HUMAN RIGHTS WATCH

350 Fifth Avenue, 34th Floor
New York, NY 10118-3299
Tel: 212-290-4700
Fax: 212-736-1300
Email: hrwnyc@hrw.org

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www.hrw.org

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Micheline Calmy-Rey
President of the Swiss Confederation
Foreign Minister
Federal Department of Foreign Affairs
Bundeshaus West
CH-3003 Bern
Switzerland

by facsimile: +41 31 323 40 01

Dear President Calmy-Rey:

Thank you for your letter of April 4, 2007, which sets forth your government's position on the use of diplomatic assurances against torture and ill-treatment.

Human Rights Watch remains extremely concerned about the efforts of your government to extradite to Turkey a number of Kurds currently resident in Switzerland. Your reply suggests that the Swiss government has departed from its previous principled position against reliance on diplomatic assurances against torture and ill-treatment in all circumstances and now seeks to carve out an exception to justify the use of unreliable "no torture" promises in the extradition context.

We seek clarification with respect to a number of issues in your letter and include additional information that supports Human Rights Watch's continuing opposition to the use of diplomatic assurances against torture and ill-treatment in *any* transfer or removal context where there is a risk of such abuse upon return.

As we noted in our first letter to you on this matter on December 14, 2006, Switzerland's absolute *nonrefoulement* obligation applies in all transfer contexts, including extradition. The distinction you raise in your letter between your opposition to the use of diplomatic assurances in ordinary returns cases (e.g. deportations) and their use as an "appropriate instrument" only in extradition cases is artificial.

Your letter justifies this distinction on the ground that the requesting state has a "crucial interest" in respecting such assurances because "[i]f it failed to honour an assurance, it would jeopardize the continuation of cooperation in this area." This argument ignores an extensive body of research that strongly indicates that diplomatic assurances are an

ineffective safeguard against torture and ill-treatment in all transfer contexts where a risk of such abuse exists.

Human Rights Watch's research includes a number of cases where courts in Canada, Germany, Netherlands, and United Kingdom have stayed or halted extraditions because diplomatic assurances were determined to be unreliable and insufficient to mitigate the acknowledged risk of torture and ill-treatment. Clearly, courts in a variety of countries have concluded that there is in fact little added incentive for a government to abide by its assurances simply because the proposed transfer takes place in the extradition context.

The extradition context offers no more protection to a person at risk of torture and ill-treatment and subject to transfer based on assurances than a person subject to deportation or other forced removal. Indeed, an extradited person would almost certainly go directly into the requesting government's criminal justice or internal security system, the very locales where clandestine – and routinely denied – acts of torture and ill-treatment are most likely to occur. Moreover, it is precisely because a government of return would desire continuing cooperation—particularly in respect to its future requests for extradition to its territory—that it has little, if any, incentive to acknowledge a possible breach of the assurances, initiate an independent and impartial investigation, and hold those responsible for acts of torture accountable.

As you acknowledge, the judiciary plays a major role in the in the control of administrative decisions regarding expulsion or extradition. However, some European governments have acknowledged at political level that diplomatic assurances are inherently problematic. For example, in its response to questioning by the UN Committee Against Torture in May 2007, a delegation from the Netherlands stated that the Netherlands had never transferred a person back to risk of torture based on such promises, adding that "[t]he weaknesses of that concept were apparent."[1] No doubt the deficiencies with respect to securing diplomatic assurances were amply demonstrated to the Dutch authorities in the course of its attempt to extradite Nuriye Kesbir, a PKK official then resident in the Netherlands. The Dutch Supreme Court ruled in September 2006 that Kesbir could not be extradited to Turkey because Turkish assurances of humane treatment were not sufficient to protect her from abuse.

Your letter, however, maintains that if a risk analysis "leads to the conclusion that a risk of violation cannot be excluded, the possibility of eliminating this risk by obtaining assurances is examined" and these guarantees are given in a "legally binding form in accordance with international law." As noted above, however, diplomatic assurances cannot eliminate the risk of torture and ill-treatment. Moreover, the person subject to transfer based on such promises has no legal recourse if the assurances are breached.

Although both Switzerland and Turkey are parties to the 1957 European Convention on Extradition, the convention provides for the use of diplomatic assurances only with respect to the death penalty, and its Second Additional Protocol provides for the use of assurances only to guarantee that a person who has been sentenced or subject to a detention order *in absentia* has the right to a retrial in conformity with fair trial standards upon return. We thus seek clarification regarding what domestic legal regime in each country would govern bilateral assurances between Switzerland and Turkey, and afford the person subject to

return based on diplomatic assurances against torture and ill-treatment legal recourse in the event of a breach of the bilateral agreement.

We are aware that a small number of persons, with support from international and national nongovernmental organizations, have been able to bring individual petitions before UN bodies for a review of their article 3 claims, including an assessment of the diplomatic assurances relied upon by the sending state to effect a transfer to a risk of torture. For example, in the Committee Against Torture case of *Agiza v. Sweden* and the Human Rights Committee case of *al-Zery v. Sweden* the respective Committees held that diplomatic assurances from Egypt were insufficient to protect the men against mistreatment in violation of Sweden's treaty obligations. It should be noted that the government of Sweden had agreed a post-return monitoring scheme with the Egyptian authorities, but both men were tortured in spite of numerous visits by Swedish diplomats.

The June 2007 Committee Against Torture case of *Pelit v. Azerbaijan* is also illustrative.[2] The Committee determined that Azerbaijan's extradition of Elif Pelit, alleged to be associated with the PKK, to Turkey in October 2006 violated article 3 of the Convention Against Torture, despite diplomatic assurances against torture and ill-treatment from the Turkish authorities prior to her transfer. Pelit had been granted refugee status by Germany in 1998 based on her claims of having been previously tortured in detention in Turkey between 1993 and 1996. It is important to note that the Committee found Azerbaijan in violation of article 3 despite the State party's claims that it had monitored Pelit's treatment post-return and that, in a private conversation with an Azeri embassy representative, Pelit "confirmed that she had not been subjected to torture or ill-treated by the penitentiary authorities."

The Committee Against Torture in *Pelit* questioned why the Azeri authorities failed to respect Pelit's refugee status, particularly "in circumstances where the general situation of persons such as the complainant and the complainant's own past experiences raised real issues under article 3."[3] The Committee thus clearly indicates that despite recent human rights reforms in Turkey, persons alleged to be in association with the PKK remain at risk of torture and ill-treatment in Turkish custody.

Human Rights Watch's past research indicates that most PKK-associated prisoners are held in F-type prisons in Turkey, where ill-treatment has been a serious human rights problem.[4] Recent efforts by the Izmir Independent Prison Monitoring Group—comprised of lawyers, physicians, human rights activists, and other civil society professionals—to monitor the treatment of detainees in Izmir Kirklar F-type prisons, for example, reveals a disturbing pattern of ill-treatment of inmates in these facilities. [5] The Group documented reports of ill-treatment that occurred in 2005 and 2006 in Izmir Kirklar F-type prisons, deriving most of its information from reports from the men's lawyers and interviews with the inmates' families. The Group has repeatedly requested access to F-type prisons to conduct independent monitoring activities, but has consistently been denied such permission, demonstrating the Turkish authorities' continuing reluctance to permit open, universal access by independent civil society actors to places of detention in Turkey.

The Group's representatives interviewed 10 prisoners, all of whom claimed they suffered disciplinary punishment in the prison consisting of being subjected to a form of restraint known as the "hogtie" (*domuz bağı*) while placed in a padded cell.[6] The prisoners reported that they had been left for prolonged periods (one man for seven days) with their wrists

bound behind their backs, their ankles bound, and wrists then bound to ankles, and left in this position lying on the floor. Handcuffs, rags, sheets, and binding tape were reportedly used and some prisoners reported the humiliation of being fed by prison guards while hogtied and of not being untied to go to the toilet. The men also reported other forms of ill-treatment, including being subjected to beatings; falaka (beatings on the soles of their feet); prolonged periods in solitary confinement, and verbal threats. [7]

Allegations of the use of this form of punishment are reportedly under investigation by the Public Prosecutor in Izmir, though lawyers have expressed concern that the prosecutor conducting the investigation is the same individual responsible for the day-to-day monitoring of the prison, presenting an obvious obstacle to an independent and effective inquiry. Fearing further reprisals by prison guards, the lawyers for the 10 men have requested that the names of the prisoners who have lodged formal complaints be withheld.

Turkey's failure to permit independent and transparent prison monitoring with universal access to all detainees in places of detention, its failure to commence an independent and impartial investigation into allegations of abuse at Izmir Kirklar F-Type prisons nos. 1 and 2, and the fear of reprisals on the part of inmates therein, demonstrate some of the most compelling obstacles to a breach of diplomatic assurances being discovered and effectively investigated.

Your letter contends that the UN High Commissioner for Human Rights, the Council of Europe, and European Parliament oppose reliance upon diplomatic assurances in connection with various forms of transfer, but that "[n]o negative conclusions can be drawn…with regard to the effectiveness of the guarantees provided in relation to extraditions." The facts indicate otherwise. In a February 2006 speech focusing specifically on secret detention and transfers to risk of torture based on unreliable diplomatic assurances, Louise Arbour stated categorically that the absolute *nonrefoulement* obligation included transfer by extradition and that assurances should not be relied upon in any transfer context.[8] In a June 2006 article, Council of Europe Human Rights Commissioner Thomas Hammarberg stated:

> "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 practised. 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 kinds (*emphasis added*). [9]

In its final report of January 30, 2007, the European Parliament's Temporary Committee on illegal CIA activity in Europe called on European Union member states to rule out the acceptance of mere diplomatic assurances from third countries "as a basis for any legal *extradition* provision, where there are substantial grounds for believing that individuals would be in danger of being subjected to torture or ill-treatment (*emphasis added*)."[10]

These statements clearly demonstrate the opposition of key international actors and bodies to reliance upon diplomatic assurances against torture and ill-treatment specifically in the context of extradition.

States that secure diplomatic assurances explicitly acknowledge that a person subject to transfer based on such promises is at risk of torture precisely because the repatriation state has failed to comply with its international obligations. Unenforceable, bilateral agreements against torture and ill-treatment are ineffective as a safeguard against abuse for the sole person subject to return. Moreover, they do not require a repatriation state to commit to any system-wide reform required by their obligations under the European Convention on Human Rights, the Convention Against Torture, or the International Convention on Civil and Political Rights. Diplomatic assurances may be an expedient way for governments to remove undesirable aliens. But they should not be confused with concerted advocacy by the global community to eradicate torture with the hard work of wide-ranging systemic reforms that, implemented in full, will protect all persons from torture and thus make the use of diplomatic assurances against torture redundant.

In light of the evidence and opinions cited above, and notwithstanding your assurances to the contrary, it is difficult to avoid the conclusion that Switzerland is seeking to circumvent the ban on torture and the principle of *nonrefoulement* by relying on diplomatic assurances against torture in the extradition context.

We call again on the Swiss government to reject firmly and absolutely the use of diplomatic assurances against torture and ill-treatment and to make a wholehearted effort to uphold the global ban on torture and *refoulement* in all transfer contexts where there is a real risk of torture and ill-treatment.

Sincerely,

Holly Cartner
Executive Director
Europe and Central Asia Division

cc. Louise Arbour, UN High Commissioner for Human Rights
Manfred Nowak, UN Special Rapporteur on Torture
Thomas Hammarberg, Council of Europe Human Rights Commissioner
Christopher Blocher, Minister of Justice, Switzerland
Mark Thomson, Secretary General, Association for the Prevention of Torture
Eric Sottas, Director, World Organization Against Torture

[1] United Nations Press Release, "Committee Against Torture Hears Response of Netherlands," May 8, 2007, http://www.unhchr.ch/huricane/huricane.nsf/view01/E3C8366BACA1AEECC12572D5005F7263?opendocumen (accessed June 25, 2007).

[2] United Nations Committee Against Torture, *Pelit v. Azerbaijan,* Communication No. 281/2005, CAT/C/38/D/281/2005, June 5, 2007, http://www1.umn.edu/humanrts/cat/decisions/281-2005.html (accessed June 25, 2007).

[3] Ibid., para. 11.

[4] See, for example, Human Rights Watch Report, *Turkey: Small Group Isolation in F-Type Prisons and the Violent Transfers of Prisoners to Sincan, Kandira, and Edirne Prisons on December 19, 2001*, Vol. 13, No. 2(D), April 2001, http://www.hrw.org/reports/2001/turkey (accessed June 25, 2007).

[5] The Izmir Independent Prison Monitoring Group is currently made up of the Izmir branches of the Contemporary Lawyers Association, the Human Rights Foundation of Turkey, the Human Rights Association, and the Architects and Engineers Professional Chamber.

[6] Documented in the Group's report covering the period November 2005 to October 2006: "İzmir Ceza ve Tutukevleri Bağımsız İzleme Grubu, Kasim 2005 – Ekim 2006 Raporu." Cases were also reported by the Çağdaş Hukukçular Derneği İzmir Şübesi (Izmir Contemporary Lawyers Association) in a report titled "İzmir F Tipi Cezaevlerinde pozisyon işkencesi ve uzun süreli ağırlaştırılmış tecrit uygulaması" ("Positional Torture and the Practice of Extended Aggravated Solitary Confinement") (no date).

[7] Ibid.

[8] Speech by Louise Arbour, UN High Commissioner for Human Rights, "In Our Name and On Our Behalf," Chatham House, February 15, 2006, http://www.chathamhouse.org.uk/pdf/research/il/ILParbour.pdf (accessed June 24, 2007).

[9] Thomas Hammarberg, Council of Europe Commissioner for Human Rights, "Viewpoints: Torture Can Never, Ever Be Accepted," June 27, 2006, http://www.coe.int/t/commissioner/Viewpoints/060626_en.asp (accessed June 24, 2007).

[10] European Parliament Temporary Committee on Illegal CIA Activity in Europe, Final Report on the Alleged Use of European Countries by the CIA for the Transportation and Illegal Detention of Prisoners, January 30, 2007, para. 21, p. 8, http://www.europarl.europa.eu/comparl/tempcom/tdip/final_report_en.pdf (accessed June 28, 2007).