

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

Governments in Europe and North America are increasingly sending alleged terrorism suspects and others to abusive states based on so-called “diplomatic assurances” of humane treatment that expose these individuals to serious risk of torture or cruel, inhuman, or degrading treatment or punishment (ill-treatment) upon return. Countries offering such assurances have included those where torture and other ill-treatment are often practiced, as well as those where members of particular groups are routinely singled out for the worst forms of abuse.

This is a deeply troubling trend. The international legal ban on torture and other ill-treatment is absolute and prohibits transferring persons—no matter what their crime or suspected activity—to a place where they would be at risk of torture and other ill-treatment (the *nonrefoulement* obligation).¹ No exceptions are allowed, even in time of war or national emergency. In the face of this absolute ban, many sending governments have justified such transfers by referring to diplomatic assurances they sought from the receiving country that the suspects would not be tortured or ill-treated upon return.

It is the position of the undersigned organizations that diplomatic assurances are not an effective safeguard against torture and other ill-treatment. Indeed, evidence is mounting that people who are returned to states that torture are in fact tortured, regardless of diplomatic assurances. The use of diplomatic assurances in the face of risk of torture and other ill-treatment violates the absolute prohibition in international law against torture and other ill-treatment, including the *nonrefoulement* obligation.

The essential argument against diplomatic assurances is that the perceived need for such guarantees in itself is an acknowledgement that a risk of torture and other ill-treatment exists in the receiving country. In order for torture and other ill-treatment to be prevented and eradicated, international law requires that systemic safeguards at legislative, judicial, and administrative levels must be implemented on a state-wide basis. Such systemic efforts cannot be abandoned and replaced by consular visits aimed at ensuring compliance with diplomatic assurances.

Diplomatic assurances are also problematic for a number of other reasons. First, they are based on trust that the receiving state will uphold its word when there is no basis for such trust. Governments that torture and ill-treat almost always deny such abusive practices. It defies common sense to presume that a government that routinely flouts its binding obligations under international law and misrepresents the facts in this context can be trusted to respect a promise in an isolated case. As noted above, diplomatic assurances are only sought from countries with well-known records of torture and other ill-treatment.

Second, states have a legal interest in ensuring that torture and other ill-treatment are prevented and prohibited, and that all persons are protected from such treatment, anywhere and in all places (the *erga omnes* nature of the prohibition against torture and other ill-treatment). Implicit in such a legal interest is a general duty of enforcement and remedy on the part of the whole international community, and the principle that states also have an obligation not to facilitate violations of the ban on torture and other ill-treatment, not only by their own agents but also by agents of another state. Transferring individuals to states where they are at risk of torture and other ill-treatment, under the rationale of inherently unreliable diplomatic assurances, flies in the face of this principle. Moreover, to seek assurances only for the person subject to transfer amounts to acquiescing tacitly in the torture of others similarly situated in the receiving country, and could be considered to constitute a general abdication by the sending state of its obligations.

A third problem relates to post-return monitoring mechanisms, which some governments argue can make diplomatic assurances work. Torture and other ill-treatment are practiced in secret and its perpetrators are generally expert at keeping such abuses from being detected. People who have suffered torture and other ill-treatment are often reluctant to speak about it due to fear of retaliation. Post-return monitoring schemes often lack many basic safeguards, including private interviews with detainees without advance notice to prison authorities and medical examinations by independent doctors.

Fourth, when diplomatic assurances fail to protect returnees from torture and other ill-treatment, there is no mechanism inherent to the assurances themselves that would enable a person subject to the assurances to hold the sending or receiving governments accountable. Diplomatic assurances have no legal effect and the person they aim to protect has no effective recourse if the assurances are breached.

A fifth problem stems from the fact that the sending government has no incentive to find that torture and other ill-treatment has occurred following the return of an individual – doing so would amount to an admission that it has violated its own *nonrefoulement* obligation. As a result, both the sending and receiving governments share an interest in creating the impression that the assurances are meaningful rather than establishing that they actually are.

Finally, it is important to distinguish diplomatic assurances against the death penalty from assurances as guarantees against torture and other ill-treatment. The undersigned organizations oppose the death penalty absolutely, but recognize that, subject to certain conditions, it is not prohibited per se under international law. Diplomatic assurances with respect to the death penalty thus simply acknowledge the different legal approaches of two states and serve as a tool that allows an exception to one state's laws and policies as an accommodation to the concerns of another state. Assurances against torture and other ill-treatment, however, do not acknowledge lawful activity, but unlawful, criminal behavior to which persons in the receiving state are routinely subjected. As such, they are effectively an admission that the receiving state is in violation of the prohibition against torture and other ill-treatment.

Moreover, monitoring a government's compliance with assurances that it will not apply or carry out the death penalty is easier than monitoring compliance with

assurances against torture, which is practiced in secret. The death penalty is rarely carried out immediately after a person's return, thus any potential breach of the assurances (e.g. sentencing a person to the death penalty despite assurances to the contrary) can usually be identified and addressed before the sentence is carried out. In cases where diplomatic assurances are proffered as a guarantee of protection against torture, however, sending states run the unacceptable risk of being able to identify a breach, if at all given the secrecy surrounding torture, only after torture and other ill-treatment have already occurred.

In a welcome move, some national courts have recognized the problems associated with assurances against torture and other ill-treatment, subjecting diplomatic assurances to greater scrutiny and blocking returns based on these empty promises. At the international level, the United Nations Special Rapporteur on Torture, the U.N. Independent Expert on human rights and counter-terrorism, and the Council of Europe Commissioner for Human Rights have all warned that the use of assurances is threatening the global ban on torture and other ill-treatment.

Suggestions have been made that "minimum standards" on the use of diplomatic assurances against torture and other ill-treatment could be established. Such efforts are misguided and dangerous. They could easily be perceived to legitimize or otherwise endorse the use of diplomatic assurances for returns where there is a risk of torture and other ill-treatment. Developing guidelines for the "acceptable" use of inherently unreliable and legally unenforceable assurances ignores the very real threat they pose to the integrity of the absolute prohibition against torture and other ill-treatment, including the ban on transferring a person to a place where he or she would be at risk of such abuse.

We are concerned 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 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. The practice should stop.

Recommendations to governments and the international community

The undersigned organizations call on governments to undertake the following measures as a matter of urgent priority:

- Reaffirm the absolute nature of the obligation under international law not to expel, return, extradite, render, or otherwise transfer (hereinafter "transfer") any person to a country where there are substantial grounds for believing that he or she would be in danger of being subjected to torture and other ill-treatment.
- Prohibit reliance upon diplomatic assurances in situations where there are substantial grounds for believing that a person would be in danger of being subjected to torture and other ill-treatment upon return, including but not limited to cases in which the following circumstances prevail in the receiving country:

- there are substantial grounds for believing that torture and other ill-treatment in the receiving country are systematic, widespread, endemic, or recalcitrant or persistent problems;
 - governmental authorities do not have effective control over the forces in their country that perpetrate acts of torture and other ill-treatment;
 - governmental authorities consistently target members of a particular racial, ethnic, religious, political or other identifiable group, including terrorism suspects, for torture and other ill-treatment and the person subject to transfer is associated with that group;
 - there is a risk of torture and other ill-treatment upon return directly related to a person's particular circumstances;
 - there is any indication that the receiving government would subsequently transfer the individual to a third state where he or she would be at risk of torture and other ill-treatment.
- - Ensure that any person subject to transfer has the right, prior to transfer, to challenge its legality before an independent tribunal. The legal review must include an examination of all relevant information, including that provided by the receiving state, and any mutual agreements related to the transfer. Persons subject to transfer must have access to an independent lawyer and a right of appeal with suspensive effect.
 -
 - Include in required periodic reports to the United Nations Committee against Torture, the Human Rights Committee, and other relevant international and regional monitoring bodies detailed information about all cases in which diplomatic assurances against the risk of torture and other ill-treatment have been sought or secured in respect of a person subject to transfer, as such action clearly implicates states' absolute obligation to prohibit and prevent torture and other ill-treatment, including the *nonrefoulement* obligation.

We further call on the international community, in particular intergovernmental institutions whose mandate includes monitoring states' compliance with their obligations pertaining to torture and other ill-treatment, to:

- Reaffirm the absolute and non-derogable nature of the prohibition against torture and other ill-treatment, of which the absolute and non-derogable obligation not to transfer any person to a country where there are substantial grounds for believing that he or she would be at risk of torture and other ill-treatment is an integral component.
-
- Declare that diplomatic assurances in relation to torture and other ill-treatment are inherently unreliable and do not provide an effective safeguard against such treatment, and make clear that the use of diplomatic assurances in the face of risk of torture and other ill-treatment violates the absolute prohibition in international law against torture and other ill-treatment, including the *nonrefoulement* obligation.
-

- Reject any attempt to establish minimum standards for the use of diplomatic assurances against the risk of torture and other ill-treatment as incompatible with the absolute prohibition in international law against torture and other ill-treatment, including the *nonrefoulement* obligation.