case above). Attia's lawyer subsequently submitted a new asylum application for Attia and her children, which is currently pending. They remain in Sweden at date of writing. See Human Rights Watch, "Call for Full and Fair Asylum Determination Procedure: Letter to Swedish Government on behalf of Hanan Attia" *A Human Rights Watch Letter*, December 17, 2003 [online] http://hrw.org/english/docs/2003/12/18/sweden6761.htm (retrieved March 26, 2004).

[124] Letters detailing the diplomatic assurances on file with Human Rights Watch.

[125] Submission of the Swedish government to the U.N. Human Rights Committee ("Information requested by the Human Rights Committee from the Government of Sweden"), May 6, 2003, on file with Human Rights Watch. In

treatment upon return and the obvious shortcomings of the Swedish monitoring scheme, however, raise serious concerns that the Swedish government has violated its absolute obligation not to return a person to a country where he is at risk of torture or ill-treatment.

Upon return, Agiza and al-Zari were held for five weeks in incommunicado detention. No representative from the Swedish government visited the men during that time.[126] Eventually Swedish diplomatic representatives did begin visiting the men in prison, "more or less on a monthly basis,"[127] but none of the visits has been conducted in private. The Swedish delegation is always accompanied by prison authorities during the visits, and never left alone with the detainees. The delegation has met only with both detainees at the same time and the meetings have taken place in the office of the prison director, sometimes with up to ten prison officials present—never in the men's own cells, which the Swedish officials have not been allowed to visit.[128] Swedish officials' apparent lack of expertise at detecting signs of torture or ill-treatment raise further concerns about the failure to conduct private visits; the men obviously would be far less inclined to speak freely about possible abuse or to reveal possible physical injuries resulting from such abuse in the absence of assurances of absolute confidentiality. Moreover, the Swedish embassy agreed to give several days' notice to the prison director before each visit. The failure of the Swedish authorities to conduct visits in private and the consequent lack of confidentiality do not conform with international standards governing prison monitoring visits.[129]

Despite Swedish government claims to the contrary, information available from additional credible sources raises serious concern that the men have in fact been subjected to torture and ill-treatment since their return to Egypt, and remain vulnerable to such abuse. Given the serious deficits in the post-return monitoring scheme, including the absence of completely confidential access to the men, the Swedish government cannot unequivocally guarantee that the men have been treated in full conformity with the diplomatic assurances. Moreover, Mohammed al-Zari was released from prison in

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communications with Human Rights Watch, Swedish authorities have readily admitted that the decision to expel the men was a very difficult one, and explained that this was especially so because Sweden had never before expelled anyone based on diplomatic assurances.

[126] Sweden's failure to visit the men during the initial stages of their detention in Egypt is all the more disconcerting in light of reports that they were held incommunicado at an interrogation center of the State Security Intelligence Service outside Cairo during this time. They were subsequently transferred to the Mazraat Tora prison. As noted above, detainees are most vulnerable to torture and ill-treatment in the first days of detention.

[127] Submission of the Swedish government to the U.N. Human Rights Committee ("Information requested by the Human Rights Committee from the Government of Sweden"), May 6, 2003, on file with Human Rights Watch.

[128] Mohammed al-Zari was released in October 2003, thus visits with both men present ended at the time of his release.

[129] See 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 on March 26, 2004).
See also, 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 26, 2004).

October 2003, after being held for nearly two years without charge. He remains under constant surveillance by the Egyptian security forces and is required to report for regular interrogations, but there is no evidence that the Swedish authorities are monitoring his treatment.

The Swedish authorities have also made little headway in terms of securing a fair trial for Ahmed Agiza. In late March 2004, more than two years after Agiza's return, the Egyptian authorities ordered a retrial, but again before a military tribunal where fair trial standards are not respected. It remains unclear what action, if any, the Swedish government is taking in the face of the Egyptian authorities' failure to honor a key condition for return of the two men. This failure amounts to a breach of the diplomatic assurances upon which the Swedish authorities based the expulsions.

Both men have cases pending in other fora; Agiza has lodged an individual application with the U.N. Committee against Torture and al-Zari has lodged an application with the European Court of Human Rights.

RECOMMENDATIONS

Human Rights Watch is deeply concerned that governments are increasingly relying on diplomatic assurances as a device to circumvent the obligation not to return any person to a place where he or she would be at risk of torture or ill-treatment. The concern derives from the many examples in this paper, indicating a trend that seriously undermines the absolute prohibition against torture and ill-treatment. The use of diplomatic assurances threatens to erode the decades-long work of governments—in close alliance with civil society—to eradicate torture. It would be tragic indeed if the actions of terrorists resurrected torture as a legitimate means of interrogation and control.

Human Rights Watch calls on all governments to:

- Reaffirm the absolute nature of the obligation not to return any person to a country where there are substantial grounds for believing that he or she may be in danger of being subjected to torture or prohibited ill-treatment, in full conformity with international law;

- Prohibit reliance upon diplomatic assurances under any circumstances to circumvent the absolute obligation not to return any person to a country where there are substantial grounds for believing that he or she may be in danger of being subjected to torture or prohibited ill-treatment;

- Declare reliance upon diplomatic assurances per definition unacceptable in circumstances where there is substantial and credible evidence that torture and prohibited ill-treatment in the country of return are systematic, widespread, endemic, or a "recalcitrant or persistent" problem; where governmental authorities do not have effective control over the forces in their country that perpetrate acts of torture and ill-treatment; or where the government consistently targets members of a particular racial, ethnic, religious, political or other identifiable group for torture or ill-treatment and the person subject to return is associated with that group;

- Ensure that any person subject to return has the effective opportunity, in conformity with internationally recognized procedural guarantees, to challenge the legality of the return—including the reliability of any diplomatic assurances provided and the adequacy of any proposed post-return monitoring arrangements—prior to return before an independent tribunal and with the right of appeal.

Human Rights Watch calls on the U.N. Special Rapporteur on Torture to:

- Undertake an in-depth inquiry focusing exclusively on the practice of states' reliance on diplomatic assurances, elaborating clear criteria and standards for their use with the purpose of reaffirming the absolute nature of the prohibition against returning any person to a country where there are substantial grounds for believing that he or she may be in danger of being subjected to torture or prohibited ill-treatment, and with the goal of ensuring full respect by U.N. member states for that legal obligation.

ACKNOWLEDGEMENTS

Julia Hall, counsel and senior researcher in the Europe and Central Asia Division of Human Rights Watch, researched and wrote this report. Acacia Shields and Diederik Lohman, senior researchers in the Europe and Central Asia Division, and Kristina Alessi, associate in the Europe and Central Asia Division, provided valuable additional research. The report was edited by Ben Ward, counsel in the Europe and Central Asia Division and Iain Levine, program director for Human Rights Watch. Dinah PoKempner, general counsel for Human Rights Watch, provided legal review. Veronika Leila Szente Goldston, advocacy director in the Europe and Central Asia Division, reviewed and provided valuable commentary on the text. Portions of the manuscript were also reviewed by Rachel Denber, acting executive director in the Europe and Central Asia Division, and Wendy Patten, advocacy director in the U.S. Program of Human Rights Watch. Anna Sinelnikova, associate in the Europe and Central Asia Division, provided invaluable production support. Special thanks to Ernest Ulrich, consultant to Human Rights Watch, for translation services.

Human Rights Watch gratefully acknowledges the contributions made to this report by a number of valued colleagues, including Anna Wigenmark, Swedish NGO Foundation for Human Rights; Julia Duchrow, Amnesty International Germany; Madeleine Siedlitz, Amnesty International Sweden; Peter Rosenblum, director, and Johanna Westeson, Adria Perez, and Lauren Butcher, students in the Columbia Law School Human Rights Clinic; and Nuala Mole, Association for Individual Rights in Europe (AIRE Centre).

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HUMAN RIGHTS WATCH

HUMAN RIGHTS WATCH REPORT TO THE CANADIAN COMMISSION OF INQUIRY INTO THE ACTIONS OF CANADIAN OFFICIALS IN RELATION TO MAHER ARAR

REPORT SUBMITTED BY WENDY PATTEN U.S. ADVOCACY DIRECTOR*

June 7, 2005

Introduction

The practice of transferring terrorist suspects to countries that routinely practice torture and other ill-treatment is of growing international concern. A number of governments around the world – in particular in Europe, the Middle East and North America – have transferred or attempted to transfer terrorist suspects to places where they are at risk of being subjected to torture or ill-treatment. In the United States, the media has reported extensively on such transfers in recent months, shedding new light on a policy that remains shrouded in secrecy.[1]

U.S. officials have been pressed to comment on the secret practice that has come to be known in the United States as extraordinary rendition. 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 future attack was "to arrest people and send them back to their

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* This report was co-authored by Wendy Patten, U.S. Advocacy Director, and Noya Shamir, Consultant to Human Rights Watch. The authors would like to thank Julia Hall and Dinah PoKempner of Human Rights Watch for their invaluable contributions to this report.

[1] For a comprehensive news report, see Jane Mayer, "Outsourcing Torture: The secret history of America's 'extraordinary rendition' program", *The New Yorker*, Feb. 14, 2005. Another example are the stories about the so-called "torture plane"—a Gulfstream jet—which 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, e.g. Dana Priest, "Jet is an Open Secret in Terror War," *Washington Post*, December 27, 2004, p. A1; John Crewdson, "Mysterious Jet Tied to Torture Flights: Is Shadowy Firm Front for CIA?" *Chicago Tribune*, January 8, 2005.

country of origin with the promise that they won't be tortured."[2] When asked by a journalist, "...what is it that Uzbekistan can do in interrogating an individual that the United States can't?" the President demurred, saying only that "[w]e seek assurances that nobody will be tortured when we render a person back to their home country."[3]

The terms "rendition" and "extraordinary rendition" have been used to describe a variety of forms of transfer of persons to the custody of other governments. It is important to clarify both the terminology used in this report and the types of activities covered. Some of the transfers of persons suspected of terrorist activities occur within a legal framework, such as an immigration deportation process or extradition proceedings. Other transfers are effectuated outside of any legal process. In many ways, these extralegal renditions raise even more serious concerns, largely because they take place in secret and without any procedural safeguards, including an opportunity for the person to challenge the transfer in a legal forum.[4]

While some have used the term "rendition" to apply to any transfer to torture, more often "rendition" is used simply to signify the transfer or sending of a person to another country. "Extraordinary rendition" typically refers to the extralegal form of the practice, in which a person is apprehended in one country and handed over to another without any formal legal procedure. Some differentiate extraordinary renditions from renditions not based on the process used to effectuate the transfer, but on whether the end result involves risk of torture. They use the term "extraordinary rendition" to signify the transfer of terror suspects to countries where they may face torture.[5]

Because these terms lack precise legal definitions, this report will use them as follows. The report will use the term "rendition" to refer generally to any transfer of a person

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

[3] Ibid.

[4] See e.g., Counterterrorism Policy: Hearing Before the National Commission on Terrorist Attacks Upon the United States (March 24, 2004) (statement by Christopher Kojm, Deputy Executive Director, National Commission on Terrorist Attacks Upon the United States, and former Deputy Assistant Secretary of State), available at http://www.9-11commission.gov/archive/hearing8/9-11Commission_Hearing_2004-03-24.pdf (retrieved April 29, 2005) (Kojm Statement). Mr. Kojm explained renditions as follows, "if a terrorist suspect is outside of the United States, the CIA helps to catch and send him to the United States or a third country." Ibid.

[5] See Michael John Garcia, "The U.N. Convention Against Torture: Overview of U.S. Implementation Policy Concerning the Removal of Aliens, " *Congressional Research Service*, March 11, 2004, at summary: "CAT obligations also have implications for any existing "extraordinary renditions" policy by the United States in which certain aliens suspected of terrorist activities are removed to countries that possibly employ torture as a means of interrogation", [online] http://www.law.duke.edu/curriculum/coursehomepages/Fall2004/351_01/readings/crs.pdf#search='crs%20convention%20torture%20removal (retrieved May 5, 2005). 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. 13 [online] http://www.abcny.org/pdf/report/Torture%20by%20Proxy%20-%20Final%20(PDF).pdf (retrieved May 5, 2005).

from the custody of one government to that of another. The term "extraordinary rendition" will be used to refer to transfers that occur outside of any legal framework. The report will use the term "rendition to risk of torture" to refer to any transfer of a person to a country where he or she is at risk of being tortured, whether the transfer is within or outside a legal procedure. This framing maintains a clear focus on the critical human rights issue implicated by these practices: the absolute prohibition on transferring people to a risk of torture or ill-treatment. Just as governments may not engage in torture directly, they may not send or transfer persons to other countries where they are at risk of torture.

Maher Arar's case may have been a rendition within a lawful procedure, given that it appears he was removed from the United States after being placed in expedited immigration proceedings. His case is likely not among those considered to be "extraordinary renditions" by U.S. officials, which are probably limited to cases involving the apprehension and transfer of persons outside of the United States and outside of any legal framework. Despite the fact that Mr. Arar's rendition purportedly occurred within a legal process, it remains unclear whether U.S. officials adhered to the legally prescribed procedures in his case. Even if the rules were followed, including with respect to diplomatic assurances from the receiving government, in this case Syria, the fact that a rendition occurs within a legally prescribed procedure does not absolve the sending government of its obligation not to transfer a person to another country where he or she is at risk of torture or ill-treatment. Human Rights Watch believes that U.S. procedures governing immigration matters, in particular the use of diplomatic assurances, are not adequate to meet U.S. obligations under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and its U.S. implementing legislation.

As will be demonstrated below, sending a person to a country where he or she is at risk of being subjected to torture is contrary to U.S. obligations under both international and domestic law. To circumvent these legal obligations, the Bush administration obtains diplomatic assurances from the receiving countries, stating that they will not torture the transferred person. As discussed in detail below, however, diplomatic assurances do not satisfy U.S. legal obligations because they do not provide an effective safeguard against torture or other ill-treatment.

Pre 9/11 Renditions

The practice of extraordinary renditions is not a new phenomenon. In the United States, it can be traced back at least to the early 1990's, when policies were formulated for the

apprehension and transfer of terrorist and other suspects outside of any formal legal process. In June 1995, then-President Clinton issued Presidential Decision Directive (PDD) 39, which includes the following language:

> When terrorists wanted for violation of U.S. law are at large overseas, their return for prosecution shall be a matter of the highest priority. ... If we do not receive adequate cooperation from a state that harbors a terrorist whose extradition we are seeking, we shall take appropriate measures to induce cooperation. Return of suspects by force may be effected without the cooperation of the host government, consistent with the procedures outlined in NSD-77, which shall remain in effect.[6]

This policy was reiterated in May 1998 with a new directive, PDD-62, which outlined ten policy programs, the first of which was "apprehension, extradition, rendition and prosecution."[7]

Before September 2001, the available information regarding extraordinary renditions strongly suggests a focus on delivering criminal suspects to prosecution, particularly in the United States. During the decade prior to 1998, the U.S. government used extraordinary rendition to bring 13 terrorist suspects to the United States to stand trial on criminal charges.[8] Then FBI Director Louis Freeh told the Senate Judiciary Committee that in the majority of terrorist renditions, the United States acted with the cooperation of the government in whose jurisdiction the suspect was located. Freeh described the framework for what he considered a useful tool in the FBI's arsenal for bringing suspected terrorists and criminals to justice in the United States:

> The rendition process is governed by Presidential Decision Directive (PDD) 77, which sets explicit requirements for initiating this method for returning terrorists to stand trial in the United States. Despite these stringent requirements, in recent years, the FBI has successfully used

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[6] Presidential Decision Directive 39, June 21, 1995, available at http://www.fas.org/irp/offdocs/pdd39.htm. It should be noted that although PDD-39 was unclassified in 1997, it is still heavily redacted. NSD-77, or National Security Directive 77 was issued in January 1992 by President George H. W. Bush. Its contents remain classified.

[7] 9/11 Commission, Staff Statement no. 5, in the 9/11 investigations, at page 7, [online] http://www.9-11commission.gov/staff_statements/staff_statement_5.pdf (retrieved May 3, 2005). The list of all ten policy programs can be found in "U.S. Counter-Terrorism Policy and Organization," Roger Cressey, Director, Transnational Threats, National Security Council, September 27, 2000. PDD-62 is still classified; a fact sheet is available [online] at http://www.fas.org/irp/offdocs/pdd-62.htm (retrieved May 4, 2005).

[8] U.S. Counterterrorism Policy: Hearing Before the Senate Judiciary Committee, 106th Cong. (Sept. 1998) (statement by Louis J. Freeh, Director of Federal Bureau of Investigation), available at http://www.fas.org/irp/congress/1998_hr/98090302_npo.html (retrieved April 29, 2005).

> renditions to bring international terrorists and criminals to justice in the United States.[9]

Because of the secretive nature of extraordinary renditions, little is known about the cases that pre-date September 11, 2001. It is not clear how many other persons were rendered to the United States for prosecution after 1998, and how many suspects were handed over to other governments by or with the assistance of the U.S. government in the decade prior to September 11. The House-Senate Joint Inquiry into the September 11th attacks claimed "dozens" of renditions took place before September 11, 2001, although it did not specify how many of those involved the transfer of a person to a country other than the United States:

> Working with a wide array of foreign governments, CIA and FBI have helped deliver dozens of suspected terrorists to justice. CTC [Counterterrorist Center] officers responsible for the renditions program told the Joint Inquiry that, from 1987 to September 11, 2001, CTC was involved in the rendition of several dozen terrorists.[10]

According to the testimony of George J. Tenet, the former director of central intelligence, before the 9/11 Commission, there were over 80 cases of extraordinary rendition prior to September 11, 2001.[11] The CIA played the leading role in carrying out renditions, but other agencies such as the FBI may have been involved.[12] Apparently, extraordinary renditions prior to 9/11 required review and approval by interagency groups led by the White House.[13]

Several cases of pre 9/11 extraordinary renditions to third countries have been uncovered. One such case involves an Egpytian national named Tal`at Fu'ad Qassim, also known as Abu Talal al-Qasimi. Qassim, who was living in exile in Denmark where he had been granted political asylum, was apprehended in Croatia in 1995. Before his forced transfer to Egypt, Qassim was allegedly questioned aboard a U.S. navy vessel and

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[9] Ibid.

[10] Steven Strasser, ed., *The 9/11 Investigations*, Public Affairs Reports, 2004, p. 463.

[11] Counterterrorism Policy: Hearing Before the National Commission on Terrorist Attacks Upon the United States (March 24, 2004) (statement by George Tenet, former Director of Central Intelligence Agency), [online] http://www.9-11commission.gov/archive/hearing8/9-11Commission_Hearing_2004-03-24.pdf (retrieved May 3, 2005).

[12] See Counterterrorism Policy: Hearing Before the National Commission on Terrorist Attacks Upon the United States, Kojm Statement, "Though the FBI is often part of the process, the CIA is usually the main player."

[13] See 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 May 5, 2005).

handed over to Egyptian authorities in the middle of the Adriatic Sea.[14] Because Qassim had already been tried and convicted in absentia by a military tribunal in 1992, he was not retried after his return to Egypt. Instead, the death sentence that he received after that trial was apparently carried out. He is believed to have been executed by the Egyptian government.[15]

U.S. Rendition Practice since 9/11

Policy Changes

Despite the limited information about pre 9/11 renditions, it is clear that the U.S. practice of rendition increased substantially after September 11, 2001.[16] Whereas there were over 80 such transfers in the years prior to this date, former government officials estimate that there have been 100 to 150 renditions of persons suspected of terrorist activities in just the three years since September 11, 2001.[17] According to media reports, a few days following the 9/11 attacks, the White House issued a new directive, which is still classified, that gave the C.I.A. expansive new authority to carry out renditions without White House approval for each and every case.[18]

Renditions have taken place 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 country authorities facilitated by the use of U.S. aircraft or personnel.[19] While the complete list of receiving countries is not

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[14] See Mayer, "Outsourcing Torture", *The New Yorker*; Anthony Shadid, America Prepares the War on Terror; U.S., Egypt Raids Caught Militants, *Boston Globe*, October 7, 2001.

[15] Qasim's attorney, Muntassir al-Zayyat told Human Rights Watch that a source in the Military Prosecutor's office had confirmed his execution, but no government official has done so publicly. Human Rights Watch interview, Cairo, Egypt, November 2004. Another example of renditions to Egypt prior to September 11, 2001, is known as the case of the Tirana cell. See Human Rights Watch report, "Black Hole: The Fate of Islamists Rendered to Egypt," May 2005, pages 21-24, [online] http://hrw.org/reports/2005/egypt0505/ (retrieved May 13, 2005); Anthony Shadid, "Syria is Said to Hand Egypt Suspect Tied to Bin Laden," *Boston Globe*, November 20, 2001; Andrew Higgins and Christopher Cooper, "Cloak and Dagger: A CIA-Backed Team Used Brutal Means to Crack Terror Cell," *Wall Street Journal*, November 20, 2001.

[16] See Strasser, ed., *The 9/11 Investigations*, p. 463.

[17] See Jehl and Johnson, "Rule Change...," *New York Times*. Compare, Dana Priest, "CIA's Assurances on Transferred Suspects Doubted; Prisoners Say Countries Break No-Torture Pledges," *Washington Post*, March 17, 2005, p. A1, reporting the CIA has rendered more than 100 people since September 11, 2001.

[18] Jehl and Johnson, "Rule Change...," *New York Times*.

[19] 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); Jehl and Johnson, "Rule Change...," *New York Times*; 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); Mayer, "Outsourcing Torture," *The New Yorker*; 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 (retrieved February 15,

known, the cases that have come to light reveal a disturbing trend of rendering people to countries widely known for their human rights violations, such as Egypt, Syria, Morocco, Saudi Arabia, Jordan, Pakistan and Uzbekistan.[20] Given the well-documented records of torture by these governments, there can be little doubt that suspects are being sent to places where they face a risk of torture and other ill-treatment.

The U.S. government is well aware of the poor human rights records of the states to which it is rendering suspects. In its annual Country Reports on Human Rights Practices, the U.S. Department of State has stated that in these countries torture is either routinely practiced, or specific groups are targeted for such abuse.[21] In Syria, the country to which Maher Arar was transferred, the 2005 State Department report declares that "there was credible evidence that security forces continued to use torture frequently." In Egypt, the report states, "torture and abuse of detainees by police, security personnel, and prison guards remained common and persistent. According to the U.N. Committee Against Torture, a systematic pattern of torture by the security forces exists, and police torture resulted in deaths during the year."[22]

The practice of renditions has not only grown in scope since September 2001. The stated purpose of post 9/11extraordinary renditions has also shifted from delivering criminal suspects for prosecution to transferring suspects and detainees to other

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2005); Seymour Hersh, *Chain of Command: The Road from 9/11 to Abu Ghraib* (New York: Harper-Collins), September 2004.

[20] See e.g. Don van Natta, Jr., "U.S. Recruits A Rough Ally To Be a Jailer," *New York Times*, May 1, 2005; Human Rights Watch Report, *Still at Risk: Diplomatic Assurances No Safeguard Against Torture* (April 2005), [online] http://hrw.org/reports/2005/eca0405 (retrieved May 5, 2005); Mayer, "Outsourcing Torture," *The New Yorker.* Ahmed Nazif, Prime Minister of Egypt, confirmed that the United States has transferred terror suspects to Egypt. See David Morgan, "U.S. has sent 60-70 terror suspects to Egypt – PM," *Reuters*, May 15, 2005. Mr. Nazif added that he does not know the exact number, "[t]he numbers vary. I have heard the number 60 or 70." Ibid.

[21] See United States Department of State Country Reports on Human Rights Practices for 2004, published on February 28, 2005, [online] http://www.state.gov/g/drl/rls/hrrpt/2004/index.htm (retrieved May 3, 2005).

[22] State Department Reports on Human Rights Practices for 2004, ibid. The report included the following information on other reported receiving countries in rendition cases:

Morocco: "some members of the security forces tortured or otherwise abused detainees."

Saudi Arabia: "authorities reportedly at times abused detainees, both citizens and foreigners. Ministry of Interior officials were responsible for most incidents of abuse of prisoners."

Jordan: "police and security forces sometimes abused detainees during detention and interrogation, and allegedly also used torture. Allegations of torture were difficult to verify because the police and security officials frequently denied detainees timely access to lawyers."

Pakistan: "Security force personnel continued to torture persons in custody throughout the country."

Uzbekistan: "police and the NSS routinely tortured, beat, and otherwise mistreated detainees to obtain confessions or incriminating information... Torture was common in prisons, pretrial facilities, and local police and security service precincts. Defendants in trials often claimed that their confessions, on which the prosecution based its cases, were extracted by torture (see Section 1.e.). In February 2003, the U.N. Special Rapporteur on Torture issued a report that concluded that torture or similar ill-treatment was systematic."

countries solely for detention or interrogation.[23] Senior U.S. officials have publicly acknowledged that the U.S. government is transferring individuals to the custody of other governments to be held on behalf of the United States. The general counsel of the Department of Defense, William Haynes, in a letter to U.S. Senator Patrick Leahy in June 2003, described the U.S. policy as follows:

> 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. [24]

Arar's case appears to fit this new pattern. He was never charged with a crime by the Syrian government, which stated that it had no interest in him and had not requested his transfer to their custody for prosecution. On the contrary, senior Syrian officials stated that the U.S. government asked Syria to detain Arar on its behalf.[25]

U.S. officials appear for the most part to have relied on their counterparts to conduct interrogations and report any new information to them. "If we are getting everything we need from the host government, then there's no need for us to [conduct interrogations]," a former U.S. government official told Human Rights Watch. "There are some situations in which the host government can be more effective at getting information."[26]

Cases

Because of the secretive nature of renditions, little is known about specific individuals who have been subjected to these transfers, and details of the cases remain murky. A small number of cases, however, have come to light, including that of Maher Arar. As human rights organizations, the media, international bodies, and some parliamentary and

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[23] Jehl and Johnson, "Rule Change...," *New York Times*.

[24] Letter from William J. Haynes II to Senator Patrick Leahy, June 25, 2003, [online] http://hrw.org/press/2003/06/letter-to-leahy.pdf (retrieved May 5, 2005). See also Letter of 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 May 5, 2005).

[25] According to press reports, Imad Moustafa, the charge d'affaires at the Syrian Embassy in Washington, denied Arar was tortured. Dana Priest, "Top Justice Aid Approved Sending Suspect to Syria," *Washington Post*, November 19, 2003, page A28. Priest quotes Moustafa as saying, "... Syria had no reason to imprison Arar. He said U.S. intelligence officials told their Syrian counterparts that Arar was an al-Qaeda member. Syria agreed to take him as a favor and to win goodwill of the United States, he said." Ibid.

[26] Human Rights Watch, *Black Hole*, p. 17 (Human Rights Watch telephone interview, name withheld on request, January 2005).

other officials have called attention to the problem of renditions, more information has been learned over the past year about specific cases. As a result, there is increasing evidence that people who have been transferred to countries such as Syria, Egypt and Uzbekistan were tortured upon their return.

One such case is that of Mamdouh Habib, an Australian citizen of Egyptian origin. As revealed in court documents filed in federal court in the United States, Habib was detained in Pakistan in October 2001 and interrogated there by American agents. He was then sent to Egypt where he was tortured in prison for six months, and then transferred to the U.S. naval base at Guantanamo.[27] Habib was in Guantanamo for more than two and a half years before he was released without charge in January of this year.[28] His allegations of torture in Egypt are supported by Rhuhel Ahmed, Asif Iqbal and Shafiq Rasul, British nationals who were in detention at Guantanamo at the time of Habib's transfer there. According to the three British ex-detainees, Habib was in "catastrophic shape" when he arrived at Guantanamo: most of his fingernails were missing, and while sleeping he regularly bled from his nose, mouth and ears.[29]

Another rendition case followed a similar trajectory. In the months after the September 11th attacks, Pakistan apprehended a ranking al-Qaeda leader, Ibn al-Shaikh al-Libi, a Libyan national, and transferred him to U.S. custody. After a period during which CIA and FBI officials interrogated him, the CIA transferred al-Libi to Egyptian custody, and the FBI "lost track of him." After months in Egyptian detention, al-Libi was handed back to the United States, and remains in detention at Guantanamo Bay.[30]

In December 2001, Sweden expelled two Egyptian asylum seekers, Ahmed Agiza and Muhammad al-Zari, to Egypt, where they were held incommunicado for five weeks after their return.[31] The United States played a key role in executing this expulsion, including transporting the men from Sweden to Egypt in a private Gulfstream jet leased to the

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[27] Mamdouh Habib, et al. v. George W. Bush, et al., Petitioner's Memorandum of Points and Authorities in Support of His Application for Injunctive Relief (2004).

[28] See, for example, Raymond Bonner, "Australian's Long Path in the U.S. Antiterrorism Maze," *New York Times*, January 29, 2005, p. A4; Dana Priest, "Detainee Sent Home to Australia," *Washington Post*, January 29, 2005, page A21.

[29] Priest, "Detainee Sent Home to Australia," *Washington Post*.

[30] See Mayer, "Outsourcing Torture," *The New Yorker*; Human Rights Watch, "The United States' 'Disappeared': The CIA's Long-Term 'Ghost Detainees'," [Briefing Paper], October 2004, Annex 1 [online] http://www.hrw.org/backgrounder/usa/us1004/7.htm#_Toc84652978 (retrieved May 6, 2005).

[31] See Tim Reid, "Flight to torture: where abuse is contracted out," *The Times*, March 26, 2005, page 43; Mattias Karen, "Report: Security police broke law allowing Americans handle extradition of Egyptians," *Associated Press*, March 22, 2005 (retrieved March 22, 2005).

CIA.[32] Mats Melin, the Swedish parliament's chief ombudsman, stated in a March 2005 report that "the American security personnel took charge" of the operation and criticized the Swedish security police for "los[ing] control of the situation at the airport and during the transport to Egypt."[33] The report faulted the Swedish Security service and airport police for "display[ing] a remarkable subordinance to the American officials."[34]

Despite monthly visits after their return to Egypt 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—that they had been tortured and ill-treated in detention.[35] To date these allegations and the roles of all three governments – Sweden, Egypt and the United States – have not been fully investigated, and the Bush administration has not acknowledged its role in the transfer of these men to Egypt.

Other renditions facilitated by the United States have been effected from European soil. For example, an Italian prosecutor is investigating the U.S. role in the February 2003 abduction of Hassan Mustafa Usama Nasr, an Egyptian cleric also known as Abu Omar. Abu Omar disappeared from Milan in February 2003, when eyewitnesses reported that he was abducted while walking to a mosque for noon prayers. He was not heard from until Italian police recorded a phone call he made to his wife a year later saying that he had been taken to a U.S. air base in Italy and then flown to Cairo.[36] During the call to his wife, Abu Omar claimed "he had been tortured so badly by secret police in Cairo that he had lost hearing in one ear."[37]

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[32] 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).

[33] Mattias Karen, "Report: Security police broke law allowing Americans handle extradition of Egyptians," Associated Press, March 22, 2005 (retrieved March 22, 2005).

[34] 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, section 3.2.2, copy on file with Human Rights Watch.

[35] Human Rights Watch Report, "Still at Risk: Diplomatic Assurances No Safeguard against Torture," April 2005, p. 58, [online] http://www.hrw.org/reports/2005/eca0405/ (retrieved May 6, 2005). *See generally*, ibid, pages 57-63.

[36] See Craig Witlock, "Europeans Investigate CIA Role in Abductions," Washington Post (March 13, 2005), pp. A1 and A 18.

[37] Stephen Grey, *U.S. Agents "Kidnapped Militant" for Torture in Egypt, The Sunday Times* (London), Feb. 6, 2005.

Another variant of a rendition case gained attention when the parents of Ahmed Omar Abu Ali, a U.S. citizen, alleged that their son was arrested by Saudi authorities in June 2003 while he was studying there, detained at the behest of U.S. authorities, and tortured during his twenty months in Saudi custody. In December 2004, a U.S. court rejected the government's motion to dismiss Abu Ali's petition for habeas corpus, ruling that it might have jurisdiction over Abu Ali's detention in Saudi Arabia if it could be established that the U.S. government had played a role in his detention by Saudi authorities. The federal court's ruling forced the Bush administration to take Abu Ali into U.S. custody and to bring criminal charges against him in February 2005.[38] More recently, Abu Ali filed court papers alleging that he had been interrogated by FBI agents while in Saudi custody, that he informed the FBI that he was being subjected to torture by the Saudi authorities, and that the FBI agents did not respond to his allegations.[39]

Maher Arar's case sits alongside these and other known cases of renditions to risk of torture. As in these cases, Arar was transferred to the custody of a government with a well-documented record of torture – one amply documented by the U.S. government in its annual State Department country reports on human rights. While his rendition occurred following expedited immigration proceedings, the end result was much the same. Notwithstanding the absolute prohibition on sending persons to places where they are at risk of torture or ill-treatment, the United States delivered Maher Arar to the custody of a government that President George W. Bush would later criticize for leaving its people a legacy of torture and oppression.[40]

These cases challenge the Bush Administration's contention that its rendition policy is lawful and does not expose people to a risk of torture. Despite the dearth of information about renditions, there is mounting evidence that suspects transferred to the custody of other governments have in fact suffered torture and ill-treatment at the hands of their jailers – a result that was wholly predictable given the poor human rights records of the receiving governments. These transfers violate the legal obligation of the United States – and of any government – not to deliver a person to the custody of another state where he or she is at risk of torture or other ill-treatment.

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[38] See Editorial, "Shame on Bush for Rights Violation," *Newsday*, February 27, 2005; Michael Isikoff, "A Tangled Web," *Newsweek*, March 7, 2005. On February 22, 2005, Abu Ali was arraigned in U.S. District Court in Alexandria, Virginia, on charges of conspiracy to commit terrorism. For a detailed account of the case, see Elaine Cassel, "The Strange Case of Ahmed Omar Abu Ali: Troubling Questions about the Government's Motives and Tactics," FindLaw's Legal Commentary (March 7, 2005), at http://writ.news.findlaw.com/cassel/20050307.html [retrieved April 1, 2005]. For more information, see World Organization for Human Rights USA website at http://www.humanrightsusa.org.

[39] See Jerry Markon, "Terror Suspect's Attorneys Link FBI to Alleged Torture by Saudis," *Washington Post*, May 11, 2005.

[40] Remarks by President George W. Bush at the Twentieth Anniversary of the National Endowment of Democracy, November 6, 2003 [online], http://www.ned.org/events/anniversary/oct1603-Bush.html (retrieved May 12, 2005).

U.S. Legal Obligations

The United States is bound under both international law and U.S. domestic legislation not to send a person to a place where he or she is at risk of torture. This *nonrefoulement* obligation is absolute, and admits of no exception under any circumstances.

International Law

Convention Against Torture

The United States signed the U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[41] (hereinafter "CAT") in April 1988, and ratified the treaty in October 1994. U.S. ratification was subject to certain declarations, reservations, and understandings, including that the Convention was not self-executing, and therefore required domestic implementing legislation to take effect.[42]

Article 3 of the CAT establishes the obligation of *nonrefoulement* in cases in which a person would be at risk of torture if sent to a given country. Article 3(1) specifically provides that "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." Article 3(2) further requires a sending government to take into consideration the existence of gross, flagrant or mass violations of human rights when assessing the risk of torture.[43]

The United States added an understanding to article 3 of the CAT, indicating that it would interpret the phrase "where there are substantial grounds for believing that he would be in danger of being subjected to torture" to mean "if it is more likely than not that he would be tortured."[44] The "more likely than not" standard has been incorporated

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[41] United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature December 10, 1984, G.A. Res. 39/46, 39 U.N. GAOR Supp. No. 51, at 197, U.N. Doc. A/RES/39/708 (1984), entered into force June 26, 1987, 1465 U.N.T.S. 85, 23 I.L.M. 1027 (1984), as modified, 24 I.L.M. 535, available at http://www.ohchr.org/english/law/cat.htm (retrieved April 26, 2005).

[42] Sen. Exec. Rpt. 101-30, Resolution of Advice and Consent to Ratification, (1990), [online] http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty14.asp (retrieved May 9, 2005.

[43] The text of article 3 of the CAT is:

1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
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.

[44] Sen. Exec. Rpt. 101-30, Resolution of Advice and Consent to Ratification, (1990), at paragraph II.3.

into U.S. immigration regulations that govern a determination to grant withholding of removal on CAT grounds.[45] This standard is more restrictive than the interpretation of the U.N. Human Rights Committee.[46] However, given that it is framed not as a reservation but as an understanding that seeks to clarify the meaning of terms used in the CAT, the U.S. understanding has generally not been viewed as an attempt to derogate from the *nonrefoulement* obligation of article 3.[47] The U.S. government has not based its current rendition policy on a claim that its understanding of Article 3 allows it to transfer persons to a risk of torture in contravention of the international norm, and therefore the understanding has not been a focus of concern regarding current U.S. rendition practices.

The Bush Administration has recently set out its understanding of its obligations under article 3 of the CAT in its report to the U.N. Committee Against Torture, which it submitted on May 6, 2005.[48] After acknowledging its *nonrefoulement* obligation, the U.S. government states in the report that it:

> Is aware of allegations that it has transferred individuals to third countries where they have been tortured. The United States does not transfer persons to countries where the United States believes it is "more likely than not" that they will be tortured. This policy applies to all components of the United States government. The United States obtains assurances, as appropriate, from the foreign government to which a detainee is transferred that it will not torture the individual being transferred. If assurances were not considered sufficient when balanced against treatment concerns, the United States would not

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[45] See Michael John Garcia, "The U.N. Convention Against Torture: Overview of U.S. Implementation Policy Concerning the Removal of Aliens," *Congressional Research Service*, March 11, 2004, [online] http://www.law.duke.edu/curriculum/coursehomepages/Fall2004/351_01/readings/crs.pdf#search='crs%20convention%20torture%20removal' (retrieved May 5, 2005), at page 6.

[46] See 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, page 37. The commentators point out that according to the Committee Against Torture "substantial risk" does not require the risk to be highly probable though it should be higher than theory or suspicion, a threshold which is lower than the U.S. "more likely than not." See Committee Against Torture, General Comment 1, *Communications concerning the return of a person to a State where there may be grounds he would be subjected to torture (article 3 in the context of article 22)*, U.N. Doc. A/53/44, annex IX at 52 (1998), [online] http://sim.law.uu.nl/SIM/CaseLaw/Gen_Com.nsf/3b4ae2c98fe8b54dc12568870055fbbd/187234925cc264a6c12568870052d8d1?OpenDocument (retrieved May 9, 2005).

[47] See, for example, 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, footnote 227.

[48] Second Periodic Report of the United States of America to the Committee Against Torture, May 6, 2005 [online] http://www.state.gov/g/drl/rls/45738.htm (retrieved May 12, 2003). Under Article 19 of the CAT, states party are required to submit periodic reports to the Committee every four years. The United States had submitted its previous report in 1999.

> transfer the person to the control of that government unless the concerns were satisfactorily resolved.[49]

In the immigration context, the U.S. report to the Committee Against Torture states that the U.S. government relies on assurances in a "very small number of cases" and only when doing so is consistent with Article 3 of the CAT.[50] In extradition cases, the decision to seek assurances is made on a case-by-case basis.[51] With respect to transfers from U.S. detention at Guantanamo Bay, the report describes U.S. policy in terms consistent with the general policy above, noting that both returns to risk of torture under the CAT and to persecution under the Refugee Convention standard are taken into account. The report refers to circumstances in which the Department of Defense has "elected not to transfer detainees to their country of origin because of torture concerns."[52] This language undoubtedly refers to the nearly two dozen Chinese Uighurs held at Guantanamo Bay.[53]

The prohibition on *refoulement* can also be rooted in the notion of complicity in torture. Article 4 of the CAT makes clear that the crime of torture encompasses not only direct acts of torture, but also participation and complicity in torture.[54] The concept of accomplice liability is well established in U.S. domestic law as well.[55] In addition, a state may be in breach of its international obligations by means of knowingly assisting in the unlawful act of another state.[56]

International Covenant on Civil and Political Rights

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[49] Ibid, para 27.

[50] Ibid, para 30.

[51] Ibid, para 37.

[52] Ibid, Annex I, Part 1, II.E.

[53] See Joe McDonald, "Powell says U.S. won't send home Chinese Muslims held at Guantanamo Bay," *Associated Press*, August 13, 2004.

[54] Article 4(1) of the CAT reads as follows: "Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture."

[55] See, for example, 18 U.S.C. §2. For an analysis of accomplice liability under U.S. domestic law in rendition cases, see 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, pp.103-108.

[56] See Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission in its 53rd session (2001), A/56/10 (supplement 10), chp.IV.E.1, December 12, 2001, art. 16-17. For an analysis on the derivative responsibility of the United States for the actions of another state and actions of organs of another state under U.S. direction and control in the rendition context, see 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, pp. 98-100.

The International Covenant on Civil and Political Rights[57] (hereinafter "ICCPR"), ratified by the U.S. on June 8, 1992, provides in article 7 that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." This guarantee is nonderogable, i.e. it remains in full force even in times of emergency that threaten the life of the nation. The Human Rights Committee, which monitors implementation of the ICCPR by national governments, has interpreted the Convention's prohibition on torture and ill-treatment 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.*"[58]

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:

> ". . . 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."[59]

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

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[57] International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 Dec. 16, 1966, entered into force 23 March 1976, 999 U.N.T.S. 171 [online] http://www.ohchr.org/english/law/ccpr.htm (retrieved May 9, 2005).

[58] Human Rights Committee, General Comment 20, *Article 7*, U.N. Doc. A/47/40 (1992), [online] http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/6924291970754969c12563ed004c8ae5?Opendocument (retrieved May 9, 2005).

[59] Human Rights Committee, General Comment No. 31, CCPR/C/21/Rev.1/Add.13, March 26, 2004 (adopted on March 29, 2004) [online] http://sim.law.uu.nl/SIM/CaseLaw/Gen_Com.nsf/a1053168b922584cc12568870055fbbc/7fe15c0f9b9dc489c1256ed800498f39?OpenDocument (retrieved May 9, 2005). ICCPR article 2 reads: "Each State party to the present Covenant undertakes to respect and to ensure to all individuals with 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."

Other International Instruments and Mechanisms

1. U.N. Refugee Convention

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."[60] The United States is a party to the 1967 Protocol, and has implemented its international obligations in U.S. domestic law through the Refugee Act of 1980.[61]

Unlike the CAT and ICCPR, the prohibition against *refoulement* under the Refugee Convention and Protocol is not absolute and exceptions to its protections are permitted in very narrow circumstances.[62] 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, such as the CAT, as well as under customary international law.

2. International Humanitarian Law

International humanitarian law prohibits torture and ill-treatment of combatants and civilians, in all circumstances of international and non-international armed conflict.[63]

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[60] 1951 Convention Relating to the Status of Refugees, 189 U.N.T.S. 150, entered into force April 22, 1954, article 33 [online] http://www.ohchr.org/english/law/refugees.htm (retrieved March 18, 2005); 1967 Protocol Relating to the Status of Refugees 606 U.N.T.S. 267, entered into force Oct. 4, 1967, [online] http://www.ohchr.org/english/law/protocolrefugees.htm (retrieved March 18, 2005).

[61] Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980).

[62] A person seeking refugee status can be excluded from such status based on article 1F of the Refugee Convention, which in general terms, precludes refugee status from persons who committed war crimes or serious non-political crimes. As for persons already recognized as refugees, article 33 of the refugee Convention states that *nonrefoulement* "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." In addition, article 32, Expulsion, requires due process of law for expulsion decisions, and that the refugee be allowed to submit evidence and be represented unless compelling reasons of national security require otherwise.

[63] First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949, 75 U.N.T.S. 31, entered into force October 21, 1950, art. 50; Second Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, August 12, 1949, 75 U.N.T.S. 85, entered into force October 21, 1950, art. 51; Third Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, entered into force October 21, 1950, arts. 13, 17, 130; Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, entered into force October 21, 1950, arts. 31, 32, 147; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to

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.[64] The humanitarian law prohibition of torture and ill-treatment covers virtually all persons who may be detained in situations of armed conflict, including unprivileged combatants or civilians who take up arms. But even in situations of armed conflict, certain human rights norms, including the norm against torture and ill-treatment as well as *refoulement* to such abuse, continue to apply because of their nonderogable nature. As a result, no person is left unprotected at any time, regardless of nationality, status as a combatant, or the characterization of hostilities.

The prohibition on torture and *refoulement* under international humanitarian law is important to note in the context of the U.S. global campaign against terrorism. President Bush has recently attempted to defend U.S. rendition policy based in part on an ongoing state of war. Although he claimed the policy complies with the law because "we expect the countries where we send somebody not to torture"[65], this assertion ignores the well-documented records of torture by receiving governments and the absolute nature of the prohibition on *refoulement*. Even if the Bush Administration were to claim that Maher Arar, as a terrorist suspect, could be treated as an enemy combatant, it would make no difference with regard to his right not to be transferred to a risk of torture and the concomitant U.S. obligation not to transfer him to a risk of torture. The laws of war prohibit torture and ill-treatment in all circumstances, including *refoulement* to such abuse. Moreover, as noted above, regardless of a person's status under international humanitarian law, he or she remains protected at all times by the international human rights law prohibition on torture and *refoulement*.

3. Other International Mechanisms

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the Protection of Victims of International Armed Conflicts (Protocol I), 1125 U.N.T.S. 3, entered into force December 7, 1978, arts. 11, 85; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 U.N.T.S. 609, entered into force December 7, 1978, art. 4.2. In addition, customary international law, common article 3 to the Geneva Conventions, and art. 75 of Protocol I require humane treatment of all detained persons in both international and non-international armed conflicts.

[64] Third Geneva Convention, art. 12 ("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."); Fourth Geneva Convention, art. 45 ("Protected persons may be transferred by the Detaining Power only to a Power which is a party to the present Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the present Convention. If protected persons are transferred under such circumstances, responsibility for the application of the present Convention rests on the Power accepting them, while they are in its custody.... In no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs.")

[65] Press Conference by the President, April 28, 2005 [online] http://www.whitehouse.gov/news/releases/2005/04/20050428-9.html (retrieved April 29, 2005).

The U.N. Special Rapporteur on Torture has expressed serious concern about government practices that are increasingly undermining the absolute prohibition on *nonrefoulement* to torture. In his report to the U.N. General Assembly in September 2004, the outgoing Special Rapporteur, Theo von Boven, highlighted the problem of renditions to torture and called on governments to respect their essential obligation to prevent acts of torture and ill-treatment not only in their own territory, but also "by not bringing persons under the control of other States if there are substantial grounds for believing that they would be in danger of being subjected to torture."[66] More recently, the newly-appointed Special Rapporteur, Manfred Nowak, expressed deep concern about attempts to circumvent the absolute nature of the prohibition on torture and ill-treatment in the name of countering terrorism, including, *inter alia*, "returning suspected terrorists to countries which are well-known for their systematic torture practices."[67]

The most recent resolution of the U.N. Commission on Human Rights on the problem of torture takes a firm stand against transferring persons to places where they are at risk of torture. Unlike previous years, the 2005 resolution addresses the *nonrefoulement* obligation in an operative paragraph in the text, and makes clear that all forms of transfer to risk of torture are prohibited by international standards. It urges states not to expel, return, extradite "or in any other way transfer" a person to a place where he or she is at risk of torture.[68] The resolution was co-sponsored by numerous governments, including the United States and Canada, and was unanimously adopted by the U.N. Commission on Human Rights on April 19, 2005.

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 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

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[66] Report of the Special Rapporteur on Torture Theo van Boven to the General Assembly, A/59/324, September 1, 2004, para. 27, [online] http://documents-dds-ny.un.org/doc/UNDOC/GEN/N04/498/52/pdf/N0449852.pdf?OpenElement (retrieved May 9, 2005). See generally, ibid, paras. 25-42.

[67] Statement of the Special Rapporteur on Torture, Manfred Nowak, to the 61st Session of the U.N. Commission on Human Rights, Geneva, April 4, 2005 [online] http://www.unhchr.ch/huricane/huricane.nsf/424e6fc8b8e55fa6802566b0004083d9/60b1e9ae29afe9b6c1256fdd0041b400?OpenDocument (retrieved May 9, 2005).

[68] U.N. Commission on Human Rights, Resolution 2005/39 on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted April 19, 2005, [online] http://documents-dds-ny.un.org/doc/UNDOC/LTD/G05/136/95/pdf/G0513695.pdf?OpenElement (retrieved May 9, 2005).

permitted, shares its *jus cogens* character.[69] The U.N. Special Rapporteur on Torture has stated that "The principle of *nonrefoulement* is an inherent part of the overall absolute and imperative nature of the prohibition of torture and other forms of ill-treatment."[70]

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.[71] 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.[72] It is 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.[73] 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 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.

U.S. Domestic Law

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[69] See Elihu Lauterpacht and Daniel Bethlehem, "The Scope and Content of the Principle of *Nonrefoulement*," June 20, 2001, re-published February 2003 [online] http://www.unhcr.ch/cgi-bin/texis/vtx/publ/opendoc.pdf?tbl=MEDIA&id=419c75ce4 (retrieved May 2, 2005); Rene Bruin and Kees Wouters, "Terrorism and the Non-Derogability of *Nonrefoulement*," *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 *Nonrefoulement*: Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the *Nonrefoulement* Provisions of Other International Human Rights Treaties," *Buffalo Human Rights Law Review*, Vol. 5 (1999).

[70] Report of the Special Rapporteur on Torture Theo van Boven to the General Assembly, A/59/324, September 1, 2004, para. 28.

[71] *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.

[72] See, e.g. arts. 146 and 147 to the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949.

[73] Rome Statute of the International Criminal Court, 1998, U.N. Doc. 2187 U.N.T.S. 90, entered into force July 1, 2002, 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.

In 1998, the U.S. Congress passed legislation that implemented article 3 of the CAT. Section 2242(a) of the Foreign Affairs Reform and Restructuring Act of 1998 (hereinafter FARRA) states that:

> 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.[74]

The policy statement contained in the FARRA largely repeats the obligation under article 3(1) of the CAT, but its language is note worthy. It spells out that the prohibition covers all types of transfers, regardless of whether the person is physically present in the United States. This language can easily support the conclusion that all types of transfers are thus covered by this provision, including extra-territorial renditions. In addition, the law repeats the "substantial grounds" standard which appears in the CAT, and foregoes the "more likely than not" language of the U.S. understanding submitted at the time of its ratification of the convention.

The 1998 law also mandates that all relevant federal agencies promulgate regulations to ensure full and effective implementation of the law.[75] Regulations are necessary to translate the policy into action and to give guidance to the officials charged with implementing the policy. Regulations serve two important purposes. First, they spell out the procedures that individuals whose rights are at stake may use to challenge their proposed transfer under the law. Second, they give practical effect to the government's *nonrefoulement* obligation by providing detailed guidance to U.S. authorities as to the steps they must take in a case where there is a possibility of torture upon transfer to another government. In this way, regulations help to make real the fundamental right against transfer to torture.

Only two federal agencies, however, have complied with this requirement of the law. The former Immigration and Nationalization Service (INS) promulgated detailed implementing regulations pursuant to the FARRA for immigration cases in March 1999, which remain binding on the immigration courts[76] as well on the immigration service following its restructuring as part of the Department of Homeland Security (DHS) in

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[74] Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277 (8 U.S.C. 1231 note), § 2242(a).
[75] FARRA, § 2242(b).
[76] 8 CFR 1208.16-1208.18.

March 2003.[77] The Department of State issued cursory regulations regarding extraditions also in 1999.[78] No other agency has issued regulations. While there has been some suggestion that the CIA may have internal policy guidelines,[79] neither the CIA nor the Department of Defense has any formal, publicly available regulations to implement the *nonrefoulement* requirement of the 1998 legislation. This failing is significant, given the important role of these agencies in the detention and transfer of terrorist suspects to the custody of other governments.

Diplomatic Assurances

The U.S. rendition program hinges on the use of diplomatic assurances, or formal promises from receiving governments that they will not subject the transferred person to torture or ill-treatment. When questioned about the legality of its renditions to countries widely known to engage in torture – countries like Syria, Egypt or Uzbekistan – the Bush Administration justifies the transfers by pointing to the fact that it has received diplomatic assurances from the receiving government.[80] The U.S. government grounds its claim that it can render suspects to countries like Syria, Egypt and Uzbekistan without violating its legal obligations on the use of diplomatic assurances. It is the assurances that enable the United States to square the circle and to claim that these renditions do not violate the absolute prohibition on renditions to risk of torture.

When assurances are thoroughly analyzed, however, it is clear that they provide no justification for transferring suspects to countries that use torture. Because of their legal and practical failings, diplomatic assurances offer no safeguard against torture. Assurances therefore do not transform an illegal rendition into a lawful transfer of custody.

Origins of Assurances – Extraditions to the United States in Potential Death Penalty Cases

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[77] 8 CFR 208.16-208.18.

[78] 22 CFR 95.1-95.4.

[79] See Michael John Garcia, "Renditions: Constraints Imposed by Laws on Torture," *Congressional Research Service*, April 28, 2005 , page 8, [online] http://www.fas.org/sgp/crs/natsec/RL32890.pdf#search='congressional%20research%20service%20RL32890' (retrieved May 9, 2005) ("CIA regulations concerning renditions...are not publicly available.")

[80] See for example, Press Conference by the President, March 16, 2005; Letter from William J. Haynes II to Senator Patrick Leahy, June 25, 2003; 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.

Obtaining diplomatic assurances prior to transferring custody of a criminal suspect is not a new phenomenon. Diplomatic assurances have been used in the death penalty context for many years. The U.N. Model Treaty on Extradition of 1990,[81] for example, includes the death penalty as optional grounds for refusal to extradite, unless the state requesting extradition supplies sufficient assurances. The growing international trend to abolish the death penalty of the last few decades has led governments and international bodies to re-evaluate extradition practices where capital punishment is a possibility.[82]

Canada is a good example of the growing reticence to extradite suspects without proper safeguards against possible execution. As the use of the death penalty has become increasingly disfavored around the world, the need for assurances against it in order for Canada to extradite a criminal suspect has grown. According to the extradition treaty between the U.S. and Canada, which was ratified in 1976, the extraditing country may require assurances against the death penalty.[83] In two cases during the 1990's, *Re Ng Extradition* and *Kindler v. Canada*, the Supreme Court of Canada held that seeking assurances against the death penalty was at the discretion of the administrative branch, and not constitutionally required in every case.[84] In 2001, however, the Canadian Supreme Court took a step forward in *U.S. v. Burns*, holding that "in the absence of exceptional circumstances, which we refrain from trying to anticipate, assurances in death penalty cases are always constitutionally required."[85] Although the Burns decision remains problematic because it opened the door to an exception, the general rule that assurances are constitutionally required in death penalty cases was a significant advance since *Kindler*.

International bodies have also addressed this issue. The Human Rights Committee, which reviewed Canada's extradition of Chitat Ng, found that Canada violated its obligations under the ICCPR by extraditing him to California without assurances against the death penalty.[86] At the time of Ng's extradition, the sole method of execution in

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[81] Model Treaty on Extradition, A/RES/45/116, 14 December 1990, article 4(d), [online] http://www.un.org/documents/ga/res/45/a45r116.htm (retrieved May 13, 2005).

[82] See Amnesty International, "USA: No Return to Execution: the US Death Penalty as a Barrier to Execution," November 2001, at p. 11 [online] http://web.amnesty.org/library/pdf/AMR511712001ENGLISH/$File/AMR5117101.pdf (retrieved May 2, 2005).

[83] See Treaty on Extradition, as amended by exchange of notes of 28 June and 9 July 1974; entered into force 22 March 1976, 27 U.S.T. 983; T.I.A.S. 8237, art. 6.

[84] *Reference Re Ng Extradition* (Can.), [1991] 2 S.C.R. 858 [online] http://www.lexum.umontreal.ca/csc-scc/en/pub/1991/vol2/html/1991scr2_0858.html (retrieved May 5, 2005); *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779 [online] http://www.lexum.umontreal.ca/csc-scc/en/pub/1991/vol2/html/1991scr2_0779.html (retrieved May 5, 2005).

[85] *USA v. Burns*, [2001] 1 S.C.R. 283, paragraph 65. [online] http://www.lexum.umontreal.ca/csc-scc/en/pub/2001/vol1/html/2001scr1_0283.html (retrieved May 2, 2005).

[86] *Chitat Ng v. Canada*, U.N. Human Rights Commission, Communication No. 469/1991, U.N. Doc. CCPR/C/49/D/469/1991 (1994) [online]

California was through gas asphyxiation. The Committee found that this method violates the prohibition on cruel, inhuman or degrading treatment or punishment under article 7 of the ICCPR.

The European Court of Human Rights (ECHR) has also addressed the question of assurances in extradition cases to countries that retain the death penalty. In 1989, the United Kingdom was about to extradite Jens Soering to the U.S. state of Virginia, despite the fact that it had not obtained assurances against Soering's execution. The U.K. government had secured a commitment only that its view of the death penalty would be explained to the sentencing judge. Soering, a German national, applied to the ECHR for relief.[87] Article 3 of the European Convention Human Rights and Fundamental Freedoms[88] prohibits torture and inhuman or degrading treatment or punishment. Given the long wait on death row as well as Mr. Soering's age and mental state at the time of the offense, the ECHR found that extradition "would expose him to a real risk of treatment going beyond the threshold set by Article 3"[89] of the European Convention.

Both the ECHR in *Soering* and the Human Rights Committee in the case of *Ng* found that the failure to secure assurances against the death penalty was in violation of the prohibition against ill-treatment, established in article 3 of the European Convention and article 7 of the ICCPR respectively.

Assurances against torture versus assurances against the death penalty

Assurances may provide an appropriate safeguard against the death penalty, but their use in the context of torture and ill-treatment is quite different. Regardless of one's views about the death penalty[90] and the trend toward worldwide abolition, it is not *per se* a violation of international human rights law. Because capital punishment remains lawful

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http://www.unhchr.ch/tbs/doc.nsf/MasterFrameView/0c4df251fe2fbc24802567230056fc46?Opendocument (retrieved May 13, 2005).

[87] *Soering v. United Kingdom*, European Court of Human Rights, Judgment of July 7, 1989, Series A No. 161.

[88] European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, entered into force Sept. 3, 1953, as amended by Protocols Nos 3, 5, 8, and 11 which entered into force on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 respectively, [online] http://www.echr.coe.int/Convention/webConvenENG.pdf (retrieved May 2, 2005). At the time of the ruling the United Kingdom did not ratify Protocol 6 of the European Convention on Human Rights and Fundamental Freedoms which bans the death penalty.

[89] *Soering*, at para. 111.

[90] Human Rights Watch opposes capital punishment in all circumstances. The death penalty is a form of punishment unique in its cruelty and is inevitably carried out in an arbitrary manner, inflicted primarily on the most vulnerable - the poor, the mentally ill, and persons of color. The intrinsic fallibility of all criminal justice systems assures that even when full due process of law is respected, innocent persons may be executed.

in the United States, it is carried out publicly and only after the imposition of a death sentence at a public trial. A government that extradites or transfers a criminal suspect to U.S. custody on the basis of assurances against the death penalty would know whether the U.S. government or a state government had violated those assurances at the moment when it sought the death penalty at trial or when it scheduled the case for execution. A sending state could protest the violation of the assurances before the execution.

By contrast, ensuring compliance with assurances against torture is complicated and often ineffective. Torture and ill-treatment are illegal in all circumstances, and governments therefore attempt to hide their illegal conduct. Abusive governments that engage in torture are typically highly skilled at using torture methods that do not leave physical marks or indications. The secrecy and obfuscation that surround the use of torture make it impossible for sending governments to know whether the assurances have been violated – unless the victim survives, is freed, and finds safe haven in order to recount his or her experiences. For these reasons, diplomatic assurances may be appropriate in the context of extradition to states that retain the death penalty, but they do not protect against torture or ill-treatment.

Diplomatic Assurances in Rendition Cases

The United States is prohibited under both U.S. and international law from sending a person to a place where he or she is at risk of being tortured. Despite the absolute prohibition on such transfers, the U.S. government has sent numerous suspects to countries with well-documented records of torture and ill-treatment since September 11, 2001. Some of these renditions have been carried out within a legal framework, such as an immigration removal, while others have involved covert transfers carried out by the executive branch outside the law.

The U.S. justifies these transfers by claiming it seeks diplomatic assurances that the transferred person will be treated humanely and not be tortured.[91] Diplomatic assurances are formal promises, either written or verbal, from the receiving government that it will not subject the transferred person to torture or ill-treatment. Obtained through diplomatic channels, the assurances are not legally binding, but are rather a set of "understandings" between the two governments. In some cases, the assurances include monitoring mechanisms, mainly allowing the sending country's diplomats to visit the transferred person.[92]

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[91] See above, note 80.

[92] For example, see Priest, "CIA's Assurances...," *Washington Post*, ("CIA Director Porter J. Goss told Congress a month ago that the CIA has "an accountability program" to monitor rendered prisoners. But he

While it is the stated policy of the United States to seek assurances against torture, provision for the use of assurances is expressly provided for only in immigration law.[93] The immigration regulations, as written, require that the Attorney General, in consultation with the Secretary of State, verify and assess the reliability of any assurances obtained by the U.S. government in an immigration case. Although the Attorney General's responsibilities appear to have shifted to the Secretary of Homeland Security with the creation of the new department, the Attorney General would have made this assessment in Maher Arar's case, which predates the creation of the new agency.[94]

The reliability assessment required by the immigration regulations is completely discretionary and not subject to judicial review.[95] In extraordinary rendition cases, the State Department and Central Intelligence Agency (CIA) apparently are tasked with securing and evaluating assurances.[96] When detainees are released or transferred from Guantánamo Bay, the Department of Defense, in consultation with the State Department and other government agencies, assumes that responsibility.[97] In none of these processes does an individual subject to transfer have the ability to challenge the assurances.

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 in all instances. In addition, while it has been the traditional role of the courts to protect

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acknowledged that "of course, once they're out of our control, there's only so much we can do." Asked to explain Goss's statement, an intelligence official said: "There are accountability procedures in place. For example, in some cases, the U.S. government is allowed access and can verify treatment of detainees." The official declined to elaborate.")

[93] 8 CFR 208.16(c), and 8 CFR 1208.18(c). In extradition, the Secretary of State has authority to surrender the person subject to conditions, and one may infer from this the authority to seek assurances, but there are no guidelines in the State Department's regulations for seeking and assessing the reliability of such assurances. See 22 CFR 95.3.

[94] See Second Periodic Report of the United States of America to the Committee Against Torture, May 6, 2005, para. 30. In cases that occurred prior to the transfer of immigration functions to the Department of Homeland Security pursuant to the Homeland Security Act of 2002 – including the case of Maher Arar – the Attorney General, in consultation with the Secretary of State, made this assessment.

[95] 8 CFR 208.18(c), 208.18(e), and 8 CFR 1208.18(c), 1208.18(e).

[96] 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.

[97] See Sherif al-Mashad et al. v. George W. Bush et al., Civil Action No. 05-0270 (JR), Declaration of Mathew C. Waxman, Assistant Secretary of Defense for Detainee Affairs, page 3, [online] http://www.state.gov/documents/organization/45850.pdf (retrieved May 10, 2005). See also Ibid., Declaration of Pierre-Richard Prosper, Ambassador-at-Large for War Crimes Issues, pp.3-6.

human rights, article 2242 of the FARRA of 1998 (and the implementing regulations where regulations exist) grant the courts only limited jurisdiction for securing the human right not to be sent to torture.[98]

The 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, and particularly the lack of opportunity to challenge the credibility or reliability of diplomatic assurances before an independent judicial body. Moreover, there are indications that assurances are used to circumvent the obligation rather than fulfill it. As an American official quoted in the media said: "They say they are not abusing [rendered prisoners], and that satisfied the legal requirement, but we all know they do."[99]

Additionally, there are powerful arguments against the use of diplomatic assurances, both as a legal matter and in practical terms.

Legal Insufficiency

The *nonrefoulement* obligation is absolute,[100] meaning that if a risk of torture exists then transfer is prohibited, and the prohibition continues as long as the risk exists. As the Council of Europe Commissioner for Human Rights Alvaro Gil-Robles stated:

> "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."[101]

Diplomatic assurances are the linchpin in the U.S. policy of extralegal renditions and other transfers, since the assurances are the basis for the U.S. claim that the person is no longer at risk of torture. In the words of President Bush: "We operate within the law, and we send people to countries where they say they're not going to torture the

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[98] FARRA Section 2242(d) does not provide jurisdiction to any court to review any claim under the CAT or section 2242 itself, except as part of the review of a final order of removal in immigration cases. The section The section also states that no court shall have jurisdiction to review the implementing regulations, unless the regulations specifically provide for such jurisdiction, thereby leaving the administration full discretion to determine whether it has complied with its obligations under the CAT and the 1998 law.

[99] Priest, "CIA's Assurances...," *Washington Post*.

[100] See, for example, Report of the Special Rapporteur on Torture Theo van Boven to the General Assembly, A/59/324, September, 1, 2004, para. 14.

[101] 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, p.9 para.19, [online] http://www.coe.int/T/E/Commissioner_H.R/Communication_Unit/Documents/pdf.CommDH(2004)13_E.pdf (retrieved May 10, 2005).

people."[102] Attorney General Alberto Gonzales elaborated on this legal argument in written responses to questions from Senators during his confirmation process. He explained the Administration's argument that assurances convert an illegal transfer into a lawful one:

> In carrying out U.S. obligations under Article 3, as subject to the Senate understanding, it is permissible in appropriate circumstances to rely on assurances from a country that it will not engage in torture, and such assurances can provide a basis for concluding that a person is not likely to be tortured if returned to another country.[103]

However, diplomatic assurances are not legally binding. They have no legal effect and carry no accountability if breached. The person whom the assurances aim to protect has no recourse if the assurances are violated.

Moreover, in the case of assurances from countries where the practice of torture is common, assurances are not only insufficient, but inherently unreliable. Diplomatic assurances are based solely on trust that the receiving state will honor its word. Yet governments in states where torture is a serious human rights problem almost always deny their abusive practices. If a government routinely violates its binding legal obligation not to engage in torture, then there is little reason to believe it will respect an unenforceable promise not to engage in the very same conduct with respect to one isolated case.

According to article 3(2) of the CAT, sending governments must take into account the "existence of a consistent pattern of gross, flagrant or mass violations of human rights" in determining whether a person faces a risk of torture. In his September 2004 report to the United Nations General Assembly, Theo van Boven, the outgoing special rapporteur on torture, expressed concern that reliance on assurances is a "practice that is increasingly undermining the principle of *nonrefoulement*."[104] He questioned "whether the practice of resorting to assurances is not becoming a politically inspired substitute for the principle of *nonrefoulement*, which...is absolute and nonderogable."[105] In his conclusions, the Special Rapporteur stated that, as a baseline, in circumstances where a

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[102] Press Conference by the President, April 28, 2005 [online] http://www.whitehouse.gov/news/releases/2005/04/20050428-9.html (retrieved April 29, 2005).

[103] Responses of Alberto R. Gonzales, Nominee to be Attorney General of the United States, to Written Questions of Senator Richard J. Durbin, p.10, on file with Human Right Watch.

[104] Report of the Special Rapporteur on Torture Theo van Boven to the General Assembly, A/59/324, September, 1, 2004, para. 30.

[105] Ibid., para. 31.

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."[106] He also noted that if a person is 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.[107]

Neither U.S. policy nor the immigration regulations requires the executive branch to reject as inherently unreliable assurances from governments in countries where torture is a common 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 render or remove a person at high risk of torture or ill-treatment based on the simplest and vaguest of guarantees.

Indeed, all of the texts of diplomatic assurances collected by Human Rights Watch reiterate the receiving country's existing treaty obligations as the basis for illustrating that they can be trusted not to torture a specific individual. Such promises from countries that already routinely flout and routinely deny violating these obligations are meaningless and cannot be relied upon in good faith.

Arar Case

Perhaps there is no better case to illustrate the fallacy of relying on diplomatic assurances to protect against torture than that of Maher Arar. Arar was transferred to the custody of Syria by the United States – by way of Jordan – despite Syria's well-documented record of torture and other ill-treatment. The United States had itself repeatedly condemned the government of Syria for its use of torture and other human rights violations. Arar states that he had repeatedly expressed his fear of torture in Syria to U.S. authorities while in U.S. immigration detention immediately prior to his removal to Syria.[108]

Notwithstanding the obvious risk of torture in his case, the Bush Administration transferred him to torture on the basis of assurances the CIA reportedly received from the Syrian government.[109] There can be no doubt that assurances from Syria are not

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[106] Ibid., para. 37. For more on this issue, see Human Rights Watch Reports, *Empty Promises: Diplomatic Assurances No Safeguard Against Torture* (April 2004), pp. 8-10 [online] http://hrw.org/reports/2004/un0404/ (retrieved May 9, 2005).

[107] Ibid., para. 39.

[108] Maher Arar, "This is What They Did to Me," *Counterpunch*, November 6, 2003 [online] http://www.counterpunch.org/arar11062003.html (retrieved May 13, 2005).

[109] Dana Priest, "Man Was Deported after Syrian Assurances," *Washington Post*, November 20, 2003, p. A24.

trustworthy. The U.S. government's reliance on Syrian assurances against torture is at best wishful thinking, and at worst they provide a fig leaf to conceal U.S. complicity in Arar's detailed allegations of torture and ill-treatment at the hands of his Syrian jailers. U.S. officials themselves have not been able to explain the basis for trusting Syrian assurances against torture. When asked by a Washington Post reporter why, given Syria's widely-known record of torture, they believed Syrian assurances to be credible, U.S. officials declined to comment.[110] Their response speaks volumes. It is simply implausible to assume that a government that routinely violates its binding legal obligation not to use torture would respect an unenforceable promise not to engage in the very same conduct.

Practical Inadequacy

Practical considerations also demonstrate the fallacy of reliance on diplomatic assurances, showing them to be an ineffective safeguard that does not mitigate and certainly does not neutralize the risk of torture. Neither the sending nor the receiving government has an incentive to engage in serious post-return monitoring, which risks uncovering evidence of violations of their legal obligations. Attempting to secure protection of a fundamental right via diplomatic channels has inherent limitations due to the very nature of diplomacy. Even if a sending government sought to engage in serious post-return monitoring, torture is difficult to detect because governments that use torture are adept at hiding it. Moreover, the fear of reprisal would inhibit the detainee from revealing the torture to any diplomat or other person who speaks to them in prison.

Attorney General Alberto R. Gonzales acknowledged that the U.S. government has only a limited capacity to enforce assurances once a person is transferred to the custody of another government. In an interview on March 7, 2005, the Attorney General said: "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."[111] Similarly, CIA Director Porter J. Goss told Congress, in a hearing of the Senate Select Committee on Intelligence on February 16, 2005, that "of course, once they're out of our control, there's only so much we can do."[112]

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[110] Ibid.

[111] Mark Sherman, "Gonzales: U.S. won't send detainees to countries that torture, but can't ensure good treatment," *Associated Press Newswires*, March 7, 2005.

[112] See Priest, "CIA's Assurances...," *Washington Post*.

Post-return monitoring, which some countries add to the assurances, does little to mitigate the risk of torture. Monitoring does not guarantee that torture will be detected, given the secret nature of torture. The perpetrators are generally expert at keeping such abuses from being noticed, and exposing torture is often made harder by intimidation of the victims and their fear of reprisals, should they complain. As an ineffective tool to detect torture, monitoring is not a deterrent against the practice of torture. Moreover, even if torture is identified through monitoring, the sending states run the unacceptable risk of being able to identify a breach only after torture or ill-treatment has already occurred.

The governments involved in negotiating the assurances have little or no incentive to monitor for and highlight a breach of the assurances. 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. Either way, a sending government that discovers a breach of the assurances would have to acknowledge a violation of its own *nonrefoulement* obligation. For its part, a receiving government that is engaging in torture obviously has little incentive to allow its human rights violations to be discovered through post-return monitoring.

Moreover, strict monitoring sends a message of mistrust to the receiving country. As the Egyptian ambassador to the United States, Nabil Fahmy, said "We wouldn't accept the premise that we would make a promise and violate it."[113] Since assurances are carried out through diplomatic channels, diplomats will very often privilege a good relationship between countries over other concerns, including the human right not to face torture. 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.

The former Swedish ambassador to Egypt, Sven Linder, waited five weeks before visiting two Egyptian nationals who were denied asylum in Sweden and were returned to Egypt based diplomatic assurances. The men allege that they were tortured during this five-week period following their transfer to Egypt and prior to the Swedish Ambassador's first visit. The Ambassador explained that visiting the men earlier would

[113] Ibid.

have sent a signal that the Egyptians are not trusted.[114] This illustrates that diplomacy is an inappropriate tool to ensure and enforce the absolute prohibition on torture.

There is also a profound lack of transparency in the process of seeking and securing assurances at a 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, an Assistant U.S. Department of State legal adviser argued that seeking, securing, and monitoring diplomatic assurances in extradition cases 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.[115] With respect to diplomatic assurances against torture, diplomacy alone provides no guarantee against maltreatment.

The disincentives and practical difficulties of post-return monitoring demonstrate the flawed logic in U.S. rendition policy. In defending the transfer of terrorist suspects to countries that engage in torture, Defense Department General Counsel William Haynes stated that "We can assure you that the United States would take steps to investigate credible allegations of torture and take appropriate action if there were reason to believe that those assurances were not being honored."[116] This policy cannot withstand careful scrutiny. Haynes portrays a reactive process, asserting that the United States carries out renditions and then simply waits to hear if the person is being tortured, without explaining how the U.S. government would learn that promises from a government such as Syria or Egypt were not being honored.

Moreover, despite evidence of torture in several rendition cases, the Bush Administration has done little to investigate the violation of assurances. Only in the case of Maher Arar has the administration taken steps to look into a rendition case, and then only after Arar was released and returned home to Canada to recount his experiences in prison in Syria. This review, however, was initiated not by senior government officials in response to allegations of torture by Mr. Arar; rather, it was undertaken independently by the Inspector General of the Department of Homeland Security upon request by the

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[114] See Swedish TV 4 Kalla Fakta Program, May 17, 2004, English transcript [online] http://hrw.org/english/docs/2004/05/17/sweden8620.htm (retrieved May 10, 2005).

[115] 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).

[116] Letter from William J. Haynes II to Senator Patrick Leahy, June 25, 2003.

ranking member of the Judiciary Committee of the U.S. House of Representatives.[117] There is no indication that the U.S. government took any action to investigate or stop the abuse while Mr. Arar was detained in Syria, or to follow up on his allegations of torture with the Syrian government after his release. Moreover, while the DHS Inspector General's review is welcome for its potential to add to what is known about Arar's case, it is limited to the conduct of U.S. immigration officials and their decision to remove Mr. Arar to Syria. Similarly, Abu Ali has alleged in court documents that he reported his torture at the hands of his Saudi jailers to FBI interrogators, but they did not respond to his allegations.[118] In short, there is no basis for believing that the stated commitment to investigate and take appropriate action if assurances were being violated is any more than empty rhetoric.

Pending U.S. Legislation on Renditions to Torture

In response to the growing phenomenon of rendering terrorist suspects to a risk of torture, members of the U.S. Congress have introduced legislation to put an end to the practice. Bills are currently pending in both the House of Representatives and the Senate that would fill the gaps in U.S. law and policy regarding the *nonrefoulement* obligation. In the House of Representatives, Representative Edward J. Markey introduced a bill entitled the "Torture Outsourcing Prevention Act" (hereinafter "Markey bill") in February, 2005,[119] and in the Senate, Senator Patrick Leahy introduced the "Convention against Torture Implementation Act 2005" in March, 2005.[120]

The bills are very similar in substance and scope. Both reaffirm the requirement to conduct an individualized assessment of the risk of torture to persons facing transfer, but they add an additional layer of protection for transfers that occur outside of an extradition proceeding or immigration removal proceeding. The bills require the State Department to develop and maintain a list of countries where torture is practiced. Transfers to the countries on the list are categorically prohibited when they occur outside of a legal process in which the person can challenge their transfer based on a risk of torture. The Secretary of State can waive the prohibition by certifying that a country on the list has "ended" the acts of torture that were the basis for its inclusion on the list

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[117] Letter from Clark Kent Ervin, Inspector General, Department of Homeland Security, to Rep. John Conyers, Jr., U.S. House of Representatives, January 9, 2004, on file with Human Rights Watch.

[118] Markon, "Terror Suspect's Attorneys Link FBI...," *Washington Post.*

[119] Torture Outsourcing Prevention Act (H.R. 952), 109th Congress, [online] http://www.theorator.com/bills109/hr952.html (retrieved April 6, 2005).

[120] Convention against Torture Implementation Act 2005 (S. 654), 109th Congress (2005) [online] http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_bills&docid=f:s654is.txt.pdf (retrieved May 10, 2005).

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. It is important to note that the bills sanction the use of post-return monitoring only in countries where the State Department certifies that torture is no longer in use.

The most crucial element of the bills in putting a stop to current U.S. renditions is their language on diplomatic assurances. The bills state that diplomatic assurances provide an insufficient basis for determining that a person is not at risk of torture, thereby precluding their use to circumvent the *nonrefoulement* obligation.

Both bills are pending in Congress, as of May 16, 2005.

Conclusion – The Importance of a Full Accounting

We still do not know precisely what transpired in the rendition of Maher Arar to Syria. While Arar's own account provides important information, there is much that remains shrouded in secrecy regarding the conduct of the governments involved – not only the United States but also Canada, Jordan, and Syria. An official commission of inquiry such as this one is crucial to understanding what happened in this case and to preventing it from happening again. The roles of Canadian law enforcement and officials should be fully explored, with an eye toward understanding whether they played a role in facilitating Arar's transfer to Syria, whether the assurances received by the CIA from Syria influenced Canada's response to his impending removal to Syria, and what steps they did or did not take to try to prevent his transfer to Syria.

Similarly, the U.S. review by the DHS Inspector General can add important new facts to the body of information regarding the handling of Arar's case while he was in the United States. In particular, the DHS review has the potential to shed light on why Arar was removed to Syria and not Canada, and how and by whom that decision was made. The review should clarify whether immigration officials complied with the applicable regulations in Arar's case, both with regard to the processing of his removal case and specifically with regard to the issue of transfer to risk of torture. Given the reports that the United States received assurances from Syria, it may be that the U.S. government followed the provision in the regulations that allows the receipt of assurances to end the inquiry into the CAT claim and to proceed with removal to the country in question.

The critical point, however, is not whether the United States actually followed the applicable regulations. Even if Arar was removed pursuant to legal immigration

proceedings, the central question remains whether the regulations that govern those proceedings are adequate to ensure compliance with the CAT and to prevent transfers to torture or ill treatment via immigration proceedings. This is the ultimate test of any inquiry into the U.S. government's handling of the Arar case.

Human Rights Watch believes that the regulations are not sufficient to satisfy U.S. legal obligations under the CAT. While overall they reflect a positive effort to create procedures to implement Article 3 of the CAT, they contain a crucial structural flaw that undermines full protection against *refoulement*. The regulations should not allow diplomatic assurances to end review of a CAT claim and they should not permit assurances to be used to transfer a person to a risk of torture.

Recommendations to Ensure Compliance with the Prohibition on Transfers to Risk of Torture

To the Government of Canada:

- Take all possible steps to prevent transfer by the U.S. or any other government of a Canadian national or resident to a risk of torture or ill-treatment. Given the responsibility of all governments to do everything in their power to prevent acts of torture, Canada must ensure that it has policies in place that enable it: (1) to learn about possible renditions to risk of torture or ill-treatment involving Canadian citizens or residents; and (2) to take high-level action through diplomatic and legal channels to prevent such transfer.

- Ensure that procedures are in place for high-level governmental review and response whenever Canadian law enforcement, immigration, or security officials learn that a Canadian national or resident in U.S. custody has raised a CAT-related concern. Specifically, if such a person raises any concern of torture or ill-treatment if transferred to another country, or if Canadian officials realize there is a risk of torture or ill-treatment, or if the U.S. government is seeking assurances from another government, then the Canadian officials must seek high-level review of the case through a carefully delineated procedure that involves not only law enforcement, immigration, or security officials, but also those officials responsible for asylum and refugee matters and compliance with Canadian international legal obligations. Such a process could facilitate action to protect the rights of Canadians in U.S. custody.

- Ensure full compliance with the absolute prohibition on *refoulement* in its own treatment of persons in Canadian custody or facing deportation from Canada. Specifically, Canada should prohibit reliance upon diplomatic assurances as a basis to transfer *any* person, including non-citizen terrorist suspects, to other countries when the case involves a risk of torture or ill-treatment. Canada should also repeal Sections 76-87 of the Immigration and Refugee Protection Act, providing for the use of security certificates 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 transfers to countries where a person would be at risk of torture or ill-treatment.

To the Government of the United States:

- End reliance on diplomatic assurances as a basis for concluding that a person can be transferred to another country without risk of torture or other ill-treatment.

- Revise DHS regulations implementing U.S. obligations under both the CAT and the 1998 U.S. law to ensure that the regulations do not permit the use of assurances in order to transfer a person to a country where he or she is at risk of torture or ill-treatment. Specifically, the U.S. government should repeal 8 C.F.R. §208.18(c), which provides for reliance upon assurances against torture to remove from U.S. territory persons raising claims under the CAT in immigration proceedings.

- Direct the Department of Defense and the Central Intelligence Agency to promulgate regulations to implement Article 3 of the CAT via public notice and comment procedures. Ensure that these regulations do not permit reliance on diplomatic assurances as a basis for ending an inquiry into a CAT claim or concluding that an individual may be transferred to a place where he or she is at risk of torture or ill-treatment.

- Enact S. 654 (Leahy bill) and H.R. 952 (Markey bill), currently pending in the U.S. Senate and House of Representatives respectively, as a means toward ending rendition to risk of torture and ensuring all relevant agencies of the U.S. government promulgate regulations that comply fully with U.S. legal obligations.

To both governments:

- Support a comprehensive international investigation of the handling of Maher Arar's case by all four governments involved in this case – the United States, Canada, Syria, and Jordan. Such investigation should be done under the auspices of an appropriate international body, such as the Office of the High Commissioner for Human Rights.

- Cooperate fully and transparently in their own and in each other's inquiries into the Arar matter. In particular, the U.S. government should reverse its decision not to cooperate with the Canadian Commission of Inquiry in the Arar matter. Because officials from both governments interacted regarding this case, including sharing information, the Canadian Commission will not be able to construct a complete picture of the consequences of actions taken by Canadian officials without cooperation from the United States.

- Comply fully with their respective reporting requirements before the U.N. Committee Against Torture, the Human Rights Committee, and other relevant international and regional monitoring bodies. Include in these reports detailed information about all cases in which requests for diplomatic assurances against the risk of torture or ill-treatment have been sought or obtained with respect to a person subject to transfer to another country.

- Acknowledge that the *nonrefoulement* obligation includes a prohibition on transfers both to risk of torture and to risk of cruel, inhuman, or degrading treatment or punishment.

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HUMAN RIGHTS WATCH

FEBRUARY 2007 VOLUME 19, NO. 1(G)

Ghost Prisoner

Two Years in Secret CIA Detention

Summary

When Marwan Jabour opened his eyes, after a blindfold, a mask, and other coverings were taken off him, he saw soldiers and, on the wall behind them, framed photographs of King Hussein and King Abdullah of Jordan. He was tired and disoriented from his four-hour plane flight and subsequent car trip, but when a guard confirmed that he was being held in Jordan, he felt indescribable relief. In his more than two years of secret detention, nearly all of it in US custody, this was the first time that someone had told him where he was. The date was July 31, 2006.

A few weeks later, in another first, the Jordanians allowed several of Jabour's family members to visit him. "My father cried the whole time," Jabour later remembered.

Marwan Jabour was arrested by Pakistani authorities in Lahore, Pakistan, on May 9, 2004. He was detained there briefly, then moved to the capital, Islamabad, where he was held for more than a month in a secret detention facility operated by both Pakistanis and Americans, and finally flown to a Central Intelligence Agency (CIA) prison in what he believes was Afghanistan. During his ordeal, he later told Human Rights Watch, he was tortured, beaten, forced to stay awake for days, and kept naked and chained to a wall for more than a month. Like an unknown number of Arab men arrested in Pakistan since 2001, he was "disappeared" into US custody: held in unacknowledged detention outside of the protection of the law, without court supervision, and without any contact with his family, legal counsel, or the International Committee of the Red Cross.

The secret prison program under which Jabour was held was established in the wake of the September 11, 2001 terrorist attacks, when US President George W. Bush signed a classified directive authorizing the CIA to hold and interrogate suspected terrorists. Because the entire program was run outside of US territory, it required the support and assistance of other governments, both in handing over detainees and in allowing the prisons to operate.

Pakistan's help was crucial to the program, more crucial than that of any other country. The Pakistani authorities delivered hundreds of prisoners to the United

States—some ending up in military custody, others in CIA custody—and it also allowed the United States and other countries to interrogate many of them on Pakistani soil. As the US State Department's annual human rights report for 2004 describes, security forces in Pakistan "held prisoners incommunicado and refused to provide information on their whereabouts, particularly in terrorism and national security cases." What the report does not say is that the Pakistani authorities carried out these abuses with the full knowledge and participation of American intelligence agents. Indeed, the degree of US control may have been so great, in some cases, that it constituted a form of proxy detention.

The possible use of proxy detention facilities is of especial concern now. In early September 2006, 14 detainees were transferred from secret CIA prisons to military custody at Guantanamo Bay. In a televised speech on September 6, President Bush announced that with those 14 transfers, "there are now no terrorists in the CIA program." But he said nothing about what had happened to a number of other prisoners who, up until that point, were believed to have been in the unacknowledged custody of the CIA.

One concern is that the US might have transferred some of the remaining prisoners to foreign prisons where for practical purposes they remain under CIA control. Another worrying possibility is that prisoners were transferred to places where they face a serious risk of torture: indeed, some of the missing prisoners are from Algeria, Egypt, Libya, and Syria.

In a letter to President Bush published in conjunction with this report, Human Rights Watch has provided a list of 16 people who were believed to have been held at one time in secret CIA prisons, and whose whereabouts are currently unknown. Jabour saw or spoke to a number of those people while he was held. The letter also includes a list of 22 people who were possibly held in such prisons, and whose whereabouts are similarly unknown. A copy of the letter is included as an appendix to this report.

Human Rights Watch has called upon the Bush administration to provide a full accounting of every person that the CIA has held since 2001, including their names,

the dates that they left US custody, and their current locations. If they are being held in proxy detention in a third country, the US government should either transfer them to the United States for prosecution in US courts, or order their release.

To leave these men in hidden limbo violates fundamental human rights norms. It is also extraordinarily cruel to their families. The wife of a man who has not been seen since he was believed to have been taken into CIA custody told Human Rights Watch that she has had to lie to her four children about her husband's absence. She explained that she could not bear telling them that she did not know where he was: "[W]hat I'm hoping is if they find out their father has been detained, that I'll at least be able to tell them what country he's being held in, and in what conditions."[1]

The fate of the missing detainees is one of the main unanswered questions about the CIA's secret prison program, but it is not the only one. Much is still unknown about the scope of the program, the precise locations of the detention facilities, the treatment of detainees, and the cooperation and complicity of other governments. Although confidential sources, including CIA personnel, have described some aspects of the program to journalists, and a small number of former detainees have recounted their experiences, many details of the program remain hidden.

What follows is the most comprehensive account to date of life in a secret CIA prison. Human Rights Watch interviewed Marwan Jabour over several days in December 2006, less than a month after he regained his freedom. He spoke clearly, precisely and in great detail about his experiences, although it was evident that he found some memories upsetting. His testimony is extremely valuable both in describing his own experience of secret detention and in providing information about others who were held with him.

Jabour was arrested in Lahore, he believes by the Pakistani intelligence services, and the worst physical abuses he endured took place while he was in their custody. He alleges that they beat him severely, burnt him with a red hot iron, and tied a tight rubber string around his penis, causing enormous pain. On this third day in Pakistani custody, three people he believes were Americans questioned him; the

[1] Communication to Human Rights Watch, January 24, 2007.

following day he was transferred to a secret facility in Islamabad. This facility had both US and Pakistani personnel, but the Americans seemed to be in charge.

Both in the Lahore facility and in Islamabad, Jabour endured many days of forced sleeplessness and forced standing, with little respite. Twice he collapsed, falling unconscious.

After a month in Islamabad he was flown to a secret prison, which he believes was in Afghanistan, where all of the personnel (except possibly the interpreters) were American. There, he was held completely naked for a month and a half, filmed naked, and interrogated naked. He was chained tightly to the wall of his small cell so he could not stand up, placed in painful stress positions so that he had difficulty breathing, and warned that if he did not cooperate he would be put in a suffocating "dog box."

As the months went by, some aspects of Jabour's treatment improved: his clothes were slowly returned; the physical mistreatment ended; he was placed in a larger cell; he got better food. Other aspects, however, changed slowly or not at all. He spent nearly all of his time alone in a windowless cell. He went a year and a half without a glimpse of sunlight. He wore leg irons for a year and a half. Worst of all, he spent more than two years with almost no contact with any human being besides his captors. Although he worried incessantly about his wife and three young daughters, he was not even allowed to send them a letter to reassure them that he was alive.

Jabour acknowledges that in 1998 he trained in a militant camp in Afghanistan in the hope of fighting in Chechnya, and in 2003 he helped Arab militants and others who had fled Afghanistan for Pakistan. But whether he violated the law should have been a matter for the courts; it was not a justification for abuse.

International human rights law prohibits enforced disappearance: basically, the holding of persons in unacknowledged, incommunicado detention. Such persons, who remain "disappeared" until their fate or whereabouts become known, are also more likely to be subjected to torture and other cruel, inhuman or degrading treatment.

The US government has long condemned these abusive practices in its policy statements and annual human rights reports; its own use of them severely undermines its moral authority on human rights. Even in wholly practical terms, its reliance on secret detention and abusive interrogation is wrong. The use of these techniques taints any testimony obtained from the persons held, making it difficult to prosecute the perpetrators of terrorist acts in fair proceedings, and to provide the public accounting of these crimes that the victims of terrorism deserve.

Key Recommendations

The US government should:

- Repudiate the use of secret detention and coercive interrogation as counterterrorism tactics and permanently discontinue the CIA's detention and interrogation program;

- Disclose the identities, fate and whereabouts of all detainees previously held at facilities operated or controlled by the CIA since 2001.

Other governments should:

- Refuse to assist or cooperate in any way with CIA detention, interrogation and rendition operations, and disclose any information that they may have about such operations.

The Case of Marwan Jabour

Marwan Ibrahim Ali al-Jabour is a 30-year-old Palestinian who was born in Amman, Jordan, and grew up in Saudi Arabia. In 1994, he moved to Pakistan to continue his studies, and in 1999 he got married. He and his wife have three young daughters.

Detention in Lahore

> The beatings were difficult, but they weren't the worst part .... [The worst] was the fear that I would never see my family.
> —Marwan Jabour, describing how he felt when he was taken into detention

Jabour was arrested after having dinner in Lahore, Pakistan, at the home of a friend, a professor at a university in Lahore, on May 9, 2004. At about 9 p.m., when he was pulling his car out of his friend's garage, a man on the street asked him about his friend. As Jabour responded, he was suddenly surrounded by a large group of Pakistani men in civilian clothing. The men grabbed him and cuffed his hands. They put him in a car and tried to put a sack over his head, but he fought back and they left the sack off.

They also arrested the friend whose house he was visiting, and another friend who was there. All three men were taken to what Jabour believes to be a Lahore station of Pakistan's Inter Services Intelligence (ISI), the country's powerful military intelligence agency; the station was close to the Panorama Centre.[2]

Jabour said that as soon as the men got him inside the station, they started beating him badly. "There were seven or eight officers in the room with me," Jabour told Human Rights Watch. "If I said I didn't know anything, they beat me: they slapped me, kicked me, and hit me with a stick. They insulted and threatened me. They kept me awake all night long."

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[2] Panorama Centre is a well known market in Lahore.

Jabour said that the men also used an electric prod on him, continually questioning him about the whereabouts of suspected terrorists.

At about 6 a.m., he said, they sent him to a cell, leaving him there with shackles on his legs. There were three small cells in a row together. Jabour was alone in his cell, and his two friends were in the other cells. "They had been beaten too, but not as badly as I was," Jabour said. "I was bruised from the beating."

From the questions that Jabour was asked, he knew that his contacts with Arab militants had aroused official interest. Jabour told Human Rights Watch that he had trained in a militant camp in Afghanistan for three months in 1998, had returned to Afghanistan for a couple of weeks after the American bombing campaign started, and in 2003 had assisted Arabs and others who had fled Afghanistan for Pakistan. Because he had lived in Pakistan since 1994 and had studied at a university there, he spoke Urdu fluently and had local contacts. His knowledge of the local environment meant that he was able to arrange for people to get medical care and stay in local homes. Jabour claims that he assisted "unaffiliated mujahideen" —those who did not belong to al Qaeda or other armed groups—and that he was never a member of a terrorist group or in any way involved in terrorist activities.[3]

When the interrogators returned to his cell an hour or two later, they wanted the details of Jabour's activities, including the names of militants he had met, and the addresses where those who had fled Afghanistan were staying. They had already found his cell phone and a diary with phone numbers. They took Jabour back to the interrogation room, where an interrogator was waiting for him. They told him to start making phone calls for them. The police began shouting and beating him. They threatened to arrest his wife. Jabour said: "They told me: 'We'll keep her on her knees in front of you.'" He described the scene:

> We were in a specially made room with iron rings on the wall, and they chained my hands to the ceiling. They also tied a rubber string on my penis that didn't allow me to pee. They left it on the whole time I was

[3] Although Human Rights Watch cannot corroborate these statements, the fact that in 2006 the US authorities released Jabour without charge suggests that they did not believe he was implicated in acts of terrorism.

with them, except sometimes they would briefly undo it. It was terribly painful.

Jabour said that because he was kept from urinating for nearly four days, except for few brief moments of respite, he now has a problem with his kidneys. He has to urinate frequently, and sometimes there is blood in his urine.

Early in the morning on his third day of detention in Lahore, Jabour said, three people who he believes were Americans came to interrogate him: two women and a man. He was blindfolded the whole time they interrogated him, but he said that their American accents were unmistakable. (They interrogated him in English.) "They told me, 'Marwan, you're at a crossroads: you could spend the rest of your life in prison, or you could cooperate with us against the terrorists. You could be a rich man.'"

Jabour said that nobody physically abused him while the Americans were present, although sometimes he was made to kneel on the floor while he was being questioned. When the Americans once asked him about the bruises on his face, caused from his beating by the Pakistani police, he told them sarcastically, "Oh, we spent a very nice night together, your friends and I."

During the interrogation, the two women did most of the talking. One was friendly, and made some suggestive comments to him; the other was very angry and swore a lot. The angry woman told him that there was a huge American man waiting for him in prison.

The Americans stayed at the police station until about midnight. After the Americans had left, the Pakistani police removed his clothes and showed him a red hot metal rod.

One of them asked me: "Where do you want to be hit with it?" I begged him not to. He burnt my left arm, just above the elbow, and my left leg. I got no medical care for the burns, which bubbled up. They took a month or so to heal. But this seemed minor compared to all the other things in my life at the time.[4]

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[4] A Human Rights Watch researcher was shown the light scars on Jabour's arm and leg when she interviewed him in December 2006.

Jabour said that on the morning of the fourth day, the Pakistanis transferred him by car to another facility. He had been kept awake nearly the whole time he was detained in Lahore. He estimated that he was allowed a total of about three to four hours' sleep during the nearly four days he was held.[5]

Islamabad: Proxy Detention

> I think it had once been a private home. It was a place of secret detention . . . . It seemed to me that this place was controlled by Americans. They were in charge.
> —Marwan Jabour, recalling his detention in Islamabad.

Jabour described the detention facility he was transferred to as a "villa": a large private compound that had been renovated to hold prisoners.[6] He was blindfolded when he arrived so he did not see it from the outside, but he heard the Pakistanis who were in the car with him say that they were going to Islamabad.[7] The drive from Lahore took three-and-a-half to four hours.[8]

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[5] Moazzam Begg, a British citizen who was imprisoned for two years at Guantanamo, described how when he was in ISI detention in early 2002, he witnessed other prisoners being beaten and deprived of sleep for days. Moazzam Begg, *Enemy Combatant: A British Muslim's Journey to Guantanamo and Back* (London: The Free Press, 2006), pp. 15-17.

[6] He was held on the ground floor, but he was under the impression that the building had a second story.

[7] The other prisoners who Jabour met in the facility confirmed that it was in Islamabad. Moreover, there are many other accounts of "disappeared" prisoners have been held in Islamabad or brought there for questioning. For example, a recent letter describing people recently released from secret detention in Pakistan states that among the detention centers where people were held was "a Safe House near Islamabad Airport." Letter from Amina Masood, Defense of Human Rights, to the Honorable Chief Justice of Pakistan, December 19, 2006. See also "FBI questions al-Qa'eda man in Pakistan," *Daily Telegraph* (U.K.), March 17, 2003 ("[Officials] said Yasir al-Jaziri, a Moroccan educated in America, was moved to the capital, Islamabad, for questioning after he was captured in a raid"); and "2 aides to Osama Yousaf arrested," *Daily Times* (Pakistan), August 12, 2005 ("Sources also said Osama Bin Yousaf had been taken to Islamabad where a foreign investigation team would see him").

Abdullah Khadr, a Canadian citizen arrested in Pakistan in October 2004, states that he too was held in secret detention in Islamabad, and was interrogated by both American and Pakistani personnel. See Affidavit of Abdullah Khadr, United States v. Khadr, Action No. EX0037/05, Superior Court of Justice, Toronto, 2006, pp. 25-27.

Moazzam Begg states that immediately after being arrested in early 2002 he was held in a house in Islamabad. He described it as a "very grand" house, like the house of a wealthy person, in what he thought was the G10 district of the city. Although he was held in a room, he saw several cells in another part of the house. Moazzam Begg, *Enemy Combatant*, pp. 6-13.

Finally, at least one detainee who is currently being held at Guantanamo stated in an administrative hearing that after being arrested he and a few others were brought to Lahore, interrogated there by American civilians, and then brought to Islamabad, where they spent two months in detention before being transported to Bagram air base in Afghanistan. Fahmi Abdullah Ahmed (ISN 688), Combatant Status Review Tribunal Transcript, US Department of Defense, set 4, pp. 425-26 (released March 3, 2006). Ahmed was arrested some time after February 2002; it is unclear when.

[8] This is roughly the time it takes to make the trip using the Lahore-Islamabad motorway.

The forced sleeplessness that Jabour endured in Lahore continued in Islamabad. Jabour told Human Rights Watch that during his first seven days in Islamabad his captors did not allow him to sleep, except for the occasional hour-long doze. "It was a continuous investigation," he said.

"The Americans were almost always around," he told Human Rights Watch. "I wasn't wearing a blindfold after I arrived there, so I could see them. I saw three American women and a man, plus about five or six Pakistanis." Speaking of the Americans, he said: "I think it was the same man who questioned me in Lahore, and at least one different woman." Jabour said that the Americans were dressed in regular Western clothes, and one of the women said that her name was Mary. They did not say what government agency they were from.

Jabour said that the Americans appeared to be in charge of the facility. They would question him during the day, sometimes showing him photos of suspected militants, and after midnight the Pakistanis would take over. At first Jabour was held alone in a cell that was like a room, and was attached to the wall by a chain about two meters long.

"The Pakistanis beat me almost every night," he said. "Once they threatened to pull out my fingernails. Other times they would be friendly, and promise to release me if I talked." He was forced to stand for long periods.

The Americans did not beat Jabour, but they made him stay awake. "They would say: 'If you cooperate, we'll let you sleep.' And: 'If you work with us, we'll make you really rich.' They never threatened to take me to Guantanamo, but they did say that I'd be taken away somewhere and would never see my children again. I was thinking that my life was finished."

"I was thinking about my oldest daughter the whole time," he said. "I thought that I'd never see her again. I was afraid that I'd be sent to Guantánamo."

Jabour told Human Rights Watch that all of the Americans he saw at the facility were relatively young: in their late twenties or early thirties. He said that the man who questioned him was about age 28-30, with thinning hair, and the woman who called

herself Mary was tall, with medium length, light colored hair. Another woman was always angry and swore a lot. (Jabour believes this is the same woman who swore at him in Lahore.) Once, in Arabic, she told Jabour "Fuck Allah in the ass."

Jabour collapsed twice during this first week in Islamabad; he believes that he had two heart attacks. The first time was on his fourth day of detention; the second time was at the end of seven days. "I fell unconscious both times, with my heart pounding out of my chest," he said. The doctor, a Pakistani, checked his heart and gave him something called "glivet."

After Jabour's first collapse, they moved him to a cell with another prisoner, an Algerian named Adnan, who took care of him. (Jabour knew him as Adnan "al-Jazeeri," or Adnan the Algerian.) Jabour was in such bad shape that he could not walk or feed himself. He was allowed to sleep for about four hours.

After his second collapse, three days later, he was allowed an entire day's rest. "After the second collapse, I was hysterical," he said.

A number of other prisoners were held in the cell block with him, which he described as a new addition to the main house. The cell block was stiflingly hot and the air was stale. There were two facing rows of three cells, each of which had a barred door facing the corridor. In front of the barred doors were wooden doors, but they were almost always left open. When the prisoners were walked down the corridor to use the toilet, they could see each other.

Jabour said that one cell held a 16-year-old boy named Khalid. Khalid, who was Egyptian, said that he had been arrested six months previously during military operations in Waziristan, in northwest Pakistan bordering Afghanistan. He was apparently badly injured during his arrest, and Jabour could hear him crying and moaning in pain at night. "He was suffering badly," Jabour recalled. Another 16-year-old who was held in the facility was an Iraqi named Tha'er, who said that he had been arrested in mid-2003. Tha'er told Jabour that he had an Australian travel document, and that the Australians had visited him the previous year, interrogating

him and making a video of the interrogation. Tha'er also said that Abu Zubaydah and members of his group had been held in this same facility.[9]

The facility also held a Yemeni detainee who had been arrested in late 2003; a Libyan named Ayoub who had been arrested in early 2004; an Afghan known as Mohammed al Afghani, who was born in Saudi Arabia, and a Palestinian who had been arrested in early 2004. The latter two prisoners had been transferred from Peshawar prison to Islamabad the same day that Jabour had arrived. There were also three Pakistanis who were accused of involvement in the attempted kidnapping of an ISI general; they said that they had been held for a year without being charged. A fourth Pakistani was also held there; he was released a few days after Jabour arrived. Jabour said that this fourth man had been badly tortured: "you can't imagine how much they were hurting him."

Jabour said that the Pakistani prisoners told him that a Pakistani named Majid Khan had previously been held there with them.[10]

Jabour was held in the Islamabad facility for more than a month. He was never brought before a judge, charged with any offense, or allowed to see a lawyer. While he was there, another prisoner, the Yemeni, was moved from the facility, supposedly for Yemen. The day before Jabour was transferred, three other prisoners—the two 16-year-old boys, and the Algerian man—were taken away.

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[9] Zine Abd el Dine, aka Abu Zubaydah, is currently incarcerated at Guantanamo. He was among the 14 detainees transferred from CIA custody in early September 2006. It is believed that he was badly tortured during his detention. See, for example, Ron Suskind, *The One Percent Doctrine: Deep Inside America's Pursuit of its Enemies since 9/11* (New York: Simon & Schuster, 2006), pp. 115-18.

[10] Majid Khan is currently incarcerated at Guantanamo. He was among the 14 detainees transferred from CIA custody in early September 2006.

Secret CIA Detention

> It was a grave.
> —Marwan Jabour, recalling his two years in secret CIA detention.

Jabour was transferred out of the Islamabad facility on the evening of June 16, 2004. The Pakistanis brought Jabour and three other prisoners (the Palestinian, the Afghan, and the Libyan) to the airport. The prisoners were blindfolded; their hands were cuffed, and their legs shackled. Jabour said that the drive to the airport took less than 20 minutes.

Before he was put on the plane, Jabour was led to the bathroom, where the Americans took off his blindfold. "I saw Americans in front of me, talking in sign language. A doctor was there, and he took my blood pressure and gave me an injection. I knew it was the end of my life." Then the Americans put a sack over his head and changed his handcuffs. The injection made him a bit woozy, but he did not pass out.

Jabour said everyone entered the plane through the back, using what seemed like the door of a military plane. The plane seemed fairly small, like it could hold perhaps 20 to 30 people. The prisoners were on one side, with a seat between them. Their hands were cuffed behind their backs, and their legs were cuffed and shackled to the floor. There were four prisoners and about a dozen other people on the plane.

Jabour believes that the secret prison facility he was brought to was located in Afghanistan. He enumerated several reasons for this belief. First, the time spent flying: the flight lasted a maximum of two hours.[11] Second, the food served at the prison: during the Eid al-Fitr holiday,[12] the prisoners were given typical Afghan food, and near the end of his stay they were fed typical Afghan bread with regular meals. Third, facts gleaned from his captors: an officer at the prison once let slip that after

[11] This is more than enough time to get to Kabul from Islamabad.

[12] The Muslim holiday of Eid al-Fitr (the Festival of Fast-Breaking) is a three-day celebration at the end of Ramadan.

the earthquake in Pakistan relief supplies were flown "from here" to Pakistan.[13] Fourth, the weather: it was extremely cold in the winter (colder than in most parts of Pakistan); one wall of his cell would be freezing to the touch. Fifth, the languages: the first director of the prison spoke fluent Farsi (Persian), suggesting that the prison was in a region where such language skills were useful.[14]

Jabour said he thinks that everyone at the prison was American—the guards, interrogators, prison directors, and medical personnel—except possibly the Arabic-speaking translators. Not only did the prison staff say they were American—informing Jabour that he was in U.S. custody—they spoke American-accented English.

The First Six Months

After the plane landed, the transfer team put Jabour and another prisoner in the back of a jeep, handling them roughly. The jeep then drove down an unpaved road to the prison.

When the group reached the prison, two guards brought Jabour inside. After they put him in a cell, by himself, they cut off all his clothes, leaving him naked. They released one of his hands from the handcuffs, and cuffed the other hand to a ring in the cell wall. It wasn't possible for him to stand because the ring was near the floor, and he was attached to it via a short chain.

The cell was just over 1 meter wide by almost 2 meters long. It was roughly the size of a single mattress, but it did not have a mattress. The only objects inside the cell were a bucket and two coarse blankets.

The cell had two video cameras near the ceiling, too high for a standing person to reach. There were also speakers and a listening device built into the wall.

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[13] The US military sent relief flights from Afghanistan to assist people affected by the 2005 earthquake in Pakistan. See Embassy of the United States in Islamabad, Press Release, "250th Relief Flight Unloaded by the U.S. Military," November 29, 2005.

[14] Farsi and closely related languages are spoken in much of Afghanistan in addition to Iran.

This cell, as well as other cells that Jabour saw later, had double steel doors that were very close to each other. (In other words, to exit the cell it was necessary to go through one door and then the next.) The door that opened into the cell had a small glass window (about 40 cm by 30 cm) and a food slot below. Except for the door, the cell had no windows, but the lights were left on all the time, including at night.

Jabour said that he thought the structure of the building was old, but the cells were new and modern. Everything was metal and seemed very new.

The guards let Jabour sleep the first night (or let him try to sleep) and returned early in the morning. No one said a word to him, but they shaved his head, and also shaved off his beard and moustache. Then, without giving him any clothes to wear, they took him to an interrogation room. In retrospect, Jabour finds it hard to believe that he was paraded around naked in front of a group of men and women, but at the time he was so disoriented and upset that his lack of clothing seemed relatively minor.

The interrogation room was a relatively big room and it held about ten people, including guards and people who appeared to be doctors. Some members of the group were women. They put him a chair, shackling his hands and legs to the chair. A doctor came and another person made a video recording of Jabour's body.

A bearded man, whom Jabour had seen at the airport in Islamabad, began to talk in American-accented English. He said he was the "emir" (director) of the facility. He said Jabour had only one option: to cooperate. He promised that if Jabour cooperated, he would be treated well.

During this interrogation and countless future interrogations, his questioners asked about Jabour's activities in Pakistan, the people he had met, and his knowledge of terrorist groups. He was shown many hundreds of photos, some of people who were obviously in detention (they were wearing prison jumpsuits and showing a plaque with numbers).

During the first six months that Jabour was being interrogated, a huge, muscular man—whom Jabour called a "Marine" because of his build—would sometimes stand

behind the interrogator and act intimidating. Jabour was also frightened by an object that the interrogators called the "dog box." It was a wooden box, about 1 meter by 1 meter in size, and the Americans told him that they put people inside it. "They said that KSM [Khalid Sheikh Mohammed] had spent some time in the dog box and then he talked. They kept threatening me: 'We could do this to you.'"[15]

Jabour said that he was slapped a few times at the beginning of his stay, but was not beaten while held in the secret facility. Instead, when the interrogators felt he was not cooperating, they would chain him up in extremely uncomfortable positions, which would become painful over time.[16] His hands would be attached to his ankles, and to the floor, and he would be left like that for a half hour to an hour. "At times it was difficult to breathe," he explained. In all, he estimates that he was put in these stress positions a total of 15 to 20 times.

Jabour said that during the first six months he was held at the secret prison they would sometimes play rock music at ear-blasting levels, which could last an hour, a day, a few days, or even a week. "It was loud, awful music," he said, "like the soundtrack from a horror movie."

Besides the music, there was also a constant, low-level, white noise; Jabour said that it sounded like a generator. Jabour thinks that one of the main reasons for the noise was to prevent prisoners from communicating with each other.

Two weeks after Jabour arrived at the prison, he was provided with a Koran. After three-and-a-half months, he was given a prayer mat.

Jabour said that the food was awful. It was almost all canned food (often tuna or sardines): uncooked, very bland and bad-smelling. "It was like dog food," he

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[15] KSM is a shorthand used by US officials for Khalid Sheikh Mohammed, alleged to be the architect of the September 11 attacks. Mohammed was held in secret CIA custody for three-and-a-half years. He was among the 14 detainees transferred from CIA custody to Guantanamo in early September 2006.

[16] Numerous detainees at Guantanamo and elsewhere have reported being put in "stress positions" as punishment. In December 2002, Secretary of Defense Donald Rumsfeld issued new interrogation rules for Guantanamo, authorizing "stress positions," removal of clothing, prolonged isolation, sensory deprivation, and forced grooming (like forced shaving of facial hair), among other interrogation techniques. In September 2003, Army Lt. Gen. Ricardo Sanchez authorized new interrogation techniques for use in Iraq, including the use of stress positions. Memorandum from Lt. Gen. Ricardo Sanchez to Commander, US Central Command, regarding "CJTF-7 Interrogation and Counter-Resistance Policy," September 14, 2003.

remembered. During his first several months at the prison, his weight dropped considerably. Whereas he had previously weighed 93 kilograms, his weight fell to 58 kilograms. (They weighed him every week.) "I felt weak, dizzy, unbalanced all the time, like I was on a ship."

Jabour received his clothes back piece by piece over time. First, after a month and a half at the prison, he was given a pair of pants. Then, after about three-and-a-half months, he was given a tee-shirt. Finally, after about eight months, he was given a pair of shoes.

Jabour told Human Rights Watch that his legs were left shackled to each other for one and a half years. During the time his legs were shackled, he could only take small steps; the chain running from one of his ankles to the other was about 75 centimeters long. Whenever he was taken out of the cell and brought to another room for interrogation, he was blindfolded.

The Remaining 19 Months

Jabour's treatment improved considerably after the initial six-month period of detention, and continued improving in stages after that. The first major change was a transfer to a much larger cell.

To bring Jabour to the new cell, the guards blindfolded him and walked him around a long, complicated route, in and out of different rooms, confusing his sense of direction. When they reached the cell and removed his blindfold, Jabour found himself in a room that was about 5 meters by 7 meters in size, with a mattress, a pillow, a sink, some books of Koranic interpretation, and some strawberries. The big cell was also quieter than his previous, small cell, and the lights were turned off from 11 p.m. to 4 a.m.

Jabour was kept in the new cell for three days, then he was sent back briefly to his previous cell. "They told me I could take one thing with me," Jabour recalled. "I wanted both the mattress and a book, but I chose the book."

On December 18, 2004, Jabour was moved to a large cell in a separate building. When the guards moved him to that building, they took him outside; he estimates that the second building was 70 meters from the first one. His new cell number was B1.[17] Like his first cell, it had no windows and no natural light.

While he stayed in the second building, he was allowed to shower once a week, on Saturdays.

Not long after he was moved into the second building he was given a watch, a calendar and a prayer schedule. He remembers that in summer the dawn prayers would be held as early as 3:25 a.m., whereas in winter the dawn prayers would be as late as 5:15 or 5:25 a.m., times that correspond to prayer times in Afghanistan.[18]

Except for interrogations, solo exercise, and his weekly shower, Jabour spent all his time confined within the four walls of his cell. With nothing else to occupy his mind, Jabour poured his energy into decorating his cell. After a year had gone by, the Americans gave him a map of the world, and later they gave him pictures of fish and animals. "I had asked them for a plant, which they didn't give me, so I drew a big tree, with leaves colored on it," he remembered. "I cut it out and taped it up on the wall." He also made grass out of strips of paper. "I drew flowers, and I stood on my chair and stuck them to the ceiling." Sometimes the Americans would take photos of his cell.

A year into his detention, the Americans started allowing Jabour to watch a movie once a week. The facility had a list of 200-250 films, including big-budget Hollywood films, documentaries, cartoons, sports, horror movies, and wrestling.

After a year and a half, an officer taught Jabour how to play chess. Jabour drew a chess board and made chess pieces out of paper. He also played checkers and cards with some of the women interrogators. About four months before he left, he was given a computer chess set, and a small video game.

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[17] He was never told the cell number of his first cell.

[18] See Islamic Finder (http://www.islamicfinder.org/) (providing prayer times around the world).

Jabour spent much of his time reading. The prison had a big library with hundreds of books and finally, by the time he left, more than a thousand books in a variety of languages. The majority were in Arabic, but there were also books in languages such as Urdu, Persian, Indonesian and English.

One of the most momentous occasions for Jabour was when he was allowed to see sunlight. He had spent a year and a half in captivity without even a glimpse of natural light. One day the Americans opened up a skylight in his building. "They brought me a chair and let me sit under the skylight," he remembered. "I was so happy. I joked with them, pretending to call outside, 'Help! Someone help me! Let me out!'"

The second building he was held in had an exercise area, about 5 by 6 meters in size, in which Jabour was allowed to kick a soccer ball by himself. Near the very end of Jabour's captivity, he was allowed to use a large gymnastics room: about 8 by 15 meters in size. The ceiling of the room was quite high up, and for a short while one of the prison subdirectors uncovered windows on the ceiling, through which Jabour could see sunlight and the sky. Jabour expressed warm feelings for the person who instituted these improvements, describing him as "a very good man."

The food also improved toward the end of his more than two-year confinement. He started receiving Afghan bread with his meals, and toward the very end his meal would arrive heated. He was also very occasionally given Western food like pizza and hamburgers, as well as cookies and candy.[19]

Jabour was never permitted to contact his family, the hope for which never left him. "I told the kind 'emir' [a prison subdirector] that I was worried about my family," Jabour recalled. "He said, 'There's some things we can do, but some things we can't do.' He said he couldn't allow me to contact them."

[19] He remembers receiving chocolate bars like Snickers, Twix, Bounty, and Kit-Kats.

Secret Prison Staff

Jabour estimates that in the more than two years he was held at the prison, he saw a total of about 70 staff, consisting of some 25 guards and 45 civilian staff, including interrogators, supervisory staff, three or four doctors, and a few psychologists. He said everyone was American except for the translators, who he said were mostly Arabs. (They could have been Arab-Americans.) He said there was an Iraqi translator, three Egyptians, and a Lebanese woman.

The prison had three "emirs," or directors, during this period. The first was a bearded man, who Jabour estimates was about 40 years old; the second was a man with a shaved head who was about 38 years old (with whom Jabour played chess on occasion); and the third was an older man, about 55, who arrived in May 2006. There were also five people who seemed to have the position of subdirector. Two of them called themselves Mr. Charlie and Mr. Warren.

Jabour said that every few months he would see a psychologist. One was a man about 50 years old. Another was a woman about 55 years old; Jabour said that he spent an hour with her on one occasion.

The translators, the doctors, and the interrogators all wore normal civilian clothing. The guards, who were all men, wore black uniforms and gloves, and had black plastic masks covering their eyes. They did not carry weapons and they did not speak, except at the very end of Jabour's imprisonment, when they spoke to him in American-accented English.

Other Prisoners

Given the size of the prison where he was held, Jabour estimates that it had a capacity of 30-35 detainees. His estimate is further supported by the hundreds of books and videos in the prison library, and the large number of personnel who worked there.

Nearly all of Jabour's contact with other prisoners occurred in the first month of his captivity. He estimates that there were about 12-15 detainees held in the same area

as him during that time. "They used to bang hard on our cell doors when they brought our meals," he said. "At the beginning, they knocked on about 12-15 doors."

Jabour found a name written on the wall in his cell: Marwan al-Adeni. He also heard what he described as "terrible shouting"—"someone saying 'Help! Help!'"—during the first three days. On the third day, in a brief moment when the white noise had stopped (Jabour believes that it was a break between two generators), Jabour heard someone call out to him in Arabic: "Who are you? Don't be afraid, talk." Although Jabour had been warned not to talk to anyone, he conversed with this prisoner whenever the generator was quiet. The man said his name was Marwan al-Adeni, and that he had been held there for two months. He said that he had been arrested the previous year, and that the Americans had kept him in a secret prison that had Russian guards.[20] He said that he and six other prisoners had been brought together from that prison to the present one.

Jabour said that the two of them spoke every day for three days, until a guard came and punished them: he left Jabour shackled for an hour is a painful stress position. Jabour never spoke to Marwan al-Adeni again, but a year later, he found his name written on a mattress, and once he found his name written on a shirt. Also, during an interrogation when Jabour was first in custody, an interrogator showed him a photo that he said was of al-Adeni.[21]

Jabour also heard other prisoners talking during this time, again in the brief moment when it seemed like the generators were being switched. Several people gave their names, including Hudaifa, Adnan, Abdul Basit, and Abu Yassir al-Jazeeri. And once, during that first month, Jabour heard Ayoub al-Libi (whom he had been held with in Pakistan) calling him.

Another prisoner with whom Jabour had more indirect contact was Majid Khan, currently incarcerated at Guantanamo.[22] On December 18, 2004, the day Jabour was

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[20] It should be noted that unless the prisoners spoke Russian themselves, they might have mistaken a related language for Russian. Also, there could be Russian-speaking guards in certain countries in Central Asia.

[21] Human Rights Watch has not found other sources with information about this prisoner.

[22] See discussion above.

transferred to the large cell, he found an inscription below the cell's sink. It said: "Majid Kahn, 15 December 2004, American-Pakistani." He also received a book in May 2006 from the prison library that may have been meant for Khan. He had not requested the book, and believes it was given him by accident; inside it had a note written in good English that said: "I'm feeling depressed and upset. I want to go home to Pakistan. And I want the newspaper every day."

Cell B1, where Jabour was held for about a year and a half, was on a corridor with two other cells. For nearly a year, Jabour said—from December 2004 until late the following year—two Somalis were held in the cells next to his. He could sometimes hear them speaking to each other in Somali. When the two Somalis were moved, at least one other prisoner replaced them, but that prisoner never spoke and Jabour does not know who he was.

Twice when he was confined in that cell he heard a prisoner yelling, sounding very upset.[23] Jabour believes that both times it was a prisoner who was being led down the corridor: the sound approached and then it receded.

Jabour saw only a single other prisoner during his entire time at the secret prison. The circumstances of his meeting were surprising. At the end of February 2006, the prison subdirector, whom Jabour liked, told Jabour that he had good news. "He said they'd let me sit with another brother," Jabour recalled. "I said I don't believe you. He asked me who did I want to sit with: Someone religious? Someone funny? ... I said I wanted a funny guy who likes to joke. He said they had just the guy for me, a good guy: Yassir al-Jazeeri."[24]

He met al-Jazeeri the next day. Al-Jazeeri told Jabour that he had arrived at the prison in April 2004. "I think he was part of the group of six prisoners who were transferred with Marwan al-Adeni," said Jabour. Al-Jazeeri told Jabour that he had been in a place where they beat him badly, doing permanent damage to his arm. Once they

[23] He remembers that one of those instances was in February or March 2006.

[24] Yassir al-Jazeeri was among the 26 people on Human Rights Watch's November 2005 list of "ghost prisoners" believed to be in CIA custody. Human Rights Watch, "List of 'Ghost Prisoners' Possibly in CIA Custody," November 30, 2005 (http://hrw.org/english/docs/2005/11/30/usdom12109.htm).

played loud music for four months straight.[25] He said that the guards were Russian but the interrogators were American. He also said that there were a lot of prisoners at that prison, and the prisoners could speak to each other.

Jabour was allowed to sit and talk to Yassir al-Jazeeri about eight times, sometimes once a week, sometime once a month. Once their meetings were suspended for a month after al-Jazeeri told Jabour that some Americans had entered his room at 3 a.m. to show him photos of Abu Musaab al-Zarqawi, who was dead.[26] The two were not supposed to talk about such things. The last time Jabour spoke to al-Jazeeri was in July 2006, a week before Jabour left the facility.

Jabour also learned of other detainees in US custody via his interrogations. An interrogator showed him a photo of a Somali man whom Jabour had known previously; the photo had been taken in Jabour's cell (the first small cell). Also in US custody was an African man named Speen Ghul; the Americans showed Jabour photos of him both before and after his arrest. Other detainees that Jabour remembers seeing photos of were two men named Retha al-Tunisi and Talaha.[27]

One photo that surprised Jabour was of a boy named Talha, who appeared to be nine or ten years old.[28] His father was said to be Hamza al-Jofi, a militant leader in Waziristan.[29] When Jabour saw the photo of Talha, who was apparently in custody, he expressed amazement that the United States was holding someone so young.

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[25] Al-Jazeeri also reportedly told Jabour that once, when a Lebanese interrogator visited that prison, they played Arab music for a full day.

[26] Abu Musab al-Zarqawi was the Jordanian who led Al-Qaeda in Iraq until his death in June 2006.

[27] From Jabour's description of Talaha, it seems very likely that he is Mohammed Naeem Noor Khan, also known as Abu Talaha. Jabour said that Talaha was in his mid-to-late 20s, that he was a Pakistani but had lived in Britain; that he was quite tall, and somewhat heavy-set; that he spoke Urdu, English, and Arabic; and that he was originally from Karachi. He also said that he thought Talaha was arrested in about July 2004, because that's when the Americans began asking Jabour about him. All of these characteristics describe Noor Khan, who was on Human Rights Watch's November 2005 list of 26 people who were possibly in CIA custody. More than two-and-a-half years after his arrest, Noor Khan's whereabouts are still unknown; his father has filed suit in Pakistan demanding information about what happened to him.

[28] This is a different person than the man named Talaha, mentioned above.

[29] American interrogators allegedly questioned Abdullah Khadr about al-Jofi while Khadr was being held in secret detention in Islamabad in October 2004. See Affidavit of Abdullah Khadr, United States v. Khadr, Action No. EX0037/05, Superior Court of Justice, Toronto, 2006, pp. 25-27. Human Rights Watch has no information about his son.

Release

As the months and years passed, Jabour lost all hope of leaving prison. But on the evening of July 30, 2006, without warning, the subdirector of the prison informed Jabour that Jabour would be leaving the following day. Notably, this announcement came just one month after the US Supreme Court's landmark ruling in *Hamdan v. Rumsfeld*, in which the Court held that detainees held as enemy combatants were protected under the Geneva Conventions.[30]

Transfer to Jordan

The prison subdirector said he knew where Jabour was going to be sent, but that he could not tell him. He said there was no toilet in the plane so Jabour would have to wear diapers, and that they would make a video of his naked body to show that his body had not been harmed. He told Jabour to be ready to leave at 6 p.m.

The transfer team picked him up the next evening. They put cotton over his eyes, cotton in his ears, and rubber over that. Then they put a band around his head, a mask over his face, and head phones over his ears. His hands were cuffed in front and his legs were shackled. A belt was put around his legs, above the knees, and his handcuffs were attached to it. "I felt like a mummy," Jabour said.

They brought Jabour outside to a car, and laid him down in it. Jabour is fairly certain that another prisoner was next to him. The car drove for about an hour.

Jabour was brought outside and put in a chair, and he heard three shots. "I was afraid," he said. "I thought they were shooting people." The team was very aggressive with him, increasing his fear.

Suddenly they removed all of his wrappings and took off all his clothes. When his eyes opened, he saw a man pointing a video camera at him. Then the transfer team put a diaper on him, and put the same outfit back on, except this time they used plastic handcuffs.

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[30] Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006).

He could only feel the airplane; he could not see it, but it seemed to him to be a small civilian jet. The seats faced forward, as in a normal passenger aircraft. In the plane, during the flight, a doctor took his blood pressure. The flight lasted about three-and-a-half to four hours.

Detention in Jordan and Israel

After the plane landed, Jabour was driven in a car for about 40 minutes and then brought inside a building. His handlers sat him down and began taking off the wrappings that covered him. Someone said to him in Arabic, "Keep your eyes closed. Now open them slowly."

When Jabour opened his eyes he saw uniformed soldiers as well as men in civilian clothing. He could also see framed photos of King Hussein and King Abdullah, and he guessed that he was in Jordan. After questioning, he was sent to a cell, where a guard finally told him that he was in Amman, Jordan. Jabour later found out that he was being held at the headquarters of the Jordanian intelligence services.

A couple of weeks later, on about August 14, he was visited by a representative of the International Committee of the Red Cross (ICRC). The ICRC representative was the first independent monitor that Jabour had seen in two-and-a-half years of imprisonment. "He was very surprised by my story," Jabour said. Jabour gave the ICRC representative the contact information for relatives who lived in Jordan. Two weeks later, a group of Jabour's family members, some of whom had flown in from abroad, came to the detention facility on visiting day and were allowed to speak to Jabour for a short while. "I was overjoyed to see them," Jabour later told Human Rights Watch.

While in Jordanian custody, Jabour was also allowed to send letters to his wife and children, his first contact with them in more than two years.

On September 18, 2006, the Jordanians transferred Jabour to Israeli custody. That morning, they told Jabour that he was being released. "They said congratulations, I was free," Jabour said. "But I was still in handcuffs. And then they took me to a car and drove me to the King Hussein Bridge [on the border of Jordan and the Israeli-

occupied West Bank]." Israeli agents were waiting for Jabour at the bridge, and the Jordanians handed him over to them.

A few days after his transfer to Israel, Jabour was allowed to see a lawyer, and soon after that he was brought before a judge. After six weeks in Israeli custody, he was released into Gaza, where some of his family members lived. Two-and-a-half years after he was first arrested, he was finally able to speak to his wife and children on the phone.

The CIA's Secret Detention Program

The detention and interrogation program in which Jabour was held was operated by the US Central Intelligence Agency (CIA). It was authorized under a classified September 17, 2001 presidential directive, and operated in close secrecy for nearly five years.[31]

As Jabour's case illustrates, prisoners in the CIA program have been "disappeared," held in acknowledged detention in secret facilities, and barred from communicating with family members, legal counsel, or anyone outside. Although the International Committee of the Red Cross has repeatedly expressed concern about being denied access to detainees in CIA custody, the US government has refused to allow them to visit such facilities.[32]

In a televised speech in September 2006, just before the anniversary of the September 11 terrorist attacks, President George W. Bush publicly acknowledged that the CIA had been secretly detaining suspected terrorists in facilities outside of the United States. The president said that he could not reveal "the specifics of this program, including where these detainees have been held and the details of their confinement." Instead, he dedicated most of the speech to lauding the program's accomplishments. While making the increasingly hollow claim that "the United States does not use torture," he described several cases where the CIA used "an alternative set of procedures" to obtain information from detainees who were resisting interrogation. Bush said: "I cannot describe the specific methods used—I think you understand why—if I did, it would help the terrorists learn how to resist questioning, and to keep information from us that we need to prevent new attacks

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[31] In response to a lawsuit filed by the American Civil Liberties Union (ACLU), the US government recently acknowledged the existence of the September 17 directive, after having for several years refused to confirm or deny that such a document existed. See ACLU, "CIA Finally Acknowledges Existence of Presidential Order on Detention Facilities Abroad," November 14, 2006. It has refused to make the document public, however, or even provide it to members of Congress. See "Leahy 'brushed off' on secret terror docs," UPI, January 3, 2007.

[32] See "US bars access to terror suspects," BBC News, December 9, 2005; ICRC, "Developments in US policy and legislation towards detainees: the ICRC position," October 19, 2006 (ICRC President Jakob Kellenberger stating that "the ICRC had repeatedly expressed concern about detainees in undisclosed detention and had requested access to them").

on our country. But I can say the procedures were tough, and they were safe, and lawful, and necessary."[33]

As discussed below, interrogation methods reportedly used in CIA secret prisons included torture and other cruel and inhuman treatment—and were anything but lawful.

Discovering the Program

President Bush's speech was the most important official acknowledgement of the CIA's detention program, but it was not the first time that information about secret CIA detention had been made public. Indeed, reports that suspected al Qaeda operatives were being held by the CIA in "undisclosed locations abroad" began circulating in 2002.[34]

The first official acknowledgement that such reports were true came with the federal prosecution of Zacarias Moussaoui for the September 11 attacks.[35] In February 2003, the federal district judge hearing the Moussaoui case ruled that the government had to allow Moussaoui's lawyers to question Ramzi bin al-Shibh, who was allegedly a key figure in the September 11 attacks, and who had information that tended to exculpate Moussaoui from responsibility in the attacks. Because defendants have a constitutional right of access to exculpatory witnesses in the government's custody, the government had to admit that it was holding bin al-Shibh in a secret location overseas. The government argued, however, that allowing Moussaoui's counsel to question bin al-Shibh would seriously interfere with bin al-Shibh's interrogation. Although the district court rejected the government's claim, ruling that questioning via closed-circuit video should be allowed, the Court of Appeals for the Fourth Circuit

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[33] White House, Office of the Press Secretary, "President Discusses Creation of Military Commissions to Try Suspected Terrorists," September 6, 2006.

[34] See, for example, "Getting al Qaeda to talk," CNN.com, September 17, 2002 (discussing the detention of Ramzi bin al-Shibh and Omar al-Faruq); "'Appropriate pressure' being put on al Qaeda leader," CNN.com, March 3, 2003 (stating that CIA had brought Khalid Shaikh Mohammed, who was arrested in Pakistan, to an undisclosed location outside of the United States).

[35] Moussaoui, a French citizen of Moroccan descent, was indicted in December 2001 on charges of conspiring with other members of al Qaeda to hijack planes and fly them into the World Trade Center and the Pentagon. He later pleaded guilty and was sentenced to life in prison.

later reversed the district court's decision and barred all access to bin al-Shibh.[36] A similar issue later arose in the federal prosecution of Uzair Paracha.[37]

More detailed and direct accounts of the CIA's secret detention and interrogation program emerged in 2004 and 2005 from former detainees. Most notably, in June 2004, Khaled el-Masri, a German citizen of Lebanese descent, told German police about his kidnapping, abuse, and secret detention. El-Masri was arrested by Macedonian agents on December 31, 2003, on the Serbia-Macedonia border, held secretly for nearly a month in a hotel in Skopje, then picked up by US agents and flown to Afghanistan, where he spent four months in unacknowledged detention. At the time the story was made public, el-Masri's lawyer said that he believed el-Masri had been held by the CIA. When journalists interviewed CIA officials regarding el-Masri's claims, the officials refused to either confirm or deny that he had been held.[38]

Later in 2005, three Yemeni former detainees told Amnesty International about their experiences in CIA detention, and a number of Guantanamo detainees told their legal counsel that prior to their transfer to Guantanamo they had been held in a secret "dark prison" in Kabul, Afghanistan.[39] All of these accounts had certain common characteristics, including descriptions of interrogators and prison directors who spoke American-accented English, black uniformed and masked guards, flights in which the detainee was placed in diapers and wrapped up like a package, and various forms of physical and mental abuse.

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[36] The access question eventually involved several other suspected members of al Qaeda (including Khalid Sheikh Mohammed and Tawfiq bin Attash), all of whom were transferred to Guantanamo in September 2006. The US government was so worried that the courts might grant Moussaoui's counsel some form of access to these detainees that it cited the Mousaoui case as a reason for denying detainee access to the 9/11 Commission. See Thomas H. Kean and Lee H. Hamilton, *Without Precedent: The Inside Story of the 9/11 Commission* (New York: Alfred A. Knopf, 2006), p. 121.

[37] In the Paracha prosecution, the defendant sought access to Majid Khan and Ammar al-Baluchi, both of whom were transferred to Guantanamo in September 2006. The defendant was convicted in November 2005 of providing material support to al Qaeda.

[38] Don Van Natta Jr. and Souad Mekhennet, "German's Claim of Kidnapping Brings Investigation of US Link," *New York Times*, January 9, 2005.

[39] Amnesty International issued a series of reports based on the Yemenis' description of their experiences. See, for example, Amnesty International, "USA/Yemen: Secret Detention in CIA 'Black Sites,'" AMR 51/177/2005 (November 2005). And Human Rights Watch issued a press release about the "dark prison." Human Rights Watch, "US Operated Secret 'Dark Prison' in Kabul," December 19, 2005.

Relying on flight logs and information from plane spotters (people who watch aircraft arrivals and departures at airports), journalists and human rights investigators were able to trace a number of the flights by which the CIA allegedly transported prisoners.[40]

Yet, despite mounting evidence of the CIA's secret prison program, the Bush administration refused to discuss its operations. Indeed, it was reported that the administration did not describe the program in any real detail to the congressional intelligence committees tasked with providing oversight of the CIA's activities.[41] Even when the *Washington Post* published a front-page news story describing the history and scope of the detention program in November 2005—a piece reportedly based on accounts by current and former intelligence officials—not a single administration official spoke about the program on the record.[42]

According to the *Washington Post*, the secret detention program had at various times included sites in eight countries, including Thailand, Afghanistan and several democracies in Eastern Europe. Although at the request of the US government the *Washington Post* did not name the Eastern European countries where the prisons were located, Human Rights Watch released information pointing to Poland and Romania as among the sites of detention facilities.[43] A few weeks later, ABC News reported that at least 11 "High Value Targets" had been held in CIA custody in Poland.[44]

Based on information from current and former intelligence sources, a number of journalists have described the interrogation methods used in CIA facilities. These

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[40] The plane that brought el-Masri from Skopje to Kabul, for example, was a Boeing Business Jet whose registration number was N313P. For detailed accounts of how the CIA used civilian jets to transport prisoners both to its own prisons and to foreign prisons, see Stephen Grey, *Ghost Plane: The True Story of the CIA Torture Program* (New York: St. Martin's Press, 2006), and Trevor Paglen and A.C. Thompson, *Torture Taxi: On the Trail of the CIA's Rendition Flights* (Hoboken, Melville House Publishing, 2006).

[41] Congressional intelligence committees were reportedly briefed about the existence of the CIA detention program, but they were not, for example, informed of the locations of the prisons. "Bush defends secret prisons, harsh interrogations," Asheville Global Report, September 14-20, 2006. Notably, in response to President Bush's September 6, 2006 speech, Senator John D. Rockefeller IV, vice-chairman of the Senate Intelligence Committee, complained that Bush had "withheld details of the CIA detention and interrogation program from the congressional intelligence committees." Press Statement, "Rockefeller Responds to President's Decision to Bring Captured Al-Qaeda Terrorists to Trial," September 6, 2006.

[42] Dana Priest, "CIA Holds Terror Suspects in Secret Prisons," *Washington Post*, November 2, 2005. Priest later won a Pulitzer prize for her reporting on the CIA's secret prison program.

[43] Human Rights Watch, "Statement on US Secret Detention Facilities in Europe," November 7, 2005.

[44] See "List of 12 Operatives Held in CIA Prisons," ABC News, December 5, 2005 (stating that, among others, Khalid Sheikh Mohammed, Hassan Ghul, and Mohammed Omar Abdel-Rahman were held in Poland).

"enhanced interrogation techniques," as the CIA reportedly called them, included extended sleep deprivation combined with forced standing, as well as exposure to extreme cold.[45] The CIA also reportedly employed waterboarding, a torture method by which the prisoner is strapped to a board and made to feel like he is drowning. It is believed that several of the 14 prisoners transferred to Guantanamo in September were subject to waterboarding.[46]

The Pakistan Connection

Jabour's experience of arrest in Pakistan and subsequent "disappearance" into CIA custody was far from unique. Indeed, it appears that a large majority of the prisoners held by the CIA were originally arrested in Pakistan, often during joint U.S.-Pakistani operations. Of the 14 high-level CIA detainees transferred to Guantanamo in September 2006, for example, nine were picked up in Pakistan.[47] And most of the other people who are thought to have been in CIA custody were arrested in Pakistan.

The Pakistani authorities have made no secret of the fact that they have handed over several hundred terrorism suspects to the United States, boasting of the arrests and transfers as proof of Pakistan's cooperation in US counterterrorism efforts.[48] While the majority of these detainees were transferred into US military custody in Afghanistan or at Guantanamo,[49] or were transported to third countries via the CIA's rendition program,[50] some substantial number of them disappeared into CIA

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[45] See Brian Ross and Richard Esposito, "CIA's Harsh Interrogation Techniques Described," ABC News, November 15, 2005. ABC News reported that these techniques were first authorized in mid-March 2002.

[46] See ibid.; Suskind, *The One Percent Doctrine*, p. 115.

[47] They are: Zine Abd El Dine (aka Abu Zubaydah), Ramzi bin al-Shibh, Mustafa Ahmad al-Hawsawi, Khalid Sheikh Mohammed, Majid Khan, Ali Abd al-Aziz Ali (aka Ammar al-Baluchi), Walid bin Attash (aka Khallad), Ahmed Khalfan Ghailani, and Abu Faraj al-Libbi.

[48] Available information indicates that somewhere between 400 and 800 people were transferred from Pakistani to US custody between late 2001 and the end of 2005. See, for example, South Asia Terrorism Portal, "443 Al Qaeda suspects handed over to US," January 7, 2003; Dr. Shoaib Suddle, Director General, National Police Bureau of Pakistan, "Fighting International Terrorism: The Role of Pakistan as a Frontline State," February 13-14, 2006. President Pervez Musharraf himself has acknowledged that Pakistan handed over 369 detainees. Pervez Musharraf, *In the Line of Fire* (New York: Free Press, 2006).

[49] According to one study, at least 36 percent of the detainees brought to Guantanamo (that is, 270 people) were arrested in Pakistan, and possibly as many as half (i.e., 380 or more people) were arrested there. Mark Denbeaux and Joshua Denbeaux, "Report on Guantanamo Detainees," Seton Hall Public Law Research Paper No. 46, February 2006, p. 14.

[50] Much has been written about the CIA's rendition program (its program of delivering detainees without legal process to countries where they often face torture), which is closely related to its secret prison program. See, for example, Stephen Grey, *Ghost Plane*; Jane Mayer, "Outsourcing torture: The secret history of America's 'extraordinary rendition' program," *New Yorker*,

custody.[51] Family members have filed suit in the Pakistani courts in some cases, but without knowing whether their relatives remain in Pakistani custody, are in US custody, or are being held elsewhere.[52]

February 14, 2005; Amnesty International, "Below the radar: Secret flights to torture and 'disappearance,'" AMR 51/051/2006, April 5, 2006; Editorial, "Torture by Proxy," *New York Times*, March 8, 2005.

[51] Human Rights Watch has the names of dozens of people who were arrested in Pakistan and may have been handed over to the CIA.

[52] Some cases have involved more than one missing person, including people who were believed to have "disappeared" into CIA custody, at least for a time, people in Pakistani custody, and people who have since turned up at Guantanamo. For example, the sister of Khalid Sheikh Mohammed filed suit seeking information about her brother Khalid, her son Ali Abdul Aziz Ali, her nephew Musab Aruchi (aka Abdul Karim Mehmood), and other family members. The first two men are now known to be at Guantanamo, after having spent years in CIA custody. Aruchi's whereabouts are unknown, although it is thought that he was in CIA detention for a time. See "Interior ministry not aware of Khalid Sheikh's whereabouts," *The News* (Pakistan), January 26, 2007.

Former Detainees: Where Are They Now?

It is not known precisely how many detainees had been held in the CIA's secret prison program at some point prior to September 2006, but it is certain that there were many more than 14 of them.

Estimates of the number of detainees held by the CIA over the course of the program vary. The *Washington Post* described a two-tier system of detention, with some 30 "major terrorism suspects" being held at high-security prisons operated exclusively by CIA personnel, and an additional 70 less important suspects being transferred to prisons run by other countries' intelligence services.[53] The major suspects, also known as "High Value Targets," were alleged top al-Qaeda leaders, not "foot soldiers."[54]

The picture emerging from detainee accounts, however, suggests that these numbers are understated, and that the true picture is more complex. For example, at the prison in Afghanistan where Khaled el-Masri was held, the guards were Afghan, but the interrogators, the main director, and the people in charge of prisoner transport appeared to be CIA.[55] So while the prisoners had daily contact with Afghan personnel, all of the important decisions regarding detention, treatment, and release were made by Americans.

And at the so-called Dark Prison in Afghanistan, which appears to have been operated solely by CIA personnel, there were a substantial number of detainees who were not top terrorism suspects. Human Rights Watch knows of some 20 prisoners previously held at that facility who are currently held at Guantanamo, as well as a former detainee who was released from Guantanamo in 2004.[56] The majority of

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[53] Stephen Grey estimates that hundreds of detainees were handed over to other countries, while "less than three dozen at any time" were held in CIA prisons. *Ghost Plane*, p. 240.

[54] High Value Target (HVT) is a US military term. The loss of High-Value Targets "would be expected to seriously degrade important enemy functions throughout the friendly commander's area of interest." Defense Technical Information Center (undated) (available at: http://www.dtic.mil/). Most of the 14 detainees in CIA custody who were transferred to Guantanamo in September 2006 had been deemed High Value Targets.

[55] Human Rights Watch interview with Khaled el-Masri, Ulm, Germany, May 26, 2006.

[56] This group includes Mohammad Nasir Yahya Khusruf (who is about 60 years old), Abd al-Salam al-Hila, Musab Omar Ali Al Mudwani, and Bashir Nasir Ali Al Marwalah, among others.

these prisoners (and obviously the one who was released) would not be considered major suspects.

Similarly, prisoners such as Marwan Jabour and the three Yemeni former detainees interviewed in 2005 by Amnesty International were far from top suspects—they were eventually released without charge. Yet they too were held in prisons that seemed to have only American staff, as well as the extreme high-security arrangements characteristic of the CIA.

Missing Detainees

There is no comprehensive accounting of CIA detainees. But based on detainee testimony, press articles, and other sources, Human Rights Watch has put together a list of 16 people whom we believe were once held in CIA prisons and whose current whereabouts are unknown. We have also compiled a separate list of 22 people who were possibly once held in CIA prisons and whose current whereabouts are unknown.[57]

The people listed below—by name, nationality, and presumed place and date of arrest—are believed to have once been held in secret CIA prisons:

1. Ibn al-Shaykh al-Libi (Libyan) (Pakistan, 11/01)[58]
2. Mohammed Omar Abdel-Rahman (aka Asadallah) (Egyptian) (Quetta, Pakistan, 2/03)
3. Yassir al-Jazeeri (Algerian) (Lahore, Pakistan, 3/03)
4. Suleiman Abdalla Salim (Kenyan) (Mogadishu, Somalia, 3/03)
5. Marwan al-Adeni (Yemeni) (arrested in approximately 5/03)
6. Ali Abd al Rahman al Faqasi al Ghamdi (aka Abu Bakr al Azdi) (Saudi) (Medina, Saudi Arabia, 6/03)
7. Hassan Ghul (Pakistani) (northern Iraq, 1/04)
8. Ayoub al-Libi (Libyan) (Peshawar, Pakistan, 1/04)
9. Mohammed al Afghani (Afghan born in Saudi Arabia) (Peshawar, Pakistan, 5/04)
10. Abdul Basit (probably Saudi or Yemeni) (arrested before 6/04)

[57] It should be emphasized that the level of secrecy surrounding the CIA's prison program remains extremely high, and the obstacles to obtaining this type of information are daunting. In short, there may well be many other former CIA detainees of whose existence nobody outside the program knows.

[58] It is believed that al-Libi was transferred from CIA custody to Libya in early 2006, but this has not been confirmed.

11. Adnan (arrested before 6/04)
12. Hudeifa (arrested before 6/04)
13. Mohammed Naeem Noor Khan (aka Abu Talaha) (Pakistani) (Lahore, Pakistan, 7/04)
14. Muhammad Setmarian Naser (Syrian/Spanish) (Quetta, Pakistan, 11/05)
15. Unnamed Somali (possibly Shoeab as-Somali or Rethwan as-Somali)
16. Unnamed Somali (possibly Shoeab as-Somali or Rethwan as-Somali)

In addition, the following people may have once been held in secret CIA prisons:

1. Abd al-Hadi al-Iraqi (presumably Iraqi) (1/02)
2. Anas al-Liby (Libyan) (Khartoum, Sudan, 2/02)
3. Retha al-Tunisi (Tunisian) (Karachi, Pakistan, early- to mid-2002)
4. Sheikh Ahmed Salim (aka Swedan) (Tanzanian) (Kharadar, Pakistan, 7/02)
5. Saif al Islam el Masry (Egyptian) (Pankisi Gorge, Georgia, 9/02)
6. Amin al-Yafia (Yemeni) (Iran, 2002)
7. _ al-Rubaia (Iraqi) (Iran, 2002)
8. Aafia Siddiqui (Pakistani) (Karachi, Pakistan, 3/03)
9. Jawad al-Bashar (Egyptian) (Vindher, Balochistan, Pakistan, 5/03)
10. Safwan al-Hasham (aka Haffan al-Hasham) (Saudi) (Hyderabad, Pakistan, 5/03)
11. Abu Naseem (Tunisian) (Peshawar, Pakistan, 6/03)
12. Walid bin Azmi (unknown nationality) (Karachi, Pakistan, 1/04)
13. Ibad Al Yaquti al Sheikh al Sufiyan (Saudi) (Karachi, Pakistan, 1/04)
14. Amir Hussein Abdullah al-Misri (aka Fazal Mohammad Abdullah al-Misri) (Egyptian) (Karachi, Pakistan, 1/04)
15. Khalid al-Zawahiri (Egyptian) (South Waziristan, Pakistan, 2/04)
16. Musaab Aruchi (aka al-Baluchi) (Pakistani) (Karachi, Pakistan, 6/04)
17. Qari Saifullah Akhtar (Pakistani) (arrested in the UAE, 8/04)
18. Mustafa Mohamed Fadhil (Kenyan/Egyptian) (eastern Punjab, Pakistan, 8/04)
19. Sharif al-Masri (Egyptian) (Pakistan border, 8/04)
20. Osama Nazir (Pakistani) (Faisalabad, Pakistan, 11/04)
21. Osama bin Yousaf (Pakistani) (Faisalabad, Pakistan, 8/05)
22. Speen Ghul (from Africa) (Pakistan)

The crucial, unanswered question is: where are all these detainees now? One concern is that the US may have transferred some of them to foreign prisons where for practical purposes they remain under CIA control. Another worrying possibility is that prisoners were transferred from CIA custody to places where they face a serious risk of torture, in violation of the fundamental prohibition on returns to torture. On the latter question, it is worth noting that some of the missing prisoners are from Algeria, Egypt, Libya, and Syria, countries where the torture of terrorism suspects is common.

The CIA Program and Human Rights Violations

In his September 6, 2006 speech, President Bush stated that the CIA's detention and interrogation program had been "subject to multiple legal reviews by the Department of Justice and CIA lawyers," and had "received strict oversight by the CIA's Inspector General." But if the CIA program passed scrutiny, as the President suggested, then that raises serious questions about the legal review provided by the responsible government agencies on matters of national and international consequence. By international human right or humanitarian law standards, the CIA program was illegal to its core.

In secretly detaining and abusing prisoners like Marwan Jabour, the US government violated a host of fundamental human rights norms. Enforced disappearance—encompassing arbitrary, secret and incommunicado detention—and torture and other cruel, inhuman and degrading treatment are all prohibited under international human rights law.

Enforced Disappearance

The International Convention for the Protection of All Persons from Enforced Disappearance (the Convention on Enforced Disappearance) defines "enforced disappearance" as:

> the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.[59]

[59] International Convention for the Protection of All Persons from Enforced Disappearance, adopted by the U.N. General Assembly on December 20, 2006, opened for signature on February 6, 2007, art. 2. The treaty will enter into force 30 days after 20 states have ratified it.

Although the newly adopted convention has yet to enter into force, its definition of enforced disappearance is consistent with definitions contained in a number of earlier international instruments.[60]

When the Convention on Enforced Disappearance was opened for signature on February 6, 2007, 57 countries signed immediately. Yet, although it had actively participated in the drafting of the convention, the United States was not among the signatories. State Department spokesman Sean McCormack said that the United States had not signed because the convention as adopted "was not one that met our needs and expectations," but he did not further elaborate.[61]

International law bans "disappearances" in all circumstances. The Convention on Enforced Disappearance states that, "No exceptional circumstances whatsoever, whether a state of war or a threat of war . . . or any other public emergency, may be invoked as a justification for enforced disappearance." The convention bars secret detention and requires states parties to hold all detainees in officially recognized places of detention, maintain detailed official records of all detainees, authorize detainees to communicate with their families and legal counsel, and give competent authorities access to detainees.

The practice of enforced disappearance constitutes a grave threat to a number of human rights, including the right to life, the prohibition on torture and cruel, inhuman, and degrading treatment, the right to liberty and security of the person, and the right to a fair and public trial.[62] The UN Working Group on Enforced

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[60] See "Report Submitted by Mr. Manfred Nowak, Independent Expert Charged with Examining the Existing International Criminal and Human Rights Framework for the Protection of Persons from Enforced or Involuntary Disappearances, pursuant to Paragraph 11 of Commission Resolution 2001/46" (Geneva: United Nations, 2002) E/CN.4/2002/71. For example, the Declaration on the Protection of all Persons from Enforced Disappearance, adopted by the U.N. General Assembly in 1992, states that enforced disappearances occur when:

> persons are arrested, detained or abducted against their will or otherwise deprived of their liberty by officials of different branches or levels of Government ... followed by a refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of their liberty, which places such persons outside the protection of the law.

[61] US State Department, Daily Press Briefing, February 6, 2007.

[62] See International Covenant on Civil and Political Rights, articles 6(1), 7, 9, and 14(1). For a detailed discussion of the human rights violations committed by "disappearances," see United Nations Commission on Human Rights, "Report submitted January 8, 2002, by Mr. Manfred Nowak, independent expert charged with examining the existing international criminal and human rights framework for the protection of persons from enforced or involuntary disappearance, pursuant to paragraph 11 of Commission resolution 2001/46," E/CN.4/2002/71, p. 36.

Disappearances has long recognized that the crime of enforced disappearance "is a continuous crime until the fate or whereabouts of the disappeared person becomes known."[63] Therefore, persons "disappeared" in US custody who have since been transferred elsewhere remain the legal obligation of the United States so long as their fate or whereabouts remain unknown.

Moreover, enforced disappearance not only violates the basic rights of the "disappeared" person, it inflicts severe mental pain and suffering on members of that person's family.[64] Besides harming Jabour himself, his secret detention meant that his three children were left not knowing whether they still had a father, and his wife not knowing whether she still had a husband. This uncertainty compounds the impact of the loss.

Notably, the UN Working Group on Arbitrary Detention has expressed grave concern about the US government's use of secret prisons to hold suspected terrorists, concluding that detention under such conditions is "a serious denial of [the detainees'] basic human rights and is incompatible with both international humanitarian law and human rights law."[65]

To help guarantee their protection from abuse, detainees should be held in officially recognized places of detention. The prisoners' names and the place of their detention, as well as the names of the persons responsible for their detention, should be kept in registers readily available and accessible to concerned persons, including relatives and friends. In addition, "accurate information on [the prisoners'] custody and whereabouts, including transfers, [should be] made promptly available to their relatives and lawyers or other persons of confidence."[66] Finally, the time and place of all interrogations should

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[63] See, for example, Report of the Working Group on Enforced or Involuntary Disappearances, Commission on Human Rights, E/CN.4/2006/56, December 27, 2005, para. 10.

[64] For this reason, the Human Rights Committee, the U.N. body charged with monitoring the implementation of the International Covenant on Civil and Political Rights (ICCPR), has found that enforced disappearances violate article 7 of the ICCPR, which prohibits torture and cruel, inhuman or degrading treatment or punishment. See *Elena Quinteros Almeida v. Uruguay*, Communication No. 107/1981, para. 14 (July 21, 1983). Similarly, the European Court of Human Rights found that the extreme pain and suffering experienced by the mother of a "disappeared" person constituted a violation of article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which prohibits torture and inhuman or degrading treatment. *Kurt v. Turkey*, Judgment, Eur. Ct. Hum. Rts, Case No. 15/1997/799/1002, para. 134 (May 25, 1998).

[65] Report of the Working Group on Arbitrary Detention, UN Doc. E/CN.4/2006/7, December 12, 2005.

[66] Principle 6 of the U.N. Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions.

be recorded, together with the names of all those present, and this information should be available for purposes of judicial or administrative proceedings.[67]

International law also bars incommunicado detention, even when it does not constitute "disappearance."[68] And according to the Restatement (Third) of Foreign Relations Law of the United States, a state violates international law if, as a matter of state policy, it practices, encourages, or condones prolonged arbitrary detention.[69]

Torture and Other Ill-Treatment

International human rights law prohibits torture and other mistreatment of persons in custody in all circumstances, during wartime as well as peacetime. Among the relevant treaties are the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture), both of which the United States has ratified.

Prohibitions on torture and other ill-treatment are also found in other international documents, such as the Universal Declaration of Human Rights, the U.N. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, and the UN Standard Minimum Rules for the Treatment of Prisoners.

International humanitarian law (the laws of war) also prohibits torture and coerced interrogations at all times during armed conflict. This prohibition, which is found in the Geneva Conventions[70] as well as customary laws of war,[71] is reflected in US military field manuals and training manuals.[72]

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[67] "ICCPR General Comment 20 (Forty-fourth Session, 1992): Article 7: Replaces General Comment 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment," A/47/40 (1992) 193, para. 11.

[68] "ICCPR General Comment 20 (Forty-fourth Session, 1992): Article 7: Replaces General Comment 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment," A/47/40 (1992) 193, para. 11.

[69] Restatement (Third) of Foreign Relations Law, § 702, comment a.

[70] See, for example, Common Article 3 to the Geneva Conventions of 1949.

[71] See International Committee of the Red Cross, *Customary International Humanitarian Law,* (Cambridge: Cambridge Univ. Press, 2005), rule 90.

[72] See, for example, US Army Field Manual 27-10, Law of Land Warfare (1956), secs. 11 and 502.

On December 2, 2002, Secretary of Defense Donald Rumsfeld approved 16 methods for use in interrogations at Guantánamo Bay, including "stress positions," hooding, isolation, stripping, deprivation of light, removal of religious items, forced grooming (shaving of facial hair), and use of dogs. On January 15, 2003, following criticism from the Navy general counsel, Rumsfeld rescinded the December 2 guidelines, stating that the harsher techniques in those guidelines could be used only with his approval. Rumsfeld then established a working group to examine which interrogation techniques should be allowed for prisoners in Guantánamo. This study led to Rumsfeld's promulgation, on April 16, 2003, of a memo outlining techniques that could only be applied to interrogations of "unlawful combatants" held at Guantánamo. Stress positions, stripping and the use of dogs were no longer authorized.[73]

These interrogation techniques "migrated" —in the words of the Schlesinger report—to Iraq and Afghanistan, where they were regularly applied by US personnel to detainees.[74] After the Abu Ghraib photos were made public in April 2004, the Bush administration repudiated and eventually replaced the August 1, 2002 Department of Justice memo that had provided the legal rationale for the approved interrogation methods.

Nevertheless, such restrictions on interrogation methods apparently did not apply to the CIA. The Bush administration and the Justice Department reportedly gave the CIA the authority to use additional techniques, including "waterboarding" (mock drowning).[75] In January 2005, Attorney General-designate Alberto Gonzales claimed in a written response during confirmation hearings that the international legal prohibition on cruel, inhuman or degrading (CID) treatment did not apply to US personnel in the treatment of non-citizens abroad, indicating that no law would prohibit the CIA from engaging in CID treatment when it interrogates non-Americans outside the United States.

In December 2005 Congress enacted—over the Bush administration's objections—the Detainee Treatment Act, which included the "McCain amendment" that prohibits the use of cruel, inhuman, or degrading treatment by any US official operating

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[73] See generally, Human Rights Watch, "Getting Away with Torture?," vol. 17, no. 1(G), pp. 11-13.

[74] James R. Schlesinger, Harold Brown, Tillie K. Fowler, Gen. Charles A. Homer, and Dr. James A. Blackwell, Jr., *Final Report of the Independent Panel to Review DoD Detention Operations* ("Schlesinger report"), August 2004, p. 7.

[75] Dana Priest, "CIA Puts Harsh Tactics on Hold," *The Washington Post*, June 27, 2004; James Risen, David Johnston and Neil A. Lewis, "Harsh CIA Methods Cited in Top Qaeda Interrogations," *The New York Times*, May 13, 2004.

anywhere in the world. And in June 2006, the Supreme Court ruled in *Hamdan v. Rumsfeld* that the US government was required to treat al Qaeda detainees humanely in accordance with the provisions of Common Article 3 to the Geneva Conventions.

The Defense Department then ordered the military to ensure that all its practices complied with these standards and announced new rules repudiating many abusive interrogation methods, including "waterboarding," painful stress positions, and prolonged sleep deprivation or exposure to cold. However, the Bush administration simultaneously proposed legislation effectively rewriting the humane treatment standards of Common Article 3 to permit the CIA to continue using the abusive interrogation techniques now banned by the Pentagon. Congress ultimately rejected the administration's proposal, but with mixed results. In the Military Commissions Act of 2006, Congress retained most of the War Crimes Act of 1996, which exposes interrogators to criminal prosecution for torture and "cruel and inhuman treatment" (defined as conduct that causes serious physical or mental pain or suffering). However, the law narrowed prosecutable offenses under the War Crimes Act by creating a higher threshold for inflicting serious physical pain or suffering, preventing prosecution of interrogators for non-prolonged mental abuse occurring prior to the new law.

Notably, even though the US authorities have claimed that detainees in CIA custody were treated in accordance with the law, they have been taking aggressive steps to ensure that the details of their treatment are not disclosed. The government has, to date, barred legal access to Majid Khan, one of the 14 detainees transferred to Guantanamo last September, claiming that because he was previously in CIA custody he may have "come into possession of [classified] information, including locations of detention, conditions of detention, and alternative interrogation techniques."[76] Similarly, the Military Commissions Act of 2006 and its Rules of Evidence and Procedure contain a number of provisions meant to protect the CIA's "methods and activities" from disclosure: methods and activities that are known to include "disappearance," torture, and other abuses.

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[76] In other words, the government is claiming that because Khan was held in a secret detention center, and "alternative" interrogation techniques were used on him, he should be barred from telling his lawyer about his experiences.

Conclusion

When President Bush announced in September 2006 that, as of that moment, there were no prisoners in CIA custody, he did not say that the CIA's prison program was closing permanently. Indeed, the apparent purpose of his speech was the opposite: he argued that "as more high-ranking terrorists are captured, the need to obtain intelligence from them will remain critical—and having a CIA program for questioning terrorists will continue to be crucial to getting life-saving information."[77] And when he signed the Military Commissions Act into law a few weeks later, he asserted that the legislation would "allow the Central Intelligence Agency to continue its program for questioning key terrorist leaders and operatives."[78]

President Bush is wrong on the law. Under any reasonable reading of the Detainee Treatment Act and the Military Commissions Act, the abusive treatment of detainees that characterized the CIA's detention and interrogation program is illegal. But perhaps as worrying as the President's misinterpretation of legal standards is his disregard of basic principles.

The CIA program—and the civilian leaders who created it—have inflicted tremendous harm on the reputation, moral standing, and integrity of the United States. It is time, now, to repudiate that program, and to take steps to repair the damage it has caused.

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[77] The White House, "President Discusses Creation of Military Commissions to Try Suspected Terrorists," September 6, 2006.

[78] Office of the Press Secretary, The White House, "President Bush Signs Military Commissions Act of 2006," October 17, 2006. The President also said: "When I proposed this legislation, I explained that I would have one test for the bill Congress produced: Will it allow the CIA program to continue? This bill meets that test."

Recommendations

The US government should:

- Repudiate the use of secret detention and coercive interrogation as tactics in fighting terrorism, and announce that the CIA's detention and interrogation program is being permanently discontinued;

- Disclose the location and current status of the detention facilities where Marwan Jabour was held, as well as the location and current status of all other secret detention facilities used by the CIA since 2001;

- Disclose the identities, fate, and current whereabouts of all prisoners held for any period of time at facilities operated or controlled by the CIA since 2001, and, for prisoners transferred to the custody of another government, disclose the date and location of the transfer;

- Order the release of any prisoner held in another country's prisons at the behest of the United States, or, if evidence exists of a prisoner's involvement in criminal offenses, transfer the prisoner to the United States for prosecution in US courts in accordance with internationally recognized fair trial standards;

- Hold terrorist suspects only in officially recognized places of detention where they are registered and have access to family members, lawyers, and courts; treat them in accordance with international standards on the treatment of prisoners, and either charge them promptly or release them;

- Acknowledge publicly that US domestic law (including the Detainee Treatment Act, the Military Commissions Act, and the *Hamdan* decision) bars the use of abusive interrogation techiques such as

"waterboarding," extended sleep deprivation, and forced exposure to extremes of heat and cold;

- Sign and ratify the International Convention for the Protection of All Persons from Enforced Disappearance;

- Ratify the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, which establishes a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other mistreatment.

The US Congress should:

- Hold hearings to investigate the CIA's secret detention program, with the goal of ascertaining the scope of the program, the manner in which detainees were treated (including the interrogation methods employed on them), and the fate and current whereabouts of every person ever held in the program;

- Compel the White House to provide the House and Senate intelligence committees with the September 17, 2001 presidential finding that authorized the CIA to initiate its program of secret detention and interrogation;

- Repeal the Military Commissions Act of 2006 or, at a minimum, amend it to:

    - ensure that all detainees in US custody, whether held on US territory or abroad, are guaranteed the right to habeas corpus;

    - reform the law's protections on classified "methods and activities" so that these provisions cannot be used to protect the CIA's coercive interrogation methods against disclosure;

- bar the use of statements obtained as result of coercion from military commission trials.

- Pass legislation to ensure that all secret detention centers are shut down permanently and that no one is forcibly disappeared into US custody or otherwise held incommunicado;

- Pass legislation to prohibit the return or transfer of persons to countries where they are at risk of torture or other abusive treatment, and to bar the government from relying on "diplomatic assurances" to justify such transfers;

- Press the Department of Justice to vigorously prosecute civilians—including those at high levels of authority—who are responsible for engaging in, authorizing or condoning the mistreatment of detainees.

The government of Pakistan should:

- Close any secret detention facilities that may be operating in Pakistan, register all prisoners in Pakistani custody (including those in the custody of the intelligence services), and ensure that all prisoners are brought before a judge within a short time of their arrest;

- Transfer prisoners to the US authorities in accordance with Pakistani law and only after obtaining written assurances that the prisoners will be brought before US courts, promptly charged or released, and will not be placed in indefinite detention at Guantanamo or elsewhere;

- Initiate a parliamentary investigation of the government's role in supporting and assisting CIA abuses in Pakistan.

The Italian, German, Spanish, and Portuguese judicial authorities should:

- Continue their investigations of CIA activities in their countries, focusing not only on the actions of low-level operatives, but also on the responsibility of higher-level officials who formulated detention, interrogation, and rendition policies and signed off on operations.

All governments should:

- Refuse to assist or cooperate in any way with CIA detention, interrogation, and rendition operations that violate international human rights norms;

- Disclose any information that they may have about CIA detention, interrogation, and rendition operations.

Acknowledgments

This report was written by Joanne Mariner, terrorism and counterterrorism program director at Human Rights Watch. It is based on research conducted by Mariner and John Sifton, senior terrorism and counterterrorism researcher. Additional research assistance was provided by Ali Dayan Hasan, South Asia researcher, and Matthew Goldfeder, an intern with the terrorism and counterterrorism program.

The report was reviewed and edited by Jen Daskal, US advocacy director; James Ross, senior legal advisor, and Joseph Saunders, deputy program director of Human Rights Watch.

Additional assistance was provided by Human Rights Watch associates Leeam Azulay-Yagev, Thodleen Dessources, and Tarek Radwan. Veronica Matushaj, creative director and photo editor, assisted with photography. Andrea Holley, publications director, and Grace Choi, publications specialist, prepared the report for publication. Fitzroy Hepkins, mail manager extraordinaire, handled the production of the report.

Human Rights Watch gratefully acknowledges the generous support of Atlantic Philanthropies, as well as several individual donors who made this project possible.