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Torture and other cruel, inhuman or degrading treatment or punishment

Note by the Secretary-General

The Secretary-General has the honour to transmit to the members of the General Assembly the interim report of the Special Rapporteur of the Commission on Human Rights on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, submitted in accordance with Assembly resolution 59/182.

* A/60/150.

Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment

Summary

In the present report, submitted pursuant to General Assembly resolution 59/182 and Commission on Human Rights resolution 2005/39, the Special Rapporteur refers to the report of his predecessor, Theo van Boven, to the Commission at its sixty-first session (E/CN.4/2005/62 and Add.1-3) and to the activities he himself has been carrying out since he assumed the mandate on 1 December 2004. He also addresses issues of special concern to him, in particular overall trends and developments with respect to questions falling within his mandate.

The Special Rapporteur, as a follow-up to previous reports submitted to the Assembly and the Commission on the issue of corporal punishment, draws attention to continuing occurrences of the practice, surveys the jurisprudence of international and regional human rights mechanisms, and concludes that any form of corporal punishment is contrary to the prohibition of torture and other cruel, inhuman or degrading treatment or punishment. In the section that follows, in the context of counter-terrorism measures and the absolute prohibition of torture, he examines the principle of non-refoulement and the use of diplomatic assurances in light of decisions of courts and international human rights mechanisms. In the opinion of the Special Rapporteur, diplomatic assurances are unreliable and ineffective in the protection against torture and ill-treatment, and States cannot resort to them.

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I. Introduction

1. The present report is the seventh submitted to the General Assembly by the Special Rapporteur of the Commission on Human Rights on torture and other cruel, inhuman or degrading treatment or punishment. It is submitted pursuant to General Assembly resolution 59/182 (para. 28) and Commission resolution 2005/39 (para. 29). It is the first report submitted by the present mandate holder, Manfred Nowak, who assumed the mandate on 1 December 2004, succeeding Theo van Boven. This report includes issues of special concern to the Special Rapporteur, in particular overall trends and developments with respect to issues falling within his mandate.

2. The Special Rapporteur draws attention to document E/CN.4/2005/62 containing the final version of the "Study on the situation of trade in and production of equipment which is specifically designed to inflict torture or other cruel, inhuman or degrading treatment, its origin, destination and forms." The study concluded that the obligation to prevent torture in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment necessarily includes the enactment of measures to stop the trade in instruments that can easily be used to inflict torture and ill-treatment.

3. Document E/CN.4/2005/62/Add.1 covered the period 16 December 2003 to 30 November 2004 and contained allegations of individual cases of torture or general references to the phenomenon of torture, urgent appeals on behalf of individuals who might be at risk of torture or other forms of ill-treatment, as well as responses by Governments. The Special Rapporteur observes that from the period 1 December 2001 to 30 November 2004, out of 999 urgent appeals, the rate of response from Governments was merely 41 per cent. And 33 Governments have never responded to these appeals, including the Governments of the following States, which have received a significant number of urgent appeals: Equatorial Guinea, Honduras, Liberia, Tajikistan, Turkmenistan, Uganda and Yemen. Without any substantive reply (i.e. confirming or repudiating the allegations, and indicating what measures were taken), the Special Rapporteur is not in a position to assess the efficacy of his interventions. Moreover, the Special Rapporteur recalls that cooperation by States to clarify allegations constitutes an essential obligation without which he is not in a position to properly carry out his mandate.

4. Document E/CN.4/2005/62/Add.2 contained information on the state of follow-up to the recommendations resulting from previous country visits. While some Governments provided useful information, half of the countries visited by the Special Rapporteur did not respond to his request for information on implementation of his recommendations. The Governments of Cameroon, Kenya, Pakistan and Venezuela have never provided any follow-up information since the visits were carried out. The Special Rapporteur points out that a country visit is not only an important fact-finding tool; it is also an opportunity for a State to begin a long-term process of cooperation with the international community to combat and prevent torture.

5. During the period from 1 December 2004 to 31 July 2005, the Special Rapporteur sent 41 letters of allegations of torture to 30 Governments, and 133 urgent appeals on behalf of persons who might be at risk of torture or other forms of ill-treatment to 47 Governments.

6. With respect to fact-finding missions, the Special Rapporteur undertook a visit to Georgia, including the territories of Abkhazia and South Ossetia, from 19 to 25 February 2005 (a preliminary note on the visit was contained in document E/CN.4/2005/62/Add.3, and the final report will be presented to the Commission on Human Rights at its sixty-second session). The Special Rapporteur expressed his appreciation to the Government for the full cooperation it extended to him. He concluded, among other things, that torture and ill-treatment by law enforcement officials still exists in Georgia, and that conditions of detention are, in general, poor. Accordingly, a number of recommendations were addressed to the Government and the de facto authorities of Abkhazia and South Ossetia.

7. From 6 to 9 June 2005, the Special Rapporteur undertook a visit to Mongolia. The Special Rapporteur expressed his appreciation to the Government for the cooperation extended to him. He concluded that torture persists, particularly in police stations and pre-trial detention facilities. Concern was expressed at the secrecy surrounding the application of the death penalty, especially the absence of any official data. The deplorable conditions on death row and the lack of notification of families, among other things, amount to torture, in the view of the Special Rapporteur. In this regard, the Special Rapporteur, having received serious and credible allegations that persons on death row are detained in isolation and are kept handcuffed and shackled throughout their detention, regrets that prison authorities denied him access to these individuals despite the Government's authorization of unimpeded access to detention facilities. The Special Rapporteur subsequently learned that one individual, Seded Bataa, had died in custody and he requested the Government to undertake a prompt and effective investigation into the circumstances surrounding the death. During the visit, he also found that the treatment of prisoners serving 30-year terms in isolation to be inhuman. The report on the visit will be submitted to the Commission at the sixty-second session.

8. On the question of pending visits, for the remainder of 2005, visits to Nepal and China are expected to take place in September and November 2005, respectively. An invitation to participate in a workshop on the implementation of the Optional Protocol to the Convention against Torture in October 2005 was received from the Government of Mexico.

9. The Special Rapporteur continued to actively consider previous invitations for fact-finding visits extended by the Governments of Paraguay and Bolivia. Moreover, positive indications for future visits were received from the Governments of Côte d'Ivoire (first requested in 2005) and the Russian Federation with respect to the Republic of Chechnya (2000).

10. He regrets that despite long-standing requests, invitations have not been received from the Governments of Algeria (1997), Egypt (1996), India (1993), Indonesia (1993), Israel (2002), Tunisia (1998), and Turkmenistan (2003). The Special Rapporteur regrets that no invitation has yet been received from the Government of the United States of America with respect to the joint request made with the Special Rapporteur on the independence of judges and lawyers, the Chairperson-Rapporteur of the Working Group on Arbitrary Detention and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health to visit persons detained on grounds of alleged terrorism or other violations in Iraq, Afghanistan and the Guantánamo Bay military base (see E/CN.4/5/5, annex I). However, he is confident

that an invitation will soon be forthcoming. In 2005, the Special Rapporteur also requested invitations from the Governments of Belarus, Equatorial Guinea, Eritrea, Ethiopia, the Islamic Republic of Iran, Nigeria, Sri Lanka, the Syrian Arab Republic, Togo and Zimbabwe.

11. The Special Rapporteur issued press statements jointly with other special procedures mandate holders concerning: the situation of Guantánamo Bay detainees following the fourth anniversary of the existence of the detention centres (4 February 2005); the situation following the state of emergency in Nepal (8 February 2005); allegations of human rights violations by the authorities of Uzbekistan in connection with the violent events in Andijan (23 June 2005); the lack of an invitation by the Government of the United States of America to visit Guantánamo Bay on the first anniversary of the request by the independent experts of the Commission on Human Rights (23 June 2005); the campaign by Zimbabwe of forced evictions of informal traders and persons living in informal settlements (24 June 2005); and the reported denial of medical treatment to an imprisoned journalist in the Islamic Republic of Iran (18 July 2005).

12. On 28 January 2005, the Special Rapporteur held an informal one-day meeting with representatives of the following international non-governmental organizations (NGOs) involved in torture issues: Amnesty International, Association for the Prevention of Torture, International Federation of ACAT (Action of Christians for the Abolition of Torture), International Federation of Human Rights Leagues, Human Rights Watch, International Commission of Jurists, International Rehabilitation Council for Torture Victims, International Service for Human Rights, and World Organization against Torture. The meeting was an opportunity for the NGO representatives to meet with the newly appointed Special Rapporteur, introduce their respective organizations and brief him on their activities. It was also an occasion for the representatives to discuss substantive issues, as well as cooperation.

13. On 4 February 2005, with a view to strengthening the collaboration among United Nations mechanisms dealing with the question of torture and ill-treatment, the Special Rapporteur met with members of the Committee on the Rights of the Child. On that occasion, issues of common interest were discussed, including the mutual follow-up to the recommendations of the respective mechanisms concerning specific countries, cooperation in terms of preparation of country visits by the Special Rapporteur, and the United Nations study on violence against children.

14. On 7 April 2005, he participated in a meeting of the European Network of Treatment and Rehabilitation Centres for Victims of Torture and Human Rights Violations in Cartigny, Switzerland. The Special Rapporteur presented an overview of the mandate and discussed the important role treatment centres played in the activities of the mandate, including preparation for and follow-up to country visits.

15. Also on 7 April 2005, during the sixty-first session of the Commission on Human Rights, the Special Rapporteur participated in a commemorative event to mark the 20 years since the establishment of the mandate, organized by the Government of Austria and the Office of the High Commissioner for Human Rights. The current mandate holder's three predecessors Pieter Kooijmans, Sir Nigel Rodley and Theo van Boven, also participated. The Special Rapporteurs highlighted the achievements and challenges during their tenures and discussed the future of the mandate.

16. On 26 June 2005, on the occasion of the United Nations International Day in Support of Victims of Torture, the Special Rapporteur, together with the Committee against Torture, the Board of Trustees of the United Nations Voluntary Fund for Victims of Torture and the High Commissioner for Human Rights, issued a joint statement.

17. On 14 July 2005, the Special Rapporteur delivered the keynote address of the Supplementary Human Dimension Meeting on Human Rights and the Fight against Terrorism convened by the Organization for Security and Cooperation in Europe in Vienna. In his statement he emphasized that attempts to circumvent the absolute and non-derogable nature of the prohibition against torture, especially in the context of counter-terrorism strategies, undermined the consensus on the primacy of human rights and signified to terrorists that they had attained their goal of upsetting rules established by States.

II. Corporal punishment

18. An issue that is of particular concern to the Special Rapporteur which he would like to draw attention to is corporal punishment.¹ Since assuming the mandate, the Special Rapporteur has intervened by transmitting communications in response to allegations in a number of countries involving corporal punishment, such as amputation, stoning, strangulation, eye-gouging, flogging, and beating. In view of such continuing practices — often grounded in justifications of domestic law, including religious law (e.g. sharia), and argued that pain and suffering incidental to lawfully sanctioned punishments fall outside the prohibition against torture² — the Special Rapporteur considers it necessary to review the relevant jurisprudence of international and regional human rights mechanisms.

A. United Nations human rights treaty bodies

19. Both the Human Rights Committee and the Committee against Torture have called for the abolition of judicial corporal punishment.³ Indeed, in paragraph 5 of general comment No. 20 (1992), the Human Rights Committee stated that the prohibition of torture and ill-treatment under article 7 of the International Covenant on Civil and Political Rights must extend to corporal punishment, including excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure.

20. The Human Rights Committee has developed this view through relevant case law. In March 2000, in *Osbourne v. Jamaica*, in which the applicant had been sentenced to receive 10 strokes of the tamarind switch, the Committee held, “Irrespective of the nature of the crime that is to be punished, however brutal it may be, it is the firm opinion of the Committee that corporal punishment constitutes cruel, inhuman and degrading treatment or punishment contrary to article 7 of the Covenant.”⁴ This case-law was later confirmed in *Sooklal v. Trinidad and Tobago*,⁵ *Higginson v. Jamaica*⁶ and in 2004 in *Errol Pryce v. Jamaica*.⁷

21. The Human Rights Committee, in its concluding observations on Iraq, held that the imposition of cruel, inhuman and degrading punishments such as amputation and branding were incompatible with article 7 of the Covenant, that the

imposition of such punishments should cease immediately, and that all laws and decrees providing for their imposition should be revoked without delay.⁸ In its concluding observations on the Sudan it stated that flogging, amputation and stoning, which are recognized as penalties for criminal offences, are not compatible with the Covenant.⁹ Concerning the Libyan Arab Jamahiriya, the Human Rights Committee stated that flogging, which is recognized as a penalty for criminal offences, is incompatible with article 7 of the Covenant; that the imposition of such punishment should cease immediately; that all laws and regulations providing for its imposition should be repealed without delay; and that amputation should be formally abolished.¹⁰

22. In 1995, the Committee against Torture expressed the view that corporal punishment in Jordan could constitute a violation of the Convention.¹¹ In 1997, after considering the State party report of Namibia, the Committee against Torture recommended that the Government bring about “the prompt abolition of corporal punishment insofar as it is legally still possible under the Prisons Act of 1959 and the Criminal Procedure Act of 1977”.¹² In 2001, in relation to Zambia, a member of the Committee stated that corporal punishment, regardless of whether the cane was three feet or four feet long was a clear violation of article 16 of the Convention.¹³ In 2002, the Committee noted in its conclusions and recommendations on Saudi Arabia, that while sharia expressly prohibits torture and other cruel and inhuman treatment, domestic law itself does not explicitly reflect this prohibition, nor does it impose criminal sanctions.¹⁴ The Committee considered that the express incorporation in the State party’s domestic law of the crime of torture, as defined in article 1 of the Convention, was necessary to signal the cardinal importance of this prohibition, and that the sentencing to, and imposition of, corporal punishments by judicial and administrative authorities, including, in particular, flogging and amputation of limbs, are not in conformity with the Convention.¹⁵ Concerning the report of Yemen, the Committee expressed the view that criminal sanctions, in particular flogging and amputation of limbs, may be in breach of the Convention.¹⁶

23. In considering the report of Saudi Arabia, the Committee on the Rights of the Child expressed concern that persons under 18 may be subject to flogging under article 28 of the 1977 Detention and Imprisonment Regulations, as well as sentenced under criminal law to flogging, stoning, and amputations for crimes committed when they were under 18.¹⁷ Similarly, the Committee noted that under article 49 of the Penal Law of the Islamic Republic of Iran, persons who committed crimes when they were under 18 could be subjected to amputation, flogging and stoning, which are systematically imposed by the judicial authorities.¹⁸ In both cases, the Committee found such measures were incompatible with the Convention. That in Yemen corporal punishment, including flogging, is still lawful as a sentence was of deep concern to the Committee, which recommended that the State explicitly prohibit all forms of corporal punishment.¹⁹

B. Regional human rights mechanisms

24. In *Tyrer v. the United Kingdom*, involving the birching of a juvenile as a traditional punishment, the European Court of Human Rights held that this amounted to degrading punishment within the meaning of article 3 of the European Convention on Human Rights, and therefore was prohibited.²⁰ The Court, in *A v. the*

United Kingdom, held that corporal punishment in the home also constitutes degrading punishment contrary to article 3 of the European Convention.²¹

25. In March 2005, the Inter-American Court of Human Rights, in *Winston Caesar v. Trinidad and Tobago*, condemned, for the first time, judicially sanctioned corporal punishment.²² Unanimously, the Court held that “punishment by lashes of the ‘cat of nine tails’ is, in its very nature, intention and consequence, incompatible with the standards of human treatment as established in articles 5.1 and 5.2 of the American Convention on Human Rights”. The Court considered that the very nature of this punishment reflects an institutionalization of violence, which, although permitted by the law, ordered by the State’s judges and carried out by its prison authorities, is a sanction incompatible with the Convention. As such, corporal punishment by flogging was deemed to constitute a form of torture and, therefore, is a violation per se of the right of any person submitted to such punishment to have his physical, mental and moral integrity respected.

C. Conclusion

26. **The Special Rapporteur recalls that the Commission on Human Rights has stated on numerous occasions that “corporal punishment, including of children, can amount to cruel, inhuman or degrading punishment or even to torture”.²³ In this regard, the Special Rapporteur endorses the view taken by his predecessor, Sir Nigel Rodley, that corporal punishment is inconsistent with the prohibition of torture and other cruel, inhuman or degrading treatment or punishment enshrined, inter alia, in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.²⁴ With respect to international humanitarian law, he notes that the infliction of corporal punishment on prisoners of war or on protected civilians would involve a clear breach of State responsibility under the Geneva Conventions, of 12 August 1949, and Additional Protocol I thereto.²⁵ Article 4 of Additional Protocol II contains fundamental guarantees of humane treatment and specifies as prohibited acts any form of corporal punishment. Moreover, rule 31 of the Standard Minimum Rules for the Treatment of Prisoners provides that “corporal punishment, punishment by placing in a dark cell, and all cruel, inhuman or degrading punishments shall be completely prohibited as punishments for disciplinary offences.”**

27. **The Special Rapporteur points out that the term “lawful sanctions” in article 1, paragraph 1, of the Convention against Torture must be interpreted as referring both to domestic and international law. Furthermore, the savings clause in article 1, paragraph 2, explicitly provides that article 1, paragraph 1, is without prejudice to any international instrument which contains provisions of wider application. It follows from the international and regional case law cited above that corporal punishment is in violation of international law (International Covenant on Civil and Political Rights, art. 7; European Convention on Human Rights, art. 3; American Convention on Human Rights, art. 5). It therefore cannot be considered a “lawful sanction” in accordance with article 1, paragraph 1, of the Convention against Torture.**

28. On the basis of the review of jurisprudence of international and regional human rights mechanisms, the Special Rapporteur concludes that any form of corporal punishment is contrary to the prohibition of torture and other cruel, inhuman or degrading treatment or punishment. Moreover, States cannot invoke provisions of domestic law to justify the violation of their human rights obligations under international law, including the prohibition of corporal punishment. He therefore calls upon States to abolish all forms of judicial and administrative corporal punishment without delay.

III. Principle of non-refoulement and diplomatic assurances

29. The Special Rapporteur continues to receive a large number of allegations involving persons in circumstances where the absolute principle of non-refoulement has not been respected. Several Governments, in the fight against terrorism, have transferred or proposed to return alleged terrorist suspects to countries where they may be at risk of torture or ill-treatment. In this section, the Special Rapporteur addresses the principle of non-refoulement and the use of diplomatic assurances, or formal guarantees, between Governments that a person to be returned will not be subjected to torture, ill-treatment or the death penalty and will be afforded the right to a fair trial.

A. The non-refoulement principle in the jurisprudence of international human rights mechanisms

30. One of the bedrock principles of international law is the express prohibition against refoulement of persons to where there are substantial grounds to believe that there is a risk of torture. This principle has already been dealt with by the Special Rapporteur's predecessors in previous reports to the General Assembly.²⁶ However, in the present report the Special Rapporteur would like to place emphasis on recent decisions reached by international human rights mechanisms on this matter.

31. Article 3 of the Convention against Torture states clearly and unequivocally that "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".

32. In general comment No. 20 (1992), the Human Rights Committee also interpreted article 7 of the International Covenant on Civil and Political Rights to cover the principle of non-refoulement by stipulating that "... States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement" (para. 9). The non-refoulement principle is also firmly anchored in article 33 of the 1951 Convention relating to the Status of Refugees and its 1967 Protocol.

33. In May 2005, the Committee against Torture, in its concluding observations on the report of Canada, expressed its concern at "the 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."²⁷ Furthermore,

concern was expressed at “the alleged roles of the State party’s authorities in the expulsion of Canadian national Mr. Maher Arar, expelled from the United States to the Syrian Arab Republic where torture was reported to be practised.”²⁸ The Committee also recommended that Canada “... unconditionally undertake to respect the absolute nature of article 3 in all circumstances and fully to incorporate the provision of article 3 into the State party’s domestic law ... Given the absolute nature of the prohibition against refoulement contained in article 3 of the Convention, the State party should provide the Committee with details on how many cases of extradition or removal subject to receipt of ‘diplomatic assurances’ or guarantees have occurred since 11 September 2001, what the State party’s minimum requirements are for such assurances or guarantees, what measures of subsequent monitoring it has undertaken in such cases and the legal enforceability of the assurances or guarantees given.”²⁹

34. On 17 May 2005, in *Mafhoud Brada v. France*, the Committee against Torture, “... acting under article 22, paragraph 7, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, considers that the deportation of the complainant to Algeria constituted a breach of articles 3 and 22 of the Convention.”³⁰

35. In March 2004, the Human Rights Committee adopted general comment No. 31 on article 2 of the Covenant in which it states that “the article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed” (para. 12).

36. In *Ahani v. Canada*, where the complainant was deported from Canada on the grounds of national security, the Human Rights Committee stated that

“... the failure of the State party to provide him ... with the procedural protections afforded to the plaintiff in *Suresh* on the basis that he had not made out a risk of harm did not satisfy the obligation in article 13 to allow the author to submit reasons against his removal in the light of the administrative authorities’ case against him and to have such complete submissions reviewed by a competent authority, entailing a possibility to comment on the material presented to that authority. The Committee thus finds a violation of article 13 of the Covenant, in conjunction with article 7.”³¹

37. On 22 June 2005, the United Nations High Commissioners for Refugees and Human Rights released a press statement in which they both urged the Government of Kyrgyzstan to refrain from any action aimed at ensuring the forcible return of Uzbek asylum-seekers to their country as there were well-founded reasons to believe that asylum-seekers in Kyrgyzstan may face an imminent risk of grave human rights violations, including torture and extrajudicial and summary executions, if returned to Uzbekistan. The Secretary-General, on the United Nations International Day in Support of Victims of Torture, also reminded Governments that the prohibition of torture is non-negotiable, and that torture cannot be justified by any circumstances whatsoever. This includes an absolute ban, in accordance with

article 3 of the Convention, on transferring any person to another jurisdiction where there are reasonable grounds to believe that the person is at risk of torture.³²

B. Jurisprudence of regional human rights mechanisms

38. The Special Rapporteur would like to recall the decision of the European Court of Human Rights in the *Soering* case in which it was established that the general principle of non-refoulement falls under the general and absolute prohibition against torture as outlined in article 3 of the European Convention on Human Rights.³³

39. In the case of *Chahal v. the United Kingdom*,³⁴ not only did the Court reaffirm the obligation of non-refoulement in European human rights law, but it also established the standard that diplomatic assurances are an inadequate guarantee for returns to countries where torture is “endemic”, or a “recalcitrant and enduring problem”. The Court ruled that the return to India of a Sikh activist suspected of involvement in terrorism would violate the United Kingdom’s obligations under article 3 of the European Convention, despite the diplomatic assurances given by the Government of India.

C. Diplomatic assurances

40. In November 2004, the Committee against Torture expressed its concern at the United Kingdom’s reported use of diplomatic assurances in the refoulement context in circumstances where its minimum standards for such assurances, including effective post-return monitoring arrangements and appropriate due process guarantees, were not wholly clear.³⁵ The Committee requested that within one year, the United Kingdom provide it with details on how many cases of extradition or removal subject to receipt of diplomatic assurances or guarantees had occurred since 11 September 2001, what the State party’s minimum contents are for such assurances or guarantees and what measures of subsequent monitoring it has undertaken in such cases.³⁶

41. In *Tapia Paez v. Sweden*, the Committee against Torture stated that the test of article 3 is absolute: “Whenever substantial grounds exist for believing that an individual would be in danger of being subjected to torture upon expulsion to another State, the State party is under obligation not to return the person concerned to that State. The nature of the activities in which the person concerned [is] engaged cannot be a material consideration when making a determination under article 3 of the Convention.”³⁷

42. In May 2005, the Committee against Torture considered the case of *Agiza v. Sweden*³⁸ involving the expulsion in December 2001 of Ahmed Agiza and Mohammed al-Zari, on the grounds of suspected terrorist activities, from Sweden to Egypt aboard an aircraft operated by the United States.

43. The Swedish authorities relied on diplomatic assurances proffered by the Government of Egypt that neither of the suspects would be subjected to the death penalty, torture or ill-treatment and that they would be afforded the right to a fair trial. The two Governments also implemented a post-return monitoring mechanism

in the form of visits to Egypt by the Swedish authorities. However, despite these assurances, Mr. Agiza

“allegedly told his mother that after the January visit further electric shocks had been applied, and that for the last ten days he had been held in solitary confinement. His hands and legs had been tied, and he had not been allowed to visit a toilet. At a following visit, he told his parents that he was still in solitary confinement but no longer bound. He was allowed to visit a toilet once a day, and the cell was cold and dark. With reference to a security officer, he was said to have asked his mother, ‘Do you know what he does to me during the nights?’ He had also been told that his wife would soon be returned to Egypt and that she and his mother would be sexually assaulted in his presence. Thereafter, the complainant’s parents visited him once a month until July 2002 and then every fortnight. According to counsel, the information available is that he is held in a two-square-metre cell, which is artificially cooled, dark and without a mattress to sleep on. His toilet visits are said to be restricted.”³⁹

Although the Swedish authorities made 25 visits to the men, no such visit was carried out during the first five weeks, during which time they were held incommunicado.

44. The Committee held in this landmark decision that “... the State party’s expulsion of the complainant was in breach of article 3 of the Convention. The procurement of diplomatic assurances, which, moreover, provided no mechanism for their enforcement, did not suffice to protect against this manifest risk.”⁴⁰

45. 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.

46. 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.

47. In July 2004, the Council of Europe Commissioner for Human Rights, Alvaro Gil-Robles, stated:

“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”.⁴¹

48. The Special Rapporteur would also like to recall the case of Maher Arar, on whose behalf the Special Rapporteur’s predecessor sent a communication on 12 August 2003.⁴² This case illustrates very clearly the consequences of violating the principle of non-refoulement and the inoperability of diplomatic assurances in the protection against torture and other forms of ill-treatment.

49. In September 2002, United States authorities apprehended Maher Arar, a dual Canadian-Syrian national, in transit from Tunisia through New York to Canada, where he resided. He was held for almost two weeks and then flown by United States immigration authorities to Jordan, where he was driven across the border and handed over to Syrian authorities. The transfer was carried out despite Mr. Arar’s

repeated statements to United States officials that he would be tortured in the Syrian Arab Republic and his repeated requests to be sent home to Canada. The Government of the United States has claimed that prior to Mr. Arar's transfer, it had obtained assurances from the Government of the Syrian Arab Republic that he would not be subjected to torture upon return. Mr. Arar was released from Syrian custody 10 months later without charge and alleged that he had been beaten by security officers in Jordan and tortured repeatedly, often with cables and electrical cords, during his confinement in a Syrian prison. Mr. Arar filed suit in United States Federal Court on 22 January 2004, alleging that United States officials and agents involved in his transfer had violated the Fifth Amendment to the United States Constitution, the Government's treaty obligations under the Convention against Torture and the Torture Victim Protection Act of 1991. In seeking to dismiss the lawsuit, the United States Department of Justice employed the rarely invoked "State secrets privilege" (section 102 (a) of the National Security Act of 1947) and filed a motion in January 2005 stating that the release of any official information concerning Mr. Arar's transfer to Syria could jeopardize the intelligence, foreign policy and national security interests of the United States.

50. The Government of the United States has not explained why it sent Mr. Arar to Syria rather than to Canada, where he resides, or why it believed the assurances of the Government of the Syrian Arab Republic to be credible in the light of serious and credible allegations of torture emanating from that country. Furthermore the Government of the United States has also refused to release any information regarding the assurances against torture it claims it received from Syria in the case of Maher Arar.

D. Conclusion

51. It is the view of the Special Rapporteur that diplomatic assurances are unreliable and ineffective in the protection against torture and ill-treatment: such assurances are sought usually from States where the practice of torture is systematic; post-return monitoring mechanisms have proven to be no guarantee against torture; diplomatic assurances are not legally binding, therefore they carry no legal effect and no accountability if breached; and the person whom the assurances aim to protect has no recourse if the assurances are violated. The Special Rapporteur is therefore of the opinion that States cannot resort to diplomatic assurances as a safeguard against torture and ill-treatment where there are substantial grounds for believing that a person would be in danger of being subjected to torture or ill-treatment upon return.

52. The Special Rapporteur calls on Governments to observe the principle of non-refoulement scrupulously and not expel any person to frontiers or territories where they might run the risk of human rights violations, regardless of whether they have officially been recognized as refugees.

Notes

¹ See also E/CN.4/1996/35, E/CN.4/1997/7, A/54/426, A/55/290 and A/57/173.

² E/CN.4/1997/7, paras. 7 and 10, and E/CN.4/1997/7/Add.1, para. 435.

- ³ See *Official Records of the General Assembly, Fiftieth Session, Supplement No. 40 (A/50/40)*, para. 467, and *ibid.*, *Fifty-second Session, Supplement No. 44 (A/52/44)*, para. 250, respectively.
- ⁴ *Ibid.*, *Fifty-fifth Session, Supplement No. 40 (A/55/40)*, vol. II, annex IX, sect. L, communication No. 759/1997, *Osbourne v. Jamaica*, para. 9.1.
- ⁵ *Ibid.*, *Fifty-seventh Session, Supplement No. 40 (A/57/40)*, vol. II, annex IX, sect. FF, communication No. 928/2000, *Boodlal Sooklal v. Trinidad and Tobago*.
- ⁶ *Ibid.*, vol. II, annex IX, sect. Q, communication No. 792/1998, *Higginson v. Jamaica*.
- ⁷ *Ibid.*, *Fifty-ninth Session, Supplement No. 40 (A/59/40)*, vol. II, annex IX, sect. B, communication No. 793/1998, *Pryce v. Jamaica*.
- ⁸ CCPR/C/79/Add.84, para. 12.
- ⁹ CCPR/C/79/Add.85, para. 9.
- ¹⁰ See CCPR/C/79/Add.101.
- ¹¹ *Official Records of the General Assembly, Fiftieth Session, Supplement No. 44 (A/50/44)*, para. 169.
- ¹² *Ibid.*, *Fifty-second Session, Supplement No. 44 (A/52/44)*, para. 250.
- ¹³ See CAT/C/SR.494, para. 34.
- ¹⁴ CAT/C/CR/28/5, para. 4.
- ¹⁵ *Ibid.*
- ¹⁶ CAT/C/CR/31/4, para. 6.
- ¹⁷ CRC/C/15/Add.148, paras. 33 and 34.
- ¹⁸ CRC/C/15/Add.123, paras. 37 and 38, and CRC/C/15/Add.254, paras. 45 and 46.
- ¹⁹ CRC/C/15/Add.266, paras. 41 and 42.
- ²⁰ *Tyrer v. The United Kingdom*, European Court of Human Rights, *Series A: Judgments and Decisions*, vol. 26, judgment of 25 April 1978, para. 35.
- ²¹ *A. v. The United Kingdom*, European Court of Human Rights, *Reports 1998-VI*, judgment of 23 September 1998, para. 21.
- ²² *Caesar v. Trinidad and Tobago*, Inter-American Court of Human Rights, Series C, No. 123, judgment of 11 March 2005.
- ²³ Commission on Human Rights resolutions 2002/38, para. 5; 2003/32, para. 5; 2004/41, para. 6 and 2005/39, para. 7.
- ²⁴ See E/CN.4/1997/7, para. 6.
- ²⁵ Article 87 of the Third Geneva Convention, article 32 of the Fourth Geneva Convention and article 75 (2) of Additional Protocol I: N. S. Rodley, *The Treatment of Prisoners Under International Law* (Oxford: Oxford University Press, 1999), pp. 314-316.
- ²⁶ See A/54/426, A/57/173 and A/59/324.
- ²⁷ CAT/C/CR/34/CAN, para. 4 (a).
- ²⁸ *Ibid.*, para. 4 (b).
- ²⁹ *Ibid.*, para. 5.
- ³⁰ CAT/C/34/D/195/2002, para. 14.
- ³¹ *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40 (A/59/40)*, vol. II, annex IV, sect. BB, para. 10.8.

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- ³² www.un.org/News/Press/docs/2005/sgsm9959.doc.htm.
- ³³ *Soering v. The United Kingdom*, European Court of Human Rights, *Series A: Judgments and Decisions*, vol. 161, judgment of 17 July 1989.
- ³⁴ *Chahal v. The United Kingdom*, European Court of Human Rights, *Reports 1996-V*, judgment of 15 November 1996.
- ³⁵ CAT/C/CR/33/3, para. 4.
- ³⁶ *Ibid.*, para. 5.
- ³⁷ *Official Records of the General Assembly, Fifty-second Session, Supplement No. 44 (A/52/44)*, annex V, sect. B.4, communication No. 39/1996, *Gorki Ernesto Tapia Paez v. Sweden*, para. 14.5.
- ³⁸ CAT/C/34/D/233/2003. See also the communications transmitted by the Special Rapporteur on behalf of Mr. Agiza (E/CN.4/2003/68/Add.1, paras. 461 and 462, and E/CN.4/2005/62/Add.1, paras. 645 and 646).
- ³⁹ *Ibid.*, annex, para. 2.8.
- ⁴⁰ *Ibid.*, para. 13.4.
- ⁴¹ Report by Mr. Alvaro Gil-Robles, Commissioner for Human Rights, on His Visit to Sweden, 21-23 April 2004, Council of Europe, document CommDH(2004)13, 8 July 2004, para. 9.
- ⁴² E/CN.4/2004/56/Add.1, para. 1665.
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