



Application No. 2947/06: Ismoilov and Others v. Russia Intervention Submitted by Human Rights Watch and AIRE Centre

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I. Introduction

1. This intervention by Human Rights Watch and the AIRE Centre includes commentary on the treatment of Uzbek nationals extradited or otherwise returned to Uzbekistan; analysis of the lack of independent access to places of detention in Uzbekistan; and an assessment of the growing international recognition of the real risk of torture and ill-treatment faced by persons wanted by the Uzbek authorities. It analyzes states' reliance upon diplomatic assurances against torture and ill-treatment in extradition and other transfer contexts, and includes relevant international, regional, and national jurisprudence regarding the use of assurances against torture and ill-treatment. It provides an analysis on the nexus between reliance on such assurances and the prohibition on return to face a real risk of treatment prohibited by Article 3.

II. Treatment of Uzbek Nationals Returned to Uzbekistan

2. Pressure from the Uzbek government and possible collusion between Uzbek security forces and the security services of several Commonwealth of Independent States (CIS) countries has led to the extradition, deportation, or rendition without legal process of dozens of Uzbek refugees either alleged to be associated with the May 2005 Andijan protests and subsequent massacre by Uzbek security forces or perceived to be “independent Muslims”—that is, people who practice Islam outside state institutions and guidelines.¹ Most of those returned are held for some period in incommunicado detention and there has been little, if any, independent access to the returnees.² The few interviews that have been conducted with returnees, their family members, or lawyers indicate that some of the returnees were tortured or ill-treated upon return to Uzbekistan. Torture and ill-treatment in Uzbekistan are systematic and in the vast majority of cases there is no accountability for torture abuses committed by state actors.³

¹Human Rights Watch, “*Bullets were Falling Like Rain: The Andijan Massacre, May 13, 2005*,” volume 17, no. 5(D), June 2005, <http://hrw.org/reports/2005/uzbekistan0605/>.

²Amnesty International Report 2007, Uzbekistan, <http://thereport.amnesty.org/eng/Regions/Europe-and-Central-Asia/Uzbekistan> (accessed July 10, 2007).

³The applicants' submissions and response to the Russian government's observations in the *Ismoilov* case include numerous references to the longstanding practice of torture in Uzbekistan, which the UN Special Rapporteur on Torture has labeled

Ill-Treatment of Returnees from Kazakhstan

3. In November 2005 at least nine Uzbek nationals seeking refuge from religious persecution were forcibly returned from Kazakhstan to Uzbekistan without any legal process.⁴ All of the men were independent Muslims. Four of the men were formally registered as asylum seekers with the office of the United Nations High Commissioner for Refugees (UNHCR). Human Rights Watch's research indicates that some of the men were ill-treated in Uzbek custody on return:

- The wife of one returnee told Human Rights Watch that when she first saw her husband, two months after his return to Uzbekistan from Kazakhstan, he told her that he was severely beaten by the security services of both Kazakhstan and Uzbekistan.⁵ He told her they took his clothes because they were full of blood. According to his wife, he was very scared, could hardly speak, and had lost a great deal of weight. The returnee's lawyer told the wife that when the lawyer saw the returnee, he had an injury to his head but the lawyer believed he was coerced to say that he had fallen to explain the bandage on his head.
- The wife of another returnee told Human Rights Watch that at the end of February 2006, the wives of some of the returnees from Kazakhstan were summoned to the Ministry of Internal Affairs (MVD) and told to "shut up and stay at home."⁶ When she saw her husband in March 2006 in a Tashkent prison, she said that he made her understand through subtle arm gestures that he had been severely beaten. He told his wife that 20 men lived in his cell, there were no mattresses, and the inmates slept in shifts on the ground. When he was transferred to the Tashkent prison in January 2006, other inmates demanded that he give them his gold teeth. They beat him until he agreed and they extracted all his teeth with "some tool." He received no

"systematic." See Report of the Special Rapporteur on Torture, Mission to Uzbekistan, E/CN.4/2003/68/add.2, February 2, 2003, p. 21, para. 68. <http://daccessdds.un.org/doc/UNDOC/GEN/Go3/107/66/PDF/Go310766.pdf?OpenElement> (accessed July 10, 2007).

⁴ Letter from Human Rights Watch to President Nursultan Nazarbaev, "Kazakhstan: Letter Details Kazakh Involvement in Forced Return of Uzbeks," March 28, 2006, <http://hrw.org/english/docs/2006/03/29/kazakh13092.htm>.

⁵ Human Rights Watch interview, Tashkent, July 10, 2006. The names of the interviewees have been kept confidential to protect their identities. Human Rights Watch retains the full names of all the interviewees in detailed notes on file with Human Rights Watch.

⁶ Human Rights Watch interview, Tashkent, July 15, 2006.

medical care until four days after this attack when he was taken to the MVD for medical evaluation. His wife told Human Rights Watch, “It was difficult for me to listen to this and I did not want him to tell me this, but he could not stop and we cried together.”

- The lawyer for another returnee told Human Rights Watch that she first saw her client at the MVD with an investigator and police agent present, in January 2006, two months after his return from Kazakhstan:⁷ “I asked him, somehow with gestures, if they beat him at the MVD and he nodded his head.” The lawyer said that the man should have been in a pre-trial detention center under judicial supervision, but he was being kept in the basement at the MVD. She saw him again in March 2006 and asked him why he was wearing a dirty old jacket, to which he replied, “when they kick then one wallows on the floor, in such a jacket, one wallows.”

Incommunicado Detention of Uzbek Refugees Extradited from Kyrgyzstan

4. Between June 2005 and August 2006, the government of Kyrgyzstan returned two groups of Uzbek refugees allegedly linked to the May 2005 events in Andijan. In June 2005, four Uzbek nationals registered as asylum seekers with UNHCR in Kyrgyzstan were returned to Uzbekistan. No independent person or group had access to the men before their extraditions to Uzbekistan. The Kyrgyz Ministry of Internal Affairs subsequently produced identical statements signed by the four men giving their consent to be returned to Uzbekistan. UNHCR and the ICRC have been denied access to the men in Uzbekistan.

5. When all efforts to track the men’s whereabouts and treatment in Uzbekistan failed, Human Rights Watch in July 2005 referred the men’s cases to the UN Working Group on Enforced or Involuntary Disappearances (WG). In its response to the WG, the Uzbek government said that the men were in a detention facility in Tashkent, charged with committing crimes during the Andijan events of May 13, 2005, and had voluntarily returned to Uzbekistan, making it unnecessary for the Kyrgyz authorities

⁷ Human Rights Watch interview, Tashkent, July 21, 2006.

to consider Uzbekistan's extradition request in full.⁸ The fact that the men were registered asylum seekers and claimed fear of persecution if returned to Uzbekistan seriously undermines the Uzbek authorities' claim that the men voluntarily returned and confessed. According to Amnesty International, one of the returnees was tortured in prison post-return.⁹

6. In August 2006 the Kyrgyz government extradited four Uzbek refugees and one asylum seeker to Uzbekistan.¹⁰ The United Nations, United States, and European Union had all urged the Kyrgyz authorities not to extradite the men. In the conclusions issued following the annual meeting between the EU and the Kyrgyz government in July 2006, the EU expressed "its strong concern over the fate of the ...four [refugees], urging the Kyrgyz side to respect its international obligations and release them to UNHCR for resettlement."¹¹ In December 2006 the German government, in its capacity as incoming president of the EU, wrote a letter to the Uzbek government requesting permission to visit the men in prison. The Uzbek authorities refused the request, saying they would consider the question of a visit again at the beginning of 2007. To date, neither the EU nor any other independent actor or organization has been granted access to the men.¹²

Illegal Returns from Ukraine

7. The government of Ukraine extradited 10 Uzbek asylum seekers to Uzbekistan in February 2006.¹³ The Uzbek authorities alleged that the men were involved in the

⁸ Letter and Report from the Working Group on Enforced and Involuntary Disappearances, January 16, 2006, on file with Human Rights Watch.

⁹ Amnesty International Report 2006, Uzbekistan, <http://web.amnesty.org/report2006/uzb-summary-eng> (accessed July 5, 2007).

¹⁰ "Kyrgyzstan: Return of Uzbek Refugees Illegal," Human Rights Watch news release, August 9, 2006, <http://hrw.org/english/docs/2006/08/09/kyrgyz13950.htm>.

¹¹ *Ibid.*

¹² Human Rights Watch interview, Tashkent, July 5, 2007. The European diplomat who shared this information with Human Rights Watch requested anonymity.

¹³ "Ukraine: Uzbek Asylum Seekers Sent Back to Face Abuse," Human Rights Watch news release, February 17, 2006, <http://hrw.org/english/docs/2006/02/17/ukrain12686.htm>.

May 2005 events in Andijan. In the immediate aftermath of the extraditions, UNHCR issued a statement deploring the forced return of the group.¹⁴

8. A group of Ukrainian nongovernmental organizations wrote to the Ukrainian Ministry of Justice in late February 2006 condemning the extraditions. In a May 3, 2006 response letter, the ministry acknowledged that torture in Uzbekistan is systematic; the men had a right to appeal against their extraditions, but were not given the opportunity; and that UNHCR and human rights groups did not have access to the men before they were extradited.¹⁵ The ministry concluded that: “The extradition request from the Prosecutor’s Office of Uzbekistan on the basis of the charges for terrorist activities cannot be a sufficient ground for the forced expulsion of a refugee without a proper consideration of the asylum application about persecution [for] political reasons.”¹⁶ Despite what appears to be the ministry’s acknowledgement of Ukraine’s responsibility for violating the human rights of the 10 Uzbek returnees, at least 14 more Uzbek nationals allegedly involved in the Andijan events were returned from Ukraine in April 2006 alone.¹⁷

9. While little is known about the treatment of the returnees from Ukraine (see section below on lack of access to returnees), two Uzbek lawyers engaged in defending the men were arrested and charged with fraud in the run-up to the men’s trials. One lawyer was convicted, lost his license to practice law for six months, and was sentenced to corrective labor.¹⁸

III. No Effective Monitoring of Places of Detention in Uzbekistan

10. The absence of independent, universal, and transparent monitoring of places of detention increases the risk that a person subject to return to Uzbekistan will be tortured and ill-treated—and makes it extremely difficult to track the treatment of

¹⁴ “UNHCR Appalled by Deportation of Uzbek Asylum Seekers from Ukraine,” UNHCR news release, February 16, 2006, <http://www.unhcr.org/news/NEWS/43f48dd8c.html> (accessed July 10, 2007).

¹⁵ Ministry of Justice Response Letter in Ukrainian and English translation by UNHCR Kiev, on file with Human Rights Watch.

¹⁶ *Ibid.*

¹⁷ Human Rights Watch interview, lawyer for some of the men returned from Ukraine, Tashkent, April 13, 2006 and June 29, 2006. The lawyer’s name is on file with Human Rights Watch.

¹⁸ Human Rights Watch interview, representatives of the American Bar Association’s Europe and Eurasia Program (ABA/CEEL), Tashkent, June 26, 2006.

Uzbek nationals extradited or otherwise transferred from abroad back to Uzbekistan. According to the International Crisis Group, “It is virtually impossible to find information about the returnees and guarantee their safety.”¹⁹ Under the subheading “disappearance,” the 2007 United States Department of State Country Report on Human Rights Practices in Uzbekistan states: “There were numerous unconfirmed reports of earlier disappearances in 2005 of persons who were present at the violent disturbances in May 2005 in Andijan. (See section 1.a.). The welfare and whereabouts of several of the refugees who were forcibly returned to the country during the year remained unknown.”²⁰

11. In April 2006 the offices of the United Nations High Commissioner for Refugees in Uzbekistan were closed on request of the Uzbek government.²¹ It is widely believed that UNHCR assistance to refugees from Andijan, including facilitating the resettlement of hundreds of refugees, led to the Uzbek refusal to continue to host a UNHCR presence.²² Although the United Nations Development Program has assumed responsibility for the material well-being of UNHCR’s refugee caseload in Uzbekistan, which is comprised primarily of Afghan refugees, UNDP does not conduct visits to places of detention or track the treatment of persons returned to Uzbekistan from abroad.

12. The International Committee of the Red Cross (ICRC) does not monitor places of detention in Uzbekistan. The organization suspended its activities in 2004 because the Uzbek government failed to abide by its commitments under its agreement with ICRC. Although the European Union is said to be encouraged that the

¹⁹ International Crisis Group Policy Briefing, “Uzbekistan: Europe’s Sanctions Matter,” Asia Briefing No. 54, November 6, 2006, p. 7, [http://www.internal-displacement.org/8025708F004CE90B/\(httpDocuments\)/7051343CE5CDC8E6C12572810031BBEF/\\$file/ICG_uzbekistan___europes_sanctions_matte.pdf](http://www.internal-displacement.org/8025708F004CE90B/(httpDocuments)/7051343CE5CDC8E6C12572810031BBEF/$file/ICG_uzbekistan___europes_sanctions_matte.pdf) (accessed July 3, 2007).

²⁰ US State Department Bureau of Democracy, Human Rights, and Labor, “Country Report on Human Rights Practices 2007: Uzbekistan,” March 6, 2007, <http://www.state.gov/g/drl/rls/hrrpt/2006/78848.htm> (accessed July 3, 2007).

²¹ UNHCR, “Uzbekistan: UNHCR Regrets Office Closure, Alternative Arrangements in Place for Care of Refugee Caseload,” April 18, 2006, <http://www.unhcr.org/news/NEWS/4444cb6516.html> (accessed July 3, 2007).

²² See International Committee of the Red Cross Annual Report 2007: Tashkent Regional Delegation, [http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/738D85/\\$FILE/icrc_ar_o6_tashkent.pdf?OpenElement](http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/738D85/$FILE/icrc_ar_o6_tashkent.pdf?OpenElement) (accessed July 10, 2007).

ICRC will resume visits to places of detention soon, to the best of our knowledge, no such resumption of ICRC visits has commenced.²³

13. The lack of access to returnees should be seen in the context of the Uzbek government's broader campaign of repression of civil society, which has included expelling numerous international organizations (e.g. Freedom House and the American Bar Association's Europe and Eurasia Program, known as ABA/CEELI) from the country—and harassing those few, including Human Rights Watch, that remain.²⁴

14. The Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Protocol) has been signed by 57 parties and establishes monitoring mechanisms that ensure independent international experts access to places of detention through inspection mechanisms similar to those used by the European Committee for the Prevention of Torture (CPT). Uzbekistan has neither signed nor ratified the Optional Protocol.

IV. International Recognition of Risk of Torture for Persons Returned to Uzbekistan

15. In recognition of the numerous credible sources on the routine use of torture in Uzbekistan, governments in North America, Europe, and Central Asia have acknowledged that returning to Uzbekistan persons detained by these governments and who are wanted by the Uzbek authorities—either because of their alleged association with the May 2005 events in Andijan or because they are perceived to be independent Muslims—would violate their international legal obligations.

16. Several European governments, including Czech Republic, Germany, Norway, Romania, and Sweden have granted full refugee status or UNHCR-mandated resettlement to Uzbek nationals fleeing persecution by the Uzbek authorities

²³ Council Conclusions on Uzbekistan, General Affairs and External Relations, http://www.delkaz.cec.eu.int/joomla/index.php?option=com_content&task=view&id=145&Itemid=43 (accessed July 5, 2007). It is important to note that ICRC monitoring is not transparent. Its findings are confidential and shared only with the host government, thus ICRC monitoring would be of little benefit in terms of revealing publicly and with a view toward accountability, any breach of diplomatic assurances against torture that may occur post-return.

²⁴ Letter from Human Rights Watch to EU Foreign Ministers, "EU: Maintain Sanctions on Uzbekistan," May 7, 2007, <http://hrw.org/english/docs/2007/05/10/eca15905.htm>.

pursuant to the Andijan events or as a result of their religious or political affiliations.²⁵

17. In October 2006 the United States abandoned efforts to deport a detained Uzbek national, Bekhzod Yusupov, in reliance on diplomatic assurances against torture from the Uzbek authorities.²⁶ A US court had previously ruled that it was “more likely than not” that Yusupov, an independent Muslim, would be tortured if returned to Uzbekistan. In a September 2006 letter, Human Rights Watch and the American Civil Liberties Union reminded the US government that “[i]t is routine for the Uzbek authorities to charge and detain political and religious dissidents (including refugees who fled the country after the May 2005 massacre in Andijan) with supporting ‘illegal religious movements.’ Recognizing the high risk of torture and other ill-treatment faced by dissidents charged with supporting ‘illegal religious movements’ in Uzbekistan, the US State Department has urged other governments not to give in to Uzbek demands to repatriate such dissidents.”²⁷ Human Rights Watch and the ACLU argued that any assurances from the Uzbek authorities would be inherently unreliable. The US reconsidered its misguided effort and in October 2006 informed Yusupov that it was no longer seeking “no torture” assurances from the government of Uzbekistan.²⁸

18. The government of Kazakhstan rejected an extradition request in July 2005 from Uzbekistan for the transfer of Lutfullo Shamsudinov, a human rights defender and eyewitness to the Andijan massacre.²⁹ Shamsudinov fled Uzbekistan on May 26, 2005, fearing torture and persecution at the hands of the Uzbek authorities. He was recognized as a refugee by UNHCR in Kazakhstan. On July 12, the Kazakh authorities made the decision to turn Shamsudinov and his family over to UNHCR for protection and they were flown out of Kazakhstan for resettlement in a safe third country.

²⁵ Radio Free Europe/Radio Liberty (RFE/RL), “Uzbekistan: Tough Times for Uzbek Refugees Abroad,” February 17, 2006, <http://www.rferl.org/featuresarticle/2006/02/2c995eda-56f6-426d-a490-e743c3547c5d.html> (accessed July 3, 2007).

²⁶ Human Rights Watch, “Cases Involving Diplomatic Assurances Against Torture: Developments Since May 2005,” no. 1, January 2007, p. 18, <http://www.hrw.org/backgrounder/eca/euo107/euo107web.pdf>.

²⁷ *Ibid.* p. 19.

²⁸ *Ibid.*

²⁹ “Central Asia: Follow Kazakh Example,” Human Rights Watch news release, July 14, 2005, <http://hrw.org/english/docs/2005/07/14/uzbeki11323.htm>.

19. In August 2006 the Kazakh authorities released Uzbek national Gabdurafikh Temirbaev into the care of the UNHCR, and allowed him and his family to be permanently resettled in a third country.³⁰ Gabdurafikh Temirbaev had reportedly been in Kazakhstan since 1999, after feeling persecution in Uzbekistan for his religious beliefs.

V. The Prohibition on Exposure to a Real Risk of Torture and Ill-Treatment

20. International law is clear: torture and ill-treatment are prohibited absolutely, in all situations and at all times, as is the return by extradition, deportation or other transfer of any person under any circumstances to a place where she or he is at real risk of such abuse (the *nonrefoulement* obligation).³¹

21. The *nonrefoulement* obligation clearly applies in the extradition context (*Soering v. UK*). Some governments have argued that states offering diplomatic assurances against torture and ill-treatment to facilitate extraditions have a greater incentive to abide by the guarantees in extradition cases to ensure future cooperation in judicial and legal matters.³² It is precisely because the extraditing

³⁰ Amnesty International Annual Report, Kazakhstan, <http://thereport.amnesty.org/eng/Regions/Europe-and-Central-Asia/Kazakhstan> (accessed July 11, 2007).

³¹ The prohibition is enshrined in Articles 1 and 3 of the UN Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT); Article 7 of the International Covenant on Civil and Political Rights (ICCPR); Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR); Article 5 of the American Convention on Human Rights (ACHR); and Article 5 of the African Charter on Human and Peoples' Rights (Banjul Charter). The prohibition against torture has risen to the level of *jus cogens* and is a peremptory norm of international law. For the purposes of this paper, the word "torture" when used alone includes cruel, inhuman, or degrading treatment or punishment in conformity with the instruments noted above and the UN Human Rights Committee's General Comment No. 20 (1992), which states: "In the view of the Committee, States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*. States parties should indicate in their reports what measures they have adopted to that end," See [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/6924291970754969c12563ed004c8ae5?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/6924291970754969c12563ed004c8ae5?Opendocument) (accessed July 10, 2007). Though the language of *nonrefoulement* is most commonly associated with the 1951 Convention relating to the Status of Refugees and the 1967 Protocol relating to the Status of Refugees, the obligation of *non-refoulement* has much broader application vis-à-vis the CAT and other instruments referenced above, and thus applies to the return of any person at risk of torture or ill-treatment, not only refugees.

³² Reply Letter from Human Rights Watch to Swiss President Calmy-Rey, "Regarding the Use of Diplomatic Assurances in Pending Extradition Cases," June 28, 2007, <http://hrw.org/backgrounder/eca/switzerland0607/>.

government would desire continuing cooperation—particularly in respect to its future requests for extradition to its territory—that it has little, if any, incentive, however, to acknowledge a possible breach of diplomatic assurances, initiate an independent and impartial investigation, and hold those responsible for acts of torture accountable. The distinction between the use of diplomatic assurances in deportation or expulsion cases and their use in extradition cases is artificial, and ignores an extensive body of research that strongly indicates that diplomatic assurances are an ineffective safeguard against torture and ill-treatment in all transfer contexts where a risk of such abuse exists.

22. The judiciary in Canada (*Pacificador v. Canada*), Germany (*In re Metin Kaplan*), Netherlands (*In re Nuriye Kesbi*), and United Kingdom (*Russia v. Zakaev*) have stayed or halted formal extraditions because diplomatic assurances obtained by the executive were determined to be unreliable and insufficient to mitigate the acknowledged risk of torture and ill-treatment.³³ These courts have concluded that there is little added incentive for a government to abide by its assurances when the proposed transfer takes place in the extradition context. These cases underscore that formal extradition offers no additional protection for a person subject to return, particularly for transfers to countries where torture and ill-treatment are endemic or where specific groups are routinely targeted for such abuse.

23. An extradited person would almost certainly go directly into the requesting government's criminal justice or internal security system, the very locales where clandestine acts of torture and ill-treatment are most likely to occur. As some of the

³³ These cases are documented in Human Rights Watch's extensive research on diplomatic assurances, including: Human Rights Watch, *Cases Involving Diplomatic Assurances Against Torture: Developments Since May 2005*, no. 1, January 2007, <http://www.hrw.org/backgroundunder/eca/eu0107/eu0107web.pdf>; Human Rights Watch, *Diplomatic Assurances Against Torture: Questions and Answers*, November 2006, <http://hrw.org/backgroundunder/eca/ecaqna1106/ecaqna1106web.pdf>; Human Rights Watch, *Still at Risk: Diplomatic Assurances No Safeguard Against Torture*, vol. 17, no. 4(D), April 2005, <http://hrw.org/reports/2005/eca0405/eca0405.pdf>; Human Rights Watch, *Empty Promises: Diplomatic Assurances No Safeguard Against Torture*, vol. 16, no. 4(D), April 2004, <http://hrw.org/reports/2004/uno404/diplomatico404.pdf>. These reports and briefing papers are attached as appendices to this intervention. All of Human Rights Watch's work on diplomatic assurances can be found at <http://hrw.org/doc/?t=da>. In the case of Metin Kaplan, the German government eventually deported Kaplan to Turkey in October 2004. In May 2003, however, a German court halted his extradition based on human rights concerns, including the insufficiency of diplomatic assurances against torture and unfair trial from the Turkish authorities. In response to the judgment, the German authorities vowed that they would find a way to remove Kaplan. See Human Rights Watch, *Empty Promises*, pp. 31-32; Human Rights Watch, *Still at Risk*, p. 72; and Human Rights Watch, *Cases Involving Diplomatic Assurances*, pp. 9-10.

testimonies above illustrate (see section above on treatment of returnees in Uzbekistan), the dynamics of torture, the absence of basic procedural safeguards, the lack of independent access to detainees, and the absence of accountability for acts of torture in states where torture is practiced are all factors that militate against compliance with diplomatic assurances by the state requesting extradition.

24. The growing weight of evidence and of international expert opinion indicates that diplomatic assurances cannot protect people at risk of torture from such treatment on return, whether by extradition or otherwise. Many of the governments offering diplomatic assurances have long histories and continuing records of employing torture, a fact that most sending governments acknowledge. Governments with poor records on torture routinely deny that torture is used and fail to initiate investigations when allegations of torture are made. There is no reason to suppose that these governments, which persistently breach the international ban on torture, would keep their promises not to torture a single individual. In a June 2006 article, Council of Europe Human Rights Commissioner Thomas Hammarberg stated:

The governments concerned have already violated binding international norms and it is plain wrong to subject anyone to the risk of torture on the basis of an even less solemn undertaking to make an exception in an individual case.³⁴

25. Torture is criminal activity of the most serious kind. It is practiced in secret using techniques that often defy detection (for example, mock drowning, sexual assault, internal use of electricity). The Court is aware that in many countries, including Uzbekistan, returned persons are often held incommunicado, without access to lawyers, family members, and the media (see paragraph 108 of the *Mamatkulov* judgment). Even when lawyers are given permission to see their clients, interviews are often conducted in the presence of prison officials and security services personnel in breach of Articles 6 §3(c) and 8. Under these circumstances,

³⁴ Thomas Hammarberg, Council of Europe Commissioner for Human Rights, "Viewpoints: Torture Can Never, Ever Be Accepted," June 27, 2006, http://www.coe.int/t/commissioner/Viewpoints/o6o626_en.asp (accessed July 5, 2007).

detainees subjected to torture are often afraid to complain to anyone about the abuse for fear of reprisals against them or their family members.

26. Maher Arar, a Canadian-Syrian citizen sent back to Syria from the United States based on diplomatic assurances, personally experienced this dilemma. In September 2002 US authorities apprehended Arar at JFK airport, in transit from Tunisia through New York to Canada, where he had lived for many years. After holding him for nearly two weeks, US immigration authorities flew Arar to Jordan, where he was driven across the border and handed over to the Syrians. The US government claimed that prior to Arar's transfer, it obtained diplomatic assurances from the Syrian government that Arar would not be tortured upon return.³⁵ After his release in late October 2002, 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. During a visit by Canadian consular officials in October 2002, Arar said that he was taken from his cell and his beard was shaved:

The interrogation and beating ended three days before I had my first consular visit. . . I was told not to tell anything about the beating, then I was taken into a room for a ten minute meeting with the consul. The colonel was there, and three other Syrian officials including an interpreter. I cried a lot at that meeting. 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.³⁶

27. The final report of a special Canadian commission of inquiry into Canada's role in Arar's transfer confirmed that Arar "lived through a nightmare" of torture while imprisoned in Syria, with profound, devastating, and continuing effects on his

³⁵ Human Rights Watch, *Still at Risk*, April 2005, pp. 33-36.

³⁶ Maher Arar's Statement, CanWest News Service, November 4, 2003, <http://www.informationclearinghouse.info/articles156.htm> (accessed July 9, 2007).

physical, psychological, social, and economic well-being. On the issue of diplomatic assurances, the commission acknowledged that Arar's case is a clear example of the problems inherent in relying on diplomatic assurances against torture.³⁷

28. Even if a detainee does complain of abuse, there is no accountability for torture in many countries where torture is routinely used, including Uzbekistan, in breach of Article 12 of the UN Convention Against Torture. Occasional post-return monitoring by diplomats from the sending country is thus unlikely to provide protection against torture and ill-treatment (see also paragraphs 35-38 below concerning Agiza).

29. A number of high-level international experts have opposed reliance on diplomatic assurances against torture and ill-treatment in the extradition context. In a February 2006 speech, the United Nations High Commissioner on Human Rights stated categorically that the absolute prohibition on return to risk of torture and ill-treatment included transfer by extradition and that assurances should not be relied upon in any transfer context.³⁸ In a March 2006 letter from the High Commissioner opposing the establishment of guidelines for the use of assurances against torture in the Council of Europe region, the High Commissioner stated, "I strongly share the view that diplomatic assurances do not work as they do not provide adequate protection against torture and ill-treatment."³⁹

30. In its final report of January 30, 2007, the European Parliament's Temporary Committee on illegal CIA activity in Europe (TDIP) called on European Union member states to rule out the acceptance of mere diplomatic assurances from third countries "as a basis for any legal extradition provision, where there are substantial grounds

³⁷ Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, "Report of the Events Relating to Maher Arar," September 18, 2006, p. 176, fn. 19, http://www.ararcommission.ca/eng/AR_English.pdf, (accessed July 10, 2007).

³⁸ Speech by Louise Arbour, UN High Commissioner for Human Rights, "In Our Name and On Our Behalf," Chatham House, February 15, 2006, <http://www.chathamhouse.org.uk/pdf/research/il/ILParbour.pdf> (accessed July 5, 2007).

³⁹ Statement by UN High Commissioner for Human Rights Louise Arbour to the Council of Europe's Group of Experts on Human Rights and the Fight Against Terrorism (DH-S-TER), March 29-31, 2006, on file with Human Rights Watch.

for believing that individuals would be in danger of being subjected to torture or ill-treatment.”⁴⁰

31. The UN Special Rapporteur on Torture has stated his firm opposition to reliance upon diplomatic assurances against torture and ill-treatment in all transfer contexts, expressing concern that this practice reflects a tendency on the part of states to circumvent the international obligation not to deport a person if there is a serious risk that he or she might be subjected to torture.⁴¹ Specifically referring to the situation of torture in Uzbekistan and returns to torture effected in reliance upon diplomatic assurances from the Uzbek authorities, the special rapporteur has stated:

[T]he practice of torture in Uzbekistan is systematic, as indicated in the report of my predecessor Theo van Boven's visit to the country in 2002. Lending support to this finding, my mandate continues to receive serious allegations of torture by Uzbek law enforcement officials...Moreover, with respect to the events in May 2005 in Andijan, the UN High Commissioner for Human Rights reported that there is strong, consistent and credible testimony to the effect that Uzbek military and security forces committed grave human rights violations there. The fact that the Government has rejected an international inquiry into the Andijan events, independent scrutiny of the related proceedings, and that there is no internationally accepted account of the events, is deeply worrying. Against such significant, serious and credible evidence of systematic torture by law enforcement officials in Uzbekistan, I continue to find myself appealing to Governments to refrain from transferring persons to Uzbekistan. The prohibition of torture is absolute, and States risk violating this prohibition—their obligations under international law—by transferring persons to countries where they may be at risk of torture. *I reiterate that diplomatic assurances are not legally binding, undermine existing*

⁴⁰ European Parliament Temporary Committee on Illegal CIA Activity in Europe, Final Report on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners, January 30, 2007, p. 8, para. 21, http://www.europarl.europa.eu/comparl/tempcom/tdip/final_report_en.pdf (accessed July 10, 2007).

⁴¹ United Nations, Press Conference by United Nations Representative on Torture Convention, October 23, 2006, http://www.un.org/News/briefings/docs/2006/o61023_Nowak.doc.htm (accessed July 10, 2007).

*obligations of States to prohibit torture, are ineffective and unreliable in ensuring the protection of returned persons, and therefore shall not be resorted to by States (emphasis added).*⁴²

32. Moreover, the European Committee for the Prevention of Torture's 15th General Report expressed concern about reliance on diplomatic assurances in light of the absolute prohibition against torture: "Fears are growing that the use of diplomatic assurances is in fact circumventing the prohibition of torture and ill-treatment. The seeking of diplomatic assurances from countries with a poor overall record in relation to torture and ill-treatment is giving rise to particular concern."⁴³

VI. International Jurisprudence: UN Treaty Bodies and Individual Petitions

33. United Nations treaty-bodies have considered three individual petitions involving transfers to risk of torture and diplomatic assurances. In each case, the Committee has determined that the diplomatic assurances against torture did not provide an effective safeguard against abuse and the transfer thus violated the *nonrefoulement* obligation enshrined in human rights law under Article 3 of the UN Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment and/or Article 7 of the International Covenant on Civil and Political Rights.

34. In the June 2007 UN Committee Against Torture case of *Pelit v. Azerbaijan*, the Committee determined that Azerbaijan's October 2006 extradition to Turkey of Elif Pelit violated Article 3 of the Convention Against Torture, despite diplomatic assurances of humane treatment from the Turkish authorities prior to her transfer.⁴⁴ Pelit, alleged by the Turkish authorities to be associated with the PKK (Kurdish

⁴² Statement of the UN Special Rapporteur on Torture Manfred Nowak to the 2nd Session of the UN Human Rights Council, Geneva, September 20, 2006, <http://www.unhcr.ch/hurricane/hurricane.nsf/o/57A079661D6696A1C12571F10046A4E5?opendocument> (accessed July 5, 2007).

⁴³ European Committee for the Prevention of Torture, 15th General Report on the CPT's Activities, covering the period 1 August 2004 to 31 July 2005, CPT/Inf (2005) 17, paras. 38-39, <http://www.cpt.coe.int/en/annual/rep-15.htm> (accessed July 9, 2007).

⁴⁴ United Nations Committee Against Torture, *Pelit v. Azerbaijan*, Communication No. 281/2005, CAT/C/38/D/281/2005, June 5, 2007, <http://www1.umn.edu/humanrts/cat/decisions/281-2005.html> (accessed June 25, 2007).

Worker's Party), had been granted refugee status by Germany in 1998 based on her claims of having been tortured in detention in Turkey between 1993 and 1996. The Committee found Azerbaijan in violation of Article 3, despite the State party's claim that it had monitored Pelit's treatment post-return and claim that in a private conversation with an Azeri embassy representative after her return, Pelit "confirmed that she had not been subjected to torture or ill-treated by the penitentiary authorities."⁴⁵ The Committee Against Torture in *Pelit* questioned why the Azeri authorities failed to respect Pelit's refugee status, particularly "in circumstances where the general situation of persons such as the complainant and the complainant's own past experiences raised real issues under Article 3."⁴⁶

35. In another proceeding, the Committee Against Torture and UN Human Rights Committee both considered individual petitions from asylum seekers Mohammed al-Zari and Ahmed Agiza, who were transferred from Stockholm to Cairo in December 2001 in the custody of CIA agents aboard a United States government-leased airplane.⁴⁷ The government of Sweden expelled al-Zari and Agiza, both suspected of terrorist activities, following written assurances from the Egyptian authorities that the men would not be subject to the death penalty, tortured or ill-treated, and that they would receive fair trials. Swedish and Egyptian authorities also agreed on a post-return monitoring mechanism involving visits to the men in prison.

36. The Human Rights Committee in November 2006 concluded that Sweden's involvement in the transfer of Mohammed al-Zari to Egypt breached the absolute ban on torture, despite assurances of humane treatment provided by the Egyptian authorities prior to the men's transfer. The Committee stated that Sweden "has not shown that the diplomatic assurances procured were in fact sufficient in the present case to eliminate the risk of ill-treatment to a level consistent" with the ban on torture and other cruel, inhuman or degrading treatment or punishment.⁴⁸

⁴⁵ *Ibid.*, para. 9.4.

⁴⁶ *Ibid.*, para. 11.

⁴⁷ Human Rights Watch, *Still at Risk*, pp. 57-66.

⁴⁸ UN Human Rights Committee, Decision: *Alzery v. Sweden*, CCPR/C/88/D/1416/2005, November 10, 2006, <http://www.unhcr.ch/tbs/doc.nsf/oac7e03e4fe8f2bdc125698a0053bf66/13fac9ce4f35d66dc12572220049e394?OpenDocument> (accessed July 2, 2007), para. 11.5.

37. That decision followed a May 2005 determination by the Committee Against Torture in Ahmed Agiza’s case. The Committee held that Sweden violated the ban on torture with respect to Ahmed Agiza’s transfer, stating that the “procurement of diplomatic assurances [from Egypt], which, moreover, provided no mechanism for their enforcement, did not suffice to protect against this manifest risk.”⁴⁹

38. In the al-Zari and Agiza cases, it is important to note that Swedish diplomats conducted dozens of post-return monitoring visits. The men complained of torture and other abuse during the first such visit, but the government of Sweden redacted those complaints from the official monitoring report and failed to share that information with the Committee Against Torture. An unedited version of the first monitoring report was obtained by a Swedish television station and only made public two years after the men were returned to Egypt. The Swedish government thus went to great lengths to keep the men’s abuse secret—and the Egyptian government denied that the men were ill-treated and refused to conduct an investigation when their allegations of torture came to light. These dynamics amply demonstrate the futility of relying on diplomatic assurances against torture for transfers to countries where such abuse is not only routinely practiced, but routinely denied.

VII. European Court of Human Rights

39. The absolute prohibition against transferring a person, including by extradition, to a place where he or she is at risk of torture has been confirmed in the jurisprudence of the European Court of Human Rights (*Chahal v. UK*, et al.). The *Chahal* decision also cautions against reliance on diplomatic assurances against torture from a state where torture is endemic or persistent, or where the authorities in the state of return do not have effective control over those state actors who perpetrate acts of torture.

40. The Grand Chamber in *Mamatkulov and Askarov v. Turkey* expressly linked the Article 34/Rule 39 violation—Turkey’s precipitous extradition of the men to Uzbekistan, despite an order from the Court for interim measures—to the fact that it

⁴⁹ UN Committee Against Torture, Decision: Agiza v. Sweden, CAT/C/34/D/233/2003, May 20, 2005, <http://www1.umn.edu/humanrts/cat/decisions/233-2003.html> (accessed July 2, 2007), para. 13.4.

did not have before it sufficient evidence to conclude that an Article 3 violation had occurred. The Court said that since the men were extradited in violation of Article 34, they had no meaningful opportunity to place before the Court evidence that could have substantiated an Article 3 violation:

In the present case, the applicants were extradited and thus, by reason of their having lost contact with their lawyers, denied an opportunity to have further inquiries made in order for evidence in support of their allegations under Article 3 of the Convention to be obtained. As a consequence, the Court was prevented from properly assessing whether the applicants were exposed to a real risk of ill-treatment and, if so, from ensuring in this respect a “practical and effective” implementation of the Convention's safeguards, as required by its object and purpose.⁵⁰

41. The Court in *Mamatkulov* recognized that it was unable to conduct a proper assessment of the Article 3 issue. The dissenting judges in *Mamatkulov* found a violation of Article 3, stating that “...an assurance, even one given in good faith, that an individual will not be subjected to ill-treatment is not of itself a sufficient safeguard where doubts exist as to its effective implementation.”⁵¹

42. In *Shamayev and Others v. Georgia and Russia* the Court found that the evidence was insufficient to find a violation of Article 3 and instead found that the Georgian government had violated Article 34 by extraditing five individuals to Russia, in spite of the Court’s request for interim measures.⁵² Where a person has already been extradited or otherwise transferred (as opposed to being threatened with extradition or transfer) and there is insufficient evidence to establish an Article 3 violation, the Court, therefore, has always chosen to censure the state by finding a

⁵⁰ *Mamatkulov and Askarov v. Turkey*, (Application nos. 46827/99 and 46951/99), February 4, 2005, p. 32, para. 108, <http://cmiskp.echr.coe.int/tpk197/viewhbk.asp?action=open&table=F69A27FD8FB86142BF01C1166DEA398649&key=9835&sessionId=1270741&skin=hudoc-en&attachment=true> (accessed July 10, 2007).

⁵¹ *Ibid.*, Joint Partly Dissenting Opinion of Judges Sir Nicolas Bratza, Bonello and Hedigan, pp. 46-47, para. 10.

⁵² *Shamayev and Others v. Georgia and Russia*, (Application no. 36378/02), April 12, 2005, <http://cmiskp.echr.coe.int/tpk197/view.asp?item=7&portal=hbk&action=html&highlight=shamayev%20%7C%2036378/02&sessionId=1270984&skin=hudoc-pr-en> (accessed July 10, 2007).

violation of Article 34 for failure to comply with Rule 39 indications. This procedural safeguard, however, is merely a legal mechanism and not a statement that diplomatic assurances can trump a real risk of torture. In fact, there has been no case in which a state has extradited or otherwise transferred a person based on, *inter alia*, diplomatic assurances against torture and ill-treatment where the Court has ruled that the transfer was in full compliance with the Convention.

43. Finally, in *Salah Sheekh v. Netherlands* the Court held that there would be a violation of Article 3 if a Somali national seeking asylum in the Netherlands were forcibly returned to Somalia.⁵³ This violation was found in part because the Dutch government could not ensure the safety of the Somali national upon return, even though the areas to which the asylum seeker would be returned were “relatively safe.” While this case did not concern extradition or diplomatic assurances, the Court was unwilling to rely on the Dutch government’s assessment of the situation in Somalia, especially as the Dutch government had no way in which to monitor treatment post-return.⁵⁴ Therefore, in the Article 3 context the government’s pre-return assurances about the post-return safety of the returnee appeared to be deemed insufficient.

VIII. National Courts

44. Since the 1990s, courts in several member states and in Canada considering extradition requests and deportations have ruled that diplomatic assurances against torture and ill-treatment did not provide an effective safeguard against such abuse and halted transfers in these contexts. The following profiles of such cases indicate that courts rightly view diplomatic assurances of humane treatment from states that practice torture as inherently unreliable and insufficient to protect against Article 3 violations:

⁵³ *Salah Sheekh v. the Netherlands*, (Application no. 1948/04), January 11, 2007, <http://cmiskp.echr.coe.int/tdtkp197/viewhbkkm.asp?action=open&table=F69A27FD8FB86142BF01C1166DEA398649&key=60417&sessionId=1271423&skin=hudoc-en&attachment=true> (accessed July 10, 2007).

⁵⁴ *Ibid.*, paras. 46 and 143.

Netherlands

45. On September 15, 2006, the Dutch Supreme Court upheld a Court of Appeal decision preventing the extradition of a Kurdish woman wanted in Turkey.⁵⁵ Nuriye Kesbir, an official of the PKK then resident in the Netherlands, was the subject of an extradition warrant from Turkey alleging that she had committed war crimes as a PKK military operative during the time she fought in the civil war in Turkey's southeast. In May 2004 a Dutch district court determined that although her fears of torture and unfair trial in Turkey were not completely unfounded, there were insufficient grounds to halt the extradition. The Court gave exclusive authority to the government to either grant or reject the extradition request, but advised the Dutch minister of justice to seek enhanced diplomatic assurances against torture and unfair trial from Turkey.

46. The Dutch Court of Appeal ruled on January 20, 2005, against Kesbir's extradition, concluding that diplomatic assurances could not guarantee that she would not be tortured or ill-treated upon return to Turkey. On September 15, 2006, the Dutch Supreme Court upheld the decision of the Court of Appeal barring Kesbir's extradition to Turkey. The Supreme Court issued a statement, concluding that "an extradition could result in a breach of European human rights laws" since Kesbir "runs a real risk of being tortured or suffering inhumane or humiliating treatment" if returned to Turkey.⁵⁶ The Supreme Court accepted the Court of Appeal's reasoning that the diplomatic assurances against torture and ill-treatment offered by Turkey were insufficient to prevent such abuse were Kesbir to be returned.

United Kingdom

DD and AS v. The Secretary of State for the Home Department

47. A British court ruled on April 27, 2007, that two terrorism suspects cannot be returned safely to Libya, despite promises of humane treatment from the Libyan government.⁵⁷ The Special Immigration Appeals Commission (SIAC) ruled that Libyan guarantees of humane treatment and fair trials for the men upon return were not

⁵⁵ Human Rights Watch, *Cases Involving Diplomatic Assurances*, January 2007, http://www.hrw.org/background/eca/eu0107/5.htm#_Toc156894656.

⁵⁶ "Dutch Court Blocks Extradition of PKK Leader," Reuters News, September 15, 2006.

⁵⁷ *DD and AS v. The Secretary of State for the Home Department*, SC/42 and 50/2005, April 27, 2007, http://www.bailii.org/uk/cases/SIAC/2007/42_2005.html (accessed July 10, 2007).

reliable. In a “memorandum of understanding” (MOU) signed by the UK and Libyan governments in 2005, Tripoli gave assurances that no person returned under the MOU’s terms would be subjected to abuse.

48. The Court concluded that the men, known only as “DD” and “AS,” would be at risk of torture and a “complete” denial of a fair trial if returned to Libya. They are alleged to be members of the Libyan Islamic Fighting Group (LIFG), an armed opposition group whose aim is the overthrow of Libyan leader Muammar al-Qadhafi. The SIAC concluded that torture is “extensively used against political opponents among whom Islamist extremists and LIFG members are the most hated by the Libyan Government, the Security Organisations and above all by Colonel Qadhafi.” It also noted that the incommunicado detention of political opponents, often without trial for many years, “is a disfiguring feature of Libyan justice and punishment.”

49. The UK government argued that the Libyan government would respect the guarantees in the MOU in order to maintain good relations with Europe and the United States. But the SIAC ruled that the assurances in the memorandum are vulnerable to breach because the Libyan government continues to use incommunicado detention and torture against prisoners and detainees.

50. The SIAC decision in the Libyan cases is in contrast to a February 2007 decision by the same court, which accepted that a similar agreement between Jordan and the UK was reliable.⁵⁸ However, Human Rights Watch has also documented the routine reliance on torture and abuse by the Jordanian internal security division.⁵⁹ The United Nations special rapporteur on torture confirmed these findings in his most recent report on Jordan.⁶⁰ Appeals are pending in both cases.

⁵⁸ *Omar Othman (aka Abu Qatada) v. Secretary of State for the Home Department*, SC/15/2005, February 26, 2007.

⁵⁹ Human Rights Watch, United Kingdom: Human Rights Watch Statement in Omar Othman (Abu Qatada) Case, May 2006, <http://www.hrw.org/backgrounder/eca/ecaqna1106/witnessstatementjuliahall.pdf>.

⁶⁰ UN Special Rapporteur on Torture, Mission to Jordan, A/HRC/4/33/Add.3, January 5, 2007, <http://daccessdds.un.org/doc/UNDOC/GEN/Go7/101/07/PDF/Go710107.pdf?OpenElement> (accessed July 11, 2007).

Russia v. Zakaev

51. In 2003 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 in 1995 and 1996.⁶¹ The Deputy Minister responsible for the Russian prison system gave testimony in court that Zakaev would come to no harm in detention in Russia. The Court accepted that the trial process in Russia might be fair, but focused on "the conditions in which Mr. Zakaev would be likely to be detained and to consider whether they would have any prejudicial effect on his trial," in particular whether he would be at risk of torture if surrendered.⁶² The Court considered material from the European Committee for the Prevention of Torture and the UN Committee Against Torture expressing concern about the continuing practice of torture and ill-treatment by Russian law enforcement officers operating in Chechnya.

52. In addition to testimony from former Russian officials about the specific vulnerability of Chechens in the Russian criminal justice system, including the increased risk to a near certainty that they will be tortured or ill-treated, the Court heard evidence from a credible witness who said he made a statement, extracted under torture, to Russian authorities implicating Zakaev in the crimes of which he was accused. The Court gave particular weight to this evidence and came to the "inevitable conclusion" that if the Russian authorities resorted to torturing a witness, "there is a substantial risk that Mr. Zakaev would himself be subject to torture,"⁶³ and that such treatment would be meted out as a consequence of Mr. Zakaev's nationality and political beliefs.

53. In refusing to accept Russian diplomatic assurances, the Court in *Zakaev* relied on the fact that torture is widespread in Russia; that Chechens, in particular, are more likely than not to be tortured; that the Russian government could not have effective control over the vast prison system in such a manner as to guarantee that

⁶¹ *The Government of the Russian Federation v. Akhmed Zakaev*, Bow Street Magistrates' Court, Decision of Hon. T. Workman, November 13, 2003, <http://www.tjetjenien.org/Bowstreetmag.htm> (accessed July 10, 2007).

⁶² *Ibid.*, p. 7.

⁶³ *Ibid.*, p. 10.

Zakaev will not be tortured; and that Russian guarantees of placement in a specific detention facility could not be relied upon. Extradition was refused.

Canada

Lai Cheong Sing v. Minister of Citizenship and Immigration

54. In May 2006 the Federal Court of Canada halted the deportation of Lai Cheong Sing, accused by the Chinese authorities of smuggling and bribery.⁶⁴ The Chinese government offered diplomatic assurances against his execution and torture, notwithstanding the fact that co-defendants in Lai's case had already been executed and family members of the co-defendants ill-treated in China. Acknowledging the pervasive practice of torture and the use of the death penalty in China, the Court halted Lai's imminent deportation stating, "The issue of assurances lies at the heart of the debate" and that there was a serious likelihood of jeopardy to Lai's life or safety if he were returned to China.⁶⁵

Mahjoub v. Minister of Citizenship and Immigration

55. On December 14, 2006, a Canadian federal court ordered the government to conduct a new risk assessment with respect to a January 2006 decision by the minister of immigration and citizenship to deport Egyptian national Mohammad Zeki Mahjoub, in detention under a security certificate since June 2000 and a recognized refugee.⁶⁶ The Court concluded that the government "consistently ignored critical evidence, failed to take important factors into consideration and arbitrarily relied on selected evidence. This flawed approach can be considered nothing short of patently unreasonable with regard to the substantial risk of torture issue."⁶⁷ With respect to the Egyptian government's diplomatic assurances that Mahjoub would not be tortured or otherwise ill-treated upon return, the Court agreed with Mahjoub that the

⁶⁴ Federal Court of Canada, *Lai Cheong Sing v. Minister of Citizenship and Immigration*, 2006 FC 672, June 1, 2006, <http://decisions.fct-cf.gc.ca/en/2006/2006fc672/2006fc672.html> (accessed July 10, 2007).

⁶⁵ *Ibid.*, para. 27.

⁶⁶ *Mohammad Zeki Mahjoub v. Minister of Citizenship and Immigration*, IMM-98-06, 2006 FC 1503, December 14, 2006, p. 37, para. 97, <http://cas-ncr-ntero3.cas-satj.gc.ca/fct-cf/docs/IMM-98-06.pdf> (accessed July 10, 2007).

⁶⁷ *Ibid.*

government “disregarded the bulk of evidence from a multitude of sources that cited Egypt’s non-compliance with assurances.”⁶⁸

IX. UNHCR’s Position on Diplomatic Assurances and Recognized Refugees

56. According to the United Nations High Commissioner for Refugees, a host State’s obligation to respect the principle of *nonrefoulement* as guaranteed under Article 33 of the 1951 Convention Relating to the Status of Refugees (Refugee Convention) applies to persons who have been recognized as refugees by its own asylum authorities and persons determined to be refugees by UNHCR through UNHCR’s “refugee status determination” (RSD) procedures.⁶⁹ In cases where a refugee who enjoys the protection of Article 33(1) of the 1951 Refugee Convention is threatened with, or subject to, *refoulement* to her or his country of origin, whether directly or indirectly, UNHCR has stated that diplomatic assurances against torture and ill-treatment should be given “no weight.”⁷⁰ In such cases, the country of refuge or UNHCR through its RSD procedures has already made a determination in the individual case and recognized the refugee to have a well-founded fear of being persecuted in the country of origin. Once refugee status has been conferred, “it would be fundamentally inconsistent with the protection afforded by the 1951 Convention for the sending State to look to the very agent of persecution for assurance that the refugee will be well-treated upon *refoulement*.”⁷¹

⁶⁸ *Ibid.*, p. 35, para. 88.

⁶⁹ Under its international protection mandate, UNHCR may conduct refugee status determination where this is required for protection reasons. UNHCR’s authority to do so derives from the Office’s 1950 Statute (annexed to General Assembly resolution 428 (V) of 14 December 1950), as developed and refined in subsequent resolutions of the General Assembly and the Economic and Social Council.

⁷⁰ UNHCR, “Note on Diplomatic Assurances and International Refugee Protection,” p. 13, para. 30, <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain/opendocpdf.pdf?docid=44dc81164> (accessed July 2, 2007).

⁷¹ *Ibid.*