

Avoiding Transfers to Torture

Ashley S. Deeks

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FOREWORD

A number of U.S. counterterrorism practices have generated significant controversy in recent years. One area in which the United States faces particular criticism is the treatment of terrorist suspects, both those it holds itself and those it sends to other countries. While this criticism generally does not directly constrain U.S. practices, its effects should not be dismissed. In the struggle to prevent terrorist attacks and, especially, to frustrate terrorist recruitment, the perceived legitimacy of U.S. actions can be as important as the actions themselves.

When the United States wishes to transfer a suspect to a country where it believes the likelihood of torture is high, it can seek diplomatic assurances of humane treatment from the receiving country. In *Avoiding Transfers to Torture*, Ashley S. Deeks analyzes the debate over U.S. use of assurances against torture. The report explains the contexts in which assurances are used, how assurances can be conveyed, and what they can contain. It then outlines the objections of critics, who argue that assurances are of little or no help in preventing mistreatment in that they come from unreliable states and compliance cannot be legally enforced or easily monitored, especially since the United States often keeps the assurances secret.

The report argues that despite problems associated with their use, assurances are an important tool for dealing with dangerous suspects. Prosecution is often impossible, and the alternatives—holding suspects indefinitely, releasing them in the United States, or sending them to other countries with no assurances—are often unpalatable or unacceptable. Deeks therefore recommends a number of ways to respond to criticism so that the United States can continue using assurances. In addition, she proposes working with U.S. allies (who also use them) to increase corrections assistance to countries that receive suspects, something that could over time diminish the incidence of mistreatment and thus the need for assurances.

Avoiding Transfers to Torture is an intellectually rigorous and honest assessment of both the utility of assurances and their shortcomings. It illustrates the age-old point that it is not enough to criticize; one must also propose solutions. Recognizing the stakes

for U.S. security, the rights of terrorist suspects, and America's reputation around the world, Deeks crafts a thoughtful report that is critical of some U.S. practices but equally demanding of potential reforms. The result is a genuine contribution on an important issue that is all too often debated as if there were easy options when in reality there are none.

Richard N. Haass

President

Council on Foreign Relations

June 2008

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Ashley S. Deeks

COUNCIL SPECIAL REPORT

INTRODUCTION AND OVERVIEW

The conflicts in Afghanistan and Iraq, the conflict with al-Qaeda, and escalating concerns about terrorism have meant that, in the past seven years, the United States has detained thousands of people. The government has held some of these individuals in the United States and some overseas. Many remain in U.S. custody. As U.S. policies and the nature of the current conflicts evolve, the United States finds itself seeking to return many of these people—combatants, suspected terrorists, and others—to their countries of origin. But, as it does so, it runs into a problem: in a significant number of cases, the U.S. government has concluded that it is more likely than not that the individuals will be tortured if the United States hands them back to their governments.

Yet detaining these individuals indefinitely, even assuming it is a practical option, has proven highly contentious, as the U.S. experience with Guantanamo Bay shows. At the same time, the United States is able to prosecute only a small percentage of these detainees. Further, these individuals generally are not people that the United States wants to release on U.S. soil because of the threat they pose. Thus, in many cases, the United States has to choose among three unappealing options: releasing the person into the United States, returning the individual to his country to face likely mistreatment, or trying to hold him indefinitely. The choice, at least at first glance, appears to be between the well-being of the many and the well-being of the few.

The United States is not alone in grappling with this problem: many European countries and Canada face comparable challenges. In an effort to thread this needle, each of these states has sought assurances against torture (also called diplomatic assurances or humane treatment assurances) from a country willing to receive a particular person that it will not torture him when he is in its custody. The United States, European states, and Canada use assurances in the context of extraditions and deportations. The CIA has relied on assurances in conducting renditions, and the Defense Department has done so before

transferring people home from Guantanamo. The use of assurances has even appeared on the battlefield: in Afghanistan, several states contributing to NATO's International Security Assistance Forces (ISAF) have obtained written assurances from the Islamic Republic of Afghanistan that it will treat humanely those people ISAF transfers to it.

Particularly since September 11, 2001, human rights groups and international organizations have roundly criticized the use of assurances against torture, questioning their reliability and citing cases in which assurances have failed to prevent torture or other mistreatment. Congress has drafted (but not passed) several bills that would prohibit the United States from relying on these assurances. U.S. courts historically have not played a role in reviewing transfers of people to other countries when the government has obtained assurances, but increasingly are seeking to provide oversight. Pressure will continue to build against the use of assurances to overcome torture concerns as allegations come in about mistreatment of those transferred.

However, assurances will remain an important tool not only for this administration but also for future ones. As the United States tries to close the detention facility at Guantanamo, assurances will help the United States overcome concerns about transferring some of the remaining 270 people home. If the next administration chooses to withdraw from Iraq, assurances may prove important as the United States relinquishes custody of the thousands of detainees it currently holds there. Assurances have already proven crucial for U.S. allies in Afghanistan, who lack their own detention facilities and must transfer detainees to the Afghans. Europe and the United States will continue to disrupt terrorist plots by detaining and deporting people, some of whom may raise real fears that they will be tortured if transferred home.

Neither human rights groups nor Congress have offered viable alternatives to the use of these assurances, and unless and until states develop other realistic options, the United States and its allies will almost certainly keep using them. At the same time, the world has changed in the past seven years: we have seen widespread discussions about and increased understanding of armed conflict, detention, renditions, and torture and nearly constant calls for greater transparency in government. But the U.S. approach to the use of assurances has not adjusted to these changes.

While the use of assurances against torture poses a liability, it also presents an opportunity. If the United States does not address the criticisms about and practical problems with the use of assurances, these criticisms and problems may undercut U.S. efforts to improve its reputation in the struggle against terrorism and ultimately strip the United States of its ability to use this tool. But if the United States addresses these problems actively and transparently, it may be better off from both a security and a human rights perspective. This report offers recommendations for how the United States can improve its practices with respect to assurances against torture to make them part of a sustainable policy, bolster its efforts to monitor returned detainees, work with European and Canadian allies on an issue of mutual concern, and develop alternatives that reduce the need for assurances.

USE OF ASSURANCES AGAINST TORTURE

In response to the attacks of September 11, the United States began a military campaign in Afghanistan to disrupt al-Qaeda's safe haven. Since this conflict began, the United States has detained thousands of people, as is common during war. The United States has relied heavily on detention as a core element of its effort to defeat al-Qaeda and the Taliban.

Early on in the war on terror, the United States placed a heavy emphasis on national security concerns and less weight on what are generally termed human rights concerns. Since 2001, U.S. policy has evolved as the government has revisited who it detains as well as when and why it detains them. For instance, between 2002 and 2005, the United States brought about 750 individuals to Guantanamo. But, in 2005, Secretary of Defense Donald Rumsfeld stated that the U.S. goal was to place detainees "in the hands of the countries of origin, for the most part."¹ Since that time, the United States has brought only eighteen individuals to Guantanamo.² This is likely due, at least in part, to a growing sense that detention without criminal trial, while lawful during war, has proven so unpopular with allies that it has undercut their willingness to cooperate with the United States in military and law enforcement arenas.

In addition to weighing the appropriate role of detention in the war on terror, the United States has grappled for several years with issues about detainee treatment and interrogation. The CIA's use of waterboarding and other aggressive interrogation techniques has fostered a robust national debate about what constitutes torture and about the reputational impact and practical efficacy of these techniques. Both presidential candidates have indicated their opposition to torture and certain other interrogation methods, forecasting a continued focus on the interplay between detainee treatment and the U.S. reputation.

The final set of issues with which the United States has grappled relates to a detainee's release. What level of risk is the government willing to bear in deciding to

¹ "Rumsfeld Favors Repatriating Detainees," *New York Times*, June 10, 2005.

² For a list of U.S. detainee transfers to and from Guantanamo, see http://www.globalsecurity.org/military/facility/guantanamo-bay_detainees.htm.

release a person? Once it decides to release or transfer a person, where should it send him? And what steps can the United States take if it is concerned that the person may face torture after he is transferred? Does the United States have alternatives?

MANAGING SECURITY THREATS

When the United States detains someone it believes poses a security threat to the country or U.S. nationals, it has several options. The most familiar—and often preferred—option is to prosecute the person for a crime. Examples include the successful prosecutions of Richard Reid (the shoe bomber) and Zacharias Moussaoui (an al-Qaeda member associated with the 9/11 hijackings). However, prosecution is not always available: the person may not yet have committed a crime under U.S. law, he may be held by U.S. forces overseas, or the United States may consider him a threat based on classified information that it does not want to reveal in court.

A second option is to attempt to detain the person indefinitely. This option has proven exceedingly controversial at Guantanamo, where the U.S. theory for detention—that the individuals are combatants in an armed conflict—permits the United States to hold these individuals until the end of that conflict. It is difficult to determine when that conflict might end, though, which gives pause even to those who believe that the United States has the authority to hold detainees there. In the immigration context, indefinite detention of people waiting to be deported from the United States has come under fire in the U.S. Supreme Court, which has deemed such detentions constitutionally suspect, if not prohibited.³

Yet another option is simply to release the individual into the United States and employ surveillance and parole-type methods to track his activities. This option, too, faces considerable opposition, by the public and by Congress, especially with regard to Guantanamo detainees. In July 2007, the Senate (by a 94–3 margin) concluded: “It is the sense of the Senate that detainees housed at Guantanamo Bay, Cuba, should not be

³ *Zadvydas v. Davis*, 533 U.S. 678 (2001). Additionally, the Patriot Act includes a provision that lets the United States detain aliens for renewable six-month periods when the government cannot remove them but believes that they pose a threat to national security. The provision is untested.

released into American society, nor should they be transferred stateside into facilities in American communities and neighborhoods.”⁴

The final option is to attempt to transfer the individual back to his country of origin or to a third country that is willing to accept him. In some of these cases, though, the detainee may hail from a country with a poor human rights record and may tell U.S. officials that he likely will be tortured if he is sent home. Sometimes he is from an ethnic group that the foreign government oppresses—as with the Uighurs detained at Guantanamo, whom the United States concluded could not return to their home country of China.⁵ Or his home country may believe that he is part of a group that engages in terrorist acts, which might increase the chance that the security services will mistreat him. Understandably, third countries are rarely willing to take in people who are not their nationals and who are possibly dangerous. Thus, when the United States concludes that a person’s home country more likely than not will torture him, a dilemma arises.⁶

STATE OBLIGATIONS REGARDING TRANSFERS

Although states traditionally have had broad latitude to craft their immigration policies, most states have accepted certain limitations on when they may deport or expel people from their territories. In particular, states that have joined the Refugee Convention or its Protocol generally may not forcibly return a refugee or asylum seeker to a place where his life or freedom would be threatened because of his race, religion, or political opinions, among other reasons. The Fourth Geneva Convention of 1949 contains a similar rule against transferring protected persons to face persecution. Similarly, the 145 states that are parties to the Convention Against Torture (CAT) may not expel, return, or

⁴ College Cost Reduction Act of 2007, S. Amt. 2351, H.R. 2669 (July 19, 2007).

⁵ Human Rights Watch (HRW) has accused China of conducting a “crushing campaign of religious repression” against the Uighurs in western China, and the United Nations has stated that China tortures ethnic minorities, including the Uighurs. See <http://www.un.org/apps/news/story.asp?NewsID=16777&Cr=rights&Cr1=China&Kw1=Nowak&Kw2=&Kw3=>.

⁶ In the case of the Uighurs, the United States approached more than one hundred countries over four years before finding a country willing to accept some of them. Tim Golden, “Chinese Leave Guantanamo for Albanian Limbo,” *New York Times*, June 10, 2007.

extradite individuals to countries where there are substantial grounds for believing that the individuals would be subjected to torture.⁷

These obligations, which collectively are subsumed in a principle called *non-refoulement*, reflect a core tenet in the area of human rights: ensuring that individuals receive at least a baseline level of treatment matters to all states, not just to the individuals' states of nationality. While the Refugee Convention—which dates from 1950—lets states expel individuals, even to face persecution, based on national security concerns, the CAT—concluded in 1984—does not contain national security or other exceptions.

The U.S. government consistently has interpreted its legal obligations under the Refugee Protocol and the CAT to cover only its activities within U.S. territory (such as extraditions and deportations), not its activities outside the United States. In contrast, some human rights groups, international organizations, and states interpret the obligation broadly, asserting that states may not surrender custody of any person—regardless of where he is held—to another state where he is likely to be tortured or ill-treated. For example, the Committee Against Torture has argued that the CAT applies to and prohibits the transfer by the United States of terrorist suspects to countries where the suspects face a real risk of torture, even though the activities happen entirely outside U.S. territory.

Why doesn't the U.S. government simply conclude that, as a matter of principle, it will never transfer someone in its custody to another state when there is a chance that he will be mistreated? Consider what that would mean in Iraq, where the United States holds some 21,000 detainees. If the Iraqi government tomorrow asked U.S. forces to leave, but 3,000 of the U.S. detainees faced a real risk of mistreatment if U.S. forces turned them over to the Iraqis or simply released them into Iraq, what would the United States do with those individuals? Bring them to the United States? Refuse to leave Iraq? To ask these questions is to understand why the principle must have some limits.

⁷ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, A/RES/39/46, December 10, 1984, article 3. European Union countries, all of which are parties to the 1950 European Convention on Human Rights, face a higher standard, because they cannot remove people where there is a real risk that the person would face cruel or inhuman treatment, a category of treatment less severe than torture. The United States has not assumed similar obligations related to cruel or inhuman treatment, and interprets the CAT substantial grounds standard to mean a situation in which someone is more likely than not to face torture.

Despite these practical limitations, the United States has adopted a policy of not transferring people, wherever held, to countries where it is more likely than not that they will be tortured.⁸ U.S. law defines torture as “an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control.”⁹ The U.S. government evaluates whether a person is “more likely than not” to be tortured using this understanding of what acts constitute torture.

Yet even if the legal definition of torture is settled, the question of what acts constitute torture is not. This issue is the subject of heated debate in the United States right now. In particular, testimony by CIA director Michael Hayden in February 2008, which confirmed that the United States had used the interrogation technique known as waterboarding on three individuals in U.S. custody, caused a furor because many believe that waterboarding constitutes torture.¹⁰ In response, Congress attempted to prohibit the CIA from using any interrogation techniques except those authorized by the U.S. Army field manual on interrogation; the president vetoed the bill.¹¹ (As discussed below, the next administration seems likely to alter U.S. policy on this issue.) This ambiguity about

⁸ White House, Office of the Press Secretary, President’s Press Conference, March 16, 2005, <http://www.whitehouse.gov/news/releases/2005/03/20050316-3.html>. See also Council on Foreign Relations, “A Conversation with Michael Hayden,” September 7, 2007. (“The standard we use is that ... we have to believe that it is less rather than more likely that the individual will be tortured. And I’ve had very well-informed people say, ‘Where did you get that standard?’ And the answer is, from the Senate of the United States. That’s in the legislative history for the Senate working to pass the International Convention Against Torture.”)

⁹ 18 U.S.C. § 2340(1). See also OLC Opinion, “Legal Standards Applicable Under 18 U.S.C. §§ 2340, 2340A,” December 30, 2004, <http://www.usdoj.gov/olc/18usc23402340a2.htm>. The CAT defines torture as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” CAT, article 1.

¹⁰ Michael Hayden, Testimony before House Permanent Select Committee on Intelligence, “Annual Worldwide Threat Assessment Hearing,” February 5, 2008.

¹¹ Field Manual 2-22.3, *Human Intelligence Collector Operations* (2006), prohibits military officials and officials undertaking interrogations in military facilities from hooding detainees; putting duct tape across their eyes; stripping them naked; waterboarding them; forcing them to perform or mimic sexual acts; beating, electrocuting, burning, or otherwise physically injuring them; subjecting them to hypothermia or mock executions; withholding food, water, and medical treatment; and using dogs in any aspect of interrogation.

what acts the United States considers to be torture complicates the use by the United States of assurances against torture.

STRUCTURE AND SUBSTANCE OF ASSURANCES

When the United States hopes to transfer a person to another state but thinks that the receiving state will more likely than not torture the person, the decision is not necessarily over. The United States may try to obtain assurances against torture from the receiving state to lower the likelihood of mistreatment below the level that would prohibit it from transferring the person. Assurances reflect a commitment by a receiving state that it will treat an individual in a particular way. If the United States deems these assurances reliable, a transfer may become the most palatable option.

Diplomatic assurances against torture take a number of forms. States may convey their assurances orally or in a diplomatic note, exchange of letters, or memorandum of understanding. Some states, including European states and Canada, make public the assurances they receive; the United States keeps them private. Most assurances are crafted as political commitments that are not legally binding, although some assurances reaffirm the receiving state's legally binding obligations under human rights treaties.

The substance of the assurances varies as well. The assurances may simply provide that the receiving state will not torture the individual. Or they may go further: Jordan's assurances to the United Kingdom (UK) state that covered individuals will "be treated in a humane and proper manner, in accordance with internationally accepted standards" and will "be afforded adequate accommodation, nourishment, and medical treatment."¹²

Assurances also may address where the person will be located after he is transferred. The assurances might state that the receiving country intends to hold the person in security detention, to prosecute him, or to release him after initial questioning. The assurances may include commitments that a particular body in the receiving state

¹² 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 Regarding the Provision of Undertakings in Respect of Specified Persons Prior to Deportation.

will hold an individual; this is important when different ministries have different reputations for how they treat people in custody.

It matters who provides the assurances. It is of little use to a transferring government to obtain a commitment from a low-level officer in the receiving government who has no authority over the police and security services. For this reason, transferring governments often seek assurances from very senior officials (including the president, prime minister, or cabinet-level minister).

Some assurances establish monitoring mechanisms. These might include guarantees that the transferring state's officials will have access to the detention facility, or they may designate an independent body, jointly chosen by the transferring and receiving states, to visit the individual and monitor his environment, trial (if he is being prosecuted), and medical condition. Sometimes the transferring state will give the detainee's family contact numbers for its embassy in the receiving state.

Assurances are often difficult to obtain. The receiving state may be offended by a request for assurances because the request implies that the transferring state does not trust the receiving state to treat individuals in its custody appropriately. A receiving state may view a request for assurances as an infringement on its sovereignty, taking the view that foreign states should not question how it treats its nationals or ask to visit its detention facilities. A receiving state may also be concerned that giving assurances will be seen as a concession that it previously engaged in torture.

The fact that receiving states have various concerns about providing assurances helps explain why the U.S. government keeps private the assurances it obtains: the United States believes that it can obtain more satisfactory assurances if the receiving state knows that the United States will not reveal the content of the assurances. Given the receiving states' concerns, it is notable that the UK has been able to obtain assurances from several states, including Jordan and Algeria, that are both extensive and public.

U.S. USE OF ASSURANCES

The United States uses assurances against torture in a growing number of contexts. It is not always clear, however, why the government seeks assurances in some situations and not others. For example, the United States sought assurances from the Islamic Republic of Afghanistan before transferring detainees but does not appear to have sought assurances from the government of Iraq before making such transfers. The United States obtains assurances before transferring people from Guantanamo to their countries of origin, but traditionally has not done so when sending prisoners of war (POWs) home at the end of a conflict. These variations in the current U.S. approach to assurances highlight the uncertainty that will surround their use in future situations unless the United States publicly clarifies its assurances policy.

The five contexts in which the United States currently uses assurances are as follows.

1. Extradition

Assurances first appeared in the context of extraditions, which long predate the war on terror. In an extradition, the United States detains and transfers someone from the United States to a foreign country to stand trial or serve a sentence. When a foreign government makes an extradition request, a U.S. court decides whether there is probable cause to believe that the requested person committed the offense and whether the offense is covered by the extradition treaty. If so, the court issues an order stating that the person may be extradited. However, the secretary of state makes the final extradition decision.

In a limited number of cases, the person arrested by the United States claims that the country seeking his extradition will torture him if the United States extradites him there. When such claims arise, the State Department must decide whether the person is more likely than not to be tortured. U.S. regulations explain: “Where allegations relating to torture are made ... appropriate policy and legal offices review and analyze information relevant to the case in preparing a recommendation to the Secretary as to whether or not

to sign the surrender warrant.”¹³ Various bureaus within the department evaluate the torture allegations, including the Bureau of Democracy, Human Rights, and Labor, which prepares annual reports on other countries’ human rights records, and the relevant regional experts, who are knowledgeable about human rights and prison conditions in the requesting state.¹⁴

If the allegations of future torture seem credible, the executive branch may seek assurances from the requesting state that the person will not be tortured if returned. If it obtains assurances, it then must evaluate whether the assurances are sufficient. The government considers the identity of the person giving the assurances, political or legal developments in the requesting state, U.S. diplomatic relations with that state, and the requesting state’s incentives and ability to fulfill the assurances.¹⁵ Sometimes the department asks its officials or human rights groups in the requesting state to monitor the fugitive’s condition after his return.

The executive branch acknowledges generally that it has sought assurances in extradition cases, but typically declines to disclose whether it sought assurances in specific cases and rarely reveals the contents of such assurances. It takes this position based on a U.S. statute and a customary rule in U.S. law called the rule of non-inquiry, under which courts generally will not examine the fairness of the system to which the person will be extradited. This often means that neither courts nor the person being extradited will see the assurances or even know whether the U.S. sought assurances. This aspect of U.S. practice has troubled many critics, who believe that people subject to being transferred should be able to challenge the reliability and sufficiency of the assurances before an independent decision-maker.

2. Immigration Removals

Under U.S. immigration law, the United States may remove different categories of people from its territory. This includes aliens who have committed serious crimes or are

¹³ 22 C.F.R. § 95.3(a).

¹⁴ Declaration of Clifton Johnson, Assistant Legal Adviser, U.S. Department of State, para. 6.

¹⁵ *Ibid.*, para. 9.

suspected of terrorism. Just determining that someone should be removed is not the end of the story, though: the United States must find a country willing to accept the person. That is hard enough when the person comes from a country like Somalia, which has a weak, semifunctioning government. It gets more complicated when the person claims he is likely to be tortured if transferred and the United States agrees.

U.S. regulations contemplate that the government may use diplomatic assurances to address a claim by a person subject to removal that he will face torture. The secretary of state may negotiate assurances from the state receiving him. The secretary of homeland security, in consultation with the secretary of state, then determines whether the assurances are sufficiently reliable. The United States has relied on assurances in only a handful of cases to overcome a finding by an immigration board that someone should not be removed because he is likely to be tortured.

Nevertheless, there are reports that the United States is accelerating its efforts to remove illegal immigrants.¹⁶ Any large group of removable aliens is likely to contain individuals who realistically fear torture if the United States returns them to their home countries. This suggests that the United States will continue to rely on assurances as one mechanism for transferring these aliens, possibly with greater frequency than it currently does.

3. Guantanamo

Perhaps the most novel situation in which the United States has relied on assurances against torture is when it transfers individuals from the detention facility at Guantanamo Bay to their home countries or to third countries. In general, even though the United States does not believe that the nonrefoulement provision of the CAT applies to Guantanamo, the government seeks assurances of humane treatment in every transfer case in which it foresees continued detention, because those are the situations in which the receiving state can most clearly control the treatment that the person receives in that

¹⁶ Ernesto Londoño, "U.S. Steps Up Deportation of Illegal Immigrants," *Washington Post*, February 27, 2007.

country. As in extradition cases, the United States has not revealed the contents of the assurances it obtains. The U.S. decision to seek assurances before transfer has had a tangible impact on its ability to move people out of Guantanamo: the United States has deemed about sixty people eligible for transfer but has not sent some of them home because it has not yet obtained satisfactory treatment assurances for them.

Two aspects of current U.S. assurances practice at Guantanamo are worth re-considering. First, it is not clear how the United States balances its stated policy of seeking assurances in every transfer case with the stated wishes of detainees who have been cleared for transfer. Specifically, what happens if some of the sixty people currently designated for transfer wish to return home, even if the United States cannot obtain what it views as credible assurances in their cases?¹⁷ The United States could view this as an opportunity: it might negotiate generic assurances that the receiving state will treat humanely the detainees who have agreed to return to that state, transfer those detainees to the receiving state, evaluate whether and how the receiving state has complied with its assurances, and only then determine whether and under what conditions to transfer those people who the United States would send back involuntarily.

Second, in many cases in which the United States transfers people from Guantanamo, it obtains both humane treatment assurances and security assurances. Security assurances are assurances in which the receiving state articulates its intention to take responsibility for mitigating the threat posed by the returnee and describes the steps it may take to ensure that the transferred detainee will not pose a continuing threat to the United States and its allies. The need for assurances against torture is greater when the receiving state plans to detain the person than when it plans to release him. The United States therefore has an opportunity to assess whether it should transfer more Guantanamo detainees for outright release, rather than seek security assurances that may lead the receiving state to decide to detain the individual for some period.

¹⁷ Some have argued that statements by detainees that they want to return home are not truly voluntary statements, because they are being made in an inherently coercive situation. If the government pursued this approach, it would need to assess carefully the detainee's expressed wishes.

While some individuals transferred from Guantanamo have returned to the battlefield in Afghanistan, the majority have not.¹⁸ Some presumably have found it difficult to rejoin their original groups, while others have chosen not to do so. To date, the United States has not made public any data showing whether the security assurances have proven necessary and sufficient to keep detainees away from the fight. If the data suggest that security assurances have not been effective, or have not been necessary to keep returned detainees from engaging in hostilities against the United States, there is room to evaluate whether to seek fewer security assurances and, concomitantly, to reduce the need to seek treatment assurances in some of these cases.

4. Other Wartime Situations

A related expansion in the use of assurances is into the battlefield context. The Geneva Conventions do not limit the ability of states to transfer POWs back to their home countries, even when the POWs fear torture—resulting in what a prominent international judge describes as a “a major human rights dilemma.”¹⁹ Nevertheless, in conflicts ranging from the Korean War to the first Gulf War, states increasingly respected the wishes of POWs who feared returning home and were creative in deciding what to do with those POWs, which included resettling them in third countries.

U.S. policy in Afghanistan reflects this trend of weighing humane treatment concerns in developing transfer arrangements during or at the end of an armed conflict. The United States has transferred many people it has detained on battlefields in Afghanistan to the Islamic Republic of Afghanistan (IROA) for the IROA to hold, prosecute, or release. According to news reports, the United States obtained assurances

¹⁸ For DOD’s list of former Guantanamo detainees who have returned to the fight, see <http://www.defenselink.mil/news/d20070712formergtmo.pdf>. Even using DOD’s number of thirty detainees, this constitutes about 6 percent of all detainees released from Guantanamo. One recent, troubling case involved a former Guantanamo detainee from Kuwait who engaged in one of three suicide bombings in northern Iraq that killed seven members of the Iraqi security forces.

¹⁹ Theodor Meron, “The Humanization of Humanitarian Law,” *American Journal of International Law*, vol. 94, no. 2, pp. 239, 254, April 2000. The Fourth Geneva Convention prevents a detaining power from transferring “protected persons” in its territory to a country where the persons fear persecution. There are no treaty rules about transfers during a conflict between a state and non-state actors such as al-Qaeda members.

from the IROA that it would treat detainees humanely; refrain from torture; allow the United States or a third party such as the International Committee of the Red Cross access to the detainees to verify treatment; investigate, detain, and prosecute the detainees to the fullest extent possible; and give the United States notice and place detainees on a watch list if the IROA releases them.²⁰

The fact that the United States sought assurances in this circumstance is notable, because the detainees at issue are Afghan nationals detained and held in Afghanistan. On the other hand, the United States does not seem to have sought assurances from the government of Iraq before transferring detainees there. Although it is not clear what accounts for this different approach in apparently similar circumstances, the United States nevertheless has stated that it would oppose a person's transfer to the Iraqis if it seemed likely the individual would be tortured.²¹

5. Renditions

The most controversial context in which the United States has used assurances is renditions. A rendition is the transfer of an individual from one state to another, without the use of traditional processes such as extradition, deportation, or expulsion. After years of declining to comment on allegations that the United States used renditions to detain and transport suspected terrorists to Guantanamo and third countries, in December 2005 Secretary of State Condoleezza Rice confirmed that the United States was using renditions as a counterterrorism tool. Secretary Rice also stated that "the United States has not transported anyone, and will not transport anyone, to a country when we believe he will be tortured. Where appropriate, the United States seeks assurances that transferred persons will not be tortured."²²

²⁰ Andrea Koppel and Elise Labott, "U.S. officials: Gitmo transfer talks active," CNN, August 9, 2005; Josh White and Robin Wright, "Afghanistan Agrees to Accept Detainees," *Washington Post*, August 5, 2005.

²¹ *Geran v. Omar and Munaf v. Geran*, Nos. 07-394 and 06-1666, Brief for the Federal Parties on writ of certiorari, p. 47, http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/07-394_FederalParties.pdf.

²² Secretary Condoleezza Rice, "Remarks Upon Her Departure for Europe," December 5, 2005, <http://www.state.gov/secretary/rm/2005/57602.htm>.

News reports from 2005 reflect that, before the CIA rendered someone to a foreign country, its lawyers required the senior CIA official in that country to obtain a verbal assurance from the country's security services. Former CIA director Porter Goss told Congress that the CIA had an "accountability program" to monitor detainees, but added, "once they're out of our control, there's only so much that we can do."²³

The interplay between the use of assurances and renditions has made many people deeply suspicious of assurances. They associate renditions with transfers of suspected terrorists to foreign governments to face harsh interrogation techniques, and thus view assurances as a legal fig leaf that lets the United States claim that it complies with its policy not to transfer people to face torture. Revelations that the United States itself used techniques such as waterboarding during interrogation make critics skeptical that the United States is committed to humane treatment of detainees. Renditions, which the United States has used for many years, can be an important counterterrorism and law enforcement tool, particularly where they are used to bring someone to trial.²⁴ (This type of rendition should not be conflated with what are frequently referred to as extraordinary renditions, which some define as the transfers of individuals to other countries with the expectation that they will be tortured.) It will take significant work, however, to restore the public's faith that renditions are valuable when used rarely and appropriately.

Restoring confidence in renditions can assuage concerns about the use of assurances, and bolstering confidence in the use of assurances may help rehabilitate renditions. One way to restore confidence in renditions would be for the United States to announce that it will render individuals to third states only when the person is wanted for criminal investigation or prosecution (rather than general interrogation or security detention).²⁵ This makes it more likely that the individual will be placed in an established

²³ Dana Priest, "CIA's Assurances on Transferred Suspects Doubted," *Washington Post*, March 17, 2005.

²⁴ For example, in 1997 the FBI rendered Mir Aimal Kansi, suspected of shooting two CIA officials in Virginia, to the United States to face trial. The United States sometimes renders a person to stand trial where the use of extradition is not an option, either because no extradition treaty exists or because the state in which the person is located is unable or unwilling to withstand a controversial extradition hearing. See Daniel Byman, written testimony, hearing before the Senate Foreign Relations Committee on "Extraordinary Rendition, Extraterritorial Detention, and Treatment of Detainees: Restoring Our Moral Credibility and Strengthening Our Diplomatic Standing," July 26, 2007.

²⁵ Daniel Byman supported this idea in his testimony before the Senate Foreign Relations Committee. Senator Joe Biden (D-DE) introduced a bill last year that takes a similar approach, by limiting renditions to

system that is easier to monitor from the outside. Such a decision would not be cost-free from a national security standpoint: there may be limited circumstances in which the United States detains someone it strongly believes to be a terrorist, no state has filed criminal charges against him, and his state of nationality is much better positioned than the United States to interrogate him, given issues related to language and knowledge of networks, clan structures, and culture. Nevertheless, there would be other important advantages to announcing publicly that the United States will transfer people only to face criminal investigation or trial, and the costs—in terms of international reputation and cooperation—of preserving an unlimited flexibility to render in these contexts are higher than the benefits.

EUROPEAN AND CANADIAN USE OF ASSURANCES

In many aspects of the war on terror, including the use of renditions, the United States has found itself on the other side of the argument from its allies. Not so with assurances. European states and Canada have used diplomatic assurances in many extradition and deportation cases for the same reasons that the United States has. Certain members of International Security Assistance Force (ISAF), including the Dutch, British, Canadians, Norwegians, and Danish, have concluded agreements with the IROA to secure the treatment of detainees they transfer. The UK has obtained similar assurances from the Iraqis.

There are some important differences in approach that make the European and Canadian assurances practices more transparent. In particular, European and Canadian courts generally review the government's decision to transfer or extradite people. Thus, the governments must show the assurances to their courts and to the person being transferred. The legal standards for European states are higher as well. Those states cannot transfer people to countries where there is a real risk that they will face inhuman or degrading treatment—a broader category of mistreatment than torture. Finally, the

those situations in which the receiving state will initiate legal proceedings against the individual rendered. S. 1876 (July 25, 2007).

assurances that the UK has obtained from states such as Jordan, Lebanon, Libya, and Algeria are very detailed and envision extensive monitoring.

Despite their more transparent approach to assurances, these countries still face complications and criticism. For example, even though the UK has detained several dangerous Libyans in its territory, UK courts have refused to permit the UK to deport people to Libya, even though the UK and Libya concluded a bilateral arrangement.²⁶ The UK, frustrated with the rigorous “no transfer to inhumane treatment” rules in the face of serious threats to its citizens, recently asked the European Court of Human Rights (ECtHR) to let it take into account the level of security threat that a person poses when considering whether to deport him in the face of torture concerns (and assurances). In the words of the UK’s former home secretary,

in developing [the human rights guaranteed in the European Convention on Human Rights] it really is necessary to balance very important rights for individuals against the collective right for security against those who attack us through terrorist violence. ... [T]his balance is not right for the circumstances which we now face.²⁷

Human rights groups accused the UK of backing away from a clear obligation to not deport people to torture. In any case, the ECtHR rejected the UK’s argument, reminding European states of their absolute obligation to not transfer someone where there is a real risk of inhuman treatment, regardless of how egregious the acts of the person to be transferred.²⁸ This leaves the UK to continue to seek detailed assurances from foreign

²⁶ Even though a senior UK official stated that it was “well-nigh unthinkable” that Libya would fail to comply with the assurances, the UK court concluded that the assurances were insufficiently reliable because Libya’s leader, Muammar al-Qaddafi, was unpredictable and Libya lacked a civil society that could shame the government in the event of reports of mistreatment.

²⁷ Speech by Charles Clarke, former UK home secretary, to the European Parliament, September 7, 2005, <http://www.eu2005.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1107293561746&a=KArticle&aid=1125559979691>. Former UK defense secretary John Reid publicly asserted that the judges on the ECtHR “just don’t get it,” because they earlier had prohibited the UK from weighing the security of millions of British people if a suspected terrorist remained in the UK against the risk he faced if deported back to his own country. See Alan Travis, “Anti-terror critics just don’t get it, says Reid,” *Guardian*, August 10, 2006, <http://www.guardian.co.uk/politics/2006/aug/10/terrorism.humanrights>.

²⁸ *Saadi v. Italy*, E. Ct. H. R., app. no. 37201/06 (February 28, 2008). Canada’s supreme court has shown a bit more flexibility on this question, refusing categorically to rule out an exceptional situation in which Canada might be able to deport someone likely to face torture. *Suresh v. Canada, Minister of Citizenship & Immigration*, [2002] 1 S.C.R. 3.

governments before transfers, to persuade courts that the assurances are reliable, and to explore other options to control the acts of those who remain on UK soil.

Canada faces a different problem. Even though Canada's assurances from the Afghans are robust, its transfers of detainees to the Afghans are the subject of ongoing litigation. Amnesty International sued Canada to prevent Canadian troops in Afghanistan from transferring detainees to the IROA. Amnesty claims that the Afghans mistreat detainees, making such transfers a violation of Canada's constitution.

A Canadian federal judge recently dismissed Amnesty's case, concluding that Afghan detainees were not entitled to protection under the Canadian constitution.²⁹ Amnesty has appealed this decision to the Canadian court of appeal. A top Canadian general argued publicly that if Canada's courts prevent the government from transferring detainees to the Afghans, Canadian troops would have to quit fighting the Taliban and hunker down in secure bases. This would effectively terminate Canada's contribution to the mission. This litigation has not gone unnoticed by other ISAF partners, making them increasingly hesitant to detain individuals during the fighting.

Unlike other war on terror issues, on which U.S. allies have criticized the United States publicly for its decisions, these allies have not voiced criticism on its use of assurances because they are wrestling with the issue themselves. These states have equities in each others' policies: if Canada cannot deport someone, there is a greater chance the person will be able to enter the United States than if he is sent home to, say, Kuwait—even if Canada keeps him under surveillance in Canada and places him on a watch list. And if U.S. partners in Afghanistan cannot detain combatants, winning the Afghan conflict becomes that much harder.

Because their security is intertwined, it is to the advantage of the United States, European states, and Canada to make assurances as sustainable as possible. Despite their different legal obligations, these states might work together fruitfully, because they start from a basic agreement that diplomatic assurances currently are the best way to address the dilemma posed by dangerous people in their custody who likely will face torture if transferred to their home countries.

²⁹ *Amnesty International Canada v. Canada (Attorney General)*, <http://decisions.fct-cf.gc.ca/en/2008/2008fc336/2008fc336.html>.

PROBLEMS WITH THE USE OF ASSURANCES

HUMAN RIGHTS CONCERNS

Human rights groups and international bodies have criticized governments harshly for using assurances because the groups think that assurances are inherently unreliable and do nothing to prevent torture.³⁰

The most common criticism is that a transferring state that feels the need to seek assurances must believe that the receiving state at least occasionally engages in torture. In this view, there is no basis on which to trust the bilateral assurances, because the receiving state already has shown itself willing to violate the law. As the UN high commissioner for human rights put it, “if there is no risk of torture in a particular case, [assurances] are unnecessary and redundant. If there is a risk, how effective are these assurances likely to be?”³¹

Second, torture is difficult to root out because it almost always occurs in secret. People who are tortured are often too afraid to report it or are not given the chance to do so. For this reason, many groups view monitoring with skepticism: if a foreign official is able to visit one or two detainees in a facility containing hundreds of people, the source of any treatment complaints will be apparent to the detention administrators, who may retaliate. Other groups believe that monitoring is ineffective because it addresses torture or mistreatment only after the fact. Additionally, those who use torture are skilled at hiding their acts from investigators, including by using techniques that do not leave visible marks.

Third, human rights groups point to cases in which assurances have failed to protect those transferred, to prove that transferring states should have no confidence in

³⁰ See, for example, Human Rights Watch, “Still at Risk: Diplomatic Assurances No Safeguard Against Torture,” April 2005; Amnesty International, “Afghanistan: Detainees Transferred to Torture: ISAF Complicity?” November 2007; European Parliament, “Interim Report on the Alleged Use by European Countries by the CIA for the Transportation and Illegal Detention of Prisoners,” May 15, 2006; UN Commission on Human Rights, *Report of the Independent Expert on the Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, E/CN.4/2005/103, February 7, 2005, para. 56, <http://www2.ohchr.org/english/bodies/chr/docs/61chr/E.CN.4.2005.103.pdf>.

³¹ Statement by UN high commissioner for human rights Louise Arbour, December 7, 2005.

assurances in the future. Often-cited examples include the cases of Maher Arar, whom the United States removed to Syria, and certain Guantanamo detainees returned to Russia and Tunisia, all of whom Human Rights Watch alleges to have been mistreated.³² The United States acknowledges that it obtained assurances from Syria and Russia that the individuals would not be mistreated, but has not responded publicly to the human rights groups' reports. A related concern is that neither the transferring state nor the receiving state has an incentive to publicly report that a transferee has been tortured because doing so strains diplomatic relations.

Many human rights groups complain that assurances are legally unenforceable. Specifically, the transferring state has no legal recourse if it discovers that the receiving state violated its assurances, and the person injured has no access to a remedy in either state.

The final basket of concerns relates to the symbolic messages that the use of assurances conveys. Assurances against torture create a two-tiered system in the receiving state: those individuals who receive special protections, and the rest of the detainee population. Critics see assurances as a signal by the transferring state that some mistreatment is fine, as long as those who it transfers are treated appropriately. Some argue that the United States signals a limited commitment to abolishing torture around the world when the State Department issues its annual human rights report criticizing a receiving country's prison system not long before the United States transfers someone into that system.

Although some of these criticisms can be addressed, the administration has not responded to these arguments head-on. For example, it cannot be the case that assurances, simply because they are not legally binding, are inherently unreliable. The United States relies on diplomatic assurances and other nonbinding arrangements in a number of important areas beyond treatment assurances. For instance, the Defense Department presumably views the security assurances it obtains from states receiving Guantanamo detainees as important and reliable. Further, there is real value to monitoring the

³² HRW, "Reject Rather Than Regulate," <http://hrw.org/backgrounder/eca/eu1205/8.htm> (Arar); HRW, *Ill-Fated Homecomings: A Tunisian Case Study of Guantanamo Repatriations*, <http://hrw.org/reports/2007/tunisia0907/tunisia0907web.pdf> (Tunisian detainees); HRW, *The Stamp of Guantanamo: The Story of Seven Men Betrayed by Russia's Diplomatic Assurances to the United States*, <http://www.hrw.org/reports/2007/russia0307/> (Russian detainees).

condition of a detainee after transfer, which has inherent deterrent effects, and there may be diplomatic and reputational, if not legal, ramifications for states that violate their assurances.

Many human rights groups reject any policy that does not eliminate the risk of torture. In their view, any risk of torture, no matter how slight, is too much—so they will never embrace the use of assurances. Yet no one, whether from a human rights group or otherwise, has been able to offer realistic alternatives. A few entities have proposed certain core elements that should be part of any set of assurances, such as guarantees of prompt access to a lawyer and recording all interrogation sessions.³³ While it would be useful to have a robust public dialogue about whether the U.S. government should seek some or all of these elements, at least some of the elements are likely unachievable because they extend well beyond the existing laws of the receiving states.³⁴

WAR ON TERROR POLICY CONCERNS

Critics of the war on terror accuse the administration of engaging in torture, acting in secret, trying to prevent courts from reviewing its actions, interpreting its international obligations as narrowly as possible, ignoring the unintended consequences of detention, and sustaining the detention facility at Guantanamo. To the extent that critics associate assurances against torture with the war on terror, they view assurances through this same lens. (Before 9/11, virtually no organization had criticized any government's use of assurances against torture. Since 9/11, there has been a steady stream of negative reports about the use of assurances.)

As applied to assurances, some of these critiques raise questions that the government should address. Some of the critiques, however, seem to stem more from emotional reactions to the Bush administration's foreign policy decisions than to the

³³ Positions of the Jacob Blaustein Institute for the Advancement of Human Rights and Columbia Law School's Human Rights Clinic on Minimum Standards and Guidelines on the Use of Diplomatic Assurances (December 6, 2005); Special Rapporteur on Torture, Report of September 1, 2004, paras. 30–42, <http://www.statewatch.org/news/2004/nov/un-torture-doc1.pdf>.

³⁴ For instance, even laws in states such as the UK and Spain permit those governments to detain individuals for some period of time (two and seven days, respectively) without being able to see a lawyer.

policies and procedures on which assurances have been based. For example, some claim that the U.S. government seeks assurances to facilitate torture, not lower the risks of torture. But if the United States was not concerned about the treatment of those it transfers, it would have been able to transfer people from Guantanamo faster, alleviating some of the intense pressure to close the Guantanamo detention facility.

In persuading skeptics about the U.S. use of diplomatic assurances, one of the biggest critiques that the United States will have to address is that it is hypocritical to ask for assurances against torture in the wake of revelations that the U.S. government waterboarded certain detainees. Regardless of which presidential candidate wins in November 2008, it seems certain that the next president will seek changes to U.S. interrogation policy to preclude U.S. agencies from employing certain harsh interrogation techniques.³⁵ These changes will help convince the public and U.S. allies that the United States is serious about using assurances and other tools, such as monitoring, to minimize the likelihood that individuals will be tortured after being transferred.

Critics accurately point out that the United States has not been public about its assurances practice and the substance of the agreements it obtains. In the view of the executive branch, it is able to obtain better assurances this way; in the view of critics, it gives the impression that the executive is cutting backroom deals and trying to avoid oversight by the courts.

Finally, it is true that the United States takes a narrow view of its treaty obligations regarding nonrefoulement, particularly about whether the CAT applies to its activities overseas. Although this position is legally defensible, it is controversial internationally. This means that critics and allies give the United States little credit for adopting policies that exceed what it views as its legal obligations under the CAT and continue to apply pressure on the government to amend its legal interpretations of the CAT and other human rights treaties.

³⁵ Senator John McCain (R-AZ) previously stated that he believes that current U.S. law prohibits the use of extreme sleep deprivation, forced hypothermia, and waterboarding. Senator Barack Obama (D-IL) has stated that he views the use of waterboarding, head-slapping, and extreme temperatures as torture.

U.S. COURT CASES

Another problem with current assurances practice is that assurances have gotten tangled in litigation in every context in which the United States has used them. No U.S. court has prevented the United States from using assurances. But few courts have seen their contents because the government consistently has declined to show the assurances to the courts or the person subject to transfer. As the State Department has noted, “the Department does not make public its decisions to seek assurances ... in order to avoid the chilling effects of making such discussions public and the possible damage to our ability to conduct foreign relations.”³⁶

Some courts accept this rationale. One court recently stated, “we have long adhered to the rule ... that it is the role of the Secretary of State, not the courts, to determine whether extradition should be denied on humanitarian grounds or on account of the treatment that the fugitive is likely to receive upon his return to the requesting state.”³⁷

But other courts increasingly look warily at the executive’s reliance on assurances. Some courts have sought ways to review the executive’s decision to transfer in the face of torture claims, even when the law does not provide a clear basis to do so. A few have required the government to give detainees thirty days’ notice of its intent to transfer them from Guantanamo. One court—because the U.S. government would not show the court the Egyptian government’s assurances—recently ordered the United States to release an individual the United States wanted to deport to Egypt. The decision is on appeal; if upheld, the United States will have to make a difficult decision about whether to show courts the assurances, to try to hold the individual in postremoval detention indefinitely, or to permit someone accused of murder to remain free in the United States. Finally, most countries that use assurances permit their courts (and the individual whose transfer is at issue) to review the assurances. This has made some courts question the U.S. argument that greater transparency would adversely affect its ability to obtain assurances.

³⁶ Johnson Declaration, para. 11. The United States has not foreclosed the idea that the U.S. government may disclose the assurances when the state giving the assurances consents.

³⁷ *Prasoprat v. Benov*, 421 F.3d 1009, 1016 (9th Circuit, 2005).

The Supreme Court recently declined to prevent the United States from transferring to the Iraqi government a U.S.-Iraqi national, held in Iraq by U.S. forces, who alleged that his transfer to Iraqi custody was likely to result in torture.³⁸ The Court concluded that the political branches are better suited than the judiciary to assess treatment issues in foreign countries and to determine national policy in light of those assessments.

This decision provides a certain amount of guidance to courts considering transfer-to-torture issues involving U.S. detainees outside the United States, but does not appear to decide other pending cases involving the transfer of detainees in U.S. custody in the United States and perhaps at Guantanamo. The case flags an important role for the political branches of government in grappling with hard policy decisions, though. Courts by definition are forced to proceed case by case and make decisions based only on the law and facts before them. In contrast, the executive branch and Congress are better suited to examine all of the issues implicated by the use of assurances against torture—bilateral relationships with foreign governments, national security and human rights concerns, possible alternatives to using assurances, and the experiences of other governments—and weigh the merits of the competing issues. And of course the political branches are accountable to voters in a way that courts are not.

PROBLEMATIC DRAFT LEGISLATION

Members of Congress have introduced bills on the topic, though Congress has not passed legislation on assurances against torture. In 2004, Speaker of the House Dennis Hastert (R-IL) introduced the 9/11 Recommendations Implementation Act, which would have permitted the United States to deport aliens suspected of terrorism even if the government thought that the aliens would be tortured.³⁹ The provision fell away before Congress

³⁸ *Munaf v. Geren*, 2008 WL 2369260 (June 12, 2008). Justice David Souter’s concurrence suggests that there are certain limited circumstances in which it would be appropriate for courts to consider “transfer to torture” claims, even in the absence of further guidance by the political branches.

³⁹ H.R. 10, section 3032.

passed the bill, but it illustrates one end of the spectrum of views in Congress about how to handle nonrefoulement issues.

More recent bills represent the other end of the spectrum. Representative Edward Markey (D-MA) introduced a bill in 2005 titled the Torture Outsourcing Prevention Act, and reintroduced the bill in March 2007 with sixty cosponsors.⁴⁰ Explaining why he reintroduced the bill, Markey asserted, “the use of so-called ‘diplomatic assurances’ is a cynical con-game played by the Bush Administration to bypass our obligations under the Convention Against Torture and under domestic law.”⁴¹ Like some U.S. judges, Markey personally asked to review the assurances that the U.S. government had received, particularly from Syria.

Under Representative Markey’s bill, the secretary of state would have to produce annually a list of countries where torture or cruel, inhuman, or degrading treatment (CIDT) is commonly used. The United States then could not transfer any person in U.S. custody to a country on that list.⁴² The bill would allow any person about to be transferred, regardless of his nationality or location, to challenge his transfer in U.S. court if he thought that he would be in danger of being subjected to torture or cruel, inhuman, or degrading treatment. These provisions effectively would foreclose the United States from rendering someone from one state to another, whether or not the state was on the secretary’s list, and would preclude the United States from returning someone even voluntarily to a listed state. By permitting individuals to challenge their transfers in court, the bill presumably would force the executive branch to show the court and the individual any diplomatic assurances it received.

The Markey bill would let the secretary of state waive the prohibition on transfers to a listed state if she certified that the state had ended acts of torture or CIDT and “there is in place a mechanism that assures the United States in a verifiable manner that a person rendered, returned, or otherwise transferred will not be tortured or subjected to [CIDT], including, at a minimum, immediate, unfettered, and continuing access, from the point of

⁴⁰ H.R. 1352, <http://thomas.loc.gov/cgi-bin/query/z?c110:H.R.1352:>.

⁴¹ “Markey Condemns Use of ‘Diplomatic Assurances’ with Russia,” March 29, 2007, http://markey.house.gov/index.php?option=com_content&task=view&id=2731&Itemid=141.

⁴² H.R. 1352, sec. 2(a). This approach would impose a broader restriction on U.S. transfers than currently exists in U.S. law, which only prohibits transfers from U.S. territory to face torture, not transfers to face cruel, inhuman, or degrading treatment.

return, to each such person by an independent humanitarian organization.”⁴³ Diplomatic assurances would not be sufficient to establish that mechanism. These requirements would impose an almost insurmountable hurdle to transfers to any state on the list.

Senator Patrick Leahy (D-VT) introduced a similar bill in the Senate, with eight cosponsors.⁴⁴ Like Representative Markey’s bill, Senator Leahy’s bill would deem written or oral assurances made to the United States an insufficient basis for believing that a person is not in danger of being tortured.⁴⁵

These bills would abolish the use of assurances without addressing what to do with those whom the United States cannot send home. Although neither set of bills strikes an ideal balance between the rights of the few and the security of the many, it is useful for Congress to take part in assessing the appropriate role for assurances in U.S. practice. Policy decisions that reflect consensus between the executive branch and Congress have a greater chance of proving sustainable in the long term. The recent bills suggest that if the executive is not willing to entertain some policy changes, Congress may try to impose those changes. Conversely, internal executive changes may alleviate pressure from Congress.

⁴³ Ibid., sec. 2(b).

⁴⁴ S. 654 (2005), <http://thomas.loc.gov/cgi-bin/query/z?c109:S.654.IS:>.

⁴⁵ S. 654, sec. 2(c).

POLICY RECOMMENDATIONS

The U.S. government has answered correctly the most important theological questions about assurances. It has rejected the idea that people who may have engaged in heinous acts are not worthy of being protected from torture. It has concluded that assurances can be used appropriately and often are a better alternative than indefinite detention. It has decided that the United States is safer with these individuals out of its territory than inside it, although reasonable people may differ on that risk calculation. And it has adopted a policy of not transferring people to places where they are more likely than not to face torture, even where it believes that it lacks a legal obligation to do so.

However, the world has changed. The events of the past seven years, the proliferation of Internet access, and an ever-increasing sense of the importance of human rights mean that both international and U.S. civil society know more and care more about torture, detention, renditions, and the human rights practices of 194 states than ever before. Publicity surrounding cases in which assurances appear to have failed to prevent the mistreatment of transferred persons—such as Arar, Ahmed Agiza, and several Guantanamo detainees transferred to Russia and Tunisia—have added to the skepticism about assurances against torture. The U.S. approach to the use of assurances has not fully caught up to these changes.

Adopting the following recommendations would help the United States and its allies address the human rights concerns and practical problems that they have encountered in their use of assurances against torture. The goals are to increase the transparency of the assurances process; ensure that decision-makers have access to as much relevant information as possible; and increase efforts to monitor the treatment of those returned. The recommendations are directed to the U.S. executive branch, U.S. Congress, European states and Canada, and the United Nations.

U.S. EXECUTIVE BRANCH

Clarify When and Why the United States Obtains Assurances

- The United States should describe publicly what assurances against torture are, why it uses them, and the process by which it obtains them. Part of the unease about assurances flows from the sense that the United States obtains them in secret, and from a larger concern about lack of transparency during this administration. To date, the most extensive public explanations about the process are in court filings and within lengthy documents submitted to the Committee Against Torture—neither of which is easy for the public to find or digest.
- The United States should directly address the critiques from human rights groups about these assurances. Several groups have issued extensive reports explaining why they oppose the use of assurances, but the government has not responded to these reports. Some criticisms may be hard to counter; others are more easily addressed. A thoughtful response from the government would foster a public dialogue about the issue and dispel some myths.
- The United States should issue guidelines about or otherwise explain the contexts in which it seeks assurances, perhaps in an executive order. For instance, reports suggest that the United States has obtained assurances from the Afghan government but not the Iraqi government, even though the transfer situations seem similar. The United States obtains assurances before returning many Guantanamo detainees, but typically has not obtained assurances when it has repatriated other types of combatants (i.e., prisoners of war). A clear U.S. policy statement about when it will seek assurances would help the public understand the process, would put allies and future receiving states on notice of the U.S. approach, and would help U.S. officials within the government recognize scenarios that may require assurances and raise the issue up their chains of authority.

For instance, the United States might decide that it will seek individualized assurances when it has full and exclusive control over the location at which the person is held, will seek general assurances covering a group of detainees when it has limited control over the location at which the people are held, and will decide in connection with allies whether to seek assurances when working as part of a multinational force. To this end, the United States should seek general assurances against torture from the Iraqi government, as it has from the Afghan government, or explain why it does not believe that any of the detainees it transfers to Iraq's custody are likely to be tortured.

Establish a Robust Internal Process for Negotiating and Evaluating Assurances

- The executive branch should carefully coordinate its assurances practice within and across agencies. Litigation filings and regulations state that the war crimes office within the State Department negotiates assurances in the Guantanamo context (where the Defense Department is the final decision-maker), that the State Department's legal office negotiates them in the extradition context (where the State Department is the final decision-maker), and that the State Department more generally negotiates them in the deportation context (where the Department of Homeland Security is the final decision-maker). While the State Department should retain the lead on negotiations, given its institutional role, one entity within State should conduct all of the negotiations.
- All decisions about the sufficiency of assurances should be made at a level no lower than the deputy secretary of the decision-making agency. Recent practice at the Department of Homeland Security, for example, suggests that lower-level officials there have made final decisions about the sufficiency of assurances in the past.
- To maximize institutional knowledge, the U.S. government should ensure that it pools all of its information about assurances, including copies of all assurances received; information about how, when, and with whom the United States

negotiated the assurances; and information received from monitoring or other posttransfer visits by U.S. officials or third parties.

One way to achieve this would be to establish a secretariat (housed at the State Department) that maintains a database on what assurances the United States has received in different contexts, and what the follow-up reporting has revealed, so that the next group seeking assurances has all relevant data at its fingertips. The secretariat could also ensure that relevant decision-makers have access to intelligence information about the situation in the receiving state that might impact their decision.

If CIA-negotiated assurances are kept distinct from this process because of the level of classification of CIA activities, the CIA should review relevant information in the database in determining whether to treat the assurances it receives as reliable.

Treat Voluntary Returns Differently from Involuntary Returns

- In the Guantanamo context, when the United States has cleared a detainee for transfer and the detainee affirmatively wishes to return home, the United States should take the voluntary nature of the return into account when assessing whether it has obtained appropriate treatment assurances.⁴⁶ Where the United States has deemed multiple detainees from a particular country eligible for transfer, the United States first should transfer those who wish to return home, relying on more generalized assurances, gauge the receiving country's compliance with those assurances, and then seek more specific assurances for those individuals whom it plans to transfer involuntarily.

⁴⁶ This issue only arises in the Guantanamo context, because of the U.S. policy to seek treatment assurances for every transfer from Guantanamo in which the receiving state will detain the person. In contexts such as extradition and immigration removals, a person who voluntarily consented to transfer presumably would not raise torture claims in the first place.

Emphasize Monitoring

Monitoring is not a panacea, but it can play an important role in the transfer process. Because the United States does not make public the assurances it receives, it is difficult to know the scope of the monitoring mechanisms it has negotiated to date. The government has stated that in appropriate cases it relies on U.S. officials or host country governmental or nongovernmental entities to monitor the treatment of those transferred. The following recommendations assume that the United States currently obtains modest monitoring arrangements for some transfers.

- The United States should devote as much time as possible during negotiations to obtaining strong monitoring arrangements in each case. The UK's recent agreements (discussed above) illustrate that it is possible to obtain arrangements that grant human rights organizations consistent, private access to transferred detainees, and to do so in a relatively standardized way. Moreover, as the use of these mechanisms becomes more common, it may become easier for the United States and other transferring countries to persuade new receiving states to agree to such mechanisms.
- The United States should devote ample attention to monitoring posttransfer. When assurances provide for U.S. access to transferred individuals, the job falls to the U.S. embassy in the receiving state. While it may be difficult to sustain senior-level attention to this issue in the face of competing embassy priorities, careful monitoring is one of the few steps that can garner the support of those skeptical of assurances but not opposed to them outright. The United States should therefore make it a high priority at its embassies.
- The United States should train one or more senior officers to assume full-time responsibility for monitoring the treatment of transferred individuals, working with in-country monitors and international organizations where appropriate.
- Third-party monitoring, when feasible, offers an additional way to track a person's treatment, and often will be seen as more neutral than governmental monitoring. The United States should explore with European states that have

established third-party monitoring arrangements whether it is possible to share the services of the same monitoring bodies. Raising the profile of the bodies has both positive and negative implications. If the bodies become known as fair and responsible and have the clear backing of multiple foreign states, a higher profile might facilitate their monitoring work; on the other hand, a lower profile might raise fewer hackles in the host government and permit the bodies to appear nonpoliticized. On balance, it would be advantageous to have multiple states support a single monitoring body that has expertise in evaluating prisoner treatment and can earn the confidence of the various governments involved.

- The United States also should determine how long it will monitor the transferred person's treatment, and should explain its approach. For instance, it might conclude that it will monitor a person's treatment for two years, unless, for example, the person is released and later arrested for an act unrelated to the reasons for his original detention.
- The United States should ask European states that use assurances to urge receiving states to join the Optional Protocol to the CAT (OPT). The OPT creates an independent body to monitor the detention facilities of states parties and requires parties to establish national monitoring mechanisms. These would be useful supplements to bilateral monitoring arrangements. The United States is not a party, because the OPT raises constitutional issues related to searches and seizures, and so cannot be an effective advocate to urge other states to join.
- One criticism by human rights groups is that the receiving state has few incentives to comply with its assurances, and faces few costs if it does not. One way to address this is to increase incentives to comply and raise the costs of noncompliance. For example, the United States should consider offering receiving states certain "carrots"—perhaps related to its economic or trade relationship with those states—that the United States may revoke or withhold if it learns that people have been mistreated after transfer. Such carrots should not be related to development or rule of law assistance.

Revisit U.S. Rendition Policy

- One of the biggest sources of discomfort with assurances is renditions. The U.S. government has never formally described the parameters of its rendition policy, but it is clear that in the past few years the United States has transferred people to countries such as Syria and has rendered people for interrogation without the expectation that they will be prosecuted. The United States should revise its rendition policy to announce that it will not render individuals to a few specified states whose human rights records are poor. While renditions raise issues too numerous to address here, publicly forswearing transfers to particular states (unless and until they make significant improvements to their human rights records) would take some pressure off renditions and permit the executive branch to continue to use them in limited circumstances.⁴⁷
- Although there are costs to doing so, the United States also should announce that it will render individuals to third states only when the person is wanted for criminal investigation or prosecution (rather than interrogation or security detention). This makes it more likely that the individual will receive the benefits of a public, established legal process.

Explore Alternatives to Transfers to States with Bad Rights Records

- The United States should assess the role that security assurances have played to date in preventing Guantanamo transferees from resuming hostile activity against the United States and its allies. If security assurances have not proven to be a necessary and effective tool to reduce the threat posed by detainees transferred from Guantanamo, the United States should consider whether to return more detainees to foreign states without the expectation that the foreign governments will detain them. In some of these cases, this may considerably reduce the need for treatment assurances. At the same time, the United States could place the

⁴⁷ Daniel Byman has suggested that the United States decline to render anyone to Syria, for example.

individuals on watch lists and communicate their respective status and identifying information to allies.

- In addition to improving the use of assurances, the United States should explore other alternatives to transfers, including undertaking active surveillance of those individuals who pose a low enough risk to release within the United States. Other alternatives include the use of global positioning system (GPS) ankle bracelets, electronic monitoring, and regular appearances before government authorities.

With European States, Help Foreign Governments Strengthen Their Detention Systems

- The best way to avoid having to resort to assurances is for countries of concern to develop better detention and prison facilities, staffed with well-trained officials who are instructed to not (and who do not) engage in abuse. If a transferring state has no concerns about how the person will be treated in the receiving state, there is no reason to seek assurances. Helping foreign governments such as Yemen, Algeria, and Tunisia improve their capacities (by training law enforcement, security, and corrections officials and promoting anticorruption efforts) is critical, although it requires years to see significant improvement. The government should try to enlist states like Saudi Arabia, which have established successful rehabilitation programs for suspected terrorists, to assist with this effort.
- To date, the United States and Europe have provided only limited corrections training to foreign governments.⁴⁸ The International Criminal Investigative Training Assistance Program (ICITAP) in the Department of Justice provides assistance to Iraq's correctional system, but is undertaking no other correctional work in the Middle East. The European Union and the Council of Europe have undertaken prison reform in certain member states, but neither has worked outside its geographical region. Building on their experiences to date, the United States and European governments should offer corrections training and assistance to

⁴⁸ U.S. law limits the government's ability to provide U.S. foreign assistance to support foreign police and prisons, although the government may use funds in certain accounts for these purposes.

states in the Middle East and South Asia, coordinating with groups such as the UK's International Centre for Prison Studies, which has undertaken training in states such as Algeria, Libya, and Morocco. This offers the opportunity for useful international cooperation, rather than antagonism, between the United States and Europe in a national security-related area.

- The United States should prioritize the task of improving detention and prison facilities in Afghanistan and Iraq. Leaving well-trained detention and corrections officers in place in those countries after the United States leaves means two fewer potential receiving states to worry about in the future. News reports reflect that, since November 2007, the Canadian government has spent over \$1.5 million to upgrade Afghan prisons. The United States funded the rebuilding of the Pol-i-Charki detention facility, and both the United States and the UK have trained Afghan prison officials. These are useful developments, but relatively minor investments. ISAF countries must persist in upgrades and training until ISAF gains a reasonable level of confidence that detainees are consistently treated humanely.

U.S. CONGRESS

- Congress should work with the executive branch to develop a sustainable framework for the use of assurances, enacting legislation that gives clear guidance to courts about when, how, and to what extent they may review the transfer process in the face of torture claims. Judicial review will give a neutral, nonpolitical entity a role in the process, diminishing the sense that the process is opaque and self-interested.
- For instance, the legislation could require the U.S. government to notify the person in advance of its intent to transfer him to a particular country, and give him the opportunity to submit his concerns to the executive about his expected treatment after transfer. After making a decision to transfer, the executive branch would submit to a court the assurances it obtained and information about its

negotiations with the foreign government, if any, as well as the State Department human rights reports, any history of assurances from the receiving state that the decision-makers considered, the individual's submissions related to his fear of torture, and a short explanation of how the executive branch reconciled the competing arguments and concerns.

- The judicial review should focus on ensuring that the executive followed certain procedures in making a decision to transfer. This type of procedural review is common in the context of administrative decisions by the executive. The legislation should not require courts to substitute their substantive judgment for that of the executive, because the executive remains better suited than courts to take all factors into account when deciding if it is more likely than not that a person will be tortured. The executive also may be held politically accountable in a way that courts cannot. Even a law that requires the court to review the assurances confidentially would be an improvement, though this would weaken the transparency gains, especially in view of European and Canadian practice.
- The legislation should contain a “carve-out” for non-U.S. citizens detained and held on active battlefields such as those in Iraq and Afghanistan. Judicial review in those circumstances is impractical; further, military decisions on the battlefield have long been committed to the executive alone. However, the United States should maintain its policy of declining to transfer individuals where it is more likely than not that they will face torture.
- If Congress cannot agree on legislation requiring judicial review of these transfers, it should consider establishing a neutral entity—akin to an inspector general—that can operate across relevant departments within the executive branch to review and make both general and specific recommendations about transfers. Like inspectors general, the entity could have a dual role reporting both to Congress and to the departments.
- In the event that Congress enacts legislation related to future U.S. detention policy, including by passing laws that would permit the government to engage in administrative detention of terrorist suspects, it should keep in mind the difficult

issues that arise in releasing and returning detainees to their home countries after the executive (or a court) determines that they should be released.

EUROPEAN STATES AND CANADA

- European states and Canada should undertake systematic efforts to urge states that are parties to the CAT (including Yemen, Saudi Arabia, Algeria, Tunisia, Egypt, Jordan, Afghanistan, and Morocco) to join the Optional Protocol to the CAT.
- European states, Canada, and the United States should share information with each other about the efficacy of their diplomatic assurances, if they can establish a mechanism by which to protect the other governments' information from public disclosure. The more information each state has in advance, the better decisions each state can make in assessing the likelihood of torture. The states eventually might create a working group to report on legal or legislative developments and share effective, creative approaches to the problems that give rise to the need for assurances.
- In view of the detention problems that ISAF member states are having in Afghanistan, the European states and Canada should consider establishing a detention facility in Afghanistan run by ISAF for ISAF detainees. This would buy time for Afghanistan to develop its detention facilities while permitting ISAF forces to detain enemy fighters—a fundamental part of armed conflict.

UNITED NATIONS

- The United Nations high commissioner for human rights should undertake a specific campaign to educate states parties to the CAT about the OPT and urge states to ratify it.
- The issue of transfers to torture (and possibly the use of assurances) is relevant for UN police on peacekeeping missions, who periodically are called on to conduct detention operations. To date, the UN lacks detention guidelines for those serving in its civilian police forces. The UN Department of Peacekeeping Operations (DPKO) is currently developing such guidelines. As part of this process, DPKO should include rules on how its police should handle situations in which they detain individuals but are concerned that the host state will torture them if the police transfer them to that state.

Ensuring that the DPKO is aware of this problem should help highlight to states involved in peacekeeping operations that the issue of transfers of detainees to foreign states with poor human rights records creates a struggle between human rights concerns and practical requirements. Requiring states other than the United States, Canada, and European states to think through these issues will foster greater understanding about the use of and problems associated with assurances.

- The UN should increase its support to the part of the DPKO Criminal Law and Judicial Advisory Section that offers support and training to foreign governments' correctional bodies and facilities. The office currently has two officers at headquarters and approximately one hundred staff in the field, which is not adequate to support the needs of the existing UN missions (including Iraq and Afghanistan).

CONCLUSION

Policies related to the war on terror may continue to evolve under the current administration, but seem certain to do so under the next one. Senators McCain and Obama have called to close Guantanamo and limit the types of interrogation techniques that the United States uses. As policymakers continue to revisit the balance between national security and human rights as they review policies related to detention, renditions, and interrogation, they should keep in mind that the issue of transfers to torture will affect—and be affected by—the resolution of these other issues.

It is hard—but imperative—to strike the right balance in the use of assurances against torture. Deciding whether specific assurances are reliable is a difficult judgment. Being too hesitant to transfer an individual may mean an increased security threat (if that individual is released into the United States) or damage to the U.S. reputation or a person's well-being (if the United States tries to hold the person indefinitely). Being too willing to transfer a person to possible torture undercuts future steps the United States might take on torture-related issues and in its efforts to improve its moral standing. If the United States can strengthen its ability to monitor the treatment of those who have been transferred, help improve the facilities of the receiving states, and work in concert with close allies on this problem of mutual concern, the United States will be able to retain the use of an important policy tool while reiterating its commitment to humane treatment.

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