

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

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

## SUMMARY

# PROMISES TO KEEP

## Diplomatic Assurances Against Torture in US Terrorism Transfers

 Columbia Law School Human Rights Institute

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

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

purposes of the Convention. Indian criminal law prohibits the use of force or causing hurt to extort confession. The judicial decisions have interpreted the law to cover not only the physical hurt but the mental derangement/sufferings also. Persons violating these provisions are subject to prosecution and imprisonment.

Once Mr. Barapind is extradited to India, he will be informed about the status of the case against him for the alleged offense.

UNITED STATES DEPARTMENT OF STATE

DECEMBER 2010

## SUMMARY & KEY RECOMMENDATIONS

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

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

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

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

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

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

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

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

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

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

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

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

## I. US PRACTICE ON DIPLOMATIC ASSURANCES

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

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

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

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

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

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

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

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

## ■ US Transfer and Assurances: Law and Practice

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

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

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

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

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

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

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

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

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

— *UN experts Manfred Nowak and Martin Scheinin*

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

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

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

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

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

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

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

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

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

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

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

## II. TRANSNATIONAL GUIDANCE ON DIPLOMATIC ASSURANCES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

### ■ Lessons from the UK & Canada

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

### **UK DEPORTATIONS WITH ASSURANCES**

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

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

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

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

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

## **CANADIAN DEPORTATIONS & AFGHAN DETAINEE TRANSFER**

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

### **Security Orders and Deportations**

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

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

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

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

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

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

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

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

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

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

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

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

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

Monitoring conducted by the Canadians was ineffective. Colvin testified:

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

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

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

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

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

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

#### ■ Transparency & Accountability

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The US government should also adopt measures to ensure fair review of transfer decisions, including assurances, in immigration, extradition and military detainee cases.

In the immigration context, the US government took steps in the right direction in the case of three Rwandan nationals when, in August 2009, it shared with the individuals' attorneys the text of the assurances of humane treatment and post-

return access it received from the Rwandan government and provided them an opportunity to respond.

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

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

### ■ Systematic Post-Return Monitoring

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

### US MONITORING PRACTICES

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

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

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

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

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

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

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

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

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

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

## KEY RECOMMENDATIONS

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

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

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

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

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

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

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

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

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

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

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

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

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





In **PROMISES TO KEEP** the Human Rights Institute at Columbia Law School describes the need for institutional reform in US policy on transferring individuals to the risk of torture on the basis of “diplomatic assurances”: promises of humane treatment and access to verify conditions.

**THE US GOVERNMENT HAS FAILED TO ARTICULATE KEY PARAMETERS OF ITS ASSURANCES POLICY** and whether they are being followed, despite the Obama administration’s commitment to transparency and reform. Instead of disclosing practice, the government has generally asserted that it does not send people to be tortured. This opaque defense, eerily reminiscent of the Bush administration’s too often empty renunciations of torture, comes with a failure to establish any known legal constraints on assurances practice. Even assuming the current administration’s best intentions, institutional reform is crucial; without it, the door is left open to a reversion to abusive practice under an administration less committed to human rights principles.

**THE US SHOULD ADOPT CRUCIAL REFORMS** reflecting international human rights principles, drawing on a vast catalogue of findings, analyses and jurisprudence from UN experts and bodies and the European Court of Human Rights. It should rule out the use of assurances where torture is systematic or where the receiving government has a record of abuse against terrorism suspects.

**THE EXPERIENCES OF THE UK AND CANADA, KEY US ALLIES, SHOW THAT GREATER TRANSPARENCY AND ACCOUNTABILITY TO COURTS IS FEASIBLE** and potentially advantageous. On the other hand, their experiences reveal persistent failings in assurances-based transfers, including decision-makers’ failures to consider the clandestine nature of torture and ill-treatment in evaluating the reliability of assurances and allegations of past abuse.

**KNOWN CASES SUGGEST THAT THE US APPROACH TO VERIFYING WHETHER TORTURE HAS OCCURRED IS AD HOC AND INSUFFICIENT.** The US should adopt standards reflecting the work of torture prevention monitoring bodies and the International Committee of the Red Cross, but acknowledge that monitoring may be insufficient to protect against abuse, especially where torture is routinely practiced with impunity.