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

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Introduction

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

U.S. officials have been pressed to comment on the secret practice that has come to be known in the United States as extraordinary rendition. At a press conference on March 16, 2005, President George W. Bush stated that one way to protect the American people and their friends from future attack was "to arrest people and send them back to their

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[1] For a comprehensive news report, see Jane Mayer, "Outsourcing Torture: The secret history of America's 'extraordinary rendition' program", *The New Yorker*, Feb. 14, 2005. Another example are the stories about the so-called "torture plane"—a Gulfstream jet—which has been spotted in numerous European, Middle Eastern and Asian countries. According to press reports and the jet's logs, which were acquired by journalists, the plane has also landed at Guantánamo Bay. See, e.g. Dana Priest, "Jet is an Open Secret in Terror War," *Washington Post*, December 27, 2004, p. A1; John Crewdson, "Mysterious Jet Tied to Torture Flights: Is Shadowy Firm Front for CIA?" *Chicago Tribune*, January 8, 2005.

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

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

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

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

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

[3] Ibid.

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

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

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

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

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

Pre 9/11 Renditions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[9] Ibid.

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

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

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

[13] See Douglas Jehl and David Johnson, "Rule Change Lets C.I.A. Freely Send Suspects Abroad to Jails," *New York Times*, March 6, 2005 [online] http://www.nytimes.com/2005/03/06/politics/06intel.html (retrieved May 5, 2005).

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

U.S. Rendition Practice since 9/11

Policy Changes

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

Renditions have taken place both from U.S. territory and from other countries, either by the direct seizure of foreign nationals on foreign territory by U.S. agents, or the transfer of foreign nationals to third countries by the host country authorities facilitated by the use of U.S. aircraft or personnel.[19] While the complete list of receiving countries is not

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

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

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

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

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

[19] See CBS 60 Minutes, "CIA Flying Suspects to Torture?" March 6, 2005 [online] http://www.cbsnews.com/stories/2005/03/04/60minutes/main678155.shtml (retrieved March 7, 2005); Jehl and Johnson, "Rule Change…," *New York Times*; Channel 4 TV (U.K.), "Torture: The Dirty Business," (Part 3 of series on the U.S. government's war on terror and the implications for the global ban on torture), March 1, 2005, post-production transcript on file with Human Rights Watch, [online] http://www.channel4.com/news/microsites/T/torture/cases.html (retrieved March 8, 2005); Mayer, "Outsourcing Torture," *The New Yorker*; Stephen Grey, "CIA Prisoners 'Tortured' in Arab Jails," File on 4, BBC Radio, February 8, 2005 [online] http://news.bbc.co.uk/1/hi/programmes/file_on_4/4246089.stm (retrieved February 15,

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

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

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

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

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

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

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

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

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

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

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

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

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

> Should an individual be transferred to another country to be held on behalf of the United States, or should we otherwise deem it appropriate, United States policy is to obtain specific assurances from the receiving country that it will not torture the individual being transferred to that country. [24]

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

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

Cases

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

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

[24] Letter from William J. Haynes II to Senator Patrick Leahy, June 25, 2003, [online] http://hrw.org/press/2003/06/letter-to-leahy.pdf (retrieved May 5, 2005). See also Letter of William J. Haynes II to Kenneth Roth, Executive Director of Human Rights, April 2, 2003, [online] http://www.hrw.org/press/2003/04/dodltr040203.pdf (retrieved May 5, 2005).

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

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

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

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

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

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

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

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

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

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

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

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

Despite monthly visits after their return to Egypt by Swedish diplomats, none of them in private, both men credibly alleged to their lawyers and family members—and, indeed, to Swedish diplomats as well—that they had been tortured and ill-treated in detention.[35] To date these allegations and the roles of all three governments – Sweden, Egypt and the United States – have not been fully investigated, and the Bush administration has not acknowledged its role in the transfer of these men to Egypt.

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

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

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

[34] Chefsjustitieombudsmannen Mats Melin, Avvisning till Egypten - en granskning av Säkerhetspolisens verkställighet av ett regeringsbeslut om avvisning av två egyptiska medborgare [Expulsion to Egypt: A review of the execution by the Security Police of a government decision to expel two Egyptian citizens], Reference Number: 2169-2004, March 22, 2005, section 3.2.2, copy on file with Human Rights Watch.

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

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

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

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

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

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

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

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

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

U.S. Legal Obligations

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

International Law

Convention Against Torture

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

Article 3 of the CAT establishes the obligation of *nonrefoulement* in cases in which a person would be at risk of torture if sent to a given country. Article 3(1) specifically provides that "no state shall expel, return ("*refouler*") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." Article 3(2) further requires a sending government to take into consideration the existence of gross, flagrant or mass violations of human rights when assessing the risk of torture.[43]

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

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

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

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

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

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

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

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

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

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

[46] See Association of the Bar of the City of New York and Center for Human Rights and Global Justice at NYU School of Law, "Torture by Proxy: International and Domestic Law Applicable to 'Extraordinary Renditions'," October 2004, page 37. The commentators point out that according to the Committee Against Torture "substantial risk" does not require the risk to be highly probable though it should be higher than theory or suspicion, a threshold which is lower than the U.S. "more likely than not." See Committee Against Torture, General Comment 1, *Communications concerning the return of a person to a State where there may be grounds he would be subjected to torture (article 3 in the context of article 22)*, U.N. Doc. A/53/44, annex IX at 52 (1998), [online] http://sim.law.uu.nl/SIM/CaseLaw/Gen_Com.nsf/3b4ae2c98fe8b54dc12568870055fbbd/187234925cc264a6c12568870052d8d1?OpenDocument (retrieved May 9, 2005).

[47] See, for example, Association of the Bar of the City of New York and Center for Human Rights and Global Justice at NYU School of Law, "Torture by Proxy: International and Domestic Law Applicable to 'Extraordinary Renditions'," October 2004, footnote 227.

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

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

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

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

International Covenant on Civil and Political Rights

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[49] Ibid, para 27.

[50] Ibid, para 30.

[51] Ibid, para 37.

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

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

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

[55] See, for example, 18 U.S.C. §2. For an analysis of accomplice liability under U.S. domestic law in rendition cases, see Association of the Bar of the City of New York and Center for Human Rights and Global Justice at NYU School of Law, "Torture by Proxy: International and Domestic Law Applicable to 'Extraordinary Renditions'," October 2004, pp.103-108.

[56] See Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission in its 53rd session (2001), A/56/10 (supplement 10), chp.IV.E.1, December 12, 2001, art. 16-17. For an analysis on the derivative responsibility of the United States for the actions of another state and actions of organs of another state under U.S. direction and control in the rendition context, see Association of the Bar of the City of New York and Center for Human Rights and Global Justice at NYU School of Law, "Torture by Proxy: International and Domestic Law Applicable to 'Extraordinary Renditions'," October 2004, pp. 98-100.

The International Covenant on Civil and Political Rights[57] (hereinafter "ICCPR"), ratified by the U.S. on June 8, 1992, provides in article 7 that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." This guarantee is nonderogable, i.e. it remains in full force even in times of emergency that threaten the life of the nation. The Human Rights Committee, which monitors implementation of the ICCPR by national governments, has interpreted the Convention's prohibition on torture and ill-treatment to include the *nonrefoulement* obligation: "In the view of the Committee, State parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*."[58]

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

> ". . . the article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 [right to life] and 7 [torture or cruel, inhuman or degrading treatment] of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed. The relevant judicial and administrative authorities should be made aware of the need to ensure compliance with the Covenant obligations in such matters."[59]

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

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

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

[59] Human Rights Committee, General Comment No. 31, CCPR/C/21/Rev.1/Add.13, March 26, 2004 (adopted on March 29, 2004) [online] http://sim.law.uu.nl/SIM/CaseLaw/Gen_Com.nsf/a1053168b922584cc12568870055fbbc/7fe15c0f9b9dc489c1256ed800498f39?OpenDocument (retrieved May 9, 2005). ICCPR article 2 reads: "Each State party to the present Covenant undertakes to respect and to ensure to all individuals with its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

Other International Instruments and Mechanisms

1. U.N. Refugee Convention

The *nonrefoulement* obligation is also a core principle of international refugee law. The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol (Refugee Convention) require that no state "shall expel or return ('*refouler*') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."[60] The United States is a party to the 1967 Protocol, and has implemented its international obligations in U.S. domestic law through the Refugee Act of 1980.[61]

Unlike the CAT and ICCPR, the prohibition against *refoulement* under the Refugee Convention and Protocol is not absolute and exceptions to its protections are permitted in very narrow circumstances.[62] Any person excluded from refugee status or continuing protection from *refoulement* as a result of any one of these exceptions, however, retains the right to claim protection from return or transfer to risk of torture or ill-treatment under other international instruments, such as the CAT, as well as under customary international law.

2. International Humanitarian Law

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

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

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

[62] A person seeking refugee status can be excluded from such status based on article 1F of the Refugee Convention, which in general terms, precludes refugee status from persons who committed war crimes or serious non-political crimes. As for persons already recognized as refugees, article 33 of the refugee Convention states that *nonrefoulement* "may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country." In addition, article 32, Expulsion, requires due process of law for expulsion decisions, and that the refugee be allowed to submit evidence and be represented unless compelling reasons of national security require otherwise.

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

The Geneva Conventions explicitly permit the transfer of prisoners of war (POWs) and civilians only to states that are parties to the conventions and willing to comply with the protections codified in them.[64] The humanitarian law prohibition of torture and ill-treatment covers virtually all persons who may be detained in situations of armed conflict, including unprivileged combatants or civilians who take up arms. But even in situations of armed conflict, certain human rights norms, including the norm against torture and ill-treatment as well as *refoulement* to such abuse, continue to apply because of their nonderogable nature. As a result, no person is left unprotected at any time, regardless of nationality, status as a combatant, or the characterization of hostilities.

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

3. Other International Mechanisms

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

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

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

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

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

Customary International Law

The prohibition against torture and ill-treatment has risen to the level of *jus cogens*, that is, a peremptory norm of international law. As such it is considered part of the body of customary international law that binds all states, whether or not they have ratified the treaties in which the prohibition against torture is enshrined. Many governments, human rights experts, and legal scholars have also affirmed that the prohibition against *refoulement*, derivative of the absolute ban on torture and from which no derogation is

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

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

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

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

The norm against torture, moreover, is undoubtedly one of the "basic rights of the human person" that partake of an *erga omnes* character, that is, it is one in which all states have a legal interest in ensuring its protection.[71] The *erga omnes* character of the norm signals that states have a right to pursue remedies for its violation collectively as well as individually. Torture is a grave breach of the Geneva Conventions, which require states parties to "search for" persons committing such crimes regardless of their nationality and bring them to justice in their own courts.[72] It is a crime of universal jurisdiction, and can also constitute a crime against humanity or a war crime under the jurisdiction of the International Criminal Court.[73] Implicit in such a general right of enforcement and remedy on the part of the whole international community is the principle that states also have an obligation not to facilitate violations, either by their own agents or agents of another state. Transferring individuals to states where they are at risk of torture and prohibited ill-treatment, under the rationale of unreliable diplomatic assurances, flies in the face of this principle.

U.S. Domestic Law

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[69] See Elihu Lauterpacht and Daniel Bethlehem, "The Scope and Content of the Principle of *Nonrefoulement*," June 20, 2001, re-published February 2003 [online] http://www.unhcr.ch/cgi-bin/texis/vtx/publ/opendoc.pdf?tbl=MEDIA&id=419c75ce4 (retrieved May 2, 2005); Rene Bruin and Kees Wouters, "Terrorism and the Non-Derogability of *Nonrefoulement*," *International Journal of Refugee Law*, Volume 15 No. 5 (2003), section 4.6 [The *jus cogens* nature of *nonrefoulement*]; Jean Allain, "The *Jus Cogens* Nature of *Nonrefoulement*," *International Journal of Refugee Law*, Vol. 13 (2001), p. 538; David Weissbrodt and Isabel Hörtreitere, "The Principle of *Nonrefoulement*: Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the *Nonrefoulement* Provisions of Other International Human Rights Treaties," *Buffalo Human Rights Law Review*, Vol. 5 (1999).

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

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

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

[73] Rome Statute of the International Criminal Court, 1998, U.N. Doc. 2187 U.N.T.S. 90, entered into force July 1, 2002, arts. 7(1)(f); 8(2)(ii); 8(2)(c)(i-ii); see also the International Law Commission's Draft Code of Crimes Against the Peace and Security of Mankind, at articles 8 and 9, 1996 [online] http://www.un.org/law/ilc/texts/dccomfra.htm (retrieved March 31, 2005). This foundational document for the Rome Statute laid out torture as a crime of universal jurisdiction to which every state is obliged to extend its criminal jurisdiction regardless of where or by whom the crime was committed.

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

> It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.[74]

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

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

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

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

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

Diplomatic Assurances

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

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

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

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[77] 8 CFR 208.16-208.18.

[78] 22 CFR 95.1-95.4.

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

[80] See for example, Press Conference by the President, March 16, 2005; Letter from William J. Haynes II to Senator Patrick Leahy, June 25, 2003; Mark Sherman, "Gonzales: U.S. Won't Send Detainees to Torturers; Attorney General Alberto Gonzales Said the United States does not Send Detainees to Nations Allowing Torture, but Once They are Transferred, Can't Ensure Good Treatment," *Miami Herald*, March 8, 2005.

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

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

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

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

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

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

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

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

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

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

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

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

Assurances against torture versus assurances against the death penalty

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

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

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

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

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

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

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

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

Diplomatic Assurances in Rendition Cases

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

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

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[91] See above, note 80.

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

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

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

It is striking that the executive branch and intelligence services have sole discretion for seeking, securing, and determining the reliability and sufficiency of diplomatic assurances in all instances. In addition, while it has been the traditional role of the courts to protect

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

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

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

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

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

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

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

The glaring deficiency in U.S. law and policy lies precisely in the absence of express provision for procedural guarantees for the person subject to transfer, and particularly the lack of opportunity to challenge the credibility or reliability of diplomatic assurances before an independent judicial body. Moreover, there are indications that assurances are used to circumvent the obligation rather than fulfill it. As an American official quoted in the media said: "They say they are not abusing [rendered prisoners], and that satisfied the legal requirement, but we all know they do."[99]

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

Legal Insufficiency

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

> "The weakness inherent in the practice of diplomatic assurances lies in the fact that where there is a need for such assurances, there is clearly an acknowledged risk of torture or ill-treatment."[101]

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

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

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

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

[101] Report by Mr. Alvaro Gil-Robles, Commissioner from Human Rights, on His Visit to Sweden, April 21-23, 2004. Council of Europe, CommDH(2004)13, July 8, 2004, p.9 para.19, [online] http://www.coe.int/T/E/Commissioner_H.R/Communication_Unit/Documents/pdf.CommDH(2004)13_E.pdf (retrieved May 10, 2005).

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

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

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

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

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

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

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

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

[105] Ibid., para. 31.

person would be returned to a place where torture is systematic, "the principle of *nonrefoulement* must be strictly observed and diplomatic assurances should not be resorted to."[106] He also noted that if a person is a member of a specific group that is routinely targeted and tortured, this factor must be taken into account with respect to the *nonrefoulement* obligation.[107]

Neither U.S. policy nor the immigration regulations requires the executive branch to reject as inherently unreliable assurances from governments in countries where torture is a common problem or where specific groups are routinely targeted for torture and ill-treatment and a person subject to return based on assurances is a member of such group. Under current U.S. law and policy, the government could render or remove a person at high risk of torture or ill-treatment based on the simplest and vaguest of guarantees.

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

Arar Case

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

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

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

[107] Ibid., para. 39.

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

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

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

Practical Inadequacy

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

Attorney General Alberto R. Gonzales acknowledged that the U.S. government has only a limited capacity to enforce assurances once a person is transferred to the custody of another government. In an interview on March 7, 2005, the Attorney General said: "we can't fully control what that country might do. We obviously expect a country to whom we have rendered a detainee to comply with their representations to us. If you're asking me 'Does a country always comply?' I don't have an answer to that."[111] Similarly, CIA Director Porter J. Goss told Congress, in a hearing of the Senate Select Committee on Intelligence on February 16, 2005, that "of course, once they're out of our control, there's only so much we can do."[112]

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[110] Ibid.

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

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

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

The governments involved in negotiating the assurances have little or no incentive to monitor for and highlight a breach of the assurances. In some cases, sending governments want the receiving state to use prohibited interrogation techniques against a person to extract information. In other cases, the sending state simply wants the receiving state to take responsibility for warehousing a suspect who is considered a national security threat in the sending state. Either way, a sending government that discovers a breach of the assurances would have to acknowledge a violation of its own *nonrefoulement* obligation. For its part, a receiving government that is engaging in torture obviously has little incentive to allow its human rights violations to be discovered through post-return monitoring.

Moreover, strict monitoring sends a message of mistrust to the receiving country. As the Egyptian ambassador to the United States, Nabil Fahmy, said "We wouldn't accept the premise that we would make a promise and violate it."[113] Since assurances are carried out through diplomatic channels, diplomats will very often privilege a good relationship between countries over other concerns, including the human right not to face torture. Inter-state dynamics at the diplomatic level are by their very nature delicate, and diplomats often invoke the need for "caution" and "discretion" in diplomatic representations and negotiations. As a result, serious human rights issues—even those involving the absolute prohibition against torture—are often subordinated to diplomatic concerns.

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

[113] Ibid.

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

There is also a profound lack of transparency in the process of seeking and securing assurances at a diplomatic level, often in the interest of preserving foreign relations, that puts the person subject to return at a serious disadvantage in terms of challenging the adequacy and reliability of the guarantees. For example, in an October 2001 statement, an Assistant U.S. Department of State legal adviser argued that seeking, securing, and monitoring diplomatic assurances in extradition cases must be done on a strictly confidential basis, with no public or judicial scrutiny, in order not to undermine foreign relations and to reach "acceptable accommodations" with the requesting state.[115] With respect to diplomatic assurances against torture, diplomacy alone provides no guarantee against maltreatment.

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

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

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

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

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

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

Pending U.S. Legislation on Renditions to Torture

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

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

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

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

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

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

and that there was a verifiable mechanism in place to ensure that any person transferred to said country would not be tortured or ill-treated. It is important to note that the bills sanction the use of post-return monitoring only in countries where the State Department certifies that torture is no longer in use.

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

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

Conclusion – The Importance of a Full Accounting

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

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

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

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

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

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

To the Government of Canada:

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

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

- Ensure full compliance with the absolute prohibition on *refoulement* in its own treatment of persons in Canadian custody or facing deportation from Canada. Specifically, Canada should prohibit reliance upon diplomatic assurances as a basis to transfer *any* person, including non-citizen terrorist suspects, to other countries when the case involves a risk of torture or ill-treatment. Canada should also repeal Sections 76-87 of the Immigration and Refugee Protection Act, providing for the use of security certificates to detain and deport, based on secret evidence presented in *ex parte* hearings and without procedural guarantees, persons determined to be an imminent danger to Canada's security, including potentially effecting transfers to countries where a person would be at risk of torture or ill-treatment.

To the Government of the United States:

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

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

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

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

To both governments:

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

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

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

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