association pour la prévention de la torture
asociación para la prevención de la tortura
association for the prevention of torture

Deportations with assurances and post-return monitoring mechanisms

Evidence to the Independent Reviewer of Terrorism Legislation

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1. Introduction

Measures taken to fight terrorism are both legitimate and important, but must be carried out with full respect to the applicable rules of international law, including various fundamental human rights protected by applicable national, regional and international laws.

The UK's use of diplomatic assurances is already well known. Assurances have been agreed since 2005 from States that are known to routinely torture, for the purposes of purportedly making lawful a detainee transfer which would otherwise be contrary to international law.[1] It is well established in jurisprudence and wider practice that diplomatic assurances alone are unlikely to provide sufficient safeguards to protect a detainee from the risk of torture or ill-treatment.[2]

[1] The prohibition against sending a person to a State where there are substantial grounds for believing a real risk of torture or ill-treatment (*non-refoulement*) is absolute and part of the *jus cogens* prohibition that applies to any transfer between the UK and a receiving State. See European Court of Human Rights (ECtHR), *N v. Finland*, Application no. 38885/02, 26 July 2005, at 158. This rule is drawn from article 3 of the UN Convention against Torture and customary international law, as applied before quasi-judicial treaty bodies, including the Committee against Torture (H.K.H. v Sweden, Communication No.204/2002, 28 November 2002) and Human Rights Committee (General Comment No. 31, CCPR/C/21/Rev.1/Add. 13, 26 May 2004).

[2] In *Chahal v. UK*, the ECtHR Grand Chamber ruled the assurances received from India would not suffice to provide the UK with a guarantee of protection ECtHR Grand Chamber, *Chahal v. UK*, Application number 22414/93, 15 November 1997, 23 EHRR 413, at 105. Assurances were equally dismissed in subsequent cases, such as *The Government of the Russian Federation v. Akhmed Zakaev*, Bow Street Magistrates' Court, Decision of Hon. T. Workman, 13 November 2003. More recently, see the case of *Singh and Singh v. Home Secretary*, SC/4/99 and SC/10/99, SIAC, 31 July 2000, quoted in the Privy Counsellor Review Committee Report, Anti-Terrorism, Crime and Security Act 2001 Review, 18 December 2003 at fn.136. The well-known cases of *Agiza* and *Alzery* demonstrate unfortunate examples of diplomatic assurances which proved deficient in practice. See CAT, *Agiza v. Sweden*,

It has been argued by various commentators, including the APT, that diplomatic assurances do not provide any additional protection to detainees, since all States are already under a binding duty to provide protection against torture and ill-treatment, either as one of the obligations described pursuant to treaties freely entered into, or as part of the customary international law protection afforded through the absolute *jus cogens* prohibition against torture. The value of signing a non-binding agreement when so many binding agreements have proven insufficient is therefore questionable.

While the UN Committee against Torture and the Special Rapporteur on torture have not ruled out the use of diplomatic assurances entirely, they have both registered increasingly strong language to describe their serious concerns that diplomatic assurances are regularly misused by States in contravention of international law, in an attempt to circumvent the absolute prohibition against torture.[3]

Most recently, in recommendations made to the UK following its periodic review, the concern of the Committee against Torture was made particularly clear:

> *"The more widespread the practice of torture or cruel, inhuman or degrading treatment is, the less likely it will be that a real risk of such treatment can be avoided by diplomatic assurances, however stringent any agreed follow-up procedure may be. Therefore, the Committee considers that diplomatic assurances are unreliable and ineffective and should not be used as an instrument to modify the determination of the Convention."*[4]

2. Post-return Monitoring

To avoid the conclusion that assurances add no additional protection for returned persons, diplomatic agreements concluded between the UK and Jordan, Libya, Lebanon, and others provide for a system of post-return monitoring.

The agreement with Jordan, dated 10 August 2005, provides for a returned person to have "prompt and regular visits from the representatives of an independent body nominated jointly by the UK and Jordanian authorities. Such visits will be permitted at least once a fortnight […] and will include the opportunity for private interviews with the returned person. The nominated body will give a report of its visits to the authorities of the sending State."

Former UN Special Rapporteur on torture, Theo van Boven, examined the legitimacy of similar monitoring regimes in 2002. He reported that deportations with assurances would not be legitimate, "unless the Government of the receiving country has *provided an unequivocal guarantee* to the extraditing authorities that the persons concerned will not be subjected to torture or any other forms of ill-treatment upon return, and that *a*

Communication No. 233/2003, 20 May 2005; and CCPR, *Alzery v. Sweden*, Communication No. 1416/2005, 10 November 2006.

[3] Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, "Interim Report to the General Assembly", 1 September 2004, UN Doc. A/59/324, at paragraphs 25-42; Committee against Torture, Concluding Observations and Recommendations on the 4th Periodic Report of the United Kingdom, *supra* n. 6, at paragraphs 4(d) and 5(i).

[4] Committee against Torture, Concluding observations on the fifth periodic report of the United Kingdom, adopted by the Committee at its fiftieth session (6-31 May 2013), CAT/C/GBR/CO/5, at 18.

system to monitor the treatment of the persons in question has been put in place with a view to ensuring that they are treated with full respect for their human dignity."[5]

Several governments, including the UK, have appeared persuaded by diplomatic assurances from States that routinely torture which provide for a system of monitoring, in excess of general international obligations, thus providing the returned person with extra protection. The mechanism would monitor and detect any ill-treatment in violation of the assurances offered by the receiving State, and provide a method through which the sending State could hold the receiving State accountable. Both arguments however, are flawed, and should be exposed as such to demonstrate the fatal assumption that such a mechanism could adequately protect the detainee from abuse.

Torture, by its nature is conducted in secret. It is often very difficult to detect. Bruises can heal, and increasingly sophisticated techniques can leave no outward sign of abuse. Victims also find it extremely difficult to talk about their experience due to the very real fear that they will suffer further abuses. Victims are regularly threatened with further violence if they complain.

The failure of the USA to cease their ill-treatment in Abu-Ghraib and Guantanamo Bay demonstrates that even when robust monitoring mechanisms (the ICRC) conduct visits and express concerns over the treatment given to detainees, they only have a limited power to prevent torture and other ill-treatment. Even the most expert monitors are not always able to prevent abuses, nor provide for accountability.

It is also significant that many existing mechanisms have denounced the regime of diplomatic assurances and refused to take part in any associated monitoring.[6]

In 2006, SRT Nowak asserted that "post-return monitoring mechanisms are no guarantee against torture – even the best monitoring mechanisms (e.g. ICRC and CPT) are not 'watertight' safeguards against torture."[7] Without a guarantee that the protection will be effective in practice, no post-return monitoring mechanism can make the system of deportations with assurances lawful.

Since their introduction, various experts have concluded that no post-return monitoring mechanism can provide the guarantees necessary to protect a person completely. For instance, the Former High Commissioner for Human Rights, Louise Arbour wrote that "short of very intrusive and sophisticated monitoring mechanisms, such as round the clock video surveillance of the deportee, there is little oversight that

[5] [emphasis added] Report of Special Rapporteur on torture, Theo van Boven, to the General Assembly, 2 July 2002, UN Doc. A/57/173, para.35.

[6] The ICRC rejected an invitation to conduct selective post-return monitoring for detainees returned to Egypt from the UK. As reported in *Hani El Sayed Sabaei Youssef v. The Home Office* [2004] EWHC 1884 (QB), 30 July 2004, para.26. The Jordanian Government had proposed the National Centre for Human Rights (NCHR) should monitor Abu Qatada after his extradition from the UK, but the NCHR declined the offer. See ECtHR, *Othman (Abu Qatada) v. UK*, Application no. 8139/09, 17 January 2012, at 85. Amnesty International report that in the Spanish plans to extradite Chechen Asylum-seeker, Murad Gasayev, to Russia relied on visits by an independent NGO nominated in court for the purpose. However, the monitors had not been consulted and refused on principle to conduct visits in accordance with them. See Amnesty International, *Dangerous Deals: Europe's Reliance on 'Diplomatic Assurances' against Torture* (2010), p.5.

[7] Report of the Special Rapporteur on torture, Manfred Nowak, to the Commission on Human Rights, 23 December 2005, UN Doc.E/CN.4/2006/6, para.31(e).

could guarantee threat the risk of torture will be obliterated in any particular case;"[8] and Amnesty International have asserted that "[t]he claim that post-return monitoring can be corrective for deficiencies in legislation, the judiciary, and the prison and detention system that allow an environment where torture flourishes, is unwarranted."[9]

While it has been widely asserted that no post-return monitoring mechanism can offer the guarantee necessary to completely eliminate the risks of torture and other forms of ill-treatment, the recent case of *Omar Othman v. UK* before the European Court of Human Rights ruled that, in fact, the assurances provided by Jordan coupled with a monitoring mechanism would suffice to eliminate the real risk of torture and ill-treatment on his return.[10] Yet despite the reasoning of the Court in *Othman*, the jurisprudence is not settled. The Court had earlier rejected a system of monitoring in *Ben Khemais v. Italy* as being deficient. It stated that "[v]isits by the International Committee of the Red Cross in Tunisian places of detention cannot dispel the risk of being subjected to treatment contrary to Article 3 of the Convention." [11]

2.1. Mechanisms nominated by the UK Government

In Libya, the UK government approached the Gaddafi International Foundation for Charity Associations to monitor deportations conducted under assurances. The Foundation was run by Saif al-Islam Gaddafi, currently detained pending trial for allegedly torturing and killing civilians, and subject to a warrant of the International Criminal Court for Crimes against Humanity. Understandably, reliance on such a body was viewed with scepticism by international observers, particularly since well-known and routine practices of torture were denied by the Foundation.[12]

The UK has concluded further agreements with the Ethiopian National Human Rights Commission and the Adaleh Centre for Human Rights to monitor returned persons to Ethiopia and Jordan. However, neither body is empowered with a statutory mandate that allows for unannounced visits to places of detention in their country, nor do they have the authority or experience to detect and prevent torture and other forms of ill-treatment.

In *Othman*, the Court relied on the fact that Adaleh, a small Jordanian NGO, would conduct monitoring upon Othman's return. The Court did not accept as conclusive that Adaleh had no experience in monitoring places of detention and has little authority to demand any assistance from the authoritative Jordanian regime. It also finds itself reliant on the funding of the British Government, which would be reluctant to find that Jordan had broken its promises. Such a funding relationship provides a potential

[8] OHCHR, Human Rights Day Statement by Louise Arbour, [former] High Commissioner for Human Rights, 7 December 2005.
[9] Amnesty International, *Dangerous Deals: Europe's Reliance on 'Diplomatic Assurances' against Torture* (2010), p.6.
[10] ECtHR, *Othman (Abu Qatada) v. UK*, Application no. 8139/09, 17 January 2012.
[11] ECtHR, *Ben Khemais v. Italy*, Application no. 246/07, 24 February 2009, para.64. The case repeats the earlier Grand Chamber ruling in the case of *Saadi v. Italy*, Application no. 37201/06, 28 February 2008.
[12] "What has been said about the existence of torture in Libyan prisons is untrue and can never happen because of the existence of an agreement between Gaddafi International Foundation for Charity Associations and Prison Authorities in Libya. This agreement allows surprise visits by local and international human rights organisations to all prisons and rehabilitation centres in the country." See, statement by Gaddafi International Foundation for Charity Associations, 20 October 2005, quoted from Human Rights Watch, *Commentary on State Replies; CDDH Questionnaire on Diplomatic Assurances*, March 2006.

incentive for political pressure on Adaleh and raises the question of their independence.

As further asserted by counsel for Othman in the case, "Notwithstanding Adaleh's own limitations, the nature of the monitoring provided for by the terms of reference was also limited. Consistently with those terms of reference, Jordan could limit access to one visit every two weeks. In addition, no provision was made for independent medical examinations; Adaleh would not enjoy unfettered access to the entire place of the applicant's detention, as it would merely be entitled to a private visit with him; there was no mechanism for Adaleh to investigate a complaint of ill-treatment; neither the applicant nor his lawyers would have access to Adaleh's reports to the Jordanian and United Kingdom Governments; and it appeared that monitoring would be limited to three years. All of these factors meant that Adaleh's monitoring fell short of international standards, such as those set out in the Optional Protocol to UNCAT."[13]

In spite of these arguments, and the fact that the agreement is fatally weakened by the failure to provide a remedy in cases of non-compliance and a failure to provide any method of enforcement, the Court ruled that such limitations would not seriously limit the capacity of Adaleh to conduct monitoring to protect Othman from ill-treatment on his return.

It is submitted that this reasoning is flawed. Such visits do not provide adequate protection from torture or ill-treatment.

Where abuse is systematic, practitioners are skilled and well-practised at masking the signs of torture. Victims are routinely threatened not to report the abuse. In such cases, even the most robust mechanism is unlikely to protect an individual against threats of specific abuse.

Even when the best monitoring mechanisms have unimpeded, unannounced and regular access to detainees, the risk of torture and other forms of ill-treatment remains.

3. System of monitoring proposed by the OPCAT

The extensive experience of organisations including the ICRC and the European Committee for the Prevention of Torture (CPT) has demonstrated that regular visits to places of detention can be extremely effective for preventing torture and other ill-treatment. This has also been recognised by the UN Special Rapporteur on torture, who recommends that regular inspections of places of detention, especially when carried out as part of a system of periodic visits, constitute one of the most effective preventive measures against torture.[14]

The Optional Protocol to the UN Convention against Torture (OPCAT) aims to prevent torture and other ill-treatment by establishing a system in which regular visits to all places of detention within the jurisdiction and control of States parties are undertaken and, on the basis of these visits, recommendations from international and national experts on improving domestic prevention measures are submitted to the authorities of the States parties.

[13] ECtHR, *Othman (Abu Qatada) v. UK*, Application no. 8139/09, 17 January 2012, at 174.
[14] See reports of the UN Special Rapporteur on torture, E/CN.4/2003/68, para.26(f), and A/59/324, para.41.

When a State ratifies the OPCAT, it gives a commitment to establish a proactive system of visits to prevent human rights abuses. Each State party consents to allow regular, unannounced visits by international and national experts to all types of places where persons are deprived of their liberty. These visits are conducted by the SPT and national preventive mechanisms (NPM). An NPM should normally be established within a year of OPCAT ratification.

Preventive visits enable monitoring bodies to identify risk factors, analyse both systematic failures and patterns of failures, and propose recommendations to address the root causes of torture and other ill-treatment. This is a long-term objective through which OPCAT mechanisms attempt to build an environment where torture is unlikely to occur.

Though a helpful contribution to prevention, OPCAT-mandated visiting mechanisms are not enough in themselves to prevent torture and other forms of ill-treatment. As recognised in article 2 of the UN Convention against Torture, the prevention of torture requires a range of legislative, administrative, judicial and other measures. Prevention aims to address the root causes of torture and other ill-treatment; to be successful, it must involve a holistic approach that is directed at society as a whole.

While successful efforts at prevention will certainly reduce the risks of abuse, it does not provide a 100% guarantee that specific vulnerable individuals will be protected from serious risks of torture and other ill-treatment.

4. Why an NPM is the 'wrong tool for the job' as post-return monitor

Specifically, some of the functions of NPMs and associated reasons mean that they are particularly unsuited to fulfil the role of a post-return monitor.

4.1. NPMs don't have capacity

First, it should be recognised that many NPMs are relatively young and are challenged by the sheer scale and variety of the problems faced by domestic systems of detention.

Article 4 of the OPCAT describes the system of visits to all places of detention to be undertaken by an NPM. The definition of 'places of detention' was designed to be very broad in order to provide the widest possible protection for persons deprived of their liberty. Consequently, a number of places fall within the scope of NPM visits including police stations, prisons, immigration and asylum-seeker centres, social care and elderly homes, mental health institutions, overseas military detention facilities and various other places.

Currently, 54 States parties have designated an NPM, though relatively few have the capacity to perform all the activities required of them, pursuant to the OPCAT.

4.2. Such a role would challenge the NPM's functional independence

Article 18(1) of the OPCAT requires that "States parties shall guarantee the functional independence of the national preventive mechanisms as well as the independence of their personnel." This provision prevents any NPM from being required to conduct

visits requested by national authorities, or adjust the regularity, focus or methodology of their planned visits.

By accepting funding to perform specific protection monitoring roles, NPMs risk losing some of their independence and freedom to operate in full compliance with the object and purpose of the OPCAT. As noted by former Special Rapporteur, Manfred Nowak, "[b]oth States have a common interest in denying that returned persons were subjected to torture."[15] The pressure from either or both States involved in the detainee transfer is likely to call into question the ability of the NPM to act impartially and independently from State authorities.

Additionally, promises of funding for such specific tasks places significant pressure on the NPM to shift its mandate from implementation of the OPCAT to performance of the assurances agreement. States which provide funding to NPMs for post-return monitoring risk undermining the genuine attempts at preventing torture and other ill-treatment for all persons deprived of their liberty.

4.3. Post-return monitoring distorts the holistic approach of prevention

Post-return monitoring is selective, yet States have a duty to extend preventive safeguards against torture to all persons deprived of liberty. Such selective monitoring creates a two-tier system of protection, "attempting to provide for a special bilateral protection and monitoring regime for a selected few and ignoring the systematic torture of other detainees, even though all are entitled to the equal protection."[16] Such a policy is inconsistent with the object and purpose of preventive monitoring.

5. Preventive, or Protective Monitoring?

Established and professional monitoring bodies, such as NPMs, are designed to reduce risks of torture and ill-treatment across the whole system of detention, rather than protect specific individuals. Prevention is forward-looking, aimed at anticipating conditions or circumstances which are likely to degenerate into torture and other ill-treatment. As noted above, no prevention mechanism provides a complete guarantee to protect persons at particular risk of abuse.

Preventive visiting mechanisms aim to identify conditions that lead to torture and other forms of ill-treatment, and make recommendations aimed at reducing the risks of future abuse. The system of visits required to enable short-term immediate protection of specific individuals, in contrast, has a different focus and mandate.

Significantly, conducting monitoring visits to specific individuals places such 'protected' persons in an untenable position: If they admit they have been tortured or abused, they will obviously be identified as the source of the complaint, making them even more vulnerable to reprisal actions from authorities. It is precisely this risk which genuine preventive mechanisms seek to eliminate in conducting interviews with many, or all, detainees in a place of detention. By conducting seemingly random interviews

[15] Report of the Special Rapporteur on torture, Manfred Nowak, to the Commission on Human Rights, 23 December 2005, UN Doc.E/CN.4/2006/6, para.31(h).
[16] OHCHR, Human Rights Day Statement by Louise Arbour, [former] High Commissioner for Human Rights, 7 December 2005.

with many detainees, the monitoring body preserves the anonymity of any complaint of ill-treatment.[17]

Even if the person does take the significant risk to admit they have been ill-treated, it seems unlikely that either the sending or receiving State would be willing to acknowledge such abuse. After all, to recognise the complaint would be to acknowledge that they had breached the prohibition against torture and that the diplomatic assurances had been violated.

Prevention recognises that no one technique or safeguard will adequately reduce the risk of torture or other forms of ill-treatment completely. Rather, a comprehensive approach is necessary with multiple layers of protections.

Short-term post-return monitoring aimed at protecting a few detainees cannot claim to be an equivalent substitute for long-term comprehensive prevention provided by regular, unannounced and professional preventive monitoring by robust visiting mechanisms. The system of preventive monitoring described by the OPCAT cannot fulfil the requirements of post-return protection-oriented monitoring.

6. Conclusions

The agreements concluded between the UK and several States provide for relatively specific post-return protections. It provides for contact with and visits from an independent body. Visits should be carried regularly and be private (i.e. confidential). After the visit, the mechanism should report to the sending State. No agreement provides for unannounced visits. Further questions may be asked to organisations nominated to conduct the visits in cases where they have little experience of detecting abuses. It is extremely unlikely that any post-return monitoring mechanism could effectively protect a person at particular risk of abuse.

Preventive monitoring recommends that monitors must be professionals, trained in detecting signs of physical and mental torture, as well as other forms of ill-treatment. Monitors must have unhindered access to detainees at any time, without notice. They must also have full access to information and to the whole facility, including areas of accommodation. Prevention is aimed at reducing the risk factors of torture and other ill-treatment for all persons deprived of their liberty, but does not attempt to offer a guarantee to protect persons deprived of their liberty.

The fact that a country has an established and functioning NPM demonstrates a commitment to take the necessary measures to effectively prevent torture and ill-treatment. While this is very positive, it should not be understood that an NPM could serve to fulfil the necessary post-return protection role required by the UK in its deportations with assurances policy.

In conclusion, NPMs should in no way be viewed as suitable post-return monitoring mechanisms to accompany diplomatic assurances. Any post-return protection role would significantly reduce the functional independence and effectiveness of an NPM, and risks undermining the developing global culture of prevention.

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[17] 'Do no harm' is a key principle of preventive monitoring. See APT, 'Principles of detention monitoring' at http://www.apt.ch/en/principles-of-detention-monitoring/.