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When a Gamekeeper turns Poacher: Torture, Diplomatic Assurances and the Politics of Trust

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The architects of the global war on terror have been collectively engaged in drawing a line under the legacy of past torture.¹ They are attempting to rebuild the trust lost as a result of the willingness to ignore or otherwise evade global human rights commitments in the pursuit of “exceptional” security objectives.² This conceit that abuses can be bracketed off rests on three key claims: first, the historical legacy of abuse is being actively and openly confronted; second, that current counterterrorism policy and practice complies with international human rights standards; and third, these measures can together contain and remedy any damage done to the standing of fundamental human rights norms as a result of past practice. This article asks whether the current strategy for reconciling human rights and security imperatives achieves its purpose. Do current efforts to manage the tensions between security and human rights avoid the exceptionalism that defined the Bush-era war on terror? Has the damage done to the practical standing of key human rights norms been contained? Or do past abuses in the war on terror continue to cast a shadow on counterterrorism policy formation?

These questions are explored through an analysis of the role that diplomatic assurances (DAs) play in global counterterrorism. Diplomatic assurances are promises that those subject to extradition or deportation proceeding will have their basic human rights protected. Because of their putative ability to manage the tensions between security and human rights, particularly the obligations created by the principle of *non-refoulement* and the desire to expel terrorists or

* This article benefitted enormously from the reviewers’ suggestions and from the difficult questions asked by Ruth Blakeley, Frank Foley and Andrea Birdsall as part of the BISA panel ‘Torture and Human Rights in the War on Terror’; I would also like to thank Mark Kersten for the opportunity to give some of the ideas explored here a preliminary airing at justiceinconflict.org.

¹ See for example, ‘Remarks by the President at the National Defense University’, 23 May 2013, available at <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>, accessed 28 August 2014; see also speech by the ex-head of MI6 Sir John Sawers, 28 October 2010, <http://www.theguardian.com/uk/2010/oct/28/sir-john-sawers-speech-full-text>; more generally, see Trevor McCrisken, ‘Ten years on: Obama’s war on terrorism in rhetoric and practice’, *International Affairs* 87:4 July 2011, pp. 781–801; Benjamin Wittes (ed.), *Legislating the war on terror: an agenda for reform* (Washington DC: Brookings, 2009), p. 1-3.

² On exceptionalism see especially Philippe Sands, *Lawless world: making and breaking global rules* (London: Penguin, 2006); Jason Ralph, *America’s war on terror: the state of the 9/11 exception from Bush to Obama* (Oxford: Oxford University Press, 2013); on the importance of trust in the war on terror see especially Cian O’Driscoll, ‘Fear and Trust: The Shooting of Jean Charles de Menezes and the War on Terror’, *Millennium - Journal of International Studies* 36:2, April 2008, 339-360.

suspected terrorists, diplomatic assurances have become an increasingly important tool.³ This article first details how diplomatic assurances function to manage the tensions in this area and respond to the legacy of the war on terror before assessing why and where human rights advocates have been pushing back against their use. This article argues that the opposition to diplomatic assurances reveals how the challenge of reconciling human rights with security has migrated from a battle over illegality and exceptionalism and towards a concern with whether counterterrorism policymakers can be trusted to progressively develop the global rules governing this domain.⁴ Understanding why human rights advocates continue to oppose what might otherwise seem to be good faith attempts to improve the law in this domain is a preliminary step towards a stronger, more stable anti-torture regime.

Non-refoulement and Diplomatic Assurances

The principle of *non-refoulement* is a key element of the global anti-torture regime and international refugee law. Article 3 of the Convention Against Torture defines it as follows:

- 1.No State Party shall expel, return ('refouler') or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

There is a general agreement that *non-refoulement* inherits the same non-derogable, *jus cogens* character as the core prohibition against torture.⁵ However, because it invites a judgement by the 'competent authorities', there is much greater room for debate and dissensus over the practical

³ Ashley S. Deeks, *Avoiding transfers to torture* (New York: Council on Foreign Relations, June 2008), available at: http://www.cfr.org/content/publications/attachments/Assurances_CSR35.pdf

⁴ "Trust" has become an increasingly important concept in international relations scholarship; it is important to be aware of the different ways in which trust matter for diplomatic assurances – as statements of confidence in a receiving country, as a component of intelligence relationships (e.g. information sharing; the exclusionary rule) which needs to be protected, and as a more general condition or characterisation of the capacity to exercise authority (trusteeship). See variously Aaron M. Hoffman, 'A Conceptualization of Trust in International Relations', *European Journal of International Relations* 8:3, September 2002, pp. 375–401; Russell Hardin, *Trust and Trustworthiness* (New York: Russell Sage Foundation, 2002); Andrew Kydd, *Trust and Mistrust in International Relations* (Princeton: Princeton University Press, 2007); Brian C. Rathbun, *Trust in International Cooperation: International Security Institutions, Domestic Politics, and American Multilateralism* (Cambridge: Cambridge University Press, 2012); Ken Booth and Nicholas J. Wheeler, *The Security Dilemma: Fear, Cooperation and Trust in World Politics* (London: Palgrave, 2007); Cian O'Driscoll, 'Fear and Trust'; Torsten Michel, 'Time to get emotional: Phronetic reflections on the concept of trust in International Relations,' *European Journal of International Relations* 19:4, December 2013, pp. 869-890; Nicholas J. Wheeler, 'Investigating diplomatic transformations,' *International Affairs* 89: 2, March 2013, pp. 477-496; more generally, see Diego Gambetta, ed., *Trust: Making and Breaking Cooperative Relations* (Oxford: Oxford University Press, 2000).

⁵ Philip Alston and Ryan Goodman, *International Human Rights* (Oxford: Oxford University Press, 2012), p. 445.

requirements of this commitment, including the sort of considerations that can and should be including in judging whether it is legal and legitimate to expel an individual to a country where they might be at risk of torture.⁶ Differences over how to operationalise the principle of *non-refoulement* have as a result become one of the key battlegrounds in the wider debate over how to integrate human rights with national security.

States have argued for the need to be allowed greater flexibility in weighing human rights commitments, including an individual's risk of torture, against other possible justifications for expulsion, particularly whether that individual represents a risk to national security. In *Ramzy v. The Netherlands*, which functioned as a test case for the absolutist interpretation of *non-refoulement* which the European Court of Human Rights (ECHR) had established in an earlier case⁷, a range of states argued that although there was a positive obligation to protect against torture, this was not a limitless obligation, especially in view of the fact that the expelling state would not itself be subjecting the individual to torture.⁸ Because of this, any assessment of the actual risk to the individual must necessarily be speculative. Moreover, they argued, states had a right to deport aliens, to protect their citizens' right to life, and to protect themselves from external threats using immigration legislation. The contention was that states were legitimately entitled to use their discretion in weighing the individual's risk on return not in isolation but against the interests of the community as a whole.

The reverse argument from the human rights groups intervening in that case – and which the Court judgement broadly reflected – was that the operative concern protected by the principle of *non-refoulement* is the risk to the individual, rather than the risk to the community at large.⁹ Inserting security risks into the calculus of whether an individual could be rendered to a country where they would be at risk of torture would dilute the practical force of the anti-torture regime and violate existing human rights obligations. National security might pose hard cases for policymakers but that is not in itself a good enough reason to recalibrate the way that the principle of *non-refoulement* has traditionally been interpreted and enshrined into international

⁶ See for example Ryan Goodman who argues that the Obama administration's "official legal position and policy choice is that states can transfer a detainee when there's a 49% percent likelihood that the individual will be killed or tortured. That standard appears to be largely out of sync with most international legal authorities", "Forced Transfer of Detainees with Diplomatic Assurances Against Ill-Treatment", 16 December 2013, available at: <http://justsecurity.org/4657/forced-transfer-guantanamo-detainees-diplomatic-assurances/>; see also David A. Martin, 'Refining Immigration Law's Role in Counterterrorism', in Wittes (ed.), *Legislating the War on Terror*, pp. 180-181

⁷ *Chahal v. United Kingdom*, ECHR judgment of 23 October 1996, para. 80.

⁸ *A (Ramzy) v. The Netherlands*, ECHR judgment of 29 June 2010.

⁹ *A (Ramzy) v. The Netherlands*, ECHR judgment of 29 June 2010; see also *Saadi v. Italy*, ECHR judgement of 28 February 2008, para. 139: 'The Court considers that the argument based on the balancing of the risk of harm if the person is sent back against the dangerousness he or she represents to the community if not sent back is misconceived. The concepts of "risk" and "dangerousness" in this context do not lend themselves to a balancing test because they are notions that can only be assessed independently of each other. Either the evidence adduced before the Court reveals that there is a substantial risk if the person is sent back or it does not. The prospect that he may pose a serious threat to the community if not returned does not reduce in any way the degree of risk of ill-treatment that the person may be subject to on return. For that reason it would be incorrect to require a higher standard of proof, as submitted by the intervener, where the person is considered to represent a serious danger to the community, since assessment of the level of risk is independent of such a test.'

law. More important is the danger of eroding the anti-torture regime and the fact that torture cannot be easily remedied or undone; victims bear their scars for life.

The use of diplomatic assurances has largely superseded these debates over whether security concerns can or should change the considerations that go into the calculation of the individual's risk of torture. Diplomatic assurances have been defined as 'an undertaking by the receiving state to the effect that the person concerned will be treated in accordance with conditions set by the sending State or, more generally, in keeping with its human rights obligations under international law'.¹⁰ Diplomatic assurances are an established part of international law, traditionally used to backstop the transfer of detainees to a country where they might otherwise face the death penalty, most commonly the United States.¹¹ The idea behind their application to counterterrorism is that extracting a promise from states known to be, let's say, less than fully compliant with their international human rights obligations can be enough to protect the individual from torture and so allow the returning state to meet its human rights obligations. The targets of such assurances in this context tend to be individuals whom the security services have flagged as dangerous but where detention or trial via domestic courts is unfeasible because of the need for operational secrecy, the need to preserve intelligence cooperation, or because the evidence of the individual's involvement in terrorism has been tainted by torture.

As this suggests, the key innovation of diplomatic assurances is to establish a mechanism by which states can legally and legitimately sidestep the question of whether there should be a national security component included in the calculus of risk: with DAs in place there is simply no need to balance the individual's risk of torture against the security risk they pose to the state. It also brackets off concern about how the individual's risk is being construed and the appropriate threshold of risk. Instead, diplomatic assurances provide a mechanism through which states are able to get rid of individuals seen to pose a continuing threat to national security while also accepting a conservative approach to assessing individual's risk of torture on return.¹² On the same basis, they have also been given a more operational role, with intelligence personnel and Ministers advised that they can 'mitigate the risk of torture or CIDT [Cruel, Inhuman or Degrading Treatment] occurring through requesting and evaluating assurances on detainee treatment'.¹³ Crucial to all of this is an assumption that receiving states are trustworthy partners.

¹⁰ UN High Commissioner for Refugees (UNHCR), *UNHCR Note on Diplomatic Assurances and International Refugee Protection*, August 2006, available at: <http://www.refworld.org/docid/44dc81164.html>, accessed 3 September 2014.

¹¹ On the history of diplomatic assurances, see especially Naureen Shah, 'Promises to Keep: Diplomatic Assurances Against Torture in US Terrorism Transfers', December 2010, pp. 56-59, available at: <http://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/PromisestoKeep.pdf>

¹² Jones, 'Deportations with Assurances', p. 185 ['The UK's policy of DWA is a way of complying with its human rights obligations, not avoiding them.']

¹³ *Consolidated Guidance to Intelligence Officers and Service Personnel on the Detention and Interviewing of Detainees Overseas, and on the Passing and Receipt of Intelligence Relating to Detainees*, July 2010, p. 6, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/62632/Consolidated_Guidance_November_2011.pdf

Trust but verify

Relying on the trustworthiness of diplomatic partners raises the immediate suspicion that this happy state of affairs in which the commitment to *non-refoulement* and the prohibition on torture are effectively ringfenced through the use of diplomatic assurances has some gaps in it. As NGOs, intergovernmental bodies and indeed the UK courts have pointed out, the very fact a country feels the need for diplomatic assurances shows that there is a worry about the risks that individual would face on return.¹⁴ Under a strict reading of CAT Article 3 this should be enough to block return. Governments want to be able to argue that having an assurance in place negates any initial suspicion, but this rather begs the questions of how much weight a promise from a serial human rights abuser can carry.¹⁵ This worry carries particular weight when states rely on a very loose conception of the safeguards needed over and above a blanket promise. As Margaret Satterthwaite argues, President Bush's statement that 'We operate within the law [when] we send people to countries where they say they're not going to torture the people' was indicative of the way diplomatic assurances subsumed all considerations of legality in the US rendition programme.¹⁶ This led Human Rights Watch to argue that states using diplomatic assurance as a safeguard against torture 'are either engaging in wishful thinking or using the assurances as a fig leaf to cover their complicity in torture and their role in the erosion of the international norm against torture'.¹⁷ In a similar vein, the late Lord Chief Justice Tom Bingham once likened the use of diplomatic assurances to trusting an alcoholic who says they're a reformed alcoholic without ever having admitted to having had a problem in the first place.¹⁸

It is generally recognised, however, that something more than a simple promise is needed before diplomatic assurances can indemnify states' *non-refoulement* obligations.¹⁹ This has led the UK, which has spearheaded the systemic integration of DAs into international law, to argue for "enhanced" diplomatic assurances which talk up the role of post-transfer monitoring and accountability.²⁰ The idea is that signing detailed bilateral memorandums of understanding (MOUs) which have provisions for monitoring can both establish a regime which safeguards the

¹⁴ Amnesty International, 'Dangerous Deals', p. 6

¹⁵ For example, Algeria hasn't signed up to the CAT optional protocols which allow monitoring, yet the UK has still used DAs to justify return.

¹⁶ Margaret L. Satterthwaite, 'Rendered Meaningless: Extraordinary Rendition and the Rule of Law', *The George Washington Law Review* 75, 2007, p. 1387

¹⁷ Julia Hall, 'Still at Risk: Diplomatic Assurances No Safeguard Against Torture', Human Rights Watch, 15 April 2005, p. 3, available at <http://www.refworld.org/docid/42c3bd400.html>, last accessed 20 September 2014.

¹⁸ <http://gordoncampbell.scoop.co.nz/2008/12/08/gordon-campbell-ivs-lord-bingham-of-cornhill/>

¹⁹ see e.g. *BB v. SSHD* [SC/39/2005], paras. 5-6 in which the UK Special Asylum and Immigration Tribunal (SAIC) outlines 4 additional "yardsticks" against which to judge the credibility and worth of DAs: "(i) the terms of the assurances must be such that, if they are fulfilled, the person returned will not be subjected to treatment contrary to Article 3; (ii) the assurances must be given in good faith; (iii) there must be a sound objective basis for believing that the assurances will be fulfilled; (iv) fulfilment of the assurances must be capable of being verified."

²⁰ According to an Amnesty International report, the UK is the "most influential and aggressive" promoter of DAs, although they have also been used by: Austria, Azerbaijan, Bosnia, Denmark, France, Germany, Italy, Russia, Slovakia, Spain, and Sweden, see "Dangerous Deals: Europe's reliance on 'diplomatic assurances' against torture", April 2010, available at: <http://www.amnesty.org/en/library/asset/EUR01/012/2010/en/608f128b-9eac-4e2f-b73b-6d747a8cbaed/eur010122010en.pdf>

prohibition against torture and get rid of the need for case-by-case assurances from a country. The need for such monitoring was recognised by the UN Human Rights Committee in April 2014 where the US was encouraged to ‘strictly apply the absolute prohibition against refoulement’ and ‘continue exercising the utmost care in evaluating diplomatic assurances, and refrain from relying on such assurances where it is not in a position to effectively monitor the treatment of such persons after their extradition, expulsion, transfer or return to other countries and take appropriate remedial action when assurances are not fulfilled’.²¹ Enhanced DAs have governed NATO and US prisoner transfers in Afghanistan.²² They have also become a central pillar of the counter-piracy regime in the Horn of Africa, governing the transfer of pirates captured by international forces for detention and trial in Kenya, Mauritius and the Seychelles.²³ More recently, the International Criminal Court used DAs as a way to return three Congolese witnesses who had claimed asylum in the Netherlands after given evidence which implicated DRC President Joseph Kabila.²⁴ The most high profile use of these enhanced diplomatic assurances, however, has been in the UK’s attempt to remove Abu Qatada to face trial in Jordan for terrorist offences.

Abu Qatada is a Jordanian national who had been living in the UK since 1993. He was indefinitely detained in the UK under the 2001 Anti-Terrorism, Crime, and Security Act before being released in March 2005 following the so-called Belmarsh judgment of the House of Lords and made the subject of a control order.²⁵ In August 2005 the UK government attempted to deport him for trial in Jordan where he had been convicted *in absentia* on terrorism related charges. Abu Qatada appealed against this on the basis that he would be tortured on his return, that he would be unable to receive a fair trial, and that he would face unlawful detention. After several rounds of appeals, the House of Lords eventually found that the diplomatic assurances received from Jordan offered sufficiently robust protection of Abu Qatada’s human rights.²⁶ When the question finally came before the European Court of Human Rights it broadly concurred with UK’s arguments that the use of diplomatic assurances had the potential to effectively protect against Abu Qatada’s risk of torture or unlawful detention, although it

²¹ Concluding observations on the fourth periodic report of the United States of America, CCPR/C/USA/CO/4, 23 April 2014, para 13.

²² Naureen Shah, ‘Promises to Keep: Diplomatic Assurances Against Torture in US Terrorism Transfers’, Human Rights Institute, Columbia Law School, p. 164-172, available at:

<http://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/PromisestoKeep.pdf>

²³ Robin Geiss and Anna Petrig, *Piracy and Armed Robbery at Sea: The Legal Framework for Counter-Piracy operations in Somalia and the Gulf of Aden* (Oxford, Oxford University Press: 2011), p. 217-220; see also ‘UNODC Counter Piracy Programme: Support to the Trial and Related Treatment of Piracy Suspects’, March 2013, available at: http://www.unodc.org/documents/easternafrika/piracy/UNODC_Brochure_Issue_11_wv.pdf; Alice Priddy and Stuart Casey-Maslen, ‘Counterpiracy under International Law’, August 2012, available at <http://www.geneva-academy.ch/docs/academyLecture/Counterpiracy.pdf>

²⁴ <http://www.news24.com/Africa/News/ICC-asylum-seekers-return-to-Kinshasa-20140707-2>; Dersim Yabasun and Mathias Holvoet, ‘Seeking Asylum before the International Criminal Court. Another Challenge for a Court in Need of Credibility’, *International Criminal Law Review* 13:3, July 2013, 725–745; Mathias Holvoet, ‘Former ICC Defendant – Ngudjolo – Applies for Asylum in the Netherlands’, 28 March 2013, <http://www.ejiltalk.org/former-icc-defendant-ngudjolo-applies-for-asylum-in-the-netherlands/>

²⁵ *A and others v Secretary of State for the Home Department* [2004] UKHL 56

²⁶ *RB (Algeria) (FC) and another v SSHD & OO (Jordan) v SSHD* [2009] UKHL 10, 18 February 2009

ultimately blocked deportation on the basis that the existing agreement could not guarantee a fair trial because it failed to establish sufficient safeguards to prevent information obtained through torture from being used as evidence in the criminal case. Abu Qatada was eventually deported to Jordan on 7 July 2013 after these additional assurances were sought and given in the form of a bilateral treaty.²⁷

The impact of this case has essentially been to establish that where diplomatic assurances incorporate sufficiently robust monitoring provisions they are capable of protecting the integrity of *non-refoulement* or other human rights obligations. It also established that the practical sufficiency of diplomatic assurances in safeguarding the individual's risk will depend on a range of criteria, including the precision of the assurances, the length and strength of the diplomatic relationship between the sending and receiving states, and the fact that the assurances were concluded at the highest levels of Government. In other words, this judgement is evidence that the scope of state's liability or complicity with torture can be limited by taking reasonable measures to ensure an individual's continued safety. By the same token it also sends a signal to that, as Conor McCarthy puts it, 'there are now few countries, however bad their human rights record may be, which are so bad that assurances cannot be sought to enable deportation, subject to sufficiently rigorous safeguards being put in place to prevent ill-treatment.'²⁸

Still Empty Promises?

In the wake of the European Court of Human Rights judgment in Abu Qatada's case most in the human rights community now privately regard the battle over the legality of diplomatic assurances as a battle lost. It is accepted that diplomatic assurances, at least in an enhanced form, are now a fixed part of the policymaker's toolbox.²⁹ They have, however, continued to express scepticism about their capacity to effectively ringfence human rights. There have been four main areas of concern which suggest that, even though there is now a firmer jurisprudential basis for their use, the threshold diplomatic assurances would have to meet before they can be used are regarded by human rights advocates as practically unattainable in the vast majority of cases.

First, even with the use of enhanced diplomatic assurances, the arrangements in place for monitoring are more *ad hoc* than the rhetoric might suggest. One human rights NGO, for example, raised concerns over the feasibility of active monitoring of DAs by the UK only to be told by the Courts that they were sure any breaches of the DA would be brought to the FCO's

²⁷ Treaty on Mutual Legal Assistance in Criminal Matters between the United Kingdom of Great Britain and Northern Ireland and the Hashemite Kingdom of Jordan, 30 July 2013, available at <https://www.gov.uk/government/publications/treaty-on-mutual-legal-assistance-between-the-uk-and-jordan>; it bears mentioning that this is the first and only time that DAs have been given in the form of a treaty.

²⁸ Conor McCarthy, 'Diplomatic Assurances, Torture and Extradition: The Case of Othman (Abu Qatada) v. the United Kingdom', 18 January 2012 <http://www.ejiltalk.org/diplomatic-assurances-torture-and-extradition-the-case-of-othman-abu-qatada-v-the-united-kingdom/>

²⁹ see e.g. *Review of Counter-terrorism and Security Powers*, January 2011, p. 33-35, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/97972/review-findings-and-rec.pdf

attention by the NGO in question.³⁰ Lord Mance, of the UK Supreme Court, has similarly suggested that the public scrutiny by human rights groups and the media surrounding high profile DA cases provides additional credibility to a receiving government's assurances.³¹ The implication that human rights organisations or the media are effective safeguards for DAs vastly overestimates the resources and access that these organisations have in states like Jordan, Ethiopia, Kazakhstan, Egypt or the DRC.³² It also ignores the worries over the willingness of individuals subject to DAs to report abuses because of the functional difficulty with protecting anonymity and preventing reprisals against the individual or their families.³³ Effective monitoring requires unimpeded unlimited unannounced access to all detainees in all detention centres precisely because torture happens in secret, in a climate of impunity and deniability.

A second ongoing difficulty concerns the objectivity of the monitoring body itself. There are useful lessons from the UK government's MoU with Libya under Qaddafi. The reason this wasn't used while Qaddafi was in power was because the UK Court of Appeal stepped in, judging that the claims to independence and objectivity were undermined by the fact that his son, Saif al-Islam, served as chair of the monitoring body.³⁴ The worry going forward is that other states will get smart and learn to bury any conflict of interest far deeper. Ethiopia seems to have done exactly this prior to signing a MoU with the UK in December 2008. The "independent" monitoring body empowered in this agreement was the government-sponsored Ethiopian Human Rights Commission. The alternatives available were limited, however, due to the Ethiopian government's crackdown on civil society, in which it closed essentially all independent NGOs. As Tom Porteous, London director of Human Rights Watch, argued at the time: 'Expecting an Ethiopian government-sponsored commission to monitor torture cases is farcical, especially when Ethiopia is fast becoming one of the most inhospitable places in the world for independent human rights investigation.'³⁵

A third issue is the continued potential for misalignment between how each side views the promises agreed to. The majority of DAs have not been legally binding, leading Juan Mendez and Ben Emmerson – respectively the UN Special Rapporteurs on Torture and on Counter-terrorism and Human Rights – to ask why states with a history of violating their binding international legal obligations should be trusted to comply with non-binding assurances.³⁶ The recent history of the Abu Qatada case suggests a further worry that even where states have signed a binding agreement in good faith, domestic courts will not always interpret the standing of international legal obligations in the way the architects of the agreement intended. The assurances governing the transfer of Abu Qatada to Jordan did have a binding legal status and

³⁰ *U & Others v Secretary of State for the Home Department* [2013] UKSAIC (25 January 2013), para 42.

³¹ <http://www.asil.org/blogs/approach-courts-foreign-affairs-and-national-security>

³² See e.g. Manfred Nowak, 'Fact-Finding on Torture and Ill-Treatment and Conditions of Detention', *Journal of Human Rights Practice* 1:1, March 2009, pp. 101-119.

³³ <http://www.hrw.org/news/2009/09/17/uk-ethiopian-assurances-no-guarantee-against-torture>

³⁴ *DD & AS v Secretary of State for the Home Department* [2007] UKSIAC 42/2005 (27 April 2007)

³⁵ <http://www.hrw.org/news/2009/09/17/uk-ethiopian-assurances-no-guarantee-against-torture>

³⁶ <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14084&LangID=E#sthash.853li3wv.dpuf>

explicitly prevented the information obtained through torture from being used as evidence.³⁷ In practice, however, the Jordanian court found that because evidence obtained through torture had already been admitted in a previous linked case, domestic jurisprudence required that this torture-tainted information be admitted as evidence against Qatada. Adam Coogle of Human Rights Watch argues that ‘the fact that the confession was admitted as evidence at all shows just how worthless the treaty really was. It’s clear that “diplomatic assurances” from countries with poor records on torture aren’t worth the paper they’re written on.’³⁸ Outside of the judicial context there is likely to be even more room for competing interpretations of cooperative agreements. For example, Pervez Musharraf has made clear that his standing assumption while in power was that underlying the anti-torture posture of Western allies was a clear tacit approval for torture, a kind of “don’t ask don’t tell” interrogation policy.³⁹ The secrecy which surrounds intelligence cooperation and national security deportations further adds to the potential for the effective operation DAs to be corrupted.⁴⁰

Finally, the capacity of diplomatic assurances to manage the conflict between human rights and security relies on confidence in the existence of a strong and stable diplomatic relationship, both as a pre-requisite for trusting partner countries and as something which can be leveraged as a punishment for failing to uphold DAs. There are problems with both of these claims. The unexpected events of the Arab Spring and its aftermath in Libya, Egypt, Syria, Iraq and Yemen highlight the degree to which political stability – hence trustworthiness – can be a chimera. More than that, diplomatic assurances negotiated with the old regime can become politically toxic in attempts to engage the new regime.⁴¹ When former friends become enemies, and vice versa, a carefully negotiated agreement can quickly become meaningless. Short of threatening forcible intervention, there are limited ways to remedy the possibility that an individual will be tortured in these cases. Similarly, there is little basis for thinking that states would be willing to endanger a valuable diplomatic relationship in order to secure or punish violations of DAs, precisely because of the forward looking nature of intelligence gathering.⁴² The fact that an ally has broken a promise and violated an agreement may be of deep concern but this fact alone won’t provide enough of an incentive to endanger a relationship regarded as vital to national security.⁴³

Illiberal norm entrepreneurs

³⁷ UK-Jordan Treaty on International Legal Assistance, July 2013, available at:

<https://www.gov.uk/government/publications/treaty-on-mutual-legal-assistance-between-the-uk-and-jordan>

³⁸ <http://www.hrw.org/news/2014/07/11/abu-qatada-trial-showed-uk-jordan-torture-treaty-worthless>

³⁹ <http://www.bbc.co.uk/news/uk-12716033>

⁴⁰ See e.g. Amnesty International, ‘Left in the Dark: The use of secret evidence in the United Kingdom’, October 2012, available at: <http://www.amnesty.org/en/library/asset/EUR45/014/2012/en/546a2059-db83-4888-93ba-8b90cc32a2de/eur450142012en.pdf>

⁴¹ <http://www.hrw.org/news/2012/09/05/us-torture-and-rendition-gaddafi-s-libya>

⁴² Rosemary Foot, ‘Torture: the struggle over a peremptory norm in a counter-terrorist era’, *International Relations* 20:2, March 2006, pp. 131-151.

⁴³ See for example the case of Yunus Rahmatullah: <http://www.theguardian.com/commentisfree/2012/oct/31/yunus-rahmatullah-unlawful-detention>

The above challenges to the use of diplomatic assurances focus on the continued operational difficulties of using DAs as an effective way to remedy the relationship between human rights and national security imperatives where there is a persistent possibility of an individual being tortured. It is also possible, however, to couch the opposition to DAs in terms of a deeper set of concerns over the damage the use of diplomatic assurances can do to the broader anti-torture regime, regardless of how stringent the case-by-case risk assessment or monitoring mechanisms might be. *Non-refoulement* is one of the preventative mechanisms detailed in the Convention Against Torture, alongside, *inter alia*, the exclusionary rule which prevents the use of evidence obtained from torture from being used in criminal proceedings (Article 15), the obligation to investigate torture (Article 12-13) and the obligation to prevent, prosecute and punish torture (Article 4-9). The worry here is that diplomatic assurances are not merely empty promises that enable torture, they're empty promises that erode the global anti-torture regime.

The war on terror has seen extraordinary rendition, targeted killing and complicity with torture all presented as legal and legitimate. This claim to legality and legitimacy has helped frame the debate over the legacy or effect of the war on terror on fundamental human rights. Tim Dunne argues, for instance, that fundamental human rights were plunged into crisis after 9/11 precisely because it became impossible to ignore the existence of a two-tier standard of legitimacy in international society, centred around the US belief in its own exceptional standing, something which was at no point more evident than in the attempt to recast torture or “enhanced interrogation” as permissible.⁴⁴ Jason Ralph has argued that the counterterrorism narrative was driven less by the “blanket exceptionalism” which characterised the earliest responses to 9/11 than by the later practice of “spatial exceptionalism”, in which the claims to exceptional authority were more precisely tied to claims about the limits of international law’s jurisdiction.⁴⁵ One example of this was the spurious argument that the legal obligations contained in the Convention Against Torture only applied to activities within the geographical United States, and didn’t cover extra-territorial practices, including prisoner transfers and interrogations in third party states. In other words, it wasn’t just the scale of the terrorist threat which justified exceptional measures but the existence of exceptional spaces in which fundamental human rights protections were argued not to apply. Either way, in leveraging its position to defend the use of torture in exceptional circumstances or spaces, the US became – wittingly or not – an illiberal norm entrepreneur. By turning what had been the ultimate moral stigma into a practice the merits of which were, at least, up for debate, Bush-era officials started the prohibition against torture on what Ryder McKeown calls a ‘death cycle’.⁴⁶ It was not just that the US sanctioned torture, but

⁴⁴ Tim Dunne, ‘The rules of the game are changing: Fundamental Human Rights in Crisis After 9/11’, *International Politics* 44:2-3, March/May 2007, pp. 269-286.

⁴⁵ Ralph, *America's War on Terror*, p. 120.

⁴⁶ Ryder McKeown, ‘Norm Regress: US Revisionism and the Slow Death of the Torture Norm’, *International Relations* 23:1, March 2009, pp. 5-25, at p. 20; see also Regina Heller and Martin Kahl, ‘Tracing and understanding “bad” norm dynamics in counterterrorism: the current debates in IR research’, *Critical Studies on Terrorism*, 6:3, December 2013, pp. 414-428.

that the torture debates have made it legitimate to think that torture could be a reasonable and responsible policy choice in exceptional circumstances.⁴⁷

Are Western governments really responsible for “breaking” the anti-torture norm? McKeown himself stops short of suggesting that the international prohibition is in terminal decline, arguing that a public recommitment to the absolute status of the norm could avert regress outside of US domestic society. His account reflects what seems to be the standing assumption that re-committing to an “inclusionary” view of human rights and international law which acknowledges that the treatment of terrorist suspects is governed by the existing international legal framework is an effective strategy for countering the damage caused by a practice of exceptionalism.⁴⁸ When understood as part of a strategy for remedying exceptionalism DAs become a *solution* to the problem of norm regress.

Another reason this constructivist narrative can be used to justify diplomatic assurances is because they seem to represent a way of generating *better* norm internalization than the existing anti-torture regime has managed. Despite beginning as a box ticking exercise, the ratification of human rights treaties and institutions has often had an unintended impact on domestic politics in illiberal states because they help mobilize domestic pressure groups⁴⁹, legitimize international calls for improved norm compliance⁵⁰, or become functional tools for proving the credibility of elite actors.⁵¹ Another spin on this constructivist theme is that because DAs require both a high-level buy-in on the institutional guarantees needed to ringfence human rights protections and because there would be serious consequences to renegeing on the agreement, DAs put Western foreign policy actors into a better position to get traction on human rights than they have traditionally had.⁵² In other words, using DAs to force better human rights compliance in a limited number cases has the potential, over time, to generate better take-up of the anti-torture norm.

There are four problems with this positive spin on DAs as a tool for bracketing off a damaging legacy of exceptionalism. These problems suggest that the shadow of illegality cast by the war on terror is darker and wider than states have been willing to admit. First, the protections granted by DAs are targeted at named individuals and, beyond reiterating the human rights commitments already enshrined in the core human rights treaties, do not provide the sort of actionable, universal rights claims that domestic pressure groups mobilize around. Mobilizing around the defence of a terrorist’s rights is also an entirely different prospect from mobilizing around a state’s international treaty obligations, as is evident from the US public’s muted

⁴⁷ Paul Gronke, Darius Rejali, Dustin Drenguis, James Hicks, Peter Miller, and Bryan Nakayama, ‘US public opinion on torture, 2001–2009’, *PS: Political Science and Politics* 43:3, June 2010, pp. 437-444.

⁴⁸ Jason Ralph, *America’s War on Terror*, p. 15.

⁴⁹ Beth A. Simmons, *Mobilizing for human rights: international law in domestic politics* (Cambridge: Cambridge University Press, 2009)

⁵⁰ Emilie M. Hafner-Burton, ‘Sticks and stones: Naming and shaming the human rights enforcement problem’, *International Organization* 62:4, October 2008, pp. 689-716.

⁵¹ Beth A. Simmons and Allison Danner ‘Credible commitments and the International Criminal Court’, *International Organization* 64:2, April 2010, pp. 225-256.

⁵² See e.g. Kate Jones, ‘Deportations with Assurances’, p. 187; also *Othman* para. 30.

reaction to the torture of Khalid Sheik Mohammed.⁵³ Third, scholars have recently pointed out that constructivist arguments tend to suffer from a ‘good norm bias’, ignoring the potential for constructivist processes to entrench alternative or ‘bad’ norms, particularly where there is a rhetorical convergence or ‘coalition of norm challengers’.⁵⁴ DAs seem well placed to entrench the norm that Western governments don’t care about incidents of torture that lack an international dimension.⁵⁵ For states without the constitutional checks of the liberal constitutional orders, for states with a history of permitting torture, and for states which continue to face “exceptional” domestic security threats, the past justification of torture is likely to have created a dangerous *and ongoing* precedent. Amnesty International has recently suggested that the global legacy of the War on Terror is that torture over the past 5 years has become ‘disturbingly widespread’, with incidents catalogued in 141 countries, including 79 of the 155 signatories of the UN Convention Against Torture.⁵⁶ Finally, focusing on the health of the core prohibition against torture ignores the damage done to the broader anti-torture regime. The principle of *non-refoulement* is a component part of the prevention of torture, yet constructivist arguments tend to disaggregate questions about the standing of the core prohibition on torture from questions about the scope or operation of *non-refoulement* and the constellation of related preventive obligations.⁵⁷ In evaluating the long term impact, at least as important as the direct violations of the core prohibition sanctioned implicitly or explicitly by Western governments are the varying forms of participation and support provided by 54 countries around the world.⁵⁸ Part of that support has been facilitated by the innovative use of diplomatic assurances.

It is the potential diplomatic assurances have to dismantle the integrated anti-torture regime which has become arguably the most pressing issue for human rights advocates. In her role as UN High Commissioner for Human Rights, Louise Arbour argued that by replacing the current regime which entitles *all* prisoners to equal human rights protections with a regime which ignores systemic torture and only seeks to protect a select few prisoners DAs ‘threaten to empty international human rights law of its content’.⁵⁹ There are some recent signs that this worry is

⁵³ McKeown, ‘Norm Regress’, p. 23.

⁵⁴ Heller and Kahl, ‘Tracing and understanding “bad” norm dynamics’, p. 420-421; Diana Panke and Ulrich Petersohn, ‘Why international norms disappear sometimes’, *European Journal of International Relations* 18:4, December 2012, pp. 719-74.

⁵⁵ See e.g. <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14357&LangID=E>

⁵⁶ Amnesty International, ‘Torture in 2014: 30 Years of Broken Promises’, May 2014, available at <http://www.amnestyusa.org/sites/default/files/act400042014en.pdf>

⁵⁷ Sir Elihu Lauterpacht and Daniel Bethlehem, *Report of the United Nations High Commissioner for Refugees on the Scope and Content of the Principle of Non-Refoulement*, 23 June 2001, available at

<http://www.unhcr.org/3b33574d1.html>; see also Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, 10 April 2014, A/HRC/25/60

⁵⁸ For a catalogue of this participation see especially ‘Globalizing Torture: CIA Secret Detention and Extraordinary Rendition’, Open Society Justice Initiative, 2013, p. 6, available at <http://www.opensocietyfoundations.org/sites/default/files/globalizing-torture-20120205.pdf>

⁵⁹ Louise Arbour, ‘On Terrorists and Torturers’, 7 December 2005, available at:

<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=2117&LangID=E>; see also the 2006 report to the UN Commission on Human Rights in which the UN Special Rapporteur on torture states that ‘Rather than using all their diplomatic and legal powers as States parties to hold other States parties accountable for their violations, requesting States, by means of diplomatic assurances, seek only an exception from the practice of torture

justified. Australia has increasingly relied on DAs to justify mass returns of asylum seekers to Papua New Guinea, ignoring the need to judge the risk of torture on a case-by-case basis. Russia has used DAs as cover for returns to Uzbekistan, despite the lack of effective monitoring and evidence of torture. Similarly, in June 2012 the Committee against Torture found that the use of DAs by Uzbekistan to justify extraditing 28 men to Kazakhstan was in breach of the CAT Article 3 prohibition against torture, warning that the existence of diplomatic assurances ‘cannot be used as an instrument to avoid the application of the principle of *non-refoulement*’.⁶⁰

These uses of diplomatic assurances may not mirror the enhanced DAs argued for by the UK – but that becomes precisely the point when considering the normative impact of changing or watering down the principle of *non-refoulement*. Enshrining diplomatic assurances into international law means that *all* states – not just Western liberal states – are able to claim a greater discretionary entitlement with regard to managing the tension between human rights and security.⁶¹ In states without a history of respect for human rights or lacking strong judicial review procedures it should be no surprise if the tools available are used either as a new form of cover for ongoing human rights violations.

Conclusion: Gaming the anti-torture regime

Debates over the relationship between human rights and counterterrorism have tended to be overshadowed by the focus on extraordinary rendition by the CIA, on “enhanced interrogation” or torture, on indefinite detention and targeted killings, on practices which have often lacked even the pretence of legality. As policymakers have sought to draw a line under the Bush-era, they have been forced to make a better case for how to operationalise the competing requirements of human rights and national security.

Enhanced diplomatic assurances have quickly become one of the key mechanisms for achieving this.⁶² Although historically a primarily European tool, diplomatic assurances are now being used on an increasingly global scale. The US, for example, relied on this mechanism to backstop the legality of the US transfer of Djamel Saiid Ali Ameziane and Bensayah Belkecem from Guantanamo to Algeria in December 2010. This is to say that the issues surrounding the use of DAs are likely to arise again and again as policymakers look to end indefinite detention in

for a few individuals, which leads to double standards vis-à-vis other detainees in those countries.’ UN Doc E/CN.4/2006/6, 23 December 2005, at para. 31(c).

⁶⁰ Amnesty International submission to Uzbekistan CAT committee hearing, October 2013, p. 13 – available <http://www.refworld.org/pdfid/5277a6d54.pdf>; see also Amnesty International, *Return to Torture: Extradition, forcible returns and removals to Central Asia*, July 2013.

⁶¹ In fact we could go further and say that the precedent has also been seen within the US, with reports that the Chicago police department has been operating their own domestic version of a CIA “black site”: <http://www.theguardian.com/us-news/2015/feb/24/chicago-police-detain-americans-black-site>

⁶² See e.g. Ashley S. Deeks, *Avoiding transfers to torture*. No. 35. Council on Foreign Relations, 2008, p. 2, available at: http://www.cfr.org/content/publications/attachments/Assurances_CSR35.pdf

Guantanamo and elsewhere⁶³; as a result of the strategic pressure for counterterrorism partnerships with human rights abusers⁶⁴; as governments look for new ways to secure their borders against transnational threats and home-grown terrorism; and because of the difficulties surrounding criminal trials for terrorists. DAs have become a crucial mechanism for outsourcing the responsibility for releasing, detaining, monitoring or prosecuting terrorists to less liberal countries, bypassing fraught debates over how to deal with suspected terrorists within the constraints imposed by a commitment to human rights. What's more, they now have a clear foothold in international law.

States have managed to establish diplomatic assurances as part of the policymakers toolbox by emphasising the need for innovative measures which allow policymakers to strike a more workable balance between human rights and national security commitments and place limits on the scope of their liability under the anti-torture regime. This challenges the idea that Obama's counterterrorism strategy is defined by continuity with the values, assumptions and attitudes of the Bush-era.⁶⁵ If the British experience is any guide, the transition to a law-enforcement framework is being framed by a more nuanced "pragmatic" approach towards fundamental human rights in which the rules and responsibilities of international law – particularly where national security is implicated – are interpreted with reference to their policy fit.⁶⁶ This contrasts with the more orthodox positivist approach which takes seriously the need to insulate international law, as far as possible, from subjective political judgements.⁶⁷ The pragmatic project is to take back the responsibility for developing international law from those advocates and institutions of international law who have conspired to graft a more settled, fixed authority onto many fundamental human rights norms than should rightfully be accepted. Crucially, such an approach does not entrench a necessary bias against human rights in the way that the exceptionalism narrative did. There is an absolute commitment both to obey international law where there is a clear sense of the obligations to be followed and to build up the effectiveness of the international legal order. The simple premise is that by failing to show some flexibility in the face of the new challenges created by transnational terrorism human rights advocates have allowed the norms to become 'devalued' and in need of fixing through administrative measures such as DAs.⁶⁸

⁶³ Ryan Goodman, 'Forced Transfer of Detainees with Diplomatic Assurances Against Ill-Treatment', justsecurity.org, 6 December 2013, available at <http://justsecurity.org/4657/forced-transfer-guantanamo-detainees-diplomatic-assurances/>, last accessed 27 August 2014.

⁶⁴ 'David Cameron must "consider cooperating with Syria" to crush Isis', *Guardian*, 5 September 2014, <http://www.theguardian.com/politics/2014/sep/05/david-cameron-syria-crush-isis-lord-richards-nato>

⁶⁵ See e.g. McCrisken, 'Ten years on', p. 781

⁶⁶ Michael J. Glennon, *The Fog of Law: Pragmatism, Security and International Law* (Washington, D.C. Stanford, Calif.: Woodrow Wilson Center Press; Stanford University Press: 2009); see also, David Kennedy, *Of War and Law* (Princeton: Princeton University Press, 2006)

⁶⁷ For more on this tension, see Andrew Jillions, *From Faith in Rules to the Rule of Law: Constitutional Responsibilities in International Society* (London: LSE PhD Thesis, December 2012), available at: <http://etheses.lse.ac.uk/571/>

⁶⁸ See e.g. Jacob Mchangama and Guglielmo Verdirame, 'The Danger of Human Rights Proliferation', *Foreign Affairs* (online) 24 July 2013: <http://www.foreignaffairs.com/articles/139598/jacob-mchangama-and-guglielmo-verdirame/the-danger-of-human-rights-proliferation> [arguing that the "currency" of human rights has been devalued,

Human rights advocates can and do accept the need to develop procedures which allow for more effective application of human rights norms to counterterrorism operations.⁶⁹ But *their* “hard-earned wisdom” from the previous 14 years has been that powerful states will use their discretionary powers to “game” the human rights system in a way which establishes a systemic bias in favour of security imperatives and against the protection of individual rights. In the 2010 report, ‘Promises to Keep’, Naureen Shah noted that ‘the US maintains broad secrecy about its current practice while insisting that others trust it to respect the law and do the right thing’, suggesting that the controversy surrounding diplomatic assurances centres on whether the US can be trusted to uphold the spirit of the law, rather than trying to construct self-serving exceptions.⁷⁰ This is only partly true. The controversy is also driven by the global legacy of past abuses. As a result, integrating the commitment to prevent torture into counterterrorism strategy becomes about more than protecting the individual subject or the actions of any one state; it also becomes about the progressive responsibilities states have for fixing the damage they’ve done to the anti-torture regime – and whether the architects of past abuses can be trusted to remedy and develop the law in a way that strengthens rather than undermines the anti-torture regime.⁷¹ Evaluating the use of diplomatic assurances as a tool for integrating human rights and counterterrorism cannot be sequestered from debates over the legacy of the war on terror, particularly the damage done to the global anti-torture regime.

One of the central insights from international relations scholars working on the concept of trust has been that alongside strategic forms of trust – deciding, for example, whether a receiving state can be trusted to abide by the substance of diplomatic assurance – is a generalized form of social trust.⁷² In this guise, trust becomes the red thread running through the liberal social contract tradition;⁷³ it is the existence of a normative disposition to trust which allows rulers to rule without having to rely on fear and punishment or, on the flip side, be required to hold public referenda prior to every decision. The secrecy which surrounds counter-terrorism

at least in part as a result of the efforts of human rights advocates and institutions to broaden the scope of the practices governed by human rights to include vague commitments to social justice and development]

⁶⁹ For example, Juan Mendez, the UN Special Rapporteur on Torture has stated that: ‘all human rights standards are subject to the norm of “progressive development,” in that they evolve in accordance with new repressive actions and features . . . expansive interpretations of norms are possible as long as they better protect individuals from torture and cruel, inhuman or degrading treatment or punishment’, ‘Statement by Mr. Juan E Méndez, Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment 16th session of the Human Rights Council - Agenda Item 3, 7 March 2011’, available at:

http://www.ohchr.org/Documents/Issues/SRTorture/StatementHRC16SRTORTURE_March2011.pdf

⁷⁰ Shah, ‘Promises to Keep’, p. 5.

⁷¹ Juan Mendez, the UN Special Rapporteur on Torture has stated that: ‘all human rights standards are subject to the norm of “progressive development,” in that they evolve in accordance with new repressive actions and features . . . expansive interpretations of norms are possible as long as they better protect individuals from torture and cruel, inhuman or degrading treatment or punishment’, ‘Statement by Mr. Juan E Méndez, Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment 16th session of the Human Rights Council - Agenda Item 3, 7 March 2011’, available at:

http://www.ohchr.org/Documents/Issues/SRTorture/StatementHRC16SRTORTURE_March2011.pdf

⁷² Rathbun, *Trust in International Cooperation*, p. 6.

⁷³ O’Driscoll, ‘Fear and Trust’; see also John Dunn, ‘Trust and Political Agency’, in Gambetta, ed., *Trust: Making and Breaking Cooperative Relations*, pp. 73-93

work heightens the role that trust plays in enabling the exercise of political authority.⁷⁴ In eschewing exceptionalism and committing to grapple with the practical challenge of managing the tensions between security and human rights, policymakers have been forced to confront their role as trustees of the values and principles which define the domestic constitutional order. However, acknowledging the need to uphold human rights while countering terrorism also demands thinking beyond this narrow domestic context and taking the global scope of counterterrorism seriously; it is states' roles as trustees of a *global* social contract or constitution, of which the anti-torture norm is a fundamental part, which is most at issue in the current round of the torture debates. To put this another way, responding effectively to the trade-offs created by the existence of the overlapping values of security and human rights, whether that be through diplomatic assurances or some other mechanism, entails engaging with how this will shape the future practices of all states, liberal and illiberal alike.⁷⁵

So long as policymakers remain evasive about their past betrayal of trust – about the depth of their complicity, about the effectiveness of monitoring regimes in preventing human rights violations, about the regressive global legacy of the war on terror – reclaiming the trust required to change and, perhaps, improve the existing fit between human rights and security will be a fractious affair.⁷⁶ This dredging up of past abuses is frustrating for security actors and policymakers who take seriously their (re)commitment to fundamental human rights and want to draw a line under past practices.⁷⁷ And yet part of this frustration stems from a failure to understand or acknowledge that human rights advocates are not attempting to refight past battles or pick at old wounds but are now motivated by a new set of worries. These worries centre not on whether policymakers can be trusted to follow international human rights law but on whether, given the legacy of the war on terror, they can be trusted to remedy and develop the law in a way that strengthens rather than undermines the global anti-torture regime. This, this loss of trust in the capacity to progressively develop the rules, is what happens when a gamekeeper turns poacher.

⁷⁴ See especially Sawers, 2010.

⁷⁵ For an interesting illustration of this see especially Mary Ellen O'Connell, 'The Choice of Law Against Terrorism', *Journal of National Security Law and Policy*, 4:2, August 2010, p. 343-367.

⁷⁶ On the relationship between betrayal and trust see especially Michel, 'Time to get emotional', pp. 881-882.

⁷⁷ See Obama's response to the US Senate report into CIA torture: 'Rather than another reason to refight old arguments, I hope that today's report can help us leave these techniques where they belong – in the past', December 2014, available at <https://www.whitehouse.gov/the-press-office/2014/12/09/statement-president-report-senate-select-committee-intelligence>