

Ben Ward
Associate Director
Europe & Central Asia division
Human Rights Watch

Diplomatic assurances against torture

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Today the global ban on torture is under threat. One of the most pernicious threats comes from reliance on “diplomatic assurances” as a means to return people to countries where they face the risk of torture. A growing list of countries—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. 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. And as human rights experts and lawyers increasingly recognize, 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.

Expert concerns

There is growing concern among international human rights experts over the use of diplomatic assurances - the outgoing Council of Europe Commissioner on Human Rights, Alvaro Gil-Robles, the former UN Special Rapporteur on Torture, Professor Theo van Boven, the former UN Expert on the Protection of Human Rights while Countering Terrorism, Professor Robert Goldman, the current UN Special Rapporteur on Torture, Manfred Nowak, have all expressed alarm at their use. In December, the UN High Commissioner for Human Rights, Louise Arbour described them as: “having an acutely corrosive effect on the global ban on torture and cruel, inhuman or degrading treatment.”

Manfred Nowak has repeatedly warned about the danger of diplomatic assurances against torture. During his statement to the U.N. Human Rights Commission in April 2005, Nowak said: “I am deeply concerned with 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.”

NGOs are acutely aware of the danger posed by diplomatic assurances against torture. In May 2005, for example, a group of human rights and anti-torture NGOs—including Human Rights Watch—issued a statement condemning their use in transfers to risk of torture and ill-treatment, 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 nonrefoulement obligation.”

The Sweden-Egypt cases and the Committee against Torture

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 grabbed from the streets, hooded, shackled and drugged and then flown to Egypt on a US-government-leased aircraft in December 2001. 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, as well as ill-treatment during their transfer. Agiza was sentenced to twenty-five years hard labor 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). Al-Zari was released from detention in October 2003 after almost two years detention without charge.

In May 2005, the United Nations Committee against Torture decided the case of one of the men Agiza in a complaint against Sweden. The Committee ruled that by sending Agiza to Egypt in awareness of the risk that he would be tortured Sweden breached its obligation under article 3 of the torture convention, despite the assurances. On 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.”

Assurances in the UK

The United Kingdom has a long history of resorting to diplomatic assurances – most of you will be familiar with the landmark Chahal case, which reaffirmed the absolute nature of the prohibition of torture, including protection against refoulement, and remains the leading case on diplomatic assurances before the ECtHR.

Despite Chahal, the U.K. 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. The British Prime Minister was personally involved in efforts to return the men, even after clear advice from the Home Office and Foreign Office that assurances would not protect the men. The returns were ultimately halted only after Egypt refused to provide assurances. In 2003, a U.K. court blocked the extradition of Akhmed Zakaev to Russia, despite assurances from the Russian government that Zakaev would not be ill-treated in detention on return.

Which brings us to today, and the UK government’s pursuit of “memoranda of understanding” (MoUs)–diplomatic assurances by another name–with countries with poor records on torture, as a means of deporting persons suspected of involvement in terrorism. One need only look at the list of countries with whom the UK has or proposes to enter into these agreements (Jordan, Libya, Lebanon in the first category, Egypt, Morocco, Saudi Arabia, Tunisia and Algeria in the second) to wonder about the logic of the government’s position. Of course, the very reason that the UK is seeking agreements with these countries is that they have, at best, poor records on torture.

Despite the new name, efforts to systematize promises of humane treatment, and the incorporation of monitoring mechanisms, these MoUs suffer from the same flaws that we have seen with DAs. 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 flouts its obligations under international law will keep its word in a particular case. If torture is systematic, they are in no position to make such a promise.

As I will discuss in a moment, post-return monitoring is no panacea. Moreover, 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. In that regard it is notable that the monitoring mechanisms proposed under the MoUs do not contain any public reporting requirement.

That is why Manfred Nowak expressed his concern in August 2005 that “the plan of the United Kingdom to request diplomatic assurances for the purpose of expelling persons in spite of a risk of torture reflects a tendency in Europe to circumvent the international obligation not to deport anybody if there is a serious risk that he or she might be subjected to torture.”

Post-return monitoring

The UK MoUs throw into contrast one of the most contested areas in the debate over the use of diplomatic assurances – the issue of post-return monitoring. Each MoU provides for a monitoring mechanism that would report to the sending and receiving governments on the status of persons returned under them. Some argue that these mechanisms are capable of making assurances effective as a safeguard against torture. In our view, such arguments are based on a fundamental misunderstanding of the proposed monitoring mechanisms.

I think it is important to begin by saying what these proposed post return monitoring mechanisms are not. They are in no way comparable to the kind of systematic institutional-wide monitoring carried out by the International Committee of the Red Cross. It is important to note that the ICRC will not agree to undertake monitoring in a detention facility unless they have global access to all of the prisoners in that facility. There are a number of reasons for that.

One of the reasons is a moral one. It is morally unacceptable to monitor a select group of detainees within a facility while other detainees in the facility are subject to ill-treatment. That is one of the reasons why many NGOs refuse to have anything to do with this form of monitoring. I should add that since the UK government has failed to persuade any international organizations to carry out post-return monitoring, it has now turned to local organizations with promises financial support, and even there it is meeting with limited success.

The second reason is a practical one. Where monitors are conducting interviews with an entire prison population, assuming that they have confidential access to the detainees, the monitors can bring reports of ill-treatment to the attention of the prison authorities without the person who provided that information being identified. So the risk of reprisals against them or family members is limited.

That is not the case in respect of the kind of monitoring which is proposed under the MoUs. They provide for monitoring of a specific individual or group of individuals after that person or those persons are returned. Any detainee who reports abuse, assuming that they have an opportunity to speak privately, knows that the information is going to be transmitted back to the government of the detention facility, and that it is likely that they will be identified as the source. Detainees therefore face a dreadful choice – report abuse, and face possible reprisals against them or family members, or remain silent.

In a speech delivered on human rights day in December 2005, Louise Arbour, made clear the profoundly counter-productive nature of such post-return monitoring mechanisms:

The fact that some Governments conclude legally non-binding agreements with other Governments on a matter that is at the core of several legally-binding UN instruments threatens to empty international human rights law of its content. Diplomatic assurances basically create a two-class system among detainees, attempting to provide for a special bilateral protection and monitoring regime for a selected few and ignoring the systematic torture of other detainees, even though all are entitled to the equal protection of existing UN instruments.

Minimum standards and the Council of Europe

Some supporters of the torture prohibition argue that the most effective response to the challenge of diplomatic assurances against torture is to establish minimum standards for their use. While motivated by good intentions, such efforts are profoundly dangerous. Assurances do nothing more than reiterate existing treaty obligations and have no bearing on the determination of risk in particular case. Any attempt to craft minimum standards would simply create a veneer of legality for an illegal practice, and thereby undermine the global ban on torture.

Such an effort is currently underway at the Council of Europe. The Council's working group of terrorism and human rights [Group of Specialists on Human Rights and the Fight against Terrorism (DH-S-TER)] met in December 2005 to discuss possible minimum standards. Working in coalition, Amnesty International, the International Commission of Jurists (ICJ), and Human Rights Watch developed a detailed briefing "reject rather than regulate" and called on member states not to establish minimum standards. Discussion on the development of possible standards was postponed until March 2006. We will be working closely with Amnesty, ICJ, and others to try to ensure that states recognize that the danger that such standards pose for the prohibition of torture.

Conclusion

It is the veneer of legality that makes diplomatic assurances so dangerous to the torture prohibition. Despite the mounting evidence of their ineffectiveness, many governments remain committed to their use. Continuing efforts by NGOs, lawyers, and human rights experts and bodies will be vital if their use is to be stopped.