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Deporting Terrorist Suspects with Assurances: Lessons from the United Kingdom

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I. INTRODUCTION

Over four years have passed since the Obama campaign responded enthusiastically to the famous Supreme Court decision in *Boumediene v Bush*.¹ Viewed from across the Atlantic, one could be forgiven for thinking that an era of change was forthcoming and that the “legal black hole”² of the Guantánamo Bay detention camp would finally succumb to a new order of constitutionalism. First impressions were encouraging; upon reaching office, the Obama administration ordered a review of all detainees held at the camp and pledged to secure its closure within one year.³ Despite this initial commitment, the subsequent and continued failure to secure Guantánamo’s closure⁴ has been repeatedly castigated by the press, academia and non-government organizations (NGO) alike.⁵

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¹*Boumediene v Bush*, 553 U.S. 723, 732–33 (2008) (holding that “aliens designated as enemy combatants . . . have the habeas corpus privilege” and that the Detainee Treatment Act of 2005, which provided the procedure to review detainees’ statuses was “not an adequate and effective substitute for habeas corpus.”). See Sam Graham-Felsen, *Obama Statement on Today’s Supreme Court Decision*, BARACK OBAMA (June 12, 2008, 4:16 PM), <http://my.barackobama.com/page/community/post/samgrahamfelsen/gG5Gz5>.

²Johan Steyn, *Guantanamo Bay: The Legal Black Hole*, 53 INT’L & COMP. L.Q. 1, 1 (2004).

³Exec. Order No. 13,492, 3 C.F.R. 203, 205 (Jan. 22, 2009); Exec. Order No. 13,493, 3 C.F.R. 207, 207–08 (Jan. 22, 2009).

⁴See Peter Finn & Anne E. Kornblut, *Guantanamo Bay: Why Obama Hasn’t Fulfilled His Promise to Close the Facility*, WASH. POST (Apr. 23, 2011), http://www.washingtonpost.com/world/guantanamo-bay-how-the-white-house-lost-the-fight-to-close-it/2011/04/14/AFtXR5XE_story.html.

⁵*The Washington Post* opined that the *volte-face* “all but cements Guantanamo Bay’s continuing role in U.S. counterterrorism policy.” Peter Finn & Anne E. Kornblut, *Obama Creates Indefinite Detention System for Prisoners at Guantanamo Bay*, WASH. POST (Mar. 8, 2011), http://www.washingtonpost.com/world/obama-creates-indefinite-detention-system-for-prisoners-at-guantanamo-bay/2011/03/07/ABbhqzO_story.html. *The New York Times* acknowledged the “failure” of the administration. Scott Shane & Mark Landler, *Obama Clears Way for Guantánamo Trials*, N.Y. TIMES (Mar. 7, 2011), <http://www.nytimes.com/2011/03/08/world/americas/08guantanamo.html?ref=militarycommission>. As to NGO opposition, see, e.g., USA: *Digging a Deeper Hole: Administration and Congress Entrenching Human Rights Failure on Guantánamo Detentions*, AMNESTY INT’L 1, 5 (Mar. 11 2011), <http://www.amnestyusa.org/research/reports/usa-digging-a-deeper-hole-administration-and-congress-entrenching-human-rights-failure-on-guantanamo> (referencing the continued “failure”).

The inability to find acceptable ways to deal with terrorist suspects in the absence of sufficient admissible evidence to substantiate a criminal conviction, perhaps even in military tribunals,⁶ is a problem shared by other Western democracies⁷ that are partners in the War on Terror, and the dichotomy between Anglo and American approaches has weakened over recent years.⁸ The British and American governments appear committed to reining in some of the emergency terrorism powers sought by their predecessors;⁹ both governments are committed to well-defined counter-terrorism strategies including executive “risk-management” of terrorist suspects.¹⁰ Transatlantic counter-terrorism strategies place at their heart a continuing emphasis on securing the removal of high-risk terrorists from home soil.¹¹ In the United Kingdom, terrorist suspects have been detained without charges¹² or subjected to controversial “control orders.”¹³ Foreign

⁶ Obama has stated that a five pronged strategy is required: to prosecute in the federal courts; to use Military Commissions through the introduction of a new series of procedures and safeguards; to release where mandated by the courts; to transfer to another country; and to use “prolonged detention,” subject to regular review and safeguards of individuals who could not be so treated. Press Release, President Barack Obama, Remarks by the President on National Security (May 21, 2009), <http://www.whitehouse.gov/the-press-office/remarks-president-national-security-5-21-09>. In the United Kingdom, comparable issues have been identified by the Government. SECRETARY OF STATE FOR THE HOME DEPARTMENT, CONTEST: THE UNITED KINGDOM’S STRATEGY FOR COUNTERING TERRORISM, 2011 Cm. 8123, at ¶ 4.25–.27 (U.K.).

⁷ As a result, assurances are now routinely sought by a number of States, including the United Kingdom, United States, Canada, and various European countries. See, e.g., *Still at Risk: Diplomatic Assurances No Safeguard Against Torture*, HUM. RTS. WATCH, Apr. 2005 Vol. 17, No. 4(D) at 1, 28, 47, 57, 67, 72, 76, 79.

⁸ By this “dichotomy,” I refer to the difference between the pursuit of Guantánamo Bay detention post-2005 in the United States, in comparison with the system of “control orders” that were established in the United Kingdom, and also the initial attempts to circumvent constitutional guarantees for terrorists in the United States in comparison to the (limited) due process that was established in the United Kingdom’s system of detention.

⁹ Compare Exec. Order No. 13,492, *supra* note 3, at 203–05 (discussing Obama’s initial support for the closure of Guantánamo Bay) with Press Release, Home Secretary, Rapid Review of Counter-Terrorism Powers (Jul. 13, 2010), <http://www.homeoffice.gov.uk/media-centre/press-releases/counter-powers> (In the United Kingdom, the Counter-Terrorism Review 2011 was announced on July 13, 2010 to amend or “roll back” legislation where needed in order to “restore the balance of civil liberties.”) The review had been commissioned by the incoming coalition government, elements of which had long-opposed aspects of the counter-terrorism regime operated by the previous Labour government. Liberal Democrats had pledged to “[s]crap control orders, which can use secret evidence to place people under house arrest” and also “reduce the maximum period of pre-charge detention to 14 days.” Liberal Democrat Manifesto 2010, Liberal Democrats 94–95 (2010), http://network.libdems.org.uk/manifesto2010/libdem_manifesto_2010.pdf. The review was limited to consideration of six core issues: the use of control orders; the use of stop and search powers; the detention of terrorist suspects before charge; extending the use of DWA; and measures to “deal with organizations that promote hatred or violence.” SECRETARY OF STATE FOR THE HOME DEPARTMENT, REVIEW OF COUNTER-TERRORISM AND SECURITY POWERS: REVIEW FINDINGS AND RECOMMENDATIONS, 2011 Cm. 8004 at 4 (U.K.).

¹⁰ See Clive Walker, *Keeping Control of Terrorists Without Losing Control of Constitutionalism*, 59 STAN. L. REV. 1395, 1400 (2007).

¹¹ In the United Kingdom, CONTEST places the DWA regime at its heart. See SECRETARY OF STATE FOR THE HOME DEPARTMENT, *supra* note 6, ¶¶ 4.30–.31. In the United States, the National Strategy for Counterterrorism, June 2011, alludes to similar principles vis-à-vis the relationship with other States. Press Release, Barack Obama, *supra* note 6.

¹² The powers were contained in Part IV of the Anti-Terrorism, Crime and Security Act 2001,

national terrorist suspects continue to be earmarked for deportation from the jurisdiction,¹⁴ and detention measures are routinely deployed while removal is secured.¹⁵

With the killing of Osama Bin Laden in Pakistan and the recent ten-year anniversary of 9/11, the world's gaze remains fixed on Guantánamo.¹⁶ Indefinite terrorist detention in the United States may have a limited shelf-life, just as it did in Great Britain, but the Obama administration appears to be advocating long-term "prolonged detention" for a number of detainees.¹⁷ Notwithstanding sustained congressional opposition to the appropriation of funds needed to secure the closure of the camp,¹⁸ there has

which provided for a process of "certification" by the Home Secretary that a foreign national was reasonably suspected to be a terrorist. Anti-terrorism, Crime and Security Act 2001, c. 24, §§ 21–23 (Eng.). In *A & Others v. SSHD*, [2004] UKHL 50–56 (appeal taken from [2004] EWCA CIV 1502), the House of Lords declared that the Part IV powers were incompatible with Articles 5 and 15 of the European Convention on Human Rights, pursuant to s. 4 of the Human Rights Act 1998. The detention powers were subsequently repealed by Parliament. See also Mark Elliott, *United Kingdom: The "War on Terror," U.K.-Style—The Detention and Deportation of Suspected Terrorists*, 8 INT'L J. CONST. L. 131, 132 (2010).

¹³ Control orders were issued pursuant to s. 2 of the Prevention of Terrorism Act 2005 and were preventive orders that required specified individuals to comply with obligations imposed for purposes connected with protecting members of the public from a risk of terrorism. For a detailed discussion of the regime. See Walker, *supra* note 10, at 1416. A new system of "Terrorism Prevention and Investigation Measures" (TPIMS) has recently been implemented by the UK Parliament, which are in effect a watered-down set of compromise measures that have replaced the maligned control order regime. For a discussion of the measures in their proposed form, see Ben Middleton, *Rebalancing, Reviewing or Rebranding the Treatment of Terrorist Suspects: The Counter-Terrorism Review 2011*, 75 J. CRIM. L. 225, 227 (2011).

¹⁴ SECRETARY OF STATE FOR THE HOME DEPARTMENT, *supra* note 6, ¶ 4.30.

¹⁵ Immigration Act 1971, c. 77, § 5, sch. 3 (Eng.). Detention pending deportation is dependent on the proceedings making satisfactory progress, and detention cannot be continued when proceedings have been discontinued. (The requisite UK authority is *R v. Governor of Durham Prison ex parte Hardial Singh* [1984] 1 WLR 704, 704; the U.S. counterpart would be *Clark v. Martinez*, 543 U.S. 371, 386 (2004)).

¹⁶ See the comments of the UN High Commissioner for Human Rights, Navi Pillay: "I urge the US Congress to take steps to enable the US Administration to close the Guantanamo Bay detention centre – as it stated it wished to do – in compliance with the Government's obligations under international human rights law, and in so doing, to fully respect the principle of non-refoulement, under which no one should be sent back to a country where they may face torture." Press Release, Office of the High Commissioner for Human Rights, Navi Pillay, *Pillay Deeply Disturbed by US failure to Close Guantanamo Prison*, United Nations (Jan. 23, 2012), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=11772&LangID=E>. In the United Kingdom, the Prime Minister has indicated that "the Foreign Secretary is working very hard with the United States to try to secure the issue and bring this chapter to a close." 11 Jan. 2012, PARL. DEB., H.C. (2012) 176 (U.K.).

¹⁷ The Belmarsh litigation ultimately led to the repeal of the detention provisions in the United Kingdom. Middleton, *supra* note 13, at 233 n.52. Note that in the United States, there has been a renewed emphasis on "prolonged detention" policies, outside of Guantánamo Bay, as part of a new direction in the Obama-inspired terrorism policy. See Press Release, Obama, *supra* note 6.

¹⁸ Congress remained opposed to the appropriation of funds to Guantánamo for trial or transfer into the US, and blocked such funds in a variety of legislative measures throughout 2009, 2010 and 2011. See Department of Homeland Security Appropriations Act, 2010, Pub. L. No. 111-83, § 552, 123 Stat. 2142, 2177-79 (2009); National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 1041, 123 Stat. 2190, 2454-55 (2009); Interior Department and Further Continuing Appropriations, Fiscal Year 2010, Pub. L. No. 111-88, § 428, 123 Stat. 2904, 2962 (2009); H.R. 6523,

been a steady decline in the numbers of inmates,¹⁹ and a variety of countries have now committed to allowing the repatriation of a number of purportedly high-risk individuals onto their home soil.²⁰

In order to realize Obama's promise to bring about the closure of Guantánamo, a renewed fervor in international co-operation is required.²¹ It is axiomatic that States must take responsibility for dealing with terrorists through conventional criminal justice procedures within their borders; States must also work with other countries to deport individuals who cannot be prosecuted.²² Where the successful prosecution of terrorists is precluded for operational, evidential, or security imperatives,²³ foreign terrorists (or terrorist suspects) should be removed to their countries of origin in a constitutional manner that is consistent with the rule of law.²⁴

111th Cong. § 1032, which is commonly known as the Ike Skelton National Defense Authorization Act for Fiscal Year 2011. In December 2011, Congress enacted the National Defense Authorization Act for Fiscal Year 2012, H.R. Res. 1540, 112th Cong. §§1021–22, which controversially affirms the broad executive powers of indefinite detention of terrorist suspects, and does not exclude U.S. citizens from the scope of the powers.

¹⁹ GUANTANAMO REVIEW TASK FORCE, Final Rep. 1 (2010) [hereinafter GUANTANAMO REVIEW] is the review by the Obama administration of the detainees at Guantánamo which held that 126 detainees had been approved for transfer to a third country (of whom forty-four had been transferred as of January 2010); Forty-four individuals were to be prosecuted either in the federal courts or by military commission; forty-eight detainees were considered too dangerous for release but not feasible for prosecution, and therefore would continue to be detained indefinitely; and thirty detainees from Yemen would be eligible for “conditional” detention pending repatriation to Yemen. *Id.* at ii. See also David Bowker & David Kaye, *Guantánamo by the Numbers*, N.Y. TIMES, Nov. 10, 2007, http://www.nytimes.com/2007/11/10/opinion/10kayeintro.html?_r=0&pagewanted=print. In March 2011, Obama signed a new Executive Order that effectively put an end to hyperbole around imminent Guantánamo closure. Exec. Order No. 13,567, 3 C.F.R. 227 (2011). The order implemented a regime of indefinite detention, together with review mechanisms, for individuals who could not be prosecuted. *Id.* at §§ 2–3. The administration also indicated that it would be restarting trial by military commission at Guantánamo. Press Release: Fact Sheet: New Actions on Guantánamo and Detainee Policy, White House, (Mar. 7, 2011), <http://www.whitehouse.gov/the-press-office/2011/03/07/fact-sheet-new-actions-guant-namo-and-detainee-policy>.

²⁰ Detainees have *inter alia* been accepted by Afghanistan, Albania, Algeria, Australia, Bahrain, Bangladesh, Belgium, Bosnia, Denmark, Egypt, France, Germany, Iran, Iraq, Jordan, Kazakhstan, Kuwait, Libya, Maldives, Mauritania, Morocco, Pakistan, Qatar, Russia, Saudi Arabia, Somalia (Somaliland), Spain, Sudan, Sweden, Tajikistan, Tunisia, Turkey, Uganda, the United Arab Emirates, the United Kingdom, and Yemen. GUANTANAMO REVIEW, *supra* note 19, at 1.

²¹ As is noted in the 2011 U.S. Counterterrorism Strategy, it is necessary to “join with key partners and allies to share the burdens of common security,” and working with other countries that do not share similar commitments to human rights and responsible governance is similarly crucial. WHITE HOUSE, NATIONAL STRATEGY FOR COUNTERTERRORISM 6–7 (2011).

²² *Id.* at 5–6, 9.

²³ There may not be sufficient evidence regarding alleged involvement in terrorism-related activity to charge an individual with an individual crime; this issue may be exacerbated by the need for law enforcement agencies to intervene at an early stage in a terrorism investigation in order to protect the public. Some or all of the available evidence may be inadmissible in court. It is also possible that prosecution may divulge sensitive intelligence gathering techniques or threaten national security. For the U.K. position in relation to these risks, see SECRETARY OF STATE FOR THE HOME DEPT, *supra* note 9, at 37.

²⁴ An evaluation of the detail of the arguments around the preservation of the rule of law is beyond the ambit of this article, but an apt definition was provided by the Secretary General of the United Nations: “[the rule of law requires...] measures to ensure adherence to the principles of

In light of the considerable emphasis placed on removal strategies for terrorism suspects by the U.K. and U.S. governments, an assessment of the use of terrorist deportation, and the ensuing juridical and legislative checks that operate, is timely. Removal of a terrorist suspect from the jurisdiction may be precluded by a variety of factors.²⁵ Perhaps the overarching prohibition stems from the obligation not to return an individual where there is a risk of torture (the non-refoulement principle).²⁶ States have resorted to assurances (diplomatic promises) through which they hope to reduce this risk to acceptable levels, in order to remove a suspect from their soil in a constitutional and rights-compliant manner.²⁷ The use of a deportation with assurances (DWA) regime has attracted multifarious criticisms.²⁸

The central premise of this article is that no compelling justification precludes the formulation of a successful DWA regime. Part II explores the background of removal procedures in the United Kingdom and contextualizes the bars to terrorist removal through an analysis of the most recent jurisprudence of the European Court of Human Rights (ECtHR). Part III contrasts the approach taken by the US government and suggests that the comparative lack of judicial oversight is a cause for concern.

In Part IV, the article advances its central argument through a systematic discussion of the various and overlapping criticisms that have beset assurance regimes. Each of the criticisms may be addressed by

supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.” *United Nations Rule of Law: What is the rule of law?*, http://www.unrol.org/article.aspx?article_id=3 (last visited Jan. 16, 2011). See e.g., TOM BINGHAM, *THE RULE OF LAW* 3–4, 133 (2010); Joseph Raz, *The Rule of Law and Its Virtue*, 93 L.Q. REV. 195, 195–96 (1997).

²⁵ In the United Kingdom, the common bars will be based on Human Rights arguments under the ECHR, most notably Articles 2, 3 and 6. It is axiomatic that UK nationals cannot be deported. Section 40(5)(b) British Nationality Act 1981 provides that the Home Secretary cannot deprive an individual of their British Nationality if it would render him stateless. See also Convention Relating to the Status of Stateless Persons, art. 2–3, 6, U.N. DOC. ECOSOC RES/526 (Sep. 23, 1954).

²⁶ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 U.N.T.S. 113 (1984) (hereinafter CAT). CAT provides:

“1. 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.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.”

²⁷ See Kate Jones, *Deportation with Assurances: Addressing Key Criticisms* 57 INT’L & COMP. L.Q. 184 (2008); Martin Jones, *Lies, Damned Lies and Diplomatic Assurances: The Misuse of Diplomatic Assurances in Removal Proceedings*, 8 EUR. J. MIGRATION & L. 9, 10 (2006).

²⁸ These criticisms are varied and complex but are summarized thus: assurances undermine the *jus cogens* status of the prohibition of torture; assurances are ineffective, unreliable and unenforceable; States may ignore assurances or break them with impunity; assurances are given, received and monitored in relative secrecy and it is in no party’s interest to report a breach; and hence monitoring is ineffective. These criticisms are examined in Part IV below.

constructing a DWA framework on the tripartite foundations of *justiciability* (in terms of whether an appropriate tribunal exercises oversight of the use of such assurances), a doctrine of *compliance* (ensuring that assurances are not reneged upon, even where they are not legally enforceable), and a requirement for appropriate *independent monitoring*. Part V concludes by suggesting that these three criteria should form the basis of a future DWA rubric and must be established in law in order to provide constitutional legitimacy and enhanced oversight. In light of the *international* nature of the required dialogue, several of the offered conclusions would inform changes to the counter-terrorism arsenal of other allies in the War on Terror.

II. REMOVAL OF TERRORISTS FROM THE UNITED KINGDOM

The deportation regime in place in the United Kingdom has been described as a “sprawling corpus”²⁹ of “imperfect”³⁰ laws of “daunting complexity.”³¹ Non-British foreign nationals from outside the EU are subject to immigration control.³² Leave to enter or remain in the United Kingdom may be given, but can be revoked at any time, even if a non-citizen has indefinite leave to remain in the United Kingdom, if the Home Secretary considers it “conducive to the public good.”³³ These powers are used frequently in terrorism-related cases.³⁴ Indeed, deportation and exclusion form part of the Pursue³⁵ strand of the government’s counter-terrorism strategy³⁶ for one important reason: deportation requires a much lower standard of proof than is required by a criminal conviction. If the Home Secretary wishes to rely on a particular act as evidence to deport, the

²⁹ Alison Harvey, *Legislative Comment: The Borders, Citizenship and the Immigration Act 2009*, 24 J. IMMIGR., ASYLUM & NAT’LITY L. 118 (2009).

³⁰ A.W. BRADLEY & K.D. EWING, CONSTITUTIONAL AND ADMINISTRATIVE LAW 452 (2007).

³¹ David McClean, *Immigration and Asylum in the United Kingdom*, 12 ECCLESIASTICAL L.J. 152, 152 (2010).

³² Immigration Act 1971, 1971, c. 77, § 3 (U.K.). Note that aliens who are nationals of EU countries benefit from the right to freedom of movement within the EU and do not require leave to do so. Immigration Act 1988, 1988, c. 14, § 7 (U.K.).

³³ Immigration Act 1971, 1971, c. 77, § 3(5) (U.K.).

³⁴ For example, “[b]etween July 2005 and the end of 2008, 153 people have been excluded from the UK on national security grounds” HOME DEPARTMENT, PURSUE PREVENT PROTECT PREPARE: THE UNITED KINGDOM’S STRATEGY FOR COUNTERING INTERNATIONAL TERRORISM, 2009, Cm. 7547, ¶ 8.19.

³⁵ “The purpose of *Pursue* is to stop terrorist attacks in [the United Kingdom]... and against our interest overseas. This means detecting and investigating threats at the earliest possible stage, disrupting terrorist activity before it can endanger the public and, wherever possible, prosecuting those responsible.” CONTEST, *supra* note 6, at ¶ 1.16.

³⁶ Although CONTEST stresses that these executive powers affect only a very small number of individuals, HOME DEPARTMENT, *supra* note 34, at 60, this does not detract from the fact that these alternative treatment strategies are in use and have proven problematic. By way of statistics, CONTEST provides that some twenty individuals were subject to deportation or had deportation appeals pending in 2008. *Id.* at 65.

civil standard of proof applies.³⁷ The House of Lords has affirmed that it is the function of the Home Secretary to carry out an assessment of risk posed by the individual and to determine whether their presence in the United Kingdom is not “conducive to the public good.”³⁸ Their Lordships have cogently stated the position:

[The Secretary of State] is entitled to have regard to the precautionary and preventative principles rather than to wait until directly harmful activities have taken place, the individual in the meantime remaining in this country. In doing so he is not merely finding facts but forming an executive judgement or assessment. There must be material on which proportionately and reasonably he can conclude that there is a real possibility of activities harmful to national security but he does not have to be satisfied, nor on appeal to show, that all the material before him is proved, and his conclusion is justified, to a “high civil degree of probability”.³⁹

These broadly conferred deportation powers are analogous, though not identical, to those formerly exercised in the United Kingdom under the control order regime, and similar deference to the security-based assessment of the Home Secretary appears in the new Terrorism Prevention and Investigation Measures.⁴⁰ When the decision to make a deportation order is made, the subject of the order can be detained under the authority of the Secretary of State.⁴¹ Detention pending deportation is an essential feature of the risk-management of terrorist suspects.⁴² The Secretary of State’s determination regarding the threat posed by a terrorist suspect, and a decision to deport based on whether their presence is not conducive to the public good, is largely objective in nature. The courts

³⁷ Sec’y of State for the Home Department v. Rehman, [2001] UKHL 47 [22].

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ The similarities relate to the possibility for secret intelligence to inform the process and the fact that the decision stems from a simple executive determination (though note that in the case of TPIMS, court authorization (save as for urgent cases) is also required under section. Terrorism Prevention and Investigation Measures Act 2011, 2011, c. 23, § 3(5).

⁴¹ Immigration Act, 1971, *supra* note 32, § 3(2).

⁴² Following *Regina v. Governor of Durham Prison ex parte. Singh*, [1984] 1 WLR 704, 706, an individual can be detained only for a period that is reasonably necessary, and the Secretary of State should not seek to detain him if it becomes apparent that deportation cannot take place within a reasonable period. Similarly, the Secretary of State must act with reasonable diligence and expedition to effect removal. Deportation proceedings must therefore be “in progress” before detention is a possibility. *See also* Chahal v. United Kingdom (No. 22), 1996-V Eur. Ct. H.R. 1831, 1862.

will reach their own assessment,⁴³ but the judiciary has consistently leaned towards affording the executive a considerable degree of deference.⁴⁴

Section 3(2) Immigration Act 1972 gives the Home Secretary the power to make Immigration Rules.⁴⁵ These powers must be exercised in accordance with the provisions of the Human Rights Act 1998 (HRA 1998), which gives further effect in domestic law to the U.K.'s obligations under the European Convention on Human Rights and Fundamental Freedoms (ECHR).⁴⁶ Immigration control decisions are generally subject to an appeals process heard by the Asylum and Immigration Tribunal.⁴⁷ For terrorist suspects, such appeals are often lodged against decisions to withdraw leave to remain in the United Kingdom or refusal to revoke a deportation order and are heard by the Special Immigration Appeals Commission (SIAC),⁴⁸ which can conduct closed hearings when necessary in order to receive secret information. Deportees are represented by Special Advocates (security-cleared counsel) in this situation.⁴⁹

Deportation may represent an attractive option to governments wishing to protect their populous but it is not without its limitations; the need for States to implement measures to deal with "home-grown" terrorists remains.⁵⁰ Additionally, the deportation of terrorist suspects is not simply an Anglo-American, or even American-European, phenomenon.⁵¹ Other

⁴³ *N (Kenya) v. Sec'y of State for the Home Department*, [2004] EWCA Civ 1094, [83] (appeal taken from Immigration Appeal Tribunal). The Special Immigration Appeals Commission Act 1997 established SIAC, a superior court of record, to hear such national security appeals.

⁴⁴ "[The Home Secretary] is undoubtedly in the best position to judge what national security requires even if his decision is open to review. The assessment of what is needed in the light of changing circumstances is primarily for him." *Sec'y of State for the Home Department v. Rehman*, [2001] UKHL 47 [26].

⁴⁵ Immigration Act 1971, *supra* note 32, § 3(2).

⁴⁶ A provision contained in Statement of Changes in Immigration Rules, 1994, H.C. Bill [395] pt. 2 (Eng.), that is largely rendered superfluous by the Human Rights Act, 1998, c. 42, §6(1), 6(3)(b) (U.K.).

⁴⁷ Asylum & Immigration (Treatment of Claimants, Etc.) Act, 2004 c. 19, § 26 (U.K.).

⁴⁸ The jurisdiction and task of the Commission is to determine an appeal against a decision to make a deportation order under section 5(1) of the Immigration Act 1971, chapter 77 when the Secretary of State has issued a certificate under section 97 of the Nationality Immigration and Asylum Act 2002. *See* Special Immigration Appeals Commission Act, 1997, § 2(1)(a) (U.K.). *See also* Nationality, Immigration and Asylum Act 2002, 2002, § 82(2)(j) (U.K.).

⁴⁹ An analysis of the role and function of Special Advocates lies outside the ambit of this article, and the European Court of Human Rights has held that deportation is a public law issue and not determinative of any civil right. *Maaouia v. France*, HUDOC, <http://echr.coe.int> (last visited Nov. 27, 2012).

⁵⁰ Four British terrorists were behind the 2005 bombings on the London transport network. While these terrorists had links to Al-Qaida, they were British citizens, with British passports. This issue was widely reported in the media and in CONTEST. *See* Philip Johnston, *Home-Grown Extremists are Biggest Threat to Life and Liberty*, TELEGRAPH (London), July 7, 2006, <http://www.telegraph.co.uk/news/uknews/1523282/Home-grown-extremists-are-the-biggest-threat-to-life-and-liberty.html>. British Nationality Act 1981, *supra* note 25, § 40(4) (stating the Home Secretary cannot deprive an individual of their British Nationality if it would render him stateless). *See also* Convention Relating to the Status of Stateless Persons, *supra* note 25, art. 28.

⁵¹ *See* HOME DEPARTMENT, *supra* note 34, at 65; 527 PARL. DEB., H.C. (2011) 465 (U.K.).

countries that do not share Western ideologies, or a commitment to International Human Rights' guarantees, are often implicated in these arrangements.⁵² In these circumstances, a complex set of agreements may be necessary to mitigate the risk of a suspect being subject to a human rights violation upon their return.

A deportee who is desperate to avoid being returned to his country of origin may claim various human rights breaches; purported evidence of threats of lengthy periods of incommunicado detention, flagrantly unfair trials, interferences with private and family life, and interferences with religious convictions are routinely deployed in U.K. challenges to removal proceedings.⁵³ These provisions, however, are not absolute in nature and may be easily circumvented.⁵⁴ Articles 8 and 9 ECHR are qualified rights; such qualifications ensure that the state may have little difficulty in discharging these burdens in order to deport.⁵⁵ Nonetheless, the ECtHR in *Soering* has recognized the "exceptional" possibility that deportation may be precluded by fair trial requirements under Article 6 ECHR.⁵⁶ A "real risk" of treatment that amounts to a "flagrant denial" of Article 6 is needed in order to constitute a breach.⁵⁷ This has been subsequently held to amount to a "complete denial or nullification" of the right.⁵⁸ The same test applies to the right to liberty and security under Article 5 ECHR.⁵⁹

⁵² The United Kingdom, for example, has sought or is seeking arrangements with several countries including Algeria, Ethiopia, Jordan, Lebanon, Libya, and Pakistan. See HOME DEPARTMENT, *supra* note 34, at 65; 527 PARL. DEB., H.C. (2011) 465 (U.K.).

⁵³ See, e.g., *J1 v. Sec'y of State for the Home Dep't*, [2011] UKSIAC 98/2010[19]-[20] (discussing the liberty and fair trial considerations); *Othman (Abu Qatada) v. United Kingdom*, HUDOC, <http://www.echr.coe.int>, (last visited Nov. 1, 2012) [hereafter *Qatada*].

⁵⁴ It is clear that assurances should ensure that a suitable degree of protection with regard, for example, to the fairness of the trial. *Othman (Abu Qatada) v. U.K.*, HUDOC, <http://www.echr.coe.int>, (last visited Nov. 1, 2012).

⁵⁵ That is not to say, however, that these issues are not raised in deportation cases; *Üner v. Netherlands*, HUDOC, <http://www.echr.coe.int>, (last visited Nov. 1, 2012) (Grand Chamber of the ECtHR ruled that a ten-year expulsion order imposed on an individual who had family ties to the Netherlands was a proportionate and lawful interference with this right. In reaching its judgment the court provided guidance as to how the balancing act would be construed in Article 8 ECHR terms). *Khan v. United Kingdom*, HUDOC, <http://www.echr.coe.int>, (last visited Nov. 1, 2012) (interpreting these criteria more recently to reach the obverse conclusion); *Omojudi v. United Kingdom*, HUDOC, <http://www.echr.coe.int>, (last visited Nov. 1, 2012) (showing that family ties may be sufficiently strong so as to cause a violation of Article 8 ECHR). Such cases in the past have aroused significant political fallout (See, e.g., Christopher Hope & Caroline Gammell, *David Cameron: Scrap the Human Rights Act*, TELEGRAPH Aug. 22, 2007, <http://www.telegraph.co.uk/news/uknews/1560975/David-Cameron-Scrap-the-Human-Rights-Act.html>).

⁵⁶ *Soering v. United Kingdom*, HUDOC, <http://www.echr.coe.int>, (last visited Nov. 1, 2012).

⁵⁷ *Id.* The court refused to suggest that the Article 6 of the European Convention on Human Rights issue should be determined on the basis of the civil standard of proof. *Othman v. Sec'y of State for the Home Dep't*, [2007] UKSIAC 15/2005[430]. Similar principles would apply to Article 5 of the European Convention on Human Rights.

⁵⁸ *R v. Special Adjudicator ex parte Ullah* [2004] UKHL 26, [70].

⁵⁹ "The Court therefore considers that ... it is possible for Article 5 to apply in an expulsion case. Hence, the Court considers that a Contracting State would be in violation of Article 5 if it removed an applicant to a State where he or she was at real risk of a flagrant breach of that Article. However, as

Reliance on these provisions in a deportation context may be the exception rather than the rule given the high threshold involved, but these rights-based bars must not be ignored.⁶⁰ In a recent application to the European Court of Human Rights (ECtHR) in Strasbourg, the notorious terrorist Abu Qatada (Omar Othman) successfully argued that deportation to Jordan would violate his right to a fair trial since there was a risk that he would be subjected to a trial in which torture-tainted evidence would be admitted upon his return.⁶¹ Notwithstanding the *Qatada* decision, however, the greatest bar to deportation is formed by the prohibition on torture and ill-treatment, and specifically the “non-refoulement” obligation.⁶² In a European context, the principal consideration is whether there is a real risk that an individual will be subjected to ill-treatment or torture contrary to Article 3 ECHR upon their return.⁶³ Before the solution, deportation through the use of assurances, is explored, it is first necessary to assess the key jurisprudence.

A. *The prohibition of torture: jus cogens erga omnes*

The Convention Against Torture (CAT)⁶⁴ provides non-derogable overarching international principles.⁶⁵ Extradition, expulsion, or “refouler” of an individual to a State where there are substantial grounds for believing there to be a real danger that he would be subjected to torture are prohibited.⁶⁶ Despite having some seventy-eight signatories and 147

with Article 6, a high threshold must apply. A flagrant breach of Article 5 would occur only if, for example, the receiving State arbitrarily detained an applicant for many years without any intention of bringing him or her to trial. A flagrant breach of Article 5 might also occur if an applicant would be at risk of being imprisoned for a substantial period in the receiving State, having previously been convicted after a flagrantly unfair trial” Othman (Abu Qatada) v. United Kingdom, HUDOC, <http://www.echr.coe.int>, (last visited Nov. 1, 2012).

⁶⁰ Othman (Abu Qatada) v. United Kingdom, HUDOC, <http://www.echr.coe.int>, (last visited Nov. 1, 2012).

⁶¹ Othman (Abu Qatada) v. United Kingdom, HUDOC, <http://www.echr.coe.int>, (last visited Nov. 1, 2012). The ensuing direct involvement of the U.K. Prime Minister and Home Secretary have proven necessary in an attempt to obtain further assurances from Jordan that such evidence will not be used in court. See Patrick Wintour, *Theresa May to Visit Jordan for Abu Qatada Deportation Talks*, GUARDIAN, Feb. 17, 2012, <http://www.guardian.co.uk/world/2012/feb/17/theresa-may-jordan-abu-qatada>. See also European Court of Human Rights, Rules of Court, Rule 39; *infra* note 110 and the discussion in the accompanying text.

⁶² European Convention on Human Rights, art. 3, Nov. 4, 1950, C.E.T.S., No.5; CAT, *supra* note 26. See also *infra* text accompanying notes 86–91 (discussing the *Chahal* court’s interpretation of the non-refoulement principle).

⁶³ *Chahal* v. United Kingdom, HUDOC, <http://echr.coe.int> (last visited Nov. 1, 2012).

⁶⁴ United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 U.N.T.S. 113 (1984) (hereinafter, CAT).

⁶⁵ *Id.* at art. 2(2). CAT provides that “No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”

⁶⁶ CAT, *supra* note 26, at art. 3.

parties,⁶⁷ a number of these States still possess questionable human rights records in the area.⁶⁸ The Convention Relating to the Status of Refugees 1951⁶⁹ has an impact, yet the applicability of this general prohibition on returning an individual to face torture or ill-treatment⁷⁰ is circumscribed. Protection under the Refugee Convention is excluded where an individual has committed acts contrary to the purposes of the United Nations, which in practice includes acts of terrorism,⁷¹ whether this was before or after the refugee came within the State's jurisdiction.⁷² Indeed, as the House of Lords has observed, arguments against deportation raised by terrorist suspects under the Refugee Convention are largely academic,⁷³ since, even if an individual is entitled to invoke its provisions, he would still be prevented from relying on the prohibition of *refoulement*.⁷⁴

In a U.K. setting, the key protection is by means of Article 3 ECHR, which does have robust enforcement mechanisms at both European and domestic levels.⁷⁵ Article 3 ECHR prohibits torture, as well as inhumane

⁶⁷ UNITED NATIONS, MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL, ch. 4, § 9, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en. at art. 4(9).

⁶⁸ See, for example, Jordan, Algeria and Pakistan: all three of these states are considered, in the absence of specific assurances to the contrary, to potentially pose a risk of torture and/or ill-treatment by U.K. authorities. For Jordan and Algeria, *see, e.g.*, *RB (Alg.) (FC) & another v. Sec'y of State for the Home Dep't*; *OO (Jordan) v. Sec'y of State for the Home Dep't*, [2009] UKHL 10. For Pakistan, *see* 527 PARL. DEB., H.C. (2011) 465 (U.K.).

⁶⁹ Convention Relating to the Status of Refugees, 189 U.N.T.S. 150 (1951) art. 33 [hereinafter *Refugee Convention*].

⁷⁰ *Id.* at art. 33(1).

⁷¹ Immigration, Asylum and Nationality Act, 2006, c. 13, § 54 (defining terrorism as “acts of committing, preparing or instigating, terrorism . . .” and “encouraging or inducing others to commit, prepare or instigate terrorism . . .”). This has been criticized and subjected to change following the recommendations of the Joint committee on Human Rights. JOINT COMMITTEE ON HUMAN RIGHTS, COUNTER-TERRORISM POLICY AND HUMAN RIGHTS: TERRORISM BILL AND RELATED MATTERS, 2005-06, H.L. 75-II, at 171-47, H.C. 561-II, at 171-74 (U.K.). From an international perspective, a difficulty with this exclusion lies in the fact that there is no internationally agreed definition of terrorism, and attempts to provide such have failed, due largely to the reservations of the United States that it would politicize the International Criminal Court. *See* Rene Bruin & Kees Wouters, *Terrorism and the Non-derogability of Non-refoulement*, 15 INT'L J. OF REFUGEE L. 5, 5-6, 15.

⁷² *RB (Alg.) (FC) & another*, [2009] UKHL 10, at [128] – [29].

⁷³ *Id.* at [129].

⁷⁴ *Refugee Convention*, *supra* note 70, at art. 33(2) provides that this protection may not be claimed by a refugee “whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.”

⁷⁵ At a European Level, the European Court of Human Rights hears cases involving alleged breaches of the European Convention on Human Rights and has a broad range of powers: its decisions are binding on European member states and can enforce the award of compensation where a breach is found. The European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment, established under the European Convention of the same name, makes visits to member States and produces reports. Other International documents which prohibit torture, of which detailed analysis lies beyond the ambit of this article, include the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 3452 (XXX), U.N. GAOR, 13th Sess., 2433rd plen. Mtg., U.N. Doc. A/RES/30/3452 (Dec. 9, 1975); Universal Declaration of Human Rights art. 5, Dec. 10, 1948; International Covenant on Civil

and degrading treatment, in absolute terms.⁷⁶ No derogation from it is permissible, even in wartime; nor is there any allowable justification in terms of public benefit, national security, or public safety.⁷⁷ The United Kingdom, however, does not enjoy an unblemished reputation in this area; experience in relation to Northern Ireland terrorism casts sharp focus on interrogation methods and conditions of detention for terrorist suspects.⁷⁸ In *Ireland v UK*,⁷⁹ the ECtHR ruled that the United Kingdom had breached its obligations under Article 3 ECHR by the adoption of a range of interrogation techniques *inter alia* including hooding, subjection to “white noise,” sleep deprivation, reduced diet, and the use of stress positions.⁸⁰ Despite the quick denunciation of these infamous techniques,⁸¹ Article 3 ECHR continues to shackle the government’s counter-terrorism strategy.⁸² The obligations imposed by this European Treaty have significant ramifications on removal policies for both America and the United Kingdom.⁸³

and Political Rights art. 7, Dec.19 1966, 999 U.N.T.S 172; and European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Mar. 1, 2002, 26.XI.1987. *See generally* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field arts. 3, 12, 50, Aug.12, 1949, 75 U.N.T.S 31. Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea arts. 3, 12, 51, Aug. 12, 1949, 75 U.N.T.S 85. Geneva Convention Relative to the Treatment of Prisoners of War arts. 3, 17, 87, 130, Aug.12, 1949, 75 U.N.T.S 135. Geneva Convention Relative to the Protection of Civilian Persons in Time of War arts. 3, 32, 147, Aug. 12, 1949, 75 U.N.T.S 287.

⁷⁶ To this extent, Article 3 of the ECHR offers a broader scope of protection than CAT, which merely prohibits torture.

⁷⁷ *See*, judgment in *Balough v. Hungary*, HUDOC, <http://echr.coe.int> (last visited Nov. 1, 2012).

⁷⁸ *See, e.g.*, *Ireland v. United Kingdom*, HUDOC, <http://echr.coe.int> (last visited Nov. 1, 2012)

⁷⁹ *Id.*

⁸⁰ *Id.* The European Court of Human Rights ruled that such practices amounted not to torture, but to inhuman treatment, contrary to Article 3 of the European Convention on Human Rights. European Convention on Human Rights, art. 3, Nov. 4, 1950, C.E.T.S, No.5.

⁸¹ The Government gave an “unqualified undertaking . . . that the ‘five techniques’ will not in any circumstances be reintroduced as an aid to interrogation.” *Ireland*, HUDOC, <http://echr.coe.int> (last visited Nov. 1, 2012).

⁸² *See* the ruling in *Saadi v. Italy*, HUDOC, <http://echr.coe.int> (last visited Nov. 1, 2012) at 45–46 (2009) (discussed below), which was seized on by the Conservative Party in election manifesto as part of the rationale for scrapping the HRA and replacing it with a Bill of Rights. The governments have since distanced themselves from this rather disingenuous proposal, and the Prime Minister has indicated that assurances are now the priority when it comes to securing Convention-compliant deportations. *See* 510 PARL. DEB., H.C. (2010) 434 (U.K.).

⁸³ These ramifications arise since the European Court of Human Rights imposes a duty on all member States in respect of those citizens within the jurisdiction of that State. European Convention on Human Rights art. 1, Nov. 4, 1950, C.E.T.S, No.5. *See generally* *M .v. Denmark*, HUDOC, <http://echr.coe.int> (last visited Nov. 1, 2012). It follows that the obligations placed on the U.K. government apply to those individuals who could be removed from the United States, and vice versa. These issues have recently been highlighted by the controversial transfer of Abu Hamza from the jurisdiction of the United Kingdom to the United States to face trial. *See* Owen Bowcott, *Abu Hamza Extradition to US Goes ahead after Court Defeat*, THE GUARDIAN (London) (Oct. 6, 2012 9:17 AM), <http://www.guardian.co.uk/world/2012/oct/05/abu-hamza-loses-extradition-appeal>.

B. European Influences: The *Chahal* Benchmarks and Beyond

The ECtHR has made it clear that ECHR rights apply extra-territorially, even where a receiving country is not a signatory to the ECHR.⁸⁴ Similarly, it is clear that even where a receiving country provides assurances, the Article 3 burden is not necessarily discharged.⁸⁵ In *Chahal v UK*,⁸⁶ the ECtHR was invited, *inter alia*, to assess whether the deportation of a failed asylum seeker and terrorist suspect to India would violate his rights under Article 3 ECHR. Reaffirming the absolute nature of the prohibition of torture and inhuman and degrading treatment,⁸⁷ the Court held that the behavior of the individual in question, however undesirable, was irrelevant:

[W]henver substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion.⁸⁸

The Court was anxious to clarify that “it should not be inferred that there is any room for balancing the risk of ill-treatment against the reasons for expulsion in determining whether a State's responsibility under Article 3 is engaged.”⁸⁹ The ECtHR was not persuaded that such assurances would provide an adequate guarantee of safety, particularly since the violation of human rights by certain members of the security forces in Punjab and elsewhere in India was an “enduring problem.”⁹⁰

The effect of *Chahal* was to set a series of benchmarks; a European State cannot deport a terrorist suspect to their country of origin should there be a real risk of the individual being subjected to treatment contrary

⁸⁴ In *Soering v. U.K.*, HUDOC, <http://echr.coe.int> (last visited Nov. 1, 2012), the applicant challenged the decision of the U.K. government to extradite a West German national to the U.S. to face a murder charge, which carried with it the death penalty. The ECtHR considered that in light of all of the circumstances, the mental anguish of awaiting execution on death row could lead to suffering contrary to Article 3 ECHR, if he was extradited. The ECtHR held that while Article 1 ECHR set a territorial limit on the reach of the Convention, and did not require contracting states to impose Convention standards on other states, the provisions had to be interpreted and applied in a manner as to make its safeguards practical and effective. *Id.*

⁸⁵ The European Court of Human Rights indicated that it must be satisfied that any assurance given is likely to remove the risk that the death penalty will be imposed. *Id.*

⁸⁶ *Chahal v. U.K.*, HUDOC, <http://echr.coe.int> (last visited Nov. 1, 2012).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

to Article 3 if returned.⁹¹ The ECtHR has made it explicit that “a mere possibility of ill-treatment...is not in itself sufficient to give rise to a breach of Article 3.”⁹² Assurances that an individual will not be tortured or subjected to ill-treatment may assuage the risk, but this might not always be the case.⁹³ The Court will consider the entire factual matrix and determine whether this risk exists.⁹⁴ From the perspective of Article 3 compliant deportations, therefore, *Chahal* represents a significant roadblock for governments wishing to neutralize a national security threat in this way. In a bid to circumvent these difficulties, the Foreign and Commonwealth Office (FCO) in the United Kingdom has developed and facilitated the signing of formal diplomatic assurances, known as Memoranda of Understanding (MOU),⁹⁵ with Algeria, Ethiopia, Jordan, Lebanon, and Libya.⁹⁶ The FCO is also actively pursuing a MOU with Pakistan.⁹⁷ Simultaneously, the government has sought to challenge the *Chahal* ruling alongside other European countries.⁹⁸

In *Saadi v Italy*,⁹⁹ the complainant was a Tunisian national who had submitted that he would be subjected to ill-treatment contrary to Article 3 ECHR if he was deported. The Italian embassy in Tunisia requested diplomatic assurances from the Tunisian government that Saadi would not be subjected to ill-treatment upon his return.¹⁰⁰ As to the nature of the assurances, the Tunisian Minister of Foreign Affairs sent notes to the Italian embassy iterating that Tunisian laws guaranteed prisoners’ rights and that Tunisia had acceded to the relevant laws and conventions (including CAT).¹⁰¹ The United Kingdom joined with Italy as a third party intervener in the case, arguing that a distinction must be drawn between treatment inflicted directly by a signatory State and treatment that might be

⁹¹ *Id.*

⁹² *Shamayev & Others v. Georgia & Russia*, HUDOC, <http://echr.coe.int> (last visited Nov. 1, 2012) at ¶ 352 (Apr. 12, 2005).

⁹³ *Chahal v. U.K.*, HUDOC, <http://echr.coe.int> (last visited Nov. 1, 2012).

⁹⁴ *Id.*

⁹⁵ The use of the term “Memoranda of Understanding” (MOU) and “diplomatic assurances” can often be misleading, since they may denote different formalized agreements. “Assurances” usually denote negotiation for promises with regard to a specific individual; MOU are broad agreements that cover the treatment of more than one individual.

⁹⁶ HOME DEPARTMENT, *supra* note 34, ¶ 8.27. Note that a formal MOU is not in place with Algeria; instead there is reliance placed on a series of written correspondence between the respective governments.

⁹⁷ 527 PARL. DEB., H.C. (2011) 465 (U.K.).

⁹⁸ See the Joint document submitted to the European Court of Human Rights by the United Kingdom, Portugal, Slovakia and Lithuania in *Ramzy v. The Netherlands* App. No. 25424/05, contained in Annex 2, of JCHR report: JOINT COMMITTEE ON HUMAN RIGHTS, *The Human Rights Act: the DCA and Home Office Reviews, Thirty-Second Report of Session, 2005-06*, H.L. 278, H.C. 1716, Annex 2.

⁹⁹ *Saadi v. Italy*, HUDOC, <http://echr.coe.int> (last visited Nov. 1, 2012).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

inflicted by the authorities of another State, and that protection against this latter form of ill-treatment should be weighed against the interests of the community as a whole.¹⁰² This argument was fundamentally rejected by the Court, which stated that there “was no basis for drawing any distinction between treatment inflicted by a State party to the Convention and a third-party State. To do so would undermine the protections of art.3.”¹⁰³ Unequivocally the Court affirmed its previous directions under *Chahal*.¹⁰⁴ The Court denounced as “misconceived” the argument that the risk posed by a suspect must be balanced against the risk of harm to the community, since the two could only be assessed independently.¹⁰⁵

Saadi makes it clear that notwithstanding the decision of a domestic court, each assurance will be subject to further judicial challenge in Strasbourg, which will assess all of the facts of the case¹⁰⁶ and determine whether sufficient safeguards have been provided.¹⁰⁷ Assurances given hurriedly are unlikely to suffice.¹⁰⁸ Such intervention into removal proceedings by the ECtHR has become increasingly prolific,¹⁰⁹ with

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* The court noted the “immense difficulties faced by states in modern times in protecting their communities from terrorist violence ... That must not, however, call into question the absolute nature of art. 3” and proceeded to affirm its *Chahal* directions. *Chahal v. U.K.*, HUDOC, <http://echr.coe.int> (last visited Nov. 1, 2012).

¹⁰⁵ “Either the evidence adduced before the Court reveals that there is a substantial risk if the person is sent back or it does not. The prospect that he may pose a serious threat to the community if not returned does not reduce in any way the degree of risk of ill treatment that the person may be subject to on return. For that reason it would be incorrect to require a higher standard of proof, as submitted by the intervener, where the person is considered to represent a serious danger to the community, since assessment of the level of risk is independent of such a test.” There was a violation of Article 3 ECHR since there were substantial grounds for believing that Saadi would face a real risk of treatment contrary to Article 3. *Saadi v. Italy*, HUDOC, <http://echr.coe.int> (last visited Nov. 1, 2012).

¹⁰⁶ *Id.*

¹⁰⁷ See *RB (Alg.) (FC) & another*, [2009] UKHL 10, at [107] – [08], [158], [265]. (The House of Lords’ affirmation of the MOU with Algeria and Jordan in *RB*).

¹⁰⁸ *Abdelhedi v. Italy*, HUDOC, <http://echr.coe.int> (last visited Nov. 1, 2012). See also *Sandi v. Italy*, HUDOC, <http://echr.coe.int> (last visited Nov. 1, 2012).

¹⁰⁹ The ECtHR. has affirmed its *Saadi* precedent in several cases. In *Ismoilov .v Russia*, HUDOC, <http://echr.coe.int> (last visited Nov. 1, 2012), the Court halted a Russian extradition since the assurances given were not considered to amount to a reliable guarantee against ill-treatment; and likewise this was the rationale for the court ruling with regard to an extradition to Turkmenistan in *Ryabikin v. Russia*, HUDOC, <http://echr.coe.int> (last visited Nov. 1, 2012). In *N. v. Sweden*, HUDOC, <http://echr.coe.int> (last visited Nov. 1, 2012), the Court held deportation of a female divorcee to Afghanistan would violate her Article 3 rights due to her personal circumstances; and similarly in *Klein v. Russia*, HUDOC, <http://echr.coe.int> (last visited Nov. 1, 2012), an extradition with assurances to Columbia was considered to violate Article 3 ECHR since the value of the assurances was questionable due to the documented instances of abusive practices by the Columbian authorities. In *Dauodi v. France*, HUDOC, <http://echr.coe.int> (last visited Nov. 1, 2012), the ECtHR held that removal of the applicant from France to Algeria would breach Article 3 due to the documented conditions of detention and ill-treatment in Algerian prisons and in the absence of formal assurances.

Strasbourg frequently invoking its Rule 39 procedure¹¹⁰ to stay extraditions or deportations.¹¹¹

One high-profile case¹¹² has been the stay of extradition granted to Abu Hamza pending a ruling regarding the compatibility of the conditions of imprisonment with Article 3 ECHR. The ECtHR, in a judgment that is not yet final,¹¹³ has ruled that there is no incompatibility and the extradition can proceed. Both the U.K. government and the U.S. Department of Justice have welcomed the decision.¹¹⁴ Elsewhere, however, there have been a number of other such decisions in which the Strasbourg court has shown the impotence of the Rule 39 procedure.¹¹⁵ The Human Rights Commissioner notes at least four occasions where Italy has ignored such interim measures.¹¹⁶

There are inherent tensions reconciling Convention principles with national security in terrorist removal cases; European governments have therefore challenged the *Chahal* and *Saadi* benchmarks.¹¹⁷ In *A. v The Netherlands*,¹¹⁸ the applicant complained of a risk of ill-treatment contrary

¹¹⁰ Mamatkulov & Askarov v. Turkey, HUDOC, <http://echrcoe.int> (last visited Nov. 1, 2012), Rule 39 of the Rules of the European Court of Human Rights allows interim measures to be taken by the court where there is an imminent risk of irreparable damage to life, or a threat of ill-treatment contrary to Article 3 ECHR, and may involve the court temporarily staying removal proceedings pending judgment. See European Court of Human Rights, Rules of Court, *supra* note 61.

¹¹¹ “For those who might face a risk of violation of their human rights, the Court is often their ultimate hope to stop a forced return to a country where they could be exposed to treatment in violation of the European Convention on Human Rights . . .” Human Rights Commissioner, *European States Must Respect Strasbourg Court’s Orders to Halt Deportations*, THE COUNCIL OF EUROPE COMMISSIONER’S HUMAN RIGHTS COMMENT (June 25, 2010, 9:04 AM), http://commissioner.cws.coe.int/tiki-view_blog_post.php?postId=52.

¹¹² See, e.g., Dominic Casciani, *Abu Hamza US Extradition Halted*, BBC NEWS, July 8, 2010, 11:50 AM <http://www.bbc.co.uk/news/10551784>; Vikram Dodd, *Abu Hamza Extradition to US Blocked by European Court*, THE GUARDIAN (July 8, 2010), <http://www.guardian.co.uk/uk/2010/jul/08/abu-hamza-human-rights-ruling?INTCMP=SRCH>; Philip Johnston, *Abu Hamza Extradition to US Blocked on Human Rights Grounds*, TELEGRAPH (July 8, 2010), <http://blogs.telegraph.co.uk/news/philipjohnston/100046585/abu-hamza-extradition-to-us-blocked-on-human-rights-grounds/>.

¹¹³ Babar Ahmad & Others v. U.K., HUDOC, <http://www.echr.coe.int> (last visited Nov. 1, 2012). On 9th July 2012, an application was lodged (on the eve of the three month deadline for such applications) for a referral to the Grand Chamber of the European Court of Human Rights. The Court will decide on admissibility within six to eight weeks of that date.

¹¹⁴ Martin Beckford, *Abu Hamza Extradition Could Take Months as David Cameron Welcomes European Court Ruling*, TELEGRAPH (Apr. 10, 2012, 7:39 AM), <http://www.telegraph.co.uk/news/uknews/terrorism-in-the-uk/9195669/Abu-Hamza-extradition-could-take-months-as-David-Cameron-welcomes-European-court-ruling.html>; John F. Burns & Alan Cowell, *European Court Says Britain Can Send Terror Suspects to U.S.*, N.Y. TIMES (Apr. 10, 2012), http://www.nytimes.com/2012/04/11/world/europe/european-court-says-britain-may-deport-terror-suspects.html?pagewanted=all&_r=0.

¹¹⁵ See Human Rights Commissioner, *supra* note 111.

¹¹⁶ *Id.* See also Ben Khemais v. Italy, HUDOC, <http://www.echr.coe.int> (last visited Nov. 1, 2012). A violation of Article 3 ECHR was found when the interim measure was ignored and the individual deported to Tunisia, despite the fact that the Tunisian assurances were not considered by the European Court of Human Rights as sufficient to guard against ill-treatment.

¹¹⁷ See, e.g., *A. v. The Neth.*, HUDOC, <http://www.echr.coe.int> (last visited Nov. 1, 2012).

¹¹⁸ *Id.*

to Article 3 ECHR if he was to be removed to Libya and was granted a stay of removal pursuant to Rule 39. The respondent government argued that the “mere possibility of ill-treatment” was insufficient to assume that expulsion is incompatible with Article 3 ECHR.¹¹⁹ A central tenet to the government’s submissions was that:

[A] thorough investigation was necessary not only to determine if the alien ... has adequately established that he can expect to be subjected to treatment prohibited by Article 3 upon returning to his country of origin, but also because it was necessary to ensure that the State is not simply forced to resign itself to the alien's presence which may represent a threat to the fundamental rights of its citizens.¹²⁰

Lithuania, Slovakia, Portugal and the United Kingdom all intervened and argued that the rigidity of the *Chahal* principle was causing difficulty for States by preventing them from enforcing expulsion measures.¹²¹ The interveners suggested that the *Chahal* benchmark should be altered in two significant ways. First, the threat presented by the person to be deported must be a factor assessed in relation to the possibility and the nature of the potential ill-treatment.¹²² Next, national security considerations had to influence the standard of proof required of the applicant, so that if the sending State adduced evidence that there was a threat to national security, stronger evidence had to be adduced to prove that the applicant would be at risk of ill-treatment in the receiving country.¹²³ In such instances, the interveners proposed that the individual must show they are “more likely than not” going to be subjected to ill-treatment.¹²⁴ These arguments were countered by NGOs, who suggested that assurances did not suffice to offset a risk of torture¹²⁵ and that no balancing exercise should be permissible under International Law or through Strasbourg jurisprudence.¹²⁶

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.* This argument would mean that the standard of proof adopted by the European Court of Human Rights in respect to Article 3 ECHR would mirror the standard of proof required in U.S. deportation proceedings under CAT.

¹²³ A. v. The Neth., HUDOC, <http://www.echr.coe.int> (last visited Nov. 1, 2012).

¹²⁴ *Id.*

¹²⁵ The submissions of Amnesty International and Human Rights Watch. *Id.*

¹²⁶ See the submissions of Liberty and JUSTICE. *Id.*

Unsurprisingly, the Court rejected the government's submissions¹²⁷ and applied its earlier decision of *Saadi*: the prohibition against torture or ill-treatment applies irrespective of the conduct of the person concerned.¹²⁸ While it appears that the *Chahal* and *Saadi* benchmarks are intact and will continue to trouble the government, they do not preclude the operation of a DWA regime.¹²⁹ The seminal challenge by Abu Qatada¹³⁰ provides important guidance here. Qatada is a Jordanian national wanted for terrorism-related offences in several countries, and has been referred to by a Spanish judge as Osama Bin Laden's right-hand man in Europe.¹³¹ Qatada claimed asylum in the United Kingdom and was granted leave to remain there until 1999.¹³² He had been convicted *in absentia* in Jordan as part of a conspiracy for various offences.¹³³ Some evidence had come to light in the trials that Qatada's co-defendants had been subjected to ill-treatment and torture, but these allegations had not been fully investigated and were deemed unproven.¹³⁴ After being subjected to the U.K.'s various counter-terrorism regimes of detention and control orders, Qatada was served with a deportation notice and was correspondingly detained for that purpose.¹³⁵

Qatada challenged the legality of his removal on the basis of the fact that the human rights situation in Jordan meant that there would be a risk of subjection to torture or ill-treatment upon his return, a violation of Article 3 ECHR, and that the assurances given by the Jordanian government to the contrary were insufficient to mitigate against that risk.¹³⁶ He simultaneously argued that he faced a violation of his right to liberty and security, contrary to Article 5 ECHR, and his right to a fair trial, contrary to Article 6 ECHR.¹³⁷ The ensuing appeals made their way through SIAC,¹³⁸ the Court of Appeal,¹³⁹ and the House of Lords, with

¹²⁷ *A. & Others v. U.K.*, HUDOC, <http://www.echr.coe.int> (last visited Nov. 1, 2012).

¹²⁸ *Id.*

¹²⁹ See generally *Chahal v. U.K.*, HUDOC, <http://echroe.int> (last visited Nov. 1, 2012); *Saadi v. Italy*, HUDOC, <http://echroe.int> (last visited Nov. 1, 2012).

¹³⁰ See *Othman (Abu Qatada) v. U.K.*, HUDOC, <http://www.echr.coe.int> (last visited Nov. 1, 2012).

¹³¹ See the opinion of SIAC that Qatada is "described by many sources as a spiritual advisor to terrorist groups or individuals who have been reasonably suspected of having links to Al Qa'ida ... It is not at all surprising that he has been believed by some to be the head of the Al Qa'ida organisation in Europe." *Abu Qatada v. Sec'y of State for the Home Dep't*, [2004] UKSIAC 15/2002[15].

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Othman (Abu Qatada) v. U.K.*, HUDOC, <http://www.echr.coe.int> (last visited Nov. 1, 2012).

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ See *Abu Qatada v. Sec'y of State for the Home Dep't* [2004] UKSIAC 15/2002 [15].

¹³⁹ *Othman v. Sec'y of State for the Home Dep't*, [2008] EWCA (Civ) 290 (appeal taken from SIAC).

their Lordships ruling that the deportation was lawful.¹⁴⁰

The *Qatada* judgment will be pivotal to the development of assurances both in Europe generally and in the United Kingdom specifically. The ECtHR held that the correct approach to take would be consistent with its previous decisions: Strasbourg would “consider both the general human rights situation in that country and the particular characteristics of the applicant.”¹⁴¹ Assurances would constitute one relevant factor for the Court to consider but “are not in themselves sufficient to ensure adequate protection of ill-treatment ... [t]he weight to be given to assurances from the receiving State depends, in each case, on the circumstances prevailing at the material time.”¹⁴² Drawing on existing case law, the Court elucidated a variety of additional factors relevant to an assessment of the quality of assurances.¹⁴³

Significantly for the government and for the pursuit of DWA strategies generally, the Court held that “the United Kingdom and Jordanian Governments have made genuine efforts to obtain and provide transparent and detailed assurances to ensure that the applicant will not be ill-treated upon return to Jordan;”¹⁴⁴ the particular assurances were considered to be “superior in both ... detail and ... formality to any assurances which the Court has previously examined.”¹⁴⁵ In light of the specific circumstances, deportation to Jordan would not violate Article 3 ECHR.¹⁴⁶ From this perspective, the judgment vindicated the DWA strategy of the U.K. government and effectively paves the way for more terrorist removals.¹⁴⁷

Despite this partial victory, the alternative finding of the ECtHR that *Qatada*’s return would violate Article 6 ECHR has caused considerable consternation.¹⁴⁸ The caustic debate aimed at a perceived diminution of

¹⁴⁰ See *RB (Alg.) (FC)*, [2009] UKHL 10, [128]-[29].

¹⁴¹ See *Othman (Abu Qatada) v. U.K.*, HUDOC, <http://www.echr.coe.int> (last visited Nov. 1, 2012).

¹⁴² *Id.*

¹⁴³ Some eleven criteria were examined that no doubt will inform future efforts of the FCO to conclude assurances that will be capable of withstanding future judicial scrutiny. See AMNESTY INT’L, *infra* note 295, at 6.

¹⁴⁴ See *Othman (Abu Qatada) v. U.K.*, HUDOC, <http://www.echr.coe.int> (last visited Nov. 1, 2012).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ In fact, the European Court of Human Rights has gone further than a mere vindication of the regime. It has tacitly required that assurances should be sought in removal cases where there is a risk of ill-treatment. See the (not final) judgment in *M.S. v. Belgium*, HUDOC, <http://www.echr.coe.int> (last visited Nov. 1, 2012) (holding that an individual returned to Iraq in the absence of assurances would suffer a violation of Article 3 ECHR).

¹⁴⁸ See 527 PARL. DEB., H.C. (2011) 465 (U.K.). The Prime Minister bemoaned that “the judgment is difficult to understand, because British Governments ... have gone to huge efforts to establish a ‘deportation with assurances’ agreement with Jordan to ensure that people are not mistreated ... [I]t is immensely frustrating. Oral Answers of the Sec’y of State, EUR. PARL. DEB., H.C. (2012) 748. The Home Secretary declared to the media that all the legal options would be examined, that it is “not the end of the road” for the removal regime generally, but made clear in Parliament that

national sovereignty vis-à-vis an increased willingness of the Court to rule against offending statute and common law precedent, with the focal point of these arguments shifting from the voting rights of prisoners¹⁴⁹ to a glut of immigration-related decisions under the Rule 39 procedure.¹⁵⁰ On April 29th, 2011, a High Level Conference of the Committee of Ministers of the Council of Europe issued a declaration that sought to limit ECtHR involvement in deportation and extradition hearings.¹⁵¹ The declaration:

Invites the Court, when examining cases related to asylum and immigration, to assess and take full account of the effectiveness of domestic procedures and, where these procedures are seen to operate fairly and with respect for human rights, to avoid intervening except in the most exceptional circumstances.¹⁵²

This statement complements the orthodox position that the ECtHR is not that of a “fourth-instance” court and it should therefore avoid “re-

the government “disagree[d] vehemently” with the decision and that the correct place for Qatada was “behind bars.” *Id.* at 165.

¹⁴⁹ In *Hirst v. United Kingdom*, the European Court of Human Rights held that the United Kingdom’s blanket ban on prisoners’ voting rights was a violation of Article 3 of the First Protocol to the ECHR. The issue was put to “consultation,” but ultimately the ban was not lifted. HUDOC, <http://echrcoe.int> (last visited Nov. 1, 2012). See generally Isobel White, HOUSE OF COMMONS LIBRARY SN/PC/01764, PRISONERS’ VOTING RIGHTS, (2011).

MPs debated the issue and, in a non-binding free vote, passed a motion upholding the status quo by 234 votes to 22 (with ministerial and opposition abstentions). PARL. DEB., H.C. (2011) 584.

¹⁵⁰ In *Ismoilov v. Russia*, the Court halted a Russian extradition since the assurances given were not considered to amount to a reliable guarantee against ill-treatment. HUDOC, <http://echrcoe.int> (last visited Nov. 1, 2012). Likewise, this was the rationale for the Court ruling with regard to an extradition to Turkmenistan in *Ryabikin v. Russia*. HUDOC, <http://echrcoe.int> (last visited Nov. 1, 2012). In *N v. Sweden*, the European Court held deportation of a female divorcee to Afghanistan would violate her Article 3 rights due to her personal circumstances. HUDOC, <http://echrcoe.int> (last visited Nov. 1, 2012). Similarly in *Klein v. Russia*, the Court held that an extradition with assurances to Columbia violated Article 3 ECHR since the value of the assurances was questionable due to the documented instances of abusive practices by the Columbian authorities. HUDOC, <http://echrcoe.int> (last visited Nov. 1, 2012). In *Daoudi v. France*, the Court held that removal of the applicant from France to Algeria would breach Article 3 due to the documented conditions of detention and ill-treatment in Algerian prisons (Unlike the United Kingdom, France had not arranged any assurances with the Algerian authorities. HUDOC, <http://echrcoe.int> (last visited Nov. 1, 2012). SIAC in the United Kingdom has therefore distinguished this case. *T v. Sec’y State Home Dep’t*, [2010] UKSAIC 31/2005, 18.

¹⁵¹ See generally TURKISH CHAIRMANSHIP, HIGH LEVEL CONFERENCE ON THE FUTURE OF THE EUROPEAN COURT OF HUMAN RIGHTS (Apr. 2011), available at <http://www.coe.int/t/dghl/standardsetting/conferenceizmir/Declaration%20Izmir%20E.pdf>.

¹⁵² *Id.*

examination of issues of fact and law decided by national courts.”¹⁵³ These developments may limit future ECtHR involvement in such cases. Perhaps as a result of these altercations, the Grand Chamber of the ECtHR refused Qatada’s application to overrule the decision, with the consequence that the judgment is now final with Qatada’s individual case proceeding through the U.K. courts.¹⁵⁴ The precedent provides invaluable guidance to interested governments as to how an effective DWA regime may be implemented. Nonetheless, there remain myriad criticisms directed towards a DWA regime, and before these issues are examined, it is first worthwhile analyzing the markedly different approach taken in the United States.

III. REMOVAL FROM THE UNITED STATES: TRUSTING THE EXECUTIVE

Assurances are routinely sought by the United States but their formulation and use is left largely to the executive branch; few specific details are released to the public regarding the content or compliance with such assurances following their formulation.¹⁵⁵ Protection against ill-treatment and torture is analogous to that in the United Kingdom; the European Commission on Human Rights has asserted the similarity between the Eighth Amendment to the U.S. Constitution and Article 3 ECHR in the context of the severity of treatment required to invoke its protection.¹⁵⁶ CAT was ratified by the United States in 1994 with the reservation that the prohibition was taken only insofar as it mirrored the protection afforded by the U.S. Constitution.¹⁵⁷ Unsurprisingly, this reservation has been criticized, since it could be argued that it is trumped by *jus cogens* principles of international law and that it imbues the U.S. legal order with a lower standard of protection against torture and ill-

¹⁵³ *Id.* A Commission has been established in the United Kingdom to look at reform of the European Court of Human Rights given its immense workload and backlog of cases, which currently stands in excess of 152,000 (as of November 2011). EUROPEAN COURT OF HUMAN RIGHTS, ANALYSIS OF STATISTICS 2011, (2011), available at http://www.echr.coe.int/NR/rdonlyres/7B68F865-2B15-4DFC-85E5-DEDD8C160AC1/0/Stats_EN_112011.pdf. The Commission has, *inter alia*, made interim recommendations to ministers that urgent reform should be pursued in a time-bound program during the UK’s Chairmanship of the Council of Europe, though ministers have made it clear that further reform will take time to achieve. Letter from Sir Leigh Lewis, Chair, Commission on a Bill of Rights, to Rt. Hon. Nick Clegg MP, Deputy Prime Minister & Lord President of the Privy Council, & Rt. Hon. Kenneth Clarke MP QC, Lord Chancellor & Secretary of State for Justice (July 28, 2011), available at <http://www.justice.gov.uk/downloads/about/cbr/cbr-court-reform-interim-advice.pdf>. Some inroads have already been made with Protocol 14, which came into force in 2010.

¹⁵⁴ The courts will now examine the fair trial implications of the Jordanian assurances in light of the ECtHR ruling, but deportation of Qatada is unlikely before October 2012.

¹⁵⁵ See generally COLUMBIA LAW SCHOOL HUMAN RIGHTS INSTITUTE, PROMISES TO KEEP: DIPLOMATIC ASSURANCES AGAINST TORTURE IN US TERRORISM TRANSFERS, Dec. 2010, available at http://www.law.columbia.edu/ipimages/Human_Rights_Institute/Promises%20to%20Keep.pdf.

¹⁵⁶ *Soering v. United Kingdom*, HUDOC, <http://echrcoe.int> (last visited Nov. 1, 2012).

¹⁵⁷ *US Reservations, Declarations, and Understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 136 CONG. REC. S17486-01 (Oct. 27, 1990).

treatment than that observed on an international arena.¹⁵⁸ Further implementation of CAT at a domestic level followed with the Foreign Affairs Reform and Restructuring Act (FARRA),¹⁵⁹ although the statute expressly prevented the courts from exercising jurisdiction over these cases.¹⁶⁰ The fact that FARRA was needed in the first place in order to give effect to CAT principles was largely the result of a U.S. Senate determination that CAT was not “self-executing,”¹⁶¹ showcasing the relative impotence of the current CAT framework.

In relation to CAT claims, there are distinct similarities between the U.S. approach to extradition and deportation, making it appropriate to consider both of these in context.¹⁶² Regulations made by the executive branch under FARRA have made it explicit that it is the function of the Secretary of State to decide whether or not to extradite and if assurances are necessary; the courts have no role in this process.¹⁶³ Under CAT, the U.S. government has an obligation to ensure an individual is not subjected to refoulement, but this obligation is discharged through a nexus of executive decisions and approvals as opposed to through judicial scrutiny of the removal and/or commensurate assurances.¹⁶⁴ This contention was challenged in the case of *Cornejo-Barreto*,¹⁶⁵ following which it appeared that an individual may be able to petition for *habeas corpus* notwithstanding the statutory and regulatory circumscription of judicial review.¹⁶⁶

¹⁵⁸ See, e.g., Bruin & Wouters, *supra* note 72, at 24, 29 (discussing the non-refoulement obligation has acquired *jus cogens* status); Alice Farmer, ‘Non-Refoulement and Jus Cogens: Limiting Anti-Terror Measures that Threaten Refugee Protection’, SELECTEDWORKS (Jun. 12, 2010), http://works.bepress.com/alice_farmer/1. See also Human Rights First, *Issues to Be Considered During the Examination of the Second Periodic Report of the United States of America* (CAT/C/48/Add 3/Rev 1, Apr. 7, 2006), available at <http://www.humanrightsfirst.info/pdf/06502-etn-hrf-cat-final-submitted.pdf> accessed 12 June 2010.

¹⁵⁹ Foreign Affairs Reform and Restructuring Act, 8 U.S.C. § 1231(a) (2006) [hereinafter FARRA].

¹⁶⁰ See generally 8 U.S.C. § 1231(d).

¹⁶¹ 136 Cong. Rec. 36,198 (1990); S. EXEC. REP. 101-30, Senate Advice and Consent to the Convention Against Torture, Unanimous Consent Agreement, at III(1) (1990). The requisite background to the signing of CAT and the implementation of FARRA has been documented extensively but is neatly summarized by the Third Circuit in *Ogbudimkpa v. Ashcroft*, 342 F.3d 207, 218 (3rd Cir. 2003).

¹⁶² These similarities relate to the significant role played by the executive branch, with limited judicial oversight. 8 C.F.R. §§ 1208.18(c); § 208.18(c) (2012).

¹⁶³ The courts have previously considered that they are “ill-equipped as institutions” to second-guess the executive’s extradition decisions. *United States v. Smyth* (In re Requested Extradition of Smyth), 61 F.3d 711, 714 (9th Cir. 1995). While this was rejected in *Mironescu v. Costner*, 480 F.3d 664, 670 (4th Cir. 2007), judicial involvement has since been circumscribed by FARRA, 8 U.S.C. § 1231.

¹⁶⁴ *Mironescu*, 480 F.3d at 169.

¹⁶⁵ *Cornejo-Barreto v. Seifert*, 218 F.3d 1004, 1007 (9th Cir. 2000).

¹⁶⁶ The appellate history is complex and the precedent is by no means certain. An appeal to the Ninth Circuit did not clarify matters. The court in *Arambasic v. Ashcroft* noted that the appeal decision had been vacated but that the original judgment had not been. 403 F.Supp.2d 951, 963 (D.S.D. 2005).A

The Fourth Circuit, however, did not endorse this position; in *Mironescu v Costner*,¹⁶⁷ the contention that the courts were barred through the rule of non-inquiry¹⁶⁸ from reviewing treatment concerns in *habeas* petitions was rejected.¹⁶⁹ In the same judgment, the court held that FARRA barred a *habeas* review of CAT proceedings.¹⁷⁰ The resulting position is woefully unclear. Deeks observes that the U.S. courts are increasingly reluctant to allow the executive branch to create assurances or MOU that are judicially untested, even where the legal basis to intervene is weak.¹⁷¹ She also postulates the possibility that the Ninth Circuit may soon find that an individual can obtain a *habeas corpus* review of the Secretary of State's decision to extradite him in the face of torture concerns.¹⁷²

A. *Lessons from America: Deportation of Terrorist Suspects*

Even with a shift in strategy resulting from a change in administration, with “an end to United States exceptionalism and an acceptance of the international law framework,”¹⁷³ some of the war-related rhetoric continued under the Obama Administration.¹⁷⁴ Despite similarities between removal strategies for non-Guantánamo detainees, the commensurate standard of legal protection is markedly different when assurances are sought.¹⁷⁵ It is therefore necessary to first consider deportation of non-Guantánamo inmates before turning to consider those detained in the “legal black hole.”¹⁷⁶

In terms of deportation practice, the U.S. approach is somewhat better than that for extradition, providing a comparably higher degree of judicial scrutiny while lacking the robust judicial safeguards found in the United Kingdom.¹⁷⁷ For individuals facing deportation, removal will be deferred

similar approach was subsequently taken by the Ninth Circuit in *Prasoprat v. Benov*, 421 F.3d 1009, 1011-12 (9th Cir. 2005).

¹⁶⁷ *Mironescu*, 480 F.3d at 677.

¹⁶⁸ “[U]nder what is called the “rule of non-inquiry” in extradition law, courts in this country refrain from examining the penal systems of requesting nations, leaving to the Secretary of State determinations of whether the defendant is likely to be treated humanely.” *Lopez-Smith v. Hood*, 121 F.3d 1322, 1327 (9th Cir. 1997).

¹⁶⁹ *Mironescu*, 480 F.3d 644 at 670.

¹⁷⁰ *Id.* at 674.

¹⁷¹ Ashley Deeks, *Promises Not to Torture: Diplomatic Assurances in U.S. Courts*, AMER. SOC. INT'L. L., 10 (2008).

¹⁷² *Id.* at 21.

¹⁷³ Róisín Pillay, *Current Challenges Regarding Respect of Human Rights In the Fight Against Terrorism*, EUR. PARL. DOC. EXPO/B/DROI/2009/27, PE 410.208, (Apr. 2010) 14.

¹⁷⁴ *Id.* at 15.

¹⁷⁵ *Id.*

¹⁷⁶ Steyn, *supra* note 2, at 1.

¹⁷⁷ *See infra* text accompanying notes 380–84.

if they are considered to be “more likely than not” tortured upon their return;¹⁷⁸ likewise the U.S. Senate¹⁷⁹ has interpreted Article 3 CAT to require the same standard of proof.¹⁸⁰ If new evidence comes to light or if the government negotiates arrangements with a receiving country, any deferral of removal can be terminated following an evidentiary hearing, with provision for appeal to the Board of Immigration Appeals (BIA).¹⁸¹

Generally, *habeas corpus* is available to a person held in custody “in violation of the Constitution or laws or treaties of the United States.”¹⁸² As is the case in an extradition context, there have been notable steps taken in immigration law to limit judicial involvement in removal cases in the context of CAT.¹⁸³ If assurances are used, the Secretary of Homeland Security, in consultation with the Secretary of State, will undertake a determination as to their effectiveness and reliability in terms of discharging the CAT burden.¹⁸⁴ Once this claim has been lodged, an immigration judge, the BIA, or an asylum officer may give no further consideration of CAT.¹⁸⁵ Despite the limited use of assurances, there has been some litigation challenging these principles.¹⁸⁶

The key issues at play in this area are best illustrated with reference to the non-terrorism related case of *Khouzam v Hogan*.¹⁸⁷ Khouzam was an Egyptian national who was facing removal given the decision of an immigration judge that there were substantial grounds for believing him to have murdered a woman in Egypt. In accordance with the procedure above,¹⁸⁸ the U.S. government obtained assurances from the Egyptian authorities.¹⁸⁹ Accordingly, Khouzam’s deferral of removal was terminated, and he petitioned the Second Circuit for *habeas corpus*,¹⁹⁰ claiming that he faced removal pursuant to inherently unreliable diplomatic assurances from Egypt without any opportunity to challenge the reliability of such assurances, which violated the CAT, commensurate regulations and the Fifth Amendment’s Due Process Clause.¹⁹¹ The respondent government argued that judicial review was exclusively limited to

¹⁷⁸ Aliens and Nationality, 8 C.F.R. § 208.17 (2012).

¹⁷⁹ S. EXEC. REP. NO. 101-30, at 10, 30, 36 (1990) (Recommendation of Advice and Consent to Ratification).

¹⁸⁰ It is clear that this is substantially higher than that employed by the ECTHR, which merely requires a “real risk.” *Chahal v. U. K.*, HUDOC, <http://echr.coe.int> (last visited Nov. 1, 2012).

¹⁸¹ 8 C.F.R. § 208.17(d) (2012).

¹⁸² 28 U.S.C. § 2241(c)(3) (2006).

¹⁸³ See 8 C.F.R. §§ 1208.18(c)(3), § 208.18(c)(3) (2012).

¹⁸⁴ 8 C.F.R. § 208.18(c)(1)-(2) (2012).

¹⁸⁵ 8 C.F.R. §§ 1208.18(c)(3), § 208.18(c)(3) (2012).

¹⁸⁶ *Khouzam v. Hogan*, 529 F. Supp. 2d 543, 547–48 (M.D. Pa. 2008).

¹⁸⁷ *Id.* at 548.

¹⁸⁸ 8 C.F.R. §§ 1208.18(c), § 208.18(c) (2012).

¹⁸⁹ *Khouzam*, 529 F. Supp. 2d at 551.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 559.

consideration of the final order of removal¹⁹² and that even if the court had jurisdiction, the petition represented a non-justiciable political question and the court should not intervene in what was a matter for executive determination.¹⁹³

In granting a stay of removal, the Court rejected the government's arguments.¹⁹⁴ Upon subsequent hearings,¹⁹⁵ the District Court granted a writ of *habeas corpus*,¹⁹⁶ holding that Khouzam had been denied due process.¹⁹⁷ The District Court rejected the contention that assurances *per se* were not a viable option but considered that the government had failed to provide the applicant with notice and meaningful opportunity to be heard in connection with the Government's reliance upon an Egyptian diplomatic assurance. Since there was no significant likelihood of removal in the foreseeable future,¹⁹⁸ release was ordered under reasonable conditions of supervision.¹⁹⁹

An appeal was quickly lodged to the Third Circuit and the judgment was delivered in December 2008.²⁰⁰ While the Court of Appeals vacated the opinion of the District Court in respect to jurisdiction, the judgment still delivered a blow to the U.S. executive's deportation strategy, holding that even if *habeas corpus* was circumscribed, there needed to be an alternative forum for judicial review²⁰¹ and that the appeals court itself was the appropriate venue.²⁰² The court rejected the notion that the appeal represented a non-justiciable political question, holding that the issues raised were fundamentally of "statutory, constitutional, and regulatory interpretation."²⁰³ In terms of the due process argument, the result of this

¹⁹² 8 C.F.R. § 1208.18(c) (2012).

¹⁹³ *Khouzam*, 529 F. Supp. 2d at 559.

¹⁹⁴ *Id.* at 571.

¹⁹⁵ The appellate history of this litigation is complex and the present work does not intend to examine the minutiae of the government challenges and court hearings. What is recounted here notes the key issues raised by the final *habeas corpus* petition.

¹⁹⁶ *Khouzam*, 529 F. Supp. 2d at 571.

¹⁹⁷ *Id.*

¹⁹⁸ The same principle applies in the context of U.K. deportations. Detention pending deportation is dependent on the proceedings making satisfactory progress, and detention cannot be continued when proceedings have been discontinued. The requisite U.K. authorities are *Chahal v. U.K., HUDOC*, <http://echr.coe.int> (last visited Nov. 1, 2012) and *Regina v. Governor of Durham Prison, Ex parte Hardial Singh*, 1 W.L.R. 704, 706 (1984). Its U.S. counterpart is *Clark v. Martinez*, 543 U.S. 371, 386 (2005).

¹⁹⁹ *Clark*, 543 U.S. at 377, 386–87.

²⁰⁰ *Khouzam v. Attorney Gen. of the U.S.*, 549 F.3d 235, 235 (3d Cir. 2008).

²⁰¹ The court avoided the circumscription by holding that the Supreme Court had established that a statute denying an alien the ability to test the legality of his detention through a *habeas corpus* petition is subject to constitutional scrutiny, and may be invalidated failing such scrutiny. Therefore, since *habeas corpus* was not available, the court held that its own assessment would amount to an adequate and effective alternative. *Id.* at 245–46.

²⁰² The judgment provides a lengthy and elaborate justification in terms of the statutory power to judicially review only the "final order[] of removal." *Id.* at 247–49.

²⁰³ *Id.* at 251.

appeal is particularly significant. The court stated that the right to due process had not been either prescribed or circumscribed by the relevant statute,²⁰⁴ that Khouzam had been entitled to the right, and that he had failed to receive any notice or hearing whatsoever.²⁰⁵ Damningly, the court held that:

[B]eyond the Government's bare assertions, we find no record supporting the reliability of the diplomatic assurances that purportedly justified the termination of his deferral of removal.²⁰⁶

Khouzam lacked an opportunity to make arguments on his own behalf or to have an individual determination made by an independent decision maker. The commensurate lack of process was considered by the court to be inherently prejudicial,²⁰⁷ and the court accordingly held that the order terminating the deferral of removal was invalid, remanding the case back to the BIA so due process could be given.²⁰⁸ In so doing, the Third Circuit provided key criteria that it deemed necessary to provide to a deportee when assurances were obtained.²⁰⁹ Under these principles, an alien must therefore receive:

[N]otice and an opportunity to test the reliability of those assurances in a hearing;

[T]he opportunity to present, before a neutral and impartial decision-maker, evidence and arguments challenging the reliability of diplomatic assurances proffered by the Government, and the Government's compliance with the relevant regulations; and

[A]n individualized determination of the matter based on a record disclosed to the alien.²¹⁰

²⁰⁴ “There is nothing in the diplomatic assurance regulations themselves that we could fairly construe as providing an alien with any process whatsoever, let alone the right to a hearing.” *Id.* at 255.

²⁰⁵ *Id.* at 257.

²⁰⁶ *Khouzam*, 549 F.3d at 257.

²⁰⁷ *Id.* at 258.

²⁰⁸ *Id.* at 259.

²⁰⁹ *Id.*

²¹⁰ *Id.*

This approach resonates with aspects of the European model and it has been suggested that *Khouzam* represents a step in that direction.²¹¹ The U.S. government has thus been forced to adopt an alternative strategy for terrorism-related deportations.

*B. Removal of “High Value” Suspects: “Habeas Schmabeas”*²¹²

If the foregoing *Khouzam* safeguards in a non-Guantánamo context provide an indication of judicial assertiveness on the executive’s front-line, the same is also true with regard to judicial challenges to removal brought by Guantánamo detainees. Guantánamo detainees have had to bridge an impasse of considerable magnitude in order to even assert their constitutional rights in the first place.²¹³ In the context of the present discussion, two major issues present themselves: the practice of extraordinary rendition, which has attracted vitriolic worldwide condemnation,²¹⁴ and the deliverance of Guantánamo Bay detainees to other countries,²¹⁵ including through deportation procedure.

²¹¹ Deeks, *supra* note 171, at 26. Note that this was in regard to the District Court hearing, rather than the appeal to the Third Circuit.

²¹² The title of an award-winning radio broadcast of *This American Life*, which described the conditions of detention at Guantánamo Bay. *Habeas Schmabeas, This American Life*, CHICAGO PUBLIC MEDIA (Mar. 10, 2006), available at <http://www.thisamericanlife.org/radio-archives/episode/310/habeas-schmabeas>.

²¹³ See, for example, the infamous case of *Rasul v. Bush*, 542 U.S. 466, 466 (2004). *Rasul* lies at the heart of the myriad of criticisms that have beset the 9/11 detention regime. *Rasul* was a foreign national captured in Afghanistan, who was held at Guantánamo and petitioned the District Court for *habeas corpus*. In common with the wartime decision of *Johnson v. Eisentrager*, 339 U.S. 763, 777–778 (1950), the District Court held that the petition lacked jurisdiction since Guantánamo was outside of the geographical territory of the U.S. *Rasul v. Bush*, 215 F. Supp. 2d 55, 72, 73 (D.D.C. 2002). This decision was upheld on appeal to the Court of Appeals. *Al Odah v. U.S.*, 321 F.3d 1134, 1145 (D.C. Cir. 2003). The Supreme Court decision, reversing the Court of Appeals, held that the U.S. courts retained the authority to decide whether the detention was lawful. In reaching the decision, the Supreme Court held that the District Court had jurisdiction under the *habeas* statute. Such jurisdiction extends to aliens held in a territory over which the U.S. has plenary and exclusive jurisdiction, even in the absence of “ultimate sovereignty.” *Rasul*, 542 U.S. at 475, 484. Although the long-term consequences of *Rasul* were significant in terms of a marked extension of the geographical reach of *habeas corpus*, in the short-term the petitioners were required to resubmit their petitions in the District Court so that a hearing could take place.

²¹⁴ A detailed review of these arguments, and indeed of extraordinary rendition generally, lies outside the ambit of this article. See U.N. Human Rights Council, 13th Sess., Feb. 19, 2010, 3, 70, U.N. Doc. A/HRC/13/42.

²¹⁵ Note that the term “rendition” is often erroneously used to denote “extraordinary rendition.” The former merely means “handing over”; the latter has come to mean such transfers outside the usual legal framework (extra-judicial transfers) which allegedly have resulted in torture and ill-treatment. The European Parliamentary Assembly has referred to this as transferring terrorist suspects “from one state to another on civilian aircraft, outside of the scope of any legal protections, often to be handed over to states who customarily resort to degrading treatment and torture” EUR. PARL. ASS., *Resolution 1507: Alleged Secret Detentions and Unlawful Inter-State Transfers of Detainees Involving Council of Europe Member States*, ¶7 (2006).

Secret renditions pose a particular problem to the current task of forming a DWA regime compliant with multilateral human rights norms and domestic constitutional guarantees.²¹⁶ The numerous allegations of complicity in torture by the United States (and indeed the United Kingdom and other European governments),²¹⁷ operating outside international and domestic laws, overshadow any relatively modest ways in which the legal framework can be modified to ensure appropriate constitutionalism. This is a prevailing concern, yet it should not preclude an examination of ways in which the laws themselves can be modified so as to ensure future human rights compliance. Worldwide attention, and resultant criticisms, has been very firmly turned towards the counter-terrorism strategy of the United States since 9/11.²¹⁸

Judicial challenges regarding alleged complicity in extraordinary rendition have been lodged;²¹⁹ in the United Kingdom, the Prime Minister has announced an independent inquiry to examine reports of complicity in torture and ill-treatment.²²⁰ The practice of extraordinary rendition has captured the public's attention.²²¹ As a response to this pressure, the U.S.

²¹⁶ For a report on these issues, see, e.g., ALL PARTY PARLIAMENTARY GROUP ON EXTRAORDINARY RENDITION, BRIEFING: TORTURE BY PROXY: INTERNATIONAL LAW APPLICABLE TO 'EXTRAORDINARY RENDITIONS' (2005), <http://www.chrgj.org/docs/APPNGYU%20Briefing%20Paper.pdf>; INTERNATIONAL BAR ASSOCIATION, EXTRAORDINARY RENDITIONS (2009), http://www.ibanet.org/Human_Rights_Institute/About_the_HRI/HRI_Activities/Guantanamo_Extraordinary_renditions.aspx.

²¹⁷ "[A]cross the world, the United States has progressively woven a clandestine "spiderweb" of disappearances, secret detentions and unlawful inter-state transfers, often encompassing countries notorious for their use of torture. Hundreds of persons have become entrapped in this web, in some cases merely suspected of sympathizing with a presumed terrorist [organization]." EUR. PARL. ASS., *supra* note 215, at ¶ 5.

²¹⁸ See, e.g., Dick Marty, EUR. PARL. ASS., *Secret detentions and Illegal Transfers of Detainees Involving Council of Europe Member States: Second Report* (2007), <http://assembly.coe.int/documents/workingdocs/doc07/edoc11302.htm>; EUR. PARL. ASS., *supra* note 215, at ¶ 7; *United States of America/Yemen: Secret Detention in CIA "Black Sites"*, AMNESTY INT'L 5 (2005), <http://www.amnesty.org/en/library/asset/AMR51/177/2005/en/413e36cb-d493-11dd-8a23-d58a49c0d652/amr511772005en.pdf>; David Johnston & Mark Mazzetti, *Interrogation Inc.: A Window into CIA's Embrace of Secret Jails*, N.Y. TIMES (Aug. 12, 2009), http://www.nytimes.com/2009/08/13/world/13foggo.html?pagewanted=all&_r=0; Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST (Nov. 2, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/01/AR2005110101644.html>.

²¹⁹ Richard Owen Rome, *23 CIA Agents are Sentenced over 'Extraordinary rendition' Kidnap; Italy*, SUNDAY TIMES (London), (November 5, 2009), <http://www.timesonline.co.uk/tol/news/world/europe/article6903439.ece>.

²²⁰ Richard Norton-Taylor & Ian Cobain, *Government to Compensate Torture Victims as Official Inquiry Launched: PM Moves to Ensure Courts Will no Longer be Able to Disclose Evidence About British Complicity in Torture*, GUARDIAN (London) (July 6, 2010), <http://www.guardian.co.uk/law/2010/jul/06/government-to-compensate-torture-victims-inquiry>.

²²¹ See, e.g., Elisabetta Povoledo, *High Court in Italy Backs Convictions for Rendition*, N.Y. TIMES, Sept. 19, 2012, <http://www.nytimes.com/2012/09/20/world/europe/rendition-convictions-of-23-americans-upheld-in-italy.html?ref=extraordinaryrendition>; Stephen Grey & Don Van Natta, *Thirteen With the CIA Sought by Italy in a Kidnapping*, N.Y. TIMES, June 25, 2005, <http://www.nytimes.com/2005/06/25/international/europe/25milan.html?pagewanted=all>.

government has stated that the policy is not to deport where it is more likely than not that the individual will be subjected to torture or ill-treatment.²²² However, the government has declined to make its assurances public and reiterated that the decision to deport should not be subject to judicial intervention, which should hardly be seen as capitulation.²²³ Prior to *Boumediene* and *Khouzam*, the courts had produced a mismatched tapestry of uncertain precedent, providing no clear indication as to whether assurances should be justiciable or not;²²⁴ further clarification by the judiciary was direly needed.

The three Executive Orders signed by the Obama Administration in January 2009 heralded a change in terms of resettlement of Guantánamo detainees, yet these resettlement policies have not secured closure of the camp.²²⁵ A report by the Special Task Force determined that the State Department should be responsible for evaluating assurances in all instances²²⁶ and that monitoring mechanisms should be established or improved.²²⁷ Meaningful changes have yet to be seen as a result of this policy.

The removal policies and practices of the United States remain mired in uncertainty, and the Obama administration has been repeatedly forced to capitulate to the demands of a recalcitrant Congress.²²⁸ Similarly, the approach of other States is by no means satisfactorily established.²²⁹ There is no real international consensus as to the use of DWA.²³⁰ Criticisms are ubiquitous and further guidelines are direly needed.²³¹ Further

²²² HUM. RTS. WATCH, *supra* note 7, at 1, 31 (citing District of Columbia, Mahmoad Abdah, et. al v. George W. Bush, Civil Action No 04-CV-1254 (HHK), Respondents' Memorandum in Opposition to Petitioners' Motion for Order Requiring Advance Notice of any Repatriations or Transfers from Guantánamo, 8 March 2005).

²²³ See *Declaration of Clint Williamson* pursuant to 28 U.S.C. § 1746, ¶¶ 9-11, <http://www.state.gov/documents/organization/116359.pdf> accessed 14 April 2010. The Declaration was given by way of providing additional information regarding the use of assurances.

²²⁴ See, e.g., *Zalita v. Bush*, No. 05-1220, 2007 WL 1183910 (D.C. Cir. Apr. 19, 2007); *Belbacha v. Bush*, No. 05-2349, 2007 WL 2422031, at *2. (D.D.C. July 27, 2007).

²²⁵ See Exec. Order No 13491, 74 Fed Reg 4893 (Jan. 22, 2009); Exec. Order No. 13492, 74 Fed Reg 4897 (Jan 22, 2009); Exec. Order No. 13493, 74 Fed Reg 4901 (Jan. 22, 2009).

²²⁶ Press Release, Department of Justice, Office of Public Affairs, Special Task Force on Interrogations and Transfer Policies Issues Its Recommendations to the President (Aug. 24, 2009) (on file with author).

²²⁷ *Id.*

²²⁸ Obama, *supra* note 6.

²²⁹ See, e.g., *infra* text accompanying notes 298-99 for differences in the standard of proof required to engage the non-refoulement obligation. See *supra* text accompanying note 179 for the particular differences between judicial supervision between the U.K. and U.S. responses. In respect of divergent European practices, see the judgment of the European Court of Human Rights in *Qatada*, ¶189. *Othman (Abu Qatada) v. U.K.*, HUDOC, <http://www.echr.coe.int> (last visited Nov. 1, 2012). See particularly the conclusion that the U.K. assurance was "superior in both its detail and its formality to any assurances which the Court has previously examined" *Id.* at ¶194.

²³⁰ See sources cited *supra* note 230 and accompanying text.

²³¹ While guidelines for the State Department appear to exist and exhibit similarities to the

international dialogue is essential, and through negotiations between the European Union and the United States it may be possible to make significant changes to a DWA regime for terrorist suspects. This suggestion has been previously proposed but has never come to fruition at European or international levels.²³²

IV. ADDRESSING CRITICISMS OF ASSURANCES

With the experience of recent European jurisprudence, there is considerable merit in developing MOU or a regime that promotes the use of individual assurances.²³³ The *Chahal* and *Saadi* judgments cause problems for governments in terms of certainty of human rights compliance,²³⁴ and assurances have attracted fierce criticism from academics²³⁵ and NGOs.²³⁶ The Committee Against Torture has expressed concern regarding the U.K. use of assurances.²³⁷ Before suggestions for change can be proposed, it is first necessary to address the detail of these varied, complex, and overlapping criticisms. Such criticisms will be

European and U.K. requirements, there are marked concerns as to their use in practice, particularly since there is no guaranteed oversight of these executive practices. See the discussion of John Bellinger's statement to Congress. COLUMBIA LAW SCHOOL HUMAN RIGHTS INSTITUTE, *supra* note 155, at 34–35.

²³² *Id.*

²³³ Prior to *Qatada v. U.K.*, ¶189, the courts had grappled with the legality of specific assurances based on a number of factors. These factors were summarized by the European Court of Human Rights, which provides a useful starting point for the crystallization of future guiding principles.

²³⁴ Richard Ford, *European Judges Thwart Attempts to Deport Foreign Terrorist Suspects*, SUNDAY TIMES (London), Feb. 29, 2008, <http://www.timesonline.co.uk/tol/news/politics/article3455996.ece> (the government expressed 'disappointment' with the *Saadi* ruling).

²³⁵ See, e.g., Martin Jones, *Lies, Damned Lies and Diplomatic Assurances: The Misuse of Diplomatic Assurances in Removal Proceedings*, 8 EUR. J. MIGRATION & L. 9, 38 (2006) ("[D]iplomatic assurances exist at the crossroads of international law, between the state centered model of treaties and the modern human rights model. Unfortunately, as an odd hybrid of both models, diplomatic assurances provide the worst of both systems."). See also David McKeever, *The Human Rights Act and Anti-terrorism in the UK: One Great Leap Forward by Parliament, but are the Courts Able to Slow the Steady Retreat that has Followed?* PUB. L. 110, 123-24 (2010); DAVID BONNER, EXEC. MEASURES, TERRORISM AND NAT'L SEC. (Aldershot 2007). Conversely, see the supportive account of the U.K. deportation regime (largely from the perspective of HM Government), *contra* Jennifer Tooze, *Deportation with Assurances: The Approach of the UK Courts* PUB. L. 362 (2010); Kate Jones, *Deportation with Assurances: Addressing Key Criticisms* 57 INT'L & COMP. L.Q. 183 (2008).

²³⁶ See, e.g., Liberty and JUSTICE Joint Submission, *UK Compliance with the UN Convention Against Torture Joint Committee on Human Rights* (Sept. 2005); *Id.* ¶ 7 ("[A] clear consensus among international legal experts that the use of diplomatic assurances are not an effective safeguard against the risk that a returned person will be subject to torture or inhuman or degrading treatment by or in the receiving state."). The relevant arguments propounded by Human Rights Watch, Liberty and Justice were summarized in a Canadian case by de Montigny J, sitting in the Federal Court of Canada. *Lai v. Canada (Minister of Citizenship and Immigration)* 2007 F.C. 361, ¶ 63-64, 132–34. See also Amnesty Int'l, Human Rights Watch & Int'l Comm'n of Jurists, *Reject Rather than Regulate: Call on Council of Europe Member States not to Establish Minimum Standards for the use of Diplomatic Assurances in Transfers to Risk of Torture and Other Ill-Treatment*, AI Index IOR 61/025/2005 (Dec. 2005).

²³⁷ Comm. Against Torture, *Conclusions and Recommendations: United Kingdom of Great Britain and Northern Ireland*, U.N. Doc. CAT/C/CR/33/3 (Dec. 10, 2004).

considered discretely, but this is an artificial exercise and a holistic view of the arguments should ultimately be taken.²³⁸

A. *Assurances Undermine the Jus Cogens Nature of the Prohibition of Torture, Inhuman and Degrading Treatment and Punishment*

The UN Commission on Human Rights has asserted that “the mere fact that such assurances are sought is arguably a tacit admission by the sending State that the transferred person is indeed at risk of being tortured or ill-treated,”²³⁹ and the UN Commissioner has stated that “[g]iven the absolute obligation of States not to expose any person to the danger of torture by way of extradition, expulsion, deportation or other transfer, diplomatic assurances should not be used to circumvent the non-refoulement obligation.”²⁴⁰ There appears to be increasingly popular, political, and judicial willingness to discuss possible exceptions to the prohibition.²⁴¹ In a U.K. context, this could be said to be reflective of the government’s successive attempts to limit or reverse *Chahal* in order to allow the State to engage in a risk balancing exercise.²⁴² Similarly, the approach of the United States to require a “more likely than not” possibility of torture or ill-treatment to be established “more likely than not” does not appear to represent an affirmation of the *jus cogens* doctrine.²⁴³ Perhaps even more significantly, the Supreme Court of Canada in *Suresh v Canada*²⁴⁴ caused consternation²⁴⁵ when it declared that a balancing act was appropriate between the State’s genuine interest in combating terrorism and protecting public security, against a constitutional commitment to liberty and fair process.²⁴⁶ The Court iterated that usually

²³⁸ K. Jones, *supra* note 27, at 185–92. Ms. Jones uses a similar format, defending such criticisms from the perspective of HM Government. The present work draws on wider research to examine many of these points in turn, as well as others exposed by the analysis. It should be noted that the conclusions drawn, particularly in relation to the first criticism, are markedly different to that of Jones; likewise, it should be observed that where appropriate, the key criticisms have been amalgamated so as to allow more detailed analysis.

²³⁹ Robert K. Goldman, U.N. Comm’n on Human Rights, *Report of the Independent Expert on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, 56 U.N. Doc. E/CN.4/2005/103 (Feb. 7, 2005).

²⁴⁰ *Id.* ¶ 61.

²⁴¹ M. Jones, *supra* note 27, at 9.

²⁴² See the sentiment captured during Parliamentary debate: 457 Parl. Deb., H.C. (6th ser.) (2007) 92; 692 Parl. Deb., H.L. (5th ser.) (2007) 1237. See also JOINT COMMITTEE ON HUMAN RIGHTS, THE UN CONVENTION ON TORTURE, 2005-6, H.L. 185-II, H.C. 701-II, at 24–26.

²⁴³ See Aoife Duffy, *Expulsion to Face Torture? Non-refoulement in International Law*, 20 INT’L J. REFUGEE L. 373, 389 (2008); see also *infra* text accompanying note 321.

²⁴⁴ *Suresh v. Canada* (Minister of Citizenship and Immigration) [2002] 1 S.C.R. 3 (Can.) at 37 ¶ 58.

²⁴⁵ Manfred Nowak, *Challenges to the Absolute Nature of the Prohibition of Torture and Ill-Treatment*, 23 NETH. Q. HUM. RTS. 674, 684 (2005).

²⁴⁶ *Suresh*, 1 S.C.R. ¶ 58. The Court’s decision in *Suresh* was in stark contrast to the approach adopted in *Saadi*, 49 E.H.R.R. ¶ 135-36.

the balance will “come down against expelling a person to face torture elsewhere”²⁴⁷ but did not conclude that the non-refoulement obligation had attained *jus cogens* status.²⁴⁸ Instead, the Court considered that the “better view” was that international law rejects deportation to torture, even where national security interests are at stake.²⁴⁹ The Court continued to state that “[w]e do not exclude the possibility that in exceptional circumstances, deportation to face torture might be justified.”²⁵⁰ This position was condemned internationally,²⁵¹ yet it nonetheless indicates an increased willingness to overlook the *jus cogens* nature of the prohibition.

A further tenet to this first criticism relates to the fact that there are documented instances in which assurances have been given and individuals have allegedly been subjected to torture upon their return.²⁵² These have been seized on by critics of the regime²⁵³ and used to undermine its *jus cogens* attribute; if even one assurance has been broken, it could be argued that assurances do not provide a reliable mechanism for preventing ill-treatment or torture. There is a distinct tension as to how these two principles can be reconciled. On the one hand, it is argued that a State which recognizes that assurances have been breached and yet persists in their creation is not embracing the *jus cogens* nature of the prohibition of torture, while on the other hand, it is contended that assurances themselves are designed to ensure that a State complies with its international obligations.²⁵⁴ These principles appear to be mutually exclusive.

The reason that these principles seem irreconcilable is as much due to political rhetoric as it is with legal norms. Condemnation of torture and ill-treatment by the State itself or its agents is prohibited *jus cogens erga*

²⁴⁷ *Suresh*, 1 S.C.R. ¶ 58.

²⁴⁸ (“Although this Court is not being asked to pronounce on the status of the prohibition on torture in international law, the fact that such a principle is included in numerous multilateral instruments, that it does not form part of any known domestic administrative practice, and that it is considered by many academics to be an emerging, if not established peremptory norm, suggests that it cannot be easily derogated from.”) *Suresh*, 1 S.C.R. ¶ 65.

²⁴⁹ *Id.* ¶ 75.

²⁵⁰ *Id.* ¶ 78.

²⁵¹ H. R. Comm., *Concluding Observations of the Human Rights Comm.: Canada*, ¶ 15, U.N. Doc. CCPR/C/CAN/CO/5 (Apr. 20, 2006). See also Int’l Comm’n of Jurists, *Assessing Damage, Urging Action: Rep. of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and H. R.* (2009). (“The Panel believes that governments claiming to ‘balance’ the rights of the individual at risk of torture upon return and the supposed needs of society as a whole are working on a false premise [The balancing of rights] is not . . . a relevant consideration when there is a risk of torture: all international law places an absolute prohibition on torture.”) *Id.* at 103.

²⁵² Liberty and JUSTICE Joint Submission, *supra* note 237, ¶ 12. See *Agiza v. Sweden*, Rep. of the Comm. against Torture, 60th Sess., Nov. 16-26, 2004, Supp. No. 44, A/60/44, ¶¶ 13.2 – 13.17 (2005) (finding that Sweden had violated the Convention).

²⁵³ K. Jones, *supra* note 27, at 188 (Criticism No. 3).

²⁵⁴ *Id.* at 185. Jones opines that such criticisms are “simply wrong. The U.K.’s policy of DWA is a way of complying with its human rights obligations, not avoiding them.” See also *Qatada*, HUDOC, <http://www.echr.coe.int>, (last visited Nov. 1, 2012). (comments of SIAC).

omnes.²⁵⁵ By definition, this means that the prohibition imposes obligations towards all members of the international community, whether or not they have ratified the relevant convention.²⁵⁶ NGOs are understandably opposed to any notion of the prohibition of torture attracting a lesser degree of international protection,²⁵⁷ and a departure from this stance would be abhorrent.²⁵⁸ The *jus cogens* status of the non-refoulement obligation, however, that is far less certain. NGOs have stressed that it is so.²⁵⁹ Others have postulated that “due to the absolute nature of the prohibition of torture or inhuman or degrading treatment, formal assurances cannot be sufficient to permit expulsions where a risk is nonetheless considered to remain.”²⁶⁰ The opinion of academics generally appears to be that non-refoulement is emerging as a new *jus cogens* norm,²⁶¹ if it has not already assumed that status,²⁶² but this is by no means settled.

The Vienna Convention defines a “peremptory norm,” or *jus cogens* norm, as a “norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”²⁶³ A treaty which conflicts with such a norm is void.²⁶⁴ Peremptory norms are unconditional in character,²⁶⁵ link the entire international community, and cannot be bilaterally limited.²⁶⁶

²⁵⁵ Prosecutor v. Furundžija, Case No. IT-95-17/1, (Int’l Crim. Trib. for the Former Yugoslavia 2002, reprinted in 121 INT’L L. REP. 213, 215 (Sir Elihu Lauterpacht ed., 1954). As to the nature of peremptory norms, see JORDAN J. PAUST, JON M. VAN DYKE & LINDA A. MALONE, INTERNATIONAL LAW AND LITIGATION IN THE U.S. 61–63 (2d ed. 2005).

²⁵⁶ ALEXANDER ORAKHELASHVILI, PEREMPTORY NORMS IN INTERNATIONAL LAW 59 (2006). (Note the exhaustive commentary as to *jus cogens* norms by Orakhelashvili, in particular with regard to the contention that all human rights are part of *jus cogens*, and one must differentiate between *jus cogens* rights and those which have acquired the status of a peremptory norm. Since a detailed analysis of these arguments is beyond the scope of this article, *jus cogens* will be used throughout to denote a *jus cogens* right that is also a peremptory norm.)

²⁵⁷ HUM. RTS. WATCH, *supra* note 7, at 25–26, 47, 78.

²⁵⁸ ALAN M. DERSHOWITZ, SHOUTING FIRE: CIVIL LIBERTIES IN A TURBULENT AGE 470–77 (2002). Although, note the (controversial) extensive work critiquing this position by Dershowitz, in particular making an argument for judicially-sanctioned torture.

²⁵⁹ HUM. RTS. WATCH, *supra* note 7, at 13. See also the submissions of Justice & Human Rights Watch and Liberty, intervening in RB [2009] U.K.H.L., *supra* note 73, at ¶¶ 2, 61, 63.

²⁶⁰ COMM’R FOR HUMAN RIGHTS, MR. ALVARO GIL-ROBLES, COMM’R FOR HUMAN RIGHTS: ON HIS VISIT TO THE UNITED KINGDOM, ¶ 29 (Comm DH (2005) 6) (Nov. 4–12, 2004).

²⁶¹ Farmer, *supra* note 160, at 2.

²⁶² Jean Allain, *The Jus Cogens Nature of Non-Refoulement*, 13 INT’L J. REFUGEE L. 533, 538–42 (2001) (arguing that *non-refoulement* has assumed the status of *jus cogens*).

²⁶³ Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 18. Of course, it would be misleading to state that no deviation from this stance has occurred since its inception. Some authors consider this definition incomplete for that reason. Farmer, *supra* note 163, at 23.

²⁶⁴ Vienna Convention on the Law of Treaties, *supra* note 264, at art. 52.

²⁶⁵ ORAKHELASHVILI, *supra* note 257, at 59.

²⁶⁶ *Id.* at 38–40.

While Orakhelashvili accepts that norms cannot be differentiated, it is suggested that the absolute character of such a norm relates not to its scope but to its normative quality.²⁶⁷ Torture may be prohibited absolutely, but the extent of the activity that comprises torture is open to interpretation.²⁶⁸ It has been suggested that non-refoulement has a similar basis²⁶⁹ and has been “firmly established” as a peremptory norm.²⁷⁰ The fact that the non-refoulement obligation is un-derogable provides strong evidence, but not conclusive proof, that it constitutes a peremptory norm.²⁷¹

Drawing on these principles, Farmer argues that the status of non-refoulement has now been widely accepted as a peremptory norm,²⁷² citing the advisory opinions of the United Nations High Commission on Refugees as affirmation of the point.²⁷³ It has been contended that a *jus cogens* norm has been accepted by the international community as a whole and that no derogation is permitted²⁷⁴ but that rigorous conformity is not required in order for a *jus cogens* norm to emerge.²⁷⁵ If the non-refoulement obligation is *jus cogens*, States cannot transgress from it in any way,²⁷⁶ implying that States cannot enact legislation that may result in refoulement.²⁷⁷

The less popular view amongst scholars is that it is uncertain whether the non-refoulement obligation has yet attained *jus cogens* status.²⁷⁸ It has been argued that little is “likely to be achieved” by regarding the non-refoulement principle as peremptory.²⁷⁹ This view has been criticized²⁸⁰ since it implies that if the principle is not peremptory. “States will be able to override it by treaties in which they will provide for the legality of the return of persons to the countries where *serious violations* of human rights *may* be faced.”²⁸¹ This criticism is self-defeating on the basis of its two central tenets. First, there is some latitude in terms of the nature of the ill-treatment itself vis-à-vis the distinction between ill-treatment and torture.²⁸² Next, there is a varying degree of risk required, or a varying

²⁶⁷ *Id.* at 68.

²⁶⁸ *Id.* at 69–70.

²⁶⁹ *Id.* at 69.

²⁷⁰ *Id.* at 55.

²⁷¹ ORAKHELASHVILI, *supra* note 257, at 58.

²⁷² Farmer, *supra* note 160, at 28.

²⁷³ *Id.*

²⁷⁴ Allain, *supra* note 264, at 538.

²⁷⁵ *Id.* at 540.

²⁷⁶ *Id.* at 533–34.

²⁷⁷ Farmer, *supra* note 160, at 30.

²⁷⁸ See GUY S. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 168 (2d ed. 1996).

²⁷⁹ *Id.*

²⁸⁰ ORAKHELASHVILI, *supra* note 257, at 55.

²⁸¹ *Id.* (emphasis added).

²⁸² See *infra* text accompanying notes 292–295.

standard of proof, before the non-refoulement obligation is triggered.²⁸³

It is possible to draw a distinction between the principle of non-refoulement as it applies under the Refugee Convention and as it applies under other international documents, including CAT.²⁸⁴ Following this reasoning,²⁸⁵ the argument that non-refoulement has acquired *jus cogens* status is “less than convincing,”²⁸⁶ since such a conclusion would suggest that “no exceptions would be considered under any circumstance”²⁸⁷ and this is clearly not the case.²⁸⁸ There remain exceptions to the non-refoulement principle in the context of the Refugee Convention,²⁸⁹ but there are also significant differences in interpretation of the obligation itself. Article 3 of CAT applies only to torture, not to other ill-treatment, and its interpretation by the ECtHR lacks universal application.²⁹⁰ In order for treatment to be characterized as torture, the ECtHR will assess its degree of severity,²⁹¹ yet Article 3 of CAT has attracted no such interpretive guidance.²⁹² It has been seen that the ECtHR considered that ill-treatment other than torture that is nonetheless contrary to Article 3 ECHR will prevent removal,²⁹³ which is not the case under CAT.²⁹⁴

Courts have accepted that a degree of risk is permissible before the non-refoulement obligation is triggered, which in itself could appear to contradict the contention that it has *jus cogens* status. It is instructive to note that NGO guidance and analysis tends to overlook the risk assessment

²⁸³ *Id.*

²⁸⁴ Duffy, *supra* note 244, at 387. Duffy conducts a thorough analysis of international refugee law, various human rights treaties, UNHCR Conclusions, UN General Assembly Resolutions and other regional declarations, and concludes that the obligation forms part of customary international law. Duffy continues to state that “A cynical response to the UNHCR policy *document* would question UN preoccupation with the principle of *non-refoulement* as defined by the Refugee Convention, which is obviously subject to significant exceptions and discriminations. Perhaps this is why some legal scholars push for its recognition as a principle of *jus cogens*—in order to liberate the principle of *non-refoulement* from its restrictive Refugee Convention definition.” *Id.* (emphasis added).

²⁸⁵ William Schabas, Non-Refoulement, in Final Report: Expert Workshop on Human Rights and Int’l Co-operation in Counter-Terrorism, OSCE Office for Democratic Institutions and Human Rights and UN Office of the High Comm’r (Nov. 15–17, 2006), available at <http://www.osce.org/odihr/24170>.

²⁸⁶ Duffy, *supra* note 244, at 373.

²⁸⁷ *Id.* at 389.

²⁸⁸ As Orakhelashvili states “peremptory norms are peremptory and non-derogable not as aspirations, but as norms.” ORAKHELASHVILI, *supra* note 257, at 78.

²⁸⁹ Farmer, for example, questions whether these exceptions have become obsolete as the non-refoulement obligation has ascended to *jus cogens* status. Note that this point is made in a refugee (non-terrorism related) context. See Farmer, *supra* note 160, at 32.

²⁹⁰ Duffy, *supra* note 244, at 389.

²⁹¹ Ireland v. United Kingdom, App. No. 5310/71, 2 Eur. Ct. H.R. 25, 79–80 (1978).

²⁹² Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res 39/46, Art. 3, U.N. Doc A/RES/39/46 (Dec. 10).

²⁹³ See *infra* text accompanying notes 85–86.

²⁹⁴ Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 294.

criterion;²⁹⁵ it is bewildering that the courts have not seen such a contradiction.²⁹⁶ In terms of the standard of proof required before the non-refoulement obligation is triggered, there is considerable variation in practice.²⁹⁷ The European jurisprudence requires that there is the absence of a real risk of torture or ill-treatment, while the U.S. approach is predicated on a considerably higher standard, effectively the equivalent of the balance of probabilities.²⁹⁸ An alternative standard of “real and substantial risk”²⁹⁹ has also been proposed.

Despite such variance, the ECtHR has indicated that it accepts that assurances have the potential to satisfy the demands of Article 3 ECHR,³⁰⁰ and there have been no ripples of dissent from the Supreme Courts of comparable jurisdictions in the United States, Canada or Australia.³⁰¹ It is contended that the way in which the non-refoulement obligation has been applied, therefore, shows exactly the kind of “differentialism” that cannot be representative of a peremptory norm.³⁰² Allied to this are other difficulties; the *raison d’être* of the Optional Protocol to the Convention Against Torture (OPCAT) is to allow for monitoring to ensure that refoulement does not occur.³⁰³ OPCAT naturally lends little credence to

²⁹⁵ See, e.g., AMNESTY INT’L, DANGEROUS DEALS: EUROPE’S RELIANCE ON “DIPLOMATIC ASSURANCES” AGAINST TORTURE 6 (2010), available at http://www.amnesty.org.uk/uploads/documents/doc_20299.pdf. The document refers to the fact that the non-refoulement obligation relates to a transfer where there is a “risk” of torture, not a “real” or “substantial” risk. Implicitly it appears to suggest that any degree of risk is impermissible. *Id.*

²⁹⁶ See *Y v. Sec’y of State for the Home Dep’t*, [2005], UKSIAC 36/2005 [390], (SIAC held that the European jurisprudence shows that assurances can “reduce the risk of a breach of Article 3 to below the threshold level . . . a judgment as to [assurances’] effectiveness in the light of all the circumstances of the case and country is called for.”); see also *RB (Algeria) v. Sec’y of State for the Home Dep’t*; *OO (Jordan) v. Sec’y of State for the Home Dep’t*, [2009] UKHL 10, [114] (Lord Phillips held “I do not consider that these decisions establish a principle that assurances must eliminate all risk of inhuman treatment before they can be relied upon.”); see also *Shamayev v. Georgia and Russia*, App. No. 36378/02, Eur. Ct. H.R. 352 (2005).

²⁹⁷ See *Bruin & Wouters*, *supra* note 71, at 26.

²⁹⁸ See *Duffy*, *supra* note 244, at 378.

²⁹⁹ Int’l Comm’n of Jurists, *supra* note 252, at 190.

³⁰⁰ *Chahal v. United Kingdom*, App. No. 22414/93, Eur. Ct. H.R. [147–148] 36–37 (1996); see generally *Mamatkulov and Askarov v. Turkey*, App. Nos. 46827/99 and 46951/99, Eur. Ct. H.R. 20–25 (2005); *Qatada v. UK*, HUDOC, <http://www.echr.coe.int> (last visited Nov. 1, 2012).

³⁰¹ For Canada, see *Suresh v. Canada (Minister of Citizenship and Immigration)* [2002] 1 S.C.R. 3 (Can.) at 66, ¶ 125. In the United States, there have as yet been no substantive challenges to the process; See Fourth Periodic Report of the United States to United Nations Committee on Human Rights Concerning the International Covenant on Civil and Political Rights (Dec. 30, 2011), available at <http://www.state.gov/j/drl/rls/179781.htm#art5>. The High Court in Australia has not been required to rule on any of these issues.

³⁰² *ORAKHELASHVILI*, *supra* note 257, at 68.

³⁰³ “The objective of the present Protocol is to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.” Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1, G.A. Res. 57/199, U.N. Doc. A/RES/57/199 (Dec. 18, 2002).

the argument that non-refoulement is *jus cogens*, given the comparatively low extent of international ratification,³⁰⁴ and the fact that the protocol is *optional*.³⁰⁵

These issues will no doubt continue to be disputed by jurists. Most scholars have argued that the principle of non-refoulement has *jus cogens* status³⁰⁶ and would contend that the “existence of exceptions to the principle of non-refoulement indicate the boundaries of discretion as opposed to any fundamental objections to the principle itself.”³⁰⁷ Yet there is a more obvious impediment to non-refoulement gaining preemptory status. Extraordinary rendition has been castigated as an extra-judicial tool that has resulted in torture and ill-treatment.³⁰⁸ Complicity in its practice has been well documented in States across the world,³⁰⁹ presenting an impasse of considerable magnitude to those who would seek to argue for the current preemptory nature of *non-refoulement*.³¹⁰ It is difficult to maintain the defense that such practices provide confirmation of the *jus cogens* rule; there must come a point when a plethora of exceptions serve to terminally undermine it.³¹¹

The analysis of this part has identified several possibilities. First, the *non-refoulement* obligation may be classified as *jus cogens*.³¹² Accepting this in principle does not preclude the use of assurances, since it is argued that they have the potential to comply with the obligation.³¹³ Some have suggested that the use of assurances adds a layer of protection above that offered by *jus cogens*.³¹⁴ Second, non-refoulement may be classified as *jus cogens* (as scholars and NGOs would advocate), but by recognizing the need and negotiating for assurances, the Refugee Commission has

³⁰⁴ Only 74 states have either signed or ratified OPCAT, and of those, only 54 have ratified. See *generally id.*

³⁰⁵ The United Nations Human Rights Council has strongly stated that other states should ratify the Optional Protocol in its analysis of rendition and detention: U.N. Human Rights Council, *supra* note 216, at 133.

³⁰⁶ See *generally* Allain, *supra* note 264.

³⁰⁷ GOODWIN-GILL, *supra* note 280, at 353.

³⁰⁸ See *generally* AMNESTY INT’L, *supra* note 296, at 1.

³⁰⁹ *Id.*

³¹⁰ See Duffy, *supra* note 244, at 390.

³¹¹ It should be observed here that taking this to its logical conclusion, an argument could be made that the prohibition of torture itself could not be *jus cogens*, particularly in light of the alleged activities of the US government since 9/11 at Guantánamo Bay and secret detention facilities. See, e.g., Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, Conclusions and recommendations of the Committee against Torture, [14-18], U.N. Doc CAT/C/USA/CO/2. But the worldwide condemnation that such activities have attracted could perhaps confirm the existence of the rule under Allain’s and Goodwin-Gill’s analysis.

³¹² See Nina Larsaeus, *The Use of Diplomatic Assurances in the Prevention of Prohibited Treatment* 9 (Univ. of Oxford, Refugee Studies Ctr., Working Paper No. 32, 2006), available at http://www.rsc.ox.ac.uk/publications/working-papers-folder_contents/RSCworkingpaper32.pdf.

³¹³ See *id.*

³¹⁴ See *id.* at 8.

argued³¹⁵ that recognition is given to the existence of the peremptory norm by these States.³¹⁶ This argument may appear counterintuitive,³¹⁷ but many, including the U.K. government, have accepted it.³¹⁸ The third possibility is that the non-refoulement obligation has not yet fully ascended to *jus cogens* status, since there has been inconsistent observation of the norm in practice and since there are myriad examples of instances in which it has been ignored. Perhaps this is currently the most likely possibility, even if it is the least politically palatable.

Taking these arguments to their logical conclusion, what is needed is further international consensus as to the standard of protection afforded by the non-refoulement principle. The obligation should be finally allowed to attain its status as a peremptory norm, yet this can only meaningfully be achieved when international agreement has been reached as to its definition. It should be possible to redefine non-refoulement obligation itself, from the current bar where there are “substantial grounds for believing that he would be in danger of being subjected to torture”³¹⁹ to something that is universally interpreted.³²⁰ There could be clear identification of the fact that the exceptions to the Refugee Convention have been trumped by this emerging norm. Considerable pressure should be put on States to ratify OPCAT; the likelihood of this being achieved will increase when an end is put to extraordinary rendition. The legal and political difficulties in reaching an agreement on such a definition are significant, and indeed may be insurmountable.³²¹ Nonetheless, this should not prevent States from attempting to reach some acceptable agreement.

Removal of an individual to a State to face torture is prohibited.³²² However, the legal reality is that not *all* risk of torture must be eliminated before a deportation can be said to comply with the non-refoulement obligation.³²³ This article rejects the contention that assurances cannot be

³¹⁵ See, e.g., U.N. High Commissioner for Refugees, *The Principle of Non-Refoulement as a Norm of Customary International Law*. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93 (Jan. 31 1994), <http://www.unhcr.org/refworld/docid/437b6db64.html>.

³¹⁶ *Id.*

³¹⁷ Duffy, *supra* note 244, at 386–87.

³¹⁸ K. Jones, *supra* note 27, at 189.

³¹⁹ CAT, *supra* note 26, at art. 3, ¶ 1.

³²⁰ In terms of the existence of practical problems in respect to the burden of proof, this point is briefly alluded to in Bruin & Wouters, *supra* note 72, at 26.

³²¹ Achieving even European consensus as to a framework for assurances has so far proven elusive; and clearly the ECtHR would be unwilling to lower the risk threshold to that, for example, of the US standard, since this was unsuccessfully argued in *A v. The Neth.*, HUDOC, <http://www.echr.coe.int>. (last visited Nov. 1, 2012). With regard to the fact that a European framework may be poised for future development, see Pillay, *supra* note 175, at 38.

³²² CAT, *supra* note 26, at art. 3, ¶ 1.

³²³ *RB v. Sec’y of State for the Home Dep’t*, [2009] UHKL 10, [242]. “In this field there can be no absolute guarantees that assurances, even at the highest level, will be adhered to. But the Strasbourg jurisprudence does not require them to achieve that standard. The words ‘substantial’ and ‘real risk’

used without compromising international obligations around the prohibition of torture. Instead, what is proposed is a procedure for assurances that can be adopted in order to reduce this risk to an acceptable level. The standards required of such an assurance model can be particularly rigorous.³²⁴

B. Non-Legally Binding Assurances are Not Effective (or Reliable) Since They May Not Be Observed by States

There have been criticisms that assurances, due to their political or quasi-legal nature, are not legally enforceable³²⁵ and therefore do not offer adequate protection. Larsaeus gives a comprehensive account of the arguments around international enforceability and the difference between legally binding treaties and non-enforceable political promises.³²⁶ It is commonly understood that assurances are legally binding under international law if they amount to treaties.³²⁷ Some academics have postulated that all MOU are treaties and therefore binding,³²⁸ while others are not so certain.³²⁹ It has been contended that in order to be effective, assurances should be legally binding.³³⁰ NGOs such as Human Rights Watch have disputed the efficacy of mere political assurances, perhaps because there are no competitive market forces at play on an international stage, leading the costs of noncompliance to be either low or nonexistent.³³¹ From an analysis of the language of the U.K. assurances, there is broad agreement that they are not intended to be legally binding.³³²

show that the court's approach is essentially a practical one that strikes a balance between the interests of the community and the protection of the individual." *Id.*

³²⁴ States cannot balance the risk posed by an individual against the threat to the community. *See Saadi v. Italy*, HUDOC, <http://echr.coe.int> (last visited Nov. 1, 2012). An individual cannot be deported where there is a "real risk" of ill-treatment. *See Chahal v. U.K.*, App. No. 22414/93, Eur. Ct. H.R. 1832, 1855 (1996); *In the SIAC judgment in DD and AS v. Sec'y of State for the Home Dep't*, [2007] UKSIAC 50/2005 [275], the court considered expert evidence that it was "*well-nigh unthinkable*" that the assurance would not be honored by the Libyan government, but SIAC still reached the decision that based on all of the facts, there was a real risk of ill-treatment which precluded deportation. This was cited by the Court of Appeal, rejecting the appeal of the Secretary of State, and again by a later House of Lords. *See AS & DD v. Sec'y of State for the Home Dep't*, [2008] EWCA (Civ) 289 [24]; *RB v. Sec'y of State for the Home Dep't*, [2009] UHKL 10, [119].

³²⁵ M. Jones, *supra* note 27, at 28–29.

³²⁶ Larsaeus, *supra* note 313, at 22–23.

³²⁷ A treaty is a document "governed by international law." There must be an intention to create obligations under international law. *See Vienna Convention on the Law of Treaties*, 1155 U.N.T.S. 331, art. 2, para. 1(a).

³²⁸ *See* JAN KLABBERS, *THE CONCEPT OF TREATY IN INTERNATIONAL LAW* 8–9 (1996); *see also* Gregor Noll, *Diplomatic Assurances and the Silence of Human Rights Law*, 7 MELB. J. INT'L L. 104, 113 (2006).

³²⁹ ANTHONY AUST, *MODERN TREATY LAW AND PRACTICE* 26 (2000).

³³⁰ Larsaeus, *supra* note 313, at 22.

³³¹ Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 1938 (2002), *cited in* HUM. RTS. WATCH, *supra* note 7, at 21.

³³² HUM. RTS. WATCH, *supra* note 7, at 21. (Note that this does not necessarily preclude the

The U.K. government has not argued that the MOU that are currently in place have full legal force.³³³ This does not necessarily mean that assurances are ineffective.³³⁴

Accepting that U.K. MOUs are not intended to confer binding international legal principles on the sending or receiving State, the reliance on assurances takes place at a level over and above that attained by the relevant international obligations under CAT.³³⁵ There are multiple problems with this contention. First, it assumes that international obligations *viz* non-refoulement under CAT may be discharged without resorting to the use of assurances. The European jurisprudence has shown this to be questionable, if not unlikely. Second, it suggests that the assurances currently used by the United Kingdom comply with the non-refoulement obligation. Although the House of Lords has been satisfied,³³⁶ even a more definitive ECtHR ruling has not finally settled the issue.³³⁷ Third, it does not follow that a similar approach would be adopted by States interpreting CAT on an international stage, given the very different standards of protection conferred by the respective Conventions.³³⁸ Rather than accepting that U.K. assurances offer protection above that available multilaterally, a more pertinent question would be whether there are appropriate enforcement mechanisms in place to ensure *compliance*.

1. Enforcement

One of the central criticisms regarding the use of assurances, and their corresponding ineffectiveness, is in relation to the lack of adequate enforcement mechanisms.³³⁹ There is considerable evidence to suggest that States which had provided assurances still had a reputation for ill-treatment and/or torture.³⁴⁰ The legal value of assurances is questionable, and their justiciability on an international stage is even more so.³⁴¹ Nonetheless, an assurance that lacks legal enforceability is not necessarily

possibility that MOU are not legally binding, but it raises a significant doubt).

³³³ SIAC acknowledged as much in the context of the Jordan assurance, since if the MOU amounted to a treaty, and was therefore binding, it would have required Parliamentary approval by Jordan. The clear intention of both governments was therefore that it was not legally binding. *See* Qatada v. Sec'y of State for the Home Dep't, [2007] UKSIAC 15/2005 [500].

³³⁴ *See* Qatada v. UK, HUDOC, <http://www.echr.coe.int> (last visited Nov. 1, 2012).

³³⁵ Larsaeus, *supra* note 313, at 8.

³³⁶ RB (Alg.) (FC) and another v. Sec'y of State for the Home Dep't, [2009] UKHL 10 [129].

³³⁷ Qatada v. U.K., HUDOC, <http://www.echr.coe.int> (last visited Nov. 1, 2012).

³³⁸ *Infra* Part IV. A.

³³⁹ Liberty and JUSTICE, *supra* note 237, ¶¶ 17–20; *see also* Agiza v. Sweden, Report of the Comm. against Torture, 60th Sess., Nov. 16–26 2004, Supp. No. 44, A/60/44, at ¶ 13.4 (2005). “The procurement of diplomatic assurances, which, moreover, provided no mechanism for their enforcement, did not suffice to protect against this manifest risk.” *Id.*

³⁴⁰ Liberty and JUSTICE, *supra* note 237, ¶¶ 21–33.

³⁴¹ 8 C.F.R. § 1208.18(e) (2012.); *Id.* at § 208.18(e).

rendered redundant.³⁴² It is important to differentiate between *legal* enforcement and enforcement by other means, including political sanctions or other ramifications in the case of breach.³⁴³

Central to the U.K. government's assessment of the potential value of assurances is the strategy of placing assurances at the heart of a bilateral relationship between States.³⁴⁴ With regard to the argument that MOUs are invariably created with States with questionable human rights records and that such States would not comply with non-legally binding rules, Jones responds by noting that compliance by such States will:

[D]epend less on the legal status of a commitment and more on reasons and incentives they have to comply. Failure to comply with formal political commitments in an MOU or similar international instrument can do serious damage to diplomatic relations between the signatory States.³⁴⁵

In the United Kingdom, SIAC continues to scrutinize assurances on a case-by-case basis,³⁴⁶ and it may be thought that there is considerable force in Jones' argument that with such factual determinations as to assurances' reliability³⁴⁷ and with the appropriate scrutiny, right of appeal, and political and legal checks, assurances *can* be considered reliable safeguards.³⁴⁸ SIAC has formed the opinion that bilateral agreements do provide substantial protection against potential breaches, suggesting that the Commission considers, similarly to Larsaeus,³⁴⁹ that such agreements offer protection over the existing multilateral rights protection stemming from international law.³⁵⁰ The ECtHR has added further support to this

³⁴² *Qatada v. Sec'y of State for the Home Dep't*, [2007] UKSIAC 15/2005 [279, 293, 503].

³⁴³ *Id.* ¶ 507.

³⁴⁴ Note that "bilateral relationships" include relationships between states where there is one clear junior political (or economic) partner. It could be argued that the United States and the United Kingdom, for example, are in a very strong position to negotiate for forceful assurances with other states. The same may not be true of other (for example European) countries.

³⁴⁵ K. Jones, *supra* note 27, at 188.

³⁴⁶ That scrutiny has been criticized. See Eric Metcalfe, *The False Promise of Assurances Against Torture*, 6 JUSTICE J. 63, 78 (2009).

³⁴⁷ K. Jones, *supra* note 27, at 186.

³⁴⁸ *Id.*

³⁴⁹ Larsaeus, *supra* note 313, at 8.

³⁵⁰ In *Qatada*, SIAC questioned why it was "unclear why a bilateral agreement in the form of an MOU would be adhered to, where a multilateral human rights agreement with reporting arrangements has been breached," and continued, "The answer here as set out above is precisely that it is bilateral, and is the result of a longstanding and friendly relationship in which there are incentives on both sides to comply once the agreement was signed. The failure of those who regard these arrangements as unenforceable, in some asserted but not altogether realistic comparison with international human rights agreements, is a failure to see them in their specific political and diplomatic context, a context which

contention.³⁵¹

There is one criterion that must be considered on an international level before this can be achieved. Much has been said of the “bilateral relationship” needed between the sending and receiving States.³⁵² However, in many situations one party to a removal is subordinate to another.³⁵³ A consistent approach internationally, requiring the existence of such bilateral relationships over and above the multilateral framework, is impossible. Political promises are only effective where there is a political sanction for breach; the complex social, political, and economic factors at play in an international arena preclude the formation of a wholly uniform rubric.³⁵⁴ Once a successful bi-lateral relationship can be shown, and provided the nature of this relationship adds a sufficient degree of *political* enforceability, an assurance may be upheld.³⁵⁵ A tribunal such as SIAC, together with a robust appeals procedure, should be able to carry out this exercise and uphold an assurance only where its effectiveness has been established.³⁵⁶ SIAC has exposed assurances to intensive scrutiny in numerous cases.³⁵⁷

The effectiveness of assurances should therefore be questioned by an independent assessment of the political will and overall likelihood of a breach by either State. Thus enforceability in international terms has a different meaning than strictly legal enforceability; a more fitting international term may be compliance,³⁵⁸ which must be justiciable.

will vary from country to country.” *Qatada v. Sec’y of State for the Home Dep’t*, [2007] UKSIAC 15/2005 [508].

³⁵¹ *Qatada v. U.K.*, HUDOC, <http://www.echr.coe.int> (last visited Nov. 1, 2012).

³⁵² *Qatada v. Sec’y of State for the Home Dep’t*, [2007] UKSIAC 15/2005 [496, 503].

³⁵³ In respect of the Jordanian assurances, *see, e.g.*, *Qatada v. Sec’y of State for the Home Dep’t*, [2007] UKSIAC 15/2005 [278]. “In reaching this arrangement with the Government of Jordan, the UK Government had taken into consideration the long tradition of friendly relations between the two countries. It believed that placing the agreement in the context of the countries’ bilateral relations reinforced the commitment of both parties to respect it.” *See also id.* ¶ 508, “For our part, we have some difficulty in seeing why...it [is] unclear why a bilateral agreement in the form of an MOU would be adhered to, where a multilateral human rights agreement with reporting arrangements has been breached. The answer here ...is precisely that it is bilateral, and is the result of a longstanding and friendly relationship in which there are incentives on both sides to comply once the agreement was signed.”

³⁵⁴ SIAC has drawn comparisons, for example, with the assurances given and received between Sweden and Egypt and between the United States and Syria. *Id.* ¶ 496–497.

³⁵⁵ *See id.* at [495]; *RB v. Sec’y of State for the Home Dep’t*, [2009] UKHL 10 [126]; *Qatada v. UK*, HUDOC, <http://www.echr.coe.int> (last visited Nov. 1, 2012).

³⁵⁶ K. Jones, *supra* note 27, at 186.

³⁵⁷ Numerous SIAC decisions are referred to in the following analysis. *Outcomes 2007 Onwards*, Tribunals Judiciary of England and Wales, <http://www.siac.tribunals.gov.uk/outcomes2007onwards.htm> (last visited Nov. 27, 2012).

³⁵⁸ “[W]hilst it is true that there are no specific sanctions for breaches, and the MOU is certainly not legally enforceable, there are sound reasons why Jordan would comply and seek to avoid breaches,” *Qatada v. Sec’y of State for the Home Dep’t*, [2007] UKSIAC 15/2005 [507].

Observing these differences, Larsaeus analyzes the ways in which international relations may ensure compliance with assurances, discussing the use of both incentives and threats as a means to facilitate such compliance.³⁵⁹ Larsaeus also discusses the relevance of the degree of trust between sending and receiving States.³⁶⁰ These considerations will clearly vary on a case-by-case basis and will be determined by a variety of factors that govern the political relationship between the two States.

2. A Doctrine of Compliance

In order to ensure compliance, much will depend on the relationship between the sending and receiving State in terms of political will, trust, incentives, and threats.³⁶¹ It is instructive to examine relevant SIAC cases in which assurances have been challenged in order to study how weight has been given to the likelihood of compliance through an examination of the bilateral relationship. The “strength, duration and depth”³⁶² of such a bilateral relationship are key factors. There is a requirement for a “sound objective basis for believing that the assurances would be fulfilled.”³⁶³ As Lord Phillips has stated, this requires a “settled political will to fulfill the assurances allied to an objective national interest in doing so.”³⁶⁴ Jones lists pertinent examples as to the approach of the U.K. government and SIAC, addressing these briefly in order to see the various ways in which compliance may be facilitated and to demonstrate their relative advantages.³⁶⁵

First, there should be discussions between Heads of State or governments. This criterion is particularly important where there is a risk

³⁵⁹ Larsaeus, *supra* note 313, at 23.

³⁶⁰ *Id.* at 26–27.

³⁶¹ SIAC has demonstrated the importance of trust between the British Government and, for example, the Algerian Authorities. See *T v. Sec’y of State for the Home Dep’t*, [2010] UKSIAC 31/2005, [16]. This could be contrasted with the UK government’s reliance on trust in the Libyan regime; SIAC held that particular assurance was insufficient. See *DD and AS v. Sec’y of State for the Home Dep’t*, [2007] UKSIAC 42 and 50/2005, [334]; see also *Qatada v. Sec’y of State for the Home Dep’t*, [2007] UKSIAC 15/2005, [312].

³⁶² *Qatada v. Sec’y of State for the Home Dep’t*, [2007] UKSIAC 15/2005, [496]; see also *Qatada v. U.K.*, HUDOC, <http://www.echr.coe.int> (last visited Nov. 1, 2012). “The Court shares SIAC’s view, not merely that there would be a real and strong incentive in the present case for Jordan to avoid being seen to break its word but that the support for the MOU at the highest levels in Jordan would significantly reduce the risk that senior members of the GID, who had participated in the negotiation of the MOU, would tolerate non-compliance with its terms.” *Id.*

³⁶³ *RB v. Sec’y of State for the Home Dep’t*, [2009] UHKL 10, [23] (appeal taken from [2007] EWCA (Civ) 808). (Lord Phillips, citing the test adopted by Justice Mitting of SIAC).

³⁶⁴ *Id.*

³⁶⁵ K. Jones, *supra* note 27, at 187. Note that Jones’ account lists six, but these have been combined into four for the sake of clarity. Jones’ discussion is of the steps that are taken by the U.K. government, as opposed to suggestions for how to ensure compliance. SIAC is the arbiter in that case.

of breach by the security services or other agents of a receiving State.³⁶⁶ By invoking a top-down approach, a clear message is sent to agents of the receiving State that a breach of the assurance will not be tolerated. Senior level discussions were advocated in the U.S. case of *Khouzam v Ashcroft*, where the court held that “[t]he regulations require more than the mere forwarding of diplomatic assurances obtained by the State Department. They require *consultation at the highest levels of the Departments of State and Homeland Security.*”³⁶⁷ While the actions of uncontrollable security services or other personnel will remain a prevailing concern and represent a key consideration when it comes to the assessment of an assurance by the relevant tribunal,³⁶⁸ adopting such an approach should help to minimize this risk.³⁶⁹

Second, there should be detailed discussions at both the ministerial and operational level as to the practical meanings of such assurances;³⁷⁰ in this way, the literal “black letter” of the assurances themselves is supplemented by myriad guarantees and understandings that form part of the agreement.³⁷¹ This ensures that the existence of black letter promises does not result in a restrictive interpretation being placed on specific guarantees.³⁷² Linked to this should be a requirement to carry out a detailed inquiry as to what will happen to a deportee upon their return,

³⁶⁶ “In evaluating assurances by a foreign government, the Minister may also wish to take into account the human rights record of the government giving the assurances, the government’s record in complying with its assurances, and the capacity of the government to fulfill the assurances, particularly where there is doubt about the government’s ability to control its security forces.” *Suresh v. Canada* (Minister of Citizenship and Immigration), [2002] 1 SCR 3, [125]; *see* *Chahal v. U.K., HUDOC*, <http://www.echr.coe.int> (last visited Nov. 5, 2012).

³⁶⁷ *Khouzam v. Hogan*, 529 F. Supp. 2d 543, 558 (M.D. Pa. 2008) (emphasis in original).

³⁶⁸ *See, e.g.*, *QJ v. Sec’y of State for the Home Dep’t*, [2009] UKSIAC 84/2009, [23]. The notice taken by SIAC of an “isolated incident” in Algeria in which between thirty and eighty prisoners were stripped naked, beaten, kicked, beaten and threatened with sexual abuse. *Id.*

³⁶⁹ In the context of the Jordan assurances, *see, e.g.*, *Othman v. Sec’y of State for the Home Dep’t*, [2008] EWCA (Civ) 290, [362]. SIAC considered the actions of “quite senior” officers, who had sanctioned or turned a blind eye to torture, but held that this was mitigated by the King’s political power and prestige. *Id.*

³⁷⁰ This approach may be particularly important when dealing with states which are reluctant to “go beyond that which was strictly agreed to initially.” *See* *Sihali v. Sec’y of State for the Home Dep’t*, [2010] UKSIAC 38/2005, [22] (summarizing comments in respect of the Algerian promises of Mr. Layden, the Special Representative of the DWA regime for the Foreign and Commonwealth Office).

³⁷¹ While this would therefore appear to question the validity of the Algerian assurances, it is submitted below that these already should fall below the required standard due to the absence of independent monitoring (at least until OPCAT is ratified).

³⁷² Or, in the words of SIAC, “the assessment of the value and effectiveness of assurances is less a matter of their text . . . and more a matter of the domestic political forces which animate a government and of the diplomatic and other pressures which may impel its performance of its obligations, or lead to quick discovery and redress for any breach.” *DD and AS v. Sec’y of State for the Home Dep’t*, [2007] UKSIAC 42 and 50/2005, [319]. “[T]he political realities in a country matter rather more than the precise terminology of the assurances.” *Othman v. Sec’y of State for the Home Dep’t*, [2008] EWCA (Civ) 290, [495].

which will help to remove any potential ambiguity as to a deportee's treatment immediately on their return arguably the time in which a deportee is most at risk.³⁷³ There is a clear need for justiciability of these issues.

The third criterion is arguably the most important; assurances should be placed "at the heart of a bilateral relationship" so as to reinforce the severity of the consequences of a breach.³⁷⁴ This draws on the issues identified above in relation to incentives and sanctions, which may be trade related or otherwise political in nature.³⁷⁵ It is important that there is an independent arbiter ensuring that the issues are justiciable.³⁷⁶ One example would be the assurances provided by Algeria, upheld by SIAC and the House of Lords, partially due to the fact that Algeria wished to become a normally functioning civil society; breaching solemn political promises would be incompatible with such an aim.³⁷⁷

Fourth, the political relationship and potential ramifications of deportation to the individual should be considered.³⁷⁸ In some instances, the removal of individuals has attracted media scrutiny and captured the public interest;³⁷⁹ this may reduce the likelihood of a breach. There may also be accounts of treatment of previous deportees or detainees, which will naturally influence any decision.³⁸⁰

³⁷³ See, e.g., OPEN SOCIETY INSTITUTE, *The Global Campaign for Pretrial Justice, Pretrial Detention and Torture: Why Pretrial Detainees Face the Greatest Risk* (2010), <http://www.opensocietyfoundations.org/sites/default/files/summary-pretrial-detention-torture.20100409.pdf>.

³⁷⁴ *Qatada v. Sec'y of State for the Home Dep't*, [2007] UKSIAC 15/2005, [278, 280].

³⁷⁵ For reasons of diplomatic relations and national security, it is often difficult to categorize the ways in which such sanctions could be implemented; SIAC will consider the availability of such sanctions in a closed session if necessary, and such considerations will inform its overall judgment. For SIAC's assessment of the Jordan assurances, see, e.g., *VV v. Sec'y of State for the Home Dep't*, [2007] UKSIAC 59/2006, [30].

³⁷⁶ Such as the SIAC in the United Kingdom, see *infra* text accompanying notes 373–77.

³⁷⁷ The court noted that very considerable efforts have been made at the highest political levels on both sides to strengthen these ties. *Y, BB, and U v. Sec'y of State for the Home Dep't*, [2007] UKSIAC 39/2005, [18].

³⁷⁸ This was raised by Abu Qatada in respect of deportation to Jordan. Qatada argued that the fact that his high profile placed him at higher risk of ill-treatment in Jordan; the court considered "it more likely that the applicant's high profile will make the Jordanian authorities careful to ensure he is properly treated; the Jordanian Government is no doubt aware that not only would ill-treatment have serious consequences for its bilateral relationship with the United Kingdom, it would also cause international outrage." *Qatada v. U.K.*, HUDOC, <http://www.echr.coe.int> (last visited Nov. 1, 2012).

³⁷⁹ *Othman v. Sec'y of State for the Home Dep't*, [2008] EWCA (Civ) 290, T1/2007/9502 [355–56]; but see *Naseer et al. v. Sec'y of the State for the Home Dep't*, [2010] UKSIAC 77/80/81/82/83/09 [34] (accepting that "although publicity can provide a measure of protection for those suspected of terrorism, it is no guarantee of their safety").

³⁸⁰ "Political will apart, it seems to us that the best indicator of whether these assurances will be fulfilled is the experience of those who have been returned to Algeria." *Sihali v. Sec'y of State for the Home Dep't*, [2010] UKSIAC 38/2005[52]. SIAC compared Sihali's potential treatment upon return to that of other deportees whom were higher in terms of threat hierarchy. In particular, see *id.* ¶ 52–64 (discussing the treatment of every deportee to Algeria and relevant detainee). See also *U v. Sec'y of the State for the Home Dep't*, [2007] UKSIAC SC/32/2005 [37].

All of the abovementioned criteria have their place in ensuring an effective and broadly rights-compliant DWA regime, and the recent ECtHR judgment in *Qatada* has crystallized some eleven principles that no doubt will inform efforts of the Foreign Commonwealth Office (FCO) to conclude assurances that will be capable of withstanding future judicial scrutiny.³⁸¹ These criteria may be summarized as: whether the assurances have been disclosed to the court, whether the assurances are specific or vague, who has given and received the assurances and whether they are binding, the nature of the bilateral relationship between the sending and receiving State, including the State's previous record in abiding by assurances, the requirement for objective verification of compliance with assurances, whether there is an effective system of protection against torture in the receiving State, whether the applicant has previously been subject to ill-treatment in the receiving State, and whether the reliability of the assurances has been examined by the domestic courts of the sending State.³⁸²

Other measures could be implemented at an international level in order to ensure greater compliance or enforcement. Once a bilateral relationship is established, transparency at an international level will alleviate some of the concerns regarding secrecy.³⁸³ Of real significance are the multiple NGO reports facilitating appropriate international scrutiny.³⁸⁴ The publication of monitoring reports,³⁸⁵ together with mandatory reporting to the Committee Against Torture on the use of assurances, will help to ensure compliance in such a manner. This is already a requirement of those States that have ratified OPCAT.³⁸⁶ Much could be said for increasing the size of the Committee Against Torture and to correspondingly require States to submit reports subject to full public and NGO scrutiny, on an annual basis. There is a considerable time lag evident between recommendations of the Committee and the subsequent response and/or remedial action of the concerned State.³⁸⁷ Such time lag may be reduced by an implementation of these measures.

³⁸¹ See generally *Qatada v. UK* [HUDOC, <http://www.echr.coe.int> (last visited Nov. 1, 2012)].

³⁸² *Id.* at [189].

³⁸³ Noll, *supra* note 329, at 125.

³⁸⁴ See Amnesty Int'l, *supra* note 237, at 5–7.

³⁸⁵ States are currently required to submit a report to the Committee Against Torture one year after acceding to the Convention and then at 4-yearly intervals. The Committee against Torture adopted a new optional reporting procedure, consisting of a list of issues to which states are required to respond. U.N. Rep. of the Comm. Against Torture, Nov. 6, 2006–Nov. 24, 2006, Apr. 30, 2007–May 18, 2007, U.N. Doc. A/62/44; GAOR, 62d Sess., Supp. No. 44 (2007).

³⁸⁶ Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 18, 2002, U.N. Doc A/RES/57/199; GAOR, 57th Sess., (2003). As to the significance of OPCAT in a monitoring context, see *supra* text accompanying notes 370–72.

³⁸⁷ The four-yearly requirement was not observed either by the United States or the United Kingdom. The last report of the United States was due in 2001 and submitted in 2005, completed in 2006; the last report of the United Kingdom was due January 2002 and submitted November 2003.

Each of the foregoing suggestions may help ensure greater compliance with assurances. From the jurisprudence of the U.K. courts and the ECtHR, it is clear that the removal should be justiciable. An appropriate tribunal should have the power to scrutinize the assurance, rather than simply afford unfettered discretion to the executive, which is contrary to the current practice of the U.S. government. It is therefore necessary to consider the ways in which this may be implemented.

3. *Justiciability: Iura Novat Curia*

The refusal of the U.S. government to allow the courts to intervene in these matters echoes U.K. concern voiced in 1971 during passage of the Immigration Act.³⁸⁸ Yet the experience of the United Kingdom since that time has shown that the courts have discharged their function remarkably well.³⁸⁹ In terms of the composition and function of an appropriate tribunal, some lessons may be drawn from SIAC in the United Kingdom. Clearly there is tension between the requirement to protect national security when dealing with sensitive terrorism-related issues with the obligation to ensure secrecy in some cases to protect diplomatic relations with other States.³⁹⁰

The use of a DWA regime should be clearly prescribed by the legal system in a concerned State.³⁹¹ Lessons may be drawn from the German system, which implements a formal administrative procedure to regulate the use of assurances.³⁹² Establishing an assurance regime on a statutory footing would have numerous advantages in terms of clarity and justiciability, whilst encouraging further debate during its legislative passage.³⁹³ A tribunal responsible for judicial oversight of a DWA regime must be adept at analyzing national security matters within a specific legal framework, as has been emphasized by the House of Lords:

³⁸⁸ “Whether an individual’s presence in this country is a danger to this country is not a legal decision. It is not a justiciable issue or a matter of law; it is a matter of judgment. Judgment should be exercised by the Government, subject to the House of Commons, and not by a tribunal which is not under the control of the House.” PARL. DEB., H.C. (5th ser.) (1971) 392 (U.K.).

³⁸⁹ For a comprehensive historical account of deportation since the 1971 Act, see Bradley and Ewing, *supra* note 30, at 451–52.

³⁹⁰ These issues were considered by the ECtHR in *Chahal*, with the ECtHR criticizing the mechanisms for review. *Chahal v. U.K.*, [HUDOC, <http://www.echr.coe.int> (last visited Oct., 12, 2012)]. These criticisms led to the creation of SIAC.

³⁹¹ U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, Conclusions and recommendations of the Committee against Torture, Jul. 25, 2006, U.N. Doc. CAT/C/USA/CO/2, GAOR, 36th Sess., (2006) at [22].

³⁹² Gemeinsames Ministerialblatt, 30 October 2009 (GMBI 42-61, S 877ff) §§ 60(2), (3), and (7) respectively.

³⁹³ *Id.* at 60(2), (3), and (7).

This is an expert tribunal charged with administering a complex area of law in challenging circumstances ... the ordinary courts should approach appeals from [such tribunals] ... with an appropriate degree of caution; it is probable that in understanding and applying the law in their specialized field the tribunal will have got it right.³⁹⁴

SIAC holds closed hearings and gives closed judgments where appropriate, and it has been seen that the tribunal must be capable of assessing the political situation in the sending and receiving States.³⁹⁵ An examination of this role lies outside the ambit of this article; the United States would benefit from an analysis of the Commission concerning the way in which it manages the sensitive issues at play in this area, since judicial oversight in a U.S. context has been problematic.³⁹⁶

One area in which the U.K. system is potentially deficient is the absence of an effective appeals route; once SIAC has reached a decision, appellate court scrutiny is limited.³⁹⁷ The ECtHR in *Chahal* has established that the test as to whether there is a “real risk” that a deportee would be subject to ill-treatment is a matter of fact that will turn on the individual circumstances of the case,³⁹⁸ and the United Kingdom has stipulated that an appeal can only be brought on questions of law.³⁹⁹ As Lord Hoffmann has stated, “[t]he findings of SIAC on safety on return are therefore open to challenge only if no reasonable tribunal could have reached such a conclusion on the evidence.”⁴⁰⁰ The House of Lords could perhaps have ruled that in determining an appeal, scrutiny was required of

³⁹⁴ See the approach of Lord Phillips in *RB v. Sec’y of State for the Home Dep’t*, [2009] UHKL 10, [101, 118, 169, 218-19, 223, 232] (appeal taken from [2007] EWCA Civ 808) (citing comments made by Baroness Hale, in the context of the Asylum and Immigration Tribunal in *AH (Sudan) v. Sec’y of the State for the Home Dep’t*, (UNHCR intervening), [2007] UKHL [49]).

³⁹⁵ *Qatada v. U.K.*, [HUDOC, <http://www.echr.coe.int> (last visited Nov. 1, 2012)]. The role of SIAC in assessing the viability of assurances was effectively vindicated by the ECtHR, which considered that SIAC was a “fully independent court” with the power to conduct a “full merits review” of the deportation, including the power to quash the deportation order. *Id.*

³⁹⁶ For an examination of which, see Deeks, *supra* note 172, at 74–79. The suggestion that the U.S. policy should be different (i.e. not establish full judicial review) in light of the “sense within the Executive Branch that the U.S. role in the world may require a greater degree of discretion and confidentiality than that required by our Western allies” is particularly pertinent. *Id.*

³⁹⁷ See *RB v. Sec’y of State for the Home Dep’t*, [2009] UKHL 10, [61–73] (Lord Phillips).

³⁹⁸ “There is in my opinion nothing in the subsequent jurisprudence of the ECHR to change the question or to convert it into a question of law.” *RB v. Sec’y of State for the Home Dep’t*, [2009] UHKL 10, [185] (Lord Hoffmann). See *id.* ¶ 214 (Lord Hope) (“There is nothing in Convention law or section 6(1) of the [Human Rights] Act that requires SIAC’s findings of fact on these issues, contrary to this provision, to be reopened on appeal.”).

³⁹⁹ Special Immigration Appeals Commission Act, 1997, c. 68, § 7(1) (Eng.).

⁴⁰⁰ *RB v. Sec’y of State for the Home Dep’t*, [2009] UHKL 10, [191] (Lord Hoffmann).

the factual matrix itself, but it declined to do so.⁴⁰¹ The current position is that SIAC conducts a detailed fact-based analysis and reaches a judgment; an appeal lies to the Court of Appeal only on a point of law, and the applicable principles are those of traditional judicial review.⁴⁰² If a further application is lodged to Strasbourg, the ECtHR will examine the entire factual matrix in a similar manner to SIAC.⁴⁰³ There is much to be said for entrusting the initial task to a highly specialized tribunal, notwithstanding the fact that an applicant is denied a meaningful reassessment of the factual situation pending a determination by Strasbourg.⁴⁰⁴ It does, however, mean that any future attempts to limit ECtHR involvement in deportation cases should be closely scrutinized, since as a court of last instance, the U.K. Supreme Court will be concerned only with questions of law.⁴⁰⁵

Despite the fact that SIAC provides detailed scrutiny of key issues, criticisms levied at the Commission have been aimed at its deference to executive decision-making.⁴⁰⁶ SIAC has rejected submissions on behalf of the Secretary of State that it was “poorly equipped to review the assessments and decisions” in the field of international relations.⁴⁰⁷ Instead, the Commission has consistently held that it is for SIAC to decide how much weight to give to the Secretary of State’s determination, forming its view from all of the available evidence.⁴⁰⁸

[T]he Commission has not adopted a deferential approach, treating the SSHD as having a constitutionally allocated function or role, which requires us to defer to him ... We do not deny that the Security Service has an expertise which we

⁴⁰¹ *Id.* at [189]; Section 6 of the Human Rights Act, 1998, chapter 42.

⁴⁰² *See* *RB v. Sec’y of State for the Home Dep’t*, [2009] UKHL 10, [61–73] (Lord Phillips).

⁴⁰³ *Id.* at [66] 4.1. “It makes sense to reserve such a task to a specialist tribunal without providing for a full merits review by an appellate court. That does, of course, mean that decisions of SIAC may be reversed at Strasbourg, either because the ECtHR makes a different assessment of the relevant facts or because additional relevant facts have come to that court’s attention. This is a possibility that Parliament has chosen to accept.”

⁴⁰⁴ “There is good reason for this. The length of SIAC’s decision in *Qatada*’s case, and the time that it took to deliver, evidences the size of the task that a rigorous scrutiny of the material facts in a case such as this can involve. It makes sense to reserve such a task to a specialist tribunal without providing for a full merits review by an appellate court.” *Id.* at [66] (Lord Phillips). *See also* the comments of Lord Hoffmann: “[T]here is nothing in the Convention which prevents the United Kingdom from according only a limited right of appeal, even if the issue involves a Convention right. There is no Convention obligation to have a right of appeal at all.” *Id.* at [190] (Lord Hoffmann).

⁴⁰⁵ *See* *RB v. Sec’y of State for the Home Dep’t*, [2009] UKHL 10, [61–73] (Lord Phillips).

⁴⁰⁶ Metcalfe, *supra* note 350, at 77–79.

⁴⁰⁷ *Qatada v. Sec’y of State for the Home Dep’t*, [2007] SIAC SC/15/2005 [3]; *Y v. Sec’y of State for the Home Dep’t*, [2006] SIAC SC/36/2005 [324–26].

⁴⁰⁸ *Y v. Sec’y of State for the Home Dep’t*, [2006] SIAC SC/36/2005 [324–26]; *Othman (Abu Qatada) v. Sec’y of State for Home Dep’t*, [2007] UKSIAC 15/2005 [324–26].

have to take into account but that is different from constitutional deference or respect for differently allocated roles.⁴⁰⁹

SIAC's decision regarding the insufficiency of Libyan assurances adds further credence to the government's assertions that SIAC, given its expertise, is suitably independent and capable of subjecting assurances to the appropriate degree of scrutiny.⁴¹⁰ The role of SIAC has been vindicated by successive decisions of the ECtHR.⁴¹¹

A tribunal endowed with the appropriate powers of review, such as SIAC, is an essential prerequisite to the formation of an effective DWA regime, particularly insofar as it encourages and assesses compliance with assurances. This is not to suggest, however, that assurances do not still pose problems. To do so would ignore NGO criticisms and two significant indicators that demonstrate the potential fallibility of assurances: cases in which assurances have been breached and the subsequent impotence of the States in which breaches have occurred.⁴¹²

C. There Are Examples of Non-Compliance and Impotency if Assurances are Broken

NGOs and other institutions have repeatedly stressed reports of instances where assurances have been reneged upon.⁴¹³ In a recent report, Amnesty International documented several such instances, including returns from Italy to Tunisia, Spain to Russia, as well as the notorious Sweden to Egypt return.⁴¹⁴ Noll conducts a detailed analysis of the Swedish-Egyptian assurances which were breached, and concludes that in the aide-memoirs that were passed between Sweden and Egypt, Sweden deferred to Egypt's reading of human rights principles,⁴¹⁵ rather than insisting on internationally approved norms.

The existence of such breaches may serve as an affirmation of the

⁴⁰⁹ *Y & Anor v. Sec'y of State for the Home Dep't*, [2006] UKSIAC 36/2005 [59]; *Qatada v. Sec'y of State for the Home Dep't*, [2007] UKSIAC 15/2005 [324–26].

⁴¹⁰ K. Jones, *supra* note 27, at 193. Note that this is not without criticism: “A superficial consideration of SIAC's judgments might lead one to conclude that its rejection of the Libyan MOU was proof of the overall reasonableness of its approach. Nothing could be further from the truth. The fact that even SIAC found a promise from Colonel Gaddafi too weak an assurance against torture is proof only that its members are not entirely bereft of reason, not that their judgment is therefore to be commended.” Metcalfé, *supra* note 350, at 82–83.

⁴¹¹ *Case of A. and Others v. U.K.*, HUDOC, <http://echr.coe.int> (last visited Nov. 1, 2012); *Case of Othman (Abu Qatada) v. U.K.*, HUDOC, <http://echr.coe.int> (last visited Nov. 1, 2012).

⁴¹² Liberty & JUSTICE, *supra* note 237, ¶ 16.

⁴¹³ *Id.*

⁴¹⁴ Amnesty Int'l, *supra* note 296, at 6.

⁴¹⁵ Noll, *supra* note 329, at 107–112.

observations above in relation to the nature of the bilateral agreement.⁴¹⁶ Assurances may work where there is such an arrangement, but the sending State must be careful not to acquiesce to unreasonable demands of the receiving State, particularly where that means deferring to the receiving State's interpretation of the scope of CAT protection.⁴¹⁷ Various States took measures by which to limit the standard of protection against torture under CAT to that found in their own constitutions.⁴¹⁸ It has already been suggested that care must be taken to ensure consistent interpretation of the obligation.⁴¹⁹ Much will again depend on the nature of the bilateral relationship. The United Kingdom has required compliance from receiving States in terms of the U.K.'s obligations flowing from both European and international law, despite Amnesty's report criticizing both the U.K. government's DWA policy.⁴²⁰

Even where a breach is suspected, it has been suggested that the deporting State may be powerless to take action.⁴²¹ The Director of Central Intelligence notoriously summarized this in 2005, stating to Congress:

We have a responsibility of trying to ensure that they are properly treated, and we try and do the best we can to guarantee that. But of course once they're out of our control, there's only so much we can do.⁴²²

The evident concern with such a policy has been echoed by NGOs.⁴²³

⁴¹⁶ In respect of the Jordanian assurances, *see, e.g.*, *Qatada v. Sec'y of State for the Home Dep't*, [2007] UKSIAC 15/2005 [278] (stating, "In reaching this arrangement with the Government of Jordan, the UK Government had taken into consideration the long tradition of friendly relations between the two countries. It believed that placing the agreement in the context of the countries' bilateral relations reinforced the commitment of both parties to respect it."), *see also id.*, at [280], [478], [495–96], [508] (stating, "For our part, we have some difficulty in seeing why . . . it [is] unclear why a bilateral agreement in the form of an MOU would be adhered to, where a multilateral human rights agreement with reporting arrangements has been breached. The answer here . . . is precisely that it is bilateral, and is the result of a longstanding and friendly relationship in which there are incentives on both sides to comply once the agreement was signed.").

⁴¹⁷ Noll, *supra* note 329, at 107–112.

⁴¹⁸ Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res 39/46, Art. 3, U.N. Doc. A/RES/39/46 (Dec. 10, 1984). The U.S. in particular lists such a reservation. *Id.*

⁴¹⁹ *See* Noll, *supra* note 329, at 107–112.

⁴²⁰ *See* Amnesty Int'l, *supra* note 296, at 30.

⁴²¹ HUMAN RIGHTS WATCH, *supra* note 7, at 26–27.

⁴²² *Id.* at 37 (citing testimony of Porter J. Goss, Director, Central Intelligence, *quoted in* Douglas Jehl & David Johnston, *Rule Change Lets C.I.A. Freely Send Suspects Abroad to Jails*, N.Y. TIMES, Mar. 6, 2005, <http://www.nytimes.com/2005/03/06/politics/06intel.html>).

⁴²³ Amnesty Int'l, *supra* note 237, at 9–10.

The obvious response to such criticism lies in the nature of the bilateral agreement.⁴²⁴ A carefully implemented DWA strategy, firmly entrenched in a bilateral relationship between States, is very different to that adopted in this statement, and it is also very different, as the SIAC analysis makes clear,⁴²⁵ from the attitudes of the Swedish and Egyptian Governments in *Agiza v. Sweden*.⁴²⁶ It may be impossible for sending States to divulge the exact nature of the political or other sanctions that may be imposed should a receiving State renege on its assurances. That does not preclude the possibility that an appropriate tribunal may provide adequate scrutiny, as SIAC has proven.⁴²⁷

A breach of assurance in the past should not preclude the possibility of effective and reliable assurances being promulgated in the future. If one assurance is flawed, it does not necessarily follow that all assurances are flawed, since, as the courts have repeatedly stressed,⁴²⁸ each case will turn on its own particular facts, and each assurance needs to be assessed on its independent merits on the basis of the entire factual matrix. What is instead needed here is for lessons to be learned from those alleged cases in which assurances have been reneged upon.⁴²⁹ It is clear from the SIAC jurisprudence in the United Kingdom that this has been a prime concern. It should be possible to distill ways in which, with improved guidance⁴³⁰ and procedure, future violations can be prevented. It is therefore suggested that this criticism does not provide substantial grounds for considering assurances to be incapable of satisfying obligations under CAT.⁴³¹

⁴²⁴ In respect of the Jordanian assurances, *see, e.g.*, *Qatada v. Sec'y of State for Home Dep't*, [2007] UKSIAC 15/2005 [278] (stating, "In reaching this arrangement with the Government of Jordan, the UK Government had taken into consideration the long tradition of friendly relations between the two countries. It believed that placing the agreement in the context of the countries' bilateral relations reinforced the commitment of both parties to respect it."), *see also id.* at [280], [478], [495–96], [508] (stating, "For our part, we have some difficulty in seeing why...it [is] unclear why a bilateral agreement in the form of an MOU would be adhered to, where a multilateral human rights agreement with reporting arrangements has been breached. The answer here ...is precisely that it is bilateral, and is the result of a longstanding and friendly relationship in which there are incentives on both sides to comply once the agreement was signed.").

⁴²⁵ *See* *Qatada v. Sec'y of State for Home Dep't*, [2007] UKSIAC 15/2005 [496].

⁴²⁶ *See* Supp. No. 44 A/60/44; *supra* note 253, at 231 n.q.

⁴²⁷ *See, e.g.*, *VV v. Sec'y of State for the Home Dep't*, [2007] UKSIAC 59/2006 [30].

⁴²⁸ *Saadi v. Italy*, HUDOC, <http://echr.coe.int> (last visited Nov. 1, 2012).

⁴²⁹ Note, U.N. Refugee Agency, *Diplomatic Assurances and International Refugee Protection*, U.N.H.C.R. Note (Aug. 2006) at ¶ 22.

⁴³⁰ K. Jones, *supra* note 27, at 193.

⁴³¹ JOINT COMMITTEE ON HUMAN RIGHTS, COUNTER-TERRORISM POLICY AND HUMAN RIGHTS: TERRORISM BILL AND RELATED MATTERS, 2005-06, H.L. 75-I, H.C. 561-I, ¶ 142 (U.K.).

D. *Lord Phillip's Catch-22*.⁴³² *If You Need to Ask for Assurances, You Cannot Rely on Them*

The UN Special Rapporteur has stated that “the very fact that such diplomatic assurances are sought is an acknowledgement that the requested State, in the opinion of the requesting State, is practicing torture.”⁴³³ As long as a DWA regime of some sort is pursued, this criticism is unlikely to abate. It is difficult to deny the logic of the conundrum: why should a State, which has previously breached legally enforceable international obligations surrounding torture, suddenly honor a non legally-binding political promise? Lord Phillips has made a similar observation, stating that there is an:

[A]bundance of material that supports the proposition that assurances should be treated with scepticism if they are given by a country where inhuman treatment by State agents is endemic.⁴³⁴

This criticism directly correlates to the contention that assurances damage existing multilateral rights protection,⁴³⁵ a notion reinforced by the Rapporteur. Rather than using diplomatic and legal powers to hold offending States to account for their violations, a requesting State through an assurance seeks only an exception for the practice of torture for a few individuals.⁴³⁶ This leads to double standards.⁴³⁷ The UN High Commissioner for Human Rights has likewise raised this argument⁴³⁸ but the inverse, that assurances actually weaken individual human rights protection, has similarly been made.⁴³⁹

⁴³² *RB (Alg.) (FC) & another v. Sec’y of State for the Home Dep’t*, [2009] UKHL 10 [115].

⁴³³ Special Rapporteur on the Question of Torture, Civil and Political Rights, Including the Questions of Torture and Detention, Comm’n on Human Rights, U.N. Doc. E/CN.4/2006/6 (Dec. 23, 2005) (by Manfred Nowak).

⁴³⁴ *RB (Alg.) (FC) & Another v. Sec’y of State for the Home Dep’t*, [2009] UKHL 10 [115].

⁴³⁵ “[D]amage will be done, either to the diplomatic assurances, or to multilateral treaties protecting human rights. Or, one may add, to the coherence of international law.” Noll, *supra* note 329, at 115.

⁴³⁶ HUMAN RIGHTS WATCH, *supra* note 7, at 16–17.

⁴³⁷ *Id.* at 23–24 (stating, “If the international community as a whole were to endorse assurances to protect one person, it would be perceived as ignoring those systematic failings, neglecting the obligation to address the endemic nature of the problem, and providing abusive governments with a device to falsely flaunt their human rights credentials without having to abide by their general legal obligations on torture.”).

⁴³⁸ U.N. High Commissioner for Human Rights, *Statement before the Council of Europe Group of Specialists on Human Rights and the Fight against Terrorism*, ¶ 3, (Mar. 29–31, 2006).

⁴³⁹ In the context of *Agiza v. Sweden*, it has been suggested that the assurances at play fell short of those required by CAT. Noll, *supra* note 329, at 108–12.

Against this backdrop of criticism, it has been argued on behalf of the U.K. government that the existence of bilateral agreements actually serve to strengthen the multilateral rights framework.⁴⁴⁰ Bilateral agreements that have been in place and subject to judicial scrutiny in the United Kingdom may well have caused further scrutiny of the receiving States' compliance with multinational rights norms.⁴⁴¹ It is possible to identify States that have substantially improved their reputation, despite prior firmly entrenched notoriety for breaching their international obligations.⁴⁴² It would be impossible for a State with a notable reputation for violating its obligations under CAT to suddenly accede to international pressure, renounce its old ways, and ratify OPCAT. Interim diplomacy is vital, and the U.K. experience with the Algerian authorities has shown that long-term international compliance may follow once bilateral obligations have been successfully negotiated.⁴⁴³

E. It Is Not in the Interests of Either Party to the Assurance to Report a Breach

One of the central difficulties with the implementation and monitoring of assurance lies in the fact that secrecy is paramount. Noll observes a "double secret" which conceals each source of terror on behalf of both the individual and the State commenting that assurances negatively circumscribe this fear since details cannot be released for security reasons.⁴⁴⁴ It is argued that a breach of an assurance cannot be articulated as a human rights violation since this would jeopardize the position of the State.⁴⁴⁵ Indeed, it could be stated that it is in the interests of neither party to an assurance to find a breach. The State seeks to avoid a breach for both political and security reasons, as well as its international law obligations.⁴⁴⁶ A body monitoring the use of assurances may be under pressure by virtue of the relationship between the monitoring agency and the sending and receiving countries, since continued access to deportees will require ongoing compliance and dialogue.⁴⁴⁷ A receiving State obviously does not

⁴⁴⁰ K. Jones, *supra* note 27, at 190.

⁴⁴¹ *Id.*

⁴⁴² *See, e.g.,* Y v. Sec'y of State for the Home Dep't., [2006] UKSIAC 36/2005 [342, 346–47, 372, 402].

⁴⁴³ *Id.*

⁴⁴⁴ Noll, *supra* note 328, at 119.

⁴⁴⁵ *Id.*

⁴⁴⁶ HUM. RTS. WATCH, *supra* note 7, at 4; Amnesty Int'l., *supra* note 296, at 9; Rebekah Braswell, *Protection Against Torture in Western Security Frameworks: The Erosion of Non-Refoulement in the UK-Libya MOU 17* (Univ. of Oxford Refugee Studies Ctr., Working Paper No. 35, 2006).

⁴⁴⁷ It is easy to see how this could apply to the QDF, the body which was notionally responsible for monitoring compliance with the Libyan assurances, given its perceived lack of complete independence. *See* DD & AS v Sec'y of State for the Home Dep't, [2007] UKSIAC 42 and 50/2005 [152].

wish to have their assurance brought into disrepute, particularly where it involves negotiations undertaken at the highest level of government, and likewise has international obligations and politics to consider.⁴⁴⁸ Finally, the deportee himself may not wish to draw attention to any mistreatment for fear of secret repercussions and further abuse.⁴⁴⁹ Similar criticisms have been provided by the UN Special Rapporteur⁴⁵⁰ and were voiced by the UN High Commissioner for Human Rights:

[S]hort of very intrusive and sophisticated monitoring measures, such as around-the-clock video surveillance of the deportee, there is little oversight that could guarantee that the risk of torture will be obliterated in any particular case. While detainees as a group may denounce their torturers if interviewed privately and anonymously, a single individual is unlikely to reveal his ill-treatment if he is to remain under the control of his tormentors after the departure of the “monitors”.⁴⁵¹

Allied to this is the concern that specific forms of ill-treatment and torture may not leave physical marks and therefore may be extremely difficult, if not impossible, to detect. This issue was highlighted by SIAC in *Qatada*.⁴⁵²

Jones’ response to these arguments is that steps are taken for independent monitoring, ensuring that ill-treatment should not be kept secret once a deportee was returned.⁴⁵³ It has been disingenuously argued that it is not in the U.K.’s interest for breaches of assurances to be hidden, since it is U.K. policy not to deport where there is a real risk of ill-treatment;⁴⁵⁴ this argument is at odds with the U.K.’s aggressive promotion

⁴⁴⁸ *Qatada v. UK*, HUDOC, <http://www.echr.coe.int> (last visited Nov. 1, 2012).

⁴⁴⁹ This particularly may be the case if the sending state has no enforcement mechanism or system in place in case of breach of the assurance. *See, e.g.*, Supp. No. 44, A/60/44, *supra* note 253, ¶ 13.2–13.17 (2005).

⁴⁵⁰ *Report of the Special Rapporteur*, *supra* note 433, ¶ 31.

⁴⁵¹ Louise Arbour, U.N. High Commissioner for Human Rights, Human Rights Day Statement, On Terrorists and Torturers (Dec. 7, 2005), *available at* <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=2117&LangID=E> (last visited Oct. 18, 2012).

⁴⁵² “It is, of course, true that a detainee could be tortured by the chiffon method, and refuse to say anything about it afterwards but such an event could occur even under a monitoring regime.” *BB v. Sec’y of State for the Home Dep’t*, [2006] UKSIAC 39/2005 [21]. The *chiffon* method of torture is essentially the practice of “waterboarding,” where a rag is forced into the victim’s mouth and water, urine or chemicals are poured on to it to induce the sensation of drowning. SIAC in *Othman* stated that expert training in detection methods would offset the risk of such treatment by monitoring staff. *Qatada v. Sec’y of State for the Home Dep’t*, [2007] UKSIAC 15/2005 [515–516].

⁴⁵³ K. Jones, *supra* note 27, at 187.

⁴⁵⁴ *Id.* at 192.

of DWA generally.⁴⁵⁵ Secrecy remains a prevailing concern regarding breaches of the CAT obligation, but through independent monitoring and wider international cooperation, this should not represent an insurmountable hurdle for a rights-compliant DWA regime to overcome. By importing effective monitoring mechanisms, the risk of torture or ill-treatment may be brought below the requisite threshold to comply with the non-refoulement obligation.⁴⁵⁶ Black-letter assurances (*a priori* MOUs) offer only one side to a multifaceted DWA regime; compliance with such assurances relies not only on the black letter of the agreement but also on the associated political will, verbal agreements, and trust between the parties.

Championing international law as the sole arbiter in non-refoulement instances leads to problems with regard to enforceability and State compliance.⁴⁵⁷ What is needed is a twin-track approach, the establishment in States' domestic law of a clear, robust, and justiciable DWA framework, together with a more robust international stance, to allow for greater enforcement, independence, and sanctions for breach.

F. Monitoring is Ineffective:

A recent JURISTS report concludes that:

[I]n principle and practice ... there are serious problems with diplomatic assurances. In principle, reliance on diplomatic assurances is wrongly being used as a way of “delegating” responsibility ... to the receiving country alone. That undermines the truly *international* nature of the duty to prevent and prohibit torture.⁴⁵⁸

In answer to such criticisms, Jones mounts a robust defense of the system of assurances adopted by the U.K. government,⁴⁵⁹ stating that the differing approaches taken by the government and SIAC illustrate that each assurance is objectively assessed for reliability and that the government does believe that the governments who have provided it with assurances

⁴⁵⁵ Amnesty Int'l, *supra* note 296, at 27.

⁴⁵⁶ Qatada v. UK, HUDOC, <http://www.echr.coe.int> (last visited Nov. 1, 2012).

⁴⁵⁷ Liberty & JUSTICE, *supra* note 236, ¶¶ 21–33.

⁴⁵⁸ Int'l. Comm'n. of Jurists, *supra* note 251, at 105.

⁴⁵⁹ K. Jones, *supra* note 27, at 189. Jones contends that the system of assurances by the U.K. government complements existing Multilateral Human Rights Treaties and does not weaken them; that out of control security forces are not a prevailing concern in Algeria, Jordan or Libya. *Id.* at 190; and that that the use of assurances does not result in a two-tier system, whereby insistence on compliance with human rights in some instances impliedly condones human rights abuses in others. *Id.* at 192.

will comply with them.⁴⁶⁰ It should be noted that many of Jones' arguments are predicated and reliant on the rigor and independence of a monitoring body following removal despite the fact that a monitoring body is not an essential prerequisite.⁴⁶¹ The foregoing criticisms have also highlighted the need for independent monitoring in a rights-compliant DWA regime; there is a need for international cooperation and discussion as to how consistent monitoring may be implemented.

1. A Mandatory Independent Monitoring Mechanism

OPCAT was designed to facilitate inspections so as to prevent violations of CAT.⁴⁶² The relevant provisions of OPCAT are found in Part IV and *inter alia* allow for independent monitoring through the establishment of "national preventive mechanisms." Under Article 23, parties to the Convention undertake to publish annual reports of such mechanisms.⁴⁶³ The UN High Commissioner for Human Rights has stated that countries cannot give credible assurances if they have not accepted independent monitoring under OPCAT.⁴⁶⁴ It is certainly true that this will be one factor for consideration when making an assessment as to an assurance's reliability. The reality, however, is that there are many States that have not ratified OPCAT,⁴⁶⁵ and the very States to which a sending country may wish to deport are invariably not parties to it.⁴⁶⁶ In theory, of course it is desirable that an individual should not be deported to a State that has not ratified OPCAT. In reality, this has not been the case; adopting the stance supported by the High Commissioner would preclude deportation to each of the States with which assurances have been developed and upheld by the courts.⁴⁶⁷

⁴⁶⁰ Itself, this contention is hardly surprising, since to state otherwise would be a tacit admission that the U.K. government was in breach of its international obligations under CAT. *Id.* at 189.

⁴⁶¹ *See id.* at 184.

⁴⁶² Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 57/199, at Art. 1, U.N. Doc. A/RES/57/199(Dec. 18, 2002).

⁴⁶³ *Id.* at Art. 23.

⁴⁶⁴ U.N. High Commissioner for Human Rights, Statement before the Council of Europe Group of Specialists on Human Rights and the Fight against Terrorism (Mar. 29-31, 2006), *available at* <http://www.unhcr.ch/Hurricane/Hurricane.nsf/60a520ce334aaa77802566100031b4bf/c19c689539c57eabc1257146002ce1b9?OpenDocument> (last visited Oct. 25, 2012).

⁴⁶⁵ Only seventy-four states have either signed or ratified OPCAT, and of those, only fifty-four have ratified. Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or degrading Treatment or Punishment (Dec. 18, 2002), http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-9-b&chapter=4&lang=en. G.A. Res. /57, U.N. Doc. A/RES/57/199 (Dec. 18, 2002), *available at* <http://www2.ohchr.org/english/law/cat-one.htm> (accessed June 19, 2010).

⁴⁶⁶ For example, in a U.K. context, Jordan, Libya, Lebanon, Ethiopia, and Algeria, five of the states from which assurances or MOU have been sought by the United Kingdom, have not signed or ratified the treaty. *Id.*

⁴⁶⁷ Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Dec. 18, 2002), <http://www2.ohchr.org/english/law/cat-one.htm> (last visited Dec. 5, 2012).

Nonetheless, the requirement for monitoring has been widely accepted. The UN Rapporteur has stressed the need for prompt, regular, independent monitoring, together with private interviews in order to ensure that the assurance is complied with and that there is no resulting ill-treatment.⁴⁶⁸ Monitoring by competent and independent personnel appears to be a requirement realized by the Committee Against Torture.⁴⁶⁹

The practice of the United Kingdom has not been entirely consistent with this guidance. SIAC and the (then) House of Lords have stopped short of requiring monitoring *per se*, instead requiring only that effective verification should take place; monitoring merely provides one means of achieving this aim.⁴⁷⁰ Other courts, including the ECtHR, have stressed the importance of monitoring,⁴⁷¹ but there remains no developed legal practice as to minimum requirements for monitoring provisions.⁴⁷² The U.K.'s assurances with Algeria, Jordan, and Libya provide some pertinent illustrations here.

Independence of the monitoring body is an essential requirement,⁴⁷³ and it is generally accepted that the more independent the monitoring body, the stronger the assurance will be. First, compliance with transparent monitoring mechanisms would act as a more effective deterrent against ill-treatment to the receiving State.⁴⁷⁴ Second, potential ill-treatment following return may be more likely to be uncovered by an independent team of expertly-trained investigators.⁴⁷⁵ While the foregoing concerns regarding secrecy and transparency remains applicable, such monitoring may go some way to assuage these considerations.⁴⁷⁶ This reasoning resonates with the attitude of the U.K. government.⁴⁷⁷

⁴⁶⁸ Special Rapporteur of the UN Commission on Human Rights on torture and other cruel, inhuman or degrading treatment or punishment, *transmitted by note by the Secretary-General, Report submitted pursuant to G. A. Res. 58/164*, ¶ 42, UN Doc. A/59/324 (Sept. 1, 2004).

⁴⁶⁹ Supp. No. 44 A/60/44, *supra* note 253, ¶ 13.8 (2005); Report of the High Commissioner for Human Rights, *Protection of human rights and fundamental freedoms while countering terrorism, UN Commission on Human Rights*, ¶ 30, U.N. Doc. E/CN.4/2006/94, (Feb. 16, 2006).

⁴⁷⁰ Lord Phillips, citing the test adopted by Mitting J. in SIAC: RB v. Sec'y of State for the Home Dep't, [2009] UKHL 10, [23] (Eng.).

⁴⁷¹ See Supp. No. 44 A/60/44, *supra* note 339, ¶ 13.8 (2005).

⁴⁷² Larsaeus, *supra* note 312, at 18.

⁴⁷³ See particularly DD and AS v. Sec'y of State for the Home Dep't, [2006] UKSIAC 42 and 50/2005, [330] (Eng.), in which SIAC held that the body responsible for monitoring the Libyan regime was not sufficiently independent of the Libyan regime. The SIAC decision was upheld by the Court of Appeal: AS and DD v. Sec'y of State for the Home Dep't, [2008] EWCA (Civ.) 289, [83] (Eng.).

⁴⁷⁴ Larsaeus, *supra* note 312, at 18.

⁴⁷⁵ *Id.* at 18–19.

⁴⁷⁶ Qatada v. U.K., HUDOC, <http://www.echr.coe.int> (last visited Nov. 1, 2012).

⁴⁷⁷ “The more independent the monitoring body, the more HMG can rely on them to report breaches and not to hide them, regardless of whatever perception they may have of HMG's underlying interests.” K. Jones, *supra* note 27, at 192.

The U.K.'s assurances from Algeria are not predicated on the basis of full MOU and, indeed, there is no provision for independent monitoring,⁴⁷⁸ yet both the SIAC and the House of Lords have upheld these.⁴⁷⁹ Other arrangements made by the United Kingdom have used local organizations for monitoring; indeed this represents a key strand of the U.K. government's strategy of enhanced assurances.⁴⁸⁰ From this perspective, one of the key criticisms levied at the United Kingdom relates to the monitoring of the MOU between the United Kingdom and Jordan, since it relies on a local human rights charity acting without statutory mandate.⁴⁸¹ Nonetheless, the ECtHR scrutinized the monitoring arrangements in place, and it is clear that whilst the charity "does not have the same expertise or resources as leading international NGOs such as Amnesty International, Human Rights Watch or the International Committee of the Red Cross,"⁴⁸² it nonetheless was capable of verifying compliance with the assurances, was independent of the government, and its limitations had been realistically appraised by SIAC.⁴⁸³ Conversely, the Libyan MOU was held to be insufficient by SIAC and the Court of Appeal, not least because the "independent" monitoring body was headed by the son of Colonel Gaddafi, allegations of ill-treatment in Libya were commonplace, and Gaddafi himself was known to be unpredictable; there was a real risk the assurance could be reneged upon at a later date.⁴⁸⁴

It is contended that the U.K. courts' requirement for "[e]ffective verification" of an assurance falls far short of the standard required of such a regime, even though it satisfied the House of Lords.⁴⁸⁵ This has the consequence of perhaps undermining the sufficiency of the Algerian assurances, despite the fact that SIAC has accepted that there is a "continuum of developing understanding...between the two countries"⁴⁸⁶ and that SIAC appears to be suggesting that these agreements in principle

⁴⁷⁸ *RB v. Sec'y of State for the Home Dep't*, [2009] ULHK 10, [193] (Eng.). (Lord Hoffmann): "In this particular case the Algerian government regarded external monitoring as inconsistent with its sovereign dignity."

⁴⁷⁹ *See Y v. Sec'y of State for the Home Dep't*, [2006] UKSIAC 12/2005, [98], in which SIAC held that the reason Algeria had refused monitoring was not because of fear as to what would be revealed or prevented by monitoring but rather "[t]he assessment of a sensitive, rather prickly state, seeing NGO monitoring, UK monitoring, bilateral monitoring agreements as a public slur on its record (however true in substance), and thus as a public humiliation at the hands of a Western former colonial power which has not been notably friendly or helpful to it in the past."

⁴⁸⁰ K. Jones, *supra* note 27, at 187.

⁴⁸¹ Amnesty Int'l, *supra* note 296, at 11.

⁴⁸² *Qatada v. U.K.*, HUDOC, <http://www.echr.coe.int> (last visited Nov. 1, 2012).

⁴⁸³ *Id.*

⁴⁸⁴ *DD and AS v. Sec'y of State for the Home Dep't*, [2006] UKSIAC 42 and 50/2005, [187] (Eng.); *AS and DD v. Sec'y of State for the Home Dep't*, [2008] EWCA (Civ.) 289, [71] (Eng.).

⁴⁸⁵ *RB v. Sec'y of State for the Home Dep't*, [2009] UKHL 10, [23] (Eng.).

⁴⁸⁶ *Sihali v. Sec'y of State for the Home Dep't*, [2010] UKSIAC 38/2005, [41].

are sufficiently robust.⁴⁸⁷ Strasbourg's ruling that the Qatada assurances amounted to a partial vindication of the U.K. government's policy, but the situation may have been very different had independent monitoring arrangements not been in existence.⁴⁸⁸

A strong case can be made for mandatory independent post-return monitoring in order to comply with the non-refoulement obligation. Amnesty International rejects this contention, stating that "sporadic monitoring alone cannot eliminate the risk of torture or other ill-treatment that a particular person would otherwise face - and no reputable independent monitoring body has ever made that claim."⁴⁸⁹ It is acknowledged that even the best monitoring mechanisms does not provide adequate safeguards against torture.⁴⁹⁰ As the NGO has stated:

[A]d hoc monitoring schemes necessarily omit the broader institutional, legal, and political elements that can make certain forms of system-wide monitoring of all places of detention (and therefore all detainees) in a country one way, in combination with other measures, of potentially reducing the country-wide incidence of ill-treatment over the long-term.⁴⁹¹

It has already been seen above that the non-refoulement obligation is not absolute; a degree of risk of ill-treatment remains permissible.⁴⁹² The approach of SIAC has been to require only that independent monitoring should ensure that there is no real risk of ill-treatment,⁴⁹³ even in circumstances where an individual felt inhibited from speaking out about ill-treatment upon their return.⁴⁹⁴ It would be irrational to preclude the use of assurances in some form or another in order to reduce this risk of ill-treatment to permissible levels.

⁴⁸⁷ *Id.* at [40]. There were eleven cases, all substantially similar in result with regard to the sufficiency of the assurance, from August 2006 to 2010. *Id.*

⁴⁸⁸ Qatada v. U.K., HUDOC, <http://www.echr.coe.int> (last visited Nov. 1, 2012).

⁴⁸⁹ Amnesty Int'l, *supra* note 268, at 6.

⁴⁹⁰ Special Rapporteur Report, *supra* note 433, ¶ 31.

⁴⁹¹ Amnesty Int'l, *supra* note 268, at 10.

⁴⁹² *See Id.*

⁴⁹³ *See generally* the approach of SIAC in Qatada v. U.K., HUDOC, <http://www.echr.coe.int> (last visited Nov. 1, 2012); the Commission "ascribe real significance to that point" with respect to Qatada, but observed that the issue had arisen elsewhere. (*Abu Qatada v Secretary of State for the Home Department* [2007] UKSIAC 15/2005, (¶509).

⁴⁹⁴ *Id.* SIAC considered that the monitoring would not be wholly ineffective for this reason. First, in other instances allegations of torture had routinely been made (and therefore the deterrent factor did not seem to be an issue). Second, the existence of MOU would reduce the threat of reprisals since there was a known disapproval of such acts higher up in government.

As to the form that such international monitoring should take, eminent international NGOs, including the International Committee for the Red Cross, Amnesty International, or Human Rights Watch, may be best placed to act as an independent arbiter and monitor compliance with assurances following removal.⁴⁹⁵ The UK Parliamentary Joint Committee on Human Rights has suggested a similar proposal.⁴⁹⁶ All of these organizations have already refused to serve in this function as a matter of course in DWAs,⁴⁹⁷ seeing this as tacit affirmation as to the human rights compatibility of the assurance regime generally, rather than as a means of preventing future violations.⁴⁹⁸ It is unfortunate that such NGOs have chosen to maintain their principled opposition against the use of assurances, despite overwhelming evidence that assurances continue to be sought.⁴⁹⁹ Opposition in theory is laudable but hardly pragmatic, particularly where further NGO involvement could offer a further valuable safeguard as part of a package of monitoring measures.

OPCAT in its current form does not provide the degree of support required due to low ratification; international pressure should be brought to increase the number of States that have ratified the protocol.⁵⁰⁰ Facilitating assurances in the first instance requires a significant degree of diplomacy; there is no reason why such pressure and diplomacy, reciprocated at an international level, cannot result in a higher ratification rate of OPCAT. The U.K.'s experience with the Algerian DWA provides such an illustration; Algeria refused to acquiesce to demands for independent monitoring, perceiving it as an encroachment on its national sovereignty.⁵⁰¹ Yet the political importance of the U.K.-Algerian relationship was

⁴⁹⁵ *Id.* The “[v]ery careful scrutiny which Special Rapporteurs, NGOs and others will give to these deportations means that not only are abuses in these cases unlikely but that any abuses that may occur are likely to be detected sooner rather than later, even if notice of them comes to HMG in less direct ways, including through rumour. This is a valuable additional safeguard.” K. Jones, *supra* note 27, at 192.

⁴⁹⁶ JOINT COMM. ON HUMAN RIGHTS, THE UN CONVENTION AGAINST TORTURE (UNCAT), 2005-06, H.L. 185-II, H.C. 701-II at 116 (U.K.).

⁴⁹⁷ James Sturke, *Amnesty Refuses Involvement in UK Deportations*, GUARDIAN (Aug. 26, 2005), <http://www.guardian.co.uk/politics/2005/aug/26/uksecurity.terrorism1>. As to the refusal of the Red Cross, see *Youssef v. Home Office*, [2004] EWHC 1884 (QB), [26].

⁴⁹⁸ See, e.g., Amnesty International’s conclusion that “monitoring mechanisms that are not part of an established framework with a proven track record not only in detecting cases of abuse, but also consistently bringing all perpetrators fully to justice and immediately stopping all further abuse, and in actually reducing the incidence of torture, cannot seriously be considered as having any significant preventive or deterrent effect.” Amnesty Int’l, *supra* note 268, at 11.

⁴⁹⁹ *Id.* at 5-6. Amnesty International draws on considerable European research, concluding that Denmark, France, Italy and Sweden either considered the use of assurances or were undecided. Germany and the United Kingdom remain strong progenitors of a DWA regime.

⁵⁰⁰ Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. G.A. Res. A/RES/57/199 (Dec. 18, 2002).

⁵⁰¹ *Y v. Sec’y of State for the Home Dep’t* [2006] UKSIAC 12/2005, [98]. (paragraphs from closed judgment made open).

examined by SIAC, and “top-level green light” for the ratification of OPCAT by the Algerian authorities was said to exist, pursuant to the appropriate mechanisms being in place.⁵⁰²

The longevity of the post-return monitoring obligation may give cause for concern. The risk to a deportee is greatest immediately following their return;⁵⁰³ it is unrealistic to expect a sending State to ensure monitoring occurs for the lifetime of the concerned individual. In *Ben Khemais v Italy*,⁵⁰⁴ the court held a diplomatic assurance insufficient to comply with the demands of Article 3 ECHR, since there was no reliable system of accountability for torture in Tunisia, the receiving State, and there had been difficulties in accessing detainees in Tunisian prisons.⁵⁰⁵ This was notwithstanding the fact that the deportee in that case had not complained of ill-treatment following his return; the court held the assurance insufficient due to the inability to verify or challenge the situation as it developed in the future.⁵⁰⁶ It should be noted that a three-year post-return monitoring deadline was set in the MOU between the United Kingdom and Jordan, and this assurance was upheld by the House of Lords and the ECtHR.⁵⁰⁷ Crucially, Strasbourg held that subsequent diplomatic notes had made clear that monitoring would potentially continue indefinitely while the deportee was in detention, provided that detention began within the first three years of return.⁵⁰⁸ SIAC has observed that it cannot be concerned with long-term political speculation and that it must evaluate conditions over the medium term.⁵⁰⁹ Nonetheless, it appears inevitable that future assurances will incorporate lengthy periods of post-return monitoring if they are to be upheld.⁵¹⁰ The imposition of a lifetime monitoring requirement would pose an unacceptable, if not insurmountable, burden on returning States, but it would appear sensible to

⁵⁰² *Id.* at [84]. (paragraphs from closed judgment made open).

⁵⁰³ “[E]xperience has shown that the risk of ill-treatment of a detainee is greatest during the first hours or days of his or her detention.” *Othman (Abu Qatada) v. U.K.*, [2012] HUDOC, <http://www.echr.coe.int> (last visited Oct. 28, 2012).

⁵⁰⁴ *Khemais v. Italy*, [2009], HUDOC, <http://www.echr.coe.int> (last visited Oct. 28, 2012).

⁵⁰⁵ Italy had ignored the advice of the ECtHR Court, pursuant to Rule 39, which had indicated that it should stay removal proceedings pending a full hearing. Statewatch reports that the Italian government’s response made it clear that it preferred to deport where its national security was threatened, rather than wait for a ‘slow’ ECtHR to make a judgment. *Italy Repeatedly Ignores ECtHR Orders to Suspend Expulsions to Tunisia*, STATEWATCH, <http://www.statewatch.org/news/2009/sep/italy-echr-tunisia.pdf> (last visited Mar. 15, 2011).

⁵⁰⁶ *Khemais v. Italy*, [2009], HUDOC, <http://www.echr.coe.int> (last visited Oct. 28, 2012).

⁵⁰⁷ See 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, STATEWATCH, <http://www.statewatch.org/news/2005/aug/uk-jordan-MOU.pdf> (last visited Mar. 10, 2010).

⁵⁰⁸ *Othman (Abu Qatada) v. U.K.*, [2012], [202], HUDOC, <http://www.echr.coe.int> (last visited Oct. 28, 2012).

⁵⁰⁹ *Y, BB, and U v. Sec’y of State for the Home Dep’t*, [2007] UKSIAC 32/36/39/2005, [22].

⁵¹⁰ *Id.*

create a link between detention upon return and the temporal duration of a monitoring requirement.

A further criticism relates to the lack of post-return remedies⁵¹¹ once an assurance is breached. Diplomatic sanctions may provide an appropriate response at State level, but an individual who suffers refoulement should have an adequate remedy. One suggestion has been to impose an obligation to return the deportee to the sending State where monitoring reveals an indication of human rights violations.⁵¹² This issue may be worthy of further exploration. There are likely to be substantial practical difficulties with such an approach, not least of which is the additional credence given to the criticisms around secrecy in a DWA regime. It is not difficult to see why a sending State may be reticent to acknowledge the breach of an assurance if it means that it then faces the return of a known terrorist onto home soil.

V. CONCLUSIONS: A FRAMEWORK FOR FUTURE ASSURANCES

The use of assurances has proven to be a cornerstone of the new counter-terrorism policies of Anglo-American governments and beyond. The terrorism threat is an international phenomenon and individual countries must take responsibility for augmenting their counter-terrorism arsenal both at home and abroad. A more consistent international approach could be taken *viz* non-refoulement, assurances and the prohibition on torture and ill-treatment generally.⁵¹³ This article has shown that the United States and the United Kingdom interpret their international law obligations in this area very differently.

It is contended that there is no consistent principle of international law that prohibits the use of assurances in removal cases; any criticisms that continue to be directed towards a DWA regime are eminently surmountable.⁵¹⁴ Assurances can be used in order to bring the risk of ill-treatment to below a threshold level. There is evidence that the development of sound bilateral agreements serve to strengthen multilateral rights protection.⁵¹⁵ Although the U.K.'s response is far from perfect, the expert scrutiny of SIAC is clearly preferable to the U.S. practice of reliance on executive determinations. This article has identified areas in which improvements are possible, whilst at the same time recognizing the pragmatic reality of the threat faced by States in the War on Terrorism.

⁵¹¹ Larsaeus, *supra* note 313, at 20.

⁵¹² Noll, *supra* note 329, at 105.

⁵¹³ Duffy, *supra* note 244, at 389.

⁵¹⁴ See *infra* Part III.

⁵¹⁵ See e.g. *Y v. Sec'y of State for the Home Dep't* [2006] UKSIAC 12/2005 [98]; *id.* at [102].

A. *Towards a Domestic DWA Policy*

States should establish in their domestic law a clear, robust, and justiciable DWA framework, building on principles of international law. This framework has tripartite foundations: there is a need for justiciability, effective compliance, and independent monitoring of assurances. Codifying removal procedures in statute would allow for initial and continuing scrutiny by the legislative branch. In the United Kingdom, such a policy could lead to greater transparency through expanding the role of the “Independent Reviewer” of Terrorism legislation.⁵¹⁶ Parliamentary Committees, including the influential Joint Committee on Human Rights, would scrutinize and supervise the operation of the regime.

In terms of justiciability, the judiciary should play a central role in ensuring oversight of executive-based removal strategies. The use of a highly specialized tribunal, such as SIAC, has been key to the success of the DWA regime in the United Kingdom, but the United States has yet to implement an appropriate oversight mechanism.⁵¹⁷ A suitable starting point for such a tribunal may be the four yardsticks adopted by SIAC, subsequently upheld upon appeal to the House of Lords:⁵¹⁸

1. the terms of the assurances have to be such that, if they are fulfilled, the person returned would not be subjected to [ill treatment or torture]...;
2. the assurances have to be given in good faith;
3. there has to be a sound objective basis for believing that the assurances will be fulfilled;
4. fulfillment of the assurances has to be capable of being verified.⁵¹⁹

As SIAC suggested, the first two of these requirements are axiomatic, but the subsequent comments of Lord Phillips, accepting the judgment of SIAC in the House of Lords, are of considerable importance:

The third (test) require[s] a settled political will to fulfil [sic] the assurances allied to an objective national interest in doing so. It also require[s] the state to be able to exercise an

⁵¹⁶ The Independent Reviewer produces annual reports in relation to the U.K.’s counter-terrorism laws, which then help to inform Parliamentary debate and legislative oversight in Committees. David Anderson QC is the current U.K. reviewer, replacing Lord Carlile of Berriew in February 2011. *See* Independent Reviewer of Terrorism Legislation, Reviewer’s role, <http://terrorismlegislationreviewer.independent.gov.uk/role-of-the-reviewer>.

⁵¹⁷ Special Task Force on Interrogations and Transfer Policies Issues Its Recommendation to the President, 09 Op. Att’y Gen. 835 (2009).

⁵¹⁸ *RB v. Sec’y of State for the Home Dep’t*, [2009] UKHL 10, [1].

⁵¹⁹ *Id.* at [23]. Lord Phillips, citing the test adopted by Mitting, J.

adequate degree of control over its agencies, including its security services, so that it would be in a position to make good its assurances. As to verification, this could be achieved by a number of means, both formal and informal, of which monitoring [is] only one. Effective verification [is], however, an essential requirement.⁵²⁰

The terminology of fulfillment here is consistent with the conclusions of this article; *enforcement* is not so much an essential prerequisite as effective *compliance*. Many considerations are relevant to such compliance and would be suited to incorporation within a Code of Practice, or set of guidelines, in order to provide *transparent* guidance as to the operation of a DWA regime.⁵²¹ In this way, the considerable experience amassed through the work of the U.K.'s Foreign and Commonwealth Office, SIAC, and judgments of the appellate courts could be harnessed to inform developments to the regime. The executive practices of the United States, if more openly discussed and examined, may also have a marked impact on the formulation and enhancement of new assurances.

Integral to Lord Phillips' fourth criterion is the need to ensure that assurances are not entirely propagated in secret.⁵²² Respectfully, it is argued that this requirement does not go far enough. The House of Lords,⁵²³ Court of Appeal,⁵²⁴ and ECtHR⁵²⁵ have all indicated that independent monitoring is an important, but not essential, prerequisite for the current development of assurances. It nonetheless would be sensible for States to adopt a system of monitoring as a minimum threshold for all assurances, given the uncertainty around their use⁵²⁶ and the robust judicial scrutiny to which all such arrangements should be subjected.

⁵²⁰ *Id.* at [23].

⁵²¹ See *supra* text accompanying notes 238–42; White House, *supra* note 17, at 242; *Id.*

⁵²² See the (probably obiter) remarks in *RB v. Sec'y of State for the Home Dep't*, [2009] UKHL 10, [102]. (Lord Philips); this was applied at in *Naseer et. al v. Sec'y of State for the Home Dep't*, [2010] SIAC, SC/77/80/81/82/83/09, [36].

⁵²³ *RB v. Sec'y of State for the Home Dep't*, [2009] UKHL 10, [23].

⁵²⁴ The Court of Appeal has recently denied that there is a rule of law that requires post-return monitoring: *MS (Algeria) v. Sec'y of State for the Home Dep't*, [2011] EWCA Civ 306, [26].

⁵²⁵ *Othman (Abu Qatada) v. U.K.*, [2012], HUDOC, <http://www.echr.coe.int> (last visited Oct. 28, 2012).

⁵²⁶ Strasbourg has confirmed that what is required is an assessment of “whether compliance with the assurances can be objectively verified through diplomatic or other monitoring mechanisms, including providing unfettered access to the applicant’s lawyers.” *Id.* But the Jordanian assurances rest in part upon the use of an independent organization (the Adaleh Centre for Human Rights Studies) to monitor and report on the treatment of deportees and compliance with assurances generally. The door is therefore left open to further challenges, *inter alia* where such independent monitoring mechanisms are not in place.

Mandatory independent post-return monitoring should operate in conjunction with any other operable verification measures. Imposing such a requirement will help to assuage many of the various criticisms that have been levied against assurances generally, particularly those in relation to compliance and secrecy. The refusal of international NGOs to partake in such independent monitoring is disappointing; in developing a DWA regime, States should consider the possibility of using suitable smaller independent NGOs, which may report directly to the Committee Against Torture and the receiving State. Over time it is possible that larger NGOs will follow suit. It is equally possible that smaller NGOs will expand their scope and remit with the appropriate funding and support.⁵²⁷

CAT provides a valuable multilateral rights framework, but it is regrettable that some signatories have registered reservations that are designed to limit the scope of its protection. These reservations should be revisited and further international dialogue is required if the non-refoulement obligation is to be permitted to attain the status of *jus cogens*. Increased ratification of OPCAT, with commensurate requirements for reporting and monitoring, would be a laudable goal; the development of a DWA regime with States may provide an important intermediary step on the path to full OPCAT compliance. In this way, the pursuit of assurances can strengthen international cooperation, promote human rights and act as a lodestar for adherence to the rule of law beyond our borders. Such principles are the very antithesis of the terrorist ideologies with which we are fighting, and few countries are better placed to champion this approach than the United States or the United Kingdom.

⁵²⁷ This certainly appeared to be the case with the Jordanian monitoring body, as was observed by the ECtHR. *Id.*