HUMAN RIGHTS WATCH

United States District Court
Middle District of Pennsylvania

SAMEH SAMI S. KHOUZAM (A 75 795 693) Petitioner, v.	CIVIL NO. 3:CV-07-0992
	(Judge Vanaskie)
THOMAS HOGAN, as Warden, York County Prison, et. al.,	ELECTRONIC FILING
Respondents.	

Declaration of Julia Hall

Julia Hall declares as follows:

1. I am an attorney admitted to practice in the state of New York and am counsel and a senior researcher in the Europe and Central Asia division at Human Rights Watch, New York, USA. Human Rights Watch is a nongovernmental, not-for-profit organization. I am the principal author of a number of Human Rights Watch research reports on diplomatic assurances and returns of suspects, including alleged terrorist and national security suspects, to risk of torture, including Cases Involving Diplomatic Assurances Against Torture: Developments Since May 2005, January 2007, http://www.hrw.org/backgrounder/eca/eu0107/; Diplomatic Assurances: Questions and Answers, November 2006, http://hrw.org/backgrounder/eca/ecaqna1106/; Still at Risk: Diplomatic Assurances No Safeguard Against Torture, April 2005, http://hrw.org/reports/2005/eca0405/; and Empty Promises: Diplomatic Assurances No Safeguard Against Torture, April 2004, http://hrw.org/reports/2004/una0404/.
2. I was the lead lawyer for Human Rights Watch as intervenor or expert in a range of cases related to the use of diplomatic assurances and violations of article 3 (prohibition against returns to risk of torture) of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter Convention Against Torture) and article 3 (prohibition against torture or inhuman or degrading treatment or punishment) of the European Convention on Human Rights and Fundamental Freedoms

(ECHR). These cases include the United Nations Human Rights Committee individual petition case of Al-Zery v. Sweden [Communication 1416/2005, CCPR/C/88/D/1416/2005 (2006)]; United Nations Committee Against Torture individual petition case of Agiza v. Sweden [Communication No. 233/2003, CAT/C/34/D/233/2003 (2005)]; the European Court of Human Rights cases of Ismoilov and Others v. Russia [pending as of July 2007 before the First Chamber; Application No. 2947/06]; Mamatkulov and Askarov v. Turkey [Grand Chamber Judgment, Application Nos. 46827/99 and 46951/99, February 4, 2005]; and the Dutch case in Netherlands (Ministry of Justice) v. Nuriye Kesbir [De Staat der Nederlanden (Ministerie van Justitie) tegen N. Kesbir, Het Gerechtshof's Gravenhage, LJN: AS3366, 04/1595 KG, January 20, 2005].

3. I provided expert testimony in May 2006 to the United Kingdom's Special Immigration Appeals Commission (SIAC) in the deportation with diplomatic assurances against torture ("memorandum of understanding") case of Omar Othman (aka Abu Qatada) [SIAC, Omar Othman (aka Abu Qatada) v. Secretary of State for the Home Department, SC/15/2005, February 26, 2007, http://www.hrw.org/backgrounder/eca/ecaqna1106/witnessstatementjuliahall.pdf] and appeared in June 2005 in Ottawa as an expert witness on diplomatic assurances and the Convention Against Torture before the Canadian Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar [Transcripts at http://www.stenotran.com/commission/maherarar/2005-06-07%20volume%2023.pdf#page=4, Hall testimony beginning at p. 5533].

Judicial Review of Diplomatic Assurances Worldwide

4. To the best of my knowledge, no other country that has absolute nonrefoulement obligations under the Convention Against Torture or a similar treaty instrument (e.g. European Convention on Human Rights) transfers a person at risk of torture without permitting him to challenge that transfer before an independent, impartial body. The person at risk of torture who is threatened with removal or other transfer (including extradition) is informed of the case against him and given the opportunity to rebut the transferring government's effort to remove him. Judicial review of the transfer entails the

production by the transferring government of any diplomatic assurances against torture received from the country of return and an evaluation by the court of the text of the assurances and the context within which the assurances were sought, negotiated, secured and alleged to be enforceable post-transfer. The person subject to transfer and/or his representative has access to the text of the assurances and any other documents that shed light on the process of negotiating and securing them.

5. The vast majority of countries that have ratified the Convention Against Torture do not rely on diplomatic assurances against torture for removals in the immigration, asylum, extradition, or other transfer contexts. Many countries view reliance upon such assurances as a way to circumvent the absolute prohibition against returning a person to a place where he is at risk of torture.
6. The United States is the only government that purports to deny a person subject to transfer the right to challenge the reliability and sufficiency of diplomatic assurances against torture before an independent, impartial body. In every other country that either currently employs or proposes employing diplomatic assurances against torture to effect transfers of suspects, judicial review of the reliability and sufficiency of the assurances is guaranteed. This group of countries, all parties to the Convention Against Torture, includes some of the US's closest allies and is comprised of Austria, Canada, Germany, Netherlands, Russia, Sweden, Switzerland, Turkey, and the United Kingdom [Human Rights Watch, Still at Risk: Diplomatic Assurances No Safeguard against Torture, April 2005]. None of these governments has claimed that judicial review of diplomatic assurances would have a "chilling effect" on future negotiations for such guarantees or would impede in general its ability to conduct foreign relations. Where sensitive matters of national security are under review, parliaments in some of these countries have mandated procedures intended to ensure the confidentiality of that information while preserving the right of the person subject to transfer to effectively challenge the diplomatic assurances.
7. The UN Committee Against Torture has criticized the US government for refusing persons subject to transfer based on diplomatic assurances against torture the right to effectively challenge the assurances in court. The

Committee Against Torture is the treaty-body tasked with monitoring the implementation in states parties of the Convention Against Torture. The Committee's jurisprudence in individual petition cases (see section below regarding Egypt's breaching diplomatic assurances in the past) and its recommendations and conclusions to states parties on convention implementation are considered authoritative interpretations of state responsibility under the convention. In July 2006, the Committee Against Torture stated that it was "concerned by the State party's [the US's] use of 'diplomatic assurances,' or other kind of guarantees, assuring that a person will not be tortured if expelled, returned, transferred or extradited to another State. The Committee is also concerned by the secrecy of such procedures including the absence of judicial scrutiny and the lack of monitoring mechanisms put in place to assess if the assurances have been honoured" [Committee Against Torture, Consideration of Reports Submitted by States Parties under Article 19: United States of America, Conclusions and Recommendations, CAT/C/USA/CO/2, July 25, 2006, p. 5, para. 21, http://daccessdds.un.org/doc/UNDOC/GEN/G06/432/25/PDF/G0643225.pdf]. The Committee recommended that the US "establish and implement clear procedures for obtaining such assurances" and provide "adequate judicial mechanisms for review" of the assurances [Id.].

Diplomatic Assurances Not an Effective Safeguard Against Torture

8. Procedural safeguards guaranteeing a person subject to removal or other transfer from US custody the right to challenge diplomatic assurances against torture are essential because the dynamics of torture, the limits of diplomacy, and the ineffectiveness of post-return monitoring all militate against the US government's presumption of protection based on such assurances.
9. The US government has secured or has attempted to secure diplomatic assurances against torture to effect transfers in a variety of contexts, including immigration removals, Guantanamo Bay repatriations, and via rendition abroad. Most of the countries from which the US has sought diplomatic assurances have long histories and continuing records of employing torture. These states include Egypt, Libya, Russia, Saudi Arabia, Uzbekistan, and Yemen. The 2007 US State Department Country Reports on

Human Rights Practices (hereinafter Country Report) concluded that in Egypt, for example, the "torture and abuse of prisoners and detainees by police, security personnel, and prison guards remained common and persistent" and that the primary methods of torture included beatings with whips and metal rods, attacks with electric prods, and sexual assault. The report also noted that "[v]ictims frequently reported being subjected to threats and forced to sign blank papers for use against themselves or their families should they in the future lodge complaints about the torture" [2007 Country Report on Egypt, http://www.state.gov/g/drl/rls/hrrpt/2006/78851.htm].

10. Diplomatic assurances cannot provide adequate protection based on the nature of torture itself. Torture is criminal activity of the most serious kind. It is practiced in secret using techniques that often defy detection, for example, sexual assault, use of electricity, psychological abuse, and mock drowning. In some countries, medical personnel in detention facilities monitor the abuse to ensure that the torture is not easily detected.
11. In many countries, including Egypt, returned persons are often held incommunicado, or without regular access to lawyers, family members, and the media. According to the 2007 US State Department Country Report on Human Rights Practices, relatives and lawyers in Egypt often were unable to obtain regular access to prisons for visits. Even when lawyers are given permission to see their clients, interviews are often conducted in the presence of prison officials and security services personnel. Whether individual visits take place in the presence of prison officials or in private, when monitors do not have universal access to all detainees in a detention facility, it is simple for prison staff and authorities to identify any single detainee who is visited and identify that detainee as having complained of torture or other abuse. Under these circumstances, detainees subjected to torture are often afraid to complain to anyone about the abuse for fear of reprisals against them or their family members.
12. The International Committee of the Red Cross (ICRC), the preeminent international monitor and advisor on prison conditions, has refused to visit particular detainees in Egyptian detention facilities and prisons without a general agreement allowing it access to all prisoners and has refused to be "involved in any process which could in any way be perceived to contribute to,

facilitate, or result in the deportation of individuals to Egypt" [Hani El Sayed Sabaei Youssef v. The Home Office, Case No. HQ03X03052, 2004 EWHC 1884 (QB), July 30, 2004, para. 26, http://www.courtservice.gov.uk/judgmentsfiles/j2758/youssef-v-home_office.htm].

13. Maher Arar, a Canadian-Syrian dual national sent back to Syria from the United States based on diplomatic assurances against torture, personally experienced the dilemma of wanting to speak to Canadian consular visitors about his torture in Syrian custody, but fearing reprisals if he did so. In September 2002 US authorities apprehended Arar at JFK airport, in transit from Tunisia through New York to Canada, where he has lived for many years. After holding him for nearly two weeks, US immigration authorities flew Arar to Jordan, where he was driven across the border and handed over to the Syrians. The US government claimed that prior to Arar's transfer, it obtained diplomatic assurances from the Syrian government that Arar would not be tortured upon return. After his release in late October 2002, Arar told a gruesome tale of abuse and torment that included severe beatings, incarceration in a tomb-like cell infested with rats, and psychological abuse. During a visit by Canadian consular officials in October 2002, Arar said that he was taken from his cell and his beard was shaved:

> The interrogation and beating ended three days before I had my first consular visit. I was told not to tell anything about the beating, then I was taken into a room for a ten minute meeting with the [Canadian] consul. The colonel was there, and three other Syrian officials including an interpreter. I cried a lot at that meeting. I could not say anything about the torture. I thought if I did, I would not get any more visits, or I might be beaten again…The consular visits were my lifeline, but I also found them very frustrating. There were seven consular visits, and one visit from members of Parliament. After the visits I would bang my head and my fist on the wall in frustration. I needed the visits, but I could not say anything there. [Maher Arar's Statement, CanWest News Service, November 4, 2003, http://www.informationclearinghouse.info/article5156.htm].

14. The final report of a special Canadian commission of inquiry into Canada's role in Arar's transfer confirmed that Arar "lived through a nightmare" of torture while imprisoned in Syria, with profound, devastating, and continuing effects on his physical, psychological, social, and economic well-being. On the issue of diplomatic assurances, the commission acknowledged that Arar's case is a clear example of the problems inherent in relying on diplomatic assurances against torture from a state that routinely practices such abuse. [Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, "Report of the Events Relating to Maher Arar," September 18, 2006, p. 176, fn. 19, http://www.ararcommission.ca/eng/AR_English.pdf].
15. If an allegation of torture is made, neither the sending nor receiving government has any incentive to acknowledge or investigate such a charge. The sending government would necessarily have to admit a violation of its absolute obligation not to transfer a person to a place where he is at risk of torture and the receiving government would have to admit a violation of the absolute prohibition against torture (see section below on Egypt's failure in the past to comply with diplomatic assurances).
16. Moreover, even if torture were established to have occurred, diplomatic assurances lack an enforcement mechanism. Diplomatic assurances are bilateral political agreements, brokered at diplomatic level. They are not treaties and have no legal character or force in law. If the assurances are breached, the sending government has no way to hold the receiving government legally accountable. Moreover, in only a handful of cases have those who suffered torture, despite assurances, been able to able get some form of redress against the governments directly or indirectly responsible for their treatment.
17. Diplomacy and international cooperation in the conduct of foreign affairs promote the overall interests of a State. While human rights may be one of those interests, it is seldom the only or the most important one, and, as a consequence, diplomacy – including that underpinning the seeking and securing diplomatic assurances in various transfer contexts – cannot be a reliable lever for human rights protection. Diplomats are often quite candid that their top priority is to ensure friendly relations with other States,

sometimes at the expense of confronting governments about possible human rights violations, including breaches of pre-agreed diplomatic assurances. The US government's request for absolute confidentiality regarding the negotiations leading up to securing diplomatic assurances is emblematic of how diplomatic "sensitivities" are privileged over human rights protection. The absence of transparency surrounding the reliability and sufficiency of diplomatic assurances thus can directly contribute to a person's risk of abuse upon return.

US Officials Admit They Have No Control Once a Person is Transferred

18. High-level US administration officials have admitted that the US has a limited capacity to enforce diplomatic assurances against torture post-transfer. On February 16, 2005, then-Director of Central Intelligence Porter J. Goss testified before Congress regarding the US's practice of transferring terrorism suspects abroad based on diplomatic assurances. He stated: "We have a responsibility of trying to ensure that they are properly treated, and we try and do the best we can to guarantee that. But of course once they're out of our control, there's only so much we can do" [Tracy Wilkinson and Bob Drogin, "Missing Imam's Trail Said to Lead from Italy to CIA," Los Angeles Times, A1, March 3, 2005].
19. Attorney General Alberto Gonzales also said in a March 2005 interview that the US State Department and CIA secure diplomatic assurances that detainees subject to transfer will be treated humanely upon return, but that once a detainee is in custody in another country, "We can't fully control what that country might do. We obviously expect a country to whom we have rendered a detainee to comply with their representations to us… If you're asking me, 'Does a country always comply?' I don't have an answer to that" [Mark Sherman, "Gonzales: No Guarantee Captives Aren't Tortured," Associated Press, March 8, 2005].
20. These striking admissions by US government officials acknowledge that once a detainee is transferred there is no way to enforce diplomatic assurances or guarantee a returnee's safety. Reliance on such unenforceable assurances is particularly dangerous for persons who will go directly into the confines of the receiving government's prison and criminal justice systems—the very locus of

the human rights abuses for which the receiving country is notorious and upon which basis the US seeks diplomatic assurances in the first place.

Post-Return Monitoring

21. The Egyptian government did not permit a visit during 2006 by the UN Special Rapporteur on Torture, who had been seeking to make an official visit since 1996. The International Committee of the Red Cross and other international and independent domestic human rights monitors do not have access to prisons or to other places of detention. In 2006, officials from the National Council for Human Rights (NCHR) who visited several prisons were the only domestic human rights actors permitted to visit detention facilities. Although Human Rights Watch lauded the Egyptian authorities for establishing the NCHR in 2004 and appointing several respected independent activists to its board, "serious issues like routine torture of persons in detention and suppression of non-violent political dissent remain unaddressed" by the Council [Human Rights Watch World Report 2005: Egypt, http://hrw.org/english/docs/2005/01/13/egypt9802.htm; see also Joshua A. Stracher, "Rhetorical Acrobatics and Reputations: Egypt's National Council for Human Rights," Middle East Report 235, Summer 2005, http://www.merip.org/mer/mer235/stacher.html ("the council's limited legal reach suggests it is unlikely to assert itself as a check on the abuse of power in Egypt")].
22. The absence of independent, universal, and transparent monitoring of places of detention increases the risk that a person subject to return to Egypt will be tortured and ill-treated—and makes it extremely difficult to track the treatment of Egyptian nationals extradited or otherwise transferred from abroad back to Egypt. The absence of any meaningful independent oversight of detention facilities generally enables governments with poor records on torture, such as Egypt, to routinely deny that torture is used and to decline to initiate investigations when allegations of torture are made. Jack Straw, then-UK Foreign Secretary, identified the nexus between such denials and the problem of holding torturing States accountable while giving oral evidence before the Parliamentary Foreign Affairs Committee in December 2005 when he explained that "the…problem with torture is that those who commit the

torture deny it to themselves as much as they deny it to other people, so to track it is very difficult…" [Unofficial transcript of proceedings, Q27 at http://www.publications.parliament.uk/pa/cm200506/cmselect/cmfaff/uc768-i/uc76802.htm].

Egypt Has Breached Diplomatic Assurances Against Torture

23. Egypt has breached diplomatic assurances against torture in the past. The UN Human Rights Committee in November 2006 concluded that Sweden's involvement in the transfer of Mohammed al-Zari to Egypt breached the absolute obligation not to transfer a person to a place where he is at risk of torture, despite assurances of humane treatment provided by the Egyptian authorities prior to his transfer. Al-Zari was transferred along with Ahmed Agiza in December 2001 and both men were subsequently tortured in Egyptian custody [Human Rights Watch, Still at Risk, pp. 57-66]. The Human Rights Committee stated that Sweden "has not shown that the diplomatic assurances procured were in fact sufficient in the present case to eliminate the risk of ill-treatment to a level consistent" with the ban on torture and other cruel, inhuman or degrading treatment or punishment [UN Human Rights Committee, Decision: Alzery v. Sweden, CCPR/C/88/D/1416/2005, November 10, 2006, para. 11.5, http://www.unhchr.ch/tbs/doc.nsf/0ac7e03e4fe8f2bdc125698a0053bf66/13fac9ce4f35d66dc125722200 49e394].
24. That decision followed a May 2005 determination by the Committee Against Torture in Ahmed Agiza's case. The Committee held that Sweden violated the ban on torture with respect to Ahmed Agiza's transfer, stating that the "procurement of diplomatic assurances [from Egypt], which, moreover, provided no mechanism for their enforcement, did not suffice to protect against this manifest risk" [UN Committee Against Torture, Decision: Agiza v. Sweden, CAT/C/34/D/233/2003, May 20, 2005, para. 13.4, http://www1.umn.edu/humanrts/cat/decisions/233-2003.html].
25. In the al-Zari and Agiza cases, it is important to note that Swedish diplomats conducted dozens of post-return monitoring visits. These visits, however, did not begin until five weeks after the men were returned to Egypt. When the former Swedish Ambassador to Egypt was asked why he let five weeks lapse

before visiting the men, he replied that the Swedes could not have visited the men immediately because that would have signaled a lack of trust in the Egyptian authorities [Swedish TV 4, Kalla Fakta Programme, May 17, 2004, English Transcript, http://hrw.org/english/docs/2004/05/17/sweden8620.htm].

26. The men complained of torture and other abuse during the first monitoring visit, but the government of Sweden redacted those complaints from the official monitoring report and failed to share that information with the Committee Against Torture. An unedited version of the first monitoring report was obtained by a Swedish television station and only made public two years after the men were returned to Egypt. In a December 2004 radio interview, Carl Henrik Ehrenkrona, chief legal adviser to the Swedish Ministry of Foreign Affairs, claimed that one reason for not communicating the men's torture allegations to the Egyptian authorities was to protect the men from reprisals from the Egyptian police [Sveriges (Swedish) Radio, Ekot Programme, December 10, 2004, copy of transcript on file with Human Rights Watch; see also Human Rights Watch, Still at Risk, pp. 65-66 (full interview)].
27. Not only did Sweden decline to visit the men during the very high risk initial period of incommunicado detention because it did not want to endanger the diplomatic relationship with Egypt, but once Swedish diplomats did visit, they covered-up torture allegations to further prevent undermining that relationship. The Egyptian government simply denied that the men were ill-treated and refused to conduct an investigation when their allegations of torture came to light. These dynamics amply demonstrate the futility of relying on diplomatic assurances against torture for transfers to countries where such abuse is not only routinely practiced, but routinely denied.
28. Other persons transferred to Egypt by the US government in reliance upon diplomatic assurances of humane treatment have alleged that they were tortured in Egyptian custody. In February 2003 Egyptian national Hassan Mustafa Osama Nasr (known as Abu Omar), was abducted in Milan and rendered to Egypt by the CIA via Aviano, a US Air Force Base. Omar was held incommunicado upon return and temporarily released from Egyptian custody in April 2004 when he called his wife and a Muslim cleric living in Italy. The Italian police intercepted those calls, during which Omar claimed he had

been tortured in an Egyptian prison, including by electric shock, leading to the loss of hearing and sustained trouble walking. [Katherine Hawkins, "The Promises of Torturers: Diplomatic Assurances and the Legality of Rendition," Georgetown Immigration Law Journal, volume 20, no. 213, pp. 251-252.]. In February 2007, Omar's lawyer reported that Abu Omar had been released from custody again. Human Rights Watch interviewed Abu Omar in March 2007 and he told us that he had been tortured in Egyptian custody. On February 16, 2007 an Italian court indicted 26 Americans, including 25 CIA agents, for their role in Abu Omar's kidnapping, enforced disappearance, and rendition to Egypt [Human Rights Watch World Report 2007, Italy Chapter, http://hrw.org/englishwr2k7/docs/2007/01/11/eu14775.htm#italy].

Transfers to Egypt in Reliance upon Diplomatic Assurances Have Been Halted

29. The US government has declined to transfer a Guantanamo Bay detainee to Egypt, despite efforts to secure diplomatic assurances against torture. According to the State Department and Department of Defense, it is the policy of the United States not to send any Guantanamo Bay detainee to a place where it is more likely than not that the detainee would be tortured upon return. In cases where there is a risk of torture, the government seeks and secures diplomatic assurances against such treatment [US Court of Appeals for District of Columbia, Ghanim-Abdulrahman al-Harbi, et al. v. Robert M. Gates, Secretary of Defense, et al., No. 07-1095, Attachment A: Declaration of Clint Williamson, Ambassador-at-Large for War Crimes, US Department of State]. Despite this process, the US government declined to transfer a former Guantanamo Bay detainee, specifically classified as "no longer an enemy combatant" (N-LEC) to Egypt due to the government's fear that he would be at risk of torture if returned. ["3 Detainees at Guantanamo are Released to Albania," Associated Press, November 18, 2006, A13, http://www.washingtonpost.com/wp-dyn/content/article/2006/11/17/AR2006111700613.html] Some detainees transferred from Guantanamo Bay to other countries in reliance on diplomatic assurances against torture have in fact been tortured and ill-treated [Human Rights Watch, The "Stamp of Guantanamo:" The Story of Seven Men Betrayed

by Russia's Diplomatic Assurances to the United States, March 2007, http://www.hrw.org/reports/2007/russia0307].

30. On December 14, 2006, a Canadian federal court ordered the government of that country to conduct a new risk assessment with respect to a January 2006 decision by the minister of immigration and citizenship to deport Egyptian national Mohammad Zeki Mahjoub. Mahjoub is a recognized refugee who has been in detention under a security certificate since June 2000 [Mohammad Zeki Mahjoub v. Minister of Citizenship and Immigration, IMM-98-06, 2006 FC 1503, December 14, 2006, p. 37, para. 97, http://cas-ncr-nter03.cas-satj.gc.ca/fct-cf/docs/IMM-98-06.pdf]. The Court concluded that the government "consistently ignored critical evidence, failed to take important factors into consideration and arbitrarily relied on selected evidence. This flawed approach can be considered nothing short of patently unreasonable with regard to the substantial risk of torture issue" [Id.]. With respect to the Egyptian government's diplomatic assurances that Mahjoub would not be tortured or otherwise ill-treated upon return, the Court agreed with Mahjoub that the government "disregarded the bulk of evidence from a multitude of sources that cited Egypt's non-compliance with assurances" [Id., p. 35, para. 88].
31. In the UK case of Hani Youssef, the government's attempts to deport four Egyptian nationals in reliance on assurances against torture was thwarted when the Egyptian authorities failed to offer guarantees of humane treatment [Human Rights Watch, Still at Risk, pp. 69-72]. Despite the Prime Minister's eagerness to secure assurances from Egypt, legal advisors in the Home Office (Interior Ministry) and Foreign and Commonwealth Office (FCO) repeatedly advised the Prime Minister that seeking and accepting such guarantees would clearly violate the UK's nonrefoulement obligations under article 3 of the European Convention on Human Rights. In a February 1999 memo, the Home Office warned that "there are a number of factors which suggest that assurances [from Cairo] would do little or nothing to diminish the Article 3 risk" [Id., p. 70].

The US has Declined to Seek Assurances in Other Cases Where a Court has Ruled that a Person Would "More Likely than Not" be Tortured on Return

32. In October 2006 the United States abandoned efforts to deport a detained Uzbek national, Bekhzod Yusupov, in reliance on diplomatic assurances against torture from the Uzbek authorities [Human Rights Watch, Cases Involving Diplomatic Assurances Against Torture: Developments Since May 2005, p. 18, http://www.hrw.org/backgrounder/eca/eu0107/eu0107web.pdf]. A US court had previously ruled that it was "more likely than not" that Yusupov, an independent Muslim, would be tortured if returned to Uzbekistan [US Department of Justice, Executive Office for Immigration Review, Decision of the Board of Immigration Appeals, In re Bekhzod Yusupov, A79 729 905-York, August 26, 2005, p. 3]. In a July 19, 2006 "Decision to Continue Detention" letter, however, the Office of Immigration and Customs Enforcement (ICE) informed Yusupov that it was pursuing assurances from the government of Uzbekistan that he would not be tortured upon return [Letter from the US Immigration and Customs Enforcement Office of Detention and Removal Operations to Bekhzod Yusupov (A79 729 905), "Decision to Continue Detention," July 19, 2006, p. 1, on file with Human Rights Watch]. The letter concluded that there was a significant likelihood of Yusupov's removal in the reasonably foreseeable future in light of the attempt to secure such assurances, and that he would remain in detention until such time as the assurances were received.
33. In a September 2006 letter, Human Rights Watch and the American Civil Liberties Union reminded the US government that "[i]t is routine for the Uzbek authorities to charge and detain political and religious dissidents (including refugees who fled the country after the May 2005 massacre in Andijan) with supporting 'illegal religious movements.' Recognizing the high risk of torture and other ill-treatment faced by dissidents charged with supporting 'illegal religious movements' in Uzbekistan, the US State Department has urged other governments not to give in to Uzbek demands to repatriate such dissidents" [Letter to US Officials regarding Diplomatic Assurances in the Case of Bekhzod Yusupov, September 7, 2006, http://hrw.org/english/docs/2006/09/07/uzbeki16454_txt.htm]. Human

Rights Watch and the ACLU argued that any assurances from the Uzbek authorities would be inherently unreliable. The US subsequently reconsidered its misguided effort and in October 2006 the State Department informed Yusupov that it was no longer seeking "no torture" assurances from the government of Uzbekistan [Human Rights Watch, Cases Involving Diplomatic Assurances Against Torture, p. 20]. Yusupov's habeas petition, filed in the Middle District of Pennsylvania (Judge Jones) in December 2006, was granted and he was released from detention in January 2007.

Transfers in Reliance on Diplomatic Assurances to Other Countries that Practice Torture Ruled in Breach of Nonrefoulement Obligation

34. In addition to the Canadian federal court in Mahjoub, courts in the United Kingdom [DD and AS v. The Secretary of State for the Home Department, SC/42 and 50/2005, April 27, 2007, http://www.bailii.org/uk/cases/SIAC/2007/42_2005.html (no deportation to Libya despite diplomatic assurances against torture) and The Government of the Russian Federation v. Akhmed Zakaev, Bow Street Magistrates' Court, Decision of Hon. T. Workman, November 13, 2003, http://www.tjetjenien.org/Bowstreetmag.htm (no extradition to Russia despite diplomatic assurances against torture)]; and the Netherlands [De Staat der Nederlanden (Ministerie van Justitie) tegen N. Kesbir, Het Gerechtshof's Gravenhage, LJN: AS3366, 04/1595 KG, January 20,2005 (no extradition to Turkey despite diplomatic assurances against torture)] have also halted extraditions and deportations to risk of torture, despite the fact that the UK and Dutch governments had secured diplomatic assurances from the receiving governments.
35. In the June 2007 UN Committee Against Torture case of Pelit v. Azerbaijan, the Committee determined that Azerbaijan's October 2006 extradition to Turkey of Elif Pelit violated Article 3 of the Convention Against Torture, despite diplomatic assurances of humane treatment from the Turkish authorities prior to her transfer [Pelit v. Azerbaijan, Communication No. 281/2005, CAT/C/38/D/281/2005, June 5, 2007, http://www1.umn.edu/humanrts/cat/decisions/281-2005.html]. Pelit, alleged by the Turkish authorities to be associated with the PKK (Kurdish

Worker's Party), had been granted refugee status by Germany in 1998 based on her claims of having been tortured in detention in Turkey between 1993 and 1996. The Committee found Azerbaijan in violation of Article 3, despite the State party's claim that it had monitored Pelit's treatment post-return and claim that in a private conversation with an Azeri embassy representative after her return, Pelit "confirmed that she had not been subjected to torture or ill-treated by the penitentiary authorities" [Id., para. 9.4]. The Committee Against Torture in Pelit questioned why the Azeri authorities failed to respect Pelit's refugee status, particularly "in circumstances where the general situation of persons such as the complainant and the complainant's own past experiences raised real issues under Article 3" [Id., para. 11].

Human Rights Experts Condemn Practice of Seeking Diplomatic Assurances

36. A number of high-level international experts have opposed reliance on diplomatic assurances against torture and ill-treatment in all transfer contexts. In a February 2006 speech, the United Nations High Commissioner on Human Rights stated categorically that the prohibition on return to risk of torture and ill-treatment is absolute and that such assurances should not be relied upon in any transfer context [Speech by Louise Arbour, UN High Commissioner for Human Rights, "In Our Name and On Our Behalf," Chatham House, February 15, 2006, http://www.chathamhouse.org.uk/pdf/research/il/ILParbour.pdf]. In a March 2006 letter from the High Commissioner opposing the establishment of guidelines for the use of assurances against torture in the Council of Europe region, the High Commissioner stated, "I strongly share the view that diplomatic assurances do not work as they do not provide adequate protection against torture and ill-treatment" [Statement by UN High Commissioner for Human Rights Louise Arbour to the Council of Europe's Group of Experts on Human Rights and the Fight Against Terrorism (DH-S-TER), March 29-31, 2006].
37. The UN Special Rapporteur on Torture has stated his firm opposition to reliance upon diplomatic assurances against torture and ill-treatment in all transfer contexts, expressing concern that this practice reflects a tendency on the part of states to circumvent the international obligation not to deport a

person if there is a serious risk that he or she might be subjected to torture [United Nations, Press Conference by United Nations Representative on Torture Convention, October 23, 2006, http://www.un.org/News/briefings/docs/2006/061023_Nowak.doc.htm (accessed July 10, 2007).

38. In a June 2006 article, Council of Europe Human Rights Commissioner Thomas Hammarberg stated:

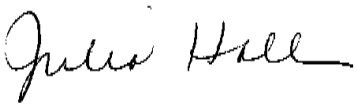
> "Diplomatic assurances," whereby receiving states promise not to torture specific individuals if returned, are definitely not the answer to the dilemma of extradition or deportation to a country where torture has been practised. Such pledges are not credible and have also turned out to be ineffective in well-documented cases. The governments concerned have already violated binding international norms and it is plain wrong to subject anyone to the risk of torture on the basis of an even less solemn undertaking to make an exception in an individual case. In short, the principle of non-refoulement should not be undermined by convenient, non-binding promises of such kinds ["Viewpoints: Torture Can Never, Ever Be Accepted," June 27, 2006, http://www.coe.int/t/commissioner/Viewpoints/060626_en.asp (accessed July 5, 2007).

39. The European Committee for the Prevention of Torture, which monitors prison conditions in the countries of the 47-member Council of Europe, has also expressed concern about reliance on diplomatic assurances in light of the absolute prohibition against torture: "Fears are growing that the use of diplomatic assurances is in fact circumventing the prohibition of torture and ill-treatment. The seeking of diplomatic assurances from countries with a poor overall record in relation to torture and ill-treatment is giving rise to particular concern" [European Committee for the Prevention of Torture, 15th General Report on the CPT's Activities, covering the period 1 August 2004 to 31 July 2005, CPT/Inf (2005) 17, paras. 38-39, http://www.cpt.coe.int/en/annual/rep-15.htm].

Conclusion

40. On the basis of my extensive research on the use of diplomatic assurances against torture, I conclude that the US government's obligations under Article 3 of the Convention Against Torture require that any person subjected to transfer from US custody in reliance on diplomatic assurances against torture from the receiving state be given access to the text of the assurances and any documents that shed light on the negotiations surrounding them and an effective opportunity to challenge those assurances before an independent, impartial body.
41. In the case of transfers to Egypt in specific, I conclude that any assurances of humane treatment offered by the Egyptian authorities should be rejected as inherently unreliable. I base that conclusion on the persistent and widespread practice of torture in Egypt in violation of the absolute prohibition against torture enshrined in the Convention Against Torture; the lack of control of the governing authorities over police and security services that perpetrate acts of torture; the lack of accountability in Egypt for acts of torture; the absence of independent, universal monitoring of places of detention; and the failure of Egypt to comply with diplomatic assurances against torture in the past. Diplomatic assurances from the Egyptian government do not provide an effective safeguard against torture and thus do not mitigate the risk faced by persons at risk of such abuse upon return. As a result, reliance on diplomatic assurances against torture from Egypt would violate the US government's Art. 3 nonrefoulement obligation under the Convention Against Torture.
42. I declare under penalty of perjury that the foregoing is true and correct.

Executed this 26th day of July, 2007.



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