



“Diplomatic Assurances” against Torture

Questions and Answers

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What are “diplomatic assurances” against torture?

“[Diplomatic assurances](#)” are an increasingly popular way for governments to get around the international ban on torture. They smooth the way for undesirable foreigners to be sent to another country where they will be at risk of torture and other abuse. Because it is illegal to send someone to a country where she or he will be at risk of torture, the sending government first gets a promise from the receiving government that it won’t use torture.

Most cases involve foreigners suspected of involvement in terrorism or labeled national security threats. Failed asylum seekers, people being deported following conviction or sentence for ordinary crimes, and people subject to extradition warrants for ordinary crimes have also been threatened with removal based on assurances.

Diplomatic assurances take a variety of forms. Some are simply oral promises. Others are written documents, in some cases signed by officials from both governments. The content of the assurances also varies, and assurances against torture are sometimes packaged with other promises, such as for a fair trial. Some assurances do no more than reiterate that the receiving government will respect its domestic law or its obligations under international human rights law. Some diplomatic assurances include arrangements for post-return monitoring.

Why is the use of diplomatic assurances growing?

Because of September 11 and other more recent terrorist attacks, for example the London bombings in July 2005. Although some governments used diplomatic assurances against torture before these attacks, a growing number of governments want to get rid of foreign nationals suspected of involvement in terrorist activities. Instead of prosecuting these suspects, many governments simply transfer them to their home or other countries, and argue that diplomatic assurances guarantee that they won’t be tortured.

Some governments have used diplomatic assurances in relation to the death penalty. Because the death penalty is outlawed in Europe, governments there will not extradite a person to countries like the United States and China, where the death penalty is legal, without an assurance that the death penalty will not be used. But assurances against the death penalty are different from assurances against torture. Although Human Rights Watch is opposed to the death penalty, its use as a punishment following a criminal conviction is not prohibited under international law. The use of assurances against the death penalty simply acknowledges the different legal approaches of two states. By contrast, assurances against torture relate to conduct that is criminal in both the sending and the receiving state, is practiced in secret, and is routinely denied. It is much easier to monitor an assurance against the death penalty—and protest such a breach—before an execution happens. In cases where diplomatic assurances against torture are proffered, 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 has already occurred.

Why do governments seek these assurances?

Most governments openly admit that they only seek diplomatic assurances from states where torture is an ongoing serious problem or where people labeled as terrorists are particularly targeted for such abuse. Governments that seek assurances argue that such promises make it less likely that the person will be tortured on return, making it possible for the return to take place without breaching international law.

Do diplomatic assurances work?

The growing weight of evidence and international expert opinion indicates that diplomatic assurances cannot protect people at risk of torture from such treatment on return. Sending countries that rely on such assurances are either engaging in wishful thinking or using the assurances as a fig leaf to cover their own complicity in torture. In either case, governments seeking diplomatic assurances against torture are in effect trying to circumvent their own obligations not to return people to face such treatment.

All the governments offering diplomatic assurances have long histories and continuing records of employing torture, a fact that most sending governments acknowledge. Governments with poor records on torture routinely deny that torture is used and fail to initiate investigations when allegations of torture are made. It is highly unlikely that these governments, which persistently breach the international ban on torture, would keep their promises not to torture a single individual.

Part of what makes such promises worthless is the nature of torture itself. Torture is criminal activity of the most serious kind. It is practiced in secret using techniques that often defy detection (for example, mock drowning, sexual assault, internal use of electricity). In many countries, medical personnel in detention facilities monitor the abuse to ensure that the torture is not easily detected. And detainees subjected to torture are often afraid to complain to anyone about the abuse for fear of reprisals against them or their family members.

Have people who were sent back with diplomatic assurances actually been tortured?

Yes. Ahmed Agiza, an asylum seeker in Sweden, was expelled in December 2001 based on assurances against torture from the Egyptian government. Swedish authorities handed over Agiza to U.S. agents and he was transferred to Cairo aboard a CIA-leased aircraft. He was subsequently beaten and subjected to electric shock in an Egyptian prison, despite arrangements for post-return monitoring by Swedish diplomats. In May 2005, the [UN Committee against Torture](#) ruled that Sweden had violated its absolute obligation not to return a person to a risk of torture and stated that “the procurement of diplomatic assurances, which, moreover, provided no mechanism for their enforcement, did not suffice to protect against this manifest risk.”

In October 2002, the U.S. government transferred Maher Arar, a dual Canadian-Syrian citizen, from New York via Jordan to Syria based on diplomatic assurances of humane treatment. Arar was released in October 2003. An independent fact-finder appointed by an official Canadian Commission of Inquiry into Arar’s treatment concluded in October 2005 that Arar had been [tortured in Syrian custody](#), despite Syrian assurances to the contrary and several visits from Canadian consular officials.

In September 2006, the [Commission of Inquiry](#) itself concluded that Arar's torture in Syria is "a concrete example" that diplomatic assurances from totalitarian regimes have "no value" and do not provide a safeguard against torture.

The U.S. government transferred a Russian man, Rasul Kудayev, from Guantanamo Bay to Russia in 2004, based on assurances from the Russian authorities that he would be treated humanely in accordance with Russia's domestic law and international obligations. In October 2005, [Kудayev](#) was unlawfully arrested and detained, severely beaten and denied necessary medical care, and had his lawyer arbitrarily removed from his case when she complained about his ill-treatment.

These cases demonstrate that diplomatic assurances do not provide effective protection and should not be used in cases where there is an acknowledged risk of torture.

How do governments know whether the assurances worked?

There is no reliable way to verify if the receiving government kept its promise not to use torture. The sending government has no incentive to find that torture or ill-treatment occurred because by doing so it would be admitting that it had breached its absolute obligation not to return anyone to a risk of torture. The receiving government has even less incentive. Admitting that torture has occurred would mean acknowledging that it had violated the global ban on torture, as well as the promise it gave to the other government. Human Rights Watch is unaware of any cases in which sending or receiving governments have acknowledged a breach of diplomatic assurances against torture.

Are diplomatic assurances legally binding?

No. Diplomatic assurances are bilateral political agreements, brokered at diplomatic level. They are not treaties and have no legal character or force in law. If the assurances are breached, the sending government has no way to hold the receiving government legally accountable. Moreover, in only a handful of cases have those who suffered torture, despite assurances, been able to get some form of redress against the governments directly or indirectly responsible for their treatment.

If a diplomatic assurance is public, doesn't that put the receiving government's reputation on the line?

Some governments, the UK for example, argue that a receiving government's international reputation and bilateral relations will suffer if diplomatic assurances are breached. But many of the receiving governments are well known to routinely employ torture, yet they suffer little, if any, backlash for perpetrating such abuses. In fact, many of the governments offering diplomatic assurances (including Egypt, Jordan, Morocco, Turkey, and Uzbekistan) are considered faithful allies in the global effort to combat terrorism, which often results in muted criticism of their records on human rights.

If the sending government monitors a person's treatment after he is returned, does that make the assurance more reliable?

No. The key deficiency with monitoring an isolated detainee is the lack of confidentiality. If monitors have universal access to all detainees in a facility, and are able to speak with detainees privately, a detainee can report an incident of abuse to them without fear that he or she will be identified by the authorities, and subject to reprisals. The International Committee of the Red Cross makes such access a condition of its monitoring for precisely that reason.

Such confidentiality cannot be provided when only one detainee or small group is being monitored. Some governments argue that meetings with the detainee would be held in private, guaranteeing confidentiality. The detainee, however, would be easily identifiable to the authorities in the facility. If allegations of ill-treatment were communicated, the prison or detention facility authorities and staff would know directly where the information came from. Such easy identification is a strong disincentive for the detainee to report any abuse. A detainee would justifiably fear reprisals targeting him or his family members by prison staff or other government actors.

Moreover, monitoring organizations, both international and local, often have trouble with open access to facilities. Monitoring by the [International Committee of the Red](#)

[Cross \(ICRC\) at the Abu Ghraib prison](#) in Iraq was often frustrated by the actions of prison staff. In April 2004, the ICRC suspended visits to [Jordanian detention facilities](#) for three months “owing to problems of access to certain detainees.

Local monitoring groups, in particular, are vulnerable to intimidation by their governments, which often control them via registration laws, if not by outright harassment and worse. In many countries where torture is employed, including Libya, Syria, Uzbekistan, and Yemen, local organizations lack the capacity to conduct effective follow-up monitoring, and independent international monitors are routinely denied access to detention facilities.

Most of the receiving states are Arab or Muslim. Is Human Rights Watch saying that these governments are inherently untrustworthy?

No. Many governments around the world employ torture, including some of the sending governments, such as the United States and Russia. Despite decades of international effort to eradicate torture and ill-treatment, such treatment remains common in many countries regardless of their religious or cultural character. The most [recent report of the UN special rapporteur](#) on torture highlights allegations of torture in dozens of countries across the world. It is also important to emphasize that while any government that engages in torture and ill-treatment is violating international law, so is a government that sends a person to a place where he or she risks being tortured.

Can diplomatic assurances be a way of improving a country’s record on torture?

No. Governments do not seek diplomatic assurances to facilitate improvements in a country’s torture record. They are sought only to facilitate the removal of undesirable foreigners to places where they are at risk of serious abuse.

Receiving states that provide diplomatic assurances are already under a duty not to torture or ill-treat detainees, and most have ratified legally binding treaties promising to refrain from such abuse. In light of this, the UN special rapporteur on

torture stated in August 2005 that diplomatic assurances “therefore do not provide any additional protection to the deportees.”

States that are serious about eradicating torture should actively encourage abusive governments to meet their existing obligations to prevent such ill-treatment by taking effective system-wide and nationwide measures to end torture and other abuses against all people. Reliance on non-binding, bilateral agreements like diplomatic assurances undercuts the credibility and integrity of universally binding legal norms and their system of enforcement. States effectively “opt out” of the global enforcement system by brokering non-binding bilateral diplomatic assurances, leaving a damaging gap in oversight and accountability for torture abuses. Employing diplomatic assurances does not signify an advance in torture eradication, but a harmful step backward.

The U.S. government says that it always seeks assurances if there is a risk of torture. Does this make transfers by the U.S. legal?

No. The U.S. uses assurances against torture in a variety of circumstances. But whatever the underlying context in which the assurances are sought, returning people to places where they face the risk of torture is always illegal. Moreover, a person subject to any type of transfer by the U.S. based on diplomatic assurances has no ability to challenge the reliability or sufficiency of the assurances in a court.

Sometimes the U.S. seeks assurances within a legal framework, including deportations under U.S. immigration laws or extradition proceedings. The U.S. government also employs diplomatic assurances to justify transfers outside the law, notably in the “extraordinary rendition” of terrorism suspects for interrogation to governments with a record of torture. In a number of rendition cases, people transferred by the U.S. based on assurances have in fact been tortured, including Maher Arar (U.S. via Jordan to Syria), Abu Omar (Italy to Egypt), and Ahmed Agiza (Sweden to Egypt).

In its attempts to transfer detainees from Guantanamo Bay back to their home countries or to third countries, U.S. authorities claim that they always seek assurances of humane treatment from the receiving government. Some ex-

Guantanamo Bay detainees returned to their home countries have in fact suffered abuse (see above on Russian detainees), and some Yemeni detainees have been subjected to indefinite detention since returning to Yemen.

The U.S. government states that, where appropriate, it seeks guarantees of humane treatment before transferring people, but acknowledges that it has [no control](#) over what happens to a detainee once he is transferred. Michael Scheuer, the man who started and ran the U.S. government's renditions program, has called diplomatic assurances nothing more than "a legal nicety" to satisfy the requirements of government lawyers. The U.S. has been criticized by the United Nations, the European Parliament, the Council of Europe, and the Inter-American Commission on Human Rights, among others, for its policies permitting the use of diplomatic assurances where there is a risk of torture.

Are the agreements brokered by the UK government, called "memorandums of understanding," better than ordinary diplomatic assurances?

No. A "memorandum of understanding" is simply another name for diplomatic assurances. The United Kingdom has agreed "memorandums of understanding" with Jordan, Libya, and Lebanon to permit the deportation of suspected terrorists or national security threats based on assurances of humane treatment upon return. The memos include arrangements for post-return monitoring, which the UK government wrongly claims provides an added measure of protection (see above section on post-return monitoring). Neither the blanket nature of the agreements, nor the fact that they are signed by officials from both governments, have any bearing on the effectiveness of the promises made within them. The agreements are not treaties, do not create binding obligations on the parties, and have no legal effect.

The first court challenge to a "memorandum of understanding" was heard in May 2006 in the case of Omar Othman (also known as Abu Qatada), a terrorism suspect threatened with return to Jordan. Lawyers for Othman argued that he would be at risk of torture, possible secondary transfer to the United States, and unfair trial if returned, despite [diplomatic assurances from Jordan](#). A decision is expected by the end of 2006.

The UK parliamentary Joint Committee on Human Rights concluded in May 2006 that “diplomatic assurances such as those to be agreed under the Memoranda of Understanding with Jordan, Libya, and Lebanon present a substantial risk of individuals actually being tortured, leaving the UK in breach of its obligations.”

What is Canada’s record on diplomatic assurances against torture?

In addition to involvement in the apprehension of Maher Arar, leading to his transfer by the U.S. to Syria based on assurances, the Canadian government has itself sought and secured diplomatic assurances in a number of cases. For example, the authorities have sought diplomatic assurances in an effort to remove five Arab men deemed to threaten national security. The men are subject to “security certificates” that in practice allow them to be detained indefinitely on the basis of secret evidence pending their deportation to countries where they are at risk of torture and ill-treatment.

The Canadian government acknowledges that in some cases assurances against ill-treatment cannot be trusted, but claims it can still transfer the men because of a January 2002 decision by the Canadian Supreme Court (the *Suresh* case), which permits transfers to risk of torture in extraordinary circumstances if national security interests outweigh concerns about a detainee’s safety.

Canada has been roundly condemned by the UN and others for providing an exception to the absolute prohibition against returns to risk of torture in its Supreme Court jurisprudence. None of the men currently subject to security certificates has been transferred thus far and some of their cases are on [appeal to the Canadian Supreme Court](#).

Canada has also secured assurances in ordinary asylum and deportation cases. In May 2006, the Federal Court of Canada halted the deportation of Lai Cheong Sing, accused by the Chinese authorities of smuggling and bribery. The Chinese government offered diplomatic assurances against his execution and torture, notwithstanding the fact that co-defendants in Lai’s case had already been executed and family members of the co-defendants ill-treated. Acknowledging the pervasive

practice of torture and the use of the death penalty in China, the court halted Lai's imminent deportation stating, "The issue of assurances lies at the heart of the debate" and that there was a serious likelihood of jeopardy to Lai's life or safety if he were returned to China.

Have any countries followed the lead of the U.S., UK and Canada?

Yes. A growing list of governments in Europe and Central Asia have sought or secured assurances as a means of removing individuals at risk of torture on return. At least some have been encouraged or emboldened by the actions of the U.S., Canada, and the UK.

In October 2002, for example, the Georgian government extradited a group of Chechens to Russia, based on assurances of humane treatment from the Russian authorities, and despite a request from the European Court of Human Rights not to transfer the men until their cases could be reviewed by the court.

The Uzbek government offered diplomatic assurances to the Kyrgyz authorities for the [forced return of Uzbek refugees](#) accused of involvement in the May 2005 protest and uprising in Andijan, which were quashed by Uzbek government forces who killed hundreds of unarmed protesters fleeing a demonstration. Torture is systematic in Uzbekistan, and the authorities routinely deny allegations of abusive treatment.

This trend has raised concern worldwide that the ban on transferring people to places where they are at risk of torture is being eroded systematically by the growing use of diplomatic assurances.

What do international human rights bodies say about diplomatic assurances?

There is broad consensus among international human rights bodies that diplomatic assurances do not provide an effective safeguard against torture and ill-treatment.

Louise Arbour, the UN high commissioner for human rights, has condemned the "dubious practice" of seeking diplomatic assurances, stating in March 2006, "I

strongly share the view that diplomatic assurances do not work as they do not provide adequate protection against torture and ill-treatment.”

Manfred Nowak, UN special rapporteur on torture, has also condemned the practice charging in August 2005 that it reflects a tendency on the part of states “...to circumvent the international obligation not to deport anybody if there is a serious risk that he or she might be subjected to torture.”

Thomas Hammarberg, the [Council of Europe’s commissioner for human rights](#), wrote in June 2006 that diplomatic assurances “are not credible and [have] also turned out to be ineffective in well-documented cases. The governments concerned have already violated binding international norms and it is plain wrong to subject anyone to the risk of torture on the basis of an even less solemn undertaking to make an exception in an individual case.”

A special European Parliament committee established to investigate European complicity in extraordinary rendition and the unlawful detention of terrorism suspects by the U.S. government called in June 2006 on “Member States [of the EU] to reject altogether reliance on diplomatic assurances against torture...”

The EU Network of Independent Experts on Fundamental Rights also stated in May 2006 that the “only acceptable position under international law” is that “states cannot resort to diplomatic assurances as a safeguard against torture and ill-treatment where there are substantial grounds for believing that a person would be in danger of being subjected to torture or ill-treatment upon return.”

In June 2006, Dick Marty, a Swiss senator tasked by the Parliamentary Assembly of the Council of Europe with investigating European states’ involvement in “extraordinary renditions” and possible secret detention sites, concluded that “[r]elying on the principle of trust and on diplomatic assurances given by undemocratic states known not to respect human rights is simply cowardly and hypocritical.”

The Inter-American Commission on Human Rights adopted a resolution in July 2006 calling on the U.S. to close Guantanamo Bay and “ensure that diplomatic assurances are not used to circumvent the [U.S.’s] nonrefoulement obligation.”

If diplomatic assurances don’t protect a person from torture, why don’t courts outlaw them?

Domestic and regional courts, in addition to some UN monitoring bodies, have determined, in considering individual cases, that diplomatic assurances do not provide an effective safeguard against torture and ill-treatment.

In the Netherlands, UK, and Canada, for example, courts have halted extraditions and deportations based on assurances, ruling that the assurances did not provide sufficient protection against torture. In 1996, the European Court of Human Rights ruled in the case of *Chahal v. United Kingdom* that the return to India of a Sikh activist would violate the UK’s absolute obligation not to return a person to risk of torture, despite diplomatic assurances proffered by the Indian government. The *Chahal* case remains the standard in Europe, confirming the absolute nature of the prohibition against returning a person to risk of torture, no matter what crime he or she is suspected of having committed. (A 2005 European Court of Human Rights case frequently cited by governments as validating the use of assurances, *Mamatkulov and Askarov v. Turkey*, actually failed to address the question, thus leaving *Chahal* as the European standard.)

Unfortunately, the U.S. courts have so far declined to hear any cases challenging the use of diplomatic assurances, concluding that the issues are matters for the executive branch of government. Maher Arar and Khalid el-Masri are appealing lower court decisions along those lines. The lawyers for some of the security certificate detainees in Canada (described above) plan to challenge the use of diplomatic assurances in upcoming court proceedings.

If governments can’t deport terror suspects because of the torture risk, what are they supposed to do with possibly dangerous foreigners?

Since the September 11 attacks in New York and Washington, acts of terrorism have been carried out in Egypt, Iraq, Israel, India, Indonesia, Jordan, Russia, Saudi Arabia, Spain, Turkey, the United Kingdom, and elsewhere. These attacks underscore the seriousness of the threat from terrorism. Governments have a duty to take effective measures to protect the population in their territories from death or serious injury. But as the UN Security Council has emphasized in Resolution 1456, states are obliged to conduct all counterterrorism operations in accordance with international human rights law.

Acts of terrorism are serious crimes, and those who commit them should be prosecuted subject to internationally recognized fair trial guarantees. Many governments claim that they cannot prosecute some detainees because the evidence is too sensitive and might compromise national security. But there are many areas of law where sensitive evidence is reviewed in a manner that does not jeopardize national security, law enforcement or intelligence operations, or the safety of witnesses and jurors (for example, in international drug trafficking or organized crime cases). There is no reason why these procedures cannot be relied upon to prosecute terrorism suspects.

Transferring foreign suspects to places where they face the risk of torture or ill-treatment is also unacceptable. Such returns violate international law, even where assurances are sought. Moreover, transferring people suspected of involvement in terrorism to other states may simply move the threat from one state to another. Bringing those responsible to justice is often complex and time consuming, but it allows states to address the threat without undermining the rule of law and the global ban on torture.

Don't some foreign detainees want to return to their home countries, despite the risk that they will be tortured?

Some detainees in the UK and at Guantanamo Bay have decided either to abandon claims that they will be tortured on return, or not to raise such concerns, and instead accept deportation or transfer to their countries of origin, despite the risk of ill-treatment on return.

In the UK, a group of Algerians held in detention for up to four years wrote to *The Guardian* newspaper in April 2006 saying that they would rather go home than endure prolonged detention in the UK with no end in sight: “We know that we face torture in our country of origin but some of us have come to the decision that a quick death is preferable to the slow death we feel we are enduring here.” Likewise, many of the detainees at Guantanamo Bay have stated that they would rather suffer in prisons in their own countries than remain indefinitely in U.S. custody.

Given the “choice” between indefinite detention on the one hand—often accompanied by highly restrictive or abusive detention conditions—and transfer to face the risk of torture on the other, the decision to return cannot be seen as truly voluntary.