

DANGEROUS DEALS

EUROPE'S RELIANCE ON 'DIPLOMATIC ASSURANCES' AGAINST TORTURE

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INTRODUCTION

Sami Ben Khemais Essid was deported from Italy to Tunisia in June 2008 in the face of overwhelming evidence that he would face a real risk of torture and ill-treatment at the hands of the Tunisian government. The Italian government invoked promises proffered by the Tunisian authorities that he would not be ill-treated upon return. Eight months after his return, Sami Ben Khemais Essid was taken from his cell in Mornaguia prison and brought to the Tunisian Ministry of Interior where he alleges that he was tortured and ill-treated during a two-day interrogation. No investigation of his charges of mistreatment has ever been conducted. The European Court of Human Rights subsequently ruled in February 2009 – even without knowledge of his alleged mistreatment, having only heard evidence that Sami Ben Khemais Essid was not ill-treated *immediately* upon return -- that Italy violated the absolute ban against sending a person back to a risk of torture and other ill-treatment. The European Court categorically rejected the notion that the Tunisian government's "diplomatic assurances" could shield Sami Ben Khemais Essid from mistreatment – and the Court was right to express that concern.

The Spanish government likewise alleged that Russian officials promised access for independent monitors for visits to Murad Gasayev, a Chechen asylum-seeker, if the government were to extradite him to Russia, notwithstanding the clearly established risk of torture he would face on return. Based in part on this representation, the Audiencia Nacional refused Murad Gasayev's appeal against extradition. Monitors named by the Spanish authorities in court, however, had not been consulted about these arrangements and declined on principle to conduct visits in accordance with them. Murad Gasayev was extradited in December 2008 and was visited in prison pursuant to the Russian assurances by Spanish officials, not independent monitors. He was released from Russian custody without charge or trial in August 2009, and he and his family have been continually harassed and threatened by Russian law enforcement officials.

The travails of Sami Ben Khemais Essid and Murad Gasayev lay bare the fiction that promises of humane treatment from governments whose police, security services officers, prison personnel, or other agents routinely torture and ill-treat returnees can be trusted. They cannot. These two cases -- and others detailed in this report -- illustrate a number of fundamental flaws inherent in such diplomatic promises: the lengths to which some sending governments will go to convince courts that assurances can "work", including by misrepresenting the arrangements in place (e.g. claiming that independent bodies will monitor the individual, without having consulted with those bodies); lack of effective means for the sending government to protect a person once a transfer occurs; the absence of good faith willingness and/or ability to ensure respect for the rights of a returnee on the part of the receiving state—already acknowledged as a country where torture, ill-treatment, and other human rights violations are practised, often with impunity; the absence of incentive on the part of both governments to acknowledge a breach of the assurances and to investigate such breaches; and the vague scope of the promises, including how long they are supposed to apply to a specific person.

Amnesty International has long challenged the notion that unenforceable, bilateral diplomatic assurances from one government to another provide a reliable safeguard against serious human

rights violations, most notably torture and ill-treatment. Such unreliable promises, made outside the international multilateral treaty regime that was created specifically to bind governments in a global effort to prevent torture, undermine the absolute ban on torture and other cruel, inhuman or degrading treatment or punishment, which includes the prohibition against sending persons back to places where they are at risk of such abuse (the *non-refoulement* obligation). The claim that post-return monitoring can be a corrective for deficiencies in legislation, the judiciary, and the prison or detention system that allow an environment where torture flourishes, is unwarranted. As the research and analysis included in this report demonstrate, sporadic monitoring alone cannot eliminate the risk of torture or other ill-treatment that a particular person would otherwise face – and no reputable independent monitoring body has ever made that claim.

Sami Ben Khemais Essid and Murad Gasayev join the ranks of a number of other persons labelled by governments as national security threats or terrorism suspects who have been deported, expelled, extradited or otherwise transferred (including via unlawful rendition) by European countries -- or threatened with such transfers -- to places where they were at risk of torture or other ill-treatment, despite assurances from the receiving governments that they would be safe on return. A few European countries employed diplomatic assurances against torture and other ill-treatment in a smattering of deportation and extradition cases prior to the attacks of 11 September 2001 on the USA. But in the aftermath of those attacks, the number of countries in Europe that have adopted or seek to adopt this practice has grown considerably.

In addition to these forcible returns from Italy to Tunisia and Spain to Russia respectively, Amnesty International and other human rights organizations have documented cases of returns from Austria to Russia, Georgia to Russia, Sweden to Egypt, and Turkey to Uzbekistan, where diplomatic assurances of humane treatment have been breached and people have been tortured or ill-treated, or subjected to other human rights violations on return, such as being held incommunicado with no access by family members, lawyers, or others. A number of persons in a range of countries across Europe have been threatened with such forcible return and either a court has halted the return or the proceedings are still ongoing. In some cases, the European Court of Human Rights has issued an order requiring a state to halt a removal until the Court reviewed the case.

Domestic courts in European countries including France, Germany, the Netherlands, Slovakia, and the UK, among others, have ruled that diplomatic assurances from authorities in countries such as Algeria, Libya, Russia, Tunisia, and Turkey were not reliable and have halted deportations and extraditions where a person was at risk of torture and other ill-treatment. The European Court of Human Rights has issued five judgments since February 2008, including in the case of Sami Ben Khemais Essid, that diplomatic assurances against torture and ill-treatment from the authorities in Colombia, Tunisia, Turkmenistan, and Uzbekistan did not mitigate the risk of mistreatment on return. To date, the European Court has never permitted a transfer in reliance on diplomatic assurances from a European state to a country where torture is routinely practised or where persons belonging to specific groups are particularly targeted for torture.

Intergovernmental bodies, including a number of United Nations (UN) special procedures, and committees of the Parliamentary Assembly of the Council of Europe and the European Parliament, have expressly called on member states to refrain from using diplomatic assurances

against torture and other ill-treatment. The UN Special Rapporteur on torture Manfred Nowak noted in his February 2010 report to the UN Human Rights Council that he has stated “repeatedly” that “diplomatic assurances related to torture are nothing but an attempt to circumvent the absolute nature of the principle of non-refoulement”.¹

Since 2003, individual petitions lodged before UN treaty bodies, including the Committee against Torture and the Human Rights Committee, have resulted in three decisions finding that diplomatic assurances from Egypt and Turkey were not sufficient to mitigate the risk of torture alleged by a petitioner. No UN treaty body has ever ruled in favour of a government that has sent or attempted to send a person back to a place where he or she is at risk of torture based on promises of humane treatment from the country of return.

International and national human rights non-governmental organizations (NGOs) have spoken virtually with one voice against reliance on diplomatic assurances against torture, largely based on reliable field research in many countries where torture is practised. The February 2009 report of the Eminent Jurists Panel of the International Commission of Jurists (ICJ), for example, calls on states to reaffirm their commitment to the *non-refoulement* principle and urges them “not to rely on diplomatic assurances or other forms of non-binding agreements to transfer individuals when there is a real risk of serious human rights violations”.²

Despite such widespread criticism of the use of diplomatic assurances, many governments continue to attempt to secure them, seeking to justify forcible returns of persons they allege are national security and terrorism suspects. As the research and opinion in this report demonstrate, governments are using diplomatic assurances in their own self-interest to rid themselves of foreigners alleged to be involved in acts of terrorism, instead of prosecuting those persons for any crimes of which they are accused. But under international law, the ban on torture and other ill-treatment, including sending a person to a place where he or she is at risk of such abuse, is absolute: the status of the person or crimes he or she might be suspected of committing is simply irrelevant and cannot be taken into consideration in assessing the risk.

Amnesty International calls on the member states of the European Union (EU) and the Council of Europe to reject unequivocally the failed experiment of accepting unreliable, unenforceable promises of humane treatment from governments that torture and to recommit to comply with their absolute obligation not to send persons, no matter what their alleged crime or status, to places where they are at risk of torture and other ill-treatment. It is abundantly clear that promises of humane treatment in such circumstances simply cannot be trusted and they should no longer be used by European governments in an attempt to re-brand returns to the risk of torture as “human rights friendly” measures.

This report focuses exclusively on recent developments with respect to the use of diplomatic assurances against torture and other ill-treatment by European governments.³ It is not a comprehensive survey of all cases in the Council of Europe region, but an effort to select key cases and initiatives in European countries to highlight the growing use of assurances in the name of countering terrorism; the role of domestic and regional courts – and other international bodies – as the bulwark against the practice; and continuing advocacy and campaigning endeavors to end the practice once and for all.

OPPOSITION TO DIPLOMATIC ASSURANCES

The global ban on torture and other cruel, inhuman or degrading treatment requires governments to take positive steps to prohibit such abuse, prevent it from happening, prosecute those involved in torture, and provide reparation and rehabilitation to victims. In addition to directly forbidding state actors from using torture or other ill-treatment, the ban prohibits a government from expelling, returning, extraditing or otherwise transferring a person to another country where there are substantial grounds for believing that he or she would be in danger of being subjected to torture or other ill-treatment. This dimension of the torture ban, the *non-refoulement* obligation, is a primary tool of torture prevention – and it is under assault around the globe.

Governments claim that forcibly removing foreigners they deem national security threats or terrorism suspects to places where torture is routinely employed by security and intelligence agencies or the police is a necessary counter-terrorism tool that allows them to rid their countries of unwanted threats. Moreover, they argue that by securing promises from governments not to torture people who are sent there – in the form of diplomatic assurances – they comply with their obligations under the torture ban. Amnesty International challenges that claim.

Amnesty International's principled and pragmatic opposition to diplomatic assurances has appeared in a number of campaign documents, and also in joint statements in partnership with other human rights organizations.⁴ In brief, that opposition is two-pronged: first, it is based in principle on the need to maintain respect for the existing legally-binding international machinery of human rights protection; second, on a more practical level, it is based on inherent deficiencies with respect to the reliability, efficacy and sufficiency of diplomatic assurances against torture and other ill-treatment. Taken together, these concerns comprise a critique of the use of diplomatic assurances based on the clear threat they pose to the international mechanisms created to eradicate torture and returns to risk of torture, and the more specific ways in which governments claim that these promises can be trusted to work, when the research strongly indicates that they cannot.

First, the absolute ban on torture and other cruel, inhuman and degrading treatment or punishment requires that all governments take positive steps toward the global eradication of such abuses.⁵ The prohibition of torture and other ill-treatment remains in full force at all times and places in respect of all persons: no exception is permitted even in situations of armed conflict or any other emergency that “threatens the life of the nation.”⁶ Under customary and treaty law, all states have a legal interest, both jointly and individually, in ensuring that torture and ill-treatment practised by other states are prevented and prohibited, and that all persons are protected from such treatment, anywhere and in all places.⁷ Implicit in such a legal interest is a general obligation to cooperate in and utilize the machinery of international enforcement and remedy in good faith towards these ends.⁸ This obligation is given further force by the fact that the prohibition of torture is also a *jus cogens* peremptory norm of international law.⁹

In a case where diplomatic assurances against torture and other ill-treatment are procured, the sending state prioritizes its perceived national interest in “doing a deal” to allow it to “rid” itself of an individual, over respect for its existing absolute legal obligation of *non-refoulement*, owed to the individual concerned and to other states, not to expose anyone to torture or other ill-treatment.¹⁰ The sending state also fails to engage the established legal machinery to seek fulfillment of the legal obligations already owed to it by the receiving state vis-à-vis the ongoing general situation of torture and other ill-treatment in the receiving country. By so doing, the sending state implicitly tolerates, and may even in effect encourage, the continuation of the broader pattern of torture violations in the receiving state. As the Eminent Jurists Panel has stated, “reliance on diplomatic assurances is wrongly being used as a way of ‘delegating’ responsibility for the absolute prohibition on torture to the receiving country alone. That undermines the truly *international* nature of the duty to prevent and prohibit torture.”¹¹

States and global civil society have endeavored for decades to establish this international system, based on the consensus that torture is one of the most abhorrent human rights violations. That system is fundamentally undermined when states seek to circumvent it with non-binding, bilateral promises not to torture. Reliance on such promises allows states to neglect and evade their legal obligations, including by avoiding accountability and effective remedy for breaches of the absolute ban on torture and other ill-treatment and bypassing the prohibition against transferring people to places where they risk such violations.

The second prong of Amnesty International’s opposition to diplomatic assurances arises from inherent deficiencies in diplomatic assurances that militate against them providing a reliable safeguard against torture and other ill-treatment. Among these concerns, examples of which are described in sections below, are the following:

- Given the absolute nature of the prohibition of torture under international law, its status as a crime under international law, and the stigma associated with its use, governments that practise torture routinely deny it;¹²
- Deniability is made plausible by the routine failure of the state to investigate allegations of torture and bring those responsible to account, creating an environment of impunity for perpetrators; and by the fact that torture is usually practised in secret, with the collusion of law enforcement and other government personnel, including medical staff in some cases, and with the understanding that no one will be held accountable for the abuse;
- Persons subject to torture and other ill-treatment are often afraid to recount their abuse to their lawyers, family members, and monitors for fear of reprisals against them or their families;
- In the event a breach is alleged, bilateral diplomatic assurances are not legally binding and lack an enforcement mechanism, leaving it to the two governments involved to voluntarily assume responsibility for investigating breaches of the assurances and holding perpetrators accountable;
- Governments have no incentive to acknowledge a breach of diplomatic assurances, and indeed have strong incentives to remain ignorant of or to ignore potential breaches; such an acknowledgement would not only amount to an admission that the governments had violated the absolute ban on torture and sending people to places where they were at risk of torture, but

would likely complicate efforts to rely on assurances in the future;

- Even when breaches are detected by the sending government, there is no evidence to support the notion that serious diplomatic consequences will result, and it has no means of ensuring a cessation of the breaches or effective protection of the individual;
- Attempts to forcibly return people in reliance on a bilaterally-negotiated diplomatic assurance covering transfers based on “security” or “terrorism” grounds may lead to some individuals being labelled as “terrorists” who may not have been so labelled by the receiving country in the past; the assurances themselves thus may put people at risk of ill-treatment on return.

POST-RETURN MONITORING

In recent years, some governments have asserted that post-return monitoring can render the use of diplomatic assurances against torture and other ill-treatment compatible with international human rights obligations.¹³ Amnesty International's long experience in monitoring patterns of human rights violations worldwide strongly indicates that no system of post-return monitoring of individuals will render assurances as an acceptable alternative to rigorous respect for the absolute prohibition of transfers to risk of torture or other ill-treatment. Such *ad hoc* monitoring schemes necessarily omit the broader institutional, legal, and political elements that can make certain forms of system-wide monitoring of all places of detention (and therefore all detainees) in a country one way, in combination with other measures, of potentially reducing the country-wide incidence of ill-treatment over the long-term.

As the European Court of Human Rights has acknowledged, however, system-wide monitoring cannot guarantee the humane treatment of particular individuals. In a series of cases dealing with the return of alleged national security suspects from Italy to Tunisia, the Court highlighted the research of human rights organizations, including Amnesty International, documenting the serious torture and ill-treatment of such detainees in Tunisia and "concluded that international reports mentioned numerous and regular cases of torture and ill-treatment meted out in Tunisia to persons suspected or found guilty of terrorism and that visits by the International Committee of the Red Cross to Tunisian prisons could not exclude the risk of subjection to treatment contrary to Article 3 [the ban on torture and ill-treatment]".¹⁴

On the other hand, a series of post-return visits to a particular individual or just a few people would also put the detainee in an untenable position: the person is forced to choose between staying silent or reporting abuse in a situation where he or she will be clearly identifiable as the source of the report. As noted above, and borne out by Amnesty International's research, even if the individual decided to take the risk of reporting the abuse while he or she is still at the mercy of the abusers, it is unlikely that either the sending or the receiving state would be willing to acknowledge that torture or ill-treatment had occurred after return. To make such an acknowledgement would be to admit a breach of a core obligation under international human rights law, and to concede the failure of the assurance, possibly frustrating efforts to rely on such agreements in the future.

Some governments -- notably the United Kingdom in the context of negotiating "memorandums of understanding" with some governments for the deportation of their nationals in reliance on diplomatic assurances -- have identified local or national organizations and have contracted with them to conduct post-return monitoring visits. For example, the Ethiopian National Human Rights Commission has agreed to make visits to Ethiopians deported from the UK and returned to Ethiopia. The Adaleh Centre for Human Rights was nominated by the Jordanian government and has been retained by the UK government to monitor the treatment of Jordanian nationals returned from the UK to Jordan under a bilateral deportation agreement between the two governments.

Neither of these bodies is endowed with a statutory mandate that allows unhindered, unannounced access to all places of detention in their countries nor are they imbued with the

influence and authority to ensure that if torture and other ill-treatment are detected, an independent and impartial investigation of those allegations will be conducted, perpetrators held accountable, and victims afforded a remedy.

The realities of any post-return monitoring of particular returnees under diplomatic assurances are in stark contrast to a key prerequisite of proper system-wide monitoring, i.e. ensuring that a large number of detainees are visited in sufficiently private conditions to ensure that the authorities do not know which individuals provided which information – thereby helping to protect detainees against reprisal and better reassure detainees that they can safely provide critical information. The absence of any enforcement or remedial mechanism in the event of a breach of the assurances only further underscores the ineffectiveness of an assurance to prevent harm that is, in any event, never truly reparable.

Indeed, by the wording of the UN Convention against Torture, stating that all victims of torture have a right to “redress ... including the means for as full rehabilitation as possible”,¹⁵ states themselves acknowledge the reality that “full rehabilitation” for torture is simply not achievable – the nature of torture itself means that the most one can hope for is “as full rehabilitation as possible”. Once it has occurred, nothing can truly fully erase the consequences of torture for the victim. It was the very recognition of the irreparable nature of the harm caused by torture (and other similar human rights violations) that gave rise to the *non-refoulement* obligation in the first place.¹⁶

Nothing in any post-return monitoring mechanism, no matter how rigorous, can possibly change the irreparable nature of the harm caused by torture. Further, monitoring mechanisms that are not part of an established framework with a proven track record not only in detecting cases of abuse, but also consistently bringing all perpetrators fully to justice and immediately stopping all further abuse, and in actually reducing the incidence of torture, cannot seriously be considered as having any significant preventive or deterrent effect. Thus, “post-return monitoring” of any kind simply fails to address the fundamental incompatibility of diplomatic assurances against torture and other ill-treatment with international human rights obligations. As the Council of Europe Commissioner for Human Rights has concluded, “it is absolutely wrong to put individuals at risk through testing such dubious assurances”.¹⁷

INTERNATIONAL JURISPRUDENCE AND AUTHORITY

EUROPEAN COURT OF HUMAN RIGHTS

In a 1996 case involving the UK government's efforts to deport a Sikh named Karamjit Singh Chahal to India, the European Court of Human Rights for the first time opined on the reliability of diplomatic assurances against torture and other ill-treatment from a government in a country where persons similarly situated to the petitioner were routinely targeted for torture. The Court in *Chahal* ruled that the ban on *refoulement* to risks of torture or inhuman or degrading treatment (as prohibited by Article 3 of the European Convention on Human Rights (ECHR)) was absolute and allowed no exceptions. In response to the UK government's claim that Karamjit Singh Chahal posed a threat to national security, the Court clarified that in the context of the absolute ban on returning a person to face a risk of torture or other ill-treatment, "the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration". The mistreatment of Sikhs in the Punjab at the hands of certain members of the Indian security forces was acknowledged by the Court as a "recalcitrant and enduring problem. Against this backdrop, the court is not persuaded that the above [diplomatic] assurances would provide Mr. Chahal with an adequate guarantee of safety."¹⁸

The European Court categorically reaffirmed the principles set out in *Chahal v UK* in a series of judgments between 2008 and 2010: *Saadi v Italy*, *Ismoilov v Russia*, *Ryabikin v Russia*, *Ben Khemais v Italy*, and *Klein v Russia*. The Court has not yet held that removal of a person on the basis of diplomatic assurances against torture and other ill-treatment *per se* violates Article 3 of the ECHR. However, the Court has "cautioned against reliance on diplomatic assurances against torture from a state where torture is endemic or persistent"¹⁹ and has held that "[d]iplomatic assurances are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary to the principles of the Convention".²⁰ Indeed, in each of the five cases, the Court ruled decisively that the diplomatic assurances received by the sending states were not sufficient to safeguard against abuse upon return to the receiving country.

In the *Saadi v Italy* judgment, issued in February 2008, the European Court held that assurances, such as those proffered by the Tunisian authorities, that merely restate domestic legal and international treaty obligations "are not in themselves sufficient to ensure adequate protection...where...reliable sources have reported practices resorted to or tolerated by the authorities which are manifestly contrary" to the ECHR.²¹

The European Court went even further and articulated what stands to date as the Court's approach to cases involving diplomatic assurances against torture and ill-treatment. Even if the Tunisian government had provided more detailed assurances, "that would not have absolved the Court from the obligation to examine whether such assurances provided, in their practical application, a sufficient guarantee that the applicant would be protected against the risk of treatment prohibited by the Convention. The weight to be given to assurances from the receiving

State depends, in each case, on the circumstances obtaining at the material time".²²

The April 2008 *Ismoilov v Russia* judgment halted the impending extradition by Russia of 13 Uzbek refugees to Uzbekistan: "The Court is not persuaded that the assurances from the Uzbek authorities offered a reliable guarantee against the risk of ill-treatment."²³ Similarly, taking note of Turkmenistan's extremely poor conditions of detention, as well as the practice of torture and ill-treatment, the Court's June 2008 judgment in *Ryabikin v Russia* ruled that the planned extradition of an alleged white collar criminal to Turkmenistan violated the ban on *refoulement* under Article 3 ECHR. The Court stated that assurances from Turkmenistan were not sufficient to ensure adequate protection against ill-treatment.²⁴

Sami Ben Khemais Essid had already been deported to Tunisia, in violation of an order for interim measures, when the Court ruled in February 2009 that Tunisia's diplomatic assurances were not sufficient to ensure against Sami Ben Khemais Essid's ill-treatment and found Italy in violation of Article 3 of the ECHR.²⁵ The *Ben Khemais* judgment invoked the Court's decision in *Saadi*, which concluded that "international reports mentioned numerous and regular cases of torture and ill-treatment meted out in Tunisia to persons suspected or found guilty of terrorism and that visits by the International Committee of the Red Cross to Tunisian prisons could not exclude the risk of subjection to treatment contrary to Article 3" and "in virtually all cases the authorities had failed to carry out investigations or bring the alleged perpetrators to justice."²⁶

The basic principles articulated in *Saadi* were reiterated in the April 2010 judgment of *Klein v Russia*.²⁷ The European Court ruled in *Klein* that Russia would be in violation of Article 3 of the ECHR if it extradited an Israeli mercenary to Colombia where he previously had been convicted of terrorism-related offences under Colombian law, despite diplomatic assurances of humane treatment from the Colombian authorities. The Court questioned the "value" of the Colombian assurances, and cited the *Saadi* standard marking diplomatic assurances as "insufficient" when pitted against reliable sources reporting abusive practices by the authorities that ran contrary to the principles articulated in the ECHR.²⁸

As of April 2010, the European Court had a number of pending cases in which diplomatic assurances against torture or other ill-treatment were at issue. These cases include *Othman v UK*, involving a planned deportation from the UK to Jordan (see section below on the UK); *Atmaca v. Germany*, involving a planned extradition from Germany to Turkey (see section below on Germany); and *Bilasi-Ashri v. Austria*, involving a previously planned return to Egypt (see section below on Austria).

With *Saadi*, *Ismoilov*, *Ryabikin*, *Ben Khemais*, and *Klein* the European Court of Human Rights has reaffirmed its strong commitment to the *non-refoulement* obligation set out in *Chahal*. The European Court has thus expressed its unwillingness to weaken the absolute prohibition against sending a person to a place where he or she would face a real risk of torture and other ill-treatment by endorsing the negotiation by states of dubious bilateral "human rights" agreements under the table. Pending cases will undoubtedly benefit from the Court's apparent concerns about the reliability of "gentlemen's agreements" in the form of diplomatic assurances from states where torture and other ill-treatment is widespread or endemic or is routinely practised against a group of persons of which the returnee is a member.

UN TREATY BODIES

The Committee against Torture (CAT) has issued authoritative interpretations of states parties' obligations under the UN Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment with respect to the practice of seeking and securing diplomatic assurances against torture and ill-treatment to effect returns of people considered to be threats to national security.

The CAT has taken an approach similar to that articulated by the European Court of Human Rights, electing to assess risk on return and the sufficiency of any diplomatic assurances on a case-by-case basis. In its 2006 conclusions and recommendations on the USA's periodic report, however, the CAT rebuked the US government for attempting to justify the CIA-led rendition programme by claiming that it secured diplomatic assurances from the receiving country if a person were at risk of such abuse in the context of a rendition operation. Expressing concern about the secrecy of such operations, lack of judicial oversight, and absence of follow-up to monitor individuals' treatment post-return, the CAT stated categorically that the USA should not rely on diplomatic assurances from States that "systematically violate the Convention's provisions".²⁹ The Committee declined to rule out the use of diplomatic assurances entirely, recommending that the USA should "establish and implement clear procedures for obtaining such assurances, with adequate judicial mechanisms for review, and effective post-return monitoring arrangements".³⁰

The CAT, however, has not found specific assurances against torture sufficient in any individual petition case to allow a transfer that otherwise would have been prohibited by Article 3 of the Convention against Torture. In two of the three cases for which opinions have been issued – *Agiza v Sweden* (expulsion from Sweden to Egypt) and *Pelit v Azerbaijan* (extradition from Azerbaijan to Turkey) – the CAT rejected the Egyptian and Turkish governments' diplomatic assurances as insufficient and found a violation of Article 3 by Sweden and Azerbaijan respectively. In the third case, *Attia v Sweden*, as will be explained below, the Swedish government failed to disclose critical information to the CAT regarding the reliability of assurances against torture from the Egyptian government. In the absence of that information, the CAT assumed that Hanan Attia would be safe on return. The CAT corrected that assumption in the *Agiza* case when it found that the diplomatic assurances from the Egyptian authorities, which the CAT found to apply to both Hanan Attia, Ahmed Agiza's wife, and Ahmed Agiza himself – "which, moreover, provided no mechanism for their enforcement, did not suffice to protect against this manifest risk".³¹

Ahmed Agiza and Mohamed al-Zari, Egyptian asylum-seekers, were apprehended in Stockholm in December 2001 by Swedish law enforcement officials. The men were beaten by the Swedish police while in transport to Bromma airport and then handed over to CIA operatives and rendered to Egypt, where they were subsequently tortured and ill-treated in Egyptian custody. The Swedish government claimed that it had obtained diplomatic assurances against torture and ill-treatment, the death penalty, and unfair trial from the Egyptian authorities prior to transfer.

After her husband's abduction and expulsion, Hanan Attia, Ahmed Agiza's wife, and her five children went into hiding and subsequently lodged an individual petition with the CAT alleging that their own pending expulsion would violate Sweden's obligations under the Convention against Torture. Hanan Attia presented information to the CAT indicating that, despite the

diplomatic assurances, Ahmed Agiza had been mistreated in Egyptian custody. Based largely on information from the Swedish government from reports of its post-return monitoring visits to Ahmed Agiza, the CAT ruled in November 2003 that Egypt was complying with its diplomatic assurances and therefore Hanan Attia would not be at risk on return.³²

When Ahmed Agiza's petition came up for consideration by the CAT it was revealed that the Swedish government had failed to fully disclose a January 2002 monitoring report which contained allegations by Ahmed Agiza and Mohamed al-Zari that they had been beaten and otherwise ill-treated in Egyptian custody in the weeks following their return. This information, coupled with Ahmed Agiza's subsequent allegation that he had also been subject to other abuse, including electric shocks, led the CAT to rule in May 2005 that Ahmed Agiza was in fact at risk of torture at the time he was rendered to Egypt and that Egypt's diplomatic assurances did not provide a sufficient safeguard against that manifest risk of torture and other ill-treatment.

In November 2006, the UN Human Rights Committee made a similar finding against Sweden of a violation of Article 7 of the ICCPR in the case of Mohamed al-Zari.³³

The *Agiza* and *Alzery* decisions are the only judgments of judicial or quasi-judicial bodies that have ruled on states' international legal obligations with respect to torture abuses, including the use of unreliable diplomatic assurances, associated with the US government's rendition programme, operated in the context of the global "war on terror" in the aftermath of 11 September 2001 terrorist attacks on the USA.³⁴ The cases highlight the fact that post-return monitoring schemes cannot in themselves prevent ill-treatment, governments have an interest in ensuring that no breach of the assurances comes to light even when a breach can be detected, and a sending government has little sway over a receiving government to investigate, let alone to effectively prevent or remedy, possible abuse. The Egyptian authorities have repeatedly rebuffed overtures by the Swedish government with respect to a full and impartial investigation into Ahmed Agiza's and Mohamed al-Zari's allegations of torture, yet Swedish-Egyptian diplomatic relations do not seem to have suffered at all.³⁵ (See section on Sweden below for updates in these cases.)

The extradition of Elif Pelit, alleged to be associated with the Kurdish Worker's Party (PKK), from Azerbaijan to Turkey in October 2006 in reliance upon diplomatic assurances from the Turkish authorities, led her to lodge an individual petition with the CAT, the third petition addressing the issue of diplomatic assurances.³⁶ Elif Pelit was extradited despite an order for interim measures from the CAT requesting that the Azerbaijani authorities delay her transfer until the Committee had the opportunity to review her case. Before travelling to Azerbaijan, Elif Pelit had been granted refugee status by Germany in 1998 based on her claims that she was tortured in detention in Turkey in the mid-1990s. She submitted evidence to the CAT, including from Amnesty International, indicating that most PKK-associated prisoners are held in F-type prisons in Turkey, where ill-treatment had been and continued to be a serious human rights problem.

The CAT ruled in May 2007 that Azerbaijan had violated Article 3 of the Convention against Torture, despite assurances of humane treatment from the Turkish authorities. The CAT questioned why the Azerbaijani authorities had failed to respect Elif Pelit's refugee status, particularly "in circumstances where the general situation of persons such as the complainant

and the complainant's own past experiences raised real issues under article 3".³⁷ The Azerbaijani government's claim that Turkey promised and in fact did allow access for post-return monitoring did not convince the Committee that Azerbaijan had complied with its obligations under the Convention:

"The Committee further notes that the Azeri authorities received diplomatic assurances from Turkey going to issues of mistreatment, an acknowledgment that, without more, expulsion of the complainant would raise issues of her mistreatment. While a certain degree of post-expulsion monitoring of the complainant's situation took place, the State party has not supplied the assurances to the Committee in order for the Committee to perform its own independent assessment of their satisfactoriness or otherwise (see its approach in *Agiza v Sweden*), nor did the State party detail with sufficient specificity the monitoring undertaken and the steps taken to ensure that it both was, in fact and in the complainant's perception, objective, impartial and sufficiently trustworthy".³⁸

The CAT decisively reaffirmed in *Pelit* that the *non-refoulement* obligation applies to transfers in the extradition context, that proof of a person's mistreatment *after* return was not required to determine whether a violation of Article 3 had occurred, and that the Committee expected to conduct an independent assessment of any diplomatic assurances and post-return monitoring schemes to reach its own conclusion regarding whether such guarantees sufficiently reduced risk of abuse on return.

COUNTRY DEVELOPMENTS

The following survey of developments with respect to the use of diplomatic assurances by governments in Europe is not exhaustive. Certain cases in key countries demonstrate how governments will go to great lengths to justify returns on alleged national security grounds based on unreliable and insufficient diplomatic assurances. Courts in a number of countries have served as the bulwark against this practice, halting some planned returns in recognition that assurances from governments that facilitate torture are inherently unreliable. In other cases, governments, with the sanction of the domestic courts, have proceeded with such forcible returns.

AUSTRIA

The Austrian government appears recently to have adopted a principled position against the use of diplomatic assurances against torture, despite past efforts to extradite persons in two separate cases.

Muhammad 'Abd al-Rahman Bilasi-Ashri, an Egyptian national alleged to be associated with militant Islamist groups, first applied for asylum in Austria in 1995. He had been convicted in a state security court *in absentia* in Egypt and sentenced to 15 years in prison on charges of membership in a terrorist organization. The Egyptian government first sought his extradition in 1998. The Austrian government attempted to comply with the Egyptian extradition request, despite evidence that he would be at risk of torture and other ill-treatment if returned to Egypt.³⁹ An Austrian court rejected his appeal against extradition in 2001, but conditioned his return on the Austrian government securing diplomatic assurances from the Egyptian authorities against ill-treatment and for a fair retrial in a civilian court. The Egyptian government rejected the request for assurances and the effort to extradite Muhammad 'Abd al-Rahman Bilasi-Ashri was halted.

The Austrian government attempted to extradite him again in 2005, having received diplomatic assurances from the Egyptian authorities. In June 2005, the Austrian Regional Court of Krems decided that the extradition of Muhammad 'Abd al-Rahman Bilasi-Ashri was permissible as there were no new facts or evidence that would warrant a change in the 2001 decision allowing extradition if the Egyptian authorities agreed to meet certain conditions regarding his treatment after he was returned. Muhammad 'Abd al-Rahman Bilasi-Ashri's appeal failed in September 2005. Amnesty International expressed concern at that time that Muhammad Bilasi-Ashri would be at serious risk of torture and other serious human rights violations if returned to Egypt.⁴⁰ In November 2005, the European Court of Human Rights issued an order for interim measures and extradition proceedings were suspended in accordance with the European Court order. Consideration of Muhammad 'Abd al-Rahman Bilasi-Ashri's case remains pending at the European Court.

In another case, Akhmet A., a Russian citizen, was extradited in February 2004 to Russia despite pending asylum procedures, after the Russian Prosecutor General applied for his extradition on charges of the abduction of two members of the Russian military, and the illegal acquisition and possession of weapons. The Regional Appeal Court in Austria granted the extradition request based on assurances from the Russian Procurator General, which were

included in the request for extradition, that Akhmet A.'s human rights would be respected after his return to Russia. According to information available to Amnesty International, following his extradition, further criminal charges were brought against Akhmet A. in Russia, which did not relate to the request for extradition. Also, Amnesty International received reports which raised concern that Akhmet A. may have been ill-treated in pre-trial detention by Russian law enforcement officers following his return to Russia.⁴¹ Although the ICRC confirmed that it had visited Akhmet A. in detention in Russia, the monitoring report was confidential.⁴²

In the context of presenting its combined fourth and fifth periodic reports to the CAT, the Austrian government stated in March 2009 that: "Where courts determine the specific risk of torture or ill-treatment, a petition for extradition must be rejected. The offer of a diplomatic assurance is not acceptable. Austria has never – insofar as can be assessed – ordered an extradition on the basis of a diplomatic assurance for the protection against torture."⁴³ In response, the CAT requested an update on the case of Muhammad 'Abd al-Rahman Bilasi-Ashri, in particular how his case comported with the Austrian government's claim that it has never ordered an extradition in reliance on such assurances.⁴⁴

The Austrian response to the Committee's query indicated that the Austrian government has reconsidered its position concerning diplomatic assurances:

"Austria is firmly committed to the absolute prohibition of torture and the full respect for the obligations of States in relation to the question of extraditions, in particular under Art. 3 of CAT and Art. 3 of ECHR, which clarify that an extradition to a third country is permissible only when it can be ascertained that the person to be extradited would not be subjected to torture or inhuman or degrading treatment. Any concern that a person to be extradited might be subjected to torture or inhuman or degrading treatment cannot be compensated by diplomatic assurances. Based on this policy, no extradition took place on the basis of diplomatic assurances. Also in the case of Mr. Bilasi-Ashri, an extradition has not been ordered and he continues to live in Austria".⁴⁵

The Austrian government's position on diplomatic assurances, among other issues related to Austria's implementation of various UN treaty body recommendations, was confirmed in statements to Amnesty International from the Ministry of Foreign Affairs and the Ministry of Justice in 2009.⁴⁶ Amnesty International calls on the Austrian authorities to continue to articulate at the UN, European Union, and Council of Europe its commitment not to use diplomatic assurances against torture and other ill-treatment, and to press other governments to adopt a similar position.

BOSNIA AND HERZEGOVINA

The government of Bosnia and Herzegovina (BiH) has faced pressure in recent years from the USA to strip some individuals (mostly of Arab origin) of their BiH nationality and expel them, on the presumption that they are a threat to BiH national security. Most of these individuals came to BiH during the war between 1992 and 1995, and fought in the al-Mujahidin Unit of the Army of Bosnia and Herzegovina, which consisted primarily of foreign volunteers from Muslim countries. The foreign fighters were supposed to be repatriated after the war, but many were granted citizenship instead.

After the 11 September 2001 attacks in the USA, western intelligence agencies took an

interest in the former fighters, among them Imad Al Husin.⁴⁷ Imad Al Husin, a Syrian national, acquired Bosnian citizenship through marriage to a Bosnian woman. His naturalization was revoked without a hearing in 2001, based on unspecified national security grounds. On 6 October 2008, Bosnia and Herzegovina authorities seized Imad Al Husin in Sarajevo and placed him in the Lukavica immigration detention centre, pending possible deportation to Syria.⁴⁸ The European Court of Human Rights intervened in late 2008 and requested that the Bosnian government not deport Imad Al Husin until the Constitutional Court reviewed his case.

In October 2008, Amnesty International, the Helsinki Committee for Human Rights in Bosnia and Herzegovina, and Human Rights Watch called upon authorities in Bosnia and Herzegovina not to deport Imad Al Husin to Syria, where he would face a serious risk of torture and other ill-treatment, and to release him from immigration detention immediately. Concerned that the BiH authorities would rely on diplomatic assurances against torture and ill-treatment to effect the transfer of Imad Al Husin and others, the organizations specifically called on the BiH authorities to refrain from seeking diplomatic assurances from the Syrian authorities.⁴⁹

Amnesty International has repeated the call to the BiH government not to seek assurances against torture, most recently in another case involving another former member of the Mujahidin Unit of the Army of Bosnia and Herzegovina. In January 2010, Amnesty International urged the BiH authorities to refrain from deporting Ammar al-Hanchi to Tunisia where he would be at risk of torture, other ill-treatment and unfair trial -- and not to rely on diplomatic assurances from the Tunisian government to effect al-Hanchi's forcible return.⁵⁰ The European Court of Human Rights has issued an order for interim measures against his deportation until the Constitutional Court of Bosnia and Herzegovina decides the case.⁵¹

DENMARK

The Danish government has long promoted torture prevention, both within Europe and globally. Press reports in April 2008, however, featured comments by then-Justice Minister Lene Espersen signalling a willingness on the part of the Danish government to contemplate using diplomatic assurances against torture and ill-treatment in order to forcibly remove persons alleged by the government to be threats to national security from Denmark to their home or third countries. The Danish government subsequently established a working group to study the issue.⁵²

In a June 2008 letter, Amnesty International, Human Rights Watch, International Commission of Jurists, and Redress Trust jointly urged the Danish government not to consider endorsing the use of diplomatic assurances against torture to effect such forcible returns.⁵³ The groups instead urged the Danish government to give the working group a remit to focus on additional measures that Denmark could take, both individually and through cooperation with other states and international organizations, to work more effectively with countries to eradicate the root causes of serious human rights violations, including torture and other ill-treatment and unfair trials, in countries that Denmark was prohibited from forcibly returning people to.

The UN Special Rapporteur on torture, Manfred Nowak, in his February 2009 report on a mission to Denmark in May 2008, called on the Danish authorities to abandon the concept of diplomatic assurances as a means of expelling people to face a real risk of torture, and to focus instead on comprehensive efforts, including efforts by the EU acting collectively, to prevent and eradicate torture in the Middle East, North Africa and globally.⁵⁴

The Danish government ignored the calls by the Special Rapporteur and the NGOs. In February 2009, the Danish Ministry for Refugees, Immigrants and Integration issued a white paper by an expert committee on the "administrative expulsion of foreigners deemed a danger to state security".⁵⁵ In the chapter on diplomatic assurances, the committee concluded that although diplomatic assurances were extremely problematic, there existed a narrow margin for their use in certain circumstances. According to the committee, "It cannot be ruled out that it could be possible to make use of diplomatic assurances in a way that would not violate international law, but the possibilities are limited".⁵⁶

The committee formulated a set of requirements that it considered would need to be fulfilled in order for diplomatic assurances to be deemed reliable and sufficient: 1) The assurances could not be a broad declaration of intention, but rather a very precisely worded legal agreement as to the treatment of persons on return to their country of origin; 2) Provision would need to be made in the assurances clearly stipulating the right of the deporting/expelling state to monitor through direct access the circumstances, living conditions, and well-being of the deportee; and 3) Clear provisions would need to be included in the assurances regarding the consequences of any violation of the diplomatic assurances with respect to the harm/human rights violations suffered by a returned person.⁵⁷ For all the reasons set out in this report, Amnesty International strongly disagrees with the committee's conclusion that such elements could eliminate the real risk of torture or other ill-treatment in the case of any person whose forcible return would otherwise be prohibited.

Of particular concern is the suggestion in the white paper that the national preventive mechanisms (NPMs) established under the Optional Protocol to the Convention against Torture (OPCAT) might be engaged to monitor the treatment of persons returned to their home or third countries in reliance on diplomatic assurances.⁵⁸ This suggestion might encourage sending governments to invoke the system of monitoring visits to be established under the OPCAT to justify sending people to countries where they face a risk of torture or other ill-treatment.⁵⁹

The purpose of the OPCAT, and the establishment of the NPMs under it, is to reduce on a country-wide and gradual basis the incidence of torture and other ill-treatment through a process of ongoing visits to all places of detention and confidential dialogue with authorities. That system was never designed, and does not purport to have the capacity, to provide protection to particular individuals. It is deeply disturbing for the Danish expert committee to invoke this fledgling system for torture prevention as a possible means of justifying the forcible return of persons to places where they would face a personal risk of torture which instead could be avoided altogether if the *non-refoulement* obligation was simply respected. Full good-faith implementation of the OPCAT in a country may, over a period of years and together with other critical elements including elimination of impunity in law and practice, contribute to a future situation where the risks that presently give rise to the prohibition of *refoulement* no longer exist in a country. The existence of OPCAT institutions in a country, however, cannot in itself be a relevant factor; the demonstrable reduction in the actual incidence of torture and, in particular the personal risk of such abuse for a specific person, must be established first if it is to be relevant to the assessment of risk on return. No forcible return can be premised on speculation about the possible future effects of such a system of visits, or on mistaken assumptions about the purpose and capacity of OPCAT visits when it comes to protection of specific individuals rather than gradual system-wide reform.

While it is unlikely that most receiving states would agree to the conditions laid out by the expert committee, Amnesty International is deeply concerned that the Danish government would give its imprimatur to the practice of using diplomatic assurances against torture at all. Particularly because it sees itself as a standard-bearer in the fight against torture, the Danish government should demonstrate leadership and adopt policies toward prevention that would guarantee maximum protection to persons at risk of torture. In cases of deportation, extradition, or other forcible removal of foreign nationals, that maximum protection is guaranteed by state compliance with the absolute *non-refoulement* obligation, that is, not exposing an individual to the risk of torture through the transfer in the first place. Instead, the conclusions of the expert committee indicate that the Danish authorities will reserve the right to deport or otherwise forcibly remove a person to a place where he or she is at risk of torture and other ill-treatment in reliance on assurances that cannot, by their inherent lack of reliability, provide a safeguard against such abuse.

FRANCE

A French court has recognized without equivocation the danger an ethnic Chechen can face if returned to Russia, despite promises from officials in Moscow of an individual's safety on return. In March 2009, the Court of Appeal in Paris rejected a request from the Russian government for the extradition of Ahmed Lepiev, a 27-year-old Chechen suspected of having participated in the killings of special forces officers in Dagestan in 1998. Ahmed Lepiev would have been 16-years-old at the time of the killings.

The Court of Appeal ruled that Ahmed Lepiev would be at risk of physical harm and violations of the right to a fair trial. Citing Amnesty International's research, the Court noted that Ahmed Lepiev's risk of abuse would be aggravated by his status as an ethnic Chechen, a group routinely targeted in Russia for torture, ill-treatment, and other serious human rights violations.⁶⁰ Guarantees of humane treatment proffered by the Russian authorities at the request of the Court thus were ultimately deemed insufficient.

On the other hand, French officials reporting to the Council of Europe's Group of Specialists on Human Rights and the Fight against Terrorism (DH-S-TER) in 2006, while seemingly rejecting the idea that written assurances could be relied upon in cases of risk of torture, nevertheless described a practice whereby French authorities relied upon "diplomatic contact" with potential receiving countries through which the French authorities apparently seek to "assure" themselves that the person in question would not be subject upon return to any restrictive measures contrary to Article 3 of the ECHR.⁶¹ The officials claimed this was simply to "obtain more precise information about the situation of the person in the case of their return" and was a "supplementary precaution" which did not replace the ordinary examination in relation to compliance with Article 3 of any proposed return. Ultimately, then, the substantive position of the French government on the use of diplomatic assurances – whether given formally in writing or in some other manner – remains regrettably unclear.

GERMANY

The German government has sought diplomatic assurances in deportation and extradition cases on a case-by-case basis in the past, but in July 2009 administrative regulations providing for the use of assurances in cases of "international terrorism" were formally adopted by the government.⁶² Amnesty International and other human rights organizations campaigned against the adoption of these regulations and called on the German government to refrain from

legitimizing the use of unreliable assurances against torture, but to no avail.⁶³

The regulations implement the Residence Act (Aufenthaltsgesetz), which controls the entry, residence, and employment of foreigners in Germany. The Bundesrat (Federal Council) approved the regulations in September 2009 and they were published by the Ministry of Interior in October in 2009.⁶⁴ Provision for the use of diplomatic assurances in national security deportations carried out by the Federal Ministry of the Interior are now enshrined in the regulations implementing this aspect of German administrative law.

The Residence Act prohibits the deportation of persons to countries where they are at risk of torture, the death penalty, danger to life and limb or of deprivation of liberty, or when the deportation would be prohibited under Germany's obligations under the ECHR.⁶⁵ According to the regulations, the Federal Ministry of the Interior can seek diplomatic assurances as guarantees against these violations in returns cases dealing with "international terrorism" but "must ensure that the competent authorities of the target state [receiving state] comply with the assurances".⁶⁶ According to the regulations, if the German authorities can verify that the receiving country is able to comply with the assurances, the original assumption of risk of torture or other ill-treatment on return can be rebutted for the purposes of German law.

Recent cases in German courts indicate that the judiciary may provide the bulwark against the government's apparent plan to institutionalize the use of assurances in certain cases.

In January 2009, the Administrative Court in Dusseldorf, North Rhine-Westphalia, halted the deportation of a Jordanian man who the government claimed was a threat to national security based on the risk of torture and ill-treatment he would face on return. Although the German government had not sought diplomatic assurances from the Jordanian authorities, the Court stated that even if diplomatic assurances had been proffered, they would not have sufficed to permit the man's deportation.⁶⁷

The same Dusseldorf court ruled in March 2009 that a Tunisian man, labelled a national security threat by the government, could not be deported to Tunisia despite diplomatic assurances from the Tunisian authorities.⁶⁸ The court concluded that assurances from Tunisia that were "not legally binding...and by nature hardly trustworthy or verifiable" would not protect against torture or other ill-treatment on return.⁶⁹

Amnesty International has opposed in the past the use of diplomatic assurances in deportations and extraditions from Germany.

In May 2006, for example, the German Court of Appeal requested that the Turkish government provide diplomatic assurances as a prerequisite to the Court's ordering the extradition of Hasan Atmaca, a Turkish national allegedly associated with the PKK. In a verbal note, the Turkish authorities stated that he would be placed in a high security F-type prison, that requests from German Embassy staff to visit him would be "looked on favorably", despite the fact that such visits were not normally permitted, and that embassy staff would be able to gather information about his situation in detention.⁷⁰ The Darmstadt Administrative Court ruled in May 2007 that Hasan Atmaca should be granted refugee status and should not be extradited to Turkey. An appeal lodged by the Federal Office for Migration and Refugees against that decision is still pending. German authorities have said they will not approve the extradition until the asylum

procedure is concluded. German asylum law does not prohibit the extradition of recognized refugees, in contravention of international law.⁷¹ The European Court of Human Rights issued interim measures on Hasan Atmaca's behalf in October 2008 and his case is currently pending before the European Court.

Amnesty International is concerned that by enshrining provision for the use of diplomatic assurances against torture and other ill-treatment in the Residence Act regulations, the German government may employ assurances as a routine matter in all national security-related deportation and extradition cases. Moreover, such a step may give other governments the impetus to take similar actions, further proliferating the use of unreliable assurances at the expense of the guarantee of torture prevention that is realized when governments observe their absolute *non-refoulement* obligation.

ITALY

The government of Italy has deported a number of persons alleged to be national security suspects to Tunisia and other countries since 2008. Not all of those cases involved the use of diplomatic assurances, but in the two that were finally decided by the European Court of Human Rights – *Saadi v Italy* and *Ben Khemais v Italy* (see section on European Court of Human Rights above) – the Court found Tunisia's assurances insufficient. These key cases significantly contribute to a small, but growing international jurisprudence on the issue of assurances.

Despite Italy's place at the centre of that jurisprudence, the UN Human Rights Council in its consideration of Italy's first report in February 2010 under the relatively new Council's procedures, the Universal Periodic Review, failed to signal the use of diplomatic assurances as an issue of concern.⁷² Nor did the Human Rights Council recognize as problematic Italy's habit of deporting persons deemed by the government to be national security threats without due process and in violation of orders for interim measures from the European Court of Human Rights. Amnesty International and other human rights groups made written submissions to the Human Rights Council prior to the February 2010 session arguing that Italy should be questioned about the practice of employing diplomatic assurances to conduct national security deportations and that the Council should recommend that Italy bring all measures it takes in the name of countering terrorism into compliance with its human rights obligations. The Council failed to do either.

In March 2010, the Committee of Ministers of the Council of Europe, which is mandated to supervise states' implementation of judgments of the European Court of Human Rights, considered Italy's implementation to date of the Court's judgment in *Ben Khemais v Italy*.⁷³ The Committee of Ministers stated that the Italian authorities are "fully committed" to complying with the Court's orders for interim measures and that the Italian government had taken steps to collect information on Sami Ben Khemais Essid's situation in prison "in addition to the diplomatic assurances given by the Tunisian authorities".⁷⁴

In the case of Sami Ben Khemais Essid, however, these efforts on the part of the Italian government are a classic case of "too little, too late". As this case makes abundantly clear, once a person is removed, a sending government has little or no control over what happens to him or her. This is an inherent deficiency of the diplomatic assurances regime that cannot be remedied by tweaks to the particular terms of the assurances. No matter what effort the Italian

government expends at this point, one sobering fact remains: Sami Ben Khemais Essid was sent back to Tunisia despite his being at a serious risk of torture and ill-treatment -- and he alleged that he was in fact ill-treated in detention.⁷⁵

In addition to implementing the judgment on the *Ben Khemais* case, the Italian government should demand, as a matter of urgency, that the Tunisian authorities conduct an effective and impartial investigation of Sami Ben Khemais Essid's allegations of torture.

SLOVAKIA

In June 2008, Amnesty International welcomed the ruling of the Constitutional Court of Slovakia in the case of Mustapha Labsi, an Algerian asylum-seeker alleged by the Slovak government to be a threat to national security. Mustapha Labsi originally was detained in Slovakia on the basis of an extradition request by Algeria. The Constitutional Court concluded that the Supreme Court's decision of 22 January 2008, allowing the extradition of Mustapha Labsi in reliance on diplomatic assurances from the Algerian authorities, had violated his right to judicial protection and had failed fully to consider the human rights situation in Algeria.⁷⁶

The Constitutional Court reaffirmed the absolute duty of the authorities not to return anyone to a country where he or she would face a real risk of torture or other ill-treatment. Slovakia's obligation not to rely on diplomatic assurances was implicit in the judgment's criticism of a Bratislava Regional Court decision issued in November 2007 and the Supreme Court decision of January 2008.

The Supreme Court subsequently reconsidered Mustapha Labsi's case and ruled on 7 August 2008 that he could not be deported to Algeria where he faced the risk of serious human rights violations, including torture and other ill-treatment. He was released but immediately detained again on the basis of a deportation order dating from 2006. Mustapha Labsi applied again for asylum, which was rejected in October 2008. In October 2009 the regional court in Bratislava affirmed the decision of the Migration Office to decline his application for asylum. He fled to Austria in December 2009 and was returned to Slovakia on 11 March 2010.⁷⁷

Amnesty International calls on the Slovak authorities to comply with the decision of the Supreme Court and refrain from deporting or extraditing Mustapha Labsi to Algeria. Moreover, in light of the rulings in the Labsi case, the government of Slovakia should abandon any plans to use such assurances in the future in cases of forcible return on alleged grounds of national security.

SPAIN

The extradition of Murad Gasayev, an ethnic Chechen, from Spain to Russia in December 2008 in reliance on diplomatic assurances from the Russian authorities is the first known case of the use of diplomatic assurances by the Spanish authorities.⁷⁸

In 2005, Murad Gasayev's asylum claim was rejected by the Spanish authorities on the basis of confidential information that neither Murad Gasayev nor his lawyer were ever given access to and were unable to challenge. The Russian authorities publicly alleged that Murad Gasayev was involved in a June 2004 attack by an armed group on government buildings in the Republic of Ingushetia. He has claimed that he was detained in Ingushetia in August 2004 by five masked law enforcement officials who took him to the main office of the Department of the Federal

Security Service for Ingushetia, where he was tortured for three days and questioned about the attack. He was not charged with the attack and was released.

Amnesty International has received reports indicating that Murad Gasayev's name had been mentioned by another individual who had been detained in relation to the June 2004 attacks and allegedly subjected to torture or other ill-treatment in January 2005. During the trial of this individual, he retracted the statements made during interrogation by officials from an investigation unit of the Directorate of the General Procuracy in the Southern Federal District, based in North Ossetia. The Russian Prosecutor General failed to inform the Spanish authorities about the withdrawal of the statement incriminating Murad Gasayev.

Russian NGOs have documented a range of abuses related to the investigation of the June 2004 attacks, including the torture and ill-treatment of suspects and numerous fair trial violations.⁷⁹ Amnesty International has interviewed several people whose statements concur with these findings.⁸⁰ The European Committee for the Prevention of Torture (CPT), which normally conducts its monitoring on a confidential basis sharing its findings only with the government concerned -- unless the government agrees to publication, which most governments do -- took the extraordinary step of publishing three public statements without agreement of the Russian government between 2001 and 2007 expressing grave concerns about torture, other ill-treatment and unlawful detention by state officials in Chechnya. The CPT statements noted that investigations into cases involving allegations of ill-treatment or unlawful detention are rarely carried out in an effective manner and that the Russian authorities have failed to react adequately to the concerns raised by the CPT.⁸¹ In his own case, Murad Gasayev presented evidence to the Court that Russia had, in the past, breached assurances it had proffered in similar cases.⁸²

Despite such credible evidence of the risk of torture Murad Gasayev would face if forcibly returned, in February 2008 the Spanish National Criminal Court (Audiencia Nacional) approved the extradition request based on diplomatic assurances from the Russian General Prosecutor's office that he would not be sentenced to death or to life imprisonment without parole, and that he would be able to receive visits from the UN Committee against Torture -- ostensibly to ward off mistreatment -- while he was detained. Upon discovering that the Committee against Torture does not undertake any visits to detention facilities and that Russia is not a party to the Optional Protocol to the Convention against Torture, which provides for periodic monitoring of places of detention by a separate UN body, the Court then requested assurances that the CPT would be able to monitor Murad Gasayev's detention.

The CPT, however, was not consulted about the diplomatic assurances given by the Russian General Prosecutor until after the Spanish National Criminal Court had approved the extradition request. When it was informed of the assurances, the CPT stated that it was not prepared to assume the task of monitoring the detention of Murad Gasayev in Russia under the terms of the assurances as a matter of principle due to concerns over the unreliability of diplomatic assurances against torture and other ill-treatment.

On 31 December 2008, the Spanish authorities extradited Murad Gasayev to Russia with the simple assurance to the Spanish National Criminal Court that staff from the Spanish embassy in Moscow would be able to visit him in detention. In a letter to the court, the Spanish Ministry of Justice stated that, although there was no precedent for such action by the Spanish embassy,

other diplomatic missions in Moscow had undertaken similar tasks, albeit "with certain difficulties".⁸³ It stated that in such cases the general practice was to visit the detainee once upon arrival in Russia and once after final sentencing.

After arrival in Russia, Murad Gasayev was detained in Moscow, before being transferred to the pre-trial detention facility in Piatigorsk. To Amnesty International's knowledge, between 31 December 2008 and 9 February 2009, he had received one visit from his lawyer and one visit from Spanish embassy staff. His family had not been given permission to visit him.⁸⁴

On 28 August 2009 Murad Gasayev was released from detention because of the expiry of the maximum period of time during which he could be held in custody. Most of the charges against Murad Gasayev had been dropped in June, yet the Russian authorities held him in custody for a further two months. The prosecutor had found no evidence linking him to the June 2004 attack. However, to Amnesty International's knowledge, Murad Gasayev is still charged with membership in an armed group and illegal acquisition of weapons. These charges remain, despite the fact that those who are known to have "confessed" that Murad Gasayev participated in an armed group have withdrawn their "confessions".

As a result of the harassment they have suffered since his detention, Murad Gasayev's family continues to fear for their own and for Murad Gasayev's safety in Russia. His lawyer told Amnesty International in September 2009 that law enforcement officers have repeatedly threatened Murad Gasayev's brother, mother and other relatives, and that Murad Gasayev himself is "absolutely terrified" and "living in a climate of constant intimidation".⁸⁵ Reportedly, before his release from detention, his family was told by law enforcement officials "even if he is being released now, we will have him done, without trial or record".⁸⁶

This case highlights a number of pressing concerns regarding the reliability and sufficiency of assurances and their use to effect the removal of an asylum-seeker and alleged national security suspect. In addition to misrepresentations by the Spanish government to the National Criminal Court regarding the willingness and ability of independent bodies to monitor Murad Gasayev's treatment post-return, the Spanish court gave little weight to credible and abundant information regarding the vulnerability of ethnic Chechens to torture and ill-treatment and Russia's failure to abide by assurances it had given in the past.

The case of Murad Gasayev also highlights the same problem that arose in the case of Sami Ben Khemais Essid: how long can assurances apply to a specific person in any event, and what about continuing long-term risks? Murad Gasayev lodged an asylum claim in Spain on the basis that he would be persecuted and ill-treated if returned. He is now living in fear due to harassment of and threats to him and his family, Russia's assurances of humane treatment notwithstanding.

SWEDEN

Despite the findings by the CAT and Human Rights Committee that Sweden violated the absolute prohibition on *refoulement* by expelling Ahmed Agiza and Mohamed al-Zari to Egypt in reliance on diplomatic assurances, the Swedish government has refused to rule out reliance on such assurances in the future. In its fifth periodic report to the CAT, the Swedish government stated that "In very rare exceptional cases there may be a need, and [it may] be deemed possible to obtain such assurances in order to guarantee the security of a person refused entry

or expelled when he or she is returned to the receiving country”.⁸⁷

The CAT’s findings triggered as well the requirement that the Swedish government provide the men with an effective remedy, including compensation, and to take steps to prevent similar incidents from happening in the future. In 2008 the Swedish Chancellor of Justice ruled that Ahmed Agiza and Mohammed al-Zari be awarded 3 million Swedish kronor (about 300,000 euros) each in compensation for the human rights violations they suffered.⁸⁸

Amnesty International is concerned, however, that Sweden has failed to provide full reparation to the men, which should include not only compensation, but also other measures including guarantees of non-repetition.⁸⁹ Although the government formally rescinded the men’s expulsion orders in 2008, it refused to grant the men residence permits in late 2009. Ahmed Agiza remains imprisoned in Egypt following an unfair trial before a military court, in violation of international law. Mohamed al-Zari was freed from prison in October 2003.

The Swedish government has failed to date to fully satisfy its obligation to investigate the men’s unlawful transfers and torture or other ill-treatment, and to bring those responsible to account, in compliance with its international obligations. The government should establish a full, effective, independent inquiry into its role and the role of foreign officials in the men’s transfers and, where responsibility for crimes under international or national law is identified, criminal prosecutions should be initiated. The Swedish government has done little, if anything, recently to pressure the Egyptian government to grant Ahmed Agiza a fair retrial in a civil court. The Swedish government should also implement preventive measures to ensure full judicial review of all decisions to expel, deport or otherwise transfer persons the authorities allege to be threats to national security. Such preventive measures should include a commitment by the Swedish government not to employ diplomatic assurances against torture or ill-treatment as a basis for removals to countries where there is a real risk of such treatment to the individual.

UNITED KINGDOM

The UK government has been the most influential and aggressive promoter in Europe of the use of diplomatic assurances to forcibly return people it considers threats to national security to countries where they would face a real risk of serious human rights violations, including torture or other ill-treatment. The promotion of a policy of “deportation with assurances”, adopted with the stated aim of countering terrorism, has occurred at a number of levels: as a matter of domestic policy in cases involving individuals accused of presenting a threat to national security whom the government wished to deport or extradite to Algeria, Egypt, Ethiopia, India, Jordan, Lebanon, Libya, and Russia; at the European Court of Human Rights as a respondent state (*Chahal v UK*, 1996; *Othman v UK*, pending) and third party intervener (*Saadi v Italy*, 2008); and in a number of intergovernmental forums including the EU Justice and Home Affairs Council, meetings of the G-6 and G-8, and in various other fora at the Council of Europe, including in the Committee of Experts on Terrorism.

The UK authorities began seeking assurances in national security-related cases as far back as 1992⁹⁰ and since that time their policy has developed to include general “memorandums of understanding” (MoUs) negotiated with key countries. The UK government asserts that the MoUs provide a framework for the deportation of nationals to those countries with which such agreements have been concluded. The MoUs that have been negotiated to date – with the governments of Ethiopia, Jordan, Lebanon, and Libya – contain promises from the receiving

countries that returned persons will be treated humanely, not subjected to the death penalty, and afforded fair trials or retrials.⁹¹ The UK agreements purport to provide for post-return monitoring by local organizations. The UK government posits that such monitoring constitutes "enhanced assurances" and argues that this is the distinguishing feature of the UK model for assurances.⁹²

Serious concerns have been raised domestically about the UK government's policy of seeking assurances from states that practise torture as a means of circumventing its obligations under the prohibition against torture. A detailed report issued in May 2006 by the parliamentary Joint Committee on Human Rights concluded that the UK's policy of employing diplomatic assurances to effect deportations of those accused of posing a threat to national security left the committee with "grave concerns that Government's policy ... could place deported individuals at real risk of torture or inhuman and degrading treatment, without any reliable means of address".⁹³ The Committee also commented on how the government's policy undermined the absolute prohibition on returns to risk of torture and threatened to place the UK in violation of its binding international obligations because reliance on assurances "... presents a substantial risk of individuals actually being tortured, leaving the UK in breach of its obligations under Article 3 UNCAT, as well as Article 3 ECHR".⁹⁴ The House of Commons Select Committee on Foreign Affairs also expressed concern about the UK's policy with respect to deporting persons to places where they were at risk of torture and ill-treatment.⁹⁵

At international level, the UK's policy of "deportation with assurances" has been criticized by the UN Human Rights Committee⁹⁶ and the Council of Europe Commissioner for Human Rights who concluded, after a visit to the UK in 2008, that diplomatic assurances "should never be relied on, where torture or ill-treatment is condoned by... Governments and is widely practiced".⁹⁷ Manfred Nowak, the UN's Special Rapporteur on torture, has said that "the plan of the United Kingdom to request diplomatic assurances for the purpose of expelling persons in spite of a risk of torture reflects a tendency in Europe to circumvent international obligations".⁹⁸

Despite this range of criticism, the annual report of the Foreign and Commonwealth Office (FCO), issued in March 2010, states that the UK government will "continue to negotiate new memoranda of understanding in 2010".⁹⁹

Numerous and lengthy court proceedings have resulted from challenges to the UK government's attempts to deport individuals in reliance on diplomatic assurances and MoUs. The status of the proceedings in key cases, include:

- **Ethiopia:** The first challenge to the MoU with Ethiopia will proceed in April 2010 in the Special Immigration Appeals Commission (SIAC) – the court that hears appeals against deportations on national security grounds. The MoU raises serious concerns given Ethiopia's exceedingly poor human rights record, including arbitrary arrests, and the torture and ill-treatment of detainees, in particular those perceived as associated with armed opposition groups and some opposition parties;¹⁰⁰ renditions in the horn of Africa; the lack of independence of the Ethiopian National Human Rights Commission, identified by the UK as the post-return monitoring body; and the profound problems in general of monitoring human rights violations in Ethiopia, due to restrictions and obstruction by the government, including interference with access to detainees by their families, lawyers, the media, and independent monitoring bodies such as the International Committee of the Red Cross (ICRC);¹⁰¹

- **Jordan:** The case of Omar Othman (aka Abu Qatada), threatened with deportation to Jordan under the UK-Jordan MoU, is currently pending at the European Court of Human Rights.¹⁰² In February 2007, the SIAC dismissed Omar Othman's appeal against deportation. Following a further appeal, the Court of Appeal of England and Wales ruled in April 2008 that he could not be forcibly returned to Jordan because evidence extracted by the torture of a key witness would most likely be used in any retrial of Omar Othman and render any re-trial a flagrant denial of justice. However, the Law Lords (now the Justices of the UK Supreme Court) held in February 2009 that the SIAC's original assessment of his risk on return should not be second-guessed and Omar Othman's appeal against deportation was finally dismissed domestically. The European Court of Human Rights issued an order for interim measures that same month indicating that Omar Othman should not be deported pending its review of his case. Amnesty International, Human Rights Watch, and JUSTICE (the London-based affiliate of the International Commission of Jurists) jointly submitted an intervention (amicus brief) to the European Court in October 2009 arguing that the assurances of humane treatment on return from the Jordanian government could not be trusted and that secret evidence of risk on return considered by the SIAC to reach its original conclusion should have been made available to Omar Othman;
- **Algeria:** The UK government has no formal general MoU with Algeria, apparently in large part because the Algerian authorities believed that such an agreement, including provisions for post-return monitoring, would be an encroachment on their national sovereignty.¹⁰³ In a July 2006 "exchange of letters" and *notes verbales* with the UK government, the Algerian President agreed to negotiate bilateral assurances for humane treatment and fair trial on a case-by-case basis, including the possibility for staff from the UK Embassy in Algiers to maintain contact with returnees who were not detained and with the next of kin of detainees.¹⁰⁴ In February 2009, the Law Lords dismissed the appeals of two Algerians against their deportations, upholding as reliable the assurances from the Algerian government.¹⁰⁵ That same month, the European Court of Human Rights issued an order for interim measures staying the deportations and the men's cases are currently pending at the European Court. In their judgment, the Law Lords upheld earlier rulings by the SIAC and the Court of Appeal of England and Wales permitting the men's deportations, despite hearing evidence that two Algerian nationals deported from the UK to Algeria in January 2007 were ill-treated on return.¹⁰⁶ The Algerian government did not offer diplomatic assurances of humane treatment to the UK government in these cases, but told the men directly that amnesty measures would be applicable to them; and consequently, they would not be prosecuted for any terrorism-related offence. Upon return the men were detained by the security police for about 12 days, interrogated, and reportedly beaten and threatened. Both were later prosecuted and convicted of "participation in a terrorist network operating abroad";¹⁰⁷
- **Libya:** In April 2008, the Court of Appeal of England and Wales upheld a prior decision of the SIAC allowing the appeals of two Libyan nationals against their deportations on the grounds that the assurances from the Libyan government were not sufficient to protect the men from a real risk of torture or other ill-treatment if they were to be forcibly returned to Libya.¹⁰⁸ In particular, the Court of Appeal found no grounds to disagree with the original conclusions of the SIAC that torture was used "extensively" against political opponents of the government, the Libyan authorities could not be relied upon to comply with the assurances, and the agreed upon monitoring mechanism (in the form of a foundation overseen by Saif al-Islam al-Gaddafi, the son of Libyan leader Colonel Muammar Gaddafi) was not a sufficient deterrent against torture

and other ill-treatment.¹⁰⁹

The UK authorities often claim that the judgment in the Libyan cases is proof that the UK courts will “catch” any problems or deficiencies in the MoUs the government has brokered. But Amnesty International would argue that the Law Lords’ judgments in the Omar Othman and Algerian cases reflect a failure by the courts to uphold the absolute prohibition on forcible returns to places where people are at risk of torture and other ill-treatment. The judgments in these cases appear to have emboldened the UK government, which continues aggressively to advocate for the use of assurances and plans to broker new MoUs in the future. In a disturbing development, judgments in recent cases indicate that the UK has employed diplomatic assurances against torture and ill-treatment for forced returns outside the national security context.¹¹⁰

Amnesty International has repeatedly called on the UK government to abandon its policy of “deportations with assurances” and urgently repeats that call again.

CONCLUSION

Amnesty International calls on all governments to halt the use of unreliable diplomatic assurances against torture and other ill-treatment to forcibly return persons to places where they are at risk of such violations. Reliance on diplomatic assurances profoundly undermines the absolute prohibition on torture and other cruel, inhuman and degrading treatment and punishment. As this report documents, and domestic and regional courts and international bodies have concluded, such assurances do not provide an effective safeguard against torture and other ill-treatment. States should instead commit the necessary resources to assist governments in countries where torture and other ill-treatment are persistent to eliminate these practices.

ENDNOTES

- 1 Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment, UN Doc A/HRC/13/39, 9 February 2010, p. 18, para. 67.
- 2 International Commission of Jurists, Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism, and Human Rights (EJP Report), 4 May 2009, p. 167. <http://icj.org/IMG/EJP-report.pdf>, accessed 21 March 2010.
- 3 The USA, Canada, Australia, and other countries also employ diplomatic assurances for some types of national security transfers. In the USA, the government employs such guarantees in a range of cases, including in its continuing rendition programme. See, for example, United States Department of Justice News Release, "Special Task Force on Interrogations and Transfer Policies Issues Its Recommendations to the President," 24 August 2009. <http://www.justice.gov/opa/pr/2009/August/09-ag-835.html>, accessed 21 March 2010.
- 4 See, e.g., the following documents by Amnesty International: Campaign Factsheet, "Diplomatic Assurances" – No Protection Against Torture and Ill-Treatment, (AI Index: ACT 40/021/2005), 1 December 2005. <http://www.amnesty.org/en/library/info/ACT40/021/2005>, accessed 31 March 2010; 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, (AI Index: IOR 61/025/2005), 2 December 2005 (with Human Rights Watch and the International Commission of Jurists); Amnesty International, Human Rights Watch, International Commission of Jurists, Redress Trust, "Open Letter to Danish Minister of Justice Regarding Denmark and Diplomatic Assurances against Grave Violations of Human Rights", (AI Index: EUR 18/004/2008), 17 June 2008. <http://www.amnesty.org/en/library/info/EUR18/004/2008/en>, accessed 31 March 2010.
- 5 See, e.g., article 7 of the International Covenant on Civil and Political Rights (ICCPR) and Human Rights Committee General Comment no 20; UN Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (Convention against Torture) and Committee against Torture (CAT), General Comment No. 2 – Implementation of Article 2 by States Parties, UN Doc CAT/C/GC/2, 24 January 2008.
- 6 See, e.g., article 4 of the ICCPR and Human Rights Committee General Comments Nos. 20 (1992) and 29 (2001); Convention against Torture, article 4, and CAT General Comment No. 2, paras 3-6.
- 7 Per the erga omnes nature (an obligation to the international community as a whole) of the prohibition against torture and other ill-treatment. See, e.g., Prosecutor v Furundžija, International Criminal Tribunal for the former Yugoslavia, Case IT-95-17/1-T, Trial Judgment of 10 December 1998 2002, paras. 151-152.
- 8 See Human Rights Committee, General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 2; and Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law, UN General Assembly A/Res/60/147 (16 December 2005), para. 4. See also the rule "pacta sunt servanda" as codified in article 26 of the 1969 Vienna Convention on the Law of Treaties ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith.") and articles 55 and 56 of the Charter of the United Nations. Article

55 of the UN Charter is also referenced in the Preamble to the UN Convention against Torture and the Preamble to the ICCPR.

9 See Articles 40 and 41 on the Responsibility of States for Internationally Wrongful Acts, UNGA Res 56/83 (Annex) (12 December 2001): under 41(1) “States shall cooperate to bring to an end through lawful means any serious breach” which is defined by article 40 to include “a gross or systematic failure by the responsible State to fulfil” an “obligation arising under a peremptory norm of general international law.” Article 41 also provides that “No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.” See also *Prosecutor v Furundžija*, paras. 144, 147, 153-157, and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ, 2004, ICJ Report 136, paras. 154-160.

10 The obligation of non-refoulement arises from, among other sources, the UN Convention against Torture, article 3; the ICCPR article 7 (see Human Rights Committee General Comment no 20, para. 9 and General Comment no 31, para. 12; regional treaties such as the ECHR, article 3 [see the judgment of the European Court of Human Rights in *Soering v UK*, judgment of 7 July 1989, and other cases cited below]; customary international law [see E. Lauterpacht and D. Bethlehem, 'The Scope and Content of the Principle of Non-refoulement' in E. Feller, V. Türk, and F. Nicholson (eds), 'Refugee Protection in International Law' UNHCR's Global Consultations on International Protection (Cambridge: Cambridge University Press, 2003), 78-177, and, in a slightly different form, in international refugee law.

11 EJP Report, p. 105. In his 2006 report to the UN Commission on Human Rights, the UN Special Rapporteur on torture stated at para. 31(c): “It is often the case that the requesting and the requested States are parties to CAT, ICCPR and other treaties absolutely prohibiting torture. Rather than using all their diplomatic and legal powers as States parties to hold other States parties accountable for their violations, requesting States, by means of diplomatic assurances, seek only an exception from the practice of torture for a few individuals, which leads to double standards vis-à-vis other detainees in those countries.” UN Doc E/CN.4/2006/6, 23 December 2005.

12 As many commentators have noticed, this characteristic significantly distinguishes diplomatic assurances against torture and other ill-treatment, from the more widely-accepted use of diplomatic assurances that the death penalty will not be sought or applied in the case of a particular returnee.

13 This argument unfortunately seems to have found some favour, albeit only in the abstract, with the UN Human Rights Committee and Committee against Torture, notwithstanding the absence of empirical evidence to support it. See, for example, Human Rights Committee, Concluding Observations: Sixth Periodic Report of the United Kingdom, CCPR/C/GBR/CO/6, 30 July 2008, p. 3, para. 12; Committee Against Torture, Conclusions and Recommendation: Second Periodic Report of the United States of America, CAT/C/USA/CO/2, 25 July 2006, para. 21.

14 *Ben Khemais v Italy*, Application No. 246/07, 24 February 2009, para. 64.
<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=246/07%20%7C%20246/07&sessionId=49366331&skin=hudoc-en> (in French), accessed 21 March 2010.

15 See, e.g., article 14(1) of the Convention against Torture.

16 See, e.g., Human Rights Committee, General Comment No. 31, para. 12.

17 Thomas Hammarberg, “Viewpoint: ‘The Protection against Torture must be Strengthened’”. 18 February 2008. http://www.coe.int/t/commissioner/Viewpoints/080218_en.asp, accessed 21 March 2010.

18 *Chahal v UK*, 70/1995/576/662, 15 November 1996, paras. 80 and 105.

- 19 Ismoilov v Russia, Application No. 2947/06, 24 April 2008, para. 127.
- 20 Ryabikin v Russia, Application No. 8320/04, 19 June 2008, para. 119.
- 21 Saadi v Italy, Application No. 37201/06, 28 February 2009, para. 147.
- 22 Saadi v Italy, para. 148.
- 23 Ismoilov v Russia, para. 127.
- 24 Ryabikin v Russia, para. 119.
- 25 Ben Khemais v Italy, para. 7.
- 26 Ben Khemais v Italy, paras. 4-5.
- 27 Klein v Russia, Application No. 24268/08, 1 April 2010.
- 28 Klein v Russia, para. 55.
- 29 Committee against Torture, Conclusions and Recommendation: Second Periodic Report of the United States of America, CAT/C/USA/CO/2, 25 July 2006, para. 21. <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G06/432/25/PDF/G0643225.pdf>, accessed 21 March 2010.
- 30 Committee against Torture, Conclusions and Recommendation: Second Periodic Report of the United States of America, para. 21.
- 31 Agiza v Sweden, Communication No. 233/2003, CAT/C/34/D/233/2003, 20 May 2005, para. 13.4. <http://www1.umn.edu/humanrts/cat/decisions/233-2003.html>, accessed 21 March 2010.
- 32 Attia v Sweden, Communication No. 199/2002, CAT/C/31/D/199/2002, 17 November 2003. <http://www1.umn.edu/humanrts/cat/decisions/sweden199-2002.html>, accessed 21 March 2010. The Committee also reiterated its policy of not extending protection to family members simply on the basis of their relationship with a person who might be at risk on return. The risk had to be personal to the petitioner and family associations were deemed, in general, to be too tenuous to meet the requirement that the danger be personal.
- 33 Alzery v Sweden, Communication No. 1416/2005, CCPR/C/88/D/1416/2005, 10 November 2006. <http://www.unhcr.org/refworld/publisher,HRC,,EGY,47975afa21,0.html>, para 11.5. Amnesty International spelling is Mohamed al-Zari while the Human Rights Committee spells his name Mohammed Alzery.
- 34 An Italian court convicted 23 US nationals in absentia and two Italian nationals for the abduction of Usama Mostafa Hassan Nasr (better known as Abu Omar) from a street in Milan in February 2003. Abu Omar was subsequently transferred to Egypt where he reported that he was tortured. The US and Italian agents were not convicted for Abu Omar's rendition or torture in Egypt. See Amnesty International, "Convictions in Abu Omar Case a Step Toward Accountability," 5 November 2009. <http://www.amnesty.org/en/news-and-updates/news/convictions-abu-omar-rendition-case-step-toward-accountability-20091105>, accessed 21 March 2010.
- 35 See Human Rights Watch, Not the Way Forward: The UK's Dangerous Reliance on Diplomatic Assurances, 22 October 2008, p. 1: "Robert Hårdh, secretary of the Swedish Helsinki Committee, a Stockholm-based human rights organization, told Human Rights Watch that to his knowledge, there have not been any negative diplomatic effects at all due to the Agiza affair". <http://www.hrw.org/en/node/75603/section/1>, accessed 21 March 2010.

36 Pelit v Azerbaijan, Communication No. 281/2005, CAT/C/38/D/281/2005, 29 May 2007.
<http://www1.umn.edu/humanrts/cat/decisions/281-2005.html>, accessed 21 March 2010.

37 Pelit v Azerbaijan, para. 11.

38 Pelit v Azerbaijan, para. 11.

39 Amnesty International, Urgent Action – Austria: Risk of Forcible Return/Torture, Muhammad ‘Abd Al-Rahman Bilasi-Ashri, (M) Aged 35, Married with Five Children, (AI Index: EUR 13/001/2002), 4 January 2002.

40 Amnesty International, Urgent Action -- Austria: Risk of Forcible Return/Torture: Muhammad 'Abd al-Rahmin Bilasi-Ashri, (m), UA 266/05, (AI Index: EUR 13/001/2005), 7 October 2005.

41 Amnesty International, Europe and Central Asia: Concerns in Europe and Central Asia: January – June 2004, (AI Index: EURO1/005/2004), 7 October 2005.

42 Human Rights Watch, Still at Risk: Diplomatic Assurances No Safeguard Against Torture, 14 April 2005, p. 78. <http://www.hrw.org/en/reports/2005/04/14/still-risk>, accessed 21 March 2010.

43 Committee against Torture, Austria: Combined Fourth and Fifth Reports, CAT/C/AUT/4-5, 15 July 2009, para. 29. <http://www2.ohchr.org/english/bodies/cat/docs/CAT.C.AUT.4-5.doc>, accessed 21 March 2010.

44 Committee against Torture, List of Issues to be Considered during the Examination of the Fourth and Fifth Periodic Reports of Austria, CAT/C/AUT/Q/4-5, 9 December 2009, para. 13.
<http://www2.ohchr.org/english/bodies/cat/docs/AdvancedVersions/CAT-C-AUT-Q-4-5.pdf>, accessed 29 March 2010.

45 Response to the list of issues with regard to the consideration of the 4th and 5th periodic reports submitted by Austria under the Convention against Torture, CAT/C/AUT/Q/4-5/Add.1, undated, p. 13.
<http://www2.ohchr.org/english/bodies/cat/docs/AdvancedVersions/CAT-C-AUT-Q-4-5.pdf>, accessed 29 March 2010.

46 Letters on file with Amnesty International Austria.

47 In 2003, for example, US operatives apprehended six men, who had come from Algeria, in Bosnia -- three of whom were Bosnian citizens -- and transferred them to Guantánamo Bay. Three of the men were repatriated to Bosnia in December 2008. France accepted two of the men for resettlement and one other remains at the US detention facility in Cuba.

48 Amnesty International, Urgent Action – Bosnia and Herzegovina: Forcible Return/Fear of Torture or Ill-Treatment: Imad Al Husin, (AI Index: EUR 63/005/2008), 20 October 2008.

49 In May 2009, Amnesty International issued an Urgent Action on behalf of Awad Aiman, whom Bosnia and Herzegovina also wishes to deport to Syria. See Amnesty International, Urgent Action – Bosnia and Herzegovina: Forcible Return/Fear of Torture and Other Ill-Treatment: Awad Aiman, (AI Index: EUR 63/004/2009), 6 May 2009.

50 Amnesty International, letter dated 12 January 2010.

51 Al Hanchi v Bosnia and Herzegovina, Application No. 48205/09, 19 August 2009.

52 Berlingske Tidende, “Lene Espersen: Vi skal ikke være en magnet for terrorister”, 20 April 2008, and Politiken.dk, “Denmark unable to return terror suspects to nations unwilling to sign agreements”, 28 April 2008, and “Tunisian suspect in cartoonist murder plot leaves Denmark”, 22 August 2008. The Government established a working party to consider the procedural rules related to administrative

expulsion of foreign nationals who were deemed to be a danger to national security, without putting them at risk of the death penalty, torture or cruel, inhuman or degrading treatment or punishment. The mandate included the consideration of diplomatic assurances.

53 Amnesty International, Human Rights Watch, International Commission of Jurists, Redress Trust, "Open Letter to Danish Minister of Justice Regarding Denmark and Diplomatic Assurances against Grave Violations of Human Rights", (AI Index: EUR 18/004/2008), 17 June 2008.

54 Human Rights Council, Report of the Special Rapporteur on torture: Mission to Denmark, A/HRC/10/44/Add.2, 18 February 2009, para. 69.

55 Betænkning om administrativ udvisning af udlændinge, der må anses for en fare for statens sikkerhed, no. 1505 of February 2009 (Report on administrative expulsion of foreigners considered to constitute a threat/danger to national security). On the expert committee were representatives of the Ministry of Refugees, Immigrants and Integration; Ministry of Justice; National Police; PET (Danish Security and Intelligence Service); Danish Judges Association; Danish Bar Association; and Ministry of Foreign Affairs. The Secretariat for the committee was provided by the Ministry of Refugees, Immigrants and Integration. Requests by Amnesty International, Human Rights Watch, International Commission of Jurists, and Redress Trust to receive information about the Committee's work and to address the Committee did not receive a favourable response.

56 Report on administrative expulsion of foreigners, chapter 10.3.4, pp. 266-267.

57 Report on administrative expulsion of foreigners, pp. 265-267, 289-291, 298.

58 Report on administrative expulsion of foreigners, p. 265, 267.

59 Current state parties to the OPCAT include countries where torture and other ill-treatment are persistent problems, or particular groups are routinely targeted for such abuse, including Cambodia, Guatemala, Kazakhstan, Kyrgyzstan, Nigeria, and Ukraine.

60 Sophie Shihab, "La justice française refuse d'extrader vers la Russie un demandeur d'asile tchéchène," *Le Monde*, 5 March 2009. Torture abuses targeting Chechens continue. See, e.g., Amnesty International, Russian Federation: Rule without Law: Human Rights Violations in the North Caucasus, (AI Index: EUR 46/012/2009), July 2009; Amnesty International, Public Statement – "Russia: Protect Rights in the North Caucasus: Insurgency No Excuse for Abandoning Rule of Law, 7 Groups Say", (AI Index: EUR 46/015/2009), 7 July 2009; Amnesty International, "Russian Federation: Normalization in Chechnya must bring accountability", 16 April 2009.

61 Council of Europe document DH-S-TER(2006)002 Bil (15 March 2006), p. 22 [original in French, English translations presented here are not official].

62 For details related to past cases, see Human Rights Watch, *Empty Promises: Diplomatic Assurances against Torture No Safeguard Against Torture*, Vol. 16, No. 4 (D), April 2004, pp. 31-32 (case of Metin Kaplan). In February 2007, it was also reported that the Federal Ministry of Interior had sought diplomatic assurances from Algeria not to torture anyone suspected of involvement in terrorism-related activities, when returned there from Germany. The Ministry reportedly provided its Algerian counterpart with a list of Algerians suspected of involvement in such activities whom Germany sought to return to Algeria. Amnesty International raised concerns that handing over such a list might have put the individuals at increased risk of grave human rights violations in case of return. See Amnesty International, Germany -- Submission to the UN Universal Periodic Review: Fourth Session of the UPR Working Group of the Human Rights Council, February 2009, (AI Index: EUR 23/004/2008), 8 September 2009.

63 Amnesty International, Germany -- Submission to the UN Universal Periodic Review, 8 September 2009. See also, Human Rights Watch, "Letter to the German Government regarding Diplomatic

Assurances", 21 July 2009.

64 Gemeinsames Ministerialblatt, 30 October 2009 (GMBI 42-61, S. 877ff.).

65 Sections 60(2), (3), and (7), respectively.

66 Section 60(2)(3).

67 Verwaltungsgericht Duesseldorf, 21 K 3263/07.A, 16 January 2009.

68 Verwaltungsgericht Duesseldorf, 11 K 4716/07.A, 4 March 2009.

69 Ibid., p. 18.

70 Note verbale on file with Amnesty International. See also, Amnesty International, Germany -- Submission to the UN Universal Periodic Review, 8 September 2009.

71 Amnesty International, Germany -- Submission to the UN Universal Periodic Review, 8 September 2009.

72 Human Rights Council, Italy: Universal Periodic Review Highlights, 9 February 2009. <http://www.ohchr.org/EN/HRBodies/UPR/Pages/Highlights9February2010am.aspx>, accessed 29 March 2010.

73 Council of Europe, Committee of Ministers, 1078th DH Meeting, 4 March 2010, Section 4.3.

74 Ibid., paras. 1-2.

75 Amnesty International, Tunisia: End Denial, Address Human Rights Abuses in the Name of Security, 25 June 2009. <http://www.amnesty.org/en/news-and-updates/news/tunisia-address-human-rights-abuses-in-the-name-of-security-20090626>, accessed 29 March 2010.

76 Amnesty International, Public Statement – "Slovakia: Constitutional Court Upholds the Absolute Ban on Torture", (AI Index: EUR 72/005/2008), 27 June 2008.

77 TASR, "Terrorist Suspect Mustafa Labsi back in Slovakia", 11 March 2010.

78 Amnesty International, "Spain: Halt Extradition to Russia!" (AI Index: PRE 01/319/2008), 12 December 2008.

79 See, for example, <http://www.memo.ru/hr/hotpoints/caucas1/index.htm>.

80 Amnesty International, "Spain: Halt Extradition to Russia!" 12 December 2008.

81 European Committee for the Prevention of Torture, Public Statement Concerning the Chechen Republic of the Russian Federation, 13 March 2007. <http://cpt.coe.int/documents/rus/2007-17-inf-eng.htm>, accessed 29 March 2010. Governments usually agree to publish the CPT's findings and their responses to those findings; however, Russia has singularly failed to do so over the years.

82 See European Court of Human Rights, Shamayev and 12 Others v Georgia and Russia, Application No. 36378/02, 12 April 2005.

83 Amnesty International, Spain: Briefing to the Committee against Torture, (AI Index: EUR 41/004/2009), November 2009.

84 Ibid.

- 85 Email communication with Amnesty International, 15 September 2009.
- 86 Email communication with Amnesty International, 15 September 2009.
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- 88 "Sweden to Compensate Exonerated Terror Suspect", International Herald Tribune, 3 July 2008.
- 89 See, UN Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by the UN General Assembly in resolution 60/147 of 16 December 2005, paragraphs 15-24.
- 90 *Chahal v UK*, para. 92.
- 91 Memorandum of Understanding between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Hashemite Kingdom of Jordan Regulating the Provision of Undertakings in Respect of Specified Persons Prior to Deportation, signed 10 August 2005; Memorandum of Understanding between the General People's Committee for Foreign Liaison and International Cooperation of the Great Socialist People's Libyan Arab Jamahiriya and the Foreign and Commonwealth Office of the United Kingdom of Great Britain and Northern Ireland Concerning the Provision of Assurances in Respect of Persons Subject to Deportation, signed 18 October 2005; Memorandum of Understanding between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Lebanese Republic Concerning the Provision of Assurances in Respect of Persons Subject to Deportation, signed 23 December 2005; and Memorandum of Understanding between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Federal Democratic Republic of Ethiopia Concerning the Provision of Assurances in Respect of Persons Subject to Deportation, signed 12 December 2008. See Foreign and Commonwealth Office, "Targeting Terrorist Activity", for copies of all the MoUs: <http://www.fco.gov.uk/en/global-issues/counter-terrorism/targeting-terrorism>, accessed 29 March 2010.
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- 93 Joint Committee on Human Rights, Nineteenth Report, Session 2005-06, 18 May 2006, para. 129.
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- 97 Memorandum by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, cOMMdh(2008)23, 18 September 2008, paras. 92-93.
- 98 "Ministers accused of sidestepping torture ban", *The Guardian*, 2 November 2006.
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- 101 See Human Rights Watch, "Letter to British Foreign Secretary David Miliband on Diplomatic Assurances with Ethiopia", 17 September 2009. <http://www.hrw.org/en/news/2009/09/17/letter-british-foreign-secretary-ethiopian-deportation-cases>, accessed 29 March 2010.
- 102 *Omar Othman v UK*, Application No. 8139/09, 11 February 2009.
- 103 *MT, RB, and U v Secretary of State for the Home Department*, [2007] EWCA Civ. 808, 30 July

2007,

para. 131: "The appellant said that the refusal of the Algerian authorities to accept independent monitoring, when the United Kingdom had wished them to do so, was significant. That argument ignored the finding of SIAC at [21] of BB, referring back to its findings at [335] and [336] of Y, that that diffidence was caused by the sensitivity of Algeria, as a recently post-colonial state, to any suggestion that it needed outside surveillance of its behaviour; and that the refusal of outside monitoring was not sinister so far as the interests of BB were concerned."

104 The exchange of letters can be viewed on the FCO website. See Foreign and Commonwealth Office, "Targeting Terrorist Activity": <http://www.fco.gov.uk/en/global-issues/counter-terrorism/targeting-terrorism>, accessed 29 March 2010.

105 RB and U (Algeria) v Secretary of State for the Home Department, [2009] UKHL 10, 18 February 2009.

106 Amnesty International, United Kingdom – Deportations to Algeria at All Costs, (AI Index: EUR 45/001/2007), 26 February 2007.

107 Ibid.

108 AS and DD v Secretary of State for the Home Department, [2008] EWCA Civ. 289, 9 April 2008. See also, Amnesty International, UK – Time to Abandon the Policy of 'Deportation with Assurances', (AI Index: EUR 45/004/2008, 9 April 2008.

109 DD and AS v Secretary of State for the Home Department, [2007] UKSIAC 42/2005, 27 April 2007.

110 The UK also seeks diplomatic assurances in cases where the government does not claim that a person is a threat to national security. In *Lodhi v Secretary of State for the Home Department*, the High Court ruled on 19 March 2010 that the UK government could not rely on diplomatic assurances against torture and other ill-treatment from the government of the United Arab Emirates to extradite a Pakistani national wanted on charges of drug trafficking there. See *Mohammed Fakhar Al Zaman Lodhi v SSHD*, [2010] EWHC 567 (Admin), Case No. CO/7687/2008, 19 March 2010, para. 76. In a second case, decided on 26 March 2010, the SIAC dismissed the appeal of an Algerian national subject to deportation with assurances against torture and other ill-treatment from the Algerian authorities. The SIAC had accepted in 2002 the government's claim that he was a threat to national security, but in a 2007 judgment, SIAC concluded that whatever risk he posed in 2002, "the risk is now insignificant." See *Moloud Sihali v SSHD*, SC/38/2005 (Open Judgment), 26 March 2010.



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DANGEROUS DEALS

EUROPE'S RELIANCE ON 'DIPLOMATIC ASSURANCES' AGAINST TORTURE

Preventing torture is a fundamental obligation of every state. States are not only obliged to eliminate torture at home, but they must also refuse to forcibly return people to countries where torture is practised. Whoever the individual is, and whatever crime he or she is accused of cannot be taken into consideration.

Yet many European countries, such as Austria, Bosnia and Herzegovina, France, Germany, Italy, Slovakia, Spain, Sweden and the UK, have undermined the ban on torture. Their governments have transferred, or attempted to transfer people to countries acknowledged as places where they risk facing serious human rights violations including torture or other ill-treatment, often with impunity.

The returning governments cite unenforceable, bilateral “diplomatic assurances” from one government to another, as a reliable safeguard against these human rights violations. However, landmark cases detailed in this report expose the fiction that promises of humane treatment from governments whose agents routinely torture and otherwise ill-treat returnees can be trusted. They cannot.

This report highlights key cases and initiatives regarding the disturbing use of diplomatic assurances as a counter-terrorism tool; the role of the courts in the process; and continuing campaigns to end their use once and for all.

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