DIPLOMATIC AGREEMENTS CANNOT BE USED TO RETURN PEOPLE TO TORTURE

12 August 2005

The REDRESS Trust ("REDRESS") is deeply concerned over the British Government's stated intention to deport foreign nationals resident in the UK to their home countries or to third countries where they would risk being tortured or face other ill-treatment. These planned deportations would apparently be based on "diplomatic assurances" against torture. To forcibly return persons on the basis of such assurances is fundamentally incompatible with the international prohibition on the return of persons to countries where they face a risk of torture *(non-refoulement).*

REDRESS has a mandate to assist torture survivors to seek justice and other forms of reparation, which it fulfils thought casework, law reform, research and advocacy. It has been closely following events in the aftermath of September 11 insofar as they have negatively impacted on the rule of law and international human rights generally, and the scourge of torture in particular.

The International Obligation of *Non-Refoulement*

The use of extraditions, deportations or expulsions to move a person from one country to another must always comply with the basic obligation not to render, transfer, send or return such a person to any place where there are substantial grounds for believing that he or she would be in danger of torture and other forms of ill-treatment. This principle of law (*non-refoulement*) forms part of the absolute prohibition against torture and other forms of cruel, inhuman and degrading treatment or punishment contained in Article 3 of the European Convention on Human Rights (ECHR), and it is also specifically established in Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to which the UK is a State Party :

> "1.No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
> 2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consisted pattern of gross, flagrant or mass violations of human rights."

This principle of *non- refoulement* is an obligation under international customary law applicable to *all* States since it forms part of the absolute obligation not to torture, which is recognized as one of the highest norms of international law (*jus cogens*). In other words this obligation exists without the need to sign and ratify specific human rights conventions, so even if the UK withdrew from the ECHR or other international conventions it would still be under an international obligation not to send individuals to countries where they risk being tortured.

The Use of "Diplomatic Assurances" or "Inter-State Memorandums of Understanding" to Circumvent the Non-*Refoulement* Obligation

Since the attacks of 11 September there has been increased use of "diplomatic assurances" to justify the extradition or deportation of persons to countries known to systematically or routinely practice torture. However, as has been pointed out by the European Court of Human Rights in ***Chahal v United Kingdom***, despite assurances by the receiving government, a decision to deport a person facing a risk of torture would still violate Article 3 of the ECHR.

In an attempt to circumvent the ***non-refoulement*** obligation, the UK and other governments have attempted to extend the practice of "diplomatic assurances" in extradition cases where a person might face the death penalty, to cases where the person faces a risk of being tortured. These are two completely different scenarios, in legal and practical terms.

The death penalty is not absolutely prohibited under international law. As such, it is exercised by some States through public means (judicial, legislative, administrative and others). Therefore, where there is an obligation to extradite an individual under an extradition treaty, the sending State can request diplomatic assurances from the receiving State to guarantee that the person would not be executed. But even in these cases, where assurances have been given, international law states that it is the discretion of the sending State to extradite the person. However, in cases where the person faces a risk of torture, the sending State is under an international obligation to refrain from extraditing or deporting him or her. The legal reasoning, as observed by the European Court, is that:

> "…the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 even in the event of a public emergency threatening the life of the nation…The prohibition provided by Article 3 against ill-treatment is equally absolute in expulsion cases. Thus, whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion…In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration. The protection afforded by Article 3 is thus wider than that provided by Articles 32 and 33 of the United Nations 1951 Convention on the Status of Refugees".[1]

[1] *Chahal v. The United Kingdom*, Judgment of 15November 1996, 1996-V, no. 22 paras. 79 & 80.

It is clear that the correct legal interpretation of the obligation under Article 3 of the ECHR is that there is no room for balancing. When there is a risk of ill treatment the obligation is absolute and no other consideration, including national security, can counteract the obligation not to *refoule*. This conclusion has consistently been reached by all international and human rights bodies.

But it is important to note that if individuals cannot be deported or extradited, it doesn't mean that they cannot be prosecuted. The *non-refoulment* principle applies to protect all individuals from torture and ill treatment, but it does not prevent States from prosecuting and punishing alleged criminals.

On the practical level, the essential argument against diplomatic assurances (or inter-state memorandums of understating) is that ***the perceived need for such guarantees in itself is an acknowledgement that a risk of torture and other ill-treatment exists in the receiving country***. In order for torture and other ill-treatment to be prevented, effective safeguards at legislative, judicial, and administrative levels must be in place on a state-wide basis. These safeguards cannot be replaced by consular visits aimed at ensuring compliance with diplomatic assurances. This fact is illustrated by the case of the four British nationals who were detained and allegedly tortured in Saudi Arabia despite consular visits to guarantee their protection (see *R. JONES v. SAUDI MINISTRY OF THE INTERIOR et. al. case UK Court of Appeal*).

Several other inherent problems stem from the use of diplomatic assurances to circumvent the *non-refoulement* obligation. Importantly, when diplomatic assurances fail to protect returnees from torture and other ill-treatment, there is no mechanism that would enable a person subject to the assurances to hold the sending or receiving governments accountable. Diplomatic assurances have no legal effect and the person they aim to protect has no effective recourse if the assurances are breached. Furthermore, the sending government has no incentive to find that torture and other ill-treatment has occurred following the return of an individual - doing so would amount to an admission that it has violated its own *non-refoulement* obligation. **As a result, both the sending and receiving governments share an interest in creating the impression that the assurances are meaningful rather than establishing that they actually are.**

The use of diplomatic assurances by other States

Decisions by national courts on the adequacy of diplomatic assurances to protect persons from torture and other forms of ill-treatment have been mixed. In the case of *Metin Kaplan*, a German court refused a request by Turkey to extradite Kaplan, the leader of a banned Islamist fundamentalist group. The court held that diplomatic assurances from the Turkish Government would not provide Kaplan with "sufficient protection" against such violations. The court stated in *Kaplan* that:

> "…Such formal guarantees in an extradition proceeding can only provide sufficient protection in favour of the persecuted person if their correct implementation through the institutions of the requesting state—in this case the independent Turkish judiciary—can reliably be expected. The latter is not the case here."

The December 2001 transfers of asylum seekers Ahmed Agiza and Mohammed al-Zari from Sweden to Egypt aboard a U.S. Government-leased airplane remain among the most controversial cases involving the use of diplomatic assurances by a European government. This case provide the clearest illustration to date of the inherently flawed nature of diplomatic assurances and of post-return monitoring mechanisms. Sweden expelled Agiza and al-Zari, suspected of terrorist activities, following written assurances from the Egyptian authorities that they would not be subject to the death penalty, tortured or ill-treated, and would receive fair trials. Swedish and Egyptian authorities also agreed on a post-return monitoring mechanism involving visits to the men in prison. The men had no opportunity under Swedish law to challenge the legality of their expulsions or the reliability of the Egyptian assurances.

Agiza and al-Zari were held incommunicado for five weeks after their return. Despite monthly visits thereafter by Swedish diplomats, none of them in private, both men credibly alleged to their lawyers and family members—and, indeed, to Swedish diplomats as well—that they had been tortured and ill-treated in detention. Agiza remains in prison to date after a patently unfair retrial in April 2004. Al-Zari was released without charge or trial in October 2003, remains under surveillance by Egyptian security forces, and reports regularly to the police. He is not permitted to speak with journalists or human rights groups.

Finally, it is important to note that there is a fundamental difference between a 'harsh' asylum policy and a policy of ***refoulement*** based on diplomatic assurances. Asylum systems in some counties might lack necessary judicial safeguards in determining the right of asylum seekers not to be retuned if they face a risk of torture, but this is not to be confused with sending residents who have ***successfully obtained a right to remain*** to countries where they can be tortured or executed. In other words, stopping individuals from getting into the country or deporting them before they get the right to remain is one thing, ***refouling*** them once they are resident is another. The former might be reviewed in light of the obligation under the ECHR to guarantee an effective remedy to individuals seeking protection from torture, but the position of the latter is completely different. People who have obtained the right to remain and have lived many years (even decades) in the UK cannot be detained and deported to countries where they can be subjected to torture or execution; they must be prosecuted in the UK if there is evidence that they have broken this country's laws, or they must be left alone.

Relevant publications:

- TERRORISM, COUNTER-TERRORISM AND TORTURE: INTERNATIONAL LAW IN THE FIGHT AGAINST TERRORISM, July 2004 http://www.redress.org/publications/TerrorismReport.pdf

- COMMENTS TO THE UNITED KINGDOM'S 4TH PERIODIC REPORT TO THE COMMITTEE AGAINST TORTURE, *February 2005* http://www.redress.org/publications/CATRepOct2004.pdf

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