

Strasbourg, 16 December 2005

DH-S-TER(2005)018

STEERING COMMITTEE FOR HUMAN RIGHTS
(CDDH)

**GROUP OF SPECIALISTS ON HUMAN RIGHTS
AND THE FIGHT AGAINST TERRORISM**

(DH-S-TER)

MEETING REPORT

1st meeting

Strasbourg, 7 – 9 December 2005

Item 1: Opening of the meeting and adoption of the agenda

1. The Group of Specialists on Human Rights and the Fight against Terrorism (DH-S-TER) held its first meeting in Strasbourg on 7-9 December 2005, with Mr. Derek WALTON (United Kingdom) in the chair. The list of participants is contained in Appendix I. The agenda, as adopted, is contained in Appendix II.

Item 2: Exchange of views on the terms of reference

2. Examining the terms of reference received from the CDDH (Appendix III), the DH-S-TER decided to focus on the issue of diplomatic assurances in the context of the fight against terrorism, mainly in cases where there was a risk of torture or inhuman or degrading treatment or punishment (Article 3 ECHR) in the context of expulsion procedures. However, it did not rule out the possibility of addressing the issue in cases where there was a risk of other Convention articles being violated. The DH-S-TER also reserved the possibility of addressing the issue of diplomatic assurances in the context of extradition procedures in so far as it is of relevance to its considerations of diplomatic assurances in the context of expulsion procedures.

Item 3: Reflection on the issues raised with regard to human rights by the use of diplomatic assurances in the context of expulsion procedures

3. The DH-S-TER held successive exchanges of views with Mr Manfred NOWAK, United Nations Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and with Mr Alvaro GIL-ROBLES, the Council of Europe's Commissioner for Human Rights. Both speakers voiced strong misgivings, for reasons of principle (risk of circumventing the absolute prohibition of torture and the principle of non-refoulement) and practical reasons (difficulty of ensuring that assurances were honoured; previous negative experiences), with regard to the use of diplomatic assurances related to Article 3 treatment. In order to avoid giving out the wrong signal, namely the idea that the use of diplomatic assurances freed States from their obligations under the ECHR, they strongly urged that no consideration be given to the setting of minimum standards in this field. In response to a particular question whether diplomatic assurances in respect of countries with no substantial risk of torture might be permissible, Mr Nowak replied that such additional guarantees, under the condition that they are not aimed at circumventing international obligations of non-refoulement, would not be harmful.

4. For the purpose of its discussion, DH-S-TER took a broad approach to the concept of "diplomatic assurances", regarding it as covering written undertakings (note verbale, memorandum of understanding etc) and promises given through diplomatic channels regarding a person's forced removal from one country to another when these are designed to ensure respect for the removed person's fundamental rights.

5. The DH-S-TER then structured its work around three specific aspects.

National experiences of the use of diplomatic assurances

6. Several members of the DH-S-TER gave an indication of their national experience of the consideration or use of diplomatic assurances relating to a risk of torture or inhuman or degrading treatment or punishment. Many States did not have experiences in this field. Experiences identified during the discussion fall under four categories: (i) some States had experiences of diplomatic assurances related to Article 3 treatment that had not been effective; (ii) other examples cited concerned the use of diplomatic assurances in the context of extradition or where there was a risk of capital punishment. Without dismissing this aspect of the question at this stage, the Group wondered whether it was useful to dwell on it, given the major differences between these cases and the expulsion procedures implying a risk of torture in the receiving country; (iii) a few instances were mentioned of experiences of diplomatic assurances relating to Article 3 treatment that had resulted in expulsions that appear not to have been successfully challenged; (iv) lastly, solutions other than the use of diplomatic assurances were mentioned, such as expulsion to a third State where there was no risk of torture or managing the situation in the country itself.

Questions of principle in connection with the risk of torture or inhuman or degrading treatment or punishment (Article 3 ECHR) in the context of an expulsion procedure

7. There was an in-depth discussion of issues raised by the use of diplomatic assurances regarding Article 3 ECHR treatment in the context of expulsion procedures.

8. The Group agreed on the following:

- States are under the obligation to take the measures needed to protect the fundamental rights of everyone within their jurisdiction against terrorist acts, especially the right to life. These measures must however comply with their human rights obligations;
- the prohibition of torture, inhuman or degrading treatment or punishment is absolute and non-derogable;
- States must not expel an individual where there are substantial grounds to believe that he or she will be subject to a real risk of treatment contrary to Article 3 ECHR;
- the assessment must be carried out on a case-by-case basis. There should be no list of “safe” or “unsafe” States;
- the existence of diplomatic assurances in a particular case does not relieve the sending States of its obligation not to expel if there are substantial grounds to believe that there is a real risk of treatment contrary to Article 3 ECHR. In other words, diplomatic assurances are not an alternative to a full risk assessment.

9. As concerns the question of the role and weight, if any, diplomatic assurances should have in carrying out the risk assessment, views in the Group differed. There were broadly three positions.

10. Firstly, some took the view that diplomatic assurances concerning Article 3 ECHR treatment in the context of expulsion procedures were inherently unreliable and could not be regarded as having sufficient weight to amount to an effective mitigating

factor in a risk assessment. They should thus never be relied upon. Some expressed this view for all the cases, others limited their remarks to cases where there is a systematic pattern of torture in the receiving State. The reasons advanced to support this view included:

- the diplomatic assurances are sought from countries which have a proven record of torture or other ill treatment contrary to their international obligations;
- the State asking for the diplomatic assurances knows that the other State violates its obligations regarding torture and therefore implicitly recognizes that torture occurs and, by relying on such diplomatic assurances, undermines efforts of the international community to ensure respect for human rights obligations;
- the diplomatic assurances create double standards between the person protected by the assurances and other persons in the country who may face torture without any such protection;
- the diplomatic assurances are not necessarily legally binding;
- it seemed that in many cases the post-return monitoring mechanisms of the respect of the fundamental rights of the expelled person were proven not to be effective;
- the individual concerned has no recourse if the assurances are violated;
- the requested and requesting States might be thought to have a common interest in the monitoring body finding no evidence of torture;
- there is no climate of mutual trust;
- torture is of clandestine nature.

11. Other experts argued that diplomatic assurances can be effective and therefore have significant weight in carrying out a risk assessment. However, there must be safeguards to ensure the effectiveness of diplomatic assurances if they are to be relied upon. Such assurances must be assessed on a case-by-case basis according to the particular circumstances of the case. Diplomatic assurances are not in principle in breach of Article 3 or other international law standards. There exists no decision of an international court that indicates that diplomatic assurances are in general ineffective. There are, in addition, decisions of national courts that explicitly rely on these assurances.

12. Thirdly, others expressed a view between these two positions:

- they did not exclude the possibility that diplomatic assurances may be effective and thus carry weight in risk assessment in some circumstances;
- on the other hand, some experts had not concluded that diplomatic assurances were in practice necessarily effective in any particular case;
- some experts would wish to consider the practical factors that might have bearing on the diplomatic assurances more carefully before reaching a view.

13. In the context of the last two positions, a number of factors were suggested during the course of discussion as potentially having some relevance to assess the effectiveness of diplomatic assurances in a particular case. No conclusion was drawn concerning these factors. They were:

- the nature of the human rights situation in the receiving State (in particular is there a systematic pattern of abuse?);
- the nature of the risk to the individual;
- the existence and nature of any follow-up arrangement (such as a monitoring system);
- the possibilities of sanctions or other consequences in case of non-compliance with the diplomatic assurances (both at the instigation of the victim and of the sending State);
- the nature of the assurances (the degree of formality);
- the nature of the suspected activity giving rise to expulsion;
- the extent to which the receiving State has control over the relevant authorities;
- the importance of keeping in mind the presumption of innocence of those not convicted of any offence in this context.

14. The Group recognized that, although it was not without merit to look at experience of the use of diplomatic assurances in other contexts, there were fundamental differences between the use of diplomatic assurances regarding Article 3 ECHR and their use regarding the death penalty. In addition, there is a fundamental difference between expulsion procedures and extradition procedures. The same principles and procedures cannot automatically be applied to both situations.

15. There was also some discussion of possible alternatives to the use of diplomatic assurances regarding Article 3 ECHR. Three possibilities were studied:

- it was recognised that effective prosecution for criminal offences is in many cases the ideal. Some noted that this did not deal with the threat posed after the sentence had been served. Others noted that prosecution would not always be a practical option because of, for example, the nature of the evidence giving rise to a suspicion of involvement in terrorist activity (for example as in the Ramzy case). The option of expulsion had therefore to be retained, while recognising that the person might still pose a threat when returned to their country of origin;
- expulsion to a third State offering sufficient protection to the individual;
- managing the situation in the country itself.

Other issues (risk of violation of, for examples, Articles 5, 6 and 8 ECHR, capital punishment)

16. The DH-S-TER briefly discussed these other issues. It noted that they were relevant in the context of expulsion and the fight against terrorism. Several topics were identified, in particular the risk of a flagrant denial of justice. However, the main examples mentioned concerned the question of extradition and Article 6 ECHR, and not that of expulsion. Further thought should be given to the relationship between diplomatic assurances and convention rights other than Article 3 ECHR. This would include the question of the relevance of these rights independently from Article 3 or in combination with Article 3. Lastly, the Group decided to instruct the Secretariat to prepare a compilation of the Court's case-law on these issues and of the cases that had come before national courts.

Item 4: Consideration of the appropriateness of a legal instrument on diplomatic assurances

17. The Group decided to postpone consideration of this item until its next meeting (29-31 March 2006).

Item 5: Working methods for the continuation of the activity

18. The Group noted that it lacked practical information about the practice of States in the use of diplomatic assurances. It concluded to the need for a brief questionnaire that should first set the context of the DH-S-TER's consideration of the matter and then address the three following issues:

- national practical experience in the use of diplomatic assurances (including how the assessment of the risk of torture in the receiving State is carried out);
- the outcome of any use of diplomatic assurances (both in terms of the factual outcome and any lessons to be learnt from the experience);
- examples of case-law (of the European Court of Human Rights, of national courts and decisions of other bodies such as the UN Committee against torture).

19. The resulting compilation will give priority to examples of the use of diplomatic assurances in the context of the fight against terrorism, in cases where there was a risk of torture or inhuman or degrading treatment or punishment (Article 3 ECHR) in expulsion procedures. In addition, to the extent that they may be relevant to the consideration of diplomatic assurances relating to Article 3 treatment in expulsion procedures, other examples could also be given. These would be reflected, albeit less extensively, in the compilation.

20. The questionnaire will be drafted by the Secretariat in collaboration with the Chair and Vice-Chair. It will then be sent out to all CDDH members and observers, together with this meeting report as a background information document. Other documents mentioned in the agenda of this meeting could be sent on request. The deadline for sending replies to the Secretariat (mikael.poutiers@coe.int) is 31 January 2006.

21. As part of its consultation of other parties concerned by its work, the DH-S-TER decided to invite the following bodies and organisations to be represented as observers at its second meeting (29-31 March 2006), on an *ad hoc* basis, and at their own expense: the Committee of Legal Advisers on Public International Law (CAHDI), the European Committee on Crime Problems (CDPC), the Office of the United Nations High Commissioner for Refugees (UNHCR), Human Rights Watch, the World Organisation against Torture (OMCT) and the Association for the Prevention of Torture (APT). It was recalled that Member States which are not members of the DH-S-TER may also attend the second meeting at their own expense.

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* * *

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3. Office for Democratic Institutions and Human Rights (OSCE-ODIHR) / Bureau des institutions démocratiques et des droits de l'homme (BIDDH-OSCE)

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4. Office of the Human Rights Commissioner of the Council of Europe / Bureau du Commissaire aux droits de l'homme du Conseil de l'Europe

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5. European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment / Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT)

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6. Committee of Experts on Terrorism / Comité d'experts sur le terrorisme (CODEXTER)

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9. International Federation of Human Rights / Fédération internationale des Ligues des Droits de l'Homme (FIDH)

Apologised/Excusé

10. European Coordinating Group for National Institutions for the promotion and protection of human rights / Groupe européen de coordination des institutions nationales pour la promotion et la protection des droits de l'homme

Dr Wolfgang HEINZ

Institut Allemand des Droits de l'Homme (*Deutsches Institut für Menschenrechte*)

11. Forum européen des Roms et des Gens du voyage / European Roma and Travellers Forum

Apologised/Excusé

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M. Mikaël POUTIERS, Administrator / Administrateur, Human Rights Intergovernmental Cooperation Division / Division de la coopération intergouvernementale en matière de droits de l'homme, Secretary of the DH-S-TER / Secrétaire du DH-S-TER

Mr Gerald DUNN, Lawyer / Juriste, Human Rights Law and Policy Division / Division du droit et de la politique des droits de l'homme

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Interpreters/Interprètes:

Ms Barbara GRUT

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Ms Joëlle NORDMANN-LASSERRE

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Appendix II**Agenda****Item 1: Opening of the meeting and adoption of the agenda****Item 2: Exchange of views on the terms of reference***Working documents*

- Terms of reference of the Group of Specialists on Human Rights and the Fight against Terrorism (DH-S-TER) DH-S-TER(2005)001
- Extracts from the reports of the 60th meeting of the CDDH (14-17 June 2005) and of the 70th meeting of the Bureau (27-28 October 2005) DH-S-TER(2005)002

Item 3: Reflection on the issues raised with regard to human rights by the use of diplomatic assurances in the context of expulsion procedures*Working document*

- Human Rights and the Fight against Terrorism – The Council of Europe Guidelines

*Information documents**United Nations Committee against Torture*

- Decision in the case Ms G. K. v. Switzerland of 12 May 2003 (communication n° 219/2002), followed by the Observations of the Swiss Government on the admissibility and the cogency of the communication (*the Observations exist only in French*) DH-S-TER(2005)003
- Decision in the case Agiza v. Sweden of 24 May 2005 (communication n° 2333/2003) DH-S-TER(2005)004

United Nations Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment

- Report of Mr Theo van Boven, United Nations Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, document A/59/324 of 1st September 2004 DH-S-TER(2005)014
- Report of Mr Manfred Nowak, United Nations Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, document A/60/316 of 30 August 2005 DH-S-TER(2005)005
- United Nations Press release of 23 August 2005: “‘Diplomatic assurances’ not an adequate safeguard for deportees, UN Special Rapporteur against torture warns” DH-S-TER(2005)006

Office for Democratic Institutions and Human Rights (OSCE-ODIHR)

- OSCE-ODIHR Background Paper on Extradition and Human Rights in the Context of Counter-terrorism (n'existe qu'en anglais) DH-S-TER(2005)015

Parliamentary Assembly of the Council of Europe

- Questions put forward by members of the Parliamentary Assembly and answers by the Committee of Ministers DH-S-TER(2005)007

European Court of Human Rights

- Press release No. 554 issued by the Registrar of the Court of 20 October 2005: "Application lodged with the Court Ramzy v. The Netherlands" DH-S-TER(2005)008

European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)

- Extracts from the 15th General Report on the activities, covering the period 1 August 2004 to 31 July 2005 DH-S-TER(2005)009

Human Rights Commissioner of the Council of Europe

- Extracts from the Reports of Mr Alvaro Gil-Robles, Human Rights Commissioner of the Council of Europe, on his visits to Sweden (21-23 April 2004) and the United Kingdom (4-12 November 2004) DH-S-TER(2005)010

Non-Governmental Organisations / Civil society

- Call for Action against the Use of Diplomatic Assurances in Transfers to Risk of Torture and Ill-Treatment: Joint Public Statement by Amnesty International and other Organisations, 12 May 2005 DH-S-TER(2005)011
- Still at Risk: Diplomatic Assurances no Safeguard against Torture: Human Rights Watch, April 2005, vol. 17, No. 4 (D) DH-S-TER(2005)012
- Reject rather than regulate Call from Amnesty International, Human Rights Watch and the International Commission of Jurists DH-S-TER(2005)013
- Position paper of the European Group of National Institutions for the Protection and Promotion of Human Rights on the use of diplomatic assurances in the context of expulsion procedures and the appropriateness of drafting a legal instrument relating to such use DH-S-TER(2005)016
- Positions of the Jacob Blaustein Institute for the Advancement of Human Rights (JBI) and Columbia University Law School's Human Rights Clinic on Minimum Standards and Guidelines on the Use of Diplomatic Assurances DH-S-TER(2005)017

Item 4: Consideration of the appropriateness of a legal instrument**Item 5: Working methods for the continuation of the activity**

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Appendix III**Terms of reference of the Group of Specialists on Human Rights
and the Fight against Terrorism (DH-S-TER)**

1. Name of committee: GROUP OF SPECIALISTS ON HUMAN RIGHTS AND THE FIGHT AGAINST TERRORISM (DH-S-TER)
2. Type of committee: Committee of experts
3. Source of terms of reference: Steering Committee for Human Rights (CDDH)
4. Terms of reference:

Following the High-Level Seminar “*Protecting Human Rights while fighting Terrorism*” (Strasbourg, 13-14 June 2005), the Group of Specialists on Human Rights and the Fight against Terrorism (DH-S-TER) is called to:

- (i) start a reflection on the issues raised with regard to human rights by the use of diplomatic assurances in the context of expulsion procedures; and
- (ii) consider the appropriateness of a legal instrument, for example a recommendation on minimum requirements/standards of such diplomatic assurances, and, if need be, present concrete proposals.

In carrying out its terms of reference the DH-S-TER shall have due regard, in particular, to the Guidelines on human rights and the fight against terrorism (adopted by the Committee of Ministers on 11 July 2002 at the 804th meeting of the Ministers’ Deputies), the Guidelines on the protection of victims of terrorist acts (adopted by the Committee of Ministers on 2 March 2005 at the 917th meeting of the Ministers’ Deputies), other texts on terrorism adopted in the framework of the Council of Europe, the case-law of the European Court of Human Rights and relevant international texts and work, particularly that carried out by the United Nations, the European Union and other international organisations.

Upon completing its work the DH-S-TER will prepare a final activity report for the attention of the CDDH.

5. Membership:

The Group of specialists shall be composed as follows:

Austria*, Belgium, Croatia, Finland*, France, Germany, Greece, Italy, Latvia, the Netherlands*, Poland, the Russian Federation, Spain, Sweden*, Switzerland, Turkey and the United Kingdom.

* At their own expenses.

The Council of Europe will bear the travel and subsistence expenses of thirteen specialists for attendance at meetings of the Group. Other member States expressing an interest in the work of the Group may designate, at their own expense, specialists to participate in meetings of the Group.

6. Observers:

The Office of the United Nations High Commissioner for Human Rights, the European Commission, the Office for Democratic Institutions and Human Rights (ODIHR-OSCE), the Office of the Commissioner for Human Rights of the Council of Europe, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) and the Committee of Experts on Terrorism (CODEXTER) shall be invited to designate a representative to participate as an observer, as well as Non-Governmental Organisations and bodies with observer status within the CDDH.

7 Working structures and methods:

In carrying out its terms of reference, the Group of Specialists shall consult all parties concerned by its work by all appropriate means. In particular, it may organise hearings of representatives of non-governmental organisations and written consultations.

8. Duration:

These terms of reference expire on 31 May 2006.

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