

## ILPA Submission to the Joint Committee on Human Rights regarding UK compliance with the United Nations Convention Against Torture

1. The Immigration Law Practitioners' Association (ILPA) was established in 1984 and is committed, inter alia, to securing a non-racist, non-sexist, just and equitable system of immigration, refugee and nationality law. ILPA has more than 1,200 members including lawyers, advice workers, academics, immigration judges and law students. ILPA is regularly consulted by the Immigration and Nationality Directorate and has made substantial policy representations over the years. ILPA has also been very active in informing parliamentary debate on nationality, immigration and asylum issues and we have, as a concerned NGO, instituted judicial review proceedings.
2. We welcome the decision by the Joint Committee on Human Rights to undertake an inquiry into the compliance of the UK government with its obligations under the United Nations Convention Against Torture (hereafter "the Convention").
3. The purpose of the Convention is to "make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world."<sup>[1]</sup> It does so by enumerating a series of measures that states parties must take in order to give effect to the prohibition against torture. It is important to emphasize that the prohibition against torture is a peremptory norm of customary international law binding on all states (*jus cogens*).
4. Article 3 of the Convention states "No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture."<sup>[2]</sup> The *non-refoulement* obligation expressed in article 3 is integral to the prohibition against torture. It is a norm of customary international law, and arguably enjoys the same *jus cogens* status as the overall prohibition.
5. ILPA is extremely alarmed by current efforts by the government to return persons suspected of involvement of terrorism to countries where they face the risk of torture, based on promises of humane treatment.
6. There is a growing international consensus that such promises, generally referred to as "diplomatic assurances," are an ineffective safeguard against the risk of torture. Successive UN Special Rapporteurs on Torture, the UN Committee against Torture, the UN Independent Expert on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, the Council of Europe Commissioner on Human Rights, and the European Committee for the Prevention of Torture have all expressed concern about their use.<sup>[3]</sup> Leading human rights and anti-torture NGOs have called on states to stop the practice of seeking or relying on such assurances.<sup>[4]</sup>
7. Human rights experts are also increasingly concerned that the practice of states seeking such assurances risks creating a loophole in the *non-refoulement* obligation contained in article 3 of the Convention, thereby eroding the absolute nature of the prohibition against torture. In the words of the UN Special Rapporteur on Torture, the government's plan to rely on promises against torture

from Jordan and other government “reflects a tendency in Europe to circumvent the international obligation not to deport anybody if there is a serious risk that he or she might be subjected to torture.”[\[5\]](#)

8. Efforts to seek assurances against torture are not new. In 1996, the European Court of Human Rights ruled that the UK government could not rely on assurances against torture to return to India a Sikh activist wanted by the Indian authorities on terrorism charges.[\[6\]](#) In 1999, the government tried unsuccessfully to return four alleged Islamic militants to Egypt by seeking assurances against torture, despite reservations expressed by Home Office and Foreign Office lawyers about the effectiveness of such measures as a safeguard against ill-treatment.[\[7\]](#)
9. The government signalled a renewed interest in diplomatic assurances as a mechanism to return people to torture in a February 2004 Home Office consultation paper.[\[8\]](#) The government’s plans to seek assurances against torture were also referred to by the government in written submissions to the Judicial Committee of the House of Lords during its review of the lawfulness of the indefinite detention of foreign terrorism suspects under the Anti-Terrorism Crime and Security Act 2001 (ATCSA) in October 2004.[\[9\]](#)
10. The United Nations Committee against Torture, the expert body established to review state compliance with the treaty, signalled unease about the government’s plans to seek diplomatic assurances during the fourth periodic review of the UK in November 2004. The concluding observations on the UK, express concern at: “the State party’s reported use of diplomatic assurances in the “refoulement” context in circumstances where its minimum standards for such assurances, including effective post-return monitoring arrangements and appropriate due process guarantees followed, are not wholly clear and thus cannot be assessed for compatibility with article 3 of the Convention.”[\[10\]](#) While stopping short of an outright condemnation of the government’s plans, the conclusion reflects the evident concern on the part of the Committee about the proposed agreements.
11. The policy of “deportation with assurances” was formally announced to Parliament on 26 January 2005 by the Home Secretary as part of a “twin track strategy” to replace the indefinite detention after it was ruled unlawful by the Law Lords in December 2004. The government has entered into negotiations with a number of governments in the Middle East, including Jordan, Algeria, Morocco and Egypt, to conclude “memoranda of understanding” in relation to humane treatment in order to facilitate the return of foreign nationals presently in the UK, who would be at risk of torture upon return. Those liable to deportation under the agreements include men previously certified as terrorism suspects under the ATCSA.[\[11\]](#)
12. The first memorandum of understanding was agreed with Jordan on 10 August 2005. There is no reference to the word torture in the text. Instead it contains an undertaking by the government of Jordan that: “If arrested, detained or imprisoned following his return, a returned person will be afforded adequate accommodation, nourishment, and medical treatment, and will be treated in a humane and proper manner, in accordance with internationally accepted standards.”[\[12\]](#) The memorandum also contains provisions relating to judicial supervision and visits by an “independent body nominated jointly by the UK and Jordanian authorities.”[\[13\]](#)
13. Experience has shown that diplomatic assurances are an ineffective safeguard

- against torture. The two most prominent cases of transfers based on assurances against torture resulted in credible allegations that the persons were tortured on return. In a number of cases, courts have blocked transfers based on such assurances.<sup>[14]</sup> In several cases where transfers have been made on the basis of assurances (from Turkey to Uzbekistan and from Georgia to Russia), the inability to gain access to detainees upon return has made it impossible to determine whether they were subject to torture upon return.<sup>[15]</sup>
14. In one case, the government of Sweden returned two Egyptian nationals –Ahmed Agiza and Mohammed al-Zari – to Egypt in December 2001 on a U.S. government leased aircraft, following assurances from Cairo that they would not be tortured and would be given fair trials. There is credible evidence that both men were tortured, notwithstanding the assurances, and a post-return monitoring mechanism agreed separately between the two governments.<sup>[16]</sup>
  15. In May 2005, the UN Committee against Torture decided that Sweden had violated its obligations under article 3 of the Convention when it returned Ahmed Agiza to Egypt. In its decision the Committee stated that “[t]he procurement of diplomatic assurances, which, moreover, provided no mechanism for their enforcement, did not suffice to protect against this manifest risk.”<sup>[17]</sup> The factors relevant to risk identified by the Committee included Egypt’s record on torture, and the fact that the government of Sweden regarded Agiza as involved in terrorism, and the fact that he was of interest to the security services in Egyptian and the United States. The Swedish and Egyptian governments continue to deny any wrongdoing in the case.
  16. The second case involved Maher Arar, a dual Canadian-Syrian national, whom the US government transferred to Jordan in September 2002 where he was handed over to the Syrian government. The US government has claimed that prior to Arar’s transfer, it obtained assurances from the Syrian government that Arar would not be subjected to torture upon return. Arar has claimed credibly that he was beaten by security officers in Jordan and tortured repeatedly, including with cables and electrical cords, during the ten months he spent in Syrian jail.<sup>[18]</sup> The case is the subject of a Commission of Inquiry in Canada.<sup>[19]</sup>
  17. In addition to the empirical evidence that assurances are an ineffective safeguard against torture, common sense suggests that such promises are unlikely to work. By seeking assurances the UK government is explicitly acknowledging the risk of torture to those persons it wishes to deport. In light of the human rights records of the states with whom the government is seeking agreements, such a conclusion is hardly surprising. There are persistent allegations of torture in Jordan, notably of persons detained on suspicion of terrorism.<sup>[20]</sup> In Algeria there are regular reports that those suspected of involvement in terrorism are subject to torture. <sup>[21]</sup> There are credible allegations of torture in custody in Morocco, particularly directed at persons accused of involvement in terrorism.<sup>[22]</sup> The most recent U.S. State Department on human rights in Egypt describes “numerous, credible reports that security forces tortured and mistreated detainees.”<sup>[23]</sup> What is surprising is that the UK government should regard as credible assurances on torture offered by any government that routinely violates its international obligations in respect of torture. Moreover, even assuming the good intentions of those giving assurances, the reality is that reliable assurances are simply not within the gift of highly placed officials where security services and those charged with the day to day care of those detained are able in practice to perpetrate torture with impunity.

18. ILPA understands that the government has emphasized the importance of post-return monitoring as a means of securing compliance with the agreement made with Jordan. In practice, post-return monitoring is not capable of rendering diplomatic assurances an effective safeguard against torture. The European Committee against the Prevention of Torture recently “indicate[d] it has yet to see convincing proposals for an effective post-return monitoring mechanism.”<sup>[24]</sup> Given the nature of torture it is not hard to see why. Torture is practiced in secret and denied by governments. Those who commit torture are often expert at keeping abuses from being detected, and those subject to torture are frequently reluctant to speak about it, fearing reprisals against themselves or family members. Moreover, states with poor records on human rights are unlikely to accept the kind of intrusive independent monitoring without notice that might be able to uncover such abuse. In addition, it should be noted neither the sending nor the receiving state have any incentive to acknowledge incidents of abuse, because to do so would be an admission that they had breached their obligations under international law.
19. In summary, experience shows that diplomatic assurances are an ineffective safeguard against torture, a fact reflected in the growing consensus against their use among international human rights bodies and experts. ILPA has grave concerns about the memorandum of understanding with Jordan, and other efforts by the UK government to secure assurances from countries with poor records on torture, as a means to facilitate the deportation of persons acknowledged to be at risk of torture upon return. ILPA considers that returns based on such agreements are incompatible with the UK’s *non-refoulement* obligation under the Convention, and that by their use, the UK is weakening the global ban on torture.

ILPA

25 September 2005

#### ENDNOTES

---

<sup>[1]</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Preamble.

<sup>[2]</sup> Convention against Torture, article 3(1).

<sup>[3]</sup> Statement of the Special Rapporteur on Torture, Manfred Nowak, to the 61<sup>st</sup> Session of the U.N. Commission on Human Rights, Geneva, 4 April 2005; Report of the Independent Expert on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, E/CN.4/2005/103, 7 February 2005; Report of the Special Rapporteur on Torture Theo Van Boven to the General Assembly, 23 August 2004, para. 30.; UN Convention against Torture, Decision: Communication No. 233/2003, *Agiza v. Sweden*, CAT/C/34/D/233/2003, 20 May 2005; Report by Mr. Alvaro Gil-Robles, Commissioner for Human Rights, on his Visit to the United Kingdom, 4th – 12th November 2004, CommDH(2005)6, 8 June 2005; European Committee for the

Prevention of Torture, 5th General Report on the CPT's activities, 22 September 2005.

[4] Call for Action against the Use of Diplomatic Assurances in Transfers to Risk of Torture and Ill-Treatment - Joint Statement by Amnesty International, Association for the Prevention of Torture, Human Rights Watch, International Commission of Jurists, International Federation of Action by Christians for the Abolition of Torture, International Federation for Human Rights, International Helsinki Federation for Human Rights, and World Organisation Against Torture, April 2005.

[5] United Nations Press Release: 'Diplomatic Assurances' Not An Adequate Safeguard For Deportees, UN Special Rapporteur Against Torture Warns, 23 August 2005. Similar concerns have been expressed by Professor Robert Goldman, the UN Independent Expert on human rights and counter-terrorism, and by the European Committee on Prevention of Torture.

[6] *Chahal v. United Kingdom* (1996).

[7] The case came to light when one of the men, Hani Youssef, brought a successful civil action against the UK government for wrongful imprisonment pending deportation. *Youssef v. The Home Office*, High Court of Justice, Queen's Bench Division [2004] EWHC 1884 (QB)

[8] Home Office Discussion Paper, Counter-Terrorism Powers: Reconciling Security and Liberty in an Open Society, para. 38, February 2004

[9] The written submissions stated the government was "exploring the possibility of removing foreign nationals to states where there are fears of Article 3 treatment [sic]...with a view to establishing memoranda of understanding which could provide sufficient safeguards to allow return." *A and Others v. Secretary of State for the Home Department*, Case for the Secretary of State [submission to

House of Lords], 13 September 2004, p. 10, footnote 2.

[10] Conclusions and recommendations of the Committee against Torture, United Kingdom of Great Britain and Northern Ireland, Crown Dependencies and Overseas Territories, 25 November 2004, CAT/C/CR/33/3.

[11] ILPA members (Birnberg Peirce Solicitors) acting on behalf of a number of Algerian nationals who had been detained indefinitely and subsequently subject to control orders (under the Prevention of Terrorism Act 2005) indicated on 15 September 2005 that the majority have been taken back into custody pending deportation.

[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 regulating the provision of undertakings in respect of specified persons prior to deportation, 10 August 2005, para. 1.

[13] Memorandum, paras. 2 and 4.

[14] Courts in Austria, Canada and the Netherlands, as well as in the UK, have blocked returns despite assurances offered. In 2003, Bow Street Magistrates Court refused a request from Russian authorities to extradite Akhmed Zakayev, a prominent Chechen, despite assurances of humane treatment offered to the court by a Russian government minister. See, Human Rights Watch, *Still at Risk: Diplomatic Assurances No Safeguard Against Torture*, April 2004; and, Human Rights Watch, *Empty Promises: Diplomatic Assurances No Safeguard Against Torture*, April 2004.

[15] Both cases (Mamatkulov and others; Shamayev and others) have been the subject of post transfer appeals to the European Court of Human Rights. In both cases, the Court held that there was insufficient information about the fate of the returned persons to determine whether the sending state had violated article 3 ECHR. National courts have allowed transfers on the basis of assurances in an Austrian case involving extradition to Russia and a German case involving extradition to Turkey. For more information see, Human Rights Watch, Still at Risk, and Human Rights Watch, Empty Promises.

[16] See: Human Rights Watch, Still at Risk, and Human Rights Watch, Empty Promises.

[17] UN Convention against Torture, Decision: Communication No. 233/2003, Agiza v. Sweden, CAT/C/34/D/233/2003, 20 May 2005.

[18] Human Rights Watch, Still at Risk

[19] <http://www.ararcommission.ca/eng/index.htm>

[20] United States Department of State, Bureau of Democracy, Human Rights and Labor, 2004 Country Reports on Human Rights Practices: Jordan; Amnesty International, Annual Report, 2004; Human Rights Watch, U.K./Jordan: Torture Risk Makes Deportations Illegal, 16 August 2005.

[21] Amnesty International, Annual Report 2005: Algeria.

[22] UN Committee against Torture, Conclusions and recommendations of the Committee against Torture: Morocco, 5 February 2004, CAT/C/CR/31/2.; Amnesty International, Torture in the “anti-terrorism campaign” – the case of the Témara Detention Centre, June 24, 2004.

[23] United States Department of State, Bureau of Democracy, Human Rights and Labor, 2004 Country Reports on Human Rights Practices: Egypt; see also, Human Rights Watch, Egypt’s Torture Epidemic, February 2004.

[24] CPT Annual Report.