Star LAW analysis

Diplomatic assurances and the extent of its reliability in protection of human rights

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SINCE the attacks of 11th September there has been increased use of " diplomatic assurances" to justify the extradition or deportation of persons to countries known to regularly practice torture. The legality and efficiency of this practice in protecting human rights and fulfilling states' non-derogable obligation has been called into question. Under the Convention Against Torture (CAT), it is expressly prohibited to transfer a person to a country where he or she would be at risk of torture. The ban thus defends logical reliability: states cannot torture and cannot avoid this obligation by sending people to governments that will. The obligation not to send a person to a place where he or she would be at risk of torture is clearly expressed in article 3 of the CAT: "No State 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." In Tapia Paez v. Sweden, the Committee against Torture, authorized under the convention to consider individual cases, 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 engaged cannot be a material consideration when making a determination under article 3 of the Convention."

PHOTO:CNN

Moreover, in March 2004, the Human Rights Committee adopted General Comment No. 31 on International Covenant on Civil and Political Rights (ICCPR) article 2 (concerning nondiscrimination) regarding "The Nature of the General Legal Obligation Imposed on States Parties to the Covenant." Paragraph 12 reads in part: . . . 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 [right to life] and 7 [torture or cruel, inhuman or degrading treatment] 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. The relevant judicial and administrative authorities should be made aware of the need to ensure compliance with the Covenant obligations in such matters.

However, as has been pointed out by the European Court of Human Rights in Chahal v United Kingdom, despite assurances by the receiving government, a decision to deport a person facing a risk of torture would still violate Article 3 of the European Convention on Human Rights. In an attempt to avoid the non-refoulement obligation, the UK and other governments have attempted to extend the practice of " diplomatic assurances" in extradition cases where a person might face the death penalty, to cases where the person faces a risk of being tortured. The death penalty is not absolutely prohibited under international law. As such, it is exercised by some states through public means (judicial, legislative, administrative and others). Therefore, where there is an obligation to extradite an individual under an extradition treaty, the sending state can request diplomatic assurances from the receiving state to guarantee that the person would not be executed. But even in these cases, where assurances have been given, international law states that it is the discretion of the sending state to extradite the person. In cases where the person faces a risk of torture, the sending state is under an international obligation to refrain from extraditing or deporting the person.

On practical level, the governments involved in negotiating the assurances have little or no incentive to scrutinize for and emphasize a breach of diplomatic assurances against torture or ill-treatment. In some cases, sending governments want the receiving state to use prohibited interrogation techniques against a person to extract information. In other cases, the sending state simply wants the receiving state to take responsibility for warehousing a suspect who is considered a national security threat in the sending state. In either situation, a sending government that learns a breach of the assurances would have to acknowledge a violation of its own non-refoulement obligation. A receiving government also has little incentive to abide by assurances against torture and ill-treatment. All of the receiving states identified routinely violate their legally binding human rights treaty obligations by employing torture to effect state policy. They obviously believe that there is little to gain from observing those legal obligations. It is unlikely that governments that practice torture unconstrained by international legal commitments will restraint in abuse on the basis of non-binding assurances.

In his September 2004 report to the United Nations General Assembly, Theo van Boven, a Special Rapporteur on torture, articulated concern that reliance on diplomatic assurances is a "practice that is increasingly undermining the principle of non-refoulement." He questioned "whether the practice of resorting to assurances is not becoming a politically inspired substitute for the principle of non-refoulement, which...is absolute and nonderogable." In his conclusions, the Special Rapporteur stated that, as a baseline, in circumstances where a person would be returned to a place where torture is systematic, "the principle of non-refoulement must be strictly observed and diplomatic assurances should not be resorted to." He also noted that if a person is a member of a specific group that is routinely targeted and tortured, this factor must be taken into account with respect to the non-refoulement obligation. The other Special Rapporteur on torture, Manfred Nowak, echoed van Boven's conclusion against the use of assurances for returns to countries where torture is systematic in one of his first public statements on the issue.

In the situation that there's a country where there's a systematic practice of torture, no such assurances would be possible, because that is absolutely prohibited by international law, so in any case the government would deny that torture is actually systematic in that country, and could easily actually give these diplomatic assurances, but the practice then shows that they are not complied with. And there's then no way or very, very little possibility of the sending country to actuallyas soon as the person is in the other countryto make sure that this type of diplomatic assurances are complied with. Nowak's statement not only firmly rejects the use of assurances to countries where torture is systematic, it highlights some of the most obvious faults inherent in enforcing such guarantees in any case where they might be used, including denials by the receiving state and the inability of the sending state to monitor effectively for torture after a person is transferred to an abusive state.

Indeed, states that torture routinely escort their deliberate violations with firm denials of abuse, often despite overwhelming evidence to the contrary. Such denials also obtain in individual cases of abuse despite diplomatic assurances of protection. For example, amidst serious and credible allegations that the two Egyptian men expelled from Stockholm to Cairo in December 2001 were tortured, the Egyptian authorities simply issued a complete denial that torture or ill-treatment had occurred. The Egyptian government "refuted the allegations [of torture] as unfounded" and communicated to the Swedish authorities that the Egyptian authorities were "of the opinion that further investigations are not necessary." The Swedish government appears to have little recourse in the face of such denials. When Maher Arar, a Syrian-Canadian binational, credibly alleged that he had been tortured in Syria after his transfer there by U.S. and Jordanian operatives following assurances from the Syrians, the Syrian authorities simply claimed that his allegations were not trueand the U.S. government accepted the Syrian denial of torture at face value.

All of the text of diplomatic assurances collected by Human Rights Watch recapitulate the receiving country's existing treaty obligationsones that they already routinely ignore and routinely deny violatingas the basis for illustrating that they can be trusted to comply with non-legally binding diplomatic assurances when it comes to the treatment of the one individual in question. For example, in January 2005, a Dutch court ruled that assurances from Turkey "added nothing" to the protection of a former PKK operative threatened with extradition because the guarantees merely restated Turkey's currently existing human rights obligations, which Turkey had not observed in general with respect to eradicating torture on the ground. None of the assurances provide for a mechanism to challenge a breach of the assurances or any other remedy for a credible allegation that the agreement had been broken. Thus, if one or the other of the states involved violates the assurances, it literally has nothing to lose. It should also be noted that the situation for refugees and asylum seekers has been of further concern following the 'war against terrorism'. Despite the fact that many have fled their homes to escape persecution and repression, they are at times regarded as potential terrorists because of their country of origin.

Within the context of fight against terrorism it has been observed that the use of diplomatic assurances in the face of risk of torture and other ill-treatment violates the absolute prohibition in international law against torture and other ill-treatment and the non-refoulement obligation. States can implement this obligation in part by ensuring that extradition treaties and procedures prevent return in such circumstances, and by ensuring an effective appeals process against the decision to return, expel or extradite. However, as stated by Holly Cartner: "The evidence shows that assurances against torture don't work...It defies belief that a country that doesn't respect international obligations not to torture would comply with a mere promise made to one country."

The author is doing LL.M in UK.

LAW news

REGIONAL MOOT COURT COMPETITION, DELHI

Bangladesh wins the best memorial award

Bangladesh has won the Award and Certificate for the Best Memorial in the Regional Moot Court Competition held in Delhi organized by the International Committee of the Red Cross (ICRC) in collaboration with the International Society of International Law (ISIL). The competition is named in memory of Mr Henry Dunant, the co-founder of the ICRC in 1863 and spiritual father of the Red Cross and Red Crescent Movement.

The competition was inaugurated by Justice Vikramajit Sen, Honourable Judge of the Delhi High Court on 14 October, 2005. Mr. Vincent Nicod, Head of the Regional Delegation of ICRC, Mr. Larry Maybee, Legal Advisor of the Regional Delegation and Mr. Shri Ram Niwas Mirdha, President of ISIL were present on the occasion. On the basis of the criteria set by the ICRC for the eligibility of the participants in the Regional Moot Court competition, students from four SAARC countries namely Bangladesh, Srilanka, Nepal and India participated in the Competition. Each participating country nominated a team consisting of three student members, and a coach from the faculty of the University that they represent. From Bangladesh, Dhaka University, being the Champion at the national level competition, participated in the Regional one. Mahfuza Liza, Shikder Muhmudur Razi and Sharin Shajahan Noami were the members of the Dhaka University team. Mr. Nazmuzzaman Bhuian, Lecturer, Department of Law, Dhaka University, guided them as the Coach.

The eminent Judges who were selected from the different categories such as academicians, serving and retired judges and the senior advocates of the High Court of Delhi judged the teams. Although India got the Best Advocate Award, Bangladesh secured the Best Memorial Award. Undoubtedly, Dhaka University team deserves congratulations for receiving such a prestigious award for Bangladesh.

-- Law Desk

RIGHTS monitor

Sierra Leone: War crimes court makes major strides

The U.N.-backed court for war crimes in Sierra Leone is making major strides toward ensuring justice for serious crimes committed during the eleven-year war in Sierra Leone, Human Rights Watch said in a report. The devastating conflict, which lasted from 1991 until 2002, was characterized by brutal human rights abuses committed by all warring factions. The 46-page report, "Justice in Motion: The Trial Phase of the Special Court for Sierra Leone," evaluates the conduct of the court during trials, which began last June.

"The Special Court has broken new ground with practices to promote fair trials, protect witnesses and make justice accessible to Sierra Leoneans," said Elise Keppler, counsel with Human Rights Watch's International Justice Program. "The Special Court is setting benchmarks that other tribunals can look to."

- Key accomplishments of this novel tribunal, which is a hybrid international-national court, include:
- Substantial progress on trials of accused associated with all three main warring factions
- A defense office that advocates to ensure effective defense representation and fair trials
- A comprehensive scheme of protection and support for scores of witnesses
- Robust outreach that disseminates information about the court around the country through video, radio and discussion

Initially forced to rely exclusively on voluntary donations from other countries, the Special Court has faced constant financial shortfalls. Recent pledges made at a funding conference on September 30 are commendable, but remain inadequate. As a result, the court currently lacks sufficient funds to complete operations and carry out critical "post-completion" activities, such as protecting witnesses who have testified.

"With everything the Special Court has achieved, it would be shameful if it didn't receive the funding it needs to wrap up its work," said Keppler. "Donor countries should step up and contribute generously so that the court can make a strong and historic finish."

Former Liberian President Charles Taylor's ongoing exile in Nigeria also threatens to undercut the Special Court's ability to fulfill its mandate to prosecute those bearing the greatest responsibility for serious crimes committed in Sierra Leone's armed conflict, Human Rights Watch said. Taylor has been indicted by the Special Court of seventeen counts of war crimes and crimes against humanity against the people of Sierra Leone. The crimes include killings, mutilations, rape and other forms of sexual violence, sexual slavery, the recruitment and use of child soldiers, abduction, and the use of forced labor by Sierra Leonean armed opposition groups.

"The Special Court cannot complete its work as long as Nigeria continues to harbor Taylor," said Keppler. The report details concerns regarding court operations that should be addressed to ensure that the court functions as fairly and effectively as possible. These include disclosure of information identifying protected witnesses in the courtroom, poor performance of defense counsel, and insufficient initiatives to engage the national justice system.

The Special Court is charged with bringing to justice those who bear the greatest responsibility for grave crimes committed since November 1996, including war crimes, crimes against humanity, other serious violations of international humanitarian law and certain violations of Sierra Leonean law. Created in 2002 through an agreement between the United Nations and the Sierra Leonean government, the Special Court represents a significant new model of international justice, often referred to as a "mixed" or "hybrid" tribunal.

Source: Human Rights Watch.

LAW event

Urge to implement the SAARC Regional Convention on Trafficking

SHAILA SHAHID

THE Delegates of Govern-ment, Non Government and International organizations from the SARRC countries underscore the need for proper implementation of the SAARC convention on Trafficking. The Regional Workshop entitled "Improving and Developing Strategies for the protection of Trafficked Survivors" organized by Bangladesh National Women lawyers Association (BNWLA) with the support of USAID through AED, Save the Children Sweden Denmark has brought the participants ranging from Non Government Organisation, International NGOs, UN Bodies, Civil Society and Human Rights activists together with representatives of Governments.

The Regional Workshop was organized on the eve of the SARRC Summit due in Dhaka this week with a view to discuss the feasibility of taking further steps to combat trafficking considering the human rights perspective like voluntary repatriation, safe migration, security, privacy and minimum institutional standards with a woman and child friendly atmosphere between source and receiving countries.

The two-day long workshop mainly focused on issues like: Review of the implementation of SAARC Convention; Victim and Witness Protection: Am Imperative Measure for an Inherent Right; To set Minimum Standard Care for the Survivors and Community based Reintegration; Difficulties of Identification and Repatriation of Trafficked Victims and Regional Migration Policy and other related issues.

The Inaugural session of the Workshop was chaired by Mr. Safiraj Hossain, Honourable Secretary, Ministry of Home Affairs, while Advocate Salma Ali, Executive Director of BNWLA gave her welcome speech. Among others the opening session was addressed by Mr. Shahidul Haques, regional Representative of IOM, Bangladesh; Mr. OLet Teisburg, Resident Representative of SAVE the Children Sweden Denmark; Ms. Nasrin Begum, Joint Secretary, Ministry of Law, Justice and Parliamentary Affairs, Mr. Ataul Karim, Former Secretary and President of Correction and Social Reclamation; Ms. Helha Klien, Chief of Party, SARI- Equity, Delhi.

Among the international participants from other SARRC countries Mr. Manabendra Mondol of India; Dr. Bharati Sharma of India Mr. Basanth Basant of Nepal and Ms. Lubna Tayeba of Pakistan made special remarks in the inauguration session.

The second day of the workshop discusses different issues regarding trafficking. The first working session was "To set minimum standard care for the survivors and community based integration". The second working session's topic was "Difficulties of Identification and Repatriation of trafficked ", while the third session was on "Regional Migration Policy". The workshop came out with a set of recommendations to be implemented at national and regional level.

The demands that rose by the participants, mainly:

- Recognize and addressing trafficking of women and children as a gross violation of Human rights.
- Taking urgent steps towards implementing of SAARC Regional Convention on Trafficking.
- Protection of survivors in the process of rescue, repatriation and recovery and integration.
- Taking necessary steps for the empowerment of survivors.
- Need for inter-ministerial and GO, NGO co-ordination.
- Introducing effective cross border mechanism, protocol, and infrastructure.
- Reducing the time and procedural delays keeping the rights of the survivors at the center.
- Psycho-Social treatment and social reclamation of survivors in the society.
- Need for a victim protection protocol.
- Need for concrete, authentic, and reliable data to work for preventing trafficking.
- Need to establish a regional taskforce of trafficking immediately.
- There should be a bi-lateral or multilateral agreement to prevent trafficking.
- Need to implement the Regional victim/ witness protection protocol to combat trafficking, commercial exploitation and sexual abuse of women and children in South Asia, prepared by Regional Action Forum.

Dr. Mizanur Rahman from IOM wrapped up the two daylong workshops. Supreme court advocate and advisor of BNWLA Ms. Zebunnesa Rahman chaired the concluding session. She reiterates BNWLA's commitment to make continuous effort for combating trafficking in person, especially women and children in the days to come. To ensure that there is an urgent need for combined effort and coordination among all the segments that are engaged in fighting against trafficking including GO, NGO and civil society co-operation.

A Press Conference has been organized after the two daylong workshops as part of the program to briefing the media about the outcome of the regional workshop, which was moderated by Advocate Salma Ali, Executive Director of BNWLA.

BNWLA thinks that the brainstorming and group works of the participants over these two days came up with valuable suggestions and recommendations paving the way for a better regional understanding on human trafficking.

The author is working for Law Desk, The Daily Star

LAW week

4 held for Aug 21 grenade attacks

The Criminal Investigation Department (CID) of police arrested four people for alleged involvement in the August 21 grenade attacks on the Bangabandhu Avenue rally of Awami League (AL) last year. Three of the arrestees -- Shafiqul Islam Shafiq, Abul Hashem Rana and Shah Alam -- were placed on a seven-day police remand. The three arrestees and Nure Alam were caught in separate police drives in Dhaka and Narayanganj. Shafiq and Hashem were named along with 12 others in the confessional statement of George Miah, who is also an accused in the case. The CID claimed Shafiq and Hashem admitted their involvement in the August 21 attack apparently carried out to kill AL core command including party president Sheikh Hasina. CID sources said they had employed a woman informant to hunt down Shafiq of Gopalganj and Hashem of Brahmanbaria after George Miah named them in his confessional statement on June 26. -- *The Daily Star, November 7.*

BoI wants separate law

The Board of Investment (BoI) will draft a new law to deal with large-scale package investments like that of Indian Tata and Dubai-based Dhabi Group as experts say the big ventures involve various new dimensions. This necessity emerged during the negotiations with the Tata Group as the government negotiators found the existing rules and policies wanting with regard to such large investments coming as unsolicited offers. The BoI has decided to initiate a move to create a legal instrument to deal with the multidimensional investment proposals, which will exceed the minimum level of billion-dollar business. Official sources said the public-procurement issues are involved in the Tata Group's investment as the company has offered to sell its products, particularly electricity, to the government. But the existing rules, regulations and other policies do not support any purchase from private sector on the basis of unsolicited offer. -- *UNB, Dhaka, November 8.*

40,000 strong security blanket over Dhaka

Dhaka was wrapped in a security blanket as around 40,000 security men took positions at the ten venues of the 13th Saarc Summit and at other points in the capital to ensure foolproof security during the summit. Special Security Force (SSF) officially took charge of the overall security when the full deployment took place. The security personnel equipped with sophisticated weapons and equipment have started checking vehicles and passengers at all entry points, especially around the venues where Saarc delegates will stay and hold meetings. Traffic police also began restricting traffic on some city roads near the venues. According to police administration sources, 15,000 policemen in uniform and 8,000 plainclothesmen from different intelligence agencies have been deployed. -- *The daily Star, November 8.*

OC closed for failure to maintain law and order

The officer-in-charge of Bhandaria Police Station in Pirojpur was closed in the wake of a robbery spree and killing of a youth by robbers under his jurisdiction. The district police administration closed OC Abdul Barek for his failure to maintain law and order, said a police officer asking not to be named. Armed robbers looted at least eight shops in Charail Pole Hut and in Nadmulla village in Bhandaria. A group of armed robbers attacked a number of shops and looted them in Kapali Hut More in Shilakati union just after the next night of the incidents. The robbers chopped a shopkeeper, Rafiqul Islam, and opened fire on villagers, who came to resist the robbery. Locals said extortionists attacked and looted three shops and injured two people. Shopkeepers observed a half-day strike in protest against the attack and demanded immediate arrest of the extortionists the same day. -- *The Daily Star, November 8.*

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