Mind the Gap
Diplomatic Assurances and the Erosion of the Global Ban on Torture

By Julia Hall

Introduction

The United States has rightly attracted massive international criticism for its appalling and illegal conduct in the "war on terrorism." The abuses—Abu Ghraib, extraordinary renditions, secret prisons, enhanced interrogation techniques, Guantanamo Bay—are so dramatic and counterproductive, that they overshadow the fact that the Bush administration could not have "achieved" all this single-handedly. Allies and partners complicit in the US project to undermine the rule of law have provided airspace for illegal transfers, bases to house secret prisons, and intelligence support for operations that have led to torture and disappearances. None of these governments has a record to be proud of, either.

But the role of the British government raises particular concerns. In addition to the more evident transgressions—complicity in renditions, failure to criticize Guantanamo early and assertively, and an array of rights-abusive domestic anti-terrorism measures—it has offered a counterterrorism tool that is less obvious, allegedly more "human rights friendly," and thus uniquely insidious: diplomatic assurances against torture. The US government borrowed this handy device to justify renditions, and now many countries the world over are eager to try them out. The fact that promises of humane treatment from state torturers are inherently untrustworthy and have not worked in a number of cases does not seem to bother London. The goal is to deport terrorism suspects, no matter what—and if brokering unreliable, unenforceable agreements with states that torture is what it takes, then so be it.

Like the Americans, the British government obtains promises of fair treatment from countries where torture is a serious and enduring problem in an effort to get rid of foreign terrorism suspects. Like Washington, London tries to sell this policy as a

genuine effort to square the needs of fighting international terrorism with its human rights obligations. But the British government's boast that it is committed to stopping torture cannot mask the fact that its promotion of empty promises of humane treatment will do irreparable damage to the absolute ban on torture.

The British government has sought assurances over the years from a veritable A-list of abusive regimes: Algeria, Egypt, Jordan, Libya, and Russia, to name a few. These countries have long histories and continuing records of torture, a fact that Whitehall readily acknowledges. What London fails to admit, however, is that despite compelling independent documentation of abuses, these governments routinely deny that torture takes place and usually fail to investigate allegations of abuse. And it fails to explain adequately why these governments—which continue to torture with impunity, despite international condemnation—would keep their promises not to torture a single individual.

The problems with these promises begin with the nature of torture itself. Torture is criminal activity of the most brutal sort, practiced in secret using techniques that often defy detection (for example, mock drowning, sexual assault, and the internal use of electricity). In many countries, medical personnel monitor the abuse to ensure that the torture is not easily detected. And detainees subjected to torture are often afraid to complain to anyone about the abuse for fear of reprisals against them or their family members. Occasional monitoring of a suspect's well-being after return in such circumstances is unlikely to protect him or her from abuse. Moreover, there is no formal enforcement mechanism to ensure a victim has recourse if he or she is abused.

It should therefore come as no surprise that UN High Commissioner for Human Rights Louise Arbour has opined that diplomatic assurances do not work, cannot stop torture, and should not be used. Her concerns are echoed by many human rights experts in the US, Europe, and elsewhere. With good reason: reliance on diplomatic assurances is growing in the US, Canada, and throughout Europe, and is spreading to other parts of the world.

It is bad enough that the British government has mounted a concerted campaign to gain the acceptance of assurances at the Council of Europe, the European Court of Human Rights, and in the European Union, proselytizing at every opportunity on the

benefits of this counterterrorism tool. But abusive governments are also taking a leaf out of the UK and US book to rid themselves of unwanted terror suspects. The Russian government now readily accepts diplomatic assurances from Uzbekistan—a notorious practitioner of torture. Renditions are outlawed in the Philippines *unless* promises of humane treatment are secured first. Ironically, a draft anti-torture plan recently devised by the Georgian government includes acceptance of assurances to justify the deportation of terrorism suspects. The torture ban is being slowly but surely eroded—and the British government has helped lead the way.

Good vs. Bad Assurances

Seeking "diplomatic assurances" to protect human rights began as an earnest effort by European governments to protect the most fundamental right: the right to life. Governments in countries where the death penalty is outlawed have long asked for guarantees against capital punishment from states like the US, where such punishment is legal, before extraditing suspects. International law does not prohibit the death penalty, but capital punishment is outlawed in nearly all of Europe, and the United Nations and every major intergovernmental organization and nongovernmental human rights group condemn the practice. Nearly every bilateral and multilateral extradition agreement or treaty contains a provision requiring that an abolitionist state secure assurances against the death penalty from a state where that sanction remains legal.

Assurances against torture, however, came into being in the 1990s from what Swedish legal expert Gregor Noll calls "the silence of international law." International human rights law absolutely prohibits sending a person to a place where he or she is at risk of torture (the *nonrefoulement* obligation). No exceptions are allowed, even if a person poses a threat to national security. But the law says nothing about no-torture promises between states as a means of meeting that obligation.

The UK and other governments have capitalized on this gap in the law, applying the assurances regime to torture. But they fail to acknowledge the profound difference between the dynamic governing death penalty convictions and the dynamics of torture.

As repellant as it may be to many people, the death penalty is a legal sanction, a sentence handed down after a criminal trial, and often followed by a number of appeals if fairness has been compromised. Executions are generally scheduled well in advance. If a state fails to honor a promise not to seek the death penalty, it should be easy to monitor and protest a potential breach before an execution happens. According to the Washington-based Death Penalty Information Center, the US, for example, has never violated a formal death penalty assurance, lending credence to the claim that such promises can be trusted.

The Reality of Assurances against Torture

By stark contrast, torture is always illegal. It is a brutal criminal act, usually carried out secretly and robustly denied by the perpetrators. Torture is not scheduled in advance and made public like the execution of a death sentence. Any government that receives a diplomatic assurance against torture will be able to identify a breach of the promise only after the abuse has occurred.

As the cases involving the US, Canada, and Sweden below amply demonstrate, people sent back based on these empty promises have been tortured and ill-treated:

- In December 2001, Egyptian asylum seekers Ahmed Agiza and Mohammed al-Zari were apprehended together and "roughed-up" by Swedish police, denied permission to contact their lawyers, driven to Bromma airport outside Stockholm, and handed over to hooded CIA agents. These operatives cut off the men's clothing, and blindfolded, hooded, and drugged them (by inserting suppositories), before transporting Agiza and al-Zari aboard a US government-leased Gulfstream jet to Cairo. The men were subsequently tortured, including with electric shocks, in Egyptian custody. Sweden defended its decision to permit the expulsions, claiming it had received diplomatic assurances from Egypt promising that the men would not be tortured. The UN Committee Against Torture and UN Human Rights Committee have both since ruled that Sweden violated the ban on torture as Stockholm should have known that assurances from Egypt could not be relied upon to protect the men.

- Maher Arar, a dual Syrian-Canadian national, was deported from the US in 2002 and transported to Syria where he was held for nearly a year. The US government claimed that it had secured assurances of humane treatment from the Syrian authorities before sending Arar back, but failed to explain why he was not sent to Canada where he lived. After his release in late October 2003, Arar told a gruesome tale of abuse and torment that included severe beatings, incarceration in a tomb-like cell infested with rats, and psychological abuse. A specially convened Canadian inquiry ruled definitively in 2006 that Arar was not a terrorist; that he suffered a nightmare of abuse amounting to torture in Syrian custody; and that his case is a clear example of the problems inherent in relying on diplomatic assurances. Arar is now suing the US government for deporting him to torture.

- The US government transferred seven Guantanamo Bay detainees to Russia in March 2004 in reliance on promises from Moscow to prosecute the detainees only on terrorism charges and to treat them humanely. Russia did neither. Some of the men were subsequently harassed and convicted on trumped up charges. Former detainee Rasul Kudaev, a resident of Kabardino-Balkaria in southern Russia, was detained after an armed uprising in the provincial capital in October 2005. According to photographs, medical records, court documents, and the testimony of lawyers and family members, Kudaev was repeatedly beaten in custody in an effort to compel him to confess to involvement in the uprising. The men's treatment illustrates how the "stamp of Guantanamo" can lead to ill-treatment, despite promises to the contrary.

- Two former Guantanamo Bay detainees were sent home to Tunisia in June 2007 based on Tunisia's pledge to the US government that they would be treated humanely on return. Both men were incarcerated in Tunisian prison upon return and have told those who visit them that their treatment has been so poor they would rather be back in Guantanamo.

Promoting Assurances at Home

The UK first developed assurances in the early 1990s as a means of removing a Sikh activist labeled a threat to national security. The British government began efforts to

deport Karamjit Singh Chahal to India in 1990. After much procedural wrangling, the UK issued a final deportation order in 1995, purporting to satisfy qualms about his safety upon return by producing two sets of diplomatic assurances against torture and ill-treatment from the Indian government. The British government argued that Chahal's high profile in the UK and India would guarantee him fair treatment (a claim that it and other governments continue to make).

The European Court of Human Rights, however, did not buy the British government's "all eyes are watching" defense and in a landmark 1996 decision ruled that the UK's public branding of Chahal as a "terrorist," coupled with the Indian government's lack of control over brutal security forces in Punjab, made him particularly vulnerable to torture and ill-treatment. This case set the standard in Europe for transfers of terrorism suspects: no balancing test between national security and the risk of torture is permitted; torture and ill-treatment are prohibited at all times, under all circumstances, even if a person has committed horrible crimes; and diplomatic assurances will not suffice from a country where human rights abuses are a "recalcitrant and enduring" problem.

Although the British tried to get assurances in a number of cases after the Chahal ruling, opposition within the government itself and court challenges appeared to sound the death knell for the practice. For example, throughout 1999, the Home Office and the Foreign and Commonwealth Office engaged in an unusual internal struggle against an effort led by then-Prime Minister Tony Blair to deport four Egyptian terrorism suspects, arguing that Cairo's assurances against torture could not be trusted. The Egyptian government eventually refused to give assurances and the deportations were halted.

In the aftermath of September 11, 2001, the British government took the opportunity to introduce new counterterrorism measures, including the shocking power to indefinitely detain foreign terrorism suspects whom the government refused to prosecute but who could not be sent home because they risked being tortured there. There was no talk at that time about diplomatic assurances against torture, which led many to believe that they might be off the table.

But the credibility of no-torture promises came under renewed scrutiny in 2003 when the Bow Street Magistrates' Court in London considered Russia's extradition request for the surrender of Akhmed Zakaev, an envoy for the Chechen government-in-exile, for alleged crimes committed in Chechnya. A Russian government minister traveled to London to assure the court that Zakaev would come to no harm in prison in Russia. But Zakaev's lawyers produced a credible witness who said he was tortured into giving Zakaev's name to the Russian authorities. The court rejected the Russian promises of fair treatment, relying on the fact that torture was widespread in Russia; that Chechens were particularly susceptible to torture; and that the Russian government didn't have effective control over the vast prison system.

By the time the House of Lords ruled in 2004 that the British government could not detain foreign terrorism suspects indefinitely without charge or trial, the government had already revived plans to use assurances as a solution. The UK went on to broker a series of "memorandums of understanding" (MoU) with Lebanon, Libya, and Jordan for the "deportation with assurances" (DWA) of terrorism suspects who are nationals of these countries. The agreements, which purport to systematize assurances, contain a new element: employing an "independent" local human rights group, funded and trained by the British government, to monitor an individual suspect's well-being post return. The British government argues that monitoring greatly reduces the chances that a returned suspect will be abused.

In fact, monitoring is no panacea. Its key deficiency is the lack of confidentiality. If monitors have universal access to all detainees in a facility, and are able to speak with all detainees, each in private, a single detainee can report torture or other abuse without fear that he will be identified by the authorities. The International Committee of the Red Cross (ICRC) makes universal access a condition of its monitoring for precisely that reason. Such confidentiality cannot be provided when only one detainee or small group is being monitored. The prison or detention facility authorities would know directly where the allegations of ill-treatment came from. Detainees would be too afraid of reprisals to report abuse. In a statement given after he was released from Syrian custody, Maher Arar had this to say about visits from Canadian consular officials:

> I could not say anything about the torture. I thought if I did, I would not get any more visits, or I might be beaten again … The consular visits were my lifeline, but I also found them very frustrating. There were seven consular visits, and one visit from members of Parliament. After the visits I would bang my head and my fist on the wall in frustration. I needed the visits, but I could not say anything there.

The British government has tried to argue that local human rights organizations can effectively monitor any abuse. To that end, it has provided thousands of pounds to support the Adaleh Center for Human Rights Studies, a small nongovernmental organization in Jordan. But monitoring organizations, both local and international, often have trouble with open access to facilities. Local monitoring groups are particularly vulnerable to intimidation by their governments, which often control them via registration laws, if not by threats, outright harassment, and worse.

Monitoring by the ICRC at the infamous Abu Ghraib prison in Iraq was often frustrated by the actions of prison staff. In the past few years, the ICRC has suspended visits more than once to Jordanian detention facilities owing to problems of access to certain detainees. Human Rights Watch has spoken to numerous former detainees who claim they were hidden from the ICRC while in the custody of the Jordanian intelligence services. Official government monitors are even less capable of detecting torture, let alone preventing it: Ahmed Agiza and Mohammed al-Zari were both tortured in Egyptian custody, despite numerous visits from Swedish diplomats.

The British government's MoU policy is now being challenged in the courts. In February 2007 the Special Immigration Appeals Commission (SIAC), which hears appeals against deportation in national security cases, ruled that Omar Othman (better known as Abu Qatada), a recognized refugee and radical Muslim cleric accused of ties to al Qaeda, could be returned safely to Jordan under the terms of the UK-Jordan MoU. The court admitted that torture in Jordan is a serious problem, especially for terrorism suspects, and there is little accountability for those who perpetrate such abuse. But having raised those concerns, it ignored them, and simply relied on the British government's argument that the strength of ties between the two countries meant that Jordan would keep its word.

The policy suffered a setback in April, however, when the same court ruled that two Libyan terrorism suspects risked torture and a "complete" denial of due process if deported. Applying the same logic as in the Qatada case, it determined that ties between Libya and the UK were not sufficiently strong and enduring to overcome the Libyan government's routine use of incommunicado detention and torture against prisoners.

A second SIAC ruling on the Jordan MoU, in November 2007, again failed to engage with the substantive risk of torture, despite fresh documentation of Jordanian torture practices. In August 2007, Human Rights Watch interviewed numerous prisoners in several prisons in Jordan who complained of persistent abuse by prison guards, including hanging by iron cuffs in a large cage-like cell and beatings with cables. When we returned for a second time to speak to prisoners at one prison, they reported mass beatings by guards. There were evident signs of new injuries: bruises on backs, calves, and arms, and head wounds. The prison guards wore face masks and some wielded truncheons. A diplomat representing the British government before the SIAC in the case admitted in open court that these events were "frankly horrific."

Despite accepting these accounts as truthful and accurate, the court maintained that ties between London and Amman guaranteed that no such misfortune would befall any of the suspects returned under the agreement. The court skirted around the fact that the Human Rights Watch monitors—skilled independent researchers—were invited to inspect detention facilities and interview prisoners by the Jordanian authorities, but the abuse occurred anyway. How would a small local NGO with little experience, questionable independence, and virtually no power to hold the government accountable for torture abuses be able to ensure the safety of a person returned under the terms of the memorandum? That question went unanswered.

Setting a Bad Example

The British government promotes itself as a leader in the global effort to eradicate torture. It is true that the government has funded international anti-torture projects, and paid for publications like "The Torture Reporting Handbook"—a practical guide to identifying, documenting and reporting incidents of torture for doctors, lawyers, and human rights activists. The UK was one of the first states to ratify the Optional

Protocol to the Convention Against Torture, which creates parallel international and domestic monitoring systems aimed at reducing torture and ill-treatment in detention, and has been active in pressing other governments to do the same.

All this deserves praise. But the government's relentless campaign to see "deportations with assurances" accepted throughout Europe reflects a more ambivalent attitude toward torture. In 2005-2006 it helped mount an effort to develop guidelines for the "appropriate" use of assurances at the Council of Europe, a regional intergovernmental human rights body comprising 47 member states. That effort was decisively rejected when a number of experts, including representatives from Belgium, France, Italy, and Switzerland expressed serious concern that promises from torturers could not be trusted and that any shift to reliance upon assurances would effectively gut the ban on transfers to torture.

It was not surprising that the UK then extended its direct advocacy effort on diplomatic assurances to the European Union. Although the vast majority of counterterrorism policy is set at the national level, the EU has taken up select issues for consideration and consensus, including the definition of terrorism and a regional arrest warrant. The UK is leading an effort, through the G6 group of interior ministers (France, Italy, Spain, UK, Poland, and Germany), for broader EU endorsement of the deportation with assurances policy. A UK government memorandum circulated in advance of a November 2007 meeting of EU interior ministers claimed that the expulsion of terrorism suspects is an effective tool to protect people from foreigners who threaten national security, adding that "the mechanism of seeking assurances, on a government-to-government basis" could be a "way forward."

It is also likely that the UK played a role in Italy's interest in using assurances in an effort to deport a Tunisian national security suspect. In June 2007 the Italian government argued before the Grand Chamber of the European Court of Human Rights that Nassim Saadi should be sent back to his home country with promises from the Tunisian authorities that he would not be tortured on return. The British government intervened in the Saadi case and made oral representations to the court in favor of a national security balancing test for returns to risk of ill-treatment. A decision is pending.

The Real Way Forward

The United Kingdom's post-Blair approach to combating terrorism appeared at first to offer some welcome relief. Prime Minister Gordon Brown wants to engage in the parallel battle of "winning hearts and minds" in Muslim communities. During the September 2007 Labour Party conference, Tony McNulty, the minister responsible for counterterrorism policy, said that Blair had got it wrong: the "rules of the game" have not changed and the response to terrorism should be "rooted in our civil liberties and human rights, with whatever slight tweaks at the top."

Apparently, sending people to places where they risk being tortured is simply a "slight tweak." In November 2007 Brown virtually boasted that new "memorandums of understanding" were being negotiated with a number of other countries. If these agreements are necessary, then the UK is acknowledging that these governments engage in torture, but London is willing to make a deal.

Accepting torture undermines the moral legitimacy of the British government around the world. And instead of winning hearts and minds, it damages the government's standing at home, especially with British Muslims, whose cooperation with the police and security services is so vital if the terrorist threat is to be addressed.

No person has been deported yet under an official British "memorandum of understanding." The UK government can act now to stop all deportations with assurances to countries where torture is practiced. That would send a simple but powerful message around the world: the British government does not bargain with torturers, and neither should you.

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