ODIHR.GAL/22/07
20 March 2007
OSCE+
Original: ENGLISH

BACKGROUND PAPER

ON

Extradition and Human Rights in the Context of Counter-terrorism

Workshop on Legal Co-operation in Criminal Matters Related to Terrorism

Vienna, 22-23 March 2007

INTRODUCTION

As the threat of terrorism has become increasingly global, so has the effort to combat terrorism. States have an obligation to protect those within their jurisdiction from the threat of terrorism and to ensure security. Security, both on a national and on an international level, can only be guaranteed when based upon the respect of human rights, democracy and the rule of law. This basic fact is often lost in the discourse around the fight against terrorism. An obligation to protect human rights should not be seen as a barrier to effective co-operation to guarantee security but rather as a way, in itself, of guaranteeing security and enabling states to co-operate with each other in a manner that allows for effective prosecutions and prevention of terrorism.

States must ensure that the legitimate aim of security does not undermine the very rights it seeks to safeguard. Acts of terrorism may entail serious breaches of human rights and the perpetrators of such criminal acts should not enjoy impunity. Human rights standards must always govern how states treat people under their jurisdiction, whether protecting them from crime, or assessing whether or not an individual is criminally responsible. Where states fail to respect human rights in their counter-terrorism efforts, they undermine the sense of trust and security in the very communities that they are trying to protect from terrorist acts. If a conviction is obtained through a miscarriage of justice, not only is it likely that the real offender will remain at large to potentially carry out further terrorist acts, but the damage that can be done in terms of fomenting a climate of alienation and mistrust in which the potential for radicalisation and recruitment to terrorism is exacerbated is incalculable. Where abuses of human rights arise out of, or are tacitly accepted through international co-operation, the sense of mistrust and alienation becomes a global phenomenon which threatens the security of all.

It is the failure to respect human rights rather than the respect of those rights which can create an impediment to international co-operation to combat terrorism.

In line with its mandate, the ODIHR therefore offers this background information, followed by some general conclusions and recommendations.

COMMITMENTS OF OSCE PARTICIPATING STATES

The OSCE Ministerial Council approved at its meeting in Bucharest in December 2001 a 'Decision on Combating Terrorism' where OSCE participating States pledged to 'defend freedom and protect their citizens against acts of terrorism, fully respecting international law and human rights'.[1] A year later the Ministerial Council adopted the 'OSCE Charter on Preventing and Combating Terrorism' which states that OSCE participating States consider it 'of utmost importance to complement the ongoing implementation of OSCE commitments on terrorism with a reaffirmation of the fundamental and timeless principles on which OSCE action has been undertaken and

[1] Decision No 1 on Combating Terrorism, adopted by the OSCE Ministerial Council in Bucharest, 4 December 2001 (MC(9).DEC/1).

will continue to be based in the future, and to which participating States fully subscribe'.[2] It also contained an undertaking for participating States to 'conduct all counter-terrorism measures in accordance with the rule of law, the United Nations Charter and relevant provisions of international law, international standards of human rights, and where applicable, international humanitarian law'.

The Bucharest Plan of Action calls on the ODIHR to assist participating States to act in accordance with the rule of law, democratic values and human rights when they take measures to counter terrorism.

Despite this, however, the International Helsinki Federation, in its report 'Anti-terrorism Measures, Security and Human Rights – Developments in Europe, Central Asia and North America in the Aftermath of September 11'noted a number of cases of problematic practices in OSCE participating States and said that 'In their bid not to harbour terrorist suspects within their territories in the aftermath of September 11, a number of OSCE participating States have been willing to abandon their international human rights obligations, and above all the principle of non-refoulement.'[3]

It is in the light of the commitments of OSCE participating States that this paper seeks to explore some of the problems and solutions related to the protection of human rights in the context of judicial co-operation and particularly extradition in the international fight against terrorism.

EXTRADITION

The need for improved international co-operation to combat terrorism was brought into stark relief following the events in New York of 11 September 2001 and, more recently, in Madrid on 11 March 2004 and in London on 7 July 2005. Extradition and the transfer of suspects is perhaps the front line of that co-operation and, as a result developments in extradition law have been high profile and wide ranging in Europe and beyond over the past three years. In considering decisions on extradition or the transfer of suspects, states cannot turn a blind eye to the potential for breaches of a number of rights including, among others the non-derogable right to freedom from torture, cruel, inhuman and degrading treatment and the right to a fair trial as well as the principle of legal certainty and freedom from discrimination in order to ensure that they meet their obligations under international human rights law.

Swifter extraditions based on mutual trust

As a key element of its 'Road Map on Terrorism', the European Union agreed and adopted the Framework Decision on the European arrest warrant and surrender procedures between Member States (EAW) to allow European Union countries a

[2] OSCE Charter on Preventing and Combating Terrorism, adopted by the OSCE Ministerial Council in Porto, 7 December 2002 (MC(10).JOUR/2).

[3] The International Helsinki Federation, 'Anti-terrorism Measures, Security and Human Rights – Developments in Europe, Central Asia and North America in the Aftermath of September 11', April 2003, p. 181.

simplified method of surrendering suspects between states.[4] This system has seen a speeding up of the surrender of criminal suspects, including those accused of terrorist offences, notably by removing the political element of traditional decisions on extradition (governed notably in Europe by the European Convention on Extradition 1957) and leaving a decision on surrender to another European arrest warrant country to a judicial authority. It also removes the requirement for double criminality (that is the requirement that an act be an offence in both the requested and requesting state) in relation to terrorist suspects in surrenders within the EU.

This crucial development was possible due to the high level of trust built up between Member States of the EU that they will respect the principles of human rights, democracy and the rule of law enshrined in the Treaty of the European Union and on the fact that all Member States are signatories to the European Convention on human rights and fundamental freedoms (ECHR) and the International Covenant of Civil and Political Rights (ICCPR). That trust is built, amongst other things, on the assumption, based on experience and the monitoring of Member States prior to accession to the EU, that judicial authorities are independent and will uphold the law, including international law relating to the protection of human rights. The EAW specifically states that it does not alter Member States' obligations under international human rights treaties including the ECHR. Paragraphs 12 and 13 of the preamble state that:

> *(12) This Framework Decision respects fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union, in particular Chapter VI thereof. Nothing in this Framework Decision may be interpreted as prohibiting refusal to surrender a person for whom a European arrest warrant has been issued when there are reasons to believe, on the basis of objective elements that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that the person's position may be prejudiced for any of these reasons.*
>
> *This Framework Decision does not prevent a Member State from applying its constitutional rules relating to due process, freedom of association, freedom of the press and freedom of expression in other media.*
>
> *(13) No person should be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.*

The overriding importance of fundamental rights in European law is again set down in Article 1(3) of the EAW which states:

[4] The EU Framework Decision on the European arrest warrant and surrender procedures between Member States (EAW), 13 June 2002, OJ L 190 of 18.07.2002, p.1.

This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and the fundamental legal principles as enshrined in Article 6 of the Treaty on European Union.

These provisions make it clear that both the requesting and requested states within the EAW scheme are bound to fulfil their international treaty obligations as well as those resulting from their common constitutional traditions regarding human rights.

The simplification of the system by removing the political element of the decision should, in a state with an independent and effective judiciary, allow for an improvement in the protection of individual rights as well as an improvement in the efficiency of cross-border prosecutions. Judicial authorities can and do block surrender where it would be likely to lead to a breach of human rights, whether or not the requesting state is a member of the EU[5], but surrender in cases where there is no issue of a potential breach of human rights is much quicker than under a traditional extradition regime. It is therefore in states' interests to ensure that human rights are respected in their jurisdiction to ensure that swift and effective prosecutions are possible for terrorist offences.

The European Convention on Extradition (ECE) 1957 also simplified extradition between signatory states in the Council of Europe by removing the necessity to establish the evidence on which a request was made by providing a prima facie case. This simplification is also made on the assumption that all signatory states are also signatories to the ECHR and respect human rights. The ECE also prohibits extradition in cases where a state party has 'substantial grounds for believing that a request for extradition […] has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that that person's position may be prejudiced for any of these reasons.'[6] The simplification contained in the ECE will not prevent a Member State from refusing an extradition under the ECE in cases where it is apparent that surrender would result in a serious breach of human rights, nor will it prevent a judicial authority from discharging a suspect where there is clear evidence that the request has been made in bad faith.[7]

The genuine improvement of respect for human rights and the independence of the judiciary are key elements in improving co-operation between states and allowing for more effective cross-border prosecutions.

Extradition and international human rights obligations

The case law of the European Court of Human Rights is quite clear in relation to a state's obligations to protect human rights when extraditing a suspect. The case of

[5] For example *R v Secretary of State for the Home Department, ex parte Rachid Ramda [2002] EWHC 1278 (Admin)* (request from France to UK*); Irastorza Dorronsoro No 238/2003, Judgement of the Court of Appeal of Pau of 16 May 2003* (request from Spain to France).

[6] The European Convention on Extradition (ECE), Article 3.2.

[7] For example the refusal by a UK court to extradite Akhmed Zakayev to Russia on the grounds that on the grounds of his ethnicity and political beliefs it was likely that he would be tortured if returned to the Russian Federation. 13 November 2003 (unreported).

Soering v the UK established the principle that a state would be in violation of its obligations under the ECHR if it extradited an individual to a state, in this case the U.S., where that individual was likely to suffer inhuman or degrading treatment or torture contrary to Article 3 ECHR.[8] The Court said:

> *The question remains whether the extradition of a fugitive to another state where he would be subjected to or likely to be subjected to torture or to inhuman and degrading treatment or punishment would itself engage the responsibility of a Contracting State under Article 3 … It would hardly be compatible with the underlying values of the Convention, that 'common heritage of political traditions, ideals, freedom and the rule of law' to which the Preamble refers, were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed. Extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3, would plainly be contrary to the spirit and intendment of the Article, and in the Court's view this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving state by a real risk of exposure to inhuman and degrading treatment or punishment prescribed by that Article.*

Obiter dicta in that case extended this principle to cover the possibility of a serious and flagrant breach of fair trial rights under Article 6 ECHR. These principles bind each and every signatory to the ECHR and must apply to extradition between signatories to the Convention to the same extent as they apply to extradition from a signatory state to a third state such as the U.S. Decisions as to whether or not there is a risk of a breach of human rights must be taken on the facts of each case rather than simply on a general view of a state's record with regard to the protection of human rights though clearly, where there is a recognisable pattern of human rights abuses in a state's system this is likely to increase the probability of a risk of a breach of human rights in a particular case. The Council of Europe's Guidelines on Human Rights and the Fight against Terrorism adopted in July 2002 reflect this jurisprudence.

The UN Human Rights Committee, in relation to the ICCPR has also noted that 'if a state party extradites a person within its jurisdiction in such circumstances, and if, as a result there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, the State party may be in violation of the Covenant'.[9]

Diplomatic Assurances

The use of 'diplomatic assurances' as a form of guaranteeing that a person will not be ill-treated following surrender to a state has increased within the context of the fight against terrorism. The legality and effectiveness of this practice in protecting human

[8] *Soering v the UK,* (1989) 11 EHRR 439.

[9] *Chitat Ng v Canada*, Communication No. 469/1991, UN Doc: CCPR/C/49/D/469/1991, para 14.2; in the same vein, see also General Comment 20, 10 March 1992, para 9, and General Comment 31, 26 May 2004, para 12.

rights and fulfilling states' non-derogable obligation not to render, transfer, send or return a person where there are substantial grounds for believing that he or she would be in danger of being subjected to torture (non-refoulement) has been called into question by a number of commentators.

The human rights organization REDRESS, in their report 'Terrorism, Counter-terrorism and Torture: International Law in the Fight against Terrorism' state that:

> *While assurances may be acceptable in certain cases, it is difficult if not impossible to justify their use in cases of expulsions of persons toward countries that systematically or routinely practice torture. The use of assurances in such cases would imply that the sending State believes that while the receiving State routinely engages in grave human rights violations and serious crimes under international law, they will definitely refrain from or have the capacity to prevent such acts in the one particular case. This is inherently contradictory. On the other hand, monitoring mechanisms can, at best, function on a very limited basis as countries that engage in the practice of torture usually restrict access of detainees to lawyers, doctors and other outside persons. In addition, any monitoring mechanism would normally function for only a limited time period, subsequently exposing the extradited person to torture and ill treatment. In a number of cases diplomatic assurances have not been complied with or appear to have been ineffective.*[10]

The report also cites the case of *Metin Kaplan* where a German court refused a request by Turkey to extradite Kaplan, the leader of a banned Islamist fundamentalist group.[11] The court held that diplomatic assurances from the Turkish government would not provide 'sufficient protection' for Kaplan from human rights violations:

"….Such formal guarantees in an extradition proceeding can only provide sufficient protection in favour of the prosecuted 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."[12]

Human Rights Watch[13] (HRW) in their Report "*Empty Promises: Diplomatic Assurances No Safeguard against Torture*" highlight the problem of diplomatic

---

[10] REDRESS, July 2004, p. 32. REDRESS is a human rights organization that helps torture survivors obtain justice and reparation (http://www.redress.org/).
[11] Kaplan 4 Aus (a) 308/02-147.203-204.03111, 27 May 2003.
[12] Ibid.
[13] See also HRW, *"Diplomatic Assurances" against Torture - Questions and Answers*, at http://hrw.org/backgrounder/eca/ecaqna1106/; HRW, *Still at Risk - Diplomatic Assurances No Safeguard Against Torture*, at http://hrw.org/reports/2005/eca0405. More publications on the topic of diplomatic assurances may be found in the websites of other NGOs, such as Amnesty International ('Diplomatic assurances' – No protection against torture or ill-treatment at http://www.amnesty.org.ru/library/pdf/ACT400212005ENGLISH/$File/ACT4002105.pdf) and International Helsinki Federation for Human Rights (Counter-terrorism measures and the prohibition on torture and ill-treatment - A briefing paper on developments in Europe, Central Asia and North America, November 2006 http://www.ihf-hr.org/documents/doc_summary.php?sec_id=58&d_id=4343).

assurances being used to circumvent the principle of non-refoulement and makes a number of recommendations for governments including:

- "Reaffirm the absolute nature of the obligation not to return any person to a country where there are substantial grounds for believing that he or she may be in danger of being subjected to torture or prohibited ill-treatment, in full conformity with international law;
- Prohibit reliance upon diplomatic assurances under any circumstances to circumvent the absolute obligation not to return any person to a country where there are substantial grounds for believing that he or she may be in danger of being subjected to torture or prohibited ill-treatment;
- Declare reliance upon diplomatic assurances per definition unacceptable in circumstances where there is substantial and credible evidence that torture and prohibited ill-treatment in the country of return are systematic, widespread, endemic, or a 'recalcitrant or persistent' problem; where governmental authorities do not have effective control over the forces in their country that perpetrate acts of torture and ill-treatment; or where the government consistently targets members of a particular racial, ethnic, religious, political or other identifiable group for torture or ill treatment and the person subject to the return is associated with that group;
- Ensure that any person subject to return has the effective opportunity, in conformity with internationally recognized procedural guarantees, to challenge the legality of the return – including the reliability of any diplomatic assurances provided and the adequacy of any proposed post-return monitoring arrangements – prior to return before an independent tribunal and with the right to appeal."[14]

Once again, it is not states' obligations to respect human rights which prove a stumbling block for effective cooperation but rather states' failure to protect human rights. A genuine improvement in states' record for the respect of human rights would provide an incentive for closer co-operation in the fight against terrorism but without such an improvement in practice co-operation will fail.

[14] Human Rights Watch, April 2004 Vol. 16 No. 4 (D), p. 37.

RECENT DEVELOPMENTS

In the past six months, the issues of diplomatic assurances and deportation of terrorist suspects have become a matter of considerable debate and media attention. Developments in jurisprudence and investigations, both at a national and an international level within the OSCE region have highlighted differences in approach. This annex seeks to draw out the main strands of jurisprudence and public discourse that have arisen since April 2005 to supplement the original paper.

States have increasingly been facing the dilemma of how to deal with foreign terrorism suspects who they have not been able to successfully prosecute for one of a number of reasons (often the evidence against the person is intelligence evidence that cannot be used in criminal proceedings) but who cannot be deported due to the risk of torture or ill-treatment in their country of origin and the absence of a safe third country that is willing to accept them. The solutions considered range from the agreement of memoranda of understanding with States willing to receive terrorist suspects[15] to the adoption of stricter laws on security. In this connection, the UK Anti-terrorism, Crime and Security Act 2001 in an attempt to resolve this issue had allowed for the indefinite detention without trial of foreign terrorist suspects in such cases, derogating from Article 5(1)(f) of the ECHR, but the UK's highest court, the House of Lords, found this legislation to be incompatible with human rights obligations, in particular on the grounds of discrimination as it only applied to foreign suspects. Since that judgment, the UK, along with many other participating States, has been exploring other ways of dealing with this problem in a human rights compliant manner and this exploration has given rise to a debate on extremely complex issues involving various international actors such as the UN Special Rapporteur on Torture[16] and the European Court of Human Rights.

Deportation and the Chahal Principle

The most significant authority confirming the application of the *Soering* principle to deportation cases is the ECtHR in *Chahal v UK*.[17] In that case the ECtHR found that there was sufficient evidence of a real risk of ill-treatment and underlined that to return a person in these circumstances would be a breach of Article 3 of ECHR. The application of the Article 3 was absolute. It contained no exceptions within it, nor could it be derogated from in time of national emergency under Article 15:

---

[15] For instance, the UK signed a memorandum of understanding with Jordan 10 August 2005 (see Human Rights Watch press release, *U.K./Jordan: Torture Risk Makes Deportations Illegal*, London, August 16, 2005 at http://hrw.org/english/docs/2005/08/16/jordan11628.htm) and with Libya on 18 October 2005 (see UK Home Secretary statement of 18 October 2005 at http://www.ind.homeoffice.gov.uk/ind/en/home/news/press_releases/home_secretary_statement.html).

[16] See for instance the report to the UN General Assembly Third Committee by the UN Special Rapporteur Prof. Manfred Nowak on 26 October 2005, at http://www.un.org/News/Press/docs/2005/gashc3830.doc.htm

[17] ECtHR, *Chahal v. UK*, 15 November 1996. The case concerned the prospective deportation to India of a Sikh nationalist, who presented evidence of having being tortured by the Indian authorities when he was there previously.

> *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.*[18]

Moreover, in *Chahal* the ECtHR found that assurances from the Indian government about Chahal's likely treatment were he returned did not sufficiently reduce the risk to him. About them, the ECtHR said:

> *Although [it] did not doubt the good faith of the Indian government in providing the assurances... it would appear that, despite the efforts of the government, the NHRC and the Indian courts to bring about reform, the violation of human rights by certain members of the security forces in Punjab and elsewhere is a recalcitrant and enduring problem. Against this background, the Court is not persuaded that the above assurances would provide Mr Chahal with an adequate guarantee of safety.*[19]

The ECtHR's judgment is worth emphasising - Article 3 did not only protect against State ordered torture, it protected where the State had limited control over the day-to-day practices of its security forces. The principle in *Chahal* has been extended to cover situations where the person to be removed fears ill-treatment at the hands of non-State actors. Although the ECtHR will not easily assume that a State is not capable of protecting persons within its jurisdiction against private violence, the Court has not ruled out that circumstances might be so serious that an individual might warrant protection against return.

The *Chahal* principle has been extensively debated in recent months and is subject to a challenge through interventions on the case of *Ramzy v. Netherlands*. The case is being brought by Mohammed Ramzy, who was accused, but acquitted, of involvement in a cell encouraging young Muslims to go on suicide missions. He unsuccessfully claimed asylum and is challenging a decision to deport him, arguing that he would face political persecution in Algeria. The Governments of Italy, Lithuania, Portugal, Slovakia and the UK will intervene in the proceeding, together with a number of human rights NGOs. The

[18] *Chahal*, para. 80. Accordingly, the Court rejected the British government's claim that the *Soering* obligation could be modified to take into account considerations of national security (Chahal was suspected of terrorist activity in the UK, though he had not been convicted), nor would it have been a relevant consideration if it had actually been shown that the complainant had engaged in terrorism, see *Chahal*, spec. para. 75-82.
[19] *Chahal*, para. 105.

Ramzy case has been given priority and the Court could deliver a ruling by the end of next year.[20]

Interim Measures

This jurisprudence has been substantially strengthened by the recent judgment in *Mamatkulov*,[21] in which the Grand Chamber decided that interim measures of protection requested by the Court are binding on States parties to the ECHR. In *Brada v. France*, the Committee against Torture (CAT) found that:

> *The State party's action in expelling the complainant in the face of the Committee's request for interim measures nullified the effective exercise of the right to complaint conferred by article 22, and has rendered the Committee's final decision on the merits futile and devoid of object. The Committee thus concludes that in expelling the complainant in the circumstances that it did the State party breached its obligations under article 22 of the Convention.*[22]

At the United Nations level, the CAT has repeatedly stressed the absolute nature of the prohibition on torture. In May 2005, the CAT "expresse[d] its concern at [t]he failure of the Supreme Court of Canada, in *Suresh v. Minister of Citizenship and Immigration*, to recognize at the level of domestic law the absolute nature of the protection of article 3 of the Convention, which is not subject to any exception whatsoever."[23]

In the *Agiza* case, the CAT underlined the importance of effective domestic remedies against removals:

> *The Committee recalls that the Convention's protections are absolute, even in the context of national security concerns, and that such considerations*

[20] See Press release issued by the ECtHR Registrar, 20 October 2005, and also Clare Dyer, *Ministers seek to overturn torture rule in deportations*, The Guardian, 3 October 2005 and id., *UK wins allies in challenge to torture ruling*, The Guardian, 18 October 2005.

[21] ECtHR, *Mamatkulov and Askarov v. Turkey*, 4 February 2005.

[22] *Brada v. France*, CAT/C/34/D/195/2002, 24 May 2005, para. 13.4. The case concerned the deportation of an Algerian citizen from France. On the importance of procedural guarantees against expulsions, see also Human Rights Committee, *Mansour Ahani v. Canada*, CCPR/C/80/D/1051/2002, 29 March 2004, spec. para 10.8.

[23] CAT/C/CR/34/CAN, 6 May 2005, para. 4a. In the criticized case, the national Court concluded that "Canadian jurisprudence does not suggest that Canada may never deport a person to face treatment elsewhere that would be unconstitutional if imposed by Canada directly, on Canadian soil. To repeat, the appropriate approach is essentially one of balancing. The outcome will depend not only on considerations inherent in the general context but also on considerations related to the circumstances and condition of the particular person whom the government seeks to expel. On the one hand stands the state's genuine interest in combating terrorism, preventing Canada from becoming a safe haven for terrorists, and protecting public security. On the other hand stands Canada's constitutional commitment to liberty and fair process. This said, Canadian jurisprudence suggests that this balance will usually come down against expelling a person to face torture elsewhere", *Suresh v. Canada (Minister of Citizenship and Immigration)*, para. 58 (the text is available in *International Journal of Refugee Law*, Volume 14, Number 1, January 2002, pp. 96-140).

emphasise the importance of appropriate review mechanisms. While national security concerns might justify some adjustments to be made to the particular process of review, the mechanism chosen must continue to satisfy article 3's requirements of effective, independent and impartial review.[24]

Diplomatic Assurances

The case concerned the expulsion in December 2001 of Ahmed Agiza and Mohammed Alzery, suspected of terrorist activities, from Sweden to Egypt. A US airplane was used for the removal, the Swedish government relying on diplomatic assurances issued by the Egyptian government that the suspects would not face death penalty, torture or ill-treatment and that they would be granted fair trial upon return. The memorandum of understanding between the two governments provided regular visits by Swedish diplomatic officials to Mr. Agiza.

The CAT found that in the specific case "the procurement of diplomatic assurances, which, moreover, provided no mechanism for their enforcement, did not suffice to protect against this manifest risk."[25] The CAT reached no conclusion in principle that diplomatic assurances might never tip the balance in favour of the State but it would appear that some monitoring element will be required and that the sending State must make full use of it. To speak about the "enforcement" of assurances must be understood in this way.[26] However, it is impossible to see how a non-binding understanding could be more "enforced" than the treaty which forbids the torture. Finding a violation in *Agiza*, the CAT was doubtlessly helped by Sweden's concession that it had found it hard to obtain the co-operation it expected from the Egyptian government.[27] Prof. Manfred Nowak, the UN Special Rapporteur on Torture, recently commented on the case:

[24] *Agiza v. Sweden*, CAT/C/34/D/233/2003, 24 May 2005, para 13.8. This jurisprudence may be considered consolidated, see for instance, *Tapia Paez v. Sweden*, CAT/C/18/D/39/1996, 28 April 1997, para. 14.5, and, most recently, Human Rights Committee, *Alzery v. Sweden*, Communication No 1416/2005, CCPR/C/88/D/1416/2005,10 November 2006, para. 11.8. The HRC found that "article 2 of the Covenant, read in conjunction with article 7, requires an effective remedy for violations of the latter provision. By the nature of refoulement, effective review of a decision to expel to an arguable risk of torture must have an opportunity to take place prior to expulsion, in order to avoid irreparable harm to the individual and rendering the review otiose and devoid of meaning. The absence of any opportunity for effective, independent review of the decision to expel in the author's case accordingly amounted to a breach of article 7, read in conjunction with article 2 of the Covenant."

[25] *Agiza*, para. 13.4.

[26] The same conclusions were reached by the Human Rights Committee in *Alzery*: "The existence of diplomatic assurances, their content and the existence and implementation of enforcement mechanisms are all factual elements relevant to the overall determination of whether, in fact, a real risk of proscribed ill-treatment exists […] The Committee notes that the assurances procured contained no mechanism for monitoring of their enforcement. Nor were any arrangements made outside the text of the assurances themselves which would have provided for effective implementation […] the State party has not shown that the diplomatic assurances procured were in fact sufficient in the present case to eliminate the risk of ill-treatment to a level consistent with the requirements of article 7 of the Covenant. The author's expulsion thus amounted to a violation of article 7 of the Covenant," see paras. 11.3 to 11. 5.

[27] *Agiza*, para 11.4.

> *The Agiza case is the first case of extraordinary rendition to provide us with a statement of law at the international level. In this case the diplomatic assurances procured were insufficient to protect against the manifest risk of torture and were therefore unenforceable. It is the opinion of the Special Rapporteur that post-return monitoring mechanisms do little to mitigate the risk of torture and have proven ineffective in both safeguarding against torture and as a mechanism of accountability.*[28]

Moreover, in June 2006 the CoE Commissioner for Human Rights stated that:

> *"Diplomatic assurances", whereby receiving states promise not to torture specific individuals if returned are definitely not the answer to the dilemma of extradition or deportation to a country where torture has been practiced. Such pledges are not credible and have also turned out to be ineffective in well-documented cases. The governments concerned have already violated binding international norms and it is plain wrong to subject anyone to the risk of torture on the basis of an even less solemn undertaking to make an exception in an individual case. In short, the principle of non-refoulement should not be undermined by convenient, non-binding promises of such kind.*[29]

Finally, the use of diplomatic assurances has also been criticised at the national level and extended to assurances regarding fair trial rights: on 12 October 2005, the President of the Regional Court of The Hague denied extradition of Mohammed A. to the United States. The diplomatic note issued by the American embassy was considered not to offer sufficient guarantees. First of all, the Court stated that the general phrasing of the diplomatic note ("that persons extradited to the United States are accorded, at their trial, the full panoply of rights under United States law, including under the United States Constitution") did not exclude the possibility of application of the US Military Order and related legislation. Secondly, the diplomatic note did not contain any concrete assurances that M.A. would not be detained or punished for other facts than stated in the extradition request. For this reason, the Court prohibited extradition of M.A by the Dutch State.[30]

---

[28] UN/A/60/316, para. 45-46.

[29] Thomas Hammarberg, CoE Commissioner for Human Rights, *Torture can never, ever be accepted*, available at http://www.coe.int/t/commissioner/Viewpoints/060626_en.asp. The previous Commissioner expressed the same concerns in July 2004: "The weakness inherent in the practice of diplomatic assurances lies in the fact that where there is a need for such assurances, there is clearly an acknowledged risk of torture or ill-treatment. Due to the absolute nature of the prohibition of torture or inhuman or degrading treatment, formal assurances cannot suffice where a risk nonetheless remains," Report by Mr. Alvaro Gil-Robles, CoE Commissioner for Human Rights, on His Visit to Sweden, 21-23 April 2004, Council of Europe, document Comm DH (2004) 13, 8 July 2004, para. 9.

[30] Mohammed A.'s primary claim was to prohibit his extradition to the US by the Dutch State; his subsidiary claim was to prohibit his extradition to the US without ensuring a number of specific guarantees. On 8 August 2005 an interim ruling was delivered in which the primary claim was rejected and in which the US, having regard to the subsidiary claim was requested to provide guarantees that the rights of M.A. would be respected by the US authorities and that M.A. would not be detained, tried or prosecuted for facts other than stated in the extradition request. See also *Court blocks extradition to America*, The Times, 13 October 2005.

CONCLUSIONS AND RECOMMENDATIONS

The commitments of OSCE participating States to the respect of human rights and the rule of law in countering terrorism are clear. In ensuring the necessary legal and practical frameworks at the national level to this end, they can only be fully realized on the basis of continuing practical efforts to improve the respect for human rights in participating States and the recognition of states' international human rights obligations in co-operating with each other in the fight against terrorism. The protection of human rights must not be seen as an impediment to effective international cooperation but rather as a pre-requisite to an effective international strategy to combat terrorism.

There are a number of ways in which assistance can be given to states to improve cooperation while safeguarding human rights and the rule of law. With regard to requests for extradition of subjects, the question of the risk of a breach of fundamental rights in a requesting country must be addressed through efforts such as the following:

- Advice on counter-terrorism legislation to ensure that the definition of terrorist acts and the procedures applied in terrorism cases are in compliance with international human rights standards.
- Verification, and if necessary, technical assistance to ensure that the conditions of detention and treatment of terrorist suspects in participating States comply with international human rights obligations.
- Technical assistance to reinforce the independence of the judiciary and ensure the respect of fair trial rights.
- Monitoring of proceedings related to terrorism.

Secondly, participating States subject to requests for extradition of terrorist suspects could benefit from a framework designed to clarify states' obligations to respect human rights in the context of judicial cooperation and in particular extradition. This could be done through:

- Advice on bilateral and multilateral agreements on extradition, mutual assistance and/or counter-terrorism to ensure that such agreements are in line with international human rights law and clearly reflect the importance of obligations under that law.
- Workshops at expert level to discuss specific issues relating to international cooperation and the protection of human rights in counter-terrorism.
- Training and technical assistance for judges and those involved in the decision making process on extradition requests to ensure that international human rights obligations are applied in practice.
- Monitoring of cases involving extradition of terrorist suspects which raise human rights issues to identify potential difficulties and remedies.

Based on its mandate to assist participating States to ensure the protection of human rights in the fight against terrorism, the ODIHR continues to stand ready to offer its

expertise in this regard. These broad conclusions and recommendations would need to be adapted, legally and institutionally, to each country situation according to specific parameters. Nevertheless, a common standard of basic human rights needs to be assured. The background provided here, as well as the recommendations, should therefore be understood as a starting point. The ODIHR will seek to provide additional information as well as targeted advice as requested by participating States and within the context of its human rights and anti-terrorism programme.