

Strasbourg, 6 December 2005

DH-S-TER(2005)016

STEERING COMMITTEE FOR HUMAN RIGHTS  
(CDDH)

---

**GROUP OF SPECIALISTS ON HUMAN RIGHTS  
AND THE FIGHT AGAINST TERRORISM**

**(DH-S-TER)**

---

**Position paper of the European Group of National Institutions  
for the Protection and Promotion of Human Rights  
on the use of diplomatic assurances in the context of expulsion procedures  
and the appropriateness of drafting a legal instrument relating to such use**

---

Note of the Secretariat:

This document exists only in English

Note du Secrétariat :

Ce document n'existe qu'en  
anglais

**EUROPEAN GROUP OF NATIONAL INSTITUTIONS  
FOR THE PROTECTION AND PROMOTION OF HUMAN RIGHTS**

---

*Position paper*

*on the use of diplomatic assurances in the context of expulsion procedures  
and the appropriateness of drafting a legal instrument relating to such use*

**For consideration by the DH-S-TER during its first meeting, December 7-9, 2005**

During the Third roundtable of the European Group of national human rights institutions (NHRIs) with the Council of Europe, which was held in Berlin in November 2004<sup>1</sup>, NHRIs stressed the State obligation to uphold human rights standards in the context of counter-terrorism measures. They underlined that invasive measures call for stronger legal safeguards, and critically addressed the widespread approach of ‘striking a balance’ between human rights and security issues. It is internationally recognized that the protection of human rights is fundamental and a prerequisite for any counter-terrorism measure. As such it is part of, rather than contradictory to, fulfilling the State obligation to protect people within its jurisdiction.

The NHRIs affirmed that they will scrutinise measures taken or proposed by States to combat terrorism, in particular those reported to the UN’s Counter-Terrorism Committee and those prepared within the Council of Europe and the EU, with a view to ensuring that there are corresponding safeguards adequately protecting human rights and the rule of law, as are laid down, inter alia, in the Council of Europe Guidelines on Human Rights and the Fight Against Terrorism. The NHRIs affirmed also that they will seek to ensure that governments do not permit anti-terrorism measures to be applied abusively in contexts such as immigration control and the fight against criminal activities and resulting in unjustifiable discrimination; they will also seek to ensure that governments do not disregard international human rights standards for reasons of foreign policy.

The Group of Specialists on human rights and the fight against terrorism of the Council of Europe (DH-S-TER) has been mandated for its first meeting on December 7-9 2005 to discuss on “issues raised with regard to human rights by the use of diplomatic assurances in the context of expulsion procedures”, and to “consider the appropriateness of a legal instrument on such diplomatic assurances”<sup>2</sup>. As an observer within the DH-S-TER, and in line with the above-mentioned position and commitments, the European Group of national human rights institutions (NHRIs) has important concerns on the issue to be tackled by the DH-S-TER, and would respectfully request that serious consideration be given to them during this meeting.

This paper first generally deals with the issues raised with regard to human rights by the use of diplomatic assurances in the context of expulsion procedures (I), and then takes position on the issue of the appropriateness of drafting a legal instrument providing minimum standards on the use of such assurances (II).

---

<sup>1</sup> *The Berlin Declaration*, CommDH/NHRI(2004)1, 26 November 2004

<sup>2</sup> Terms of reference of the Group of Specialists on Human Rights and the Fight against Terrorism as adopted by the Steering Committee on Human Rights (CDDH) of the Council of Europe in its 61st meeting, document DH-S-TER (2005) 01, 25 November 2005

**I. Issues raised with regard to human rights by the use of diplomatic assurances in the context of expulsion procedures**

The expulsion of terrorist suspects to their home countries has been a major theme within the context of the international fight against terrorism. As such, the issue came up several times during the High Level seminar of the Council of Europe “*Protecting human rights while fighting terrorism*”, which was held in Strasbourg on June 13-15 2005.

This part of the paper starts with a brief overview of the problematique (A) in the light of recent cases, followed by a section underlining the challenge to international law represented by the use of diplomatic assurances (B). The next section refers to a few key human rights standards (C).

**A. The problematique: Expulsion, deportation and "extraordinary renditions"**

Since 2001, deportation of terrorist suspects took place in the form of four different modalities. Only 1) and 2) are immediately relevant to this discussion paper, 3) and 4) are important as far as the context is concerned.

**1) State acknowledges detention and decides on deportation**

- *Cases: Muhammad Muhammad Ibrahim El-Zari and Ahmed Hussein Mustafa Kamil Agizas, Sweden*

In 2001, these two Egyptians were deported from Sweden to their home country, with the help of the CIA. At least one of them was tortured. Subsequently, a parliamentary investigation took place.

- **Case: Maher Arar, Canada/USA, 2002**

Mr. Arar, a Canadian citizen of Syrian origin, was arrested on 26.9.2002 at John F. Kennedy airport in New York and held in solitary confinement in the Brooklyn Detention centre. Arar was cross-examined continually for several days. He was not permitted to see a lawyer, contact his family or inform the Canadian consulate. Although he was told he would be sent back to Canada, he was actually sent to Syria and handed over to the intelligence service. According to his account, he was tortured.

Later Canadian and Syrian authorities explained they saw no connection between Arar and a terrorist group. An official Canadian investigation headed by a judge is underway.

Mr. Arar has brought a civil suit against the US, which started in October 2005. At the proceeding the US government maintained it had secret evidence that Arar was an al'Quaeda member. It also stated that an alien entering the United States is subject to deportation and only had the right to be protected against gross violations of human rights<sup>3</sup>.

---

<sup>3</sup> Cited in “U.S. Defends Detentions at Airports”, New York Times, 10.08.2005.

## **2) State acknowledges detention and decides on deportation: Extradition of criminal suspects between countries under bilateral or multilateral treaties**

The EU has established a deportation treaty with the United States in 2003, as well as other individual European Countries. The treaty contains a clause prohibiting extradition if there is a threat of the death penalty. In the case of Germany, an additional bilateral treaty was concluded with the US in 2003, which allows the refusal of deportation (apart from the death penalty), if the person is to be tried by an extraordinary judicial tribunal (e.g. military commission in Guantánamo); however this is worded "might..." not "must..." refuse. Treaty provisions vary of course, from one country to another.

## **3) State does not acknowledge detention and does not inform regarding criteria to transfer detainees in third countries: Detention of terrorist suspects in a war context (Afghanistan post-Oct.-2001) or outside a war context, transferral to Guantánamo or other places which are under no judicial control -**

State actors involved: military and intelligence services. No official acknowledgement from states of the names, and charges against detainees, etc. No access to detainees except ICRC, which reports confidentially, i.e. no information was/is, received by the public on prison conditions except for a few visits by members of US Congress and journalists.

## **4) State does not acknowledge detention and does not inform regarding criteria to transfer detainees in third countries:**

- *Abduction of terrorist suspects by an intelligence service, the CIA, handover to another intelligence service* - Certain terrorist suspects were abducted in one country by the CIA and subsequently transported to certain Middle Eastern countries such as Egypt, Jordan, Syria and Morocco, to allow for the use of interrogation methods illegal in the United States. According to media reports, the CIA has sought and received assurances from these governments that detainees would not be tortured. However, these are the same countries the US State Department has talked about for years as having chronic torture problems in its annual human rights reports. A well-known CIA agent, Michael Scheuer, has publicly confirmed this practice<sup>4</sup>.

Abductions and transferrals take place with no involvement of the judicial systems of the home country, the country where people were taken from or the country to which they were transported to. According to Human Rights Watch, 150 persons (US media sources talk about ca. 100)- were transferred to Middle Eastern countries with the help of third countries serving as stopover points and/or offering a facility where abducted people could be held. Countries identified to be part of system are/were Thailand (facility probably closed in 2003 or 2004)\*, Jordan, Poland\*, Rumania\* (countries with an \* have rejected any involvement as well as the Russian Federation). In the following countries formal judicial investigations have been launched: Spain, Norway and Sweden. In Italy and Germany specific cases are investigated (see below).

- *Case: Mullah Abu Omar, Italy, 2003*

Mullah Abu Omar, characterised as a radical Muslim by the Italian media, was apparently under surveillance by Italian intelligence agents when he was abducted in Milan by the CIA, transferred to Egypt via the US air base in Germany, Ramstein (which caused German state

---

<sup>4</sup> „Folter bringt keine brauchbaren Resultate“, Neue Zürcher Zeitung, 16.03.2005.

prosecution to open an investigation), and then transferred to Egypt. He is reported to have been ill-treated. In June 2005, Milan State prosecutors disclosed they had identified 13 CIA agents, and in October 2005, they announced that formal charges have been brought against a female diplomat of the US embassy and 20 additional US citizens.

- *Case: Khaled el-Masri, Germany, 2004*

Khaled el-Masri, a German citizen from Munich, was kidnapped in Macedonia by the CIA with the help of local police and transferred to Afghanistan into a prison where he was abused, according to his account, and then released several months later in Albania. The Munich public prosecutor's office investigated the case, determined that he was a credible witness, and has formally requested the US Department of Justice to help clarify the case.

- B. Seeking diplomatic assurances from countries know for human rights abuses is a challenge to international law

**The UK government seeks bilateral diplomatic assurances from target countries, i.e. Jordan, and openly challenges the European Convention of Human Rights, and indirectly, the Geneva Convention relating to the Status of Refugees. At the beginning of September 2005, UK Home Office Secretary Clarke stated before the European Parliament that an examination of the European Convention was necessary<sup>5</sup>.**

Also, Mohammed Ramzy, who is to be deported to his homeland Algeria has brought a complaint before the European Court of Human Rights against the Netherlands; the decision is to be issued at the end of 2005. Meanwhile, the United Kingdom as well as Italy, Lithuania, Portugal and Slovakia support the Netherlands. The question of deportation appears in a decision of the European Court for Human Rights in 1996, when the ECHR prohibited the UK, referring to the torture prohibition in art. 3 of the European Commission Human Rights, to deport a radical Sikh to India because of the danger that he might be treated in an inhuman

---

<sup>5</sup> "However, on behalf of the United Kingdom Government I also want to say that we believe that it is necessary to look very carefully at the way in which the jurisprudence around application of the European Convention on Human Rights is developing. The Convention, established over 50 years ago in a quite different international climate, has led to great advances in human rights across the continent. Its achievements must be fostered and developed and not undermined, but I believe that in developing these human rights it really is necessary to balance very important rights for individuals against the collective right for security from terrorist violence. Our strengthening of human rights needs to acknowledge a truth which we should all accept: that the right to be protected from torture and ill-treatment must be considered side by side with the right to be protected from the death and destruction caused by indiscriminate terrorism, sometimes caused, instigated or fomented by nationals from countries outside the European Union.

This is a difficult balance to get right and it requires all of us, as politicians, to ask where our citizens – who elected all of us here – would expect us to draw the line. I believe that they expect from us not only the protection of individual rights but also the protection of democratic values such as safety and security under the law.

The view of my government is that this balance is not right for the circumstances which we now face – circumstances very different from those faced by the founding fathers of the European Convention on Human Rights – and it needs to be closely examined in that context. I intend to discuss with colleagues in the Justice and Home Affairs Council how we might best address these issues in a manner consistent with our international obligations. I believe most strongly that the peoples of this continent want to be assured that the regime which defends human rights must be used to defend the rights of all our citizens in a balanced and considered way and that it is our duty to discuss this openly.

In conclusion, I believe that the 'no' votes against the Constitution should be taken as a wake-up call to those who believe in and support the European project to focus on what matters. The right to safety and security is a fundamental concern for all our citizens. Here we can show that Europe can and does deliver real benefits to our citizens. We in the European Union have a responsibility to rise to that challenge. It is not an area where we can fail them".

In European Parliament debates Wednesday 7.09.2005 Strasbourg,

<http://www.europarl.eu.int/omk/sipade3?PUBREF=-//EP//TEXT+CRE+20050907+ITEM-002+DOC+XML+V0//EN&LEVEL=5&NAV=S&L=EN>

way (the case of Karamjit Singh CHAHAL<sup>6</sup>). Countries demand that cases must be weighed against the necessity for national security. However, the ECHR stated that “the activities of the individual in question, however undesirable or dangerous cannot be a material consideration. The protection afforded by article 3 ... is thus wider than that provided by articles 32 and 33 of the UN 1951 Convention on the Status of Refugees”.

The Secretary-General of the Council of Europe, Terry Davis warned strongly not to undermine the prohibition of torture and of deportation to countries where torture occurs<sup>7</sup>. UN Special Rapporteur on torture, Professor Manfred Nowak, has warned against deportation of detainees to countries who practice torture<sup>8</sup>.

### C. Human Rights Concerns

The use of diplomatic assurances is a major concern of numerous international governmental and non-governmental organisations, such as the Council of Europe Commissioner for Human Rights, the European Committee for the prevention of torture, OSCE<sup>9</sup>, the UN Special Rapporteur on Torture<sup>10</sup>, the UN Independent Expert on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, the UN sub-commission for Human Rights<sup>11</sup>, Human Rights Watch<sup>12</sup>, Amnesty International<sup>13</sup> all have commented recently on this issue.

Similarly, the European group of national human rights institutions is very concerned by the expanding use of diplomatic assurances, in light in particular of the principle of non-refoulement, the right to a fair trial, and the absolute prohibition of torture or inhuman or degrading treatments.

---

<sup>6</sup> CHAHAL v. THE UNITED KINGDOM - 22414/93 [1996] ECHR 54 (15 November 1996), <http://www.worldlii.org/eu/cases/ECHR/1996/54.html>

<sup>7</sup> Secretary General of the Council of Europe: - “There are no excuses for torture” Strasbourg, 11.10.2005 - “Torture is a very efficient way to obtain false confessions”, said Terry Davis, Secretary General of the Council of Europe in a statement today.

*“Torture is a full-frontal attack on truth, justice and human rights. It is also a dangerous concession to terrorists, providing them with a pretext to justify their crimes and find new recruits. The prohibition of torture and inhuman or degrading treatment under the European Convention on Human Rights is absolute and applies in all circumstances. It is not negotiable. It includes an absolute ban on transferring any person to another jurisdiction if there are substantial grounds to believe that the person would face a real risk of being subjected to such ill-treatment. This is the ‘settled case-law’ of the European Court of Human Rights and a commonly agreed position of the Governments of the Council of Europe, contained in the 2002 ‘Guidelines on human rights and the fight against terrorism’, which were unanimously approved in the wake of the terrorist attacks in the United States.*

*It is wrong to suggest that this unequivocal legal and political position has changed as a result of recent terrorist threats. There cannot be any question of ‘striking the right balance’ when absolute rights are at stake.*

*The practice of seeking ‘diplomatic assurances’ from the countries of destination that the persons concerned will not be ill-treated does not mean that there is a loophole to be exploited by people looking for an escape route from the absolute prohibition of torture. All European Governments remain under an obligation to assess carefully, in advance and in each individual case, the reliability of such assurances and to refrain from deporting anyone who faces a real risk of being ill-treated.*

*European Governments should not condone torture in other parts of the world. Information obtained under torture must never, under any circumstances, be accepted as evidence in judicial proceedings, regardless of where or by whom they were obtained.”*

<sup>8</sup> See appendix 4.

<sup>9</sup> OSCRE/ODIHR, Background paper on Extradition and Human Rights in the Context of Counter-terrorism , OSCE Experts Workshop on Enhancing Legal Co-operation in Criminal Matters Related to Terrorism, Warsaw, April 2005.

<sup>10</sup> See appendix 4.

<sup>11</sup> Resolution E/CN.4/Sub.2/2005/L.11/Add.1

<sup>12</sup> See appendix 2.

<sup>13</sup> See appendix 3.

First, key international law instruments include the **principle of non-refoulement**, i.e. deportees are not to be sent to countries where they may face torture or cruel, inhuman or degrading treatment or punishment (UN Convention against Torture 1984, art. 3; Convention relating to the Status of Refugees 1951, art. 33, European Convention of Human Rights, art. 3; Optional Protocol No. 7 regarding procedural safeguards during the extradition of foreigners<sup>14</sup>; Council of Europe Guidelines on human rights and the fight against terrorism, art. XII and XIII).

Second, the **right to a fair trial** for detainees is endangered (see UN Covenant of Civil and Political Rights 1966, Art. 9 and 14, European Convention of Human Rights, art. 5, 6; Council of Europe Guidelines on human rights and the fight against terrorism, art. IX and X).

Thirdly, the **absolute prohibition of torture and cruel, inhuman and degrading treatment** is to be ensured, cf. UN Convention against Torture 1984, UN Covenant of Civil and Political Rights, art. 7, European Convention of Human Rights, art. 3; Council of Europe Guidelines on human rights and the fight against terrorism, art. IV, VIII, and XI. The link between expulsion, removal and refoulement of non nationals and torture or inhuman or degrading treatment is acknowledged by the jurisprudence of several UN treaty bodies as well as by the ECHR in the case of *Chahal v. UK*.

## II. Appropriateness of a legal instrument, for example a recommendation on minimum requirements/standards of such diplomatic assurances

The arguments given by States requesting the DH-S-TER to consider the drafting of a legal instrument are the following:

- Diplomatic assurances could ensure respect for the international obligations of states and might motivate governments, which receive deported terrorist suspects to stop torturing detainees.
- Such an approach demands a clear, efficient monitoring system for detained terrorist suspects which require a regular access and public reporting on the results of that monitoring - if governments are prepared to permit monitoring in the first place diplomatic assurances could be an instrument to ensure such a monitoring.
- By transferring detainees to their home countries, Western governments would be less inclined to re-establish detention without charge or trial legislation which is clearly on the negotiating table of parliaments in at least some countries (in Britain, the Anti-Crime Security and Terrorism Act -ACSTA - of 2001, section 4, was such an instrument which had to go because of strong criticisms from the Law Lords in December 2004; instead the Prevention of terrorism Act 2005 was adopted which included control orders by the Home Office Secretary for terrorist suspects who can stay at home, but under specific controls).

<sup>14</sup> Protocol No. 7 to the ECHR, 22nd November 1984 (STE No: 117)

Entry into force: 1st November 1988

Party States: 29

Eight Member States of the European Union are parties to this Protocol. Germany, Spain, Ireland, the Netherlands and Portugal have simply signed it. Belgium and the United Kingdom have not signed it.

Rights codified: procedural safeguards relating to the expulsion of aliens, right of review by a higher tribunal in criminal matters, the right to compensation for miscarriages of justice, right not to be tried or punished twice, and equality between spouses.

While the European group of National Human Rights Institutions understands the motive to solve the problem of terrorist suspects in countries of residence - and the alternative could be of course detention without charge or trial as in the UK under ACTSA – it is of the opinion that sending people to countries with a robust history of torture is inherently risky and therefore in violation of international human rights obligations of the sending country.

The European Group of National Human Rights institutions indeed notes that:

- In the past, assurances have been given and proved ineffective. There is no evidence from human rights reporting that torture of suspected terrorists has declined and there has been no changes in the treatment of prisoners by countries who have receive deported people, despite the fact that diplomatic assurances were given. As underlined by various international bodies, the sole use of diplomatic assurances acknowledges the fact that a risk exists for the deported person. However, the mere existence of such risk, and in view of binding legal obligations, is sufficient to prohibit the expulsion.
- No practical arrangements for effective monitoring of the prohibition of torture and cruel, inhuman or degrading treatment by the receiving countries exists. Some National Human Rights institutions in receiving Middle Eastern countries have been approached by States to monitor the post-return effectiveness of compliance to the assurance given, are not willing to perform such monitoring: it is not within their mandate, nor do they have the means or resources to ensure effective post-return monitoring. Moreover, they might come under considerable political pressure, which impairs an independent monitoring role.

As the CPT underlined in its 15th general report, there is no “convincing proposal for an effective and workable mechanism” for such monitoring”. Some visits by diplomats who have usually no practical training how to visit prisons is unlikely to constitute an effective remedy. Only regular monitoring visits by qualified human rights observers could do serious work; but which institution apart from the ICRC which works confidentially would have and offer such personnel? Moreover, confidentiality would be irrelevant in the scenario under consideration, as findings of the monitoring should be published and not be conveyed only to governments confidentially so that no political negotiations can take place whether perhaps a certain amount to ill- treatment is serious enough to be considered a breach of the diplomatic assurance (and - would this prisoner be brought back to the sending country or how would his or her rights be protected?). The CPT also underlined in its 15th general report that any deportation procedure must be open to challenge before an independent authority, with suspensive effect.

It is unlikely that certain Middle East governments will grant access to a group of detainees whose detention they have so far kept hidden from the public eye. And as Human Rights Watch argues, " It defies common sense to presume that a government that routinely flouts its binding obligations under international law can be trusted to respect a nonbinding promise in an isolated case". Therefore, any standard or minimum requirement drafted by the Council of Europe would by nature be useless.

- Deportation under uncertain conditions of an effective prohibition of torture violates international and national legal obligations of the sending state. Its judicial system does not dispose of any instruments to correct dangerous developments in time to protect the health and security of the deportee once s/he has left the sending state.

**Consequently, the European Group of National Human Rights Institutions is not in favour of a new international instrument specifying (new) state obligations in the case of deportation of terrorist suspects and urges the members of the DH-S-TER not to draft any standards or minimum requirements as this would de facto indirectly legitimize illegal practices under international law.** The Refugee convention, the UN Covenant on Civil and Political rights, the UN Convention against torture and the ECHR are binding legal instruments that offer sufficient safeguards which should be respected.