HUMAN RIGHTS WATCH

WITNESS STATEMENT OF
JULIA A. HALL

I, JULIA A. HALL, of 350 Fifth Avenue, 34th Floor, New York, U.S.A., have been requested by Birnberg Peirce to provide an opinion on the use of diplomatic assurances contained in "memoranda of understanding" to effect deportations to risk of torture and other ill-treatment, in particular their conformity with international law. I have reviewed three witness statements (16 September 2005; 30 November 2005; and 15 February 2006) and accompanying exhibits submitted by Edward Anthony Oakden, Director of Defence and Strategic Threats in the Foreign and Commonwealth Office, detailing the United Kingdom government's process and substantive reasoning regarding the negotiation of memoranda of understanding. I have been specifically requested to focus my comments on the memorandum of understanding with Jordan. I am aware, however, that the U.K. government is attempting to negotiate such agreements with Algeria and Libya, and believe that my statement is relevant to any memorandum of understanding potentially agreed by the U.K. and those governments. I make the following statement from my own knowledge and from information I have obtained and analyzed in the course of my research, and believe it to be true. In doing so, I understand that my duty as an expert witness is to the court and not to either of the two parties:

Qualifications as an expert

1. I am Counsel and Senior Researcher in the Europe and Central Asia division at Human Rights Watch, New York, U.S.A. I am an attorney admitted to the bar in the state of New York. I am the principal author of two Human Rights Watch research reports on diplomatic assurances and returns of alleged terrorist and national security suspects to risk of torture: *Empty Promises: Diplomatic Assurances No Safeguard Against Torture*, April 2004, and *Still at Risk: Diplomatic Assurances No Safeguard Against Torture*, April 2005. I am currently researching the global use of diplomatic assurances to effect such transfers for a third research report to be issued later in 2006. I was the lead lawyer/researcher for Human Rights Watch in its interventions and involvement in a range of cases related to alleged violations of article 3 of the European Convention on Human Rights and Fundamental Freedoms (ECHR) and article 3 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture) involving the use of diplomatic assurances, including the Committee Against Torture individual petition in the case of *Agiza v. Sweden* (May 2005); the European Court of Human Rights case of

Mamatkulov and Askarov v. Turkey (February 2005); and *Netherlands (Ministry of Justice) v. Nuriye Kesbir* (January 2005). I appeared as an expert witness on diplomatic assurances and the Convention Against Torture before the Canadian Commission of Inquiry into the Actions of Canadian Officials in Relation to *Maher Arar* (June 2005).

Diplomatic assurances as a safeguard against torture

2. Extensive research on state practice and the use of diplomatic assurances as an alleged safeguard against torture and other ill-treatment, unequivocally indicates that assurances contained in non-binding bilateral agreements (e.g. a "memorandum of understanding") are used to circumvent states' legally binding, absolute obligation not to transfer any person to a place where he or she is at risk of torture or other ill-treatment (the *nonrefoulement* obligation).

3. The essential argument against diplomatic assurances contained in bilateral agreements such as "memoranda of understanding" is that the perceived need for such guarantees in itself is an acknowledgement that a risk of torture and other ill-treatment exists in the receiving country. The U.K. government has admitted that it could risk breaching its ECHR obligations if it were to deport certain individuals to Jordan "without first obtaining assurances as to their treatment on return" [Oakden, 2d Statement, para. 29, 30 November 2005]. But such assurances do not provide an effective safeguard against ill-treatment for the reasons set out below.

4. The conclusion that the use of diplomatic assurances against torture is incompatible with international human rights law is shared by a growing number of international human rights experts and bodies. United Nations High Commissioner for Human Rights, Louise Arbour, has stated unequivocally her concerns about diplomatic assurances, most recently in a March 2006 statement to the Council of Europe's Group of Experts on Human Rights and the Fight against Terrorism (DH-S-TER):

> I strongly share the view that diplomatic assurances do not work as they do not provide adequate protection against torture and ill-treatment, nor do they, by any means, nullify the obligation of non-refoulement…[I]t is understood that diplomatic assurances would be sought only after an assessment has been made that there is a risk of torture in the receiving State. If there is no risk of torture in a particular case, they are unnecessary and redundant. It should be clear that diplomatic assurances cannot replace a State's obligation of non-refoulement in these circumstances, either in fact or in law. While some have suggested the establishment of post-return monitoring mechanisms as a means of removing the risk of torture and ill-treatment, we know through the experience of international

monitoring bodies and experts that this is unlikely to be an effective means for prevention.

5. In addition to the U.N. High Commissioner for Human Rights, the following international bodies and experts have expressed deep concern that diplomatic assurances do not provide an effective safeguard against torture and other ill-treatment: the present and former U.N. special rapporteurs on torture (Manfred Nowak and Theo van Boven, respectively); the present and former Council of Europe Commissioners on Human Rights (Thomas Hammarberg and Alvaro Gil-Robles, respectively); the former U.N. independent expert on the protection of human rights and fundamental freedoms while countering terrorism (Professor Robert K. Goldman); the U.N. Committee Against Torture; and the U.N. General Assembly. The current special rapporteur on torture, whose legal analysis and expert opinion is considered authoritative, has stated:

> Diplomatic assurances, which attempt to erode the absolute prohibition on torture in the context of counter-terrorism measures…are not legally binding and undermine existing obligations of states to prohibit torture, are ineffective and unreliable in ensuring the protection of returned persons, and therefore shall not be resorted to by States.

[Report of the special rapporteur on the question of torture, U.N. Commission on Human Rights, 62d Session, E/CN.4/2006/6, p. 2.]

Diplomatic relations unaffected by existing violations

6. The governments in the countries with which the U.K. has or is seeking to negotiate a memorandum of understanding routinely and flagrantly violate their legally binding multi-lateral treaty and customary law obligations with respect to torture and other ill-treatment. Numerous governmental, intergovernmental, and nongovernmental reports detail serious torture and fair trial abuses in Jordan, for example. The U.K. government has stated that "it is not the British Government's intention to contest the general thrust of such reports" [Oakden, 2d Statement, para. 29, 30 November 2005].

7. The U.K. authorities argue that any breach of a memorandum of understanding could do "serious damage" [Oakden, 2d Statement, para. 50, 30 November 2005] to diplomatic relations between it and the receiving state. Jordan, however, does not suffer pariah status as a result of persistent abusive human rights practices that violate its legally-binding treaty obligations. Indeed, the U.K. government notes that its relations with the Jordanian government "have been historically, and continue to be close at all levels" [Oakden, 1st Statement, para. 7, 16 September 2005], despite Jordan's history of employing torture and other ill-treatment, particularly in the interrogations of terrorist or national security detainees.

8. The U.K. government claims that it "is party to many non-legally binding bilateral Memoranda of Understanding with other Governments, on a diverse range of subjects" [Oakden, 3d Statement, para. 16, 15 February 2006]. This implies that the memorandum of understanding with Jordan is the same as other bilateral agreements the U.K. has negotiated on various topics, perhaps trade or cultural cooperation, and that the same incentives for compliance apply. While it may be true that there are political and/or monetary consequences when one state breaches an agreement with another state, this is not generally the case when it comes to agreements that deal specifically with human rights protection. As Oona Hathaway has observed, "[T]here are no 'competitive market forces' that press for [such] compliance. . .the costs of retaliatory noncompliance are low to nonexistent, because one nation's actions against its own citizens do not directly threaten or harm other states" ["Do Human Rights Treaties Make a Difference?" 111 *Yale Law Journal* 1935 (June 2002), p. 1938]. Legal scholar Louis Henkin has thus concluded that, "The forces that induce compliance with other law…do not pertain equally to the law of human rights" [How Nations Behave, 1979, p. 235]. It is thus difficult to see how a non-binding "understanding" addressing a human rights protection issue will force the kind of compliance that consistently eludes the legally-binding multilateral treaty regime, to which the U.K. government claims allegiance and commits significant monetary and other resources. While the enforcement mechanisms within that legally-binding treaty regime are admittedly weak, they are stronger than the "exceptionally strong political commitment" on which the memorandum of understanding between the U.K. and Jordan is based [Oakden, 3d Statement, para. 16, 15 February 2006]. Such political commitment cannot be seen as an effective substitute for a legally-binding enforcement mechanism, which the U.K. government admits is absent from the memorandum of understanding with Jordan [Ibid; see also section below on the lack of an incentive to find a breach].

9. The Jordanian government's continued use of torture and other ill-treatment has had virtually no impact on its ability to conduct foreign relations, evidenced not only by its close ties with the U.K., but by its similarly close ties with the United States. The U.S. has used Jordan as a staging ground for renditions of suspected terrorists, including Maher Arar, a Syrian-Canadian dual-national who was transferred in September 2002 from the U.S. through Jordan and on to Syria. An independent expert appointed by the Canadian Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar (hereinafter Arar Commission) detailed Arar's beatings and interrogation in Jordanian custody before his transfer to Syria, where the expert concluded that Arar was tortured [Toope Report, 14 October 2005, at http://www.ararcommission.ca/eng/ToopeReport_final.pdf, p. 13]. Amnesty International issued a report in April 2006 detailing several cases of persons rendered to Jordan by or at the instigation of the U.S. who suffered torture and other ill-treatment during interrogation there [Amnesty International, USA: Below the Radar: Secret Flights to Torture and 'Disappearance,' paras. 1.5, 1.7, 1.9, 5

April 2006, at http://web.amnesty.org/library/Index/ENGAMR510512006?open&of=ENG-313. The U.K. government acknowledges allegations of U.S. renditions to Jordan [Oakden, 3d Statement, para. 14, 15 February 2006], but maintains that the assurances it has secured will safeguard Othman's well-being on return.

10. United States Department of State Country Reports on Human Rights Practices on Jordan in recent years reflect an apparent improvement in Jordan's human rights record, as noted by the U.K. government [Oakden, 2d Statement, paras. 33, 41, 42, 30 November 2005]. Human Rights Watch's research, however, indicates that torture remains a serious and persistent problem in Jordan [Human Rights Watch 2005 World Report: Jordan, at http://hrw.org/english/docs/2006/01/18/jordan12225.htm and Human Rights Watch Press Release, "Jordan/U.S.: Summit Should Address Torture Problem, 7 February 2006, at http://hrw.org/english/docs/2006/02/07/jordan12616.htm]. Given the close cooperation of Jordan with the U.S. in counter-terrorism operations, the U.S. has a vested interest in minimizing Jordan's poor record on torture and ill-treatment.

Lack of incentive to admit breach

11. Diplomacy and international cooperation in the conduct of foreign affairs promote the overall interests of a state. While human rights may be one of those interests, it is seldom the only or the most important one, and, as a consequence, diplomacy – including that underpinning a memorandum of understanding – cannot be a reliable lever for human rights protection. Diplomats are often quite candid that their top priority is to ensure friendly relations with other states, sometimes at the expense of confronting governments about possible human rights violations, including breaches of pre-agreed and monitored diplomatic assurances. When the former Swedish ambassador to Egypt was asked why he let five weeks lapse before visiting Ahmed Agiza, an Egyptian asylum seeker transferred in December 2001 from Stockholm to Cairo based on diplomatic assurances against torture, he replied that the Swedes could not have visited the men immediately because that would have signaled a lack of trust in the Egyptian authorities [Kalla Fakta Program, "The Broken Promise," 17 May 2004, English Transcript at http://hrw.org/english/docs/2004/05/17/sweden8620.htm]. Despite on-going post-return monitoring by Swedish officials, Agiza was tortured and ill-treated in Egyptian custody.

12. The privileging of other state interests over human rights protection in diplomatic relations creates a profound lack of incentive for either the sending or receiving states to actually address a breach of a memorandum of understanding. Addressing a breach would amount to an admission that the sending state was in violation of its *nonrefoulement* obligation and the receiving state in violation

of its torture prohibition obligations. Thus, there is an inherent disincentive for both parties to address any breach to a memorandum of understanding or other bilateral diplomatic assurances agreement in relation to torture.

13. In the case of Ahmed Agiza, the Swedish authorities redacted passages—in which Agiza alleged ill-treatment—from its first post-return monitoring report. Subsequently, the government willfully refused to share the full, unredacted version of the report, including the torture allegations, with the U.N. Committee Against Torture when the case was under consideration by the Committee [*Agiza v. Sweden*, CAT/C/34/D/233/2003, paras. 8.1, 8.3., 12.11-15, 13.10, 20 May 2005, at http://www1.umn.edu/humanrts/cat/decisions/233-2003.html]. The Committee eventually received the full report from other sources. Likewise, when the Syrian government denied torturing Maher Arar, the U.S. government accepted the Syrian denial at face value, stating that it "has officially welcomed statements by the Syrian government that Mr. Arar was not tortured" [Congressional Record, Case of Maher Arar, February 10, 2004, pp. S781-S785; see also Dana Priest, "Man was Deported after Syrian Assurances, *Washington Post*, November 20, 2003, p. A24]. The unavoidable conclusion is that none of these governments had anything to gain from acknowledging that the diplomatic assurances were breached.

14. When faced with international or domestic criticism regarding persistent violations of fundamental rights, many governments simply deny that abuse occurs, making accountability unlikely. British Foreign Secretary Jack Straw admitted as much in response to questions from the Parliamentary Foreign Affairs Committee on December 13, 2005:

> The other problem about torture is that those who commit the torture deny it to themselves as much as they deny it to other people, so to track it is very difficult, but we are alive to those countries where we think malpractice of all kinds is used and we seek to deal with it…if you go through the list of countries where we and America and other leading human rights NGOs believe that the mistreatment of suspects takes place, I do not think that you will find a single one of those countries which says that it does take place. [Q 27, full transcript at http://www.publications.parliament.uk/pa/cm200506/cmselect/cmfaff/uc768-i/uc76802.htm.]

Thus, even assuming that a breach is communicated to a sending government, such denials by the receiving state erect serious obstacles to investigation and accountability.

15. In May 2005, the U.N. Committee Against Torture found Sweden in violation of article 3 of the Convention Against Torture for the December 2001 transfer of

Ahmed Agiza from Stockholm to Cairo based on diplomatic assurances, coupled with a post-return monitoring regime implemented by the Swedish authorities themselves. As noted above, Agiza was subsequently tortured and ill-treated in a Cairo prison. The Committee concluded that it was known, or should have been known, to the Swedish authorities that Agiza was at risk of torture if transferred to Egypt. It held that "The procurement of diplomatic assurances, which, moreover, provided no mechanism for their enforcement, did not suffice to protect against this manifest risk" [*Agiza v. Sweden*, para.13.4, at http://www1.umn.edu/humanrts/cat/decisions/233-2003.html]. Notably, the Egyptian government has denied the torture allegations and the Swedish government has admitted that it cannot induce the Egyptian government to investigate the allegations, despite a written bilateral agreement between the two states and a post-return monitoring scheme allegedly aimed at guaranteeing that Agiza would not be ill-treated on return. [Human Rights Watch, *Still at Risk,* April 2005, p. 58; see also, Letter from Swedish Foreign Minister Laila Freivalds to Egyptian Foreign Minister Ahmed Ali Aboul Gheit, 1 November 2005, on file with Human Rights Watch.]

Post-return monitoring concerns

16. The U.K. government claims that what differentiates the memoranda of understanding from previous assurances of humane treatment upon return is that the memoranda provide for an independent monitoring body to supervise the detainee's treatment upon return. Assuming that this monitoring regime is rigorous and implemented in good faith, it would be inherently incapable of preventing torture or other forms of ill-treatment. The dynamics of torture—practiced in secret, with highly sophisticated methods that can defy detection, and often with the collusion of trained medical personnel—militate against any group's ability to eliminate risk of abusive treatment in an isolated case. That applies to international and national human rights groups alike.

17. The key deficiency with respect to the monitoring of an isolated detainee is the lack of confidentiality. While the U.K. government argues that meetings between a detainee and the monitoring group would be held in private, the detainee himself would be easily identifiable to the authorities in the facility. If ill-treatment were communicated, the prison or detention facility authorities and staff would know directly from whom the information derived. Such easy identification is strong disincentive for the detainee to give the monitoring group any information at all. A detainee would justifiably fear reprisals targeting him or his family members by prison staff and/or other government actors. In the case of Ahmed Agiza noted above, Agiza told his family that the torture escalated after the first monitoring visit of the Swedish authorities, during which he revealed to the monitoring delegation that he had been ill-treated [Human Rights Center for the Assistance of Prisoners, "Governmental Deportation: Egyptian Nationals as Islamic Activists," 1 April 2003, p. 6].

18. International monitoring bodies and experts such as the International Committee of the Red Cross (ICRC), the European Committee for the Prevention of Torture (CPT), the Working Group against Arbitrary Detention (WGAD), and the U.N. special rapporteur on torture all require universal access; that is, unhindered access to all detainees in all places where people are deprived of their liberty in a country. The specifications for the proposed monitoring Sub-Committee on the Prevention of Torture and Other Cruel, Inhuman and Degrading Treatment and Punishment under the Convention Against Torture's Optional Protocol require the same. There are sound reasons for requiring such universal access, in particular, that no one person will be identified as having shared information with the monitors, thus reducing the possibility of direct reprisals against a detainee or his or her family.

19. A second reason for the requirement of universal access, as opposed to individual or isolated monitoring, is to avoid an inherently discriminatory, two-tiered system that allegedly aims to protect some people at risk of torture, but leaves others vulnerable to well-documented interrogation practices and punishments that amount to torture and other ill-treatment. International law governing the global system of torture prevention requires that systemic safeguards be implemented on a state-wide basis at legislative, judicial, and administrative levels. The U.K. government claims that memoranda of understanding supplement their efforts at systemic level, for example in Jordan [Oakden, 2d Statement, paras. 43-46, 30 November 2005]. However, as the U.N. High Commissioner for Human Rights, Louise Arbour maintains, "Ad-hoc arrangements, such as assurances, concluded outside the system threaten to weaken its foundations and retard the progress that has been achieved over more than half a century to extend its ambit and protection to all" [Chatham House, London, 15 February 2006, at http://www.chathamhouse.org.uk/pdf/research/il/ILParbour.doc].

20. The U.K. makes much of the fact that it has ratified the Optional Protocol to the Convention Against Torture (OPCAT). The OPCAT has been ratified by eighteen states to date. The protocol requires twenty ratifications to come into force. Upon ratification, states can make a declaration postponing the implementation of their obligations for up to three years. Upon further representations, that period can be extended another two years. Neither Jordan nor Algeria has signed or ratified the OPCAT. It will be thus be many years before the OPCAT enters into force and the practical arrangements required for its full implementation are tested and completed. Currently, it does not feature in the constellation of monitoring groups and organizations that conduct visits to places of detention. In the meantime, the U.K.'s attempts to encourage a much watered-down version of the OPCAT for itself and other states to use in individual cases seriously undermines the OPCAT and provides other states that could potentially ratify the protocol with a non-binding "alternative" that would release them from the more

multi-faceted, systematic (and thus significantly more protective) legally binding requirements of the OPCAT.

21. Moreover, it is important to note that organizations that conduct monitoring visits to places of detention do not claim that such monitoring is sufficient on its own to prevent abuse. Some of these organizations have had serious problems specifically monitoring persons apprehended and detained on suspicions of terrorist activity or as national security threats. The ICRC does have a general agreement with Jordan to visit places of detention, including detainees housed in facilities operated by the General Intelligence Directorate (GID). In April 2004, however, the ICRC suspended visits to such facilities for three months "owing to problems of access to certain detainees" [ICRC 2004 Annual Report: Jordan, at http://www.icrc.org/Web/Eng/siteengo.nsf/htmlall/6D5EW4/$FILE/icrc_ar_04_jordan.pdf?OpenElement]. Moreover, the ICRC's experience with monitoring detainees at Abu Ghraib prison and other sites in Iraq and Afghanistan, and at Guantanamo Bay, Cuba, is a stark reminder that even the most experienced and committed monitors cannot guarantee that torture and ill-treatment will not occur without a more systematic and sustained national and global approach to torture prevention and protection.

22. The U.K. government claims that the ICRC was not approached to monitor the memoranda of understanding for pragmatic reasons, that is, because the ICRC "provides its reports in confidence to the state whose institutions are being monitored" [Oakden, 3d Statement, para. 9, 16 February 2006]. In 1999, however, the ICRC declined for reasons of principle to monitor a diplomatic assurances regime proposed by the U.K. government in the case of four Egyptian nationals slated for deportation to risk of torture in Cairo. In the July 2004 case of *Hani Youssef v. Home Office*, the Foreign and Commonwealth Office reported that although the ICRC has a permanent presence in Egypt, "…it would not visit particular prisoners without a general agreement allowing it access to all prisoners and would not get involved in any process which could in any way be perceived to contribute to, facilitate, or result in the deportation of individuals to Egypt." Given the ICRC's requirement of universal access to all detainees in an effort to address torture and ill-treatment in a systemic manner, there is no bilateral memorandum of understanding providing for visits to isolated detainees that would meet the standards of the most authoritative and experienced global monitoring body.

Post-return monitoring in Jordan

23. The U.K.-brokered memorandum of understanding with Jordan provides for the naming of an independent organization to monitor the agreement post-return. Due to the pressures on civil society groups in Jordan, however, there is a strong disincentive for any national monitoring group to reveal a breach. Human rights groups in Jordan are profoundly underdeveloped and many nongovernmental

organizations suffer reprisals when they openly criticize their governments. As the materials I reviewed state, "for pragmatic reasons," Adaleh—the nongovernmental organization named to monitor the memorandum of understanding with Jordan— "maintains and values constructive relations with the Government [of Jordan] believing this will increase influence" [Oakden, Exhibits to 2d Witness Statement, "Adaleh Centre for Human Rights Monitoring Body for Returnees to Jordan, para. 5, 30 November 2005].

24. It is difficult to envision how Adaleh's efforts at constructive dialogue with respect to the memorandum of understanding will yield any accountability in case of a breach when in fact Adaleh has little, if any, influence with the Jordanian government. Adaleh has a weak track record of speaking out against torture abuses on behalf of victims, or in publicly pressuring the government of Jordan to reform the legislative, judicial, and administrative system that currently permits torture and ill-treatment to occur routinely with respect to certain categories of detainee. The governments in the receiving states will clearly have the upper hand with respect to exerting pressure on the monitoring organization, for example, by withholding the ability to register officially as a nongovernmental organization.

25. In addition, the funding that the U.K. government is willing to provide to build capacity in monitoring groups is a windfall for organizations with few resources and little influence. The U.K. government will invest thousands of pounds for training, computers, and new office space for Adaleh. Such attractive monetary incentives undermine the notion that domestic monitoring bodies will be fully independent [Oakden, 3d Statement, para. 11, 15 February 2006].

No effective remedy for breach

26. The government of the United Kingdom has admitted that the memoranda are bilateral agreements of understanding and as such are not legally binding, and thus do not carry the force of either state's treaty obligations [Oakden, 3d Statement, para. 16, 15 February 2006]. The U.K. government goes on to say that the enforcement mechanisms in legally-binding multilateral treaties "are relatively weak" [Oakden, 3d Statement, para. 16, 15 February 2006], but fails to state the obvious: the memoranda of understanding contain no enforceability mechanism at all. Even in the event that a monitoring organization did discover and reveal a breach of a memorandum of understanding, the lack of an enforceability mechanism is an inherent flaw that renders the agreements virtually meaningless with respect to recourse for the person so abused and accountability for the two governments responsible for the violation.

27. In the extremely rare cases where there has been access to some accountability mechanism, the sending state has either failed to enforce a judgment or invoked national security to obstruct a detainee's access to information to proceed with a

court challenge. Despite the fact that the U.N. Committee Against Torture found Sweden in breach of article 3 of the Convention Against Torture in the *Agiza* case, the Swedish government has insisted that the Committee's decision itself has no legally binding character. In an interview on Swedish radio on 16 November 2005, then-Swedish Foreign Minister Laila Freivalds stated that "there is no legal responsibility" flowing from the Committee's decision and that "the decision carries no legal consequences" [Interview on "Ekot" program, Sveriges Radio (Swedish Radio), 16 November 2005].

28. The authority of the Committee Against Torture, however, derives directly from Sweden's accession to the Convention Against Torture, and in particular from its declaration to abide by article 22, which permits the Committee to hear individual petitions involving a state party. Sweden's challenge to the binding nature of decision in the *Agiza* case is a clear example of the unwillingness of governments to take action even when assurances are so clearly breached.

29. In the case of Maher Arar, the U.S. government successfully argued in federal district court a "state secrets" defense against Arar's petition for relief with respect to the U.S.'s obligations under the U.S. Constitution, Convention Against Torture, and the Torture Victim Protection Act of 1991. The court accepted the U.S.'s argument that national security would be irreparably compromised by any disclosure of the facts in the Arar case [*Arar v. Ashcroft, et al.*, United States District Court, Eastern District of New York, CV-04-0249, 16 February 2006, at http://www.ccr-ny.org/v2/legal/september_11th/docs/Arar_Order_21606.pdf], despite the conclusion of the independent fact-finder appointed by the Arar Commission in Canada that Arar had been tortured and ill-treated in Syria (see above). The decision is on appeal. Thus, even when detainees seek redress in a judicial or quasi-judicial forum, some having been proven to have been tortured, there is little or no accountability for a breach of a bilateral agreement including diplomatic assurances against torture.

Link between fair trial concerns and risk of torture

30. The Committee Against Torture, commenting on the well-documented fair trial violations in the military court proceedings against Ahmed Agiza in April 2004, concluded that "the breach by Egypt of the element of the assurances relating to a guarantee of a fair trial…goes to the weight that can be attached to the assurances as a whole" [*Agiza v. Sweden*, May 2005, at http://www1.umn.edu/humanrts/cat/decisions/233-2003.html].

31. In October 2004, radical Muslim cleric Metin Kaplan was deported from Germany to Turkey based on diplomatic assurances of a fair trial in Turkey. The German government consistently argued that Kaplan's high profile in Germany and Turkey guaranteed that he would not suffer an unfair trial in Turkey, despite the fact that terrorism and national security suspects, as well as militant Islamists,

were routinely subjected to fundamentally flawed trials in Turkish courts—even in the aftermath of the abolition of the widely-criticized state security courts.

32. In June 2005, Kaplan was sentenced to life in prison for plotting to overthrow Turkey's secular system with his Cologne-based extremist group, known as the "Caliphate State." A Turkish Appeals Court in December 2005 ruled unanimously to overturn the June 2005 verdict on grounds of procedural deficiencies and inadequate investigation. A February 2006 report by Amnesty International Germany, Pro-Asyl, and Holtfort-Stiftung on fair trial concerns in Turkey dedicates nearly forty pages to the serious substantive and procedural fair trial violations, including allegations of the use of evidence extracted by torture, that plagued Kaplan's June 2005 trial. [Helmut Oberdiek, *The Rule of Law and Political Trials in Turkey*, 23 February 2006, pp. 193-234, at www.ecoi.net/pub/mk1122_7888tur.pdf (in German)].

33. Rustam Mamatkulov and Abdurasulovic Askarov, high profile Erk members were extradited from Turkey to Uzbekistan in March 1999 following diplomatic assurances of humane treatment and fair trial. Little attention has been paid to their manifestly unfair trial in June 1999, which was affected by significant procedural and substantive violations, including allegations of torture. [Human Rights Watch Third Party Intervention in the Case of *Mamatkulov and Askarov v. Turkey*, European Court of Human Rights, January 2004, at http://www.hrw.org/doc?t=central_asia&document_limit=120,20].

34. It is notable that, in addition to the numerous fair trial violations in Ahmed Agiza's April 2004 retrial in an Egyptian military court, the Swedish diplomats who had been guaranteed access to the proceedings were barred from two of the four court hearings [Human Rights Watch, *Still at Risk*, April 2005, pp. 60-61].

Conclusion

35. The memoranda of understanding drafted, negotiated, and proposed for implementation by the U.K. government in countries such as Jordan, violate the U.K.'s international legal obligations as enshrined in article 3 of the ECHR and article 3 of the U.N. Convention Against Torture. They should be rejected as an ineffective safeguard against torture and other ill-treatment, and the U.K. government directed to comply in full with its *nonrefoulement* obligation by not deporting any person to a place where he or she is at risk of torture and other ill-treatment.

Signed:_____

Date: _____