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**Protection Against Torture in Western Security Frameworks:  
The Erosion of *Non-Refoulement* in the UK-Libya MOU**

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## INTRODUCTION

In 2005, the United Kingdom (UK) signed Memoranda of Understanding (MOU) with Libya, Jordan and Lebanon. These memoranda allow the signatory nations to return individuals who are considered threats to the public safety of the host country, back to the country of origin. This paper will show that the memoranda are both an extension of the UK's security-focused migration policies and in conflict with the UK's human rights obligations. First, it will be argued that the memoranda represent an effort by the UK, pre-dating and accelerated by the September 11<sup>th</sup> attacks, to frame migration policy control as a national security goal. Second, it will be argued the non-binding nature of the memoranda and their lack of mechanisms for implementation and legal redress could negatively impact the principle of *non-refoulement* to torture.

MOUs are bilateral agreements that outline the application and scope, assurances and terms of withdrawal from the agreement. For example, they facilitate the removal of *any* Libyan or British national back to the country of origin regardless of the immigration status the individual has attained in the host country. The non-discriminatory nature of the MOU is problematic for refugees who fall under the terms of this agreement because it does not differentiate between individuals who are being returned to the country from which they sought asylum and migrants who have no fear of return. Consequently, the blanket approach of the MOU endangers individuals who are at risk of torture upon return. The UK government argues that in the cases where the individual fears return, the memoranda provide a framework under which diplomatic assurances, guarantees against torture and safeguards for fair treatment, can be negotiated to secure the safety of the returned individual (Home Office 2005). The assurances enumerated in the memoranda dictate the standards of treatment that should be afforded to the individual. However, as will be argued, the assurances do not sufficiently reduce the risk that individuals will not be *refouled* to torture.

The first section of this paper will place the memoranda within a theoretical security framework and highlight how the memoranda represent a continuation of the securitization of migration policy that began at the end of the Cold War. Distinguishing between the different forms of security threats refugees are said to represent – such as environmental, social and political threats – this section first argues that refugees are perceived as having the potential to pose a threat to the national security of the state, a conceptualization which negates a comprehensive approach to migration policy. A discussion of how migration policy is ‘securitized’ will support the argument that security goals assume a primary position in migration policy. Second, it will be shown that external control policies in the European Union (EU) had the effect of securitizing migration pre 9/11 and laid a foundation for furthering this association post 9/11. Within the umbrella of the EU, it will correspondingly be established that several policies in the UK pre 9/11 also resulted in the treatment of refugees as a security threat. Third, this section will then illustrate how the terrorist attacks in the United States (US) and UK strengthened and intensified the priority of national security in migration policy in the UK. Lastly, it will be argued that the MOU is an example of this prioritization and also of the distinctiveness of the UK to extensively formalize security-related deportations in a standing agreement.

The second section of this paper will place the memoranda within an international legal framework and argue that they have the potential to greatly curb the principle of *non-refoulement* to torture. This principle is defined as the right not to be returned to a feared risk

of torture. Through an examination of the MOU, it will first be shown that the MOU is a legally non-binding agreement that is utilized by states because of its inherent confidentiality and flexibility. Second, this section will examine how this type of agreement produces a lack of efficacy in practice and a conflict with the absolute ban on *refoulement* to torture in principle. Third, it will be shown that the implementation of an independent monitoring body does not offer a sufficient remedy to either of these two concerns because the body lacks legal recourse and does not prevent a risk of torture. Lastly, it will be argued that the ‘War against Terror’ does not offer a justification for the implementation of the MOU because its goals do not supersede the universality of the prohibition against *refoulement* to torture. Therefore, the memoranda do not ensure that these states will meet their obligation not to return individuals to a risk of torture under Article 3 of the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Article 7 of the International Covenant on Civil and Political Rights (ICCPR), and the UK’s obligation under Article 3 of the European Convention on Human Rights (ECHR) and other human and international rights law.

Given the national security theoretical background and international legal framework within which these memoranda fall, the third section of this paper will analyse how the implementation of the UK-Libya MOU could affect five Libyan nationals in the UK. A case study of these five Libyan nationals, three of them recognized refugees scheduled for deportation from the UK under the memoranda, provides an illustrative example of the MOU challenge to *non-refoulement* protection. For this reason, the UK-Libya MOU has been chosen as the unit of analysis rather than the MOU signed with Jordan or Lebanon. This section will first demonstrate that a general practice of torture still exists in Libya and that there is a personal risk for these five detainees. Second, it will be shown that despite respectable reform efforts in Libya, there are real risks that Libya will not implement the MOU to the fullest extent of all the assurances held within it. Third, an analysis of Libya’s history of failing to implement human rights reform and use of the ‘War against Terror’ to justify this lack of implementation will challenge the UK’s assumption that Libya will adhere to the MOU. By looking specifically at the country conditions in Libya, its practice of torture, harsh penal code and previous human rights agreements implementation failures, it is determined that it is premature to conclude an agreement based completely on trust with Libya, and that doing so endangers the rights and safety of these five Libyans.

The methodology employed in the first two sections of this paper relies on drawing from relevant academic and legal literature, case law, international treaties and conventions, and Home Office and human rights reports. The case study of the five detained Libyan nationals in the third section is developed from personal communications, country conditions reports on Libya, current media coverage, and political commentary, as the legal cases involved with the memoranda are contemporary and developing. The personal communications included contact with Amnesty International’s North Africa Research Team, one reporter from the *Guardian*, the Home Office, and Tyndallwoods Solicitors, who are legally representing some of the detained Libyans.

## **1. MEMORANDA OF UNDERSTANDING IN A SECURITY FRAMEWORK**

The UK-Libya MOU represents a continued effort by the UK to frame forced migration policy within a security context. The presence of asylum seekers in Western states is now not only viewed as a threat to the economy, environment or social/cultural cohesion of a state, but to the state's national security as well (Wæver 1995). In order to demonstrate how the MOUs signed by the UK are designed to place forced migrants in a security framework, a further discussion of the role of security in the state, what it means to 'securitize' migration and what effects this securitization has on forced migrants is needed. Second, an examination of how this securitization has developed in the EU and UK, both pre and post 9/11, will further ground how the MOUs fit into the UK's national security agenda.

### **1.1. Securitizing Migration**

Security on a political philosophy level 'is an instrumental value': something society needs to enjoy other values 'such as freedom, peace of mind and justice' (Gibney 2003: 41). In popular and recent discourse, security has also come to mean 'everything that is politically good or desirable' (Wæver 1995: 47). However, certain costs accompany this pursuit of security, as often individual rights are subjugated to a collective community-focused security. As Barry Buzan states, there exists a natural 'disharmony between individual security and national security' (Buzan 1991: 95). National security represents the state's commitment to protect its citizens' safety and to ensure the sovereignty and survival of the state (Wæver 1995). Therefore the individual naturally falls second to this prerogative, especially if this individual is a non-citizen. There is a significant amount of research that examines the state's response to *external* security threats in relation to non-citizens, such as border control and the enactment of non-entry measures. This study, however, explores how Western states address *internal* threats from migrants residing within the host state. This research will focus on how the UK, in an effort to ensure its national security, uses the MOU to expel individuals perceived as threats to its internal security.

Refugees are viewed as a threat to the internal security of the host state primarily because they are outsiders who carry with them the potential to change or challenge the host state (Guild 2003; Wæver 1995; Weiner 1995). Foreigners are perceived 'outside of the field of loyalty'; therefore their motives are suspect (Guild 2003: 333). Refugees, in particular, have broken or rejected their bond with their state for reasons that the host country must evaluate as being legitimate or not (Guild 2003). In addition to arriving uninvited, refugees represent a threat to many different assets possessed by the host state. Myron Weiner outlines five ways in which refugees threaten the host state: these comprise threats to the relations between the sending and receiving states, threats to the security of the host state, threats to cultural unity, threats to economic prosperity and threats to the country of origin (Weiner 1995: 137). As an agreement that facilitates the deportation of suspected terrorists, the UK-Libya MOU is clearly an instrument constructed to diminish security threats to the host state posed by individual foreigners.

In any of these security/migrant threat relationships outlined by Weiner, the process of 'securitizing migration' becomes 'the process by which governments first define migrants as a threat then treat them accordingly' (Collyer 2005: 282). For example, when the Netherlands perceived that the number of refugees and asylum seekers threatened its 'societal security' (Wæver 1995), it instituted civic integration exams that measured an individual's knowledge of Dutch history, culture and laws in order to bring foreigners in line with Dutch

values and identity (Mustavairo 2006). The same concept of identifying a threat and responding accordingly applies to the UK's use of the memoranda to facilitate the deportation of perceived terrorist threats back to states with questionable human rights records. In this case, the Home Office has the power under the Immigration Act of 1971 (Immigration Act) to identify and deport individuals deemed 'not conducive to the public good.'<sup>1</sup> Once the threat has been identified, the memoranda and their accompanying assurances facilitate a deportation the UK claims complies with its human rights obligations. These two cases illustrate the process of securitization in that the state in each case identified a security risk posed by migrants and enacted corresponding policies to protect these national interests.

## **1.2. Effects of Securitization on Forced Migrants**

Securitizing migration often endangers the life of the migrant and discourages a thorough approach to migration policy (Goodwin-Gill 1999; Lohrmann 2000). For example, the increasing link between security and population movement in UN Security Council Chapter VII resolutions in Iraq, Haiti, Rwanda and Somalia in the 1990s created 'only a small step to seeing refugees themselves as the threat and to put their lives and well-being and security as individuals at serious risk' (Goodwin-Gill 1999: 3). Border security and containment rather than protection became the priority in these interventions, which resulted in negative safety consequences for refugees (Goodwin-Gill 1999). The securitization also has a negative impact on refugees within western nations. First, many refugees have fled violent conflicts or desperate poverty, only to be seized or detained again, albeit in a different manner, by the host state. Second, a policy directed to 'exclude alleged terrorists from the protection of refugee status...risks diminishing the protection of refugees as proscribed by international law' (Brouwer 2003: 423). This emphasis on security 'may divert attention from a comprehensive view of migration which weighs the pros and cons in a balanced manner' (Lohrmann 2000: 5). The prioritization comes at the cost of many freedom of movement benefits within the host state, and, as will be discussed further in the second section, legal rights as well.

The primacy of security raises two important questions for refugees. First, is the link between security and migration inevitable? In other words, as outsiders with unknown backgrounds and migration motivations, are refugees inevitably going to be viewed as a potential threat to the state? And second, is there any positive result for refugees to be gained by this link? With regard to the security-migration nexus, Reinhart Lohrmann states that the connection 'should not be considered an unquestionable given. Rather...understood as a social construct - the mixed result of discourses and practices by given social groups and institutions in a particular cultural, socio-economic and political context' (Lohrmann 2000: 5). The aftermath of September 11<sup>th</sup> is an example of this construct, where social and political pressures in Western states moved policy from a 'focus on dangerous acts to dangerous people, with inevitable consequences for the class of people considered dangerous' (Collyer 2005: 293). Lohrmann counters that despite these negatives, the development of the security-migration nexus does 'not imply forgetting its positive side...migration brings concerned countries on both sides toward international dialogue and bilateral and multilateral cooperation' (Lohrmann 2000: 6). As the memoranda highlight, however, bilateral cooperation can represent North-South bilateral security cooperation while still curtailing protection against *non-refoulement* to torture. There is, therefore, little to be

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<sup>1</sup> Immigration Act of 1971, Schedule 2.

gained for migrants by the security-migration link. More challenging yet, once this link is made it is very difficult to break (Collyer 2005). The next sections will trace how this nexus developed, and is likely to continue developing, within the EU and specifically within the UK.

### 1.3. The Securitization of Migration in Europe Pre 9/11

The development of the memoranda fits into a broader border security history in both the UK and Europe. Securitization of migration in the EU was not instantaneous, rather the result of a long progression that began with basic security information sharing. Through the 1976 TREVI group<sup>2</sup> and 1985 Schengen Agreement, European countries collected and shared data on criminals and terrorists; migrants and asylum seekers were naturally swept into this grouping because they arrived with undocumented backgrounds (Collyer 2005; Huysmans 2006). External border and information control were at the centre of TREVI and Schengen and therefore migration became part of the package of issues which this group and agreement aimed to manage. Under Schengen, ‘migration – i.e. refugees and the asylum issue – is put into one basket with the struggle against drugs and terrorism’ (Huysmans 1995: 53). The original intent of this grouping may have been border control but it had the effect of securitizing migration. For example, Article 99 of Schengen allows the Schengen Information System (SIS) to maintain information on individuals suspected of committing a crime in the future, a provision that allows tracking of both refugees and suspected terrorists.<sup>3</sup> In these agreements, ‘asylum can be rendered a security question by being institutionally and discursively integrated in policy frameworks that emphasize policing and defence’ (Huysmans 2006: 4). These developments, while only subtly linking migration to security through information systems, laid a foundation for the migration-security nexus.

Macro level changes on the European and global level subsequently contributed to the securitization of migration in Europe. Matthew Gibney identifies the creation of the European Community (EC) in 1987 as a pre-September 11<sup>th</sup> event that had the effect of securitizing migration; where, ‘from the start, discussion welded matters of asylum and immigration with more nefarious issues of organized crime, illegal migration and terrorism’ (Gibney 2003: 40). This security-migration connection is evident in further European treaties, such as the 1997 Treaty of Amsterdam that incorporated issues of asylum into the Freedom, Security and Justice section (Gibney 2003; Goodwin-Gill 1999). Second, these treaties take place against the backdrop of the end of the Cold War and bi-polar power dynamic. Olé Wæver argues that when the ‘moorings’ of the Cold War were lost, ‘security’ became the replacement; “Order” was the buzz word of the Cold War, linked to the survival of the system, just like security is now’ (Wæver 1995: 62, 55). Jef Huysmans describes this process of replacing one international framework with another as a search for a ‘stabilizing strategy’; here, ‘securitization of certain problems is among one of those strategies, and migration seems to be one if its favourite targets’ (Huysmans 1995: 63). Security provided the structure the end of the Cold War left void, and the consequences of this new structure, extensive control efforts, impacted refugees and asylum seekers on a micro level.

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<sup>2</sup> TREVI was an intergovernmental network – or forum – of national officials from ministries of justice and the interior in the European Community created during the European Council Summit in Rome, 1-2 December 1975. It ceased to exist when it was integrated in the so-called Third Pillar of the European Union by the Treaty of Maastricht in 1992.

<sup>3</sup> Convention Implementing the Schengen Agreement of June 1985, Article 99.

Both the creation of the EC, related security and information sharing agreements and the end of the Cold War established a basis for assessing asylum and migration policy in a security context. The World Trade Center attacks in 1993 and 2001, however, served as an undeniable catalyst in strengthening this association (Gibney 2003). Here, ‘foreigners...corresponded to an empirically verifiable threat which consequently justified a series of restrictive policies across Western states’ (Gibney 2003: 41). This fury of legislation and declarations post 9/11 simultaneously mixed migration and anti-terrorism policies and further entrenched migration in a security context.

#### **1.4. Securitization of Migration in the European Union Post 9/11**

The attacks of September 11<sup>th</sup> more narrowly defined Weiner’s categorization of how refugees can be a threat to the host state by linking terrorism to forced migrants. The terrorist label gave Western states a more concrete accusation to place on forced migrants within the security framework. As Kathleen Newland remarked, ‘the context of the war on terrorism has reinforced existing trends toward narrowing the exceptional treatment accorded to people in need of international protection under national immigration laws and international norms’ (Newland et al. 2004). In Europe, that process of treating forced migrants as terrorist threats was immediate because the asylum system was viewed as being a potential channel for terrorists (Refugee Action 2006). Consequently, fortifying and aligning existing restrictive migration polices were the first steps of action taken across Europe. September 11<sup>th</sup> served as a ‘trigger to consolidate policies...which had been waiting for a long time for enough support but only found acceptance in the joint resolution to combat terrorism after 11.09’ (Brouwer 2003: 422). Through this focus on internal security, migrants were further associated with terrorism because changes to the asylum, detention and deportation system were made in the name of national security.

The recommendations submitted by the Commission of the European Communities (COM) to the Council of Ministers exhibits how the EC aimed to strengthen existing border control policies and identify new ones to address the perceived threat of migrants post 9/11. The Commission issued a working document on December 5, 2001 entitled ‘The relationship between safeguarding international security and complying with international protection obligations and instruments.’ This paper begins with the premise that legitimate refugees should not become victims in the ‘War against Terror.’ However, it is still ‘legitimate and fully understandable that Member States are now looking at reinforced security safeguards to prevent terrorists from gaining admission to their territory’ (COM 2001: 6). The authors acknowledge that terrorists are not likely to use the asylum system because other channels require significantly less scrutiny, yet the rest of the paper is nonetheless devoted to discussing the risks and holes in the asylum system. This approach leaves the impression that the Commission does not necessarily believe the changes to the asylum system will contribute to the ‘War against Terror’ but because the EC can limit the asylum system, the Commission recommends restrictions. Minimization of rights and benefits in pursuit of security continues to be a theme throughout the Commission’s proposal.

The document first examines how the EC can use existing border controls and laws to restrict entry to migrants in order to increase security. The Commission recommends using SIS asylum seeker data to identify terrorist subjects, as well as the 1997 Dublin Convention. The 1997 Dublin Convention allows for the collection of bio data of asylum seekers and ‘simultaneously assists Member States in knowing who is entering their territory, and subsequently enhance their national security’ (COM 2001: 18). In addition, methods of

exclusion of potential terrorists through all migration channels are thoroughly discussed. The authors express their frustration with the limiting power of human rights instruments in expulsion of suspected terrorist cases, stating ‘the policy options for dealing with excludable but non-removable persons is a very unsatisfactory one’ (COM 2001: 14). In order to surmount this barrier, the Commission recommends that the EC adopt a common asylum procedure that harmonizes and expands exclusion, prosecution and detention possibilities (COM 2001). Subsequently, the EC has adopted the 2004 Qualifications Directive that defines who merits asylum in the EC as a whole, and a procedural directive that outlines a minimum standards asylum procedure for the EC. The Commission’s recommendations represent a further securitization of migration because they view control, detention and removal of migrants as key methods to ensure European security.

The UK, however, chose to respond individually to the obstacles and security dilemmas identified in the Commission report by additionally signing the memoranda agreements. The memoranda and accompanying assurances provide a venue for the UK to remove excludable (and non-excludable) persons and claim accordance with international human rights instruments. Unlike the UK, the EC has not followed suit in formalizing assurances with Muslim countries. The recent decision by the Council of Europe Group of Specialists on Human Rights and the Fight Against Terrorism not to adopt guidelines on the acceptable use of assurances highlights the UK’s uniqueness in this practice (HRW 2006a). Other countries, such as Sweden, the Netherlands, Italy, Austria and Lithuania have used assurances in deportations; however, several of these countries, such as Lithuania, cited unsatisfactory results and urged the Council not formalize the use of assurances (HRW 2006a). This difference in willingness to formalize diplomatic assurances somewhat isolates the UK in its response to perceived internal security threats post 9/11.

### **1.5. Securitization of Migration in the United Kingdom Pre 9/11**

The UK’s securitization of migration developed the same elements of control and minimum standards as the EU, yet it also implemented domestic policies that further securitized migration pre 9/11. This discussion will examine how a specific member state, the UK, has acted upon migration issues within the broader context of securitization of migration in Europe. In order to demonstrate how the memoranda are a product of this securitization, it will be necessary to examine the development of the UK’s security paradigm pre and post 9/11 as well. First, the UK’s previous history with terrorism, its refusal to join the Schengen Agreement, the introduction of the Immigration Act, and the implementation of the 2000 Terrorist Act pre September 11<sup>th</sup> all laid the foundation for an enhanced migration-security focus after the 9/11 attacks. Second, the terrorist attacks in the US and UK provided the impetus for the UK to enact legislation that drastically increased detention for migrants suspected of terrorism and required the UK to derogate from some of its human rights commitments. The mandates set by the 2001 Anti-Terrorism Crime and Security Act (ATCSA), the 2002 Nationality, Immigration and Asylum Act, the 2004 Immigration and Asylum Act and the 2006 Terrorism Act exemplify how the fear of terrorists using the UK as a host country resulted in memoranda that facilitate the deportation of these suspected terrorists.

The long history of terrorism in the UK contributed to the securitization of migration decades before the September 11<sup>th</sup> attacks.<sup>4</sup> The ongoing conflict between the UK and the

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<sup>4</sup> Michael Collyer (2005) traces the link between security and migration in the UK even further back to the immigration controls introduced in 1793 during the Napoleonic wars.

Irish Republican Army (IRA) produced an intense fear of outsiders who ‘moved back and forth across the UK-Irish border in order to escape’ (Guild 2003: 340). The threat Irish migrants posed was one of the main reasons the UK decided not to join the Schengen Agreement; the UK government believed ‘the Schengen arrangements on abolition of border controls would have negative effects on security’ (Guild 2003: 341). The UK government did, however, contribute to and have access to SIS and the EU databases that collected fingerprints for asylum seekers. Primarily, the UK wanted to partake in EU security developments pre-9/11 but also wanted to maintain control over its own security agenda within this framework.

The most significant sign of the securitization of migration in the UK, however, was the Immigration Act. The Immigration Act gave immigration officials the power to detain asylum seekers for the first time, and more importantly, gave the Home Secretary power to deport non-nationals deemed ‘not conducive to the public good’.<sup>5</sup> Again, the precedence of collective security over the rights of the individual is clearly stated. The act also grants the authority to the Home Office, not the judiciary, to make determinations regarding the motivations and right to stay of an immigrant. The institutionalization of this practice led to a continuation of control over security and immigration matters by the Home Office after September 11<sup>th</sup>. The Special Immigration Appeals Commission (SIAC) was created in 1997 to hear appeals related to charges under the Immigration Act, and post 9/11 was given the power to review appeals regarding Home Office determinations of suspected international terrorists. In many respects, the Immigration Act calls into question why the UK needed to implement any of its post-9/11 restrictive immigration legislation when it already had the instruments necessary to deport unwanted individuals. For example, all of the men scheduled for deportation under the UK-Libya MOU are detained under the Immigration Act (Jeffery 2005). The subsequent acts simply expand the powers of the Home Office and grounds for deportation; the fundamental principle that the UK may remove an individual deemed a terrorist threat, though, is first embedded in the Immigration Act.

The 2000 Terrorism Act also produced significant consequences for political dissident migrants pre-9/11 in that the act incorporates violent acts committed in the country of origin in its definition of terrorism and bans international terrorist organizations.<sup>6</sup> Previously, only domestic terrorism and domestic terrorist organizations, mainly Irish ones, had been banned. These changes had a significant impact for refugees in the UK because the measures were ‘more severe still on those refugees who remain politically active in relation to their countries of origin’ (Collyer 2005: 283). This policy gave the UK the lens to view some politically active refugees as terrorists rather than formerly persecuted activists. This change in label, from refugee to terrorist, ‘delegitimizes opponents and therefore legitimizes the response to them’ (Collyer 2005: 283). This strategy became even more utilized in the UK after the September 11<sup>th</sup> attacks.

## **1.6. Securitization of Migration in the United Kingdom Post 9/11**

After September 11<sup>th</sup>, the UK was quick to enact legislation that intertwined migration and security with the subjugation of individual rights to new levels. Within three months of the attacks, parliament passed the ATCSA as a piece of emergency legislation in December 2001. This legislation situates terrorism as an immigration issue as it applies only to foreign nationals, and most of the act’s provisions are mediated through immigration

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<sup>5</sup> 1971 Immigration Act, Schedule 2.

<sup>6</sup> Terrorism Act 2000, Article 1 Sec. 4, Schedule 2.

rather than criminal channels (Collyer 2005). For example, a ‘reasonable suspicion’<sup>7</sup> is the only test of whether a migrant is considered a terrorist and this decision can only be challenged at SIAC. The evidence presented to SIAC and the Court of Appeal ‘is based on secret and therefore unchallengeable documents’ (Collyer 2005: 294). Part 4 section 23, however, was the most controversial provision of ATCSA because it essentially provided for the indefinite detention of suspected terrorists.<sup>8</sup> This measure responded to the European Commission’s question of how to handle excludable but non-removable persons. If the UK could not deport suspected terrorists because of its human rights obligations of *non-refoulement* to torture, it could simply keep them incarcerated without formal charges because of the security-sensitive material involved.<sup>9</sup> The UK’s human rights commitments would not deter its community security prerogative and consequently it derogated from two human rights instruments to implement ATCSA.

The derogation from the international human rights instruments demonstrated the value the UK placed on internal security over the rights of detained migrants in the UK. The UK was forced to derogate from ECHR Article 5 and ICCPR Article 9 because the right to liberty and prohibition of indefinite detention of these provisions conflicted with Part 4 section 23 of ATCSA. The derogation made the UK ‘unique amongst its neighbours’ (Blake 2003: 426); in fact, the UK and Germany were the only EU countries that directly related amendments to migration and asylum law to anti-terrorism policies (Brouwer 2003). Elspeth Guild criticizes this decision to derogate on two grounds:

The flaws in the logic are equally impressive. The first, which applies to all issues of expulsion and terrorism, is that by expelling an individual, national security is enhanced. If the individual is expelled to a country which permits him or her to carry on terrorist activities without hindrance then no country’s national security is enhanced by the expulsion (Guild 2003: 342).

This logic applies to the memoranda as well. The countries that have entered into memoranda agreements with the UK, particularly Libya, have a history of state-sponsored terrorism.<sup>10</sup> If these suspected terrorists are returned to their host country, it is incumbent on the country of origin to prevent them from resuming their terrorist activities. Second, Guild states ‘the UK approach of derogating from inconvenient human rights guarantees sets at least an equally poor example for the rest of the world’ (Guild 2003: 342). As demonstrated by this derogation and the enactment of the memoranda, the UK signals that human rights obligations can be edited, avoided or eroded (Black-Branche 2002).

In addition to ATCSA, the UK has implemented other measures that treat forced migrants as a security threat. The 2002 Nationality, Asylum and Immigration Act centred on expediting the removal procedures for failed asylum seekers. The 2004 Immigration and Asylum Act gave the Home Office power to place ‘tags,’ location-placing ankle bracelets, on asylum seekers or other foreign nationals suspected of terrorism in order to track their movements. The UK Refugee Council recently expressed concern that this practice had

<sup>7</sup> ATCSA Article 21 (1) 2001.

<sup>8</sup> ATCSA, Part 4 (23) states that ‘a suspected international terrorist’ may be detained ‘despite the fact that his removal...is prevented (whether temporarily or indefinitely).’

<sup>9</sup> The Law Lords ruled this provision incompatible with Article 15 of the ECHR on December 16, 2004. ‘Detention’ was replaced with ‘control orders,’ methods such as house arrest, in the 2005 Prevention of Terrorism Act. An Amnesty International report, *United Kingdom Human Rights: A broken promise* (February 23, 2006) further explores the effects of house arrest and ATCSA on asylum seekers.

<sup>10</sup> See US State Department’s *State-Sponsored Terrorism*, [www.state.gov/s/ct/rls/crt/](http://www.state.gov/s/ct/rls/crt/)

extended now to include some non-detained asylum seekers without justification from the Home Office (Refugee Council 2006). The UK also places asylum seekers and terrorist suspects under house arrest, a tactic suggested by the European Commission's Final Report 743 (Commission of the European Communities 2001). These measures criminalize foreign nationals and make their integration and provision for their families virtually impossible (BBC 2006). The 2006 Terrorism Act also expands the scope of terrorist offences, including encouraging terrorism or disseminating terrorist publications, which jeopardizes the interpreted legitimacy of some political activism undertaken by the Libyan refugees. All of these policies further entrench the idea that asylum seekers have hidden motives that threaten the UK; therefore, like the MOU, their implementation is not only justified but imperative to the UK government.

### **1.7. Memoranda as an Extension of UK National Security Policy**

While the memorandum itself does not contain language to indicate its security purpose, all the public relations comments around its signing indicate that security is the primary goal. Former Home Secretary Charles Clarke described the memoranda as 'an example of effective international cooperation that we need in order to confront and defeat the type of terrorism we now face' (Home Office 2005). The terrorist attacks in London in July 2005 convinced a previously sceptical Foreign & Commonwealth Office (FCO) of the need for the memoranda as well. In 2004, the FCO Human Rights Report expressed 'serious concerns as to the conditions in Libyan prisons...No doubt further independent corroboration of the happy state in Libya will be forthcoming before any attempted removals' (*Times* 2005). This rhetorical prohibition on removals to countries with questionable human rights records changed after the July 7, 2005 London Tube attacks. At the time of the signing of the memorandum with Libya, the FCO issued a statement which said 'the dreadful attacks in London on July 7 have served to remind us all of the tragic consequences of international terrorism and underline the need to work together for a truly effective international response' (*Times* 2005). With respect to the memorandum specifically, the FCO continued:

The government firmly believes that the assurances provided by this type of MOU should enable the British courts to allow the deportation of foreign nationals who threaten national security or whose presence is not conducive to the public good; and that such deportations will uphold the UK's international obligations (*Times* 2005).

The overriding importance of national security and the memoranda as a means to maintain that security is clearly evident.

In part, the development of the MOU and the imbalance between collective security and the rights of individual migrants represent the evolution of this prioritization in the EU and to a larger extent the UK. The securitization of migration, the identification of migrants as a potential security threat and the treatment of them accordingly, began before 9/11, in the EU with border controls and in the UK with the 1971 Immigration Act. September 11<sup>th</sup> only strengthened the association between migrants and internal threats to the state. This process resulted in the development of minimum standards of treatment on the EU level and the derogation from human rights and the formalization of diplomatic assurances in the UK. This process not only impacts the rights afforded to migrants but, as will be shown in the third section, endangers those who have expressed a fear of *refoulement* to torture as well. Whether the memoranda will actually increase or decrease the security of the UK is impossible to measure at this point. What is noteworthy from the FCO's statement above, though, is that the government believes that the memoranda fully comply with the UK's

international legal obligations. This statement indicates that the memoranda provide enough of a framework under which diplomatic assurances can be negotiated to ensure that the UK meets its obligations of *non-refoulement* to torture under CAT, ICCPR, ECHR and relevant case law. Whether the memoranda fulfil the security goals of the UK is irrelevant in an international legal framework that supports an absolute prohibition on returning any individual to a risk of torture.

## 2. MEMORANDA OF UNDERSTANDING IN AN INTERNATIONAL LEGAL FRAMEWORK

*As the House knows, we have been trying for some time to address the problems posed by individuals whose deportation could fall foul of our international obligations by seeking memorandums of understanding with their countries of origin.*

-Charles Clarke speaking to the House of Lords, January 26, 2005<sup>11</sup>

Former Home Secretary Charles Clarke indicates that diplomatic assurances mediated under MOUs are consistent with the UK's international human rights obligations; however, a further examination of the MOUs in an international legal framework is required. This section argues that the legally non-binding nature of MOUs results in a low level of guarantee that the receiving state will comply with the diplomatic assurances. It will be shown that states utilize MOUs because of the flexibility and convenience of these memoranda in facilitating deportations on national security grounds. Guy Goodwin-Gill argues that diplomatic assurances negotiated under the MOU fail to meet the international ban on *refoulement* to torture because they are 'in tension with the absolute prohibition enshrined in article 3 [ECHR]' and they 'lack efficacy as a protection against prohibited ill treatment' (Goodwin-Gill 2005: 1). Through examining the language of the MOU itself and referencing current case law and the Special Rapporteur on Torture, it will be shown that the MOUs do not improve the efficacy of diplomatic assurances nor resolve the tension with the absolute ban on *refoulement* to torture. In short, in practice and in principle, MOUs still 'fall foul' of the UK's international legal obligation not to return individuals who might face a risk of torture.

### 2.1. The Legal Status of Memoranda of Understanding

The 1969 Vienna Convention on the Law of Treaties (Vienna Convention) outlines the legal implications of treaties; however, it does not explicitly state what status MOUs acquire under international law. Under Article 2.1(a) of the Vienna Convention a “treaty” means an international agreement concluded between States in written form and governed by international law'. The word ‘treaty’ has subsequently been interpreted as creating obligations for the state under international law (Watts 1999). At the drafting convention, however, the UK was very clear that it did not consider MOUs as treaties. In the Vienna Convention Official Records, the UK delegation ‘considered that many “agreed minutes” and the “memoranda of understanding” were not international agreements subject to the law of treaties because the parties had not intended to create legal rights and obligations, or a legal relationship, between themselves.’<sup>12</sup> Article 3 of the Vienna Convention itself recognizes that states enter into a range of legally binding agreements and that these agreements can operate outside the scope of the Vienna Convention. Yet, the acknowledgement that there are varying

<sup>11</sup> Hansard HC deb, 26.1.05, Col 307.

<sup>12</sup> Vienna Convention, 2 Official Records at 228, para 35.

types of international agreements does not clarify what status those other agreements, such as an MOU, have attained on an international level. Jan Klabbers' analysis of the Official Records states that there is little evidence that the Vienna Convention negotiators 'actually contemplated whether the agreement [MOU] was meant to be legally binding, or, perhaps, exclusively politically binding or morally binding' (Klabbers 1996: 68). Therefore, Article 3 of the Vienna Convention implies that an MOU can still exist as an international agreement even though it is not a treaty; the language of the Vienna Convention does not explicitly specify what legal standing an MOU represents.

Consequently, there exists a debate whether MOUs are legally binding in nature. The Special Rapporteur on Torture Manfred Nowak and Anthony Aust, supported by overwhelming state practice, conclude MOUs are not legally binding. However, those who argue that MOUs must be legally binding question what purpose an international agreement can have if it is not legally binding. Klabbers, for example, states, 'the very idea that some agreements are not legally binding, but nevertheless concluded with a view to mutual adherence is a fairly novel one' (Klabbers 1996: 4). Klabbers concludes that the commitment but non-binding status of MOUs 'is impossible, and, even where it would be possible, that it is highly impracticable' (Klabbers 1996: 9). This impossibility leads him to determine that despite the intent of states to create solely commitments, MOUs by default must be binding. This interpretation would make both Libya and the UK legally bound to adhere to the assurances in the MOU and potentially more responsive to implementing the assurances. On the other hand, and as will be argued here, this non-binding nature is the reason why states enter into these agreements and is one of the primary reasons Nowak insists that MOUs do not provide sufficient guarantees against torture (Nowak 2005). Aust states an 'MOU is an instrument concluded between states which is not legally binding' and that the intent of the state to enter into varying levels of commitment and accountability must be recognized (Aust 2000: 26). As will be demonstrated, the UK did not intend to enter into a legally binding commitment with Libya.

Both the UK's statements on its understanding of the legal nature of MOUs and the procedural differences between MOUs and treaties support the conclusion that the UK perceives the UK-Libya MOU as a non-binding agreement. The FCO further confirms this interpretation by stating that UK MOUs are 'international "commitments" but in a form and with wording which expresses an intention that it is not to be legally binding' (FCO 2004: 1). Treaties and MOUs also show tangible signs that they impose different degrees of commitment; these include a difference in language, registration practices and approval procedures (Aust 2000; FCO 2004). For example, treaties use words with legal implications like 'shall' or 'agree,' whereas MOUs use 'will' or 'come into operation.'<sup>13</sup> The UK-Libya MOU at no point employs any of the traditional treaty language listed by Aust or the FCO. Second, most treaties are registered under Article 102 of the UN Charter, whereas MOUs are not, nor are they even published in many cases. In one agreement dispute, the US-UK Heathrow User Charges Arbitration MOU was found not legally binding because it had not been registered under Article 102 (Aust 2000: 29). Third, the absence of a parliamentary procedure also indicates that an agreement is not a treaty. The Acting Secretary for European Affairs and the British Ambassador to Libya were the signatories to the UK-Libya MOU and neither country's legislature was involved. On a more fundamental level, though, Aust argues that MOUs are not treaties because mandating treaty status to MOUs would ignore the

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<sup>13</sup> For more examples of the differences in UK treaty v. MOU language, see Foreign & Commonwealth Office (2004) 'Treaties and MOUs: Guidance on Practice and Procedures,' 15-18.

overwhelming practice of states and deny that the ‘sovereign state is free to exercise (or not to exercise) its treaty making power’ (Aust 2000: 42). Therefore, MOUs are used as a means for the state to maintain a significant amount of autonomy under a non-binding bilateral agreement; this latitude in implementation is what concerns both Nowak and human rights advocates.

Even though the MOUs are legally non-binding, the doctrine of estoppel and the provisions contained within the agreement have the potential to produce some level of adherence to the agreement. Aust argues that MOUs have legal consequences through the doctrine of estoppel, where if an agreement is made in good faith, then the state is estopped to its detriment from defecting from its original commitments (Aust 2000: 46). In this case, the government of Libya would follow through on the assurances related to the returned individual because it had made a good faith agreement. In addition, on a political and moral level, neither the British nor the Libyan government would want their international reputations damaged by lack of adherence to this agreement. Nowak counters that this theory still provides no legal effect (Nowak 2005). While the debate regarding the legal label given to MOUs could be indicative of the level of adherence each state will invest, the actual provisions in the agreement and what they require are much more indicative of the implementation power of the document. What the advantages are for states in using these agreements and the risks these advantages have for the subjects of the agreement will further clarify whether the MOUs violate the prohibition on *refoulement* to torture in practice and in principle.

## 2.2. Advantages of Memoranda of Understanding

Confidentiality and convenience are the primary reasons the UK enters into an MOU agreement (FCO 2004: 1). Unlike treaties, there is no requirement to publish MOUs domestically in the UK or register them under Article 102 of the UN Charter.<sup>14</sup> This lack of transparency gives the state a significant amount of leeway in negotiations and implementation. This type of agreement, consequently, is very useful in the ‘War against Terror.’ MOUs have been employed extensively in the past in the defence field ‘for reasons of national security and [agreement details] are therefore found only in MOUs. All states do this’ (Aust 2000: 36). Given the securitization of migration and the historic use of MOUs in defence matters, migration-related MOUs become integrative tools in the migration-security nexus. Convenience is another advantage of the MOU agreement structure. As Lord McNair states, an MOU ‘forms a step in the process of tidying up a complicated situation’ (McNair 1961: 15). MOUs lack formality in that there are no elaborate clauses and diplomats usually sign the agreements. They also can be amended and terminated ‘with the same ease and speed as the MOU itself’ (Aust 2000: 37). For example, the UK-Libya MOU was negotiated in Tripoli in August 2005 and was signed and went into effect by October 18, 2005. This ease of facilitation is unparalleled compared to treaty negotiations that can consume years.

Convenience is a recurring justification in other migration procedures related to the UK’s ‘War against Terror.’ As noted previously, all provisions under the MOU are conducted through immigration rather than criminal channels. In the UK’s intervention brief (UK Brief) to the European Court of Human Rights (ECtHR) in the pending *Ramzy v. The Netherlands* case, the UK claims that criminal justice channels do ‘not offer sufficient or effective route to ensure that the terrorist threat posed by the individual is properly dealt

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<sup>14</sup> By comparison, in the United States, MOUs must be published annually and the text must be submitted to Congress within 60 days of entry into force (Aust 2000: 36).

with.<sup>15</sup> For example, the UK states the terrorist would be vigilant not to commit a criminal offence before the terrorist attack, thus defusing the possibility for trial on criminal grounds. A terrorism charge in a criminal court requires ‘proof beyond a reasonable doubt’ whereas a ‘reasonable suspicion’,<sup>16</sup> required for deportation under immigration law provides a lower threshold for removal. The UK-Libya MOU follows a similar line of reasoning in that, in the interests of expediency and national security, the MOU is a convenient and flexible way to handle a security-sensitive deportation. This sacrifice of formality and accountability for convenience and confidentiality, however, puts at risk the enforceability of many safeguards outlined in the MOU.

### **2.3. Risks of Memoranda of Understanding**

The advantages of convenience and confidentiality result in trade-offs in the respect afforded to MOUs. Because they do not create legal obligations ‘there may sometimes be a temptation not to take the commitment in it so seriously’ (Aust 2000: 39). Aust warns that this lack of respect can produce a possible lack of care in drafting because the agreements are so easy to amend and do not require implementation in domestic legislation. The informality surrounding these agreements can even, surprisingly, result in governments physically losing a copy of the MOU. In the UK, the FCO requires a copy of all MOUs to be sent to it so that the agreements do not just disappear (FCO 2004: 2).

More significantly, MOUs do not necessarily contain a mechanism for arbitration if a conflict arises between the two states. Under an MOU one state ‘cannot take the matter to an international court or tribunal or impose the countermeasures it might be entitled to’ (Aust 2000: 45). In the context of the UK-Libya MOU, this characteristic means that if an individual is returned and tortured, the UK has no court to petition for the return of the individual or the cessation of torture. Whether the UK would take enough interest in this potential consequence is another matter for consideration altogether. However, if the question here is whether MOUs provide a strong enough framework to ensure the efficacy of diplomatic assurances, the lack of judicial review must be considered. The next section will apply this general discussion about the legal nature, advantages and risks of MOUs specifically to the UK-Libya MOU; it will illustrate how under this understanding of the legal nature of MOUs as non-binding commitments, the MOU does not improve the efficacy of diplomatic assurances.

### **2.4. Efficacy of Diplomatic Assurances under the UK-Libya MOU**

The UK-Libya MOU seeks to provide a framework for diplomatic assurances that have previously been criticized as highly inefficient. Goodwin-Gill outlines four reasons why diplomatic assurances lack efficacy: first, they are based on trust; second, post-return monitoring mechanisms are insufficient due to the way torture is administered; third, non-state actors can be the potential perpetrators of torture; and forth, states are not held accountable. He concludes: ‘in short, diplomatic assurances effectively add nothing to the receiving States’ obligations, while in no way diminishing those of the sending State’ (Goodwin-Gill 2005: 2). The UK-Libya MOU provisions under the ‘Application and Scope’ and ‘Assurances’ sections make minimal improvements to the efficacy of diplomatic assurances and reinforce many of the deficiencies Goodwin-Gill raises.

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<sup>15</sup> Lithuania, Portugal, Slovakia and United Kingdom (2005) ‘Intervening Brief’ in *Ramzy v. The Netherlands* Application No. 25424/05, para 14.

<sup>16</sup> 2001 Anti-Terrorism Crime and Security Act.

First, both the MOU and assurances are fundamentally based on trust; it would therefore be difficult to argue that assurances based on trust could somehow be augmented by another agreement, a memorandum of *understanding*, based on trust. For example, while the UK-Libya MOU contains nine assurances, ranging from a prompt and fair trial to the right to practise religious customs in detention or elsewhere, states still have latitude in enforcing and accepting the assurances. First, requests ‘may’ be made, which entrusts the UK and Libya to pursue the assurances when one state deems it appropriate; it is not mandatory.<sup>17</sup> Second, any case-specific assurances negotiated under the MOU ‘will be for the receiving state to decide whether to give such further assurances.’<sup>18</sup> The only difference with respect to trust between the MOU and diplomatic assurances is that the MOU lays out the mutual understandings in a general non-case-specific way and initiates diplomatic relations on return issues before a pressing need arises. However, on the whole, the MOU structure does not change the trust foundation of diplomatic assurances.

Second, the monitoring mechanisms in the UK-Libya MOU are insufficient safeguards against torture. While the MOU requires both countries to ‘comply with their human rights obligations under international law regarding a person in respect of whom assurances are given under this Memorandum,’<sup>19</sup> there is no explicit prohibition on torture. The MOU does further provide that if the returned individual is detained upon return, he should be ‘treated in a humane and proper manner, in accordance with internationally accepted standards.’<sup>20</sup> A prohibition on torture is implied through these statements, yet as the case of *Agiza v. Sweden* demonstrates, torture has still been administered even with these types of assurances. In order to allay this concern, the MOU calls for an independent monitoring body to be involved in the return and detention process, if applicable. This provision is essential because Libya has not signed the 2002 Optional Protocol to CAT, which requires states to cede detention access to independent human rights monitoring bodies.<sup>21</sup> However, even a thorough and fair monitoring body cannot provide a guarantee that cases of torture will be uncovered. Torture tactics are designed to inflict pain without leaving marks and instil the fear of divulging the torture in the victim; they are usually ‘extra legal and covert’ (Goodwin Gill 2005: 9). Consequently, the monitoring mechanisms in the MOU cannot ensure verification that torture has not taken place.

Third, the UK-Libya MOU does not address the potential threat of non-state or rogue state actors. All statements are state-focused and assume complete state control over the returned migrant’s well being, both in and out of detention. The issue of rogue state agents was addressed in *Chahal v. The United Kingdom*, where the ECHR decided that Punjabi security forces represented a threat to Chahal and therefore the UK was prohibited from returning him to this risk of torture. The Court stated:

despite the best efforts of that Government...the violation of human rights by certain members of the security forces...is a recalcitrant and enduring problem...Against this background, the Court is not persuaded that the above assurances would provide Mr. Chahal with an adequate guarantee of safety.<sup>22</sup>

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<sup>17</sup> UK-Libya MOU, Application and Scope.

<sup>18</sup> UK-Libya MOU, Assurance 1.

<sup>19</sup> Ibid.

<sup>20</sup> Ibid, Assurance 3.

<sup>21</sup> Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Punishments, Article 1.

<sup>22</sup> *Chahal v. United Kingdom*, para. 104-105.

The UK-Libya MOU has no overt measure to address this concern, though hypothetically if a similar situation arose, the UK could seek additional assurances. However, under the case law of *Chahal*, assurances on top of assurances would not equal increased or satisfactory protection against rogue state actors.

Lastly, underlying the concerns about trust, monitoring and rogue state actors is the lack of accountability built into diplomatic assurances. The MOU framework makes a basic attempt to address this objection by instituting an independent monitoring body. Assurance number six provides that the returned individual has unimpeded access to the monitoring body unless he is detained. If he is detained, he is entitled to contact the monitoring body within one week of being detained, after which he is entitled to regular visits ‘in co-ordination with the competent legal authorities.’<sup>23</sup> The number of personal/private visits with the monitoring body is left vague, only that there will be an ‘opportunity’ for private visits and in case of a trial visits will be permitted once every three weeks.<sup>24</sup> The monitoring body can even ask for a medical examination if necessary. Who will constitute this monitoring body, however, is an interesting question the MOU left unspecified. Out of three human rights non-profits in Libya that could be eligible as monitors, two advocate only within unofficially accepted levels of dissent and the third, the Gaddafi International Foundation for Charity, has the benefit of close ties to the government. (HRW 2006b). The UK approached the Gaddafi International Foundation for Charity to serve as the monitoring body, yet the fact that Gaddafi’s son is the CEO of this organization questions its independent nature (HRW 2006a). Once a monitoring body is established, though, Nowak states that the problem remains that there is ‘no means of legal recourse if the assurances are violated’ (Nowak 2005: 2). Therefore the monitoring body could prove to be fairly ineffective due to its somewhat independent nature, limited access to the detainees and lack of legal redress.

The lack of efficacy enforces what Gregor Noll calls a ‘silence’ on the courts, the captive, the diplomat and the norm of the prohibition on torture. For example, the lack of access to the courts in the UK ‘shifts the power from the judiciary to diplomacy and security networking’ (Noll 2006: 16). The priority of security in these cases moves the well being of the returned individual away from judicial scrutiny or committee review, a procedural right held central in CAT.<sup>25</sup> In the case of the tortured detainee, the captive is also most likely silenced because he fears future retributive torture. Maher Arar, a Canadian citizen held in Syria, articulated this complicity in concealing torture; he expressed his frustration with receiving visits from diplomats yet being unable to admit to the torture out of fear of retribution (Noll 2006). This example suggests ‘the futility of diplomatic visits to detect or avert the usage of violent interrogation methods against rendered persons’ (Noll 2006: 17). In the Arar case, Noll states the diplomat was also silenced in two ways. First, if the returned person was supposedly an enemy of the sending state, it is difficult for the diplomat to gauge the motives behind accusations of torture. Second, evidence of torture also represents failure of the bilateral agreement, which is internationally embarrassing for both states. As cited in Section 1, the returnee in this situation represents not only a threat to the host state, but a threat to the relations between states as well. The incentive to report the torture is consequently very low. The silencing effect, or the removal of agency, caused to several key players – the judiciary, the diplomat and the captive – illustrates the inefficiencies and potential dangers inherent to the diplomatic assurances system.

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<sup>23</sup> UK-Libya MOU, Assurance 6.

<sup>24</sup> Ibid.

<sup>25</sup> See CAT, Articles 13, 21 and 22.

While assurances lack efficacy in practice, the MOU itself in principle is also in conflict with the pre-emptory norm on *non-refoulement* to torture. Noll's reference to the silencing of the prohibition on torture norm undercuts this entire discussion because in some respects it is irrelevant whether the assurances lack efficacy if the overarching principle of the agreement conflicts with an international legal norm. Even if the UK-Libya MOU made drastic improvements to the structure of assurances to improve trust, post-return monitoring mechanisms, control of rogue state actors, and accountability, the MOU is still in tension with the prohibition on *refoulement* to torture in principle. A security-based agreement accompanied by assurances does not carry the same legal weight as a ban on torture. As will be demonstrated, case law, customary law and international bodies state that even in the context of the 'War on Terror' MOUs and assurances do not meet standard of the prohibition on return to torture.

## 2.5. Normative Ban on Torture in the Context of the UK-Libya MOU

The UK-Libya MOU represents an attempt to balance national security goals with the ban on *non-refoulement* to torture. The UK government contends that this balance is possible and necessary whereas the human rights advocates and Nowak argue that these two concepts are mutually exclusive if a risk of *refoulement* to potential torture is present. The UK position rests on the assumption that the ban against return to torture is not absolute and that balancing human rights and national security is the right of the state. Human rights advocates counter that the ban on torture is absolute and *non-refoulement* is inherently tied to this ban. This section weighs these two positions through an examination of case law and the intervening briefs written in the pending *Ramzy v. The Netherlands* case, where the question of rendition with assurances for national security reasons is again before the ECtHR. It will be argued that the ban against torture is a matter of *jus cogens*, a pre-emptory right, that in this case supercedes the right of the state to pursue its security through an MOU that does not offer sufficient guarantees that the ban against torture will be upheld. Second, Nowak argues that by virtue of negotiating an agreement such as the MOU, the UK tacitly acknowledges that there is a risk of torture facing these detainees and thereby violates its obligations under the ECHR.

The governments of Lithuania,<sup>26</sup> Portugal, Slovakia and the UK argue in an intervening brief (UK Brief) in *Ramzy* that the ban on *refoulement* to torture is not absolute. The UK maintains that Article 3 in CAT, one of the main sources cited for the unconditional ban on torture, is not absolute for three reasons.<sup>27</sup> First, it was not clear that that was the intent of the convention during drafting. Second, the UK reminds the ECtHR that CAT Committee interpretations are not legally binding, which would weaken the impact of *Agiza v. Sweden* that mandated diplomatic assurances were insufficient safeguards against torture in that case. Third, the ban on torture only applies in actual cases of torture, whereas the return and subsequent torture of Ramzy in Algeria is based on speculation. The UK claims that other instruments often used to support the ban against *refoulement* to torture are also not applicable. Article 3 of the ECHR is irrelevant in this case because the UK is not directly subjecting any person to torture and Algeria is a state 'outside of the norms of the ECHR'.<sup>28</sup> This same contention would apply to Libya. Following these arguments, the MOU is

<sup>26</sup> It should be noted that, as cited in section one, the government of Lithuania stated five months later to the Council of Europe Group of Specialists on Human Rights and the Fight Against Terrorism that it found diplomatic assurances insufficient safeguards against torture (HRW 2006a).

<sup>27</sup> UK Brief, para. 26.5.

<sup>28</sup> UK Brief, para. 10.2.

consistent with the UK's human rights obligations because it is not in conflict with a pre-emptory norm.

The UK also argues that case law and international human rights instruments acknowledge that states have to engage in a balancing act between their human rights obligations and national security prerogatives. Drawing from the ECtHR decision in *Soering v. United Kingdom*, the UK brief cites the court's decision that 'inherent in the whole of the Convention is the search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.'<sup>29</sup> This balance, the UK maintains, is evident in the ECHR itself, which upholds both the right to life and inferred community safety in Article 2 and the prohibition against torture in Article 3. Claiming one of these values absolute, as Article 3 is in *Chahal v. The United Kingdom*, negates the rights enumerated in Article 2.<sup>30</sup> The UK asserts that this lack of consideration of Article 3 is the reason that seven of the judges dissented on the Article 3 ruling in *Chahal*. It is also because of the belief that security and human rights must be balanced that the UK endorses the UK-Libya MOU as a sufficient mediator between the two state obligations.

The intervening parties represented in *Ramzy* by AI, the AIRE Centre and other NGOs counter that the prohibition on torture is absolute, and, the prohibition remains absolute even in light of the 'War on Terror.' First, the prohibition on torture has achieved *jus cogens* status through case law and declarations made by international bodies such as the United Nations,<sup>31</sup> the Parliamentary Assembly of the Council of Europe,<sup>32</sup> the Secretary General of the Council of Europe<sup>33</sup> and the Committee for the Prevention of Torture (CPT).<sup>34</sup> The fact that different courts and committees reaffirm the absolute nature of the prohibition, such as the Human Rights Committee, the CAT Committee in *Agiza v. Sweden*, and ECtHR in *Chahal v. United Kingdom* and *Paez v. Sweden*, also indicates the prohibition's universality and pre-eminence. In this context, it becomes clear that the lack of certainty, accountability and legal redress inherent to the UK-Libya MOU does not offer valid protection against torture.

The AIRE Centre argues that this prohibition is further held up in the context of the 'War against Terror,' as evidenced by the Venice Commission's 2002 'Guidelines on Human Rights in the Fight Against Terrorism.' The AIRE brief pointedly notes that the same intervening governments in *Ramzy* were contributors to these guidelines, which were 'adopted expressly in the context of the fight against terrorism and they are couched in the same jurisprudence of the Court'.<sup>35</sup> This argument is reinforced by the ICCPR Article 7 prohibition against torture, 'even in the case of public emergency' and CAT Article 2(2). The CPT places the 'War against Terror' in a historical context and contends that the insecurity faced now does not differ from other points in time; therefore, the 'War against Terror' does not constitute a right to derogate from international human rights norms:

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<sup>29</sup> *Soering v. United Kingdom*, para. 89.

<sup>30</sup> UK Brief, para. 25.3.

<sup>31</sup> AI brief, para. 10.

<sup>32</sup> AIRE Centre brief, para. 31.

<sup>33</sup> AIRE Centre brief, para. 35.

<sup>34</sup> AIRE Centre brief, para. 34.

<sup>35</sup> AIRE Centre brief, para. 21.

In fact it is precisely at a time of emergency that the prohibition of torture and inhuman or degrading treatment is particularly relevant...the prohibition...is one of those few human rights which admits of no derogations.<sup>36</sup>

In fact, it was a time of emergencies and atrocities during World War II that resulted in the call for the ECHR (Black-Branch 2002: 32). As was highlighted in the previous section, security interests were intertwined with deportation decisions before the September 11<sup>th</sup> and July 7<sup>th</sup> attacks, therefore it is questionable why there is a need to tamper with the human rights norms in these cases now.

Related to the absolute prohibition against torture is the prohibition on *refoulement* to torture. The UK contends that the assurances in the MOU protect against this possibility, however, the AI brief states:

the principle of non-refoulement is integral – and necessary to give effect – to the prohibition of torture. To deport an individual in circumstances where there is a real risk of torture is manifestly at odds with the positive obligations not to aid, assist, or recognize such acts and the duty to act to ensure that they cease.<sup>37</sup>

The UK-Libya MOU return provisions would violate this principle because there is a potential risk of torture that diplomatic assurances cannot conclusively eliminate. The inability of the UK-Libya MOU to sufficiently guarantee against this risk places the MOU in tension with the absolute ban on torture and *non-refoulement*.

Lastly, the UK's efforts to negotiate the MOU acknowledge that a high enough risk of torture does exist and demonstrate further that the MOU is in tension with Article 3 in principle. Nowak explains 'the fact that such assurances are sought shows in itself that the sending country perceives a serious risk of the deportee being subjected to torture or ill-treatment upon arrival in the receiving country. Diplomatic assurances are not an appropriate tool to eradicate this risk' (UN 2005). The Committee Against Torture reiterated this position in *Agiza v. Sweden* when it stated that the sending country must make a deportation decision 'primarily with reference to those facts which were known or ought to have been known to the state party at the time.'<sup>38</sup> By seeking assurances against torture for Agiza, Sweden implicitly acknowledged that a high enough risk of torture did exist. Negotiating an MOU to prevent potential torture connotes a similar attempt to ensure against the risk of torture without overtly acknowledging that one exists. This knowledge of a high enough level of risk, however, violates the principle of *non-refoulement* to torture.

As a non-binding agreement, the UK-Libya MOU does little to enhance the protection against torture offered by diplomatic assurances. In practice, the implementation of a monitoring body still does not adequately address the problems of trust, concealed torture, rogue state actors and accountability. In this case, the efficacy of the UK-Libya MOU is sacrificed for the convenience, confidentiality and the national security purpose of this agreement. The decision in *Soering v. United Kingdom*, the case cited by the UK to justify this national security balance, even requires that Article 3 of the ECHR 'be interpreted and applied to make its safeguards practical and effective'.<sup>39</sup> An examination of the terms of this

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<sup>36</sup> AIRE Centre brief, para. 34.

<sup>37</sup> AI Brief, para. 22.

<sup>38</sup> *Agiza v. Sweden*, para 12.22.

<sup>39</sup> *Soering v. United Kingdom*, para. 87.

MOU reveals that there are many obstacles to making the assurances ‘practical and effective,’ the most significant one being the lack of legal redress. In principle, the UK-Libya MOU is in tension with Article 3 because assurances tacitly concede that a risk of torture is present. Courts, international bodies, and academics also cite the ‘War against Terror’ as an insufficient justification to breach the *non-refoulement* to torture norm. Therefore, placed within an international legal framework, the UK-Libya MOU violates human rights obligations of both the UK and Libyan governments.

Moreover, the UK-Libya MOU is a ‘disturbing sign of cultural relativism in international human rights law’ (Noll 2006: 14). It indicates that the prohibition against *refoulement* to torture will be upheld in Europe yet compromised in North Africa. As the next section will demonstrate, this danger of a universal norm acquiring regional relevance is very real. The following case study of the 5 detained Libyans to be deported from the UK through the MOU will show the potential impact of *refoulement* to torture which this agreement can impose on forced migrants.

### **3. IMPLEMENTATION IMPLICATIONS OF THE UK-LIBYA MOU**

Bashir Al Fakhi, Ziad Hashim Al-Rigai, Khalid Abusalama Alalagi, Nasir Abu Rwag<sup>40</sup> and Ismail Kamouka are scheduled to be the first Libyans deported through the UK-Libya MOU (Abdulmalek 2005). Detained under the Immigration Act, these men have been identified as threats to the UK’s national security and are part of a ‘government crackdown on alleged Islamic extremists after the July 7 attacks on London’ (Dodd 2005a). This section will first assess whether there is a risk of torture as defined by CAT Article 3 for the detained Libyans upon their return to Libya. An analysis of their specific cases in relation to the practice of torture, the provisions of the penal code in Libya and the risks faced by other returnees demonstrate that these men face a personal risk of torture or ill-treatment upon return. The purpose of the MOU ostensibly is to reduce this risk, yet, as is shown in the second part of this section, there is a likelihood that Libya will not implement the MOU to the fullest extent of the assurances. While Libya has made some significant attempts to improve its human rights record on a domestic and international level, it will be demonstrated that Libya still fails to implement many reforms and human rights agreements. In recent years, the ‘War against Terror’ has been used as an excuse against raising or implementing human rights standards in Libya. Thus the risks of the security focus of the MOU, discussed in relation to the UK’s practices in Section 1, are also relevant in the case of Libya. This goal of collective national security, which motivated the UK to deport individuals through the MOU, also gives Libya a reason not to implement it. Therefore, the UK-Libya MOU exposes these five men to a risk of *refoulement* to torture.

#### **3.1. The Practice of Torture in Libya**

Article 3(2) of CAT states that in order for there to exist a risk of return to torture, there must be ‘a consistent pattern of gross, flagrant or mass violations of human rights’ in the state concerned. It has subsequently been determined by the Committee Against Torture that the individual concerned must also be ‘personally at risk of being subjected to torture.’<sup>41</sup> There is both a history of human rights violations in Libya and a specific risk of this violation

<sup>40</sup> This individual’s name is given as Abu Rwag by Libya Watch, and Bourourg by the *Guardian* (see p.23 below). I have not been able to confirm the correct spelling.

<sup>41</sup> *X v. Netherlands* para. 7.2.

of human rights for the five detainees. The practice of torture is prohibited in Libyan domestic law<sup>42</sup> and perpetrators of torture are subject to criminal prosecution.<sup>43</sup> However, as AI reports, ‘states that systematically torture or engage in other forms of ill-treatment of detainees also systematically deny that they carry out such practices’ (AI 2005a). Evidence is consequently difficult to obtain; nonetheless, human rights organizations and state governments have documented specific cases of torture in Libya (AI 2004; HRW 2006; US State Department 2006). The US State Department gathered testimony on methods of torture used in Libya, including:

chaining prisoners to a wall for hours, clubbing, applying electric shock, applying corkscrews to the back, pouring lemon juice in open wounds, breaking fingers and allowing the joints to heal without medical care, suffocating with plastic bags, deprivation of food and water, hanging by the wrists, suspension of a pole inserted between the knees and elbows, cigarette burns, threats of dog attacks, and beatings on the soles of the feet. (US State Department 2006: 1)

In interviews conducted by HRW in Libya in April-May 2005, fifteen out of the thirty-two prison interviewees said that ‘Libyan security forces had tortured them during interrogations, usually to extract a confession;’ one man reported being tortured in front of his pregnant wife (HRW 2006b: 2, 12). Unfortunately, it is difficult to pinpoint which prisons or officials are likely to take part in torture because corruption is prevalent in all levels of the government (Abdulmalek 2005). Therefore, despite Libyan law prohibiting torture, this practice was documented as existing only five months before the UK-Libya MOU was signed. The evidence of the general practice of torture alone presents a strong argument that the UK would potentially violate the *non-refoulement* to torture principle by returning the Libyan detainees; an examination of the specific and personal nature of these cases supports this case.

### 3.2. A Personal Risk of Torture

The five detained Libyans face a personal risk of torture as stated opponents of Colonel Mu’ammar al-Gaddafi, who has ruled Libya since 1969 (Dodd, 2005a), and as supposed members of the Libyan Islamic Fighting Group (LIFG) that attempted to assassinate Gaddafi in 1996 (HRW 2005). The 2006 Home Office Operation Guidance Note (OGN) on Libya warns that the risk of ‘being seriously ill-treated appear[s] to relate to those who have been involved...in serious political activity or are radical Islamic supporters’ (Home Office 2006: 3.6.111). The OGN recommends granting asylum in these cases. Reportedly, several of the detainees are also recognized refugees in the UK (HRW 2005). One was found not guilty on terrorism charges in a British court and given indefinite leave to remain (Abdulmalek 2005). As recognized refugees, these men have expressed a fear of return due to their political opinion that has been validated by the British government. This right to refugeehood is revocable under Article 32(1) of the 1951 Convention Relating to the Status of Refugees; however, even if these men lose their refugee status their fear of return to torture still incurs protection under Article 3 under CAT and the ECHR.

The detainees’ political activities in the UK also place them personally at risk, in that they attempted to aid other political dissidents in Libya and spoke against the Gaddafi government in the UK. In an interview with *The Guardian* on October 19, 2005, three of the

<sup>42</sup> Article 17, Law 20, cited in HRW 2006b: 48.

<sup>43</sup> Article 435, cited in HRW 2006b: 48.

d detainees' wives expressed fear for their husbands' return on account of their political dissident activities in Libya and the UK. For example, Alalagi and Bourourg served two years in the UK for passport fraud. Alalagi's wife stated that her husband was trying to help his friends escape from Libya and fears for her husband's return because 'some of my husband's friends in Sudan were returned to Gaddafi and have been sentenced to death.' Hashim's activities in the UK can also be construed as an attempt to defame the Libyan government. He ran a website, which his wife said 'tried to embarrass Gaddafi to the world to show all his crimes.' Hashim's wife also fears that her husband will be punished for leaving Libya because when he left 'the government arrested his dad and tortured his brother until he went mental.' Each wife 'denied their husbands were involved in violence or threatened national security' and expressed a fear for the safety of their husbands if returned to Libya. If returned, the activities of the detainees would merit surprisingly harsh punishments, including the death penalty mandated in Libya's penal code.

### **3.3. Libya's Penal Code**

While Libya is currently drafting a new penal code, the criminalization of most forms of political opposition in the present set of laws endangers the detainees if returned to Libya. For example, Law 71 bans the formation of any political group opposed to the principles of the al-Fateh revolution of 1969, Gaddafi's rise to power; Article 3 of Law 71 imposes the death penalty for violators of this law.<sup>44</sup> The UK-Libya MOU expressly prohibits the use of the death penalty in Assurance 2; however, Law 71 is enshrined in domestic law and the relatively unenforceable MOU offers very little protection. The UK-Libya MOU stipulates that 'the death penalty will not be carried out'; yet, it relies on the receiving state to 'utilize all the powers available to them under their system of justice to ensure that, if the death penalty is imposed, the sentence will not be carried out.'<sup>45</sup> It is unlikely, since the imposition of the death penalty is a much more visible act than torture, that Libya would violate this assurance. Nonetheless, Law 71 is illustrative of the intolerance of political dissent and the severity with which this transgression is met. As opponents of Gaddafi, the Libyan detainees could easily be prosecuted under Law 71 and other articles. Hashim's website publications, for example, could be illegal under Article 178, which mandates life imprisonment for the distribution of information deemed to 'tarnish [Libya's] reputation or undermine confidence in it abroad.'<sup>46</sup> This concern is relevant given the arrest of Abd Al-Raziq Al-Mansuri in Libya in January 2005 for publishing critical commentary on a UK website and the arrest and death penalty sentence of Fathi Al-Jahmi in March 2004 for criticizing Gaddafi to foreign media (US State Department 2006). Therefore, the detainees are at real risk under Libyan domestic law for prosecution for their political activities in Libya and abroad. Previous returns of Gaddafi opponents and LIFG members confirm this risk.

### **3.4. Previous Risks of Return**

The many examples of voluntary and involuntary returns to Libya where assurances have been violated highlight the potential for the UK-Libya MOU assurances to be equally disregarded. Assurances were ignored especially in cases where the returnees had past or suspected connections to the LIFG (AI 2004). These cases establish a precedent of ignoring assurances and confirm UK AI Director Kate Allen's warning that it is 'dangerously misguided to expect countries with a record of torturing people to respect bits of paper

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<sup>44</sup> Law 71, Article 3 cited in AI 2004: 7.

<sup>45</sup> UK-Libya MOU, para. 2.

<sup>46</sup> Article 178 cited in AI 2004:8.

promising not to torture' (Dodd 2005a). The following cases demonstrate that there is a real risk the assurances in the UK-Libya MOU would not be implemented:

- In July 2005, Mahmoud Mohamed Boushima, a Gaddafi opponent, returned to Libya voluntarily from the UK with assurances for his safety. He has since been held in detention incommunicado without any contact with his lawyer or family.<sup>47</sup>
- Also in July 2005, Kamel Mas'ud Al-Kilani returned to Libya with assurances for his safety. He was arrested and no further information as to his whereabouts was available at the end of 2005.<sup>48</sup>
- In February 2002, Mustapha Muhammed Krer received assurances from the Libyan Embassy in Malta that he would not be detained for returning to Libya after leaving 15 years earlier in protest against the Gaddafi government; however he was arrested at the airport. By February 2004, he still had not been charged or tried. In March 2004, he had a hearing in front of the People's Court with other accused LIFG affiliates.<sup>49</sup>
- In October 2002, the Sudan returned three Libyan nationals and their families with assurances from the Libyan Embassy in Khartoum. Upon returning, the men were separated from their families and detained. One detainee faces trial with more than 50 other LIFG affiliates.<sup>50</sup>
- In 2000, Jordan returned 8 men upon suspicion of being sympathizers with Islamic groups. Reportedly, three of the returnees were shot. As of February 2004, the Libyan government still refuses to release information on 7 of these detainees.<sup>51</sup>

The Libyan government's history of failing to comply with assurances combined with a history of practising torture and the inability of the UK to ensure compliance with the MOU, could endanger the lives and rights of the Libyan detainees. Even this possibility of risk, as stated by Manfred Nowak and cited in Section 2, violates the ban on *refoulement* to torture.

### 3.5. Reform Efforts in Libya

There are significant signs, however, that Libya is attempting to improve its practices to support a better image abroad (Whitaker 2006). This motivation could reduce or eliminate the practice of torture and the suppression of other human rights and political activity. If this is the case, there is less of a risk for the Libyan detainees and less of a need for the UK-Libya MOU. The US and the EU have been receptive to these efforts, perhaps because warmed relations have resulted in a high degree of cooperation in the 'War against Terror' and an open oil market (Labott 2006). The facilitation of diplomatic relations is eased by Libya's efforts to open itself to human rights examination and willingness to accept responsibility and compensate victims of terrorist attacks carried out by Libya in the 1980s (BBC 2004a).

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<sup>47</sup> UK Parliament Select Committee on Foreign Affairs, Minutes of Evidence, November 16, 2005.

<sup>48</sup> Home Office OGN 2006, 3.10.6.

<sup>49</sup> AI 2004: 10-12.

<sup>50</sup> Ibid. p.10.

<sup>51</sup> Ibid. p.10.

In order to express its openness to political activism and reform, Libya has made changes on both a domestic and international level. In 2001 and 2002, the government released almost 300 political prisoners, some of whom had been in jail since 1973 (BBC 2004a). In March 2006, Libya also abolished the People's Court, which tried political cases, often in secret (BBC 2006). In addition, the government has allowed the Gaddafi International Foundation for Charity, a non-profit non-governmental organization, to speak publicly about the need for reform ranging from detention practices to welfare policy.<sup>52</sup> In its relations with international human rights organizations, in 2004, for the first time in 15 years, AI and Physicians for Human Rights were permitted to visit Libya and conduct interviews, followed by HRW in 2005.

On an international level, Libya has responded to the calls of the UN and many states to compensate victims' families for the 1986 Berlin disco bombing, the 1988 bombing of the Pan Am flight over Lockerbie and the 1989 bombing of a French UTA airliner (BBC 2004b). This acknowledgement of responsibility led the UN to lift sanctions in 2003 and initiated normalization of relations with Europe and the US. Libya gained more headway in diplomatic relations when it renounced its weapons of mass destruction programme in 2003 and simultaneously provided the US with a list of its black market weapons suppliers (Labott 2006). These efforts along with Gaddafi's 2004 visit to Europe 'mark the latest stage in Libya's rapid return to the international community after years of being derided as a sponsor of international terrorism' (BBC 2004a). This normalized status was confirmed on 15 May 2006, when the US announced it would fully restore diplomatic relations with Libya and remove it from the US State Department's state-sponsored terrorism list, where it has remained since 1979 (Labott 2006). Many media channels and human rights organizations claim that this emerging US/EU-Libya friendship is the result of Libya's need for foreign investment in its oil reserves and western states' need for cheaper oil (HRW 2006b; Labott 2006; Wray 2005). How this relationship will impact the return of forced migrants remains to be seen. On the one hand, it may not matter whether the motivation for change is political or economic if the result is a positive change in Libya's human rights efforts. Yet, a natural discord can exist when the motivation does not entirely respond to the goal. As will be demonstrated, this discord in Libya produces a lack of implementation and a willingness to use the 'War against Terror' to justify it.

### **3.6. Lack of Implementation**

The failure of Libya to implement many of its domestic and international human rights promises questions its ability to commit or adhere to the UK-Libya MOU. HRW contends that Libya's criminal procedures essentially meet international standards; however, 'Libya has failed to act on the majority of the recommendations made by the UN body' (AI 2004: 4) and its domestic law violations 'mostly result from poor implementation of the law' (HRW 2006b: 79). Both the reports from AI's and HRW's recent visits to Libya point again and again to the lack of implementation. Even the Home Office's Libya OGN state 'promises of change lagged behind implementation' (Home Office 2006: 2.10). Understandably, there is a time gap between the announcement of reform and its implementation. Nevertheless, Libya's past implementation record is rather uninspiring. For example, Libya's 1988 Great Green Charter of Human Rights Article 8 states that abolishing the death penalty is a future aim of the Libyan state. Seventeen years later, Article 71 still provides for the death penalty

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<sup>52</sup> For more information see [www.gifca.org.ly](http://www.gifca.org.ly), accessed 10.05.06; numerous organizations and media outlets, such as AI, HRW, the *Guardian* and the *Times* have cited the Gaddafi International Foundation for Charity as successfully critical of the government on some social welfare issues.

for joining or starting an oppositional political party. This article is at odds with ICCPR Article 6(2), which states ‘in countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crime.’ Currently in Libyan domestic law, this punishment is broadly reserved for ‘he whose life represents danger or damage to society.’<sup>53</sup> Libyan Secretary of Justice Bakr assured HRW that the new penal code will reduce the imposition of the death penalty ‘to the greatest possible extent’ and leave it only for ‘terrorism’ and ‘the most serious crimes’ (HRW 2006b: 33). Yet, the inability of the Libyan legislature to submit the new penal code to the General People’s Congress even for an initial review, promised by the end of June 2004, illustrates again troubles with follow-through on human rights matters.<sup>54</sup> This tendency should be of particular concern considering that the assurances under the UK-Libya MOU require significant monitoring and implementation. It is perhaps premature to conclude such an agreement until Libya has demonstrated it can fulfil obligations entered into decades ago.

### **3.7. ‘War against Terror’ Justifications in Libya**

The second reason Libya’s commitment to human rights should be questioned is that it often employs the ‘War against Terror’ to justify its practices. Here, security and legal human rights obligations again come into conflict, with security again superseding the latter. AI argues ‘a new rhetoric inspired by the “war on terror” has been used in recent years to justify the repetition of old practices at the expense of human rights’ (AI 2004: 1). This practice predominantly affects political dissidents, now labelled ‘terrorists’, and could have significant consequences for Libyans who are being returned not as failed asylum seekers but as suspected terrorists. The draft penal code reviewed by AI in 2004 did not directly define terrorism or terrorist activity.<sup>55</sup> One year later, the Secretary of Justice still did not have a definition of terrorism but told HRW ‘at the moment we consider terrorism to be anything that threatens the state’ (HRW 2006b: 27). The vagueness in definition and the lack of respect of legal rights afforded to suspected-terrorists endanger the detained Libyans and the implementation of the UK-Libya MOU. The Home Office OGN reports that since September 11<sup>th</sup>, the Libyan government has ‘tended to accuse all its opponents of membership of conspiracy with the Al-Qa’ida organization’ (Home Office 2006: 3.6.2). For example, in his 2002 national address, Gaddafi said he would treat terrorists ‘just like America is treating [the al-Qa’ida or Taliban detainees]. America said, these people do not have a right to defend themselves, it will neither provide them with lawyers nor respect their human rights.’<sup>56</sup> Such statements call into question whether the Libyan government will respect Assurances 1, 2, 3, 4, 5 and 8 out of the nine assurances in the UK-Libya MOU, which call for immediate access to lawyers, fair and prompt trials and immediate declaration of charges.<sup>57</sup> While Libya has made a commitment to these assurances, as the discussion in Section 2 debates, the government is not legally bound to respect them. Gaddafi’s comment also affirms Guild’s warning in Section 1 that western states should be wary of the example they are setting in the ‘War against Terror.’ Libya has little motivation to respect human rights and procedures if it can point to the sending state as circumventing its own obligations through deportation.

<sup>53</sup> Law 20 (1991), Law on Enhancing Freedoms, Article 4.

<sup>54</sup> As of 31 May 2006, Paul Luther from Amnesty International confirmed that the draft penal code still had not been submitted for review.

<sup>55</sup> Provision 5 in Article 260 in the draft penal code criminalizes ‘approaching or communicating with an association or society or organization or group or gang, whose headquarters are abroad, or anyone working for their interests with a view to undertaking terrorist act/s in the country or against its interests, even if abroad.’ (AI 2004: 6).

<sup>56</sup> Quoted in AI (2004): 5.

<sup>57</sup> See UK-Libya MOU Appendix 1.

Consequently, the ‘War against Terror’ provides a dangerous rhetoric for forced migrants in both the UK and Libya.

The general practice of torture in Libya, the personal risk facing the detainees and the likelihood that the UK-Libya MOU will not sufficiently reduce this risk indicate that the UK is potentially violating the *non-refoulement* to torture ban. This case, currently under review by SIAC,<sup>58</sup> will clearly challenge the validity of MOUs as an enforceable framework for assurances given to the detainees. While Section 2 discussed how MOUs lack efficacy on a general scale, this section demonstrates how MOUs could specifically lack efficacy in Libya as well. Previous failures in human rights implementation and the use of the ‘War against Terror’ to justify some of these failures and detention practices is evidence of the potential return implications for the detainees.

## CONCLUSION

The first purpose of this paper was to demonstrate how the UK-Libya MOU represents an effort by the UK, pre-dating and accelerated by the September 11th attacks, to frame migration policy control as a national security goal. The second purpose of this paper was to show how the non-binding nature of the memorandum and its lack of implementation and legal redress mechanisms could negatively impact the principle of *non-refoulement* to torture. The findings of this research are grounded in a theoretical security framework and an international legal framework, and are supported by a case study that illustrates these arguments.

The findings regarding the first purpose of the hypothesis show that the MOU has its theoretical root in the state’s pursuit of the collective security of its citizens. Individual rights, especially those of non-citizens, were shown to be subjugated to this priority. This philosophy resulted in the gradual securitization of migration. An analysis of how a state identifies a threat to its internal security and treats it accordingly illustrated how migration becomes ‘securitized’. This process was shown to have the effect of discouraging a thorough approach to migration policy, and in the case of the MOU, potentially endangering the physical integrity of the migrant by returning him to a risk of torture. The EU focus on border control pre 9/11 served as an example of security-prioritized migration policy. The fact that at this time the UK was already engaging in the deportation of individuals deemed ‘not conducive to the public good’ showed how this practice laid the foundation for further restrictions post 9/11. The policies implemented in the UK since 9/11, such as ATCSA and the 2006 Terrorism Act, demonstrated that September 11<sup>th</sup> hastened and intensified the securitization of migration. This emphasis on security led to the development of the UK-Libya MOU. Therefore, the UK-Libya MOU embodies the UK’s unique effort to frame migration policy as a national security goal in this manner.

The findings regarding the second purpose of the hypothesis are grounded in an international legal framework that supports the principle of *non-refoulement* to torture. The discussion regarding the legal nature of MOUs served to assess whether these agreements could uphold the UK’s obligation to this principle. The examination of the MOU language and enactment procedure and the UK’s statements regarding its interpretation of MOUs solely as commitments, led to the conclusion that MOUs are not legally binding. It was

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<sup>58</sup> Confirmed by Paul Luther from Amnesty International and Tyndallwoods Solicitors as of 31 May 2006.

shown that the confidentiality and convenience of these non-binding documents were precisely the reasons the UK sought to employ them. This approach proved to incur a lack of enforceability and efficacy. The questionable effectiveness of a monitoring body and lack of legal redress attested to the lack of efficacy in practice. Utilizing the opposing arguments in the pending *Ramzy v. The Netherlands* case, it was also shown how the MOU violates - in principle - the ban on *refoulement* to torture. Case law and the Special Rapporteur on Torture support the argument that seeking diplomatic assurances implicitly acknowledges that a risk of torture does exist and therefore the MOU is in tension with Article 3 of the ECHR and CAT, even in light of the ‘War against Terror.’ Consequently, the use of the UK-Libya MOU greatly curbs the protection of the *non-refoulement* to torture principle.

The case study of the five detained Libyans in the UK illustrated how the theoretical security impetus for the MOUs outlined in Section 1 conflicts with an international legal framework supported by Section 2. An analysis of the country conditions in Libya and the personal details of the detainees demonstrates that a present and personal risk of torture exists in Libya for these individuals. Primarily, the provisions in the penal code and experience of other returnees who had arrived in Libya with safeguards showed that the risk of ill-treatment and disregard of assurances for political dissidents and suspected LIFG members was very real. Furthermore, Libya’s previous failures to implement human rights reforms also challenges the likelihood that the UK-Libya MOU’s assurances against torture will be enforced. The Libyan government’s rhetorical use of the ‘War against Terror’ to justify a lack of implementation also advances this argument. In short, the case study exemplifies how a security-driven agreement may erode the principle of *non-refoulement* to torture.

The implications of these findings are twofold. On a personal level for the five detainees, the UK-Libya MOU potentially endangers their safety and right not to be *refouled* to a risk of torture. On a theoretical level, the UK-MOU represents the continued supremacy of security over international legal rights. For example, the UK has expressed its wish to negotiate a total of ten MOUs with Muslim countries and its willingness to amend its human rights commitments to reach this goal (Pantanesco 2005). After the July 7<sup>th</sup> London Tube bombings, Prime Minister Tony Blair warned ‘let no one be in any doubt, the rules of the game are changing...Should legal obstacles arise we will legislate further including, if necessary, amending the Human Rights Act’ (Blair 2005). Such a decision would negate the argument developed here that the UK-Libya MOU is in tension with the UK’s human rights obligations. However, simply because national security goals and human rights are unsuccessfully mediated in the UK-Libya MOU, these two concepts are not necessarily incompatible. Rather than amend human rights obligations, this research suggests that the UK and Libya increase their obligations under the MOU to satisfy the national security goals of the agreement and the principle of *non-refoulement* to torture.

The findings of this research suggest that the UK and Libya need to provide stronger enforcement mechanisms and legal redress in the UK-Libya MOU in order to meet their human rights obligations. Nowak, one of the most prominent critics of diplomatic assurances, embraces the implementation of a ‘genuine system of monitoring in all places of detention to stop the practice of torture’ (UN 2005). If the UK-Libya MOU contained a more detailed plan for a comprehensive monitoring system that aimed to end the entire practice of torture and provided a venue for legal redress in case of a violation of the MOU, the UK-Libya MOU could sufficiently lower the risk of *refoulement* to torture. This course of action would better resolve the lack of a comprehensive approach to security-focused migration policy identified in Section 1 and the lack of efficacy and violation of the principle of *non-*

*refoulement* to torture identified in Section 2. Consequently, a more accountable and enforceable MOU may realize more of the UK and Libya's national security goals and human rights obligations. This strengthened MOU would set a better international example and elevate human rights practices and accountability in a former pariah state.

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### **Personal Communications**

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## **APPENDIX 1: UK-LIBYA MOU**

Memorandum of Understanding Between the General People's Committee for Foreign Liaison and International Co-Operation of the Great Socialist People's Libyan Arab Jamahiriya and the Foreign and Commonwealth Office of the United Kingdom of Great Britain and Northern Ireland Concerning the Provision of Assurances in Respect of Persons Subject to Deportation

### **Application and Scope**

A request for assurances under this Memorandum may be made by the sending state in respect of any citizen of the receiving state, any stateless person who was habitually resident in the receiving state, or any third-country national whom the receiving state is prepared to admit.

Such requests will be submitted in writing either by the British Embassy in Tripoli to the General People's Committee for Foreign Liaison and International Co-operation or by the People's Bureau of the Great Socialist People's Libyan Arab Jamahiriya in London to the Foreign and Commonwealth Office. The state to which the request is made will acknowledge receipt of the request within 5 working days.

A final response to such a request will be given promptly in writing by the Foreign Secretary in the case of a request made to the United Kingdom, or by the Secretary of the General People's Committee for Foreign Liaison and International Co-operation in the case of a request made to Libya.

To assist a decision on whether to request assurances under this Memorandum, the receiving state will inform the sending state of any penalties outstanding against a person to be deported, and of any outstanding convictions or criminal charges pending against him and the penalties which could be imposed.

Requests under this Memorandum may include requests to the receiving state for further specific assurances. It will be for the receiving state to decide whether to give such further assurances.

The United Kingdom and the Great Socialist People's Libyan Arab Jamahiriya will comply with their human rights obligations under international law regarding a person in respect of whom assurances are given under this Memorandum. The assurances set out in the following paragraphs (numbered 1-9) will apply to such a person, together with any further specific assurances provided by the receiving state.

An independent body ('the monitoring body') will be nominated by both sides to monitor the implementation of the assurances given under this Memorandum, including any specific assurances, by the receiving state. The responsibilities of the monitoring body will include monitoring the return of, and any detention, trial or imprisonment of, the person. The monitoring body will report to both sides.

## **Assurances**

1. Where, before his deportation, a person has been tried and convicted of an offence in the receiving state in absentia, he will be entitled to a re-trial for that offence on his return.
2. In cases where the person may face the death penalty in the receiving state, the receiving state will, if its laws allow, provide a specific assurance that the death penalty will not be carried out. In any case, where there are outstanding charges, or where charges are subsequently brought, against the person in respect of an offence allegedly committed before his deportation, the authorities of the receiving state will utilise all the powers available to them under their system for the administration of justice to ensure that, if the death penalty is imposed, the sentence will not be carried out.
3. If arrested, detained or imprisoned following his deportation, the deported person will be afforded adequate accommodation, nourishment, and medical treatment, and will be treated in a humane and proper manner, in accordance with internationally accepted standards.
4. If the deported person is arrested or detained, he will be informed promptly by the authorities of the receiving state of the reasons for his arrest or detention, and of any charge against him. The person will be entitled to consult a lawyer promptly.
5. If the deported person is arrested or detained, he will be brought promptly before a civilian judge or other civilian official authorised by law to exercise judicial power in order that the lawfulness of his detention may be decided.
6. The deported person will have unimpeded access to the monitoring body unless they are arrested, detained or imprisoned. If the person is arrested, detained or imprisoned, he will be entitled to contact promptly a representative of the monitoring body and to meet a representative of the monitoring body within one week of his arrest, detention or imprisonment. Thereafter he will be entitled to regular visits from a representative of the monitoring body in co-ordination with the competent legal authorities. Such visits will include the opportunity for private interviews with the person and, during any period before trial, will be permitted at least once every three weeks. If the representative of the monitoring body considers a medical examination of the person is necessary, he will be entitled to arrange for one or to ask the authorities of the receiving state to do so.
7. The deported person will be allowed to follow his religious observance following his return, including while under arrest, or while detained or imprisoned.
8. If the deported person is charged with an offence he will receive a fair and public hearing without undue delay by a competent, independent and impartial civilian court established by law. The person will be allowed adequate time and facilities to prepare his defence, and will be permitted to examine or have examined the witnesses against him and to call and have examined witnesses on his behalf. He will be allowed to defend himself in person or through legal assistance of his own choosing, or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.
9. Any judgment against the deported person will be pronounced publicly, but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of

the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

### **Withdrawal**

Either participant may withdraw from this Memorandum by giving 6 months notice in writing to the diplomatic mission of the other.

Where one or other participant withdraws from the Memorandum any assurances given under it in respect of a person will continue to apply in accordance with its provisions.

### **Signature**

This Memorandum of Understanding represents the understandings reached upon the matters referred to therein between the Great Socialist People's Libyan Arab Jamahiriya and the United Kingdom of Great Britain and Northern Ireland.

Signed in duplicate at Tripoli on 18 October 2005 in the English and Arabic languages, both texts having equal validity.

Abdulati Ibrahim Obeidi, Acting Secretary for European Affairs, Secretariat for Foreign Liaison and International Co-operation, Tripoli For the Great Socialist People's Libyan Arab Jamahiriya	Anthony Layden HM Ambassador British Embassy, Tripoli For the United Kingdom of Great Britain and Northern Ireland
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