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A Fig-Leaf for Torture: The Use of Diplomatic Assurances in the OSCE Region

When European governments sat down in the late nineteen-forties to negotiate a new treaty to protect human rights, they considered whether those rights should be subject to exceptions. With the carnage of the Second World War still fresh in the minds of many Europeans, the government delegations concluded that some human rights obligations could be subject to suspension “in time of war or other public emergency threatening the life of the nation”.¹ When it came to the prohibition against torture, however, the states parties concluded that the practice was so abhorrent, and the risk of creating exceptions so great, that the ban should be absolute.

Article 3 of that treaty, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), is among the best known expressions of the prohibition against torture. The absolute nature of the prohibition – which covers cruel, inhuman, and degrading treatment and punishment (CID) and includes a ban on refoulement, i.e. returning people to countries where they would be at risk of torture – is so widely accepted that it is considered to constitute a rule of customary international law, binding on all states irrespective of whether they have ratified treaties forbidding it. While torture has hardly been eradicated, the taboo on torture that the ECHR and other human rights treaties helped establish over the last half century has strengthened the hands of all those working to stamp it out.²

Today that taboo is under threat. Governments and commentators are increasingly asking aloud whether the ban on torture should apply at all times and in all circumstances, and some governments are acting as though it does not. The threat of terrorism has served as the impetus for this shift.³ Governments and others argue that the nature of the terrorist threat and the capacity and willingness of new terrorist formations to engage in the mass killing of

1 European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, Article 15.

2 Key among them, the International Covenant on Civil and Political Rights and the United Nations Convention against Torture, as well as the non-binding Universal Declaration on Human Rights. Torture is also prohibited absolutely under international humanitarian law, including the Geneva Conventions and the Rome Statute of the International Criminal Court.

3 Speaking about the universal and absolute nature of the prohibition against torture, Manfred Nowak, the UN Special Rapporteur on Torture, has written that “for this first time since World War II, this important consensus of the international community seems to have been called into question by some Governments in the context of their counter-terrorism strategies.” UNHCHR, *Statement of the Special Rapporteur on Torture, Manfred Nowak, to the 61st Session of the UN Commission on Human Rights*, Geneva, 4 April 2005, p. 3, at: <http://www.unhcr.ch/hurricane/hurricane.nsf/0/60B1E9AE29AFE9B6C1256FDD0041B400?opendocument>

civilians mean that the old rules are no longer up to the task. To answer that argument, one must compare the terrorist threat today to the threat of Nazi victory in World War Two. If the levelling of cities and millions of dead during the Second World War did not lead European governments to conclude that torture is sometimes acceptable, how can there be any justification for exceptions in the face of a lesser threat?

The ban on torture and CID is under attack from multiple directions, including: efforts to redefine torture in a manner that narrows the scope of the ban; efforts to sever the ban on CID from the ban on torture, coupled with arguments that the ban on CID is not absolute; the attempted justification or sanctioning of so-called “coercive interrogation”; efforts to legitimize the use of material obtained under torture in third countries as evidence in criminal prosecutions or for intelligence purposes; direct extraditions, transfers and other returns to torture, including so-called “renditions”; and returns based on no-torture promises by receiving states.

This essay will consider the impact of the last of these developments – efforts by states to return persons to countries where they are at risk of torture on the basis of promises, or “diplomatic assurances”, from the receiving state that the person will not be subject to torture or other ill-treatment upon return. A growing list of countries in the OSCE region – including Austria, Canada, Georgia, Germany, the Netherlands, Sweden, Turkey, the United Kingdom, and the United States – are turning to these assurances to facilitate the removal of foreign nationals from their territory. Most of those subject to return are suspected of involvement in terrorism, but such assurances have also been a factor in asylum cases where the applicant does not have a national security profile. In every case, the country of proposed return has a poor record of torture and ill-treatment.

What is particularly disturbing about the phenomenon of returns with assurances is that states that rely on this device assert that such returns are compatible with their obligations under human rights law and the torture ban. In fact, diplomatic assurances do not mitigate the risk of torture, and returns to torture under them violate international law.⁴ And as human rights experts and lawyers are increasingly recognizing, the use of these assurances threatens to create a dangerous loophole in the prohibition against torture. Rather than enhancing human rights protection, diplomatic assurances instead serve as a fig-leaf for torture. By doing so, they threaten the integrity of the absolute prohibition against torture.

4 See Human Rights Watch, “Empty Promises:” *Diplomatic Assurances No Safeguard Against Torture*, April 2004, at: <http://hrw.org/reports/2004/un0404/>, and Human Rights Watch, *Still at Risk: Diplomatic Assurances No Safeguard Against Torture*, April 2005, at: <http://hrw.org/reports/2005/eca0405/>.

OSCE Standards

As the Document of the 1990 Copenhagen Meeting makes clear, the Organization for Security and Co-operation in Europe (OSCE) is committed to the absolute nature of the prohibition of torture. Article 16 reaffirms the commitment of states to “prohibit torture and other cruel, inhuman or degrading treatment or punishment [and] to take effective legislative, administrative, judicial and other measures to prevent and punish such practices [...]”.⁵ The document also stresses that “no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture”.⁶

Since the September 11 attacks in New York and Washington, the OSCE Ministerial Council has also repeatedly stressed the importance of respecting human rights while countering terrorism. The 2002 OSCE Charter on Preventing and Combating Terrorism, for example, emphasizes the obligation of all member States to “conduct all counter-terrorism measures [...] in accordance with the rule of law, the United Nations Charter and the relevant provisions of international law, international standards of human rights, and where applicable international human rights law”.⁷

The OSCE has also considered the practice of states seeking diplomatic assurances against torture. An April 2005 background paper on extradition and human rights prepared by the Office for Democratic Institutions and Human Rights (ODIHR) noted that “the legality and effectiveness of this practice in protecting human rights and fulfilling states’ non-derogable obligation not to render, transfer, send or return a person where there are substantial grounds for believing that he or she would be in danger of being subjected to torture (non-refoulement) has been called into question by a number of commentators”.⁸ The paper did not, however, express a conclusion about the compatibility of the practice with international human rights law.

5 Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, Copenhagen, 29 June 1990, in: Arie Bloed (ed.), *The Conference on Security and Co-operation in Europe. Analysis and Basic Documents, 1972-1993*, Dordrecht 1993, pp. 439-465, Article 16.1, p. 449.

6 *Ibid.*, Article 16.3.

7 OSCE, Tenth Meeting of the Ministerial Council, Porto, 6 and 7 December 2002, reproduced in: Institute for Peace Research and Security Policy at the University of Hamburg/IFSH (ed.), *OSCE Yearbook 2003*, Baden-Baden 2004, pp. 421-455; therein: OSCE Charter on Preventing and Combating Terrorism, pp. 425-428, p.425. See also OSCE, Ninth Meeting of the Ministerial Council, Bucharest, 3 and 4 December 2001, reproduced in: Institute for Peace Research and Security Policy at the University of Hamburg/IFSH (ed.), *OSCE Yearbook 2002*, Baden-Baden 2003, therein: Decision No. 1 on Combating Terrorism, pp. 393-394, emphasizing that states “will defend freedom and protect their citizens against acts of terrorism, fully respecting international law and human rights”, p. 394; and OSCE, Twelfth Meeting of the Ministerial Council, 6 and 7 December 2004, Sofia 2004, 7 December 2004, therein: Sofia Ministerial Statement on Preventing and Combating Terrorism, pp. 1-2, at: http://www.osce.org/documents/mcs/2005/02/4324_en.pdf.

8 OSCE Office of Democratic Institutions and Human Rights, *Background Paper on Extradition and Human Rights in the Context of Counter-terrorism*, Warsaw, April 2005, p. 9, at: http://www.osce.org/documents/odhr/2005/04/13962_en.pdf.

The Impact of Diplomatic Assurances on the Torture Prohibition

There is growing alarm among international human rights experts about the impact of diplomatic assurances on the torture prohibition, and in particular on the principle of non-refoulement.

Council of Europe Commissioner on Human Rights, Alvaro Gil-Robles, was one of the first human rights experts to highlight the risks of reliance on diplomatic assurances as a safeguard against torture. In July 2004, Gil-Robles expressed concern about the case of two men sent by Sweden to Egypt in December 2001 (see section on Sweden below) following diplomatic assurances regarding torture from Cairo, noting that this case “clearly illustrates the risks of relying on diplomatic assurances”.⁹ One year later, the Commissioner reiterated those concerns in a report on the United Kingdom: “There is clearly a certain inherent weakness in the practice of requesting diplomatic assurances from countries in which there is a widely acknowledged risk of torture. Due to the absolute nature of the prohibition of torture or inhuman or degrading treatment, formal assurances cannot be sufficient to permit expulsions where a risk is nonetheless considered to remain. There are sufficient examples already of breached assurances for the utmost caution to be required.”¹⁰

In September 2004, Professor Theo van Boven reflected in his final report to the General Assembly as UN Special Rapporteur on “whether the practice of resorting to assurances is not becoming a politically inspired substitute for the principle of non-refoulement [...]” and noted their “problematic nature.”¹¹

Professor Robert Goldman, the UN Independent Expert on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, has expressed concerns about the impact of assurances on the torture prohibition. In his February 2005 report to the UN Human Rights Commission, Professor Goldman stated that “given the absolute obligation of States not to expose any person to the danger of torture by way of extradition, expulsion, deportation, or other transfer, diplomatic assurances should not be used to circumvent the non-refoulement obligation”.¹²

During his statement to the UN Human Rights Commission in April 2005, the current Special Rapporteur on Torture, Manfred Nowak, high-

9 Council of Europe, Office of the Commissioner for Human Rights, Report by Mr. Alvaro Gil-Robles, Commissioner for Human Rights, on his Visit to Sweden, 21-23 April 2004, CommDH(2004)13, Strasbourg, 8 July 2004, p. 8, at: [http://www.coe.int/T/E/Commissioner_H.R/Communication_Unit/Documents/pdf.CommDH\(2004\)13_E.pdf](http://www.coe.int/T/E/Commissioner_H.R/Communication_Unit/Documents/pdf.CommDH(2004)13_E.pdf).

10 Council of Europe, Office of the Commissioner for Human Rights, Report by Mr. Alvaro Gil-Robles, Commissioner for Human Rights, on his Visit to the United Kingdom, 4th-12th November 2004, CommDH(2005)6, Strasbourg, 8 June 2005, p. 13, at: http://www.coe.int/T/E/Commissioner_H.R/Communication_Unit/Documents/By_country/United_Kingdom/index.asp#TopOfPage.

11 Report of the Special Rapporteur on Torture, Theo Van Boven, to the General Assembly, 23 August 2004, para. 30.

12 Report of the Independent Expert on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, E/CN.4/2005/103, 7 February 2005, para. 61.

lighted the danger to the global ban on torture from diplomatic assurances: “I am deeply concerned about any attempts to circumvent the absolute nature of the prohibition of torture and other forms of ill-treatment in the name of countering terrorism. These attempts include [...] attempts at evading the application of domestic or international human rights law [...] by returning suspected terrorists to countries which are well-known for their systematic torture practices.” The Special Rapporteur concluded that “from a legal point of view, the answer to these attempts is clear: Diplomatic assurances are not adequate means to satisfy the principle of *non-refoulement* in relation to countries where torture is systematically practised.”¹³ The United Nations High Commissioner for Human Rights, Louise Arbour, chose Human Rights Day to express her fears about diplomatic assurances, which she described as “having an acutely corrosive effect on the global ban on torture and cruel, inhuman or degrading treatment.”¹⁴

The danger to the non-refoulement principle posed by diplomatic assurances against torture has been clearly identified by non-governmental organizations. In May 2005, a group of human rights and anti-torture NGOs – including Human Rights Watch – issued a statement condemning the use of diplomatic assurances in transfers where there is a risk of torture and ill-treatment. The statement expressed concern “that sending countries that rely on diplomatic assurances are using them as a device to circumvent their obligation to prohibit and prevent torture and other ill-treatment, including the *non-refoulement* obligation”, adding that “the use of such assurances violates the absolute prohibition against torture and other ill-treatment and is eroding a fundamental principle of international human rights law”.¹⁵

Diplomatic Assurances against Torture in the OSCE Region

As their name implies, diplomatic assurances are subject to the limits of diplomacy. They are based on trust that the receiving state will keep its word when there is no basis for such trust. Governments in states where torture and ill-treatment are serious human rights problems almost always deny such practices. It defies common sense to presume that a country that routinely

13 United Nations Commissioner for Human Rights, Statement of the Special Rapporteur on Torture, Manfred Nowak to the 61st Session of the UN Commission on Human Rights, Geeva, 4 April 2005, at: <http://www.unhcr.ch/hurricane/hurricane.nsf/0/60B1E9AE29AFE9B6C1256FDD0041B400?opendocument> (emphasis in original).

14 Louise Arbour, High Commissioner for Human Rights, *Human Rights Day Statement – On Terrorists and Torturers*, United Nations, New York, 7 December, 2005.

15 *Call for Action against the Use of Diplomatic Assurances in Transfers to Risk of Torture and Ill-Treatment*, Joint Statement by Amnesty International, Association for the Prevention of Torture, Human Rights Watch, International Commission of Jurists, International Federation of Action by Christians for the Abolition of Torture, International Federation for Human Rights, International Helsinki Federation for Human Rights, and World Organisation Against Torture, 12 May 2005, at: <http://hrw.org/english/docs/2005/05/12/eca10660.htm> (emphasis in original).

flouts its obligations under international law will keep its word in an isolated case.¹⁶ Nor is post-return monitoring a panacea: Torture is practiced in secret, its perpetrators are often expert at keeping such abuses from being detected, and those subject to torture are frequently reluctant to speak about it, fearing reprisals against themselves or family members. Finally, there is no incentive for either the sending or receiving state to acknowledge if torture or ill-treatment occur since to do so would be to admit a breach of a core obligation under international human rights law.

The practice of seeking diplomatic assurances against torture is widespread within the OSCE region. The motivations of sending states vary – with some wishing to comply with extradition requests, others seeking the means to deport foreign nationals, often on national security grounds, and others wishing to send terrorism suspects to third countries for interrogation. The factor common to each case is that the receiving state has a poor record of torture, contributing to the risk that the person will be tortured on return. The cases documented by Human Rights Watch in the OSCE region demonstrate the risks inherent in seeking assurances against torture, concerns among some national courts about the unreliability of such assurances, and the willingness of states to seek them despite growing evidence of their ineffectiveness.

Austria

In November 2001, the Court of Appeal in Vienna approved the extradition to Egypt of Mohamed Bilasi-Ashri.¹⁷ Bilasi-Ashri had been sentenced *in absentia* by an Egyptian court to fifteen years hard labour for his alleged involvement with radical Islamists. The Austrian court ruled that Bilasi-Ashri would not be at risk of torture on return, notwithstanding his *in absentia* conviction and Egypt's record of torturing suspected Islamic radicals in detention, but conditioned the extradition on the receipt of assurances from Egypt that he would not be "persecuted" and would receive a new and fair trial. The Egyptian government declined to provide the assurances requested by the court, and Bilasi-Ashri was released from detention in Austria on August 2002. In 2005, Austrian authorities renewed their efforts to extradite Bilasi-Ashri, based on assurances from Egypt. An Austrian regional court ruled in June 2005 that there was no bar to his extradition, and in September 2005, the Court of Appeal refused to hear an appeal against that decision. At the time of writing, Bilasi-Ashri remained in Austria.

In a second case involving Austria, a Russian citizen, Akhmed A., was extradited to Russia from Austria in February 2004, following diplomatic as-

16 This contrasts with the practice of seeking diplomatic assurances in relation to the death penalty. A well-established practice in the OSCE region, assurances with respect to the death penalty relate to a transparent legal measure imposed by a court, with the possibility of judicial review.

17 See *Empty Promises*, cited above (Note 4), pp. 32-3.

surances by the Russian Procuracy that he would not be subject to torture or CID upon return.¹⁸ Because of the assurances offered, the Vienna Higher Region Court allowed the Russian national's extradition, despite acknowledging that he would be at risk of torture on return, and despite the fact that he had a pending claim for asylum.

Canada

In January 2002, the Supreme Court of Canada signalled its concerns about the reliability of diplomatic assurances against torture in the case of Manickavasagam Suresh, a Sri Lankan national subject to deportation on national security grounds.¹⁹ The court drew the important distinction between "assurances given by a state that it will not apply the death penalty (through a legal process) and assurances by a state that it will not resort to torture (an illegal process). We would signal the difficulty in relying too heavily on assurances by a state that it will refrain from torture in the future when it has engaged in illegal torture or allowed others to do so on its territory in the past."²⁰ The court granted Suresh a fresh deportation hearing on the ground that the first hearing lacked proper procedural safeguards.

Regrettably, the Supreme Court also said in the Suresh judgment that in cases involving national security, there might be exceptional circumstances where it was appropriate to deport a person to face a risk of torture, if the national security considerations were deemed to "outweigh" the risk, stating: "We do not exclude the possibility that in exceptional circumstances, deportation to face torture might be justified".²¹ The court ruled that such an approach would be compatible with Canadian immigration law and its Charter of Fundamental Rights. This finding, dubbed the "Suresh exception", is wholly inconsistent with international law and has been criticized by the UN Committee on Torture.²²

Despite the concerns of the Supreme Court over the reliability of diplomatic assurances against torture, the Canadian government sought such assurances to facilitate the deportation in 2004 of two foreign nationals detained in Canada under "security certificates."²³ In April 2004, the Canadian

18 See *Still at Risk*, cited above (Note 4), pp. 76-9.

19 See *Empty Promises*, cited above (Note 4), pp. 18-19, and *Still at Risk*, cited above (Note 4), pp. 47-9.

20 *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1. File No.: 27790, 11 January 2002, para. 124, at: http://www.lexum.umontreal.ca/csc-scc/en/pub/2002/vol1/html/2002scr1_0003.html

21 *Ibid.*, para. 78.

22 United Nations Committee against Torture, 34th Session, Consideration of Reports Submitted by States Parties under Article 19 of the Convention. Conclusions and Recommendations of the Committee against Torture: Canada, CAT/C/CO/34/CAN, May 2004, para. 4(a), at: <http://www.icj.org/IMG/pdf/CAT.CO.34.CAN.pdf>.

23 Security certificates permit the detention and deportation of foreign nationals on national security grounds, based on secret evidence. For more information on the security certificate regime, see *Still at Risk*, cited above (Note 4), pp. 47-55.

government obtained diplomatic assurances from Morocco in relation to Adil Charkaoui, a Moroccan suspected of involvement in terrorism whom Canada deemed a threat to national security. On the basis of the assurances from Morocco – to the effect that Charkaoui would be treated in accordance with international human rights law – the Canadian government determined in August 2004 that deportation proceedings should commence. In February 2005, however, a federal court judge released Charkaoui on bail and the Canadian government agreed to review its August 2004 determination in light of information that Charkaoui was subject to an outstanding arrest warrant in Morocco. In January 2006, Charkaoui challenged the security certificate against him in the Appeals Court.²⁴

Canada also obtained assurances against torture in the case of Mohamed Zeki Mahjoub, an Egyptian national. Mahjoub, who earlier had been granted refugee status, was acknowledged by the Canadian government to be at risk of torture if returned to Egypt, particularly in light of his 1999 *in absentia* conviction in that country on terrorism charges. In February 2005, a Canadian federal court blocked Mahjoub's deportation, despite the assurances given by Egypt that he "would be treated in full conformity with constitutional and human rights laws".²⁵ During the proceedings, the representative from the Canadian immigration ministry conceded that reports about human rights abuses in Egypt submitted by Mahjoub "presented a credible basis for calling into question the extent to which the Egyptian government would honour its assurances".²⁶

Canada has also relied on assurances in the case of a Chinese family wanted in China on multiple counts of smuggling and bribery. Lai Cheong Sing, his wife Tsang Ming Na and three children were excluded from refugee status in Canada on the basis of their alleged crimes.²⁷ The panel considering the refugee claim took into account the existence of assurances from China that Lai would not be subject to the death penalty or torture upon return. In April 2005, the Federal Court of Appeal rejected a challenge to the denial of refugee status, and in September 2005, the Supreme Court refused to hear Lai's appeal.²⁸ He is now said to be subject to a government pre-removal risk assessment prior to deportation.²⁹

24 Appeals court hears request to stop proceedings against alleged terrorist, in the Canadian Press, 12 January 2006.

25 Mahjoub v. Canada (Minister of Citizenship and Immigration) 2005 FC 156, F.C.J. No. 173, 31 January 2005, para. 31, at: <http://reports.fja.gc.ca/fc/2005/pub/v3/2005fc36384.html>.

26 Ibid., para. 33.

27 For more information, see *Still at Risk*, cited above (Note 4), pp. 55-7.

28 See Chinese fugitive appeals refugee-status ruling, in: *The Globe and Mail*, 14 June 2005.

29 China's "most wanted" Lai released after Hu visit, *Agence France Presse*, 23 September 2005.

Georgia

In October 2002, the Georgian government extradited five Chechens to Russia, despite a request by the European Court of Human Rights (ECtHR) for extradition to be suspended until the court had reviewed their cases.³⁰ The men were part of a group of thirteen Chechens detained by Georgia on arms smuggling charges. Russia subsequently offered assurances that the health and safety of the men would be protected and that it would co-operate fully with the ECtHR. However, Russia later refused to grant a delegation from court access to the men, despite its promises of co-operation.

In April 2004, the ECtHR ruled that Georgia had violated the detained men's human rights. The court also held that the extradition to Russia of one of the group still detained in Georgia would breach Georgia's obligations under Article 3 of the European Convention, notwithstanding the assurances offered by Russia.³¹ The court found Russia in breach of its obligations to co-operate with the court, which had "detrimentally affected" its ability to examine the complaints against Georgia and made examination of the application against Russia "impossible." This case demonstrates the difficulty of verifying compliance with assurances when the receiving state fails to co-operate.

Germany

The German authorities sought assurances against torture from Turkey to facilitate the extradition of Metin Kaplan, a radical Muslim cleric. In May 2003, a German court halted his extradition on human rights grounds, including the insufficiency of diplomatic assurances against torture from the Turkish authorities.³² In response to the judgment, the German authorities sought enhanced assurances from Turkey. In May 2004, Kaplan's extradition was approved by a German court, and he was extradited to Turkey in October 2004 after an appeal against the decision failed.³³ In June 2005, Kaplan was sentenced to life in prison following his conviction on terrorism charges by a Turkish court.³⁴

30 See *Empty Promises*, cited above (Note 4), pp. 24-6.

31 See European Court of Human Rights, Press release by the Registrar – Chamber Judgment, *Shamayev and 12 others v. Georgia and Russia*, 12 April 2005, at: <http://www.echr.coe.int/Eng/Press/2005/April/ChamberjudgmentShamayevand12Others120405.htm>. Georgia was found to have breached Articles 3, 5, 13, and 34 of the Convention, and Russia to have breached Articles 34 and 38.

32 See *Empty Promises*, cited above (Note 4), pp. 31-2.

33 See Richard Bernstein, *Germany Deports Radical Long Sought by Turks*, in: *The New York Times*, 13 October 2004.

34 See BBC News online, "*Cologne Caliph*" jailed for life, 20 June 2005, at: <http://news.bbc.co.uk/2/hi/europe/4113148.stm>.

The Netherlands

In January 2005, a Dutch appeals court upheld a district court decision preventing the extradition of a Kurdish woman to Turkey.³⁵ Turkey had provided diplomatic assurances that Nuriye Kesbir, an official with the Kurdish Workers Party (PKK), would not be subject to torture or ill-treatment on return. The United Nations Special Rapporteur on Torture as well as Human Rights Watch intervened in the case.

The Supreme Court determined in May 2004 that there were insufficient grounds to halt Kesbir's extradition to Turkey to face war crimes charges, but recommended that the Dutch government seek enhanced assurances from Turkey. The planned extradition was blocked in November 2004, however, when the district court in The Hague ruled that even additional assurances offered by Turkey – that Kesbir would “enjoy the full rights emanating from” the ECHR – were insufficient to mitigate the risk that Kesbir would be subject to torture on return. Kesbir was released from custody in January 2005 after the government's appeal against the judgment was rejected. The appeals court held:

In view of the real risks that she [Kesbir] runs, there can only be a question of adequate assurances if concrete guarantees are given that the Turkish authorities will ensure that during her detention and trial, [Kesbir] will not be tortured or exposed to other humiliating practices by police officers, prison staff or other officials within the judicial system. None of the aforementioned assurances meets this requirement.³⁶

Sweden

Probably the best known case involving diplomatic assurances against torture involved two Egyptian nationals whom Sweden deported to Egypt in December 2001. Ahmed Agiza and Mohammed al-Zari were denied asylum in Sweden on national security grounds because of alleged involvement in terrorism in Egypt. Following assurances from Cairo that they would not be tortured and would be given fair trials, they were transferred to Egypt on a US-government-leased aircraft in December 2001.³⁷ The men were denied an opportunity to challenge in a Swedish court the decision to return them to Egypt.

Despite the assurances, and a post-return monitoring mechanism agreed upon separately between Sweden and Egypt, there is credible evidence that the men were subject to torture in detention following their return to Egypt,

35 See *Still at Risk*, cited above (Note 4), pp. 72-76.

36 De Staat der Nederlanden (Ministerie van Justitie) tegen N. Kesbir, Het Gerechtshof's Gravenhage, LJN: AS3366, 04/1595 KG, 20 January 2005, para. 4.4 (unofficial English translation on file with Human Rights Watch).

37 See *Empty Promises*, cited above (Note 4), pp. 33-36.

as well as ill-treatment during their transfer.³⁸ Agiza was sentenced to twenty-five years hard labour following conviction by a military court in an unfair trial in April 2004 monitored by Human Rights Watch (the sentence was later reduced to fifteen years).³⁹ Al-Zari was released from detention in October 2003 after almost two years detention without charge.

The United Nations Committee against Torture decided in May 2005 that Sweden had violated its obligations under the convention by transferring Agiza to Egypt notwithstanding the assurances offered by Egypt (see below). Agiza and al-Zari's cases provide a clear example of the ineffectiveness of diplomatic assurances as a safeguard against torture, even when coupled with a post-return monitoring mechanism.

Turkey

In March 1999, the Turkish government extradited Rustam Mamatkulov and Abdurasulovic Askarov to Uzbekistan after obtaining assurances from the Uzbek government that the men would not be subject to torture or the death penalty upon return.⁴⁰ The transfers were made even after a request by the ECtHR not to extradite the men until their applications to the court had been considered (a request for "interim measures"). Mamatkulov and Askarov were tried in June 1999 in Uzbekistan on terrorism charges, together with twenty other defendants. Both men were convicted following an unfair trial, monitored by Human Rights Watch, and sentenced to lengthy prison terms.⁴¹ The men's lawyers have been unable to contact them in order to determine how they have been treated since being returned to Uzbekistan.

The men's lawyers brought a case on their behalf against Turkey in the ECtHR alleging that the authorities had violated their rights. The first instance decision by the court, in February 2003, found no violation of Article 3, but did rule that Turkey had denied the men their right to petition the ECtHR (a violation of Article 34 of the Convention). In February 2004, the Grand Chamber of the European Court of Human Rights reconsidered the case, following an appeal by the men's lawyers and a petition by Human Rights Watch and the AIRE Centre.

The Grand Chamber renewed the finding that Turkey had denied the men access to the ECtHR and had breached court rules relating to interim measures. The court also ruled that Turkey's refusal to suspend the extradi-

38 See *Still at Risk*, cited above (Note 4), pp. 57-66.

39 See Human Rights Watch, *Sweden Implicated in Egypt's Abuse of Suspected Militant – Egypt Violated Diplomatic Promises of Fair Trial and No Torture for Terrorism Suspect*, 5 May 2004, at: <http://hrw.org/english/docs/2004/05/05/egypt8530.htm>.

40 See *Empty Promises*, cited above (Note 4), pp. 26-29.

41 "The trial was closed to the public. Attorneys hired for the defense; all family members of the defendants, including relatives of Mamatkulov and Askarov; local human rights defenders; and the general public were excluded." Taken from: European Court of Human Rights, Application Nos. 46827/99 and 46951/99, *Mamatkulov and Askarov v. Turkey*. Intervention submitted by Human Rights Watch and AIRE Centre, 28 January 2004.

tions had denied the men the opportunity to place evidence before the court that could have established they were at risk of torture or other ill-treatment if returned to Uzbekistan.⁴² The Mamatkulov and Askarov case again highlights the difficulties of verifying compliance with assurances where the states involved are unwilling to co-operate.

United Kingdom

Efforts by the United Kingdom in the first half of the 1990s to deport a Sikh separatist to India on national security grounds provide an important early example of the problems associated with reliance on diplomatic assurances against torture. In a landmark November 1996 ruling, the Grand Chamber of the European Court of Human Rights held that the deportation would violate the UK's non-refoulement obligation under Article 3 ECHR, notwithstanding the assurances received from India in 1992 and 1995.⁴³

Against a background of evidence that "the violation of human rights by certain members of the security services in Punjab and elsewhere in India is a recalcitrant and enduring problem", the court ruled that it was "not persuaded that the above assurances would provide Mr. Chahal with an adequate guarantee of safety".⁴⁴ The decision in Chahal remains the leading case in the ECtHR on diplomatic assurances against torture, and is an important restatement of the absolute nature of the prohibition against torture.⁴⁵

Despite the European Court judgment in Chahal, the UK government tried again in 1999 to use diplomatic assurances against torture, this time to facilitate the return of four Egyptian nationals suspected of involvement in terrorism.⁴⁶ The British Prime Minister was personally involved in efforts to return the men to Egypt, even after clear advice from the Home Office (Interior Ministry) and Foreign Office that assurances offered by Cairo would not protect Hani Youssef and three others from the risk of torture upon return.⁴⁷ The returns were ultimately halted only after the Egyptian government refused to provide assurances.

In 2003, a UK court blocked the extradition of Akhmed Zakaev to Russia, despite assurances from the Russian government that Zakaev would not

42 "Turkey's failure to comply with the indication given under Rule 39 [Interim Measures], which prevented the Court from assessing whether a real risk existed in the manner it considered appropriate in the circumstances of the case, must be examined below under Article 34." European Court of Human Rights, Application Nos. 46827/99 and 46951/99, *Mamatkulov and Askarov v. Turkey*, Judgment of 4 February 2005, para. 77.

43 See European Court of Human Rights, Application No. 22414/93, *Chahal v. the United Kingdom*, Judgment of 15 November 1997 (1997) 23 EHRR 413.

44 *Ibid.*, para. 105.

45 Regarding the latter, see for example, Clare Ovey/Robin White, *European Convention on Human Rights*, 3rd Edition, Oxford 2002, p.58.

46 See *Still at Risk*, cited above (Note 4), pp. 69-72.

47 The details of the Prime Minister's involvement came to light in July 2004, after Youssef successfully brought a civil action for wrongful imprisonment against the UK government in the British High Court.

be ill-treated in detention on return.⁴⁸ The court heard evidence from the Russian Deputy Minister for Prisons that Zakaev, a Chechen politician alleged to have committed offences in Chechnya in 1995 and 1996, would not be harmed in Russian custody. In ruling that “there is a substantial risk that Mr. Zakaev would himself be subject to torture”, the judge in the case took account of the assurances offered by the Russian minister:

I am sure that he [Deputy Minister for Russian Prisons] gave that assurance in good faith. I do, however, consider it highly unlikely that the Minister would be able to enforce such an undertaking, given the nature and extent of the Russian prison estate.⁴⁹

In April 2004, the UK government revisited the possibility of using assurances against torture as a mechanism to facilitate the deportation of a group of foreign nationals suspected of involvement in terrorism, then subject to indefinite detention without charge in the United Kingdom.⁵⁰ After Britain’s highest court ruled in December 2004 that indefinite detention breached human rights law, the government announced in January 2005 that deportation with assurances would form part of a twin-track strategy to replace its indefinite detention policy.⁵¹

The UK government has already concluded “memorandums of understanding” with the governments of Jordan, Libya, and Lebanon, and is said to be negotiating similar agreements with Egypt, Syria, Algeria, Tunisia, Morocco, and Saudi Arabia.⁵² The agreements are effectively blanket diplomatic assurances covering all potential transfers of persons from the UK to the country in question. While the agreements provide for post-return monitoring, this bears no resemblance to the systematic monitoring of detention facilities carried out by the ICRC, contains no public reporting mechanism, and is incapable of providing protection against ill-treatment. Given the proven ineffectiveness of assurances against torture, and the poor

48 See *Empty Promises*, cited above (Note 4), pp. 29-30.

49 *The Government of the Russian Federation v. Akhmed Zakaev*, Bow Street Magistrates’ Court, Decision of Hon. T. Workman, 13 November 2003.

50 See Human Rights Watch, *Neither Just, Nor Effective: Indefinite Detention Without Trial in the United Kingdom Under Part 4 of the Anti-Terrorism, Crime and Security Act 2001*, 24 June 2004, p. 18, at: <http://hrw.org/backgrounder/eca/uk/anti-terrorism.pdf>.

51 See Human Rights Watch, *U.K.: Law Lords Rule Indefinite Detention Breaches Human Rights*, 16 December 2004, at: <http://hrw.org/english/docs/2004/12/16/uk9890.htm>; Human Rights Watch, *Commentary on Prevention of Terrorism Bill 2005*, March 2005, pp. 9-11, at: <http://hrw.org/backgrounder/eca/uk0305>.

52 BBC News Online, *Lebanon deal on terror suspects*, 23 December 2005, at: http://news.bbc.co.uk/1/hi/uk_politics/4556096.stm; Human Rights Watch, *UK: Torture a Risk in Libya Deportation Accord*, 18 October 2005, at: <http://hrw.org/english/docs/2005/10/18/libya11890.htm>; Human Rights Watch, *UK/Jordan: Torture Risk Makes Deportations Illegal*, 16 August 2005, at: <http://hrw.org/english/docs/2005/08/16/jordan11628.htm>; Human Rights Watch and Liberty, *UK: Empty promises can't protect people from torture – Joint letter to Tony Blair from Human Rights Watch and Liberty*, 23 June 2005, at: <http://hrw.org/english/docs/2005/06/23/uk11219.htm>.

records of the countries in question with regard to torture, the policy raises the prospect of renewed violations of the UK's obligations under human rights law.

United States

The case of Maher Arar is among the most notorious examples of transfers to torture with the use of assurances.⁵³ In September 2002, US authorities apprehended Arar, a dual Canadian-Syrian national, in transit from Tunisia through New York to Canada. Arar was held in detention in the US for almost two weeks and transferred to Jordan by US authorities, before being driven into Syria and handed over to Syrian authorities. The US government has claimed that prior to Arar's transfer, it obtained assurances from the Syrian government that Arar would not be subjected to torture upon return.⁵⁴

Arar was released without charge from Syrian custody ten months later and has credibly alleged that he was beaten by security officers in Jordan and tortured repeatedly, including with cables and electrical cords, during his confinement in a Syrian prison.⁵⁵ The transfer was effected despite Arar's repeated statements to US officials that he would be tortured in Syria, and his repeated requests to be sent home to Canada.

The US Department of Homeland Security has initiated an internal review of the case.⁵⁶ The role of the Canadian authorities in the case is currently the subject of a Commission of Inquiry in Canada.⁵⁷ In October 2005, the expert designated by the Commission to investigate Arar's treatment during detention in Syria confirmed he had been tortured.⁵⁸ It remains unclear on what basis the US government determined that the assurances against torture would be reliable given that the country offering them has a well-documented record of torture, including in the annual human rights reports from the US State Department.

53 See *Empty Promises*, cited above (Note 4), pp. 16-7; *Still at Risk*, cited above (Note 4), pp. 33-6.

54 See *Still at Risk*, cited above (Note 4), p. 33, fn. 94.

55 See Maher Arar's complete statement to media, CanWest News Service, 4 November 2003, at: <http://www.informationclearinghouse.info/article5156.htm>.

56 See *Still at Risk*, cited above (Note 4), p. 36, fn. 107.

57 See Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, at: <http://www.ararcommission.ca/eng>.

58 *Commission Of Inquiry Into The Actions Of Canadian Officials In Relation To Maher Arar*. Report of Professor Stephen J. Toope, Fact Finder, 14 October 2005, at: http://www.ararcommission.ca/eng/ToopeReport_final.pdf.

The Committee against Torture Decision in Agiza.

In May 2005, the United Nations Committee against Torture decided the case of *Agiza v. Sweden*.⁵⁹ The Committee ruled that by sending Ahmed Agiza to Egypt in awareness of the risk that he would be tortured Sweden was in breach of its obligation under Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, despite the assurances against torture obtained from Cairo.

Before considering the merits of the case, the Committee acknowledged “that measures taken to fight terrorism [...] are both legitimate and important. Their execution, however, must be carried out with full respect to the applicable rules of international law, including the provisions of the Convention.”⁶⁰

With respect to the question of assurances, the Committee was unequivocal: “The procurement of diplomatic assurances, which, moreover, provided no mechanism for their enforcement, did not suffice to protect against this manifest risk [of torture in Egypt in the event of expulsion].”⁶¹ It is notable that the language on assurances used by the Committee refers to the lack of enforcement mechanism in the assurances procured from Egypt, since diplomatic assurances are by their very nature unenforceable and without legal effect.⁶²

The factors disclosing this risk included: Egypt’s “consistent and widespread use of torture against detainees” especially those “held for political and security reasons”; the fact that Sweden’s own security intelligence services regarded the complainant as implicated in terrorist activity, and “the interest in the complainant by the intelligence services of two other States [the United States and Egypt]”.⁶³ A further factor was the treatment suffered by Agiza in Sweden prior to expulsion “by foreign [US] agents but with the acquiescence of the [Swedish] police”, which the Committee concluded amounted to cruel, inhuman, or degrading treatment or punishment.⁶⁴

The Committee also ruled that Sweden had further breached its obligation under Article 3 by failing to provide “an effective, independent and impartial review”⁶⁵ of the decision to expel Agiza.

The Committee against Torture decision in *Agiza* builds on the *Chahal* decision by the European Court of Human Rights, and lends significant weight to the growing body of expert opinion that diplomatic assurances are an ineffective safeguard against torture.

59 UN Convention against Torture, Decision: Communication No. 233/2003, *Agiza v. Sweden*, CAT/C/34/D/233/2003, 20 May 2005, at: <http://www1.umn.edu/humanrts/cat/decisions/233-2003.html>.

60 *Ibid.*, para. 13.1.

61 *Ibid.*, para. 13.4.

62 See *Still at Risk*, cited above (Note 4), pp. 21-23.

63 *Agiza v. Sweden*, cited above (Note 59), para. 13.4.

64 *Ibid.*, para. 13.4.

65 *Ibid.*, para. 13.8.

The Importance of OSCE Leadership

The practice of states seeking diplomatic assurances against torture can be observed throughout the OSCE region. Such assurances threaten the absolute nature of the prohibition against torture, including non-refoulement. By abandoning a fundamental principle – that torture is never justified – in the cause of countering terrorism, we undermine the values which bind our societies, and thereby help modern terrorism achieve its aim.

The geographic scope of such assurances, and the nexus between human rights and security raised by their use, makes the OSCE well placed to exercise leadership on the issue, both politically, through the Chairman-in-Office and the Ministerial Council, and practically, through ODIHR and the Action against Terrorism Unit.

Building on the Copenhagen Document and the OSCE Charter on Preventing and Combating Terrorism, the OSCE should work to ensure that the threat from terrorism is met in way that upholds rather than undermines the absolute nature of the torture ban. Standing firm against torture no matter the threat requires courage. But failing to do so will endanger more than a half-century of progress to eliminate its scourge.