



# Commentary on Prevention of Terrorism Bill 2005

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*Parliament should take a long view, and resist the temptation to grant powers to governments which compromise the rights and liberties of individuals. The situations which may appear to justify the granting of such powers are temporary—the loss of freedom is often permanent.*

U.K. Parliamentary Joint Committee on Human Rights, November 2001<sup>1</sup>

## Summary

The control orders envisioned in the Prevention of Terrorism Bill 2005 (hereafter “the Bill”) offer a seriously flawed alternative to the disastrous policy of indefinite detention under the Anti-Terrorism Crime and Security Act 2001, a policy ruled contrary to human rights law by the House of Lords Judicial Committee. Human Rights Watch acknowledges that the government has a responsibility to protect the public from the threat of terrorism. However, the government has a corresponding duty to ensure that counter-terrorism measures are fully compatible with its obligations under human rights law.

The Bill empowers the executive branch to impose what amount to criminal sanctions on the basis of a “reasonable suspicion” founded on secret evidence, and subject only to delayed and narrow judicial review. The lack of procedural safeguards seriously undermines the right to a fair trial, the presumption of innocence and the right to an effective defence. Fundamental due process rights may not be so seriously compromised without the U.K. running foul of its obligations under international human rights law.

The Bill also grants the government the power to introduce a form of control order amounting to house arrest, subject the government obtaining a new derogation from the right to liberty under article 5 of the European Convention on Human Rights. House arrest is a gross interference with liberty which impacts not only the person subject to the order, but any family members with whom he resides. It is a form of human rights abuse more often associated with apartheid South Africa and the military dictatorship in Burma than liberal democracies.

The threat from terrorism should be met through the criminal justice system. The government argues that at present it is unable to prosecute some of those whom it suspects of involvement in terrorism, because the evidence cannot be used in court. Yet the Bill fails to relax the ban on intercept evidence, despite widespread support for such a measure, and contains no other measures to facilitate such prosecutions. The absence of any initiatives makes the government’s assertion that prosecution is the “preferred approach” ring hollow.

The companion policy to control orders is the use of diplomatic assurances to enable the deportation of foreign terrorism suspects to countries where they face torture or prohibited ill-treatment. This policy is fundamentally incompatible with the absolute obligation not to expose people to torture or prohibited ill-treatment. While this issue is not addressed in the Bill under consideration, Human Rights Watch wishes to draw

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<sup>1</sup> Joint Committee on Human Rights, Second Report “Anti-Terrorism, Crime and Security Bill,” November 6, 2001, paragraph 76.

attention to its concerns about the policy. Our research indicates that such assurances are an ineffective safeguard against torture and prohibited ill-treatment. The government's policy is therefore likely to result in the return of individuals to torture, and risk the erosion of the absolute prohibition against torture and cruel, inhuman and degrading treatment and punishment.

## **Non-derogating Control Orders**

The Bill proposes two forms of control orders: those that impose such a serious restriction on human rights that they would require a fresh opt out ("derogation") from article 5 of the European Convention on Human Rights (ECHR), referred to as "derogating control orders" (Clause 2) and those that impose restrictions not deemed to require a derogation, referred to as "non-derogating" control orders (Clause 1).

Non-derogation control orders may include curfews, electronic tagging, restrictions on the use of certain items (such as a computer), restriction on the use of certain communications (such as internet), limits on people with whom the individual may associate, and travel bans. Persons subject to such orders may be subject to significant restrictions on rights guaranteed by the ECHR, including freedom of expression under Article 10, freedom of association under Article 11, the right to privacy under Article 8, and freedom of movement (potentially restricting both the right to liberty under article 5 and the right to privacy and family life under article 8). Some orders could conceivably place restrictions affecting a person's ability to work in his or her chosen field of employment or to attend services in his or her chosen place of worship.

In the view of Human Rights Watch, the serious restrictions on an individual's human rights contemplated by the Bill, render the imposition of non-derogating orders functionally equivalent to the imposition of punishment upon the determination of a criminal charge. This view is reinforced by the fact that breach of a control order is a criminal offence punishable upon conviction by up to five years imprisonment and/or a fine (Clause 6 of the Bill).

The minimum due process requirements "in the determination of...civil rights or any criminal charge" in article 6 of the European Convention on Human Rights (ECHR) require a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." A fair trial also requires equality of arms between the parties, an adversarial process and the disclosure of evidence. Further requirements for those charged with a criminal offence under article 6 include the presumption of innocence and the right to an effective defence.<sup>2</sup> These requirements reflect long-standing principles of justice in the English common law.

The control order regime laid out in the Bill, however, lacks even the safeguards required in civil proceedings under human rights law. The Bill grants the power to the Executive to impose non-derogation control orders for an indefinite period of time on the basis of

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<sup>2</sup> Similar safeguards are enshrined in the International Covenant on Civil and Political Rights.

a low standard of proof and the use of secret evidence. The scope of the review by the courts of the making, renewal or modification of these orders is limited to the narrow grounds of challenge permitted under judicial review, and in at least part through closed proceedings from which the person subject to the order and his or her lawyer of choice are excluded.

Human Rights Watch has the following principal concerns with respect to the lack of procedural guarantees:

### ***Criminal Sanctions Imposed by the Executive***

The Bill grants the Home Secretary the power to impose non-derogating control orders. Secretary of State Clarke has called these orders “preventive”. They are not. Measures that may severely restrict movement, communication and association for an extended period amount to criminal sanctions. Such sanctions should be imposed only by a competent judicial authority in proceedings that apply the criminal standard of proof, and guarantee the presumption of innocence and the right to an effective defence.

### ***Low Standard of Proof***

In taking the decision to impose a non-derogating control order, the Secretary of State must only have “reasonable grounds” for suspecting involvement in terrorism-related activity and consider that the restrictions are necessary to protect the public from the risk of terrorism (Clause 1(1)). The standard of proof for imposing a derogating control order is the “balance of probabilities”, a higher standard used in civil law (Clause 2(1)1). Both standards fall far short of the “beyond a reasonable doubt” standard in criminal law.

Even if it were argued that some lesser restrictions envisioned by the Bill would not amount to a criminal penalty, it is worth noting that the approach of the House of Lords Judicial Committee to proceedings for the imposition of Anti-Social Behaviour Orders (ASBOs). ASBOs are restrictions on an individual based on prior conduct. The orders contain requirements prohibiting a person from specific anti-social acts and from entering defined areas.<sup>3</sup> They are imposed for a minimum of two years and can include restrictions on association with named individuals and curfews. ASBOs are imposed by a magistrate upon application by local authorities and the police. Hearsay evidence is permitted. Breach of an order is a criminal offence.

In judgement of appeals in the cases of *Clingham v. Kensington and Chelsea LBC and R. (McCann and others) v. Manchester Crown Court*, the Law Lords ruled that although ASBO proceedings are essentially civil in nature, considering the seriousness of matters involved the criminal standard of proof – beyond a reasonable doubt – should be used.<sup>4</sup>

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<sup>3</sup> Anti-Social Behaviour Orders were introduced by the Crime and Disorder Act 1998. Between 1 April 1999 and 31 March 2004, 2455 ASBOs were reported to the Home Office. Home Office website [online], <http://www.homeoffice.gov.uk/crime/antisocialbehaviour/orders/index.html> (retrieved February 28, 2005).

<sup>4</sup> House of Lords Judicial Committee, *Clingham v. Royal Borough of Kensington and Chelsea; Regina v. Crown Court at Manchester Ex p McCann (FC) and Others (FC)*, October 17, 2002, [2002] UKHL 39. Full text of judgment at: <http://www.parliament.the-stationery-office.co.uk/pa/ld200102/ldjudgmt/jd021017/cling-1.htm> (retrieved February 25, 2005).

### ***Insufficient Judicial Supervision***

The scope of the judicial review of the imposition, renewal, or modification of a non-derogating control order is extremely narrow. It is not an appeal. The court is essentially called upon solely to determine whether or not the Home Secretary has acted within his powers. The court is not entitled to consider errors of fact or to substitute its findings for those of the Home Secretary. The review does not allow for full adversarial proceeding in which the evidence upon which the evidence was based may be properly tested (Clause 7, subsections 4-6).

At the time of this writing, the bill contains no timeline for court review of non-derogating control orders. Individuals subject to these orders may be forced to live under onerous restrictions on their liberty of movement, association, and communications for a considerable period of time before even the question of whether the order was *ultra vires* is considered.

### ***Reliance on Secret Evidence***

The Bill raises the prospect that control orders will be imposed on the basis of secret evidence which the person subject to the order cannot dispute. The Law Lords strongly criticised the use of secret evidence proceedings before the Special Immigration Appeals Commission (SIAC) in their December 2004 judgment. In the words of Lord Scott: “Indefinite imprisonment in consequence of a denunciation on grounds that are not disclosed and made by a person whose identity cannot be disclosed is the stuff of nightmares.”<sup>5</sup>

The schedule to the Bill sets out provisions related to rules of court. It confirms what the Home Secretary indicated to the House of Commons when announcing the government’s plans on January 26—that the system for judicial review will allow for the use of secret evidence heard in closed proceedings from which the person subject to the order and his lawyer of choice will be excluded.

According to the schedule, the rules of court governing the orders may allow “control order proceedings or relevant appeal proceedings to take place without full particulars of the reasons for decisions to which the proceedings relate being given to a relevant party to the proceedings or his legal representative” and enable “the relevant court to conduct proceedings in the absence of any person, including a relevant party to the proceedings and his legal representative” (paragraph 4(2)). Furthermore, the rules *must* allow the Secretary of State to request the non-disclosure of relevant material and the court *must* consider this request in the absence of controlled person and legal representative (paragraph 4(3)). In other words, the Government may use secret evidence to substantiate its claim of “reasonable grounds” for a control order.

The system for considering secret evidence envisaged in the Bill replicates the Special Advocates system used in the SIAC. The schedule refers to “special representation” and

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<sup>5</sup> A(FC) and Others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent); X (FC) and another (FC) (Appellants) v. Secretary of State for the Home Department (Respondent), December 16, 2004, [2004] UKHL 56, paragraph 155. See also, paragraphs 82 and 223.

states that a lawyer may be appointed to represent the interests of the controlled person in closed proceedings from which the controlled person and his legal representative are excluded (paragraph 7). The person appointed is “not responsible to the person whose interests he is appointed to represent.” As in SIAC proceedings, contact between the special advocate and the controlled person will be extremely limited once the proceedings begin. In particular, the special advocate will not be able to discuss the evidence or grounds for the decision with the concerned individual or take instructions from him.

The use of secret evidence in closed proceedings without the ability of the person subject to a control order to confront the evidence against him in person with assistance of counsel of his choice violates fundamental due process standards enshrined in human right treaties and the English common law. As with indefinite detention under the Anti-Terrorism Crime and Security Act 2001, a person subject to a control order might never know the basis of the Home Secretary’s “reasonable suspicion” against him, making any challenge to the lawfulness of the orders very difficult.

The use of secret evidence also raises the very real spectre that evidence obtained under torture may be adduced by the government to justify control orders, in whole or in part. The U.K. government asserts the right to rely on evidence obtained under torture from third countries in SIAC proceedings provided the U.K. was not involved in the torture, a position affirmed by a two-to-one majority in the Court of Appeal in August 2004.<sup>6</sup> The government’s position on third country torture evidence breaches article 15 of the U.N. Convention on Torture and the absolute prohibition against torture in article 3 of the European Convention on Human Rights. The House of Lords Judicial Committee has given leave to appeal on the Court of Appeal judgment. But until the Law Lords issue a definitive ruling on the torture evidence or the U.K. government categorically rules out the use of evidence as a matter of legal obligation, there remains a real risk that torture evidence could be adduced as secret evidence in closed hearings to justify control orders.

### ***Indefinite Renewal***

Non-derogating control orders are imposed for twelve months but may be renewed an indefinite number of times (Clause 3(1)). The Secretary of State need only consider that a control order continues to be necessary to protect the public from the risk of terrorism and that the obligations imposed are those necessary for the purpose of preventing or restricting involvement of the individual in terrorism-related activity (Clause 3(3)).

Restrictions on liberty for those charged with a crime are subject to time limitations under international law. Under Article 5 of the European Convention on Human Rights, persons accused of a crime may be subject to deprivation of liberty but must be brought to trial within a “reasonable time.”<sup>7</sup> Restrictions on liberty following conviction are not

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<sup>6</sup> Court of Appeal, *A, B, C, D, E, F, G, H, Mahmoud Abu Rideh, Jamal Ajouaou v. Secretary Of State for the Home Department*, August 2004, [2004] EWCA 1123.

<sup>7</sup> European Court of Human Rights case-law stipulates that what is reasonable must be determined by the particulars of an individual case. See for example, *Punzelt v. Czech Republic* (31315/96) [2000] ECHR 169 (25 April 2000), *P.B. v. France* (28787/97) [2000] ECHR 406 (1 August 2000), *Assenov and others v. Buglaria*

time-limited, but are imposed following a criminal trial subject to the full due process safeguards required by human rights law and domestic criminal law. By contrast, the restrictions imposed under a control order are not for a period pending trial, but are an alternative to it, renewable indefinitely, and without proper due process safeguards in place.

## Derogating Control Orders

*It is not for the executive to decide who should be locked up for any length of time, let alone indefinitely. Only the courts can do that and, except as a preliminary step before trial, only after the grounds for detaining someone have been proved. Executive detention is the antithesis of the right to liberty and security of person.* – Lady Hale, House of Lords Judicial Committee.<sup>8</sup>

It was the unequivocal judgment of the Law Lords that the indefinite detention of foreign terrorism suspects breaches human rights law. The Law Lords struck down the order derogating from article 5 ECHR. Human Rights Watch finds it extraordinary that the Government now seeks to reserve the right to subject any person in U.K. whom it suspects of “terrorism” to house arrest. No matter that to exercise the power, the government would first have to obtain a new derogation from article 5, this is an indefensible attempt to reintroduce detention without trial.

The original draft of the Bill allowed the Executive to apply the criminal sanction of house arrest on the basis of secret evidence using the civil standard of proof (balance of probabilities) (Clause 2(1)). At the time of this writing, the proposals had been altered to allow for house arrest orders to be imposed by a judge, following an ex parte application within 24 or 48 hours of a request by the Home Secretary, with new police powers of arrest that would allow persons in respect of whom an application had been made to be placed in custody while the application was considered. The judge would have to be satisfied that there was a prima facie case.<sup>9</sup>

The proposed safeguards do not address the fundamental objection that a criminal sanction that amounts to a form of imprisonment can be imposed only through criminal proceedings with the due process safeguards required by domestic law and human rights law, involving a fair and adversarial hearing, in which the person subject to a potential deprivation of his liberty knows the case against him and in which the state must adduce evidence to satisfy the court “beyond a reasonable doubt.”

Initial decisions on house arrest are to be made in the absence of the person subject to the order and his legal representatives, on the basis of secret evidence which the person

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(24760/84) [1998] ECHR 98 (28 October 1998), and *W. v. Switzerland* (14379/88) [1993] ECHR 1 (26 January 1993).

<sup>8</sup> *A, X, and others* [2004] UKHL 56, para. 222.

<sup>9</sup> The shift in the government's position came in the form of a letter to the Shadow Home Secretary David Davis indicating that the Bill would be subject to amendment in the terms indicated when it reached the House of Lords. See, for example: Jon Smith and John Deane, “Clarke Makes Terror Law Concessions,” Press Association, February 28, 2005; Jenny Booth, “Government gives in over control orders,” *The Times* (London), February 28, 2005.

subject to the order cannot challenge, even at a subsequent review. The standard of proof remains lower than the criminal standard.

House arrest has disturbing implications for liberty. It dispenses with the presumption of innocence. It affects the liberty of those not subject to the order: family members living with a person subject to house arrest would inevitably face restrictions on their liberty, by virtue of living in what had become in effect a place of detention, even if they were not subject to formal restrictions. For those who live alone, house arrest will amount to solitary confinement. The example of South Africa demonstrates that the imposition of house arrest exposes those subject to the order to the risk of violence and intimidation in their own homes.<sup>10</sup>

The Bill allows control orders, including house arrest, to be imposed on U.K. citizens as well as foreign nationals suspected of involvement in “terrorism” as defined in section 1 of the Terrorism Act 2000. The scope is therefore far wider than the indefinite detention powers under the ATCSA, which applied only to persons with links to al-Qaeda and related organisations, and could include for example, animal rights activists.

In February 2004, the Government had stated in a consultation paper on counter-terrorism powers that while “it would be possible to seek other powers to detain British citizens who may be involved in international terrorism it would be a very grave step. The Government believes that such draconian powers would be difficult to justify.”<sup>11</sup>

Human Rights Watch shares the view of the Privy Counsellor Review Committee (“Newton Committee”) and Joint Committee on Human Rights that any new anti-terrorism legislation must be compatible with all of the United Kingdom’s human rights obligations without derogation.<sup>12</sup>

### **Prosecution as the “Preferred Approach”**

Introducing the Bill to the House of Commons on February 22, the Home Secretary repeated that prosecution of terrorism suspects remains the Government’s “preferred approach” to meeting the threat from terrorism. The government argues that the rules of evidence and concerns about disclosing the sources and methods of intelligence gathering preclude it from relying on evidence that could otherwise found prosecutions.<sup>13</sup>

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<sup>10</sup> See, for example, Eric Abraham, “House arrest scarred me for life, Mr. Clarke,” *The Sunday Telegraph*, February 27, 2005.

<sup>11</sup> Counter-Terrorism Powers: Reconciling Security and Liberty in an Open Society: A Discussion Paper (February 2004), para. 36 [online] [www.homeoffice.gov.uk/docs3/CT\\_discussion\\_paper.pdf](http://www.homeoffice.gov.uk/docs3/CT_discussion_paper.pdf) (retrieved February 27, 2005).

<sup>12</sup> Privy Counsellor Review Committee (“Newton Committee”), Anti-terrorism, Security and Crime Act 2001 Review: Report; Joint Committee on Human Rights, “Review of Counter-Terrorism Powers,” Eighteenth Report of Session 2003-4.

<sup>13</sup> “Some of the material held in these cases is inadmissible [sic], and other material, which technically admissible [sic], could not be used without compromising national security, damaging relationships with foreign powers or intelligence agencies, or putting the lives of the sources at risk.” Home Office, “Frequently Asked Questions: Questions regarding terrorism legislation, n.d. [online], [http://www.homeoffice.gov.uk/terrorism/faq/atcsa\\_faq.html](http://www.homeoffice.gov.uk/terrorism/faq/atcsa_faq.html) (retrieved February 28, 2005).



Yet the Prevention of Terrorism Bill 2005 contains no measures to facilitate the prosecution of terrorism suspects. This omission underscores the Government's inclination to privilege extraordinary executive powers over proper use of the criminal justice system. There is no shortage of ideas about ways in which prosecutions could be facilitated. The Newton Committee and the Joint Committee on Human Rights have both produced extensive recommendations, based on evaluations of the practices of other countries and consultations with expert witnesses.<sup>14</sup>

The Government's refusal to consider lifting the ban on intercepted communications is particularly striking. The United Kingdom and Ireland are the only two western countries with total bans on such evidence. While the Regulation of Investigatory Powers Act 2000 prohibits using domestic intercepts, foreign intercepts may be used as evidence if obtained legally, and bugged communications and the results of surveillance or eavesdropping are also admissible, even if not authorised. There is a broad consensus that the ban is a disproportionate response to a genuine concern over disclosure of intelligence sources or methods, and that removal of the ban would facilitate prosecution of terrorism suspects. The proposal was advanced by Lord Lloyd in his 1996 review of terrorism legislation, and has been echoed by Lord Carlile and the Newton Committee.<sup>15</sup> It has drawn support from a wide spectrum of opinion including the Metropolitan Police Commissioner Sir Ian Blair, European Union High Representative on Common Foreign and Security Policy Javier Solana, and non-governmental organizations Liberty and Justice.<sup>16</sup>

Safeguards to protect against undue disclosure of sources and methods already exist, such as the judicial discretion to exclude under section 28 of the Police and Criminal Evidence Act of 1984, and further safeguards could be developed. The use of properly authorised intercepted communications subject to the rules of criminal evidence would not pose any significant human rights issues.

## Diplomatic Assurances

Human Rights Watch is deeply concerned about the Government's intention to seek "framework agreements" with governments in the countries of origin of foreign nationals subject to indefinite detention without trial, as a means of effecting their deportation. These agreements would include assurances from the authorities in the receiving countries that the individuals will not be tortured or ill-treated upon return. In a speech to the House of Commons on January 26, 2005, Home Secretary Charles

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<sup>14</sup> Privy Counsellor Review Committee, Anti-terrorism, Security and Crime Act 2001 Review: Report; Joint Committee on Human Rights, "Review of Counter-Terrorism Powers," Eighteenth Report of Session 2003-4.

<sup>15</sup> Lord Lloyd of Berwick, *Inquiry into Legislation Against Terrorism*, Cm 3420, October 1996; Privy Counsellor Review Committee, "Anti-terrorism, Security and Crime Act 2001 Review: Report," para. 6; Lord Carlile of Berriew, "Anti-Terrorism Crime and Security Act 2001 Part IV Section 28 Review 2004," para. 39.

<sup>16</sup> Rachel Sylvester, "Lift phone tap ban in terror trials, says new Met chief," *The Daily Telegraph*, February 5, 2005 [online], <http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2005/02/05/nmet05.xml&sSheet=/news/2005/02/05/ixnewstop.html> (accessed February 25, 2004); BBC News Online "Ministers 'naive' over phone-taps" February 6, 2005 [online], [http://news.bbc.co.uk/go/pr/fr/1/hi/uk\\_politics/4240253.stm](http://news.bbc.co.uk/go/pr/fr/1/hi/uk_politics/4240253.stm) (accessed February 25, 2004).

Clarke spoke of deportations as the second rail in the Government's "twin-track approach." Foreign Office Minister Baroness Symons travelled in January 2005 to Algeria, Morocco, and Tunisia, for negotiations with the governments of those countries that would facilitate the men's deportation.<sup>17</sup> Although the Bill under consideration does not address this issue, the use of framework agreements or "diplomatic assurances" is a component of the Government's counter-terrorism strategy that merits careful consideration.

International law prohibits the return, deportation or extradition of a person when there are substantial grounds for believing he or she would be at risk of torture.<sup>18</sup> Human Rights Watch research globally demonstrates that diplomatic assurances are an ineffective safeguard against the risk of torture and prohibited ill-treatment.<sup>19</sup> First, governments that seek diplomatic assurances usually do so from states where torture and ill-treatment are systematic or widespread problems. These states routinely deny that torture is practiced – often in the face of overwhelming, credible evidence – and will offer assurances that are virtually meaningless. Second, pre-agreed monitoring schemes, when adopted, often lack sufficient safeguards to ensure that torture is detected, including unhindered access by independent experts to places of detention through unannounced visits with the opportunity to meet in total privacy with the returnees. Third, the system of diplomatic assurances does not create any accountability for sending governments. In instances where there is credible evidence of torture, the sending government will simply place blame on the receiving government as the party that has violated the assurances.

The case of two Egyptian men expelled from Sweden to Egypt in December 2001, is an illustration of the dangers of relying on assurances. Ahmed Agiza and Mohammed al-Zari, both Egyptian nationals who had sought asylum in Sweden, were expelled from Sweden and forcibly returned to Egypt on December 18, 2001. The expulsions followed diplomatic assurances by the Egyptian government that the men would not be subjected to torture or ill-treatment upon return. The men were held incommunicado in police custody and subsequently credibly claimed that they had been tortured routinely in the course of those five weeks. The pre-agreed monitoring mechanism proved wholly ineffective: no visits were conducted during the five-week incommunicado period, and subsequent visits took place in circumstances woefully lacking the most basic conditions for confidentiality and expertise in detecting all forms of torture and prohibited ill-treatment. The Egyptian authorities simply issued a blanket denial that torture or ill-treatment had occurred.

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<sup>17</sup> Nick Fielding, Foreign Office in talks to deport terror suspects, *The Sunday Times*, February 27, 2005 [online], <http://www.timesonline.co.uk/article/0,,2087-1502397,00.html> (retrieved February 27, 2005).

<sup>18</sup> The prohibition against torture and ill-treatment, including the prohibition against returning a person to a country where he or she is at risk of torture or ill-treatment is absolute and permits no exceptions; states cannot derogate from this obligation. The prohibition is enshrined in Articles 1 and 3 of the U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Article 7 of the International Covenant on Civil and Political Rights; and Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

<sup>19</sup> See Human Rights Watch, "Empty Promises: Diplomatic Assurances No Safeguard Against Torture", April 2004, Vol. 16 No. 4 (D).

The European Court of Human Rights has addressed the issue of states parties' reliance on diplomatic assurances as a safeguard against violations of states' obligations under article 3 of the European Convention. In *Chahal v. United Kingdom*, the court ruled that the return to India of a Sikh activist would violate the U.K.'s obligations under article 3, despite diplomatic assurances proffered by the Indian government that Chahal would not suffer mistreatment at the hands of the Indian authorities. In the 1996 ruling, the court cited violation of human rights by security forces in India as a "recalcitrant and enduring problem" and stated that "the Court is not persuaded that the above assurances would provide Mr. Chahal with an adequate guarantee of safety."<sup>20</sup>

More recently, key international actors have expressed concerns about the increasing reliance on diplomatic assurances. Council of Europe Commissioner for Human Rights Alvaro Gil-Robles has stated that unless the receiving state exercises effective control over non-state actors and does not practice or condone torture or ill-treatment, "it is highly questionable whether assurances can be regarded as providing indisputable safeguards against torture and ill-treatment".<sup>21</sup> The U.N. Special Rapporteur on Torture has also indicated that reliance on assurances is a "practice that is increasingly undermining the principle of non-refoulement."<sup>22</sup>

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<sup>20</sup> *Chahal v. United Kingdom*, 70/1995/576/662, November 15, 1996 [online]

<http://www.worldii.org/int/cases/IHRL/1996/93.html> (retrieved March 26, 2004), paras. 104 and 105.

<sup>21</sup> Report by Mr. Alvaro Gil-Robles, Commissioner for Human Rights, on His Visit to Sweden, April 21-23, 2004. Council of Europe, CommDH(2004)13, July 8, 2004, at

[http://www.coe.int/T/E/Commissioner\\_H.R./Communication\\_Unit/Documents/pdf.CommDH\(2004\)13\\_E.pdf](http://www.coe.int/T/E/Commissioner_H.R./Communication_Unit/Documents/pdf.CommDH(2004)13_E.pdf)

<sup>22</sup> Report of the Special Rapporteur on Torture Theo van Boven to the General Assembly, A/59/324, August 23, 2004, paragraph 30.