

# 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

### Summary

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Amnesty International, Human Rights Watch and the International Commission of Jurists, call upon member states of the Council of Europe, and the Council of Europe as an institution, to reject any proposals to establish minimum standards for the content and use of diplomatic assurances against the risk of torture or other cruel, inhuman or degrading treatment or punishment (“other ill-treatment”). The organizations consider that the elaboration of such standards (and reliance on diplomatic assurances) is incompatible with the states’ obligations and the aims and principles of the Council of Europe to prevent torture and other ill-treatment.

Amnesty International, Human Rights Watch and the International Commission of Jurists, (also referred to as “the organizations”), oppose the reliance on agreements between states (usually bi-lateral and variously represented as “diplomatic assurances”, “diplomatic guarantees” or “memoranda of understanding”, and hereafter referred to generically as “diplomatic assurances”) which purportedly aim to ensure that an individual subject to transfer from one state to another will not be tortured or ill-treated upon return.

It is the position of the organizations that diplomatic assurances are not an effective safeguard against torture and other ill-treatment. We consider that states’ reliance on diplomatic assurances in sending people to a place where they face a risk of torture or other ill-treatment violates two fundamental rules of international law: the absolute prohibitions of torture and other ill-treatment and of the forcible sending of any person, under any circumstances, to a country where there are substantial grounds for believing that he or she may be in danger of being subjected to torture or other ill-treatment (the *non-refoulement* obligation).

Amnesty International, Human Rights Watch and the International Commission of Jurists urge member states of the Council of Europe not to cloak these arrangements with a legitimacy that they do not deserve by creating standards to regulate their use. Instead, the Council of Europe should see such arrangements for what they are: unacceptable attempts by governments to circumvent their obligation of *non-refoulement* which contribute to a dangerous erosion of a fundamental rule of international law.

It is important to note that states from which such assurances are sought are already under a duty under customary international law to prohibit torture or other ill-treatment of any person. Most (if not all) of these would-be receiving states are also already parties to binding multi-lateral treaties which prohibit torture and other ill-treatment and require them to take legislative, judicial, administrative and other measures necessary to prevent torture and ill-

treatment, investigate allegations of such conduct, bring those responsible to justice and ensure reparation to the victims. However, in virtually all cases which have come to the attention of the organizations, these would-be receiving states that have provided the assurances have repeatedly violated their existing obligations under international law. In particular, they have well-publicized records of widespread or systematic torture and other ill-treatment and/or are places where members of particular groups are routinely singled out for such abuse.

The organizations' opposition to such diplomatic assurances is elaborated below and also set out in the Joint NGO Statement attached hereto as **Appendix I**. It is firmly grounded in international law and the organizations' years of experience of working to eradicate torture and other ill-treatment and monitoring cases of expulsion, extradition, returns, and other forms of transfer ("transfer"). Our research indicates that reliance on such "assurances" has repeatedly shown to be misplaced and exposed the persons who were subject of the assurances to torture and other ill-treatment.<sup>1</sup> It straddles three overlapping and intertwined arguments: the legal, the principled, and the practical.

The organizations consider that states that rely on diplomatic assurances circumvent, and thereby violate, the absolute legal prohibition against sending a person to a state where they risk torture or other ill-treatment, by disregarding the receiving state's poor record of respect for detainees' fundamental rights. Diplomatic assurances are not and cannot be considered a substitute for the various legislative, administrative, judicial and other measures required by international law (with which such states have infamously failed to comply). This is true even if the assurances contain arrangements for a post-return monitoring mechanism.

At the core of the principled argument is that agreeing to enforce an exception to a receiving-state's torture practices in an individual case has the effect of accepting the torture of others similarly situated in the receiving country. In other words, asking for the creation of such an island of supposed legality in the country of return amounts, or in any case comes dangerously close to the sending state accepting the ocean of abuse that surrounds it.

At the practical level, there is ample evidence to show that diplomatic assurances have not worked and there is nothing to suggest that refining such assurances or attempting to perfect them will result in their providing adequate protection against torture or other ill-treatment.

Rather than seeking to regulate an inherently flawed device, Amnesty International, Human Rights Watch and the International Commission of Jurists therefore call on the member states of the Council of Europe, and the Council of Europe as a whole, to actively encourage governments, both within and outside of the Council of Europe, to meet their international legal obligation to prevent torture and other ill-treatment by taking effective system-wide, nation-wide, regional and international measures to that end. Once full compliance with international norms against torture and other ill-treatment is achieved, sending or returning persons between states will become a matter to be settled among law-abiding states in accordance with international law.

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<sup>1</sup> For detailed description and analysis of this subject see Human Rights Watch, *"Empty Promises: Diplomatic Assurances No Safeguard against Torture"*, April 2004; Human Rights Watch, *Still at Risk: Diplomatic Assurances No Safeguard Against Torture*, April 2005. See also "Call for Action against the Use of Diplomatic Assurances in Transfers to Risk of Torture and Ill-Treatment," a joint statement issued in May 2005 by Amnesty International, Association for the Prevention of Torture, Human Rights Watch, International Commission of Jurists, International Federation of Action by Christians for the Abolition of Torture, International Federation for Human Rights, International Helsinki Federation for Human Rights, and World Organisation Against Torture, attached as **Appendix I**.