HUMAN RIGHTS WATCH

Commentary on State Replies
CDDH Questionnaire on Diplomatic Assurances

March 2006

Human Rights Watch welcomes the Council of Europe's Group of Specialists on Human Rights and the Fight against Terrorism (DH-S-TER) reflection and continuing debate on the human rights implications of the use of diplomatic assurances in transfers of terrorism suspects to places where they are at risk of torture and other ill-treatment. The objections of Human Rights Watch and a range of international non-governmental organizations (NGOs) to the use of diplomatic assurances are detailed in two joint statements already submitted to the Council of Europe for consideration in the course of this debate.[1]

At its December 2005 meeting, the DH-S-TER concluded that it lacked information about the practice of states in the use of diplomatic assurances. The DH-S-TER subsequently distributed a questionnaire requesting such information from Steering Committee on Human Rights (CDDH) member states and observers, to inform the group's deliberations at its next meeting, scheduled for March 29-31, 2006. As of March 15, 2006, seventeen member states and the Office of the United Nations High Commissioner for Human Rights (OHCHR) had responded to the questionnaire.

This paper offers a commentary prepared by Human Rights Watch on the state responses received by the DH-S-TER. Human Rights Watch and other NGOs have already written in detail about state practice with respect to the use of diplomatic assurances against torture and other ill-treatment.[2]

This paper contains a commentary and updates on a range of cases of actual transfers based on assurances from Europe, and other developments in state practice and accountability for the use of assurances. We do not address every example provided by states, but prioritize responses from states on which Human Rights

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1 Call for Action against the Use of Diplomatic Assurances in Transfers to Risk of Torture and Ill-Treatment (May 2005); Reject Rather than Regulate: Call on Council of Europe member states not to establish minimum standards for the use of diplomatic assurances in transfers to risk of torture and other ill-treatment (December 2005).

2 Human Rights Watch, Still at Risk: Diplomatic Assurances No Safeguard against Torture, April 2005, [online] http://hrw.org/reports/2005/eca0405/ (retrieved March 21, 2006); Empty Promises: Diplomatic Assurances No Safeguard against Torture, April 2004, [online] http://hrw.org/reports/2004/un0404/ (retrieved March 21, 2006); See also, Amnesty International, Memorandums of Understanding and NGO Monitoring: a challenge to fundamental human rights, February 19, 2006, [online] http://web.amnesty.org/library/Index/ENGPOL300022006?open&of=ENG-313 (retrieved March 22, 2006).

Watch has conducted research and advocacy, or individual cases in which Human Rights Watch has been involved.

AUSTRIA

Case of Mohamed Bilasi-Ashri (2001 to present)

The reply from the government of Austria to the DH-S-TER maintains (at page 12) that Austria only negotiates bilateral extradition treaties with states that respect human rights and the rule of law: "The same applies to requesting states bound to rights enshrined in the ECHR [European Convention on Human Rights] or the U.N. Convention against Torture…In any event, the competent court has to dismiss a request of extradition if it considers that there is a substantial risk of torture; in this case, there is no room left for diplomatic assurances."

The Austrian authorities' reply also details the extradition case of Mohamed Bilasi-Ashri.[3] Bilasi-Ashri, who is not named in the reply, is an Egyptian asylum seeker. In 2001, the Austrian government sought diplomatic assurances of humane treatment from the Egyptian authorities in exchange for Bilasi-Ashri's extradition. Egypt is not a party to a bilateral extradition treaty with Austria, but has ratified the U.N. Convention against Torture (CAT).

The Austrian government reply omits key facts about the Bilasi-Ashri case. In particular, it fails to mention that Bilasi-Ashri was seeking asylum at the time that the Austrian government first approved his extradition in November 2001. Expert authority on the interface between asylum and extradition has concluded that refugee status should be determined prior to any decision on an extradition request.[4] In March 2002, the United Nations High Commissioner for Refugees (UNHCR) specifically requested that Austria grant Bilasi-Ashri refugee status on the basis that he had a well-founded fear of being persecuted if returned to Egypt. Austria has thus far declined to do so. The European Court of Human Rights (ECtHR) in March and April 2002 requested that Austria not return Bilasi-Ashri until the Court reviewed his case. In the end, the Egyptian government refused to give the assurances sought by the Austrian authorities and Bilasi-Ashri was released from detention in Austria in August 2002.

The reply also fails to explain why the Austrian authorities approached the Egyptian government again in 2005, seeking the same assurances in its quest to extradite Bilasi-Ashri. On November 17, 2005, the ECtHR communicated an order for interim measures to the Austrian authorities, requesting that the government not

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3 For details on the case, see, Empty Promises, pp. 32-33. See also, Peter Finn, "Europeans Tossing Terror Suspects Out the Door," Washington Post, January 29, 2002, page A1.

4 See, Sibylle Kapferer, The Interface between Extradition and Asylum, UNHCR, Legal and Protection Policy Research Series, Department of International Protection, United Nations High Commissioner for Refugees, PPLA/2203/05, November 2003, para. 29 [online] http://www.unhcr.org/cgi-bin/texis/vtx/protect/opendoc.pdf?tbl=PROTECTION&id=3fe84fad4 (retrieved March 23, 2006).

extradite him until it reviews his application.[5] Bilasi-Ashri's application argued possible violations of ECHR articles 3, 5, and 6 and is pending.[6]

In the context of the well-documented risk of torture upon return to Egypt for persons suspected of association with Islamic militants[7] and Egypt's breach of diplomatic assurances in a similar case (see Sweden section below), Human Rights Watch is deeply concerned that Bilasi-Ashri's extradition would place him at real risk of torture, and therefore violate Austria's *nonrefoulement* obligations under the ECHR and CAT. Indeed, Bilasi-Ashri's case discloses the very "substantial risk of torture" that the Austrian government states in its response should leave "no room" for diplomatic assurances.

GERMANY

Repatriation of Seven Sudanese Nationals (1995)

The German government acknowledges in its reply that it has sought diplomatic assurances in two cases. In the 1995 case of the repatriation of seven Sudanese nationals described in the reply at page 24, the government makes the claim that the Federal Constitutional Court found that a "note verbale" from the Sudanese Foreign Ministy—"expressly affirming" its nationals would not face persecution, arrest, or criminal prosecution upon return in relation to their activities in Germany or having filed an application for asylum— "constituted a declaration and assurances, binding under international law."

The reply states that the German court "agreed with the German government's assessment and judgment that these understandings under international law with the Sudanese government constituted suitable means which promised to be effective in countering the risk to the people concerned…and [t]he assessment and judgment fell within the area of competence of the Federal Government based on its power over foreign affairs."

The German government appears to conflate what might have been instrumental or practically expedient in terms of effecting returns to Sudan with what is effective in terms of guaranteeing the men's safety and security of person. A simple note verbale

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5 UNHCR Manual on Refugee Protection and the ECHR: Part 5.10 – Update July-December 2005

Table of interim measures – Rule 39 Requests granted during the 2d semester 2005:

No. 40902/05 Bilasi-Ashri v. Austria Date of Interim Measure: 17 November 2005 [online]

http://www.unhcr.org/cgi-bin/texis/vtx/home/opendoc.pdf?id=3ead2fec4&tbl=PUBL (retrieved March 23, 2006)

6 European Court of Human Rights, First Section Annual Activity Report 2005 (January 2006)

Bilasi-Ashri v. Austria, No. 40902/05

[online]: http://www.echr.coe.int/NR/rdonlyres/82DE0139-9EDC-44A4-A53B-BD7CFB7C683A/0/Section1.pdf (retrieved March 23, 2006).

7 Human Rights Watch, Black Hole: The Fate of Islamists Rendered to Egypt (May 2005 [online] http://www.hrw.org/reports/2005/egypt0505/ (retrieved March 23, 2006).

cannot suffice to provide an effective safeguard against ill-treatment upon return. It is notable that in other cases where governments in Europe have sought assurances that amount to a simple restatement of existing treaty obligations, courts have found them to be insufficient (see section on Netherlands: Case of Nuriye Kesbir below).

There is ample evidence that a simple note verbale would do nothing to increase safeguards against torture and ill-treatment. Persecution, ill-treatment, and unfair trials were commonplace in Sudan at that time.[8] The very fact that the German government found it necessary to obtain the note verbale amounts to an acknowledgement that the Sudanese government regularly violates its binding treaty obligations.[9] The German government reply is silent on the question of why a government that routinely violates obligations under international law would abide by a promise to respect those obligations in an individual case.

Case of Metin Kaplan

The second case detailed in the German government reply is that of Metin Kaplan, a radical Muslim cleric deported to Turkey. In May 2003, a German court halted Kaplan's extradition based on human rights concerns, including the insufficiency of diplomatic assurances against torture and unfair trial from the Turkish authorities.[10] In response to the judgment, the German authorities sought enhanced assurances from the Turkish government. Kaplan lost a series of legal challenges to his subsequent deportation, but the German government justified Kaplan's removal by claiming that it had secured written assurances from the Turkish Foreign and Justice Ministries that Kaplan would get a fair trial. Kaplan was deported to Turkey in October 2004.

In June 2005, Metin Kaplan was sentenced to life in prison in Turkey for plotting to overthrow Turkey's secular system with his Cologne-based extremist group, the Union of Islamic Communities, also known as "Hilafet Devleti" (Caliphate State). A Turkish Appeals Court overturned that verdict in November 2005. According to an *Anatolia News Agency* report, the court ruled unanimously to overturn the verdict on grounds of procedural deficiencies and inadequate investigation.[11] According to Kaplan's lawyer, the cleric was convicted on the basis of evidence from an earlier case, in which there was forensic medical evidence indicating that many of the defendants were subjected to torture. He told Human Rights Watch: "Therefore, we believe that the judgment in that case should not be taken into account in Metin

8 Human Rights Watch, Behind the Red Line: Political Repression in Sudan, May 1996, [online] http://hrw.org/reports/1996/Sudan.htm (retrieved March 24, 2006). The UN Human Rights Committee in its Concluding Observations on Sudan of 19 November 1997, (CCPR/C/79/Add.85) noted that it was "troubled by the number of reports of extrajudicial executions, torture, slavery, disappearances, abductions and other human rights violations from United Nations and NGO sources" (para. 12).

9 Sudan signed the U. N. Convention against Torture on 4 June 1986, but has never ratified it. However Sudan acceded to the International Covenant on Civil and Political Right (ICCPR) on 18 June 1986.

10 See Empty Promises, p. 31.

11 "Turkey Overturns Life Sentence against 'Caliph of Cologne'," Agence France Presse, November 30, 2005.

Kaplan's case. Since it was a judgment on the basis of evidence obtained illegally."[12] A retrial is scheduled to commence on April 28, 2006.

The Kaplan case raises concerns about the reliability of diplomatic assurances. The Turkish government undertook that Kaplan would receive a fair trial, although its judicial system has been routinely criticized for unfair trial practices, including by the European Court of Human Rights, particularly with respect to national security suspects.[13] The fact that Kaplan's conviction was overturned on appeal based on procedural and investigative irregularities lends credence to his argument in German courts prior to his deportation that he would not get a fair trial upon return. Moreover, Kaplan's contention that evidence extracted by torture was used to convict him further sullies the process.

The conduct of Kaplan's trial is also relevant to question of assurances against torture in his case. The United Nations Committee against Torture has noted that a similar fair trial breach by Egypt in 2004, despite diplomatic assurances to the contrary, went "to the weight that can be attached to the assurances as a whole."[14]

LITHUANIA

The reply of Lithuania highlights of the way in which diplomatic assurances in Europe provide an opportunity for other governments to exploit the same loophole in order to justify transfers of asylum seekers and terrorism suspects to risk of torture.

As the Lithuanian authorities note, in June 2005, the government of Kyrgyzstan relied upon diplomatic assurances to transfer Uzbek refugees allegedly involved in the May 2005 Andijan events to Uzbekistan where they certainly faced a grave risk of torture and other ill-treatment given Uzbekistan's long history of systematic torture.[15] The fate of the men is unknown, despite promises by the Uzbek authorities that the men would be monitored by an independent organization for ill-treatment after their return.

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12 Email exchange from Husnu Tuna (Metin Kaplan's lawyer) to Human Rights Watch, March 2, 2006.

13 Fair trial concerns in Turkey are detailed in a recent 300 page report (in German) by Helmut Oberdiek for Amnesty International Germany, Pro Asyl, and Holtfort-Stiftung, "Gutachterliche Stellungnahme Rechtsstaatlichkeit politischer Verfahren in der Türkei," ("The rule of law and political trials in Turkey"), February 23, 2006 [online], http://www.ecoi.net/pub/mk1122_7888tur.pdf (retrieved March 27, 2006). The Kaplan case is described in detail on pp. 193-234. See also, U.S. Department of State, 2005 Country Report on Human Rights Practices in Turkey, March 8. 2006 [online], http://www.state.gov/g/drl/rls/hrrpt/2005/61680.htm (retrieved March 24, 2006).

14 U.N. Committee against Torture, Agiza v. Sweden, No. 233/2003, U.N. Doc. CAT/C/34/D/233/2003, May 2005 [online] http://www1.umn.edu/humanrts/cat/decisions/233-2003.html (retrieved March 18, 2006).

15 Human Rights Watch Press Release, "Kyrgyzstan: Do Not Trade refugees for Empty Promises," January 12, 2006, [online] http://hrw.org/english/docs/2006/01/12/kyrgyz12404.htm (retrieved March 19, 2006).

NETHERLANDS

The reply of the government of The Netherlands, in particular, is an indication that the DH-S-TER was correct to inquire about the use of assurances in transfers (e.g. extraditions) outside of ordinary expulsion proceedings. While the Dutch government apparently does not seek assurances in expulsion cases, it has sought such alleged guarantees in the extradition context.

It is important to emphasize that member states' *nonrefoulement* obligation under the ECHR and CAT obtain no matter what type of transfer is contemplated. Thus, reliance upon diplomatic assurances in any type of transfer (deportation, expulsion, extradition, rendition, surrender) should be instructive for the DH-S-TER's current discussion.

Case of Nuriye Kesbir

The Dutch government submitted details of an extradition case involving a transfer to Turkey. This is the well-known case of Nuriye Kesbir, a woman official of the PKK. In two separate judgments (November 2004 and January 2005), courts in the Netherlands halted Kesbir's extradition based on fears of risk of torture and other ill-treatment, including sexual violence, should she be transferred to Turkey. Both judgments directly addressed the inadequacy of the assurances provided by the Turkish government, despite the fact that by January 2005, there were several demarches between the Dutch and Turkish authorities in which the Turkish government detailed and promised to abide by its currently existing treaty obligations.[16] Well-documented evidence of sexual violence against women detainees also persuaded the court that Kesbir would be at risk of gender-based violence if returned.

As with the Bilasi-Ashri case, the Dutch government's appeal of the January 2005 decision to halt Kesbir's extradition appears to be a last ditch effort to extradite her *at any cost*. Such single-minded pursuit of this transfer signals a disturbing and apparently prevalent trend in the Netherlands to dispose of alleged terrorist suspects in spite of legally binding regional and international human rights obligations.

Case of X: Netherlands to Moldova

The case of the criminal suspect extradited to Moldova in 2005 is a clear example of the Dutch government's circumvention of its absolute *nonrefoulement* obligation, and the failure of the courts to ensure that the government's actions were consistent with that obligation. According to Amnesty International's most recent annual report, "torture and ill-treatment in police custody continued to be a major problem [in

16 Assurances on file with Human Rights watch.

Moldova] and conditions in temporary detention facilities amounted to cruel and inhuman treatment."[17]

In July 2005, the Hague District Court determined that the human rights situation in Moldova was "unsatisfactory" and ordered the government to seek permission from the Moldovan authorities to visit the suspect in detention during his trial. Acknowledging the "difficulties of communication with Moldova," the Dutch authorities also sought assurances from Moldovan diplomats in Brussels and Kiev. Once the assurance of visitation was secured, X was extradited.

The Dutch government reply does not offer the DH-S-TER any details regarding the types of abuses that characterize detention and trial in Moldova, the number and nature of any visits agreed upon or conducted since X's return, X's conditions of detention, or the process that is governing X's trial. But assurances amounting to a guarantee of visits cannot be considered adequate to protect a suspect from abuse.

Case of Ramzy v. Netherlands

The reply of the Netherlands government omitted the case of *Ramzy v. Netherlands*, currently pending before the European Court of Human Rights. The omission may be based on a technicality: in seeking to deport Ramzy back to his home country of Algeria, the Dutch authorities have not requested diplomatic assurances from the Algerian authorities. The Dutch government has argued simply that Ramzy is not at risk of torture if returned to Algeria and has asked the ECtHR to rule no violation of ECHR Article 3 in the absence of that risk.

In a set of questions to the government about the case, the ECtHR asked the Dutch government if it planned to seek assurances against ill-treatment from the Algerian authorities.[18] The Dutch government, partially reflected in its submission to the DH-S-TER, but not attributed to the Ramzy proceedings, observed:

> Firstly, the Government has no concrete intentions of entering into any negotiations on diplomatic assurances with the Algerian authorities concerning the applicant, or indeed concerning any other individual for that matter. In any case, the Government takes the view that such negotiations should preferably be preceded by putting in place a proper institutional and legal framework, in particular a mutual arrangement on the return of nationals. Such an arrangement has in fact been discussed in informal contacts between the two

17 Amnesty International Annual Report 2005, chapter on Moldova, [online] http://web.amnesty.org/report2005/mda-summary-eng (retrieved on March 23, 2006).

18 The Court asked the Government "to indicate whether it intends or is prepared to enter into negotiations with the Algerian authorities aimed at obtaining from the latter diplomatic assurances in respect of the applicant that would provide the applicant with an adequate degree of safety upon his return to Algeria, in the Government's view."

> governments, but these discussions were held without any reference to the applicant or any other individual. No concrete results have materialised from these contacts to date.
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> Secondly, concerning the Government's preparedness to enter into negotiations on diplomatic assurances with regard to the applicant or in general, the Government wishes to draw the Court's attention to the following. Diplomatic assurances are currently the subject of an intensive debate in the international community. Within the Council of Europe itself, for instance, a group of specialists under the Steering Committee for Human Rights has been tasked with examining the subject. The group, which includes the Netherlands, held its first meeting in December of last year and is therefore only just embarking on its duties. That being the case, the Government merely notes that the acceptability of diplomatic assurances is a matter which has not been sufficiently crystallized. While the Government does not, as a matter of principle, rule out the use of diplomatic assurances in expulsion procedures under any circumstances, it is not prepared in the present circumstances to enter into negotiations with the Algerian authorities on diplomatic assurances concerning the applicant.

Given that the non-refoulement obligation applies equally to extradition as to deportation cases, it remains unclear why the government of The Netherlands would repeatedly seek assurances from the Turkish government in the Nuriye Kesbir case, and also in the case of X from Moldova (both Council of Europe member states bound by the ECHR, the European Convention for the Prevention of Torture, and CAT), but decline to seek such guarantees for the deportation to Algeria of a national security suspect. Algeria is a country in which torture is also a serious human rights problem, particularly with respect to terrorism or national security suspects; there is little compliance with international treaties prohibiting torture; and there is no active regional organization to hold Algeria to account for abuses.[19]

SWEDEN

The rendition cases of Ahmed Agiza and Mohammed al-Zari from Stockholm to Cairo in December 2001 are among the most well-documented to date. While the Swedish government's reply sets out some of the basic facts regarding the case, there are important omissions in its account, including the inadequate response of the Swedish government to the U.N. Committee against Torture's May 2005 decision finding Sweden in violation of article 3 of the Convention Against Torture for transferring Agiza to Cairo where he was tortured.

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19 See, for example, Human Rights Watch, "U.K.-Algeria Deal to Deport Suspects Is Fig-Leaf for Torture," March 8, 2006 [online], http://hrw.org/english/docs/2006/03/08/uk12783.htm (retrieved March 23, 2006); U.S. Department of State, 2005 Country Reports on Human Rights Practices : Algeria, March 8, 2006 [online], http://www.state.gov/g/drl/rls/hrrpt/2005/61685.htm (retrieved March 23, 2006).

The Swedish government makes only one reference to the United States government in its response to the DH-S-TER, but it is essential for a full accounting to recall that Agiza and al-Zari were originally placed under surveillance in Sweden as a result of U.S. interest in the men;[20] handed over to U.S. Central Intelligence Agency (CIA) operatives at Bromma Airport on December 18, 2001; ill-treated by both Swedish security personnel and the CIA operatives at the airport; transported to Cairo aboard a CIA-leased plane in the custody of both U.S. and Swedish intelligence and security personnel; and interrogated in Egyptian custody for a full five weeks before any Swedish official made contact with the men.

As a result of U.S. involvement in this case, it is currently of interest to the Parliamentary Assembly of the Council of Europe (PACE) Committee on Legal Affairs and Human Rights investigation into CIA operations and alleged secret detentions in Council of Europe member states. The cases also should be of interest to the Secretary General inquiry under Article 52 ECHR on the question of secret detention and transport of detainees suspected of terrorist acts, notably by, or at the instigation of, foreign agencies. Human Rights Watch has written to the Secretary General to encourage him to ask the Swedish authorities for full disclosure of the details of the men's transfers.

The Swedish government failed to include these cases in its article 52 response to the Secretary General, the omission of which is likely predicated on the timeframe established by the Secretary General's office, requiring information about CIA operations on member states' territory from January 1, 2002 onward. We believe that it is insufficient for the Swedish authorities to explain this omission by saying that these renditions occurred a few days earlier than the starting date of the article 52 inquiry, given that Sweden has a continuing involvement in the Agiza and al-Zari case as evidenced by its response to the DH-S-TER.[21]

The CIA-led renditions of Agiza and al-Zari occurred with the full knowledge of the Swedish authorities, who utilized diplomatic assurances from Egypt as a tool to circumvent their absolute obligation not to return any person to a place where she or he would be at risk of torture. The U.N. Committee against Torture subsequently ruled that Sweden had in fact violated that international obligation and required the government of Sweden to take steps in response to that judgment. In a letter to the Swedish authorities in August 2005, Human Rights Watch and Amnesty International Sweden detailed a number of measures the government should take with respect to full compliance with both the letter and spirit of the Committee's

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20 Hearing before the Swedish Standing Committee on the Constitution, addendum 6, interview with Sven-Olof Petersson, former Political Director at the Swedish Ministry for Foreign Affairs, May 24, 2005, unofficial translation on file with Human Rights Watch.

21 Human Rights Watch letter to Terry Davis Regarding Inquiries into Illegal CIA Activities in European Territory, March 10, 2005, [online] http://hrw.org/english/docs/2006/03/10/eu12879.htm (retrieved March 22, 2006).

decision. To date, the government of Sweden has not only failed to comply with the decision, but has publicly – and incorrectly – expressed the opinion that the decision has no legally binding character. In an interview on Swedish radio on November 16, 2005, the then-Swedish Foreign Minister Laila Freivalds stated that "there is no legal responsibility" flowing from the Committee's decision and that "the decision carries no legal consequences."[22]

The authority of the Committee against Torture derives from Sweden's accession to the Convention against Torture (CAT), in particular its declaration to abide by CAT article 22, which permits the Committee to hear individual petitions involving the party state. If Sweden cannot be trusted to fully comply in good faith with the Committee's decisions –and challenges the binding nature of those decisions – how can it be trusted to abide by bilateral "understandings" such as diplomatic assurances, which have no such legal character?

The DH-S-TER may wish to use the Agiza and al-Zari rendition cases as examples of the clear and unequivocal way in which diplomatic assurances fail to serve as a safeguard, instead providing governments with a tool to circumvent their legally binding treaty obligations.

UNITED KINGDOM

In response to questions from the U.K. Parliamentary Foreign Affairs Committee on December 13, 2005, about renditions and the use of torture in counter-terrorism operations, Foreign Affairs Secretary Jack Straw commented that while one problem lies with the unreliability of evidence extracted under torture:

> The other problem about torture is that those who commit the torture deny it to themselves as much as they deny it to other people, so to track it is very difficult, but we are alive to those countries where we think malpractice of all kinds is used and we seek to deal with it…if you go through the list of countries where we and America and other leading human rights NGOs believe that the mistreatment of suspects takes place, I do not think you will find a single one of those countries which says that it does take place.[23]

Despite this admission that abusive states deny their torture practices, Straw has defended the memoranda of understanding (MoUs) negotiated by the U.K. government with the governments of Lebanon, Jordan, and Libya, which the U.K.

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22 Interview on "Ekot" program, Sveriges Radio (Swedish Radio), November 16, 2005.

23 House of Commons, Corrected Transcript of Oral Evidence before the Foreign Affairs Committee, December 13, 2005, Q27-28, [online] http://www.publications.parliament.uk/pa/cm200506/cmselect/cmfaff/c768-i/c76802.htm (retrieved March 23, 2006).

government details as well in its response to the DH-S-TER.[24] It is difficult to reconcile the Foreign Secretary's admission about torture denial with the U.K. government's assertion that governments with poor records on torture can be trusted to abide by the terms of the MoUs.

The case examples on Libya provided by the U.K. in its response to the DH-S-TER reinforce those concerns. In order to justify the proposed deportation of failed asylum-seekers and convicted criminals to Libya, the U.K. government argued that such persons have no fear of reprisals upon return to Libya because the Libyan security service reserves torture and other ill-treatment exclusively for those suspected of political activities against the Libyan regime or membership in an Islamist group.

In the 2003 case of *A v. Secretary of State for the Home Department*, a domestic immigration court, the Immigration Appeals Tribunal (IAT), determined that a Libyan national convicted of sex offenses in the U.K. could be returned to Libya based on assurances from well-placed officials in the Libyan government.[25] That return could be effected, the U.K. government argued, because the deportee did not have a security profile. The IAT concluded that the background evidence also indicated "an increased focus by the security agencies on specific opposition groups. [A] is not a member of any Islamist group, which groups appear to be particularly targeted, nor is he a member of any opposition group."[26]

The same cannot be said for the Libyans currently detained by the U.K. pending deportation on the grounds of national security, and whose removal the MoU is designed to facilitate. The five Libyan nationals detained by British authorities on October 3, 2005, for example, were detained under immigration law because their presence in Britain allegedly threatens national security or is otherwise "not conducive to the public good." The five men are reportedly involved in the Libyan Islamic Fighting Group, an armed opposition group that has been fighting to overthrow the Libyan leader Muammar al-Qaddafi since the mid-1990s. Reportedly, several of the five individuals had been recognized as refugees in the United Kingdom.[27]

In the 2004 European Court of Human Rights admissibility decision of *F. v. United Kingdom*, to which the U.K. reply to the DH-S-TER refers, the Court adopted the

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24 Ibid., Q48.

25 A. v. Secretary of State for the Home Department [2002] UKIAT 07355 (March 21, 2003), cited in: European Court of Human Rights, F. v. United Kingdom, Application no. 36812/02, August 31, 2004 [online], http://cmiskp.echr.coe.int///tkp197/viewhbkm.asp?action=open&table=1132746FF1FE2A468ACCBCD1763D4D8149&key=25732&sessionId=6118019&skin=hudoc-en&attachment=true (retrieved March 21, 2006).

26 Ibid.

27 Human Rights Watch, U.K.: Torture a Risk in Libya Deportation Accord, October 18, 2005, [online] http://hrw.org/english/docs/2005/10/18/libya11890.htm (retrieved March 21, 2006).

U.K. government's argument in *A.* and ruled inadmissible F's claim for protection under Article 3 of the ECHR. But the Court's reasoning again contrasted the situation of the applicant with those who are perceived to be involved in political opposition to the regime.[28]

It is important to note that research by Human Rights Watch and the U.S. State Department human rights report indicate that torture and ill-treatment in Libya are not confined to those suspected of political or opposition activities.[29] Thus, we would disagree that failed asylum seekers and criminal deportees can safely be sent back to Libya based on diplomatic assurances.

However, it is crucial to note that in the context of the DH-S-TER reflection, states were specifically asked to prioritize examples of state practice of reliance upon diplomatic assurances in the context of the "fight against terrorism." It is therefore disingenuous for the U.K. government to use the cases of failed Libyan asylum seekers to justify its return practices, especially since the findings of the IAT and the European Court of Human Rights in relation to risk are limited to persons with no national security or opposition profile.

The example of Libya also illustrates a number of the serious difficulties with diplomatic assurances as a safeguard against torture. The U.K. government points to the mechanism allowing for post-return monitoring by an independent organization as a key element to ensure that promises of humane treatment will be respected upon return. But Libya lacks any independent civil society organization to carry out such a role.

Instead, the U.K. government has approached the Qadhafi Foundation for Development (formally known as the Qadhafi International Foundation for Charity Association), an organization run by Saif al-Islam al-Qadhafi, a son of the Libyan leader Muammar al-Qadhafi.

While the Foundation is widely perceived to be genuinely interested in human rights reform in Libya, it cannot be considered to be an independent organization.

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28 European Court of Human Rights, F. v. United Kingdom.

29 Libya: United States Department of State Country Reports on Human Rights Practices 2005, March 8, 2006 [online] http://www.state.gov/g/drl/rls/hrrpt/2005/61694.htm (retrieved March 21, 2006). The report states that security personnel routinely tortured prisoners during interrogations or as punishment. Government agents reportedly detained and tortured foreign workers, particularly those from sub-Saharan Africa. Reports of torture were difficult to corroborate since many prisoners were held incommunicado. The reported methods of torture included chaining prisoners to a wall for hours, clubbing, applying electric shock, applying corkscrews to the back, pouring lemon juice in open wounds, breaking fingers and allowing the joints to heal without medical care, suffocating with plastic bags, deprivation of food and water, hanging by the wrists, suspension from a pole inserted between the knees and elbows, cigarette burns, threats of dog attacks, and beatings on the soles of the feet. See also, Human Rights Watch, Libya: Words to Deeds: the Urgent Need for Human Rights Reform, January 2006, [online] http://hrw.org/reports/2006/libya0106/ (retrieved March 21, 2006). The report documents the torture and ill-treatment of so-called ordinary criminal suspects and foreign workers, as well as those suspected of opposition activities.

Moreover, the Foundation appears to suffer from the same denial about torture highlighted by the Foreign Secretary in his evidence to the Foreign Affairs Committee.

When Human Rights Watch publicly raised concerns in October 2005 about the risk of returns to torture under the MoU, the Foundation responded by denying that torture takes place in Libya :

> The Human Rights Watch organization has published a report on the human rights situation in Libya in which the organization mentions non-existing cases of torture. At the time when it refutes this allegation, Gaddafi International Foundation for Charity Associations stresses the following:
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> 1. Various mass media have misinterpreted the report issued by HRW due to fear from repeating what has happened in the past concerning issues of torture.
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> 2. What has been said about the existence of torture in Libyan prisons is untrue and can never happen because of the existence of an agreement between Gaddafi International Foundation for Charity Associations and Prison Authorities in Libya. This agreement allows surprise visits by local and international human rights organizations to all prisons and rehabilitation centres in the country.
>
> 3. Provisions of the agreements signed with many countries on the exchange of convicts guarantee protection of rights and prohibit all forms of torture.[30]

It remains unclear how the U.K. government could rely on the Foundation to monitor the treatment of suspects returned from the U.K. to Libya when the Foundation does not even acknowledge that torture and ill-treatment takes place.

30 See, "A statement by Gaddafi International Foundation for Charity Associations," October 20, 2005 [online] http://www.gifca.org.ly/english/main.htm (retrieved March 21, 2006).