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December 14, 2006

Moritz Leuenberger
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Head of the Federal Department of the
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Re: The use of diplomatic assurances in pending extradition cases

Dear President Leuenberger and Minister Calmy-Rey:

I am writing to express Human Rights Watch's deep concern at reports that the government of Switzerland intends to rely upon diplomatic assurances against torture and other ill-treatment from the government of Turkey to effect pending extraditions of Kurds wanted on terrorism charges in that country. These reports are at odds with Switzerland's record of expressing concern in international and regional human rights bodies about the ineffectiveness of diplomatic assurances as a safeguard against such abuse. Human Rights Watch respectfully requests clarification regarding this apparent shift in Swiss government policy, and urges you to refrain from relying on such assurances.

Switzerland's International Obligations

If the Swiss government is indeed seeking diplomatic assurances in relation to the extradition of Kurds to Turkey, that would in itself be an acknowledgement that the persons subject to transfer are in fact at risk of torture and ill-treatment. As you know, your government's obligations in relation to torture and ill-treatment are clear. Under the European Convention on Human Rights and Fundamental Freedoms

(ECHR), the United Nations Convention Against Torture (CAT), and the International Covenant on Civil and Political Rights (ICCPR), torture and ill-treatment are prohibited and no person can be transferred to another country where he or she is at risk of torture or ill-treatment (the *nonrefoulement* obligation). The ban on torture and *refoulement* are absolute, applying to all persons without consideration of their status or alleged crimes, and despite the nature of the transfer. The prohibition against *refoulement* thus applies in the extradition context and to any other form of transfer, including expulsion, deportation and rendition. Existing bilateral or multilateral extradition treaties, and other agreements providing for mutual legal assistance between or among countries, do not displace a state's multilateral human rights treaty obligations.

Diplomatic assurances against torture and ill-treatment from countries where such abuses remain a serious problem, or where certain categories of people are at risk of such abuse, are inherently unreliable and practically unenforceable. Their growing use in the Council of Europe region and, indeed, globally, threatens to undermine the ban on torture and the *nonrefoulement* obligation. We respectfully request that the Swiss authorities refrain from any action that could place an individual at risk of torture or ill-treatment, and that would legitimize a practice that undermines the prohibition against torture and ill-treatment.

Switzerland's Position on Diplomatic Assurances

Representatives of the Swiss government have a laudable track record of expressing criticism and concern at reliance by other states on diplomatic assurances to effect transfers of persons to countries where they are at risk of torture and ill-treatment.

For example, at the September 20, 2006 session of the newly-established United Nations Human Rights Council, during which Manfred Nowak, the UN special rapporteur on torture, expressed his views that diplomatic assurances undermined the prohibition against torture, the Swiss government representative appeared to support the special rapporteur's concerns.

After a representative of the United States government defended its use of such assurances in its efforts to transfer suspects in the context of the "war" on terrorism, Jean-Daniel Vigny, representative of Switzerland, expressed concern that recourse to diplomatic assurances compromised the global effort to combat torture.¹ The special rapporteur, in response, noted that diplomatic assurances were always requested from states known to practice torture, "watertight" post-return monitoring was not possible, and in any event, "diplomatic assurances did not work."²

The Swiss representative's principled expression of caution regarding the use of diplomatic assurances for transfers to risk of torture and ill-treatment in the context of the global effort to combat terrorism has been echoed by other international

actors. In March 2006, UN High Commissioner for Human Rights Louise Arbour stated, “I strongly share the view that diplomatic assurances do not work as they do not provide adequate protection against torture and ill-treatment.”³ The high commissioner has also articulated why post-return monitoring of an isolated individual cannot be regarded as an added safeguard.⁴ Commenting on the UK government’s efforts to deport terrorism suspects based on diplomatic assurances, UN Special Rapporteur on Torture Manfred Nowak has noted that seeking such assurances “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.”⁵ Thomas Hammarberg, the Council of Europe Commissioner for Human Rights, is unequivocal in his opposition to the practice of seeking assurances against torture:

“Diplomatic assurances”, whereby receiving states promise not to torture specific individuals if returned are definitely not the answer to the dilemma of extradition or deportation to a country where torture has been practiced. Such pledges are not credible and have also turned out to be ineffective in well-documented cases... In short, the principle of non-refoulement should not be undermined by convenient, non-binding promises of such kind.⁶

Indeed, your government also took a vocal and principled position opposing the use of diplomatic assurances against torture and ill-treatment in deliberations on this issue within the Council of Europe. In June 2005, the Council of Europe’s Steering Committee on Human Rights (CDDH) tasked the Group of Specialists on Human Rights and the Fight against Terrorism (DH-S-TER) with examining the wisdom of developing guidelines for the “appropriate use” of diplomatic assurances. In the end, the DH-S-TER recommended that no guidelines be developed for the use of assurances, with the Swiss government firmly in the corner of those states opposing the use of assurances for transfers to risk of torture and ill-treatment.⁷

During the expert meetings convened in December 2005 and March 2006, the representatives from Switzerland consistently opposed the use of diplomatic assurances, joining other like-minded governments who considered such assurances inherently unreliable and insufficient to mitigate the acknowledged risk.⁸

At the March 2006 meeting of the DH-S-TER, a Human Rights Watch representative attending in observer capacity noted the Swiss representative’s vocal and steadfast opposition to the use of diplomatic assurances against torture and ill-treatment. The Swiss representative joined a group of countries who argued, in concert with a coalition of nongovernmental organizations including Human Rights Watch, that

diplomatic assurances against torture and ill-treatment do not mitigate the real risk of abuse. The April 2006 final report of the meeting stated:

Certain experts considered that diplomatic assurances concerning Article 3 ECHR treatment in the context of expulsion procedures were inherently unreliable and could not be regarded as having sufficient weight to amount to an effective mitigation of the risk. They should thus never be relied upon. Some expressed this view for all the cases, others limited their remarks to cases where there is a systematic pattern of torture in the receiving State.⁹

Human Rights Watch's research directly supports these conclusions. We have documented cases in which persons transferred on the basis of diplomatic assurances have in fact been tortured and also a number of cases where courts have upheld a state's *nonrefoulement* obligation by halting a transfer after determining that diplomatic assurances from the receiving state could not provide an effective safeguard against torture and ill-treatment.¹⁰

The DH-S-TER's terms of reference focused on the use of assurances in the context of expulsion, but also stated that the DH-S-TER reserved the possibility of addressing the issue of diplomatic assurances in the context of extradition procedures in so far as it is of relevance to its considerations of diplomatic assurances in the context of expulsion procedures.¹¹ Switzerland was among the many governments that included information regarding the use of diplomatic assurances in the extradition context in their replies to a questionnaire distributed by the DH-S-TER seeking information about state practice with respect to diplomatic assurances.

As noted above, the *nonrefoulement* obligation applies to all forced transfers. While extradition and expulsion proceedings have distinct procedural elements, they both require a pre-transfer assessment for risk of torture and ill-treatment under article 3 of the ECHR and article 3 of the Convention Against Torture.

The Swiss government's reply to the DH-S-TER questionnaire on state practice and assurances circulated in the run-up to the March 2006 expert meeting illustrates the problems inherent in the use of diplomatic assurances against torture. The reply acknowledged that Switzerland extradited two Turkish nationals to India in October 1997 based on diplomatic assurances from the Indian authorities that the men would be treated in conformity with the European Convention on Human Rights and that they would not suffer physical violence.¹² After return to India, however, the assurances were breached, despite several representations by Swiss diplomats to officials in New Delhi. Swiss diplomats were forced to intervene several times with

the Indian authorities “to assess the situation and to judge the unfavourable conditions in which the two Turkish nationals were held in prison.”¹³ The men were released on bail in May 2004 and to date, nine years after their extraditions, have yet to be brought to trial. They are also not permitted to travel beyond New Delhi.

Your government’s reply to the DH-S-TER states that the “course and the duration of the cases...are highly problematic” and “an obvious violation of international law and guarantees, which were given by the Indian authorities before their extradition.”¹⁴

Diplomatic Assurances and Turkey

Human Rights Watch understands that the Swiss government is apparently relying on Turkey’s record of human rights reform and membership in the Council of Europe to distinguish it from other states where torture and ill-treatment remain serious problems, and to argue that the changed circumstances mean that extradition with assurances would be consistent with Switzerland’s *nonrefoulement* obligation.

This position begs the question: why would the government ask for diplomatic assurances from Turkey unless the Swiss authorities have serious concerns that Turkey is not currently abiding by its international obligations with respect to torture and ill-treatment? If Turkey’s reforms had progressed to such a degree that it was in full compliance with its obligations as a member of the Council of Europe, including respect for the prohibition of torture, then diplomatic assurances against torture and ill-treatment would be unnecessary. By seeking assurances, the Swiss government is acknowledging the gap between Turkey’s obligations in relation to eradicating torture and its practice. Human rights violations continue in Turkey, in particular against Kurds with links to proscribed organizations, and the risk of torture and ill-treatment and unfair trials remain serious concerns, despite Turkey’s reform process.¹⁵

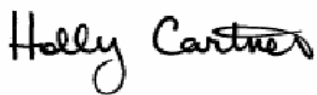
The case of PKK official Nuriye Kesbir supports the position that it is not safe to transfer suspects labeled as terrorists to Turkey based on diplomatic assurances.¹⁶ On September 15, 2006, the Dutch Supreme Court upheld a Court of Appeal decision preventing the extradition of Kesbir, a woman official of the Kurdish Worker’s Party (PKK, now known as Kongra-Gel) and minority Yezidi Kurd then resident in the Netherlands. Kesbir was subject to an extradition warrant from Turkey alleging that she had committed war crimes as a PKK military operative during the time she fought in the civil war in Turkey’s southeast. In May 2004, a Dutch district court determined that although her fears of torture and unfair trial in Turkey were not completely unfounded, there were insufficient grounds to halt the extradition. The court gave exclusive authority to the government to either grant or reject the extradition request, but advised the Dutch Minister of Justice to seek enhanced diplomatic assurances against torture and unfair trial from Turkey.

A Dutch appeals court ruled on January 20, 2005, against Kesbir's extradition, concluding that diplomatic assurances could not guarantee that she would not be tortured or ill-treated upon return to Turkey. On September 15, 2006, the Dutch Supreme Court upheld the decision of the Court of Appeal barring Kesbir's extradition to Turkey. The Supreme Court issued a statement, concluding that "an extradition could result in a breach of European human rights laws" since Kesbir "runs a real risk of being tortured or suffering inhumane or humiliating treatment" if returned to Turkey.¹⁷ The Supreme Court accepted the Court of Appeal's reasoning that the diplomatic assurances against torture and ill-treatment offered by Turkey were not an effective safeguard against abuse were Kesbir to be returned.

Conclusion

The government of Switzerland has been a standard-bearer for global human rights promotion. Its expressions of concern regarding diplomatic assurances—a device that not only places the individuals they are purported to protect at risk of torture, but also undermines the international ban on torture and *refoulement*—have been in keeping with the Swiss government's principled role in the protection of human rights worldwide. The reports of the government's recent move to employ diplomatic assurances to extradite persons labeled as terrorists by the Turkish authorities, if accurate, would be a very disturbing and disappointing development. We respectfully request the Swiss government to reject firmly the use of diplomatic assurances for transfers to risk of torture and to uphold the global ban on torture and *refoulement*.

Sincerely,



Holly Cartner
Executive Director
Europe and Central Asia Division

- cc. Louis Arbour, UN High Commissioner for Human Rights
- Manfred Nowak, UN Special Rapporteur on Torture
- Terry Davis, Council of Europe Secretary General
- Thomas Hammarberg, Council of Europe Commissioner for Human Rights
- Christopher Blocher, Minister of Justice, Switzerland

¹ United Nations Office at Geneva, Press and Media Service, “Human Rights Council Discusses Reports on Torture, Arbitrary Detention and Independence of Judges and lawyers,” September 20, 2006, [http://www.unog.ch/unog/website/news_media.nsf/\(httpNewsByYear_en\)/382DE14BFCCB59C2C12571EFO062F22D?OpenDocument](http://www.unog.ch/unog/website/news_media.nsf/(httpNewsByYear_en)/382DE14BFCCB59C2C12571EFO062F22D?OpenDocument). Vigny posed this question during the interactive dialogue with the special rapporteur on torture: “It was also noted the tendency that would compromise the common efforts to fight against torture, such as the measures taken within the context of the fight against terrorism or recourse to diplomatic assurances [sic] concerning torture. How could the Rapporteur control the effectiveness of the diplomatic insurance with regard to torture?” See also, International Service for Human Rights, “Human Rights Council, 2nd Session: Daily Update, 20 September 2006,” *Council Monitor*, http://www.ishr.ch/hrm/council/updates/20_September_06.pdf, p. 6. The government of Uzbekistan also defended the use of diplomatic assurances, claiming that sovereign states should be able to independently choose from whom to accept assurances. *Ibid.*, p. 6, fn. 25.

² United Nations Office at Geneva, Press and Media Service, “Human Rights Council Discusses Freedom of Religion or Belief, and Freedom of Opinion and Expression: Concludes Discussion on Torture, Arbitrary Detention and Independence of Lawyers and Judges,” September 21, 2006, [http://www.unog.ch/unog/website/news_media.nsf/\(httpNewsByYear_en\)/BC1286280BB6FF24C12571FO004FO0D3?OpenDocument](http://www.unog.ch/unog/website/news_media.nsf/(httpNewsByYear_en)/BC1286280BB6FF24C12571FO004FO0D3?OpenDocument)

³ Statement by UN High Commissioner for Human Rights Louise Arbour to the Council of Europe’s Group of Experts on Human Rights and the Fight Against Terrorism (DH-S-TER), March 29-31, 2006, on file with Human Rights Watch.

⁴ Address by Louise Arbour, UN High Commissioner for Human Rights at Chatham House and the British Institute of International and Comparative Law, February 15, 2006, [http://www.coe.int/t/e/human_rights/cddh/3._committees/06.%20terrorism%20\(dh-s-ter\)/working%20documents/2006/DH-S-TER\(2006\)004%20E%20Address%20Louise%20Arbour.asp#TopOfPage](http://www.coe.int/t/e/human_rights/cddh/3._committees/06.%20terrorism%20(dh-s-ter)/working%20documents/2006/DH-S-TER(2006)004%20E%20Address%20Louise%20Arbour.asp#TopOfPage). Arbour directly addressed the fallacy that post-return monitoring offers an added safeguard: “Some have postulated that diplomatic assurances could work if effective post-return monitoring mechanisms were put in place. Based on the long experience of international monitoring bodies and experts, it is unlikely that a post-return monitoring mechanism set up explicitly to prevent torture and ill-treatment in a specific case would have the desired effect. These practices often occur in secret, with the perpetrators skilled at keeping such abuses from detection. The victims, fearing reprisal, often are reluctant to speak about their suffering, or are not believed if they do.” *Ibid.*

⁵ “United Kingdom Must Not Deport People to Countries with Risk of Torture – UN Rights Expert,” UN News Centre news release, August 23, 2005, <http://www.un.org/apps/news/story.asp?NewsID=15513&Cr=UK&Cr1=>.

⁶ Council of Europe Commissioner on Human Rights, “Viewpoint: ‘Torture can never, ever be accepted,’” June 27, 2006, http://www.coe.int/T/Commissioner/Viewpoints/Default_en.asp.

⁷ “No Guidelines on Empty ‘No Torture’ Promises: Council of Europe Rejects Minimum Standards for Diplomatic Assurances,” Human Rights Watch news release, April 3, 2006, <http://hrw.org/english/docs/2006/04/03/eu13110.htm>.

⁸ Council of Europe, Steering Committee on Human Rights (CDDH), Group of Specialists on Human Rights and the Fight Against Terrorism (DH-S-TER), “Meeting Report: 1st Meeting, Strasbourg, 7-9 December 2006,” DH-S-TER(2005)018, December 16, 2006, [http://www.coe.int/t/e/human_rights/cddh/3._committees/06.%20terrorism%20\(dh-s-ter\)/meeting%20reports/2005/DH-S-TER\(2005\)018%20E%20Report%201st%20meeting.asp#TopOfPage](http://www.coe.int/t/e/human_rights/cddh/3._committees/06.%20terrorism%20(dh-s-ter)/meeting%20reports/2005/DH-S-TER(2005)018%20E%20Report%201st%20meeting.asp#TopOfPage), para. 10. Council of Europe, Steering Committee on Human Rights (CDDH), Group of Specialists on Human Rights and the Fight Against Terrorism (DH-S-TER), “Meeting Report: 2nd Meeting, Strasbourg, 29-31 March 2006,” DH-S-TER(2006)005, April 3, 2006, [http://www.coe.int/t/e/human_rights/cddh/3._committees/06.%20terrorism%20\(dh-s-ter\)/meeting%20reports/2006/DH-S-TER\(2006\)005%20E%20Report%202nd%20meeting.asp#TopOfPage](http://www.coe.int/t/e/human_rights/cddh/3._committees/06.%20terrorism%20(dh-s-ter)/meeting%20reports/2006/DH-S-TER(2006)005%20E%20Report%202nd%20meeting.asp#TopOfPage), para. 13.

⁹ The reasons presented to support this view included:

- i. diplomatic assurances are sought from countries which have a proven record of torture or other ill treatment contrary to their international obligations;
- ii. the State asking for diplomatic assurances knows that the other State violates its obligations regarding torture and therefore implicitly recognizes that torture occurs. By relying on diplomatic assurances, it undermines efforts of the international community to ensure respect for human rights obligations;
- iii. diplomatic assurances create double standards between the person protected by the assurances and other persons in the country who may face torture without any such protection;
- iv. diplomatic assurances are not necessarily legally binding;

- v. it seemed that in many cases the post-return monitoring mechanisms of the respect of the fundamental rights of the expelled person were proven not to be effective;
- vi. in practice, there have been several specific cases of decisions of international monitoring organs which established that, in the individual case, the diplomatic assurances that had been obtained were ineffective;
- vii. if the assurances are violated, the individual concerned has no available remedy;
- viii. it might be thought that the requested and requesting States have a common interest in the monitoring body finding no evidence of torture;
- ix. there is no climate of mutual trust;
- x. torture is of a clandestine nature;
- xi. if the study of the case concludes that there is a risk, the fact that diplomatic assurances were obtained does not change that conclusion;

Ibid.

¹⁰ Human Rights Watch, “*Diplomatic Assurances*” against Torture: Questions and Answers, November 10, 2006, <http://hrw.org/backgrounder/eca/ecaqna1106/>; Human Rights Watch, *Still at Risk: Diplomatic Assurances No Safeguard against Torture*, vol. 17, no. 4(D), April 15, 2005, <http://hrw.org/reports/2005/eca0405/>; and Human Rights Watch, “*Empty Promises*”: *Diplomatic Assurances No Safeguard against Torture*, vol. 16, no. 4(D), April 15, 2004, <http://hrw.org/reports/2004/uno404/>. For the complete dossier of Human Rights Watch’s work on diplomatic assurances, go to <http://hrw.org/doc/?t=da>.

¹¹ Council of Europe, Steering Committee on Human Rights (CDDH), Group of Specialists on Human Rights and the Fight Against Terrorism (DH-S-TER), “Questionnaire on the Practice of States in the Use of Diplomatic Assurances,” DH-S-TER(2006)001, January 12, 2006, [http://www.coe.int/t/e/human_rights/cddh/3._committees/06.%20terrorism%20\(dh-s-ter\)/working%20documents/2006/DH-S-TER\(2006\)001%20E%20Questionnaire.asp#TopOfPage](http://www.coe.int/t/e/human_rights/cddh/3._committees/06.%20terrorism%20(dh-s-ter)/working%20documents/2006/DH-S-TER(2006)001%20E%20Questionnaire.asp#TopOfPage), p. 1.

¹² Council of Europe, Steering Committee on Human Rights (CDDH), Group of Specialists on Human Rights and the Fight Against Terrorism (DH-S-TER), “Compilation of the Replies to the Questionnaire on the Practice of States in the Use of Diplomatic Assurances,” DH-S-TER(2006)002bil, March 15, 2006, http://www.icj.org/IMG/pdf/CoE-Diplomatic_Assurances.pdf, p. 43.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ See Letter from Human Rights Watch to His Excellency Recep Tayyip Erdoğan, Prime Minister of Turkey, “Calling for Release of Kurdish Activists İbrahim Güçlü, Zeynel Abidin Özalp and Ahmet Sedat Oğur, and Expressing Alarm at Gathering Threats to Reform Process,” June 7, 2006, <http://hrw.org/english/docs/2006/06/07/turkey13519.htm>; “Turkey: Anti-Terror Law Used Against Peaceful Activists: Turkey’s Reform Process at Risk as Three Kurdish Activists Go on Trial,” Human Rights Watch new release, June 7, 2006, <http://hrw.org/english/docs/2006/06/07/turkey13521.htm>; Amnesty International, Turkey: Justice Delayed and Denied: The Persistence of Protracted and Unfair Trials for Those Charged under Anti-Terrorism Legislation, EUR 44/013/2006, September 6, 2006, <http://web.amnesty.org/library/Index/ENGEUR440132006?open&of=ENG-TUR>.

¹⁶ Human Rights Watch, *Still at Risk*, pp. 72-76.

¹⁷ “Dutch Court Blocks Extradition of PKK Leader,” Reuters News, September 15, 2006.