



**Not the Way Forward**  
**The UK's Dangerous Reliance on**  
**Diplomatic Assurances**

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# Not the Way Forward

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## Summary

In recent years the British government has been trying to deport a number of terrorism and national security suspects to countries in which they face a real risk of torture and other ill-treatment. Because the international ban on torture is absolute and the transfer of any person to a risk of such abuse is therefore illegal, the British government has secured diplomatic assurances from the states to which it is trying to deport the persons that they will not be subjected to mistreatment once they are returned. These assurances, the government claims, are sufficient to reduce or even eliminate the risk of abuse.

Not only does the government of the United Kingdom promote the use of such assurances at home, it has also expended a great deal of time and energy at the regional and international levels attempting to legitimize the use of diplomatic assurances against torture. In recent years, British officials have engaged in vigorous lobbying at the European Union, the Council of Europe, and the United Nations to promote acceptance of diplomatic assurances as a counterterrorism tool.

But the fact is that these assurances do not work. In countries where torture is a serious problem, mere diplomatic promises are insufficient to prevent torture. No matter how detailed such agreements are, they cannot eliminate the very real risk faced by people returned to countries that practice such clandestine, brutal abuse.

Because diplomatic assurances are unenforceable promises, a country that breaches them is unlikely to experience any serious consequences if the assurances are violated. In many instances, moreover, it is practically impossible to ascertain whether a breach has occurred. Because torture is carried out in secret, and victims often do not complain for fear of reprisals against them or their families, the practice is hard to investigate, and easy to deny. Notably, neither the sending state nor the receiving state has any incentive to carry out such investigations seriously. To do so might not only reveal human rights violations, but might complicate efforts to rely on assurances in the future.

These issues are central to two important appeals facing the House of Lords this month. In *RB and U v. Secretary of State for the Home Department* and *Secretary of State for the Home Department v. OO (Othman)*—cases that will be heard on October 22 and October 28, respectively—the House of Lords will be examining the value of diplomatic assurances against torture in assessing whether terrorism suspects should be deported to their home states. The British government concedes that, but for the assurances, the deportees would be at risk of torture; it is thus the effectiveness of the assurances that lies at the heart of the appeals.

The potential deportees in the *RB and U* case are Algerian, and the diplomatic assurances at issue in the case were negotiated individually, for each person. Omar Othman (a.k.a. Abu Qatada), the respondent in the *Othman* case, is a Jordanian national and radical Muslim cleric accused of ties to al-Qaeda. The assurances in his case come in the form of a broad “memorandum of understanding” between the United Kingdom and Jordan that purports to cover any Jordanian national deported back to that country.

Notably, both cases involve countries in which the torture and other abuse of national security suspects have been well-documented.

If the two Algerians are returned to Algeria, they will most likely be detained by the notorious Department for Information and Security (DRS), whose operatives have been accused of—but never held accountable for—abuses such as beatings, electric shock torture, suspending prisoners from the ceiling, and forcing them to ingest chemicals. If sent to Jordan, Othman would likely be handed over to the General Intelligence Department (GID), which has colluded with the US government in renditions to torture, obstructed access to prisons by the International Committee of the Red Cross, and been accused of committing serious abuses—such as brutal beatings and threats of rape—with virtual impunity.

These two pending appeals represent the first time that the House of Lords has grappled with the issue of diplomatic assurances. In the Court of Appeal, the lower court that previously heard the two cases, the record has been mixed. The Court of Appeal ruled in favor of allowing the Algerians to be deported, but it barred

Othman's return, concluding that evidence extracted under torture from others in GID custody would likely be used in Othman's trial in Jordan. In a related ruling, involving two alleged members of the Libyan Islamic Fighting Group, the Court of Appeal held in April 2008 that the men would be at risk of torture and of being denied a fair trial if returned to Libya.

The British courts are the last domestic bulwark against the grave violations that are likely to occur if people are sent back to abusive countries in reliance on assurances.

At the regional level, the European Court of Human Rights has stood firm against assurances as sought by the UK and other governments: in a string of 2008 rulings concluding that diplomatic assurances are unreliable, the European Court dealt a hard blow to the UK government's persistent efforts to enshrine these agreements in law and practice. The Court ruled in key cases that the use of diplomatic assurances for returns to countries such as Tunisia, Uzbekistan, and Turkmenistan would signal a regression in rights protection.

While continuing to press its position in the courts, the UK government has also embarked on aggressive political lobbying efforts. The UK has asserted in various EU fora, for example, that diplomatic assurances, negotiated outside the multilateral human rights treaty framework, can provide an "effective way forward" for states seeking to expel persons who pose a threat to national security. And it has called any criticism of its diplomatic assurances policy "simply wrong," arguing that the policy is designed to comply with its human rights obligations, not to avoid them.

To date, the UK government's efforts have been relatively unsuccessful. Its reliance on diplomatic assurances has been criticized by the United Nations, rebuffed at the Council of Europe, and denounced within the British parliament. Opposition by numerous international actors and major defeats in the courts indicate that a critical mass of experts and authorities view the assurances negotiated by the UK government as an ineffective safeguard against torture.

There are broader moral, political, and national security reasons to be concerned about the UK's promotion of diplomatic assurances against torture. The British

government promotes itself as a leader in the global effort to eradicate torture, through actions such as its early ratification of the Optional Protocol to the United Nations Convention against Torture and its advocacy that other governments do the same. But the government's relentless campaign to see "deportation with assurances" accepted throughout Europe reflects a more ambivalent attitude toward torture. That ambivalence sends the wrong message at a time when torture protection has been under assault in many parts of the world.

The British government's "deportation with assurances" policy is also counter-productive at home. Since the July 2005 attacks on London, preventing radicalization and recruitment has been at the heart of the UK's counterterrorism strategy. Whatever the alleged benefit of counterterrorism measures like diplomatic assurances, in violating human rights in principle and practice it is clear they undermine the UK's moral legitimacy at home and abroad, damaging its ability to win the battle of ideas that is central to long-term success in combating terrorism.

## Recommendations

### To the Government of the United Kingdom

- Reaffirm the absolute nature of the obligation under international law not to expel, return, extradite, or otherwise transfer any person to a country or place where there are substantial grounds for believing that he or she would be in danger of being subjected to torture or cruel, inhuman or degrading treatment or punishment.
- Halt immediately all efforts to remove foreign terrorism and national security suspects at risk of torture and ill-treatment on return in reliance on “diplomatic assurances” from countries with established records of practicing such abuse, regardless of whether these unenforceable pledges are formalized in “memoranda of understanding.”
- Drop immediately the efforts to have the Algerians and Jordanian whose cases are pending in the House of Lords deported to their home countries in reliance on assurances from their respective governments against torture and prohibited ill-treatment on return.
- Acknowledge publicly that counterterrorism measures that violate fundamental rights—such as measures that violate the ban on torture and returns to risk of torture—can alienate affected communities and hinder government efforts to stem radicalization and terrorist recruitment.
- Stop seeking to enshrine in international and regional law and practice the use of diplomatic assurances against torture and prohibited ill-treatment to facilitate the transfer of foreign terrorism suspects to places where they are at risk of such abuse.
- Withdraw the intervention in the European Court of Human Rights case *Ramzy v. Netherlands* and halt all efforts to weaken the absolute ban on returns to risk of torture and prohibited ill-treatment.

## To the British Parliament

- Continue the close scrutiny and resultant criticism of the government’s “deportation with assurances” policy as reflected in reports by the UK Parliamentary Joint Human Rights Committee and the House of Commons Foreign Affairs Committee.
- Request the government, in particular the home secretary, foreign secretary, and the prime minister, to set out and explain British policy and efforts in international fora to promote diplomatic assurances against torture, including in the European Union, and legal interventions in European Court of Human Rights cases such as *Ramzy v. Netherlands* and *Saadi v. Italy*.
- Request the Foreign and Commonwealth Office to provide information on the cost of the United Kingdom’s interventions in cases concerning returns to risk of ill-treatment including *Ramzy v. Netherlands* and *Saadi v. Italy*.

## To the relevant institutions of the European Union

- Refuse all efforts to adopt a common position or other formal policy statement on the use of diplomatic assurances against torture and ill-treatment for the transfer of terrorism and national security suspects to countries where they are at risk of such abuse.
- Affirm that the use of diplomatic assurances against torture and ill-treatment for transfers to countries where such abuse is routine undermines the EU Guidelines on Torture.

## British Policy on Diplomatic Assurances

The British government's use of diplomatic assurances dates back to the mid-1990s. But it was only after a landmark House of Lords ruling in December 2004—in which the court held that the indefinite detention of foreign terrorism suspects violated the UK's international human rights obligations—that “deportation with assurances” became a central plank of the government's counterterrorism strategy.<sup>1</sup>

As part of this strategy, the government signed “memoranda of understanding” (MOUs) with Jordan, Libya, and Lebanon to permit the deportation with assurances of terrorism suspects based on promises from the home state of humane treatment upon return.<sup>2</sup> The government also sought to negotiate similar agreements with Algeria and other North African and Middle Eastern governments. All the governments in question have well documented records of torture and ill-treatment, particularly of persons suspected of involvement in terrorism or radical Islamism.

Notably, the Algerian government rejected these overtures, in particular the British government's request for a post-return monitoring scheme of visits to Algerian returnees. The UK government explained Algeria's refusal as the “sensitivity” of a post-colonial state to the suggestion that it needed outside surveillance of its behavior.<sup>3</sup> In light of the failed effort to obtain an MOU, the British government then claimed that the Algerian Charter for Peace and National Reconciliation—adopted by

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<sup>1</sup> *A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent)*, [2005] UKHL 71, December 8, 2005, <http://www.publications.parliament.uk/pa/ld200506/ldjudgmt/jdo51208/aand-1.htm> (accessed September 30, 2008). “Deportation with assurances” is known in the UK as “DWA.”

<sup>2</sup> Memorandum of Understanding between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Hashemite Kingdom of Jordan Regulating the Provision of Undertakings in Respect of Specified Persons Prior to Deportation, signed August 10, 2005, <http://www.fco.gov.uk/resources/en/pdf/jordan-mou> (accessed October 8, 2008); Memorandum of Understanding between the General People's Committee for Foreign Liaison and International Cooperation of the Great Socialist People's Libyan Arab Jamahiriya and the Foreign and Commonwealth Office of the United Kingdom of Great Britain and Northern Ireland Concerning the Provision of Assurances in Respect of Persons Subject to Deportation, signed October 18, 2005, <http://www.fco.gov.uk/resources/en/pdf/libya-mou> (accessed October 8, 2008); Memorandum of Understanding between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Lebanese Republic Concerning the Provision of Assurances in Respect of Persons Subject to Deportation, signed December 23, 2005, <http://www.fco.gov.uk/resources/en/pdf/lebanon-mou> (accessed October 8, 2008).

<sup>3</sup> *MT, RB, and U v. Secretary of State for the Home Department*, [2007] EWCA Civ. 808, July 30, 2007, <http://www.bailii.org/ew/cases/EWCA/Civ/2007/808.html> (accessed September 30, 2008), para. 131.

a national referendum in 2005 and followed by an amnesty law in February 2006—would protect the deportees, making assurances and monitoring redundant.<sup>4</sup>

In the end, Algerian President Abdelaziz Bouteflika agreed, in a July 2006 “exchange of letters” and *notes verbale* with UK then-Prime Minister Tony Blair, to negotiations for diplomatic assurances of humane treatment and fair trial on a case-by-case basis.<sup>5</sup> The Algerian government also agreed that the British Embassy could maintain contact with returned persons who were not detained, and with the next of kin of detainees.<sup>6</sup>

### “Enhanced” Assurances or More of the Same?

Aware of documented cases in which persons sent home from other countries based on diplomatic assurances have been abused, UK officials emphasize that the assurances that the British government secures are “enhanced.” In particular, they claim that the UK MOUs offer added protection because they provide for post-return monitoring.<sup>7</sup>

In making this claim, however, the government has ignored some fundamental problems with monitoring isolated detainees: the fact that torture occurs in secret, often using techniques difficult to detect, including psychological abuse; the lack of confidentiality and the consequent risk of reprisals when complaining of abuse; and various documented forms of obstruction to access to individual detainees by monitors, despite agreements to the contrary.<sup>8</sup> The International Committee of the

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<sup>4</sup> Amnesty International, “United Kingdom: Deportations to Algeria at All Costs,” AI Index: EUR 45/001/2007, February 26, 2007, p. 2. The amnesty law offered exemption from prosecution for some persons charged with or convicted of terrorist activities during Algeria’s civil war (1991-2002).

<sup>5</sup> Letter from Prime Minister Tony Blair to President Abdelaziz Bouteflika, July 11, 2006, <http://www.fco.gov.uk/resources/en/pdf/pm-letter-to-algerianpres> (accessed October 8, 2008); Letter from President Abdelaziz Bouteflika to Prime Minister Tony Blair, July 11, 2006, <http://www.fco.gov.uk/resources/en/pdf/algerian-pm-letter> (accessed October 8, 2008). See also *Hansard’s*, vol. 696, part no. 18, column WA 181, “Terrorism: Repatriation of Suspects,” December 4, 2007, <http://www.publications.parliament.uk/pa/ld200708/ldhansrd/text/71204w0002.htm#07120461000021> (accessed September 30, 2008).

<sup>6</sup> *MT, RB, and U v. Secretary of State for the Home Department*, para. 130.

<sup>7</sup> For more information about the UK government’s claims, see Julia Hall, “Mind the Gap: Diplomatic Assurances and the Erosion of the Global Ban on Torture,” *Human Rights Watch World Report 2008*, <http://hrw.org/wr2k8/diplomatic/index.htm>.

<sup>8</sup> Human Rights Watch, *Still at Risk: Diplomatic Assurances No Safeguard Against Torture*, vol. 17, no. 3(D), April 2005, [http://hrw.org/reports/2005/eca0405/4.htm#\\_Toc100558825](http://hrw.org/reports/2005/eca0405/4.htm#_Toc100558825).

Red Cross (ICRC) requires universal access to all places of detention in a country and all detainees held in those places, precisely to avoid such pitfalls.<sup>9</sup>

In addition to monitoring arrangements, the British government argues that the formal assurances it seeks can be distinguished from similar agreements brokered by other governments, some of which have resulted in breaches leading to torture.<sup>10</sup> It claims to have learned a lesson, in particular, from the notorious case of Ahmed Agiza, an Egyptian national who was transferred from Sweden to Egypt in December 2001 in reliance on assurances of humane treatment, and who was then tortured in a Cairo prison.<sup>11</sup>

According to the Foreign and Commonwealth Office, the assurances obtained by the British government are different. Their distinguishing features include: negotiations that occur at the “highest level,” between heads of state or government “to ensure buy-in” throughout the system; detailed discussions about why assurances are sought and what they mean in practice; placing the assurances “at the heart of the bilateral relationship” indicating “serious bilateral consequences” if a breach were to occur; and discussing in detail precisely what would happen to a person on return in terms of apprehension, detention, prosecution, and sentence to identify any “blind spots” that should be avoided or alleviated.<sup>12</sup>

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<sup>9</sup> Ibid. See also Human Rights Watch, *Empty Promises: Diplomatic Assurances No Safeguard Against Torture*, vol. 16, no. 4(D), April 2004, <http://hrw.org/reports/2004/uno404/>.

<sup>10</sup> Kate Jones, “Deportations with Assurances: Addressing Key Criticisms,” *International and Comparative Law Quarterly*, vol. 57, January 2008, pp. 183-94. Jones is assistant legal advisor in the UK Foreign and Commonwealth Office.

<sup>11</sup> In May 2005 the UN Committee Against Torture (CAT) found Sweden in violation of article 3 of the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Article 3 absolutely prohibits transferring a person to a place where there are substantial grounds for believing that he or she would be in danger of being subjected to torture. The CAT stated that Sweden should have known Agiza would be at risk and, “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*, Communication No. 233/2003, U.N. Doc. CAT/C/34/D/233/2003, May 20, 2005, <http://www1.umn.edu/humanrts/cat/decisions/233-2003.html> (accessed September 30, 2008), para. 13.4. Agiza was expelled with another man, Mohammed al-Zari, and they were held together and tortured in prison. Al-Zari was released in October 2003. In November 2006 the UN Human Rights Committee ruled that Sweden violated the ban on torture by expelling him to risk of such abuse based on unreliable diplomatic assurances. See *Alzery v. Sweden*, CCPR/C/88/D/1416/2005, November 10, 2006, <http://www.unhchr.ch/tbs/doc.nsf/oac7e03e4fe8f2bdc125698a0053bf66/13fac9ce4f35d66dc12572220049e394> (accessed September 30, 2008), para. 11.5.

<sup>12</sup> Kate Jones, “Deportations with Assurances: Addressing Key Criticisms,” p. 187.

Simply saying that these measures are distinct, however, does not make them so. Nearly every government that seeks assurances claims that it negotiates them at the highest levels, with state actors who are directly responsible for the operatives that might perpetrate acts of torture, taking into careful consideration what might happen on return.<sup>13</sup> The Swedish government sent an emissary to Cairo in advance of Agiza's expulsion who liaised with the embassy staff of other European and North American missions and with the Egyptian government itself. The assurances in that case were also in written form, guaranteeing humane treatment, no death penalty, and a fair retrial for Agiza, who had been previously tried in absentia.

Given that Swedish officials made numerous consular visits to Agiza in prison, the Agiza case also highlights the weakness of post-return monitoring. Although Agiza told visiting Swedish officials in January 2002 that he had been tortured, that information was blacked-out in an official Swedish monitoring report. In the aftermath of revelations of Agiza's torture and Sweden's cover up, the Swedes requested a full investigation by the Egyptians, which Egyptian officials in Cairo ignored completely. Requests by Sweden for a second retrial, after many violations of the right to fair trial had occurred during the first, similarly fell on deaf ears.<sup>14</sup> Despite these serious problems, Swedish-Egyptian relations were apparently unaffected. Robert Hårdh, secretary of the Swedish Helsinki Committee, a Stockholm-based human rights organization, told Human Rights Watch that to his knowledge, "there have not been any negative diplomatic effects at all due to the Agiza affair."<sup>15</sup>

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<sup>13</sup> The United States, for example, makes these same claims, and goes even further by arguing that because its negotiations are conducted at such a high political level and include the very sensitive issues of torture and ill-treatment, impunity for abuses, and monitoring of places of detention and its implications for a country's sovereignty, the US cannot reveal anything at all about the negotiations, the actors, or the substance of the assurances. To do so, it claims, would hinder the conduct of foreign affairs. See United States District Court for the Middle District of Pennsylvania, *Sameh Sami Khouzam v. Thomas Hogan*, Civil No. 3:CV-07-0992-TIV, June 15, 2007.

<sup>14</sup> "Sweden Implicated in Egypt's Abuse of Suspected Militant: Egypt Violated Diplomatic Promises of Fair Trial and No Torture for Terrorism Suspect," Human Rights Watch news release, May 5, 2004, <http://hrw.org/english/docs/2004/05/05/egypt8530.htm>.

<sup>15</sup> Email communication from Robert Hårdh to Human Rights Watch, September 29, 2008. The Swedish Helsinki Committee assisted Agiza in seeking redress from the Swedish government. The government eventually retroactively revoked Agiza's expulsion order and agreed to pay the equivalent of about \$450,000 in compensation to his family. See "Around the World: Sweden—Ex-terrorism Suspect to be Compensated," *Washington Post*, September 20, 2008. Agiza remains in prison in Egypt, and his family was granted asylum in Sweden.

In short, what is said to be unique about the UK’s “deportation with assurances” policy is in most key respects already common in terms of practice by other deporting states. It is consequently subject to many of the same deficiencies as assurances agreements that the British government recognizes have been ineffective.

The UK Court of Appeal ruled to that effect with respect to the MOU the British government signed with Libya in October 2005. In April 2008 the court blocked the deportation of two Libyans, known only as “DD” and “AS,” by upholding an April 2007 ruling by the Special Immigration Appeals Commission (SIAC)—the court that hears appeals against deportation on national security grounds—that the men would be at risk of torture and a “complete” denial of a fair trial if returned to Libya.<sup>16</sup> The two were alleged to be members of the Libyan Islamic Fighting Group (LIFG), an armed opposition group whose aim is the overthrow of Libyan leader Muammar al-Qadhafi.

The Court of Appeal ruled that the SIAC did not err by determining that Colonel Qadhafi could not be relied upon to abide by his agreement with the British government to treat the men humanely. The SIAC had concluded that torture is “extensively used against political opponents among whom Islamist extremists and LIFG members are the most hated by the Libyan Government, the Security Organisations and above all by Colonel Qadhafi.” It also noted that the incommunicado detention of political opponents without trial, often for many years, “is a disfiguring feature of Libyan justice and punishment.”<sup>17</sup> The British government did not appeal the ruling to the House of Lords and abandoned its plans to deport Libyan national security suspects back to Libya.

The government points to the Libyan cases as an example of how the courts provide a check on its diplomatic assurances policy, but the concerns raised by SIAC in the Libyan appeal arguably obtain with respect to Algeria and Jordan as well.

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<sup>16</sup> *AS and DD v. Secretary of State for the Home Department*, [2008] EWCA Civ. 289, April 9, 2008, [http://www.judiciary.gov.uk/docs/judgments\\_guidance/judgment\\_as\\_dd\\_libya\\_090408.pdf](http://www.judiciary.gov.uk/docs/judgments_guidance/judgment_as_dd_libya_090408.pdf) (accessed October 13, 2008).

<sup>17</sup> *DD and AS v. Secretary of State for the Home Department*, [2007] UKSIAC 42/2005, April 27, 2007, [http://www.bailii.org/uk/cases/SIAC/2007/42\\_2005.html](http://www.bailii.org/uk/cases/SIAC/2007/42_2005.html) (accessed September 30, 2008).

## Pending Appeals to the House of Lords

In the Algerian and Jordanian cases, the House of Lords will need to determine whether the lower courts erred in evaluating whether the men would be at real risk of torture and ill-treatment on return.<sup>18</sup>

The international standard for making such an assessment is whether, at the time of transfer, a state knew or should have known that a person would be at real risk of such abuse. The European Court of Human Rights has ruled that as far as an applicant's complaint under article 3 of the European Convention on Human Rights (ECHR) is concerned, the crucial question is whether there is a "real risk" that if expelled, a person would be subjected to torture or ill-treatment.<sup>19</sup> If a person has not been deported or otherwise transferred, the material point in time must be the moment at which a court considers the case; if extradition has already been effected, "the existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of the extradition."<sup>20</sup>

By this standard, for a court considering whether a transfer may go ahead, it will be necessary to take account of evidence that has come to light since any prior review. Thus, new evidence of continuing torture with impunity would have to be considered before any decision to deport could be made.

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<sup>18</sup> Human Rights Watch and Justice, the London-based affiliate of the International Commission of Jurists, submitted an amicus brief for consideration in both appeals. See *RB and U v. Secretary of State for the Home Department and Secretary of State for the Home Department v. OO (Othman)*, House of Lords, Submission on Behalf of Justice and Human Rights Watch, October 2, 2008, [http://hrw.org/pub/2008/ct/UKdiplomatic\\_assurances101008.pdf](http://hrw.org/pub/2008/ct/UKdiplomatic_assurances101008.pdf).

<sup>19</sup> The risk cannot be a "mere possibility," but certainty that ill-treatment will occur is not required. See *Soering v. UK*, 1/1989/161/217, July 7, 1989, para. 98. In assessing whether there is a risk of torture, the Committee Against Torture has stated that the risk must go "beyond mere theory and suspicion" but does not have to meet the test of being "highly probable." See UN Committee Against Torture, General Comment No. 1: Implementation of Article 3 of the Convention in the Context of Article 22, A/53/44, annex IX, November 21, 1997, [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/13719f169a8a4ff78025672b0050eba1](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/13719f169a8a4ff78025672b0050eba1) (accessed October 8, 2008).

<sup>20</sup> See European Court of Human Rights, *Cruz Varas and Others v. Sweden*, Series A, no. 201, March 20, 1991, pp. 29-30, §§ 75-76. As the Court explains, "Since the nature of the Contracting States' responsibility under Article 3 in cases of this kind lies in the act of exposing an individual to the risk of ill-treatment, the existence of the risk must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of the extradition." See also UN Committee Against Torture, *Tebourski v. France*, CAT/C/38/D/300/2006, May 1, 2007 [http://www.bayefsky.com/doc/france\\_t5\\_cat\\_300\\_2006.doc](http://www.bayefsky.com/doc/france_t5_cat_300_2006.doc) (accessed September 30, 2008).

## The Algerian cases

The first set of cases to be heard on appeal to the House of Lords on October 22-23, 2008, involves a July 2007 judgment of the Court of Appeal. In that case, the Court of Appeal upheld a previous ruling by the SIAC that two Algerians could be deported to Algeria in reliance on diplomatic assurances against torture and ill-treatment from the authorities in Algiers.<sup>21</sup>

As noted above, the test for assessing a deportation's compliance with article 3 of the European Convention requires an evaluation of the personal risk a person would face given conditions in the home country at the time of transfer. Recent UN reports are unequivocal in their condemnation of Algeria for torture and ill-treatment of persons held in security detention, the lack of investigation of alleged abuses, and the general impunity enjoyed by those perpetrating the violations.

In May 2008, in its review of Algeria, the UN Committee Against Torture listed several areas of concern. It referred to the extension of the official state of emergency, first declared in 1992; reports of secret detention centers, outside any judicial control, operated by the Algerian Department for Information and Security (DRS) and not subject to investigation by the authorities; numerous cases of torture and ill-treatment reportedly at the hands of the DRS; and the lack of prompt and impartial investigations into allegations of such abuse.<sup>22</sup> The UN Human Rights Committee had issued a similar report in December 2007. It expressed concern that human rights abuses were committed by Algerian public officials with "complete impunity"; requested action on reports of secret detention centers operated by the DRS; called on the Algerian authorities to investigate reports of torture by DRS operatives; and noted that, under Algerian law, confessions extracted under torture are not explicitly prohibited and excluded as evidence.<sup>23</sup>

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<sup>21</sup> *MT, RB, and U v. Secretary of State for the Home Department*. All information on these cases is taken from the Court of Appeal judgment.

<sup>22</sup> Committee Against Torture, Algeria: Concluding Observations, CAT/C/DZA/CO/3, May 26, 2008. Ironically, the committee noted "with satisfaction" that a "positive aspect" of Algerian practice was that "it does not engage in the practice of seeking diplomatic assurances against torture from a third State to which it plans to extradite, return, or expel an individual." *Ibid.*, para. 3(e).

<sup>23</sup> Human Rights Committee, Algeria: Concluding Observations, CCPR/C/DZA/CO/3, December 12, 2007, pp. 2-7.

Such reports echo evidence that was available to the SIAC at the time of its original ruling in April 2007. In a hearing before the SIAC, the British government acknowledged the existence of torture in Algeria, the lack of civilian control over the DRS, and the fact that it “had never seen any report of any prosecution of a DRS official for torture or ill-treatment.”<sup>24</sup> The SIAC found the Algerian assurances to be reliable, however, based on the trend in Algeria toward civilian control, the promised loosening of military power, and the fact that President Bouteflika’s position is not subordinate to the military.<sup>25</sup> The SIAC noted that the DRS reports directly to the president, apparently not considering that such an admission makes Bouteflika himself responsible for the torture and ill-treatment documented as occurring within DRS custody and the absence of accountability for such abuses.<sup>26</sup>

The Court of Appeal pointed out, “If a country is disrespectful of international norms and obligations, it is likely to be no less disrespectful of its obligations under a lower-level instrument such as a diplomatic note.”<sup>27</sup> Inexplicably, however, the court went on to uphold the SIAC’s findings.

Algeria’s treatment of recent returnees raises additional concerns. Indeed, the Bouteflika government has already breached promises it made regarding the treatment on return of two Algerian nationals deported from the United Kingdom in January 2007. These promises were made by Algerian officials directly to the affected men, but the British government had facilitated contacts between the officials and the men.<sup>28</sup> While not formal “diplomatic assurances” brokered between governments, these promises—which were breached to devastating effect for the men, Benaissa Taleb and Rida Dendani—are a window on the Algerian government’s absence of good faith and the abuses returnees suffer on return.

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<sup>24</sup> *MT, RB, and U v., Secretary of State for the Home Department*, para. 122.

<sup>25</sup> *Ibid.*, para. 123.

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*, para. 126.

<sup>28</sup> Statement by Rida Dendani from HMP Long Lartin, December 24, 2006, <http://www.cageprisoners.com/articles.php?id=18090> (accessed October 8, 2008). See also Gareth Peirce, “Was It Like This for the Irish?” *London Review of Books*, April 10, 2008, p. 6.

Frustrated by the long process of appealing their deportations, national security suspects Taleb and Dendani decided to return “voluntarily” to Algeria last year. Their decision was reportedly based in part on promises from the Algerian authorities that the February 2006 amnesty (see previous section) would apply to them; that they would not be tried for any offense; that they would be detained for only a short period on return; and that they would not be held in DRS custody.<sup>29</sup>

On return, however, the men were detained in DRS custody for 12 days, interrogated, and reportedly threatened and beaten. Both were later charged, tried, and convicted of involvement in a terrorist network operating outside of Algeria. Statements reportedly extracted using coercive interrogation techniques during their initial period of detention were used as evidence against them at trial. Taleb was sentenced to three years’ imprisonment and Dendani to eight years.<sup>30</sup>

There are also concerns about the treatment of four former Guantanamo Bay detainees who were recently repatriated to Algeria. Abderrahmane Houari (also known as Sofiane Hadarbache) and Mustafa Ahmed Hamlily were transferred from Guantanamo to Algiers on July 2, 2008. They were the first Algerian detainees to be repatriated after years of negotiations between the US and Algerian governments. Upon arrival, both men were detained incommunicado for nearly two weeks without access to family members or their lawyers.<sup>31</sup> They have since been charged with membership in a terrorist organization abroad and using forged travel documents. Both men were granted bail pending court appearances.

In August 2008 two other Algerians were transferred from Guantanamo to Algerian custody. For the first two weeks on return, there was no information available regarding their whereabouts or status.<sup>32</sup> They are both out on bail now pending trial

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<sup>29</sup> Ibid.

<sup>30</sup> Ibid.

<sup>31</sup> “US/Algeria: Reveal Location of Guantanamo Detainees: Two Algerians Missing Since Their July 2 Return,” Human Rights Watch news release, July 11, 2008, <http://hrw.org/english/docs/2008/07/11/algeri19339.htm>.

<sup>32</sup> Mohammed Abd al-Qadir (also known as Mohamed Trari) and Abdulli Feghoul arrived in Algiers on August 26, after more than six years in Guantanamo. “US: Rice Should Press Algeria on Fate of Returned Guantanamo Detainees,” Human Rights Watch news release, September 5, 2008, <http://hrw.org/english/docs/2008/09/05/usint19754.htm>.

on charges for membership in a terrorist organization operating abroad and using forged travel documents.

According to the US State Department and Department of Defense, it is the policy of the United States not to send any Guantanamo Bay detainee to a place where it is more likely than not that the detainee would be tortured upon return. In cases where there is a risk of torture, the government seeks and secures diplomatic assurances against such treatment.<sup>33</sup> In September 2008 Human Rights Watch urged US Secretary of State Condoleezza Rice to press President Bouteflika on the fate of the returned Guantanamo detainees.<sup>34</sup> Rice acknowledged after a meeting with Bouteflika in Algiers on September 6 that the issue of Guantanamo was discussed, but gave no indication that she sought specific information on the treatment, whereabouts, or status of the returnees, or that she asked for or received access to meet the men or their families.<sup>35</sup>

## The case of Abu Qatada

The second case on appeal to the Lords, to be heard October 28-29, 2008, involves Omar Othman, a.k.a. Abu Qatada. A recognized refugee and radical Muslim cleric accused of ties with al-Qaeda, Othman is threatened with deportation to Jordan in reliance on promises from Amman of humane treatment and fair trial.

The Court of Appeals, overturning the prior SIAC ruling in this case,<sup>36</sup> barred Othman's removal based on its finding that if he were prosecuted in Jordan—a likely outcome given Jordanian interest in him—evidence extracted by the torture of

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<sup>33</sup> US Court of Appeals for District of Columbia, *Ghanim-Abdulrahman al-Harbi, et al. v. Robert M. Gates, Secretary of Defense, et al.*, No. 07-1095, Attachment A: Declaration of Clint Williamson, Ambassador-at-Large for War Crimes, US Department of State. See also Ben Fox, "Security, Human Rights Snarl Gitmo Exits," Associated Press, August 8, 2007.

<sup>34</sup> "US: Rice Should Press Algeria on Fate of Returned Guantanamo Detainees," Human Rights Watch news release.

<sup>35</sup> US Secretary of State Condoleezza Rice, Round Table with Travel Press, Algiers, September 6, 2008, <http://www.state.gov/secretary/rm/2008/09/109231.htm> (accessed September 30, 2008). See also, "Rice Meets with Terror Fighting Allies in Africa," Associated Press, September 6, 2008, <http://www.iht.com/articles/ap/2008/09/06/africa/AF-North-Africa-Rice.php> (accessed September 30, 2008).

<sup>36</sup> *Omar Othman (aka Abu Qatada) v. Secretary of State for the Home Department*, SC/15/2005, February 26, 2007, [http://www.siac.tribunals.gov.uk/Documents/QATADA\\_FINAL\\_7FEB2007.pdf](http://www.siac.tribunals.gov.uk/Documents/QATADA_FINAL_7FEB2007.pdf) (accessed October 13, 2008).

suspects in GID custody would almost certainly be admitted into evidence.<sup>37</sup> The court ruled that the admission of such testimony would be a “flagrant denial of justice” in violation of the ban on the use of torture evidence in criminal proceedings.<sup>38</sup> The ruling was artfully crafted, essentially rejecting Jordanian promises of a fair trial, due to the likely admission of torture evidence, but avoiding a full assessment of the reliability of the specific UK-Jordanian MOU in question.

Human Rights Watch has documented the severe abuses suffered by persons held by the GID, which has a long record of torture and of obstructing the access of ICRC representatives.<sup>39</sup> The GID, whose law enforcement powers are not explicitly set out in law, continues to operate outside the normal prison supervision mechanisms in Jordan. The GID prison regime includes long periods of isolation, raising concerns about prisoners’ health and treatment and due process rights. GID detainees do not have the right to make telephone calls to inform relatives or their embassies of their whereabouts and any charges against them. Detainees are often held incommunicado for weeks, thus having no contact with lawyers or family members, before they are permitted to have weekly supervised visits. Furthermore, the GID keeps all detainees in solitary confinement, often lasting months, while interrogators conduct their investigation.<sup>40</sup> Such prolonged solitary confinement can often constitute prohibited ill-treatment.<sup>41</sup>

In 2006, after carrying out a visit to Jordan, the UN special rapporteur on torture issued a report concluding, “The practice of torture is widespread in Jordan, and in some places routine, [including] the General Intelligence Directorate (GID).” Although

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<sup>37</sup> *Othman (Jordan) and Secretary of State for the Home Department*, [2008] EWCA Civ 290, April 9, 2008, <http://www.bailii.org/ew/cases/EWCA/Civ/2008/290.html> (accessed October 13, 2008).

<sup>38</sup> *Ibid.*, para. 45.

<sup>39</sup> Human Rights Watch, *Suspicious Sweeps: The General Intelligence Department and Jordan’s Rule of Law Problem*, vol. 18, no. 6(E), September 2006, <http://hrw.org/reports/2006/jordan0906/>; *Double Jeopardy: CIA Renditions to Jordan*, April 2008, <http://www.hrw.org/reports/2008/jordano408/>. For the wider problem of torture in Jordan’s prison system, see *Torture and Impunity in Jordan’s Prisons: Reforms Fail to Tackle Widespread Abuse*, 1-56432-382-X, October 2008, <http://hrw.org/reports/2008/jordan1008/>.

<sup>40</sup> Letter from Human Rights Watch to European Union Officials on the Occasion of the Association Council between the EU and Jordan, July 23, 2008, <http://hrw.org/english/docs/2008/08/11/jordan19588.htm>.

<sup>41</sup> See Istanbul Statement on the Use and Effects of Solitary Confinement, adopted December 9, 2007, at the International Psychological Trauma Symposium, Istanbul, [http://www.irct.org/Admin/Public/DWSDownload.aspx?File=%2FFiles%2FFiler%2FTortureJournal%2F18\\_01\\_2008%2F63-66\\_Istanbul\\_statement.pdf](http://www.irct.org/Admin/Public/DWSDownload.aspx?File=%2FFiles%2FFiler%2FTortureJournal%2F18_01_2008%2F63-66_Istanbul_statement.pdf) (accessed October 8, 2008).

the special rapporteur was denied access to interview prisoners held in GID detention in Amman, he cited credible and consistent allegations that torture was used at GID headquarters “to extract confessions and obtain intelligence in pursuit of counter-terrorism and national security objectives.”<sup>42</sup>

The UK Court of Appeal thus was correct to express concern that the practice of torture in GID custody could lead to the admission into evidence of statements or confessions extracted under profoundly coercive circumstances. However, it is unclear how the Court could fail to link those findings to an analysis of the broader deficiencies with the UK-Jordanian MOU. The SIAC had acknowledged that Othman would be taken into GID custody upon return and interrogated, possibly even under “indirect” questioning by the US government at some point.<sup>43</sup> The panel also accepted that the GID system was rife with physical abuse, procedural irregularities, and impunity for those who perpetrated abuses.<sup>44</sup> Relying on Othman’s “high profile,” however, the SIAC ruled that due to the intense scrutiny of his treatment by persons sympathetic to him in Jordan, and by the local and international media, the Jordanians would comply with the terms of the MOU.<sup>45</sup> According to the SIAC, any abuse of Othman would cause a considerable outcry in Jordan, inflaming his sympathizers and possibly destabilizing the country. Thus, instructions that he be treated properly would be followed and any risk of ill-treatment avoided.<sup>46</sup>

This simplistic reliance on Othman’s high profile as an added safeguard ignores the more sophisticated analysis of the deficiencies of post-return monitoring, the relative weakness of local monitoring groups (which conduct the monitoring under the MOUs) vis-à-vis the State, the lack of incentive on the part of either the sending or receiving government to acknowledge a breach of the assurances, and the possible fear of reprisal that Othman himself might have in complaining about abuse.

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<sup>42</sup> Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, Addendum: Mission to Jordan, U.N. Doc. A/HRC/4/33/Add.3, January 5, 2007, <http://daccessdds.un.org/doc/UNDOC/GEN/Go7/101/07/PDF/Go710107.pdf> (accessed October 13, 2008), p.11, para. 29.

<sup>43</sup> *Omar Othman (aka Abu Qatada) v. Secretary of State for the Home Department*, SC/15/2005, February 26, 2007, para. 348.

<sup>44</sup> *Ibid.*, paras. 350-53.

<sup>45</sup> *Ibid.*, para. 355.

<sup>46</sup> *Ibid.*, para. 356.

The SIAC reiterated these arguments in the body of the decision, liberally referencing criticisms of diplomatic assurances made by international human rights experts and nongovernmental organizations, including Human Rights Watch. Yet the court utterly failed to address such criticisms in a meaningful way.<sup>47</sup> Moreover, the SIAC ignored the European Court of Human Rights finding in the *Chahal* decision that Chahal's high profile left him more vulnerable to torture and ill-treatment, not less so (see below).

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<sup>47</sup> See Human Rights Watch Statement in the Omar Othman Case, May 2006, <http://www.hrw.org/backgrounder/eca/ecaqna1106/witnesstatementjuliahall.pdf>.

## Domestic Criticism of UK Policy

A robust analysis of the government's policy that did recognize and engage with a substantive critique of the problems with diplomatic assurances against torture was issued by the Parliamentary Joint Committee on Human Rights in a May 2006 report. The Committee heard evidence from a number of actors regarding the policy, pending court challenges, and the impact of UK action on other countries using or contemplating using assurances. The Committee stated that “[t]he evidence we have heard in this inquiry, and our scrutiny of the Memoranda of Understanding ... have left us with grave concerns that the Government's policy of reliance on diplomatic assurances could place deported individuals at real risk of torture or inhuman and degrading treatment, without any reliable means of redress.”<sup>48</sup>

The Committee went further, however, and opined that UK policy “could well undermine well-established international obligations not to deport anybody if there is a serious risk of torture or ill-treatment in the receiving country. We further consider that, if relied on in practice, diplomatic assurances such as those to be agreed under the Memoranda of Understanding with Jordan, Libya and Lebanon present a substantial risk of individuals actually being tortured, leaving the UK in breach of its obligations under Article 3 UNCAT, as well as Article 3 ECHR.”<sup>49</sup>

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<sup>48</sup> Joint Committee on Human Rights, Nineteenth Report, Session 2005-06, May 18, 2006, <http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/185/185o8.htm> (accessed September 30, 2008), para. 129.

<sup>49</sup> *Ibid.*, para. 131.

## Regional Developments

The UK has advocated in a number of intergovernmental fora for the broader acceptance of diplomatic assurances to effect transfers of national security suspects. It has been active, for example, in intervening in cases at the European Court of Human Rights that involve diplomatic assurances.

### European Court of Human Rights

In a string of cases decided in the first half of 2008, the European Court of Human Rights reaffirmed the absolute ban on sending persons—no matter what their status or suspected crimes—to places where they are at risk of torture or cruel, inhuman and degrading treatment, despite diplomatic assurances against such abuse from their home governments. In one of those cases, *Saadi v. Italy*, the British government took the unusual step of intervening as a third party in an effort to persuade the court to rule in Italy's favor.

The logic of the absolute prohibition on returns to risk of torture was first articulated in the landmark European Court decision of *Chahal v. UK*. In that case, the court ruled that the UK could not return Karamjit Singh Chahal, an alleged Sikh militant, to India in reliance on diplomatic assurances against torture from New Delhi, no matter what crimes he was suspected of or his status in the UK.<sup>50</sup> The British government had argued that Chahal had such a high profile in the UK and India that he would be guaranteed fair treatment. The European Court, however, ruled that the UK's public branding of Chahal as a "terrorist," coupled with the Indian government's lack of control over brutal security forces in the Punjab, instead made him particularly vulnerable to torture and ill-treatment. Careful not to doubt the good faith of the Indian government in providing the assurances, the Court noted that human rights violations by certain members of the Indian security forces were a "recalcitrant and

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<sup>50</sup> *Chahal v. United Kingdom*, 70/1995/576/662, November 15, 1996, <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=695881&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649> (accessed September 30, 2008).

enduring problem. Against this background, the court is not persuaded that the above assurances would provide Mr. Chahal with an adequate guarantee of safety.”<sup>51</sup>

The European Court decisively returned to the principles of *Chahal* in 2008. Without ruling that removals on the basis of diplomatic assurances per se violate article 3, the court fashioned an approach that rightly questions the reliability of promises of humane treatment from governments that routinely torture and ill-treat detainees or members of specific minority, ethnic, or political groups.

The first such ruling came in the *Saadi* case. On February 28, 2008, the court ruled that Italy would violate article 3 if it deported Nassim Saadi, a Tunisian national lawfully residing in Italy, to Tunisia.<sup>52</sup> Saadi had been convicted in absentia of terrorism-related offenses in Tunisia, and had been sentenced to 20 years’ imprisonment. He claimed that he would be at risk of torture and ill-treatment in Tunisia, where the mistreatment of suspected terrorists is routine and well documented.

In an ill-fated attempt to encourage the court to revisit the *Chahal* decision, the British government intervened in *Saadi* to argue that the right of a person to be protected from ill-treatment abroad should be balanced against the risk he posed to the deporting state. The government had intervened in an earlier case, *Ramzy v. Netherlands*, with the same arguments, and requested that the court include its intervention in *Ramzy* for consideration in *Saadi*.<sup>53</sup>

British officials also pressed other governments through the EU Justice and Home Affairs Council to intervene in *Ramzy*, but only Lithuania, Portugal, and Slovakia joined the UK government’s intervention.<sup>54</sup> The main purpose of the UK’s intervention

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<sup>51</sup> *Ibid.*, para. 105.

<sup>52</sup> *Saadi v. Italy*, Application No. 37201/06, February 28, 2008, <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=829510&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649> (accessed September 30, 2008).

<sup>53</sup> Observations of the Governments of Lithuania, Portugal, Slovakia, and the United Kingdom Intervening in Application No. 25424/05, *Ramzy v. Netherlands*, December 2005, on file with Human Rights Watch.

<sup>54</sup> European Union, Justice and Home Affairs Council, Meeting on October 12, 2005. Main results of Council: “Article 3 of the European Convention on Human Rights. The Presidency briefed the Council about the UK and the Netherlands positions

was to ask, “[W]hy should it be irrelevant, in considering whether removal would amount to inhuman and degrading treatment, that the person to be removed himself posed a real risk to the lives of the citizens of the Contracting state?”<sup>55</sup> The intervention went on to request a reconsideration of the *Chahal* decision and the establishment of a new test in removal cases that would balance national security considerations against other relevant factors.<sup>56</sup>

The *Saadi* court rejected this argument outright. As the court explained,

[T]he argument based on the balancing of the risk of harm if the person is sent back against the dangerousness he or she represents to the community if not sent back is misconceived. The concepts of “risk” and “dangerousness” in this context do not lend themselves to a balancing test because they are notions that can only be assessed independently of each other. Either the evidence adduced before the Court reveals that there is a substantial risk if the person is sent back or it does not.<sup>57</sup>

As for the assurances, Tunisia declined to provide the Italian authorities with the detailed set of guarantees they had requested. Instead, in a *note verbale* dated July 10, 2007 (the day before the European Court hearing), the Tunisian Ministry of Foreign Affairs observed that Tunisian laws guaranteed prisoners’ rights and that Tunisia had acceded to “the relevant international treaties and conventions.” The court, however, observed that “the existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where, as in the present case, reliable sources have reported practices

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regarding the possibility for the European Court of Human Rights of revisiting an earlier Court decision in the 1996 *Chahal* case,” (undated), [http://www.fco.gov.uk/Files/kfile/JHA\\_12Oct\\_Results.o.pdf](http://www.fco.gov.uk/Files/kfile/JHA_12Oct_Results.o.pdf) (accessed October 4, 2008), p. 19.

<sup>55</sup> Observations of the Governments of Lithuania, Portugal, Slovakia, and the United Kingdom Intervening in Application No. 25424/05, *Ramzy v. Netherlands*, para. 27.1.

<sup>56</sup> *Ibid.*, para. 37.

<sup>57</sup> *Saadi v. Italy*, para. 139.

resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention.”<sup>58</sup>

The court went on to note that even explicit and detailed assurances would not necessarily be sufficient. The court explained, “[T]hat would not have absolved the Court from the obligation to examine whether such assurances provided, in their practical application, a sufficient guarantee that the applicant would be protected against the risk of treatment prohibited by the Convention. The weight to be given to assurances from the receiving State depends, in each case, on the circumstances obtaining at the material time.”<sup>59</sup>

In response to the British government’s intervention in *Saadi*, the House of Commons Foreign Affairs Committee roundly upbraided the government. The Committee pointed out that “in the case of *Saadi v. Italy*, the Government clearly attempted to water down its anti-torture commitments.” The Committee noted that “it is disturbing and surprising that such arguments were made in the name of the United Kingdom and we believe this gives cause for serious concern.”<sup>60</sup>

In two subsequent rulings, involving transfers from Russia to Central Asian republics, the European Court continued to uphold its commitment to the *Saadi* standard. In *Ismoilov v. Russia*, decided in April 2008, the petitioners were a group of Uzbek refugees who were detained in the Russian city of Ivanovo. The Tashkent authorities, known for the systematic practice of torture, claimed that the men had been involved in fomenting the 2005 events in the Uzbek city of Andijan, in which hundreds of unarmed protesters were killed by state security forces. The Russian courts ruled in favor of the men’s extradition, relying on promises of humane treatment and fair trial from the Uzbek authorities. The European Court ruled that given Uzbekistan’s well

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<sup>58</sup> *Ibid.*, para. 147.

<sup>59</sup> *Ibid.*, para. 148.

<sup>60</sup> House of Commons Select Committee on Foreign Affairs, Ninth Report, Session 2007-08, July 9, 2008, <http://www.publications.parliament.uk/pa/cm200708/cmselect/cmfa/533/53306.htm#a11> (accessed September 30, 2008), para. 72.

document record of torture, “the Court is not persuaded that the assurances from the Uzbek authorities offered a reliable guarantee against the risk of ill-treatment.”<sup>61</sup>

The Court’s June 2008 ruling in *Ryabikin v. Russia* was notable, among other things, because Aleksandr Ryabikin, threatened with extradition from Russia to Turkmenistan, was not a threat to national security, but an alleged white collar criminal. The European Court ruled that if extradited he would “almost certainly be detained and runs a very real risk of spending years in prison.” Taking note of Turkmenistan’s extremely poor conditions of detention, as well as problems of ill-treatment and torture, the *Ryabikin* panel invoked *Saadi*, recalling “that diplomatic assurances are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention.”<sup>62</sup>

With *Saadi*, *Ismoilov*, and *Ryabikin* the Court has reaffirmed its strong commitment to the *nonrefoulement* obligation set out in *Chahal* and its displeasure with states’ attempts to circumvent the Convention by negotiating dubious bilateral “human rights” agreements under the table.

## European Union

In recent years, the UK has extended its direct advocacy effort on diplomatic assurances to the European Union. Although most counterterrorism policy is set at the national level, the EU has taken up select issues for consideration and consensus, including the definition of terrorism and the question of a regional arrest warrant. The UK is currently leading an effort, through the G6 group of interior ministers (France, Germany, Italy, Poland, Spain, and UK), for broader EU endorsement of its “deportation with assurances” policy.

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<sup>61</sup> *Ismoilov v. Russia*, Application No. 2947/06, April 24, 2008, <http://cmiskp.echr.coe.int////tkp197/viewhbk.asp?action=open&table=F69A27FD8FB86142BF01C1166DEA398649&key=69746&sessionId=14266138&skin=hudoc-en&attachment=true> (accessed September 30, 2008), para. 127. This case has been referred to the Grand Chamber of the European Court.

<sup>62</sup> *Ryabikin v. Russia*, Application No. 8320/04, June 19, 2008, <http://cmiskp.echr.coe.int////tkp197/viewhbk.asp?action=open&table=F69A27FD8FB86142BF01C1166DEA398649&key=71139&sessionId=14266163&skin=hudoc-en&attachment=true> (accessed September 30, 2008), paras. 116, 119.

At the end of a May 2007 G6 meeting in Venice, the interior ministers issued a statement referring to the question. It said,

The Ministers believe that, in some legally regulated cases, expulsion related to terrorism has proven to be an effective tool for States in order to protect their people from foreign nationals that are believed to pose a threat to national security. The Ministers discussed the difficulties faced by States in seeking to implement an effective expulsion policy: the need to protect national security and the human rights of those who pose a threat. To that aim, they decided to analyse better the different mechanisms that exist, including a case by case approach, diplomatic contacts or assurances, that could be useful under certain circumstances for promoting, in repatriation States, patterns of conduct compliant with the international obligations as to the safeguard of human rights. They agreed to promote a more in-depth common study about the different systems and best practices. The need for further consideration by the European Union in this field has also been underlined.<sup>63</sup>

The public conclusions of the October 2007 G6 meeting were considerably more definitive. They said in no uncertain terms that the G6 governments “will initiate and support continued exploration of the expulsion of terrorists and terrorist suspects, seeking assurances through diplomatic understandings and other policies. In relation to the EU, the governments will seek to build consensus on these issues.”<sup>64</sup>

In an attempt to start building such a consensus, the British government circulated a memorandum in advance of a November 2007 meeting of EU interior ministers that asserted that the expulsion of terrorism suspects is an effective tool to protect people from foreigners who threaten national security. It argued that “the mechanism of seeking assurances, on a government-to-government basis” could be

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<sup>63</sup> Conclusions of the May 2007 Meeting of the Interior Ministers of France, Germany, Italy, Poland, Spain and the United Kingdom, <http://press.homeoffice.gov.uk/press-releases/g6-meeting-conclusion-0507?version=1> (accessed September 30, 2008).

<sup>64</sup> Joint Declaration by the Ministers of Interior of G6 States, Sopot, October 18, 2007, [www.statewatch.org/news/2007/oct/g6-poland-oct-07.pdf](http://www.statewatch.org/news/2007/oct/g6-poland-oct-07.pdf) (accessed September 30, 2008), para. 3.

a “way forward.”<sup>65</sup> The working group setting the agenda for the Justice and Home Affairs Council meeting that November declined to put the issue of diplomatic assurances on the agenda, however, signaling unease among some member states that the use of such assurances could be enshrined as a matter of EU policy.

In February 2008, Baroness Sarah Ludford, MEP, a vocal opponent of the British government’s “deportation with assurances” policy, raised the issue of diplomatic assurances with the European Commission and requested a written opinion on the Commission’s position on the use of assurances in the European Union. The Directorate General for External Relations (RELEX) responded in writing soon thereafter. It cited the *Saadi* decision as controlling in Europe, and referred to a 2006 opinion by the European Commission for Democracy through Law (Venice Commission), the Council of Europe’s advisory body on constitutional matters. The Venice Commission had concluded that “when there is substantial evidence that a country practises or permits torture in respect of certain categories of prisoners, Council of Europe member states must refuse the assurances in cases of requests for extradition of prisoners belonging to those categories.”<sup>66</sup> It went on to express strong concern that the use of such assurances undermines the global ban on torture and efforts to eradicate such abuse, stating,

[T]o negotiate for protection from torture on a case by case basis implies that a state does use torture sufficiently regularly for the assurance to be necessary in an individual case. Seeking assurances thus implies acceptance of that state of affairs, and an understanding that the universal international prohibition on torture is taken less seriously than the terms of an individual bilateral assurance. Assurances may thus encourage States which routinely practise

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<sup>65</sup> General Secretariat of the Council, Directorate General H2 (Justice and Home Affairs), Room Document: Article 36 Committee, Proposal from the UK Delegation: Expulsion of Terrorist Suspects: EU Council Conclusions, para. 5 (proposed language), on file with Human Rights Watch.

<sup>66</sup> European Commission for Democracy Through Law (Venice Commission), Opinion: On the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-State Transport of Prisoners, Opinion no. 363, 2005, CDL-AD(2006)009, March 17, 2006, [http://www.venice.coe.int/docs/2006/CDL-AD\(2006\)009-e.asp#\\_Toc130704778](http://www.venice.coe.int/docs/2006/CDL-AD(2006)009-e.asp#_Toc130704778) (accessed October 5, 2008), para. 142.

torture in the belief that such practices are tolerated in at least some cases.<sup>67</sup>

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<sup>67</sup> European Commission, Response to Question Tabled by Baroness Sarah Ludford under Agenda Item 7 of the Subcommittee on Human Rights of the European Parliament, (PE402.663v01-00), February 28, 2008, on file with Human Rights Watch.

## Conclusion

The British government's efforts to forcibly remove terrorism suspects in reliance on assurances against torture and ill-treatment have not, to date, been successful. And its advocacy efforts at the European Union to develop the use of diplomatic assurances as standard practice have failed. In important ways, therefore, the government's plans to enshrine these bilateral agreements in law and policy have been thwarted.

Still, with two crucial rulings pending in the House of Lords, legal protections against abusive returns are not yet secure. There are, moreover, broader moral, political, and national security reasons to be concerned about the UK's promotion of diplomatic assurances against torture.

The British government promotes itself as a leader in the global effort to eradicate torture.<sup>68</sup> The government has funded international anti-torture projects, and paid for publications like *The Torture Reporting Handbook*—a practical guide to identifying, documenting, and reporting incidents of torture for doctors, lawyers, and human rights activists.<sup>69</sup> The UK was also one of the first states to ratify the Optional Protocol to the Convention against Torture, which creates parallel international and domestic monitoring systems aimed at reducing torture and ill-treatment in detention, and has been active in pressing other governments to do the same.

All this deserves praise. But the government's relentless campaign to see "deportations with assurances" accepted throughout Europe reflects a more ambivalent attitude toward torture. That ambivalence sends the wrong message at a time when torture protection has been under assault in many parts of the world.

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<sup>68</sup> See Human Rights Watch, *Dangerous Ambivalence: UK Policy on Torture Since 9/11*, no. 1, November 2006, <http://hrw.org/english/docs/2008/04/07/global18555.htm>; and *Hearts and Minds: Putting Human Rights at the Center of United Kingdom Counterterrorism Policy*, no. 3, June 2007, <http://hrw.org/backgrounder/eca/uko607/>.

<sup>69</sup> Camille Giffard, *The Torture Reporting Handbook: How to Document and Respond to Allegations of Torture within the International System for the Protection of Human Rights*, Human Rights Centre, University of Essex, February 2000, <http://www.essex.ac.uk/torturehandbook/handbook/index.htm> (accessed October 15, 2008).

Tolerating torture undermines the moral legitimacy of the British government around the world. The abandonment by powerful governments of international rules—as we have repeatedly seen in the past few years—gives encouragement to others who believe that they, too, need not be bound by the universal rules of humanity. It is no surprise that the British government has attracted some unsavory allies in its attempts to legitimize diplomatic assurances.

Taking a page from UK policy on assurances, the Russian authorities have attempted to extradite refugees to Uzbekistan in reliance on assurances of humane treatment from Tashkent, a government that practices torture systematically. The *Ismoilov* case, noted above, represents a victory at the European Court of Human Rights against Russian efforts. Similarly aligning themselves to the UK approach on assurances, the Kyrgyz authorities, however, had already extradited four Uzbek refugees in August 2006 in reliance on diplomatic assurances against torture by the time the men’s cases got to the UN Human Rights Committee. Although the committee found that Kyrgyzstan had violated article 3 for putting the men at risk of torture, setting that legal precedent after the fact was of no material impact on the risk the men faced due to their pre-emptive transfers.<sup>70</sup>

Perhaps more surprising is a Danish initiative to explore the possibility of employing diplomatic assurances for national security-related transfers, and attempts in recent years by the Italian, Spanish, and Swiss governments to actually employ diplomatic assurances.<sup>71</sup> These governments have at various times unequivocally supported global efforts to eradicate torture. For them to employ unreliable diplomatic assurances to legitimize deportations and extraditions gravely undermines those anti-torture efforts.

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<sup>70</sup> UN Human Rights Committee, *Maksudov v. Kyrgyzstan*, CCPR/C/93/D/1461,1462,1476&1477/2006, July 16, 2008. The committee ruled, “The procurement of assurances from the Uzbek General Prosecutor’s Office, which, moreover, contained no concrete mechanism for their enforcement, was insufficient to protect against ... risk.” *Ibid.*, para. 12.5.

<sup>71</sup> See Human Rights Watch et al., “Denmark and Diplomatic Assurances Against Grave Violations of Human Rights: Joint Letter to Lene Espersen,” June 18, 2008, <http://hrw.org/english/docs/2008/06/18/denmar19151.htm>; Human Rights Watch, “Letter to the Italian Government Regarding Nassim Saadi’s Deportation and the Use of Diplomatic Assurances,” September 20, 2007, <http://hrw.org/eca/2007/italyletter0907/>; Human Rights Watch, “Letter to the Spanish Government Regarding the Extradition of Murat Ajmedovic Gasayev,” March 8, 2008, <http://www.hrw.org/backgrounder/2008/spainletter0508/>; Human Rights Watch, “Universal Periodic Review of Switzerland: Human Rights Watch’s Submission to the Human Rights Council,” May 5, 2008, <http://hrw.org/english/docs/2008/04/07/global18555.htm>.

The British government's "deportation with assurances" policy is also counter-productive at home. Since the July 2005 attacks on London, preventing radicalization and recruitment (the "prevent" strand) has been at the heart of the UK's counterterrorism strategy.<sup>72</sup> The strategy states that one of the key elements of prevention is engaging in the battle of ideas—challenging the ideologies that extremists believe justify the use of violence, primarily by helping Muslims who wish to dispute these ideas to do so. Whatever the alleged benefit of counterterrorism measures that violate human rights,<sup>73</sup> it is clear they undermine the UK's moral legitimacy at home and abroad, damaging its ability to win the battle of ideas that is central to long-term success in combating terrorism.

The most recent criticism of UK policy and practice comes from the Council of Europe human rights commissioner, who visited the UK in early 2008. In a September 2008 report, the commissioner stated categorically that he strongly opposes the forced return of aliens from the UK on the basis of diplomatic assurances. He emphasized that such assurances "are usually sought from countries with long-standing, proven records of torture," and he stressed that "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, real risk of torture and ill-treatment." Such assurances, he concluded, "should never be relied on, where torture or ill-treatment is condoned by the Governments and is widely practised."<sup>74</sup>

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<sup>72</sup> "Countering International Terrorism: The United Kingdom's Strategy," July 2006, <http://security.homeoffice.gov.uk/news-publications/publication-search/general/Contest-Strategy> (accessed October 4, 2008). The strategy, first developed in 2003, contains four elements: Prevent (tackling the radicalization of individuals), Pursue (disrupting terrorists and their operations), Protect (reducing the vulnerability of the UK to a terrorist attack), and Prepare (preparedness for the consequences of a terrorist attack).

<sup>73</sup> Government authorities have indicated publicly and privately that measures such as deportation, indefinite detention, and extended pre-charge detention have been useful in disrupting terrorist networks. Home Secretary Jacqui Smith has argued that enhanced powers such as the further extension of pre-charge detention are necessary for that effort. See "Prevent Strategy: Background and Next Steps - Speech to the BCU Commanders Conference," April 16, 2008, <http://press.homeoffice.gov.uk/Speeches/bcu-conference-speech> (accessed October 4, 2008). See also Human Rights Watch, Letter to UK Government on the Implementation of the UN Human Rights Recommendations on Counterterrorism Policies, October 8, 2008, <http://hrw.org/english/docs/2008/10/08/uk19925.htm>.

<sup>74</sup> Memorandum by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, CommDH(2008)23, September 18, 2008, <https://wcd.coe.int/ViewDoc.jsp?id=1351681&Site=CommDH&BackColorInternet=FEC65B&BackColorIntranet=FEC65B&BackColorLogged=FFC679> (accessed October 13, 2008), paras. 92-93.

Human Rights Watch calls on the British government to heed that call. We urge the government to halt immediately the practice of seeking unreliable assurances against ill-treatment from governments prone to perpetrating such abuse, and to hold perpetrators accountable rather than partner with them.

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