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# Reject rather than regulate

## Call on Council of Europe member states not to establish minimum standards for the use of diplomatic assurances in transfers to risk of torture and other ill-treatment

### Introduction:

Amnesty International, Human Rights Watch and the International Commission of Jurists, call upon member states of the Council of Europe, and the Council of Europe as an institution, to reject any proposals to establish minimum standards for the content and use of diplomatic assurances against the risk of torture or other cruel, inhuman or degrading treatment or punishment (“other ill-treatment”). The organizations consider that the elaboration of such standards (and reliance on diplomatic assurances) is incompatible with the states’ obligations and the aims and principles of the Council of Europe to prevent torture and other ill-treatment.

Amnesty International, Human Rights Watch and the International Commission of Jurists, (also referred to as “the organizations”), oppose the reliance on agreements between states (usually bi-lateral and variously represented as “diplomatic assurances”, “diplomatic guarantees” or “memoranda of understanding”, and hereafter referred to generically as “diplomatic assurances”) which purportedly aim to ensure that an individual subject to transfer from one state to another will not be tortured or ill-treated upon return.

It is the position of the organizations that diplomatic assurances are not an effective safeguard against torture and other ill-treatment. We consider that states’ reliance on diplomatic assurances in sending people to a place where they face a risk of torture or other ill-treatment violates two fundamental rules of international law: the absolute prohibitions of torture and other ill-treatment and of the forcible sending of any person, under any circumstances, to a country where there are substantial grounds for believing that he or she may be in danger of being subjected to torture or other ill-treatment (the *non-refoulement* obligation).

Amnesty International, Human Rights Watch and the International Commission of Jurists urge member states of the Council of Europe not to cloak these arrangements with a legitimacy that they do not deserve by creating standards to regulate their use. Instead, the Council of Europe should see such arrangements for what they are: unacceptable attempts by governments to circumvent their obligation of *non-refoulement* which contribute to a dangerous erosion of a fundamental rule of international law.

It is important to note that states from which such assurances are sought are already under a duty under customary international law to prohibit torture or other ill-treatment of any person. Most (if not all) of these would-be receiving states are also already parties to binding multi-lateral treaties which prohibit torture and other ill-treatment and require them to take legislative, judicial, administrative and other measures necessary to prevent torture and ill-treatment, investigate allegations of such conduct, bring those responsible to justice and ensure reparation to the victims. However, in virtually all cases which have come to the attention of the organizations, these would-be receiving states that have provided the assurances have repeatedly violated their existing obligations under international law. In particular, they have well-publicized records of widespread or systematic torture and other ill-treatment and/or are places where members of particular groups are routinely singled out for such abuse.

The organizations' opposition to such diplomatic assurances is elaborated below and also set out in the Joint NGO Statement attached hereto as **Appendix I**. It is firmly grounded in international law and the organizations' years of experience of working to eradicate torture and other ill-treatment and monitoring cases of expulsion, extradition, returns, and other forms of transfer ("transfer"). Our research indicates that reliance on such "assurances" has repeatedly shown to be misplaced and exposed the persons who were subject of the assurances to torture and other ill-treatment.<sup>1</sup> It straddles three overlapping and intertwined arguments: the legal, the principled, and the practical.

The organizations consider that states that rely on diplomatic assurances circumvent, and thereby violate, the absolute legal prohibition against sending a person to a state where they risk torture or other ill-treatment, by disregarding the receiving state's poor record of respect for detainees' fundamental rights. Diplomatic assurances are not and cannot be considered a substitute for the various legislative, administrative, judicial and other measures required by international law (with which such states have infamously failed to comply). This is true even if the assurances contain arrangements for a post-return monitoring mechanism.

At the core of the principled argument is that agreeing to enforce an exception to a receiving state's torture practices in an individual case has the effect of accepting the torture of others similarly situated in the receiving country. In other words, asking for the creation of such an

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<sup>1</sup> For detailed description and analysis of this subject see Human Rights Watch, *"Empty Promises:" Diplomatic Assurances No Safeguard against Torture*, April 2004; Human Rights Watch, *Still at Risk: Diplomatic Assurances No Safeguard Against Torture*, April 2005. See also "Call for Action against the Use of Diplomatic Assurances in Transfers to Risk of Torture and Ill-Treatment," a joint statement issued in May 2005 by Amnesty International, Association for the Prevention of Torture, Human Rights Watch, International Commission of Jurists, International Federation of Action by Christians for the Abolition of Torture, International Federation for Human Rights, International Helsinki Federation for Human Rights, and World Organisation Against Torture, attached as **Appendix I**.

island of supposed legality in the country of return amounts, or in any case comes dangerously close to the sending state accepting the ocean of abuse that surrounds it.

At the practical level, there is ample evidence to show that diplomatic assurances have not worked and there is nothing to suggest that refining such assurances or attempting to perfect them will result in their providing adequate protection against torture or other ill-treatment.

Rather than seeking to regulate an inherently flawed device, Amnesty International, Human Rights Watch and the International Commission of Jurists therefore call on the member states of the Council of Europe, and the Council of Europe as a whole, to actively encourage governments, both within and outside of the Council of Europe, to meet their international legal obligation to prevent torture and other ill-treatment by taking effective system-wide, nation-wide, regional and international measures to that end. Once full compliance with international norms against torture and other ill-treatment is achieved, sending or returning persons between states will become a matter to be settled among law-abiding states in accordance with international law.

*“...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 and ill-treatment.”*<sup>2</sup>

Council of Europe Commissioner for Human Rights,  
Alvaro Gil-Robles

## 1. An absolute prohibition

The prohibition against torture and other ill-treatment in international law is absolute.<sup>3</sup> As the European Court of Human Rights has ruled repeatedly,

[T]he Court reiterates that Article 3 enshrines one of the most fundamental values of democratic societies. Even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 § 2 even in the event of a public emergency threatening the life of the nation.<sup>4</sup>

This absolute prohibition encompasses an absolute prohibition on the involuntary sending of a person to any state where there is a risk that he or she would be subjected to torture or other ill-treatment (referred to as “the prohibition of return to torture or other ill-treatment” or the

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<sup>2</sup> Report of Mr Alvaro Gil-Robles, Council of Europe Commissioner for Human Rights, on his visit to Sweden, 21-23 April 2004, Strasbourg, 8 July 2004, CommDH(2004)13, para. 19.

<sup>3</sup> See for instance the Universal Declaration on Human Rights, Art. 5. For treaty provisions see the International Covenant on Civil and Political Rights, Arts. 7 and 4; UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Arts. 1, 2, 16; European Convention on Human Rights and Fundamental Freedoms, Arts. 3 and 15; American Convention on Human Rights Arts. 5(1), 5(2), 27(1) and 27(2); African Charter on Human and Peoples’ Rights, Art. 5; Geneva Convention III Art. 17; Geneva Convention IV Arts. 5, 27, 32, 37; Article 3(1) common to the four Geneva Conventions; Additional Protocol I Arts 75(2)(a)(ii); 75(2)(b); 75(2)(e); Additional Protocol II Arts. 4(a), 4(e), 4(h). Innumerable reports, comments and observations, declarations, decisions on individual cases and court cases, on the international, regional and domestic levels, have affirmed this general prohibition.

<sup>4</sup> *Selmouni v. France*, Reports 1999-V, Judgment of 28 July 1999, para. 95. See similarly, among others, *Ireland v. the UK*, Series A, vol. 25, Judgment of 18 January 1978, para. 163; *Tomasi v. France*, Series A no. 241-A, Judgment of 27 August 1992, para. 115; *Chahal v. the UK*, Reports 1996-V, Judgment of 15 November 1996, para. 79; *Aksoy v. Turkey*, Reports 1996-VI, Judgment of 18 December 1996, para. 62; *Labita v. Italy*, Reports 2000-IV, Judgment of 6 April 2000, para. 119; *Kmetty v. Hungary* (Application no. 57967/00), Judgment of 16 December 2003, para. 32.

“the prohibition of *refoulement*”).<sup>5</sup> The prohibition of return to torture or other ill-treatment is also found in other international treaties and instruments in varying forms.<sup>6</sup>

In its recent concluding observations on the 5<sup>th</sup> periodic report of Canada’s implementation of the International Covenant on Civil and Political Rights (ICCPR), the Human Rights Committee emphasised the absolute nature and the scope of this prohibition:

The State party should recognize the absolute nature of the prohibition of torture, cruel, inhuman or degrading treatment, which in no circumstances can be derogated from. [...] No person, without any exception, even those suspected of presenting a danger to national security or the safety of any person, and even during a state of emergency, may be deported to a country where he/she runs the risk of being subjected to torture or cruel, inhuman or degrading treatment. The State party should clearly enact this principle into its law.<sup>7</sup>

The prohibition of *return to torture or other ill-treatment*, like the general prohibition on torture and other ill-treatment, is a rule of customary international law. In a legal opinion prepared for the UNHCR in 2001, Elihu Lauterpacht and Daniel Bethlehem described “the essential content of the principle of *non-refoulement* at customary law” as follows:

No person shall be rejected, returned or expelled in any manner whatever where this would compel them to remain in or return to a territory where substantial grounds can be shown for believing that they would face a real risk of being subjected to torture,

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<sup>5</sup> See for instance *Soering v. United Kingdom*, Series A no. 161, (1989), para. 88; *Cruz Varas v. Sweden*, Series A no. 201 (1991) para. 69; *Vilvarajah v. United Kingdom*, Series A no. 215 (1991), paras. 73-74 and 79-81; *Chahal v. United Kingdom*, Reports 1996-V (1997), para. 75; *Ahmed v. Austria*, Reports 1996-VI (1997), paras. 39-40; UN Human Rights Committee, *General Comment No. 20* (1992), UN Doc. HRI/HEN/1/Rev.1, 28 July 1994, para. 9; *The Haitian Centre for Human Rights et al. v. United States*, Case 10.675 (Decision as to Merits), Report No. 51/96, Inter-Am. Ct.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 550 (1997), para. 167.

<sup>6</sup> See for instance the UN Convention against Torture, Art.3; the International Covenant on Civil and Political Rights, Art. 7; the Convention relating to the Status of Refugees, Art. 33; the Inter-American Convention to Prevent and Punish Torture, Art. 13; the European Convention on the Suppression of Terrorism (ETS No. 90) as amended by its Protocol of amendment (ETS No. 190), Art. 5(2); Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (The Robben Island Guidelines), African Commission’s 32nd ordinary session, 17-23 October 2002, Annex, Art. 15; the Council of Europe Guidelines on human rights and the fight against terrorism, adopted by the Committee of Ministers on 11 July 2002, Art. XIII(2).

<sup>7</sup> Concluding Observations of the Human Rights Committee, UN Doc. CCPR/C/CAN/CO/5, 2 November 2005, para. 15.

cruel, inhuman or degrading treatment or punishment. This principle allows of no limitation or exception.<sup>8</sup>

Council of Europe standards and bodies have reiterated this absolute rule. For example, the Council of Europe's Guidelines on Human Rights and the Fight against Terrorism, adopted by the Committee of Ministers in July 2002, provide:

Guideline XII (2): "It is the duty of a State that has received a request for asylum to ensure that the possible return ('*refoulement*') of the applicant to his or her country will not expose him/her to the death penalty, to torture or to inhuman or degrading treatment or punishment. The same applies to expulsion."

.....

Guideline XIII

"1. Extradition is an essential procedure for effective international co-operation in the fight against terrorism.

...

3. Extradition may not be granted when there is serious risk to believe that:

(i) the person whose extradition has been requested will be subjected to torture or to inhuman or degrading treatment or punishment."<sup>9</sup>

No exceptional circumstances, however grave or compelling, can justify the introduction of a "balancing test" when fundamental norms such as the prohibition of torture or other ill-treatment or return to torture or other ill-treatment are at stake. This principle is evident from the concluding observations of both the UN Human Rights Committee (HRC) and the UN Committee against Torture (CAT) on states parties' reports under the International Covenant on Civil and Political Rights (ICCPR) and UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT), respectively.<sup>10</sup> On the relatively

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<sup>8</sup> Sir Elihu Lauterpacht and Daniel Bethlehem, *The Scope and Content of the Principle of Non-refoulement*, Opinion for UNHCR's Global Consultations, UNHCR, June 2001, para. 253. See also, for instance, Guy S. Goodwin-Gill, *The Refugee in International Law* (Oxford: OUP, 1996), pp. 167-170; Jean Allain, "The *Jus cogens* Nature of Non-refoulement," 13 *IJRL* 538 (2001).

<sup>9</sup> Similar standards are set out in two treaties adopted in 2004 and 2005 on terrorism. Article 21(2) of the Council of Europe Convention on the Prevention of Terrorism (ETS No. 196), 16, May 2005 provides: "Nothing in this Convention shall be interpreted as imposing an obligation to extradite if the person who is the subject of the extradition request risks being exposed to torture or to inhuman or degrading treatment or punishment."

Article 5(2) of the European Convention on the Suppression of Terrorism, as amended in 2004 by the Amending Protocol to this Convention states: "[N]othing in this Convention shall be interpreted as imposing an obligation to extradite if the person subject of the extradition request risks being exposed to torture".

<sup>10</sup> See for instance CAT's Concluding Observations on Germany, (UN Doc. CAT/C/CR/32/7, 11 June 2004) commending the reaffirmation of the absolute ban on exposure to torture, including through *refoulement*, even where there is a security risk.

few occasions when states have introduced a degree of balancing in domestic systems, they have come under strong criticism by CAT<sup>11</sup> and the HRC.<sup>12</sup> In November 2005, for example, the HRC, in its Concluding Observations on Canada's implementation of the ICCPR, emphasized that torture and other ill-treatment "can never be justified on the basis of a balance to be found between society's interest and the individual's rights under article 7 of the Covenant".<sup>13</sup>

This position follows and underscores the ruling of the European Court of Human Rights in the *Chahal* case, where the Court rejected the United Kingdom's request to perform a balancing test that would weigh the risk presented by permitting the individual to remain in the country against the risk of torture or other ill-treatment to the individual if deported.<sup>14</sup>

In the preface to its 2004-5 General Report, the European Committee for the Prevention of Torture (CPT) similarly stated:

Like the prohibition of slavery, the prohibition of torture and inhuman or degrading treatment is one of those few human rights which admit of no derogations. Talk of "striking the right balance" is misguided when such human rights are at stake. Of course, resolute action is required to counter terrorism; but that action cannot be allowed to degenerate into exposing people to torture or inhuman or degrading treatment. Democratic societies must remain true to the values that distinguish them from others.<sup>15</sup>

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<sup>11</sup> See CAT's Concluding Observations (UN Doc. CAT/C/34/D/195/2002, para. 14; and UN Doc. CAT/C/34/CAN, 07/07/2005, para. 4(a)).

<sup>12</sup> See HRC (UN Doc. CCPR/C/79/Add. 105, paragraph 13) condemning the Canadian judicial approach (set out in *Suresh v. Canada* (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 3) which upheld a degree of balancing under Article 3 UNCAT, based on national law) The Human Rights Committee stated "13. The Committee is concerned that Canada takes the position that compelling security interests may be invoked to justify the removal of aliens to countries where they may face a substantial risk of torture or cruel, inhuman or degrading treatment. The Committee refers to its General Comment on article 7 and recommends that Canada revise this policy in order to comply with the requirements of article 7 and to meet its obligation never to expel, extradite, deport or otherwise remove a person to a place where treatment or punishment that is contrary to article 7 is a substantial risk."; see also *Mansour Ahani v. Canada*, Communication No. 1051/2002, UN Doc. CCPR/C/80/D/1051/2002, 15 June 2004, where the HRC also clearly rejected Canada's balancing test (para. 10.10) in the context of deportation proceedings.

<sup>13</sup> UN Doc.: CCPR/C/CAN/CO/5, 2 November 2005, para. 15

<sup>14</sup> *Chahal v. United Kingdom*, application no. 70/1995/576/662, Judgment of 15 November 1996

<sup>15</sup> 15th General Report on the CPT's activities covering the period 1 August 2004 to 31 July 2005, CPT/Inf (2005) 17, 22 September 2005, available at <http://www.cpt.coe.int/en/annual/rep-15.htm>, accessed 10 October 2005, Preface.

## **2. Concerns expressed by international and regional human rights monitoring bodies and experts**

There is a growing consensus among governments and international experts that diplomatic assurances are an inadequate safeguard against torture and other ill-treatment.

Most recently, this consensus was reflected in the adoption, by consensus by the 3<sup>rd</sup> Committee of the UN General Assembly, of new language in the resolution on torture that such diplomatic assurances “do not release States from their obligations under international human rights, humanitarian and refugee law...”<sup>16</sup>

This resolution followed the UN Special Rapporteur on torture’s submission to the General Assembly of his interim report in which he discussed the issue of diplomatic assurances at some length. He reached the following conclusions:

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.

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.<sup>17</sup>

In his report to the UN Commission on Human Rights, the Independent Expert on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism noted:

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<sup>16</sup> UN Doc.: A/C.3/60/L.25/Rev.1, at par 8.

<sup>17</sup> Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/60/316, 30 August 2005, paras. 51-2.

Given the absolute obligation of States not to expose any person to the danger of torture by way of extradition, expulsion, deportation, or other transfer, diplomatic assurances should not be used to circumvent that non-refoulement obligation.<sup>18</sup>

Concern about the use of diplomatic assurances was also expressed in a research report commissioned by the United Nations High Commissioner for Refugees (UNHCR):

Assurances by the requesting State that it will not expose the person concerned to torture, or to inhuman or degrading treatment or punishment, will not normally suffice to exonerate the requested state from its human rights obligations, particularly where there is a pattern of such abuses in the State seeking extradition. In such cases, the requested State is bound to refuse the surrender of the wanted person...<sup>19</sup>

A landmark decision by the UN Committee against Torture in May 2005 found that Sweden had violated its obligation not to return a person to torture or other ill-treatment in the case of Ahmed Agiza, an Egyptian national forcibly returned to Egypt in 2001. In its decision, the Committee concluded, *inter alia*, the following:

The Committee considers at the outset that it was known, or should have been known, to the State party's authorities at the time of the complainant's removal that Egypt resorted to consistent and widespread use of torture against detainees, and that the risk of such treatment was particularly high in the case of detainees held for political and security reasons. [...] The State party was also aware of the interest in the complainant by the intelligence services of two other States: according to the facts submitted by the State party to the Committee, the first foreign State offered through its intelligence service an aircraft to transport the complainant to the second State, Egypt, where to the State party's knowledge, he had been sentenced in absentia and was wanted for alleged involvement in terrorist activities. In the Committee's view, the natural conclusion from these combined elements, that is, that the complainant was at a real risk of torture in Egypt in the event of expulsion, was confirmed when, immediately preceding expulsion, the complainant was subjected on the State party's

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<sup>18</sup> Report of the Independent Expert on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Robert K. Goldman, UN Doc. E/CN.4/2005/103, 7 February 2005, para. 61. A similar view has been expressed by the Expert of the UN Sub-Commission for the Promotion of and Protection of Human Rights, Kalliopi Koufa, who is responsible for preparing a preliminary framework of draft principles and guidelines concerning human rights and terrorism: "No person shall be transferred to any State unless there is a verifiable guarantee that there will be full protection for all human rights in the receiving State. Diplomatic assurances by the receiving State are insufficient to prove that the transferred person's rights would be fully respected." UN Doc: E/CN.4/Sub.2/2005/39 at para 49.

<sup>19</sup> Sibylle Kapferer, *The Interface between Extradition and Asylum*, Legal and Protection Policy Research Series, Department of International Protection, United Nations High Commissioner for Refugees, PPLA/2203/05, Geneva, November 2003, para. 137

territory to treatment in breach of, at least, article 16 of the Convention by foreign agents but with the acquiescence of the State party's police. It follows 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.<sup>20</sup>

In *Chahal v. the United Kingdom*, the European Court of Human Rights took a firm principled position against diplomatic assurances that torture or ill-treatment would not be practised.<sup>21</sup> The applicant, a Sikh separatist, claimed that if deported to India, he would face a real risk of being tortured or killed. The Indian Government had provided an assurance to the government of the United Kingdom that Karamjit Singh Chahal "would enjoy the same legal protection as any other Indian citizen, and that he would have no reason to expect to suffer mistreatment of any kind at the hands of the Indian authorities."<sup>22</sup>

The Court, however, ruled the following:

Although the Court is of the opinion that Mr Chahal, if returned to India, would be most at risk from the Punjab security forces acting either within or outside state boundaries, it also attaches significance to the fact that attested allegations of serious human rights violations have been levelled at the police elsewhere in India. In this respect, the Court notes that the United Nations' Special Rapporteur on torture has described the practice of torture upon those in police custody as "endemic" and has complained that inadequate measures are taken to bring those responsible to justice...

Although the Court does not doubt the good faith of the Indian Government in providing the assurances mentioned above... it would appear that, despite the efforts of that Government, the NHRC and the Indian courts to bring about reform, the violation of human rights by certain members of the security forces in Punjab and elsewhere in India is a recalcitrant and enduring problem.<sup>23</sup>

More recently, a February 2005 Grand Chamber judgment of the European Court of Human Rights served to illustrate the difficulties of verifying compliance with assurances where the states involved are unwilling to cooperate. The case concerned Rustam Mamatkulov and Abdurasulovic Askarov, two citizens of Uzbekistan whom Turkey had forcibly returned to Uzbekistan after obtaining assurances from the government of Uzbekistan that the men would not be subjected to torture or the death penalty upon return. The transfers were made despite a

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<sup>20</sup> *Agiza v. Sweden*, Communication No. 233/2003, UN Doc. CAT/C/34/D/233/2003 (2005), 20 May 2005, para. 13.4.

<sup>21</sup> *Chahal v. United Kingdom*, application no. 70/1995/576/662, Judgment of 15 November 1996.

<sup>22</sup> *Ibid.*, para. 37.

<sup>23</sup> *Ibid.*, paras 104-5.

request for interim measures by the European Court of Human Rights that Turkey refrain from extraditing the men until their applications to the Court had been considered. In its ruling, the Grand Chamber concluded that Turkey had violated the men's rights, under Article 34 of the ECHR, to petition the European Court of Human Rights, by failing to comply with the interim measures. Significantly, the Court also ruled that Turkey's refusal to suspend the extraditions had denied the men the opportunity to place evidence before the Court that could have established that they were at risk of torture or other ill-treatment if returned to Uzbekistan.<sup>24</sup> In concluding that it was unable to conduct a proper assessment on the issue of an Article 3 violation because of Turkey's failure to comply with the court's request for interim measures, the Court stated the following:

In cases such as the present one where there is plausibly asserted to be a risk of irreparable damage to the enjoyment by the applicant of one of the core rights under the Convention, the object of an interim measure is to maintain the status quo pending the Court's determination of the justification for the measure. [...] In the present case, the applicants were extradited and thus, by reason of their having lost contact with their lawyers, denied an opportunity to have further inquiries made in order for evidence in support of their allegations under Article 3 of the Convention to be obtained. As a consequence, the Court was prevented from properly assessing whether the applicants were exposed to a real risk of ill-treatment and, if so, from ensuring in this respect a "practical and effective" implementation of the Convention's safeguards, as required by its object and purpose.<sup>25</sup>

### 3. Distinct from diplomatic assurances in death penalty cases

The territories of the member states of the Council of Europe now constitute a "death penalty free zone."<sup>26</sup> Amnesty International, Human Rights Watch and the International Commission of Jurists oppose the death penalty under all circumstances. However, we recognize that, unlike the absolute prohibition of torture and other ill-treatment, the death penalty is not prohibited *per se* under international law.

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<sup>24</sup> "Turkey's failure to comply with the indication given under Rule 39, which prevented the Court from assessing whether a real risk existed in the manner it considered appropriate in the circumstances of the case, must be examined below under Article 34." *Mamatkulov and Askarov v. Turkey*, applications no. 46827/99 and 46951/99, Judgment of 4 February 2005, at para 77.

<sup>25</sup> *Ibid*, para. 108.

<sup>26</sup> See "World Day Against the Death Penalty: 'The fight is far from being over', says Assembly President", statement by Council of Europe Parliamentary Assembly President René van der Linden, 10 October 2005, available at <http://assembly.coe.int/ASP/Press/StopPressView.asp?CPID=1686>, accessed 25 October 2005.

Council of Europe standards provide for member states to honour their obligations not to transfer a person to a state where they risk the death penalty by accepting *ad hoc* and *ad personam* assurances that he or she will not be subjected to the death penalty upon return. For example, Guideline XIII(2) of the Council of Europe Guidelines on Human Rights and the Fight against Terrorism provides:

The extradition of a person to a country where he/she risks being sentenced to the death penalty may not be granted. A requested State may however grant an extradition if it has obtained adequate guarantees that:

- (i) the person whose extradition has been requested will not be sentenced to death; or
- (ii) in the event of such a sentence being imposed, it will not be carried out.

Additional reasons for making a distinction between seeking and relying on diplomatic assurances against the death penalty and diplomatic assurances that a person will not be subjected to torture or other ill-treatment should be noted.

States that impose the death penalty fully acknowledge this practice, and therefore negotiations on diplomatic assurances in this respect are open and 'clean'. However states in which there is a pattern of torture or other ill-treatment routinely deny this fact, thus tainting any negotiations and resulting in assurances or understandings that are evasive and perfidious.

Torture and other ill-treatment, especially when practised by persons adept at hiding their infliction and consequences, are notoriously difficult to ascertain even where systemic, varied and professional visiting or monitoring and other preventive mechanisms are in place, let alone through the sole mechanism of occasional visits. In contrast, in the case of the death penalty, facts such as the contents of charge sheets and sentences handed down by courts are easy to establish in many countries. Thus, in death penalty cases, potential breaches of the assurances can usually be identified and addressed before the sentence is carried out, in contrast to cases involving diplomatic assurances against torture and other ill-treatment, where sending states run the unacceptable risk of being able to identify a breach, if at all, only after torture and other ill-treatment have already occurred.

#### **4. Post-return monitoring mechanisms are inherently problematic**

Arguments that post-return monitoring can make diplomatic assurances work ignore the serious limitations of such monitoring and the difficulty of detecting many forms of torture and ill-treatment. Torture and other ill-treatment are practiced in secret and the perpetrators of such abuse are generally expert at keeping it from being detected. People who have suffered torture and ill-treatment are often reluctant to speak about it due to fear of retaliation against them and/or their families. Post-return monitoring schemes often lack many basic safeguards,

including private interviews with detainees without advance notice to prison authorities and medical examinations by independent doctors.

Indeed, it has been argued that monitoring one or a few designated detainees (as opposed to systematic and generalized monitoring) actually could make those detainees and members of their families more vulnerable to abuse. Periodic visits simply cannot protect an isolated detainee. They may confront a detainee who has been tortured or otherwise ill-treated with a very serious dilemma: forcing him or her to choose between, on the one hand, pretending he or she was never mistreated, denying the shattering experience of torture, or, on the other, reporting his or her mistreatment, knowing the account will be traced back to him or her and that, in retaliation, he or she might be tortured again. It is precisely to protect detainees from such situations that the International Committee of the Red Cross (ICRC) insists on monitoring an entire prison population – it preserves the anonymity of the person reporting ill-treatment.

As explained in detail in the section below, however, even monitoring by the ICRC cannot – and does not purport to – be a panacea for preventing torture and other ill-treatment. For these reasons, any attempts to argue that post-return monitoring should be given further consideration in the context of discussions of diplomatic assurances as a device that could potentially make transfers based on such assurances compatible with states' absolute *non-refoulement* obligation are fundamentally misguided.

## **5. Visits cannot replace the need for extensive, system-wide measures to prevent torture and other ill-treatment**

As noted above, receiving states that provide diplomatic assurances are already under a duty under customary law not to subject detainees to torture or other ill-treatment and most will have previously entered binding multi-lateral agreements (as parties to treaties) not to torture or ill-treat any person. These firm undertakings are contained in such instruments as the UN Convention against Torture, the ICCPR, and the Geneva Conventions. In light of this fact, the UN Special Rapporteur on torture has stated that:

... such memoranda of understanding therefore do not provide any additional protection to the deportees.<sup>27</sup>

The need to enter yet another agreement on the same subject arises from the fact that the receiving state's continuous breaches of its international obligation not to torture or otherwise ill-treat detainees has come to the light, including to the would-be sending state. As noted by the Council of Europe's Commissioner for Human Rights "...the weakness inherent in the practice of diplomatic assurances lies in the fact that where there is a need for such assurances

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<sup>27</sup> UN News Service, "Britain must not deport people to countries with risk of torture – UN rights expert," 23 August 2005, <http://www.un.org/apps/news/printnews.asp?nid=15513#>, accessed 23 August 2005.

there is clearly an acknowledged risk of torture and ill-treatment.”<sup>28</sup> The value of signing an “understanding” or accepting an “assurance” from a state that does not respect even legally-binding multi-lateral agreements prohibiting torture and other ill-treatment is necessarily cheap. Promises to take measures detailed in diplomatic assurances are mere repetitions – indeed, pale echoes – of treaty and other international obligations which receiving states have already promised but failed to respect in the past.

The reliance on such non-binding agreements to enforce legally binding obligations may, in fact, undercut the credibility and integrity of universally binding legal norms and their system of enforcement. This is particularly the case if authorities in a country have persistently refused access to existing international mechanisms.<sup>29</sup>

Many of these arrangements rely on a single “new” safeguard: visits to the person in question, either by the sending state’s diplomats or by “a representative of an independent body.”<sup>30</sup> These mechanisms have not proved to be effective to prevent torture or other ill-treatment.

As noted above, officials that engage in torture or other ill-treatment are often skilled at preventing any visible manifestations, and are typically capable of ensuring, through threats, that no complaints would be heard by visiting monitors. Even where carried out by a professional and dedicated organization, visits to places of detention, while constituting a crucial *element* in the prevention of torture and other ill-treatment, are far from being sufficient on their own to prevent them. The ICRC’s experience in Iraq and Guantánamo Bay, where torture and ill-treatment were inflicted extensively even though the ICRC was conducting regular visits, monitoring abuse and protesting consistently, are a stark recent example. It should be noted that the ICRC itself has never claimed that visits by its staff to places of detention are all that is needed to safeguard against torture and ill-treatment, and have refused to take part in monitoring ‘diplomatic assurances’ (see below, point 6).

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<sup>28</sup> Report by Mr Alvaro Gil-Robles, Council of Europe Commissioner for Human Rights, on his visit to Sweden, 21-23 April 2004, Strasbourg, 8 July 2004, CommDH(2004)13, para. 19.

<sup>29</sup> However, as recognized by the European Court of Human Rights in the case of *Chahal v. United Kingdom*, torture and other ill-treatment are often so deeply rooted in the institutional cultures of the questioning or detaining authorities of the receiving state that compliance with such assurances offered by the government of the receiving state is not possible. See, *Chahal v United Kingdom*, application no. 70/1995/576/662, Judgment of 15 November 1996, paras 104-5, which are cited above on page 8.

<sup>30</sup> Memorandum of Understanding between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Hashemite Kingdom of Jordan Regulating the Provision of Undertakings in respect of Specified Persons prior to Deportation, 10 August 2005, available at <http://news.bbc.co.uk/1/hi/uk/4143214.stm>, accessed 15 August 2005, condition no. 4; Memorandum of understanding between The General People’s Committee for Foreign Liaison and International Co-Operation of the Great Socialist People’s Libyan Arab Jamahiriya and the Foreign and Commonwealth Office of the United Kingdom of Great Britain and Northern Ireland Concerning the Provision of Assurances in Respect of Persons Subject to Deportation, signed in Tripoli on 18 October 2005, under “[A]pplication and Scope”.

Member states of the Council of Europe have adopted a treaty establishing a unique regional visiting mechanism – the European Committee for the Prevention of Torture and other Inhuman or Degrading Treatment or Punishment (CPT). However, this mechanism, as important as it is, is by no means sufficient to ensure that that torture and other ill-treatment do not occur in the places that they visit in Council of Europe member states. The CPT itself has detailed, both in its reports (which set out specific recommendations) to the government concerned and in general reports, measures which it considers essential for the prevention of torture and other ill-treatment,<sup>31</sup> rather than ever claiming that its visits are all that is needed to prevent torture and ill-treatment.

There is a substantial gap between the multifaceted requirements of international law to “take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction,”<sup>32</sup> and their implementation in practice, on the one hand; and the single safeguard of occasional visits by diplomats or by “an independent body” provided in diplomatic assurances and memoranda of understanding on the other.

## **6. Requesting human rights and humanitarian organizations to perform selective monitoring**

At least one would-be sending state has approached national institutions for the promotion and protection of human rights, and organizations devoted to the protection of human rights or similar humanitarian causes requesting that they take the responsibility of monitoring the implementation of diplomatic assurances not to torture or ill-treat, by undertaking visits to places of detention where they would monitor the treatment of only specified detainees subject to a diplomatic assurance.

One such prominent organisation which has been asked to undertake such post-return monitoring, the ICRC, has described its “prior conditions” for visiting prisoners and prisons as follows:

Drawing on the experience acquired over the years, the ICRC has established guidelines enabling it to evaluate a prison system with maximum objectivity and submit concrete and realistic proposals which take local customs and standards into account.

Whatever the circumstances, the ICRC visits people deprived of their freedom only if the authorities allow it:

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<sup>31</sup> See for instance European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *The CPT standards: “Substantive” sections of the CPT’s General Reports*, CPT/Inf/E (2002) 1 - Rev. 2004, Strasbourg, September 2004.

<sup>32</sup> UN Convention against Torture, Art. 2(1).

- to see all prisoners who come within its mandate and to have access to all places at which they are held;
- to speak with prisoners in private, without the presence of any third parties;
- to draw up during its visit a list of prisoners whom it considers to come within its mandate, or to receive such a list from the authorities and to check and supplement it if necessary;
- to repeat its visits to all prisoners of its choice if it considers that the situation so warrants, and to do so as often as it wishes.<sup>33</sup>

In the specific context of diplomatic assurances, the ICRC was in 1999 approached as a potential monitoring body for such assurances involving the UK and Egypt. Its response was described by a UK Court (citing a UK government source) in the *Youssef* case as follows:

The ICRC... would not visit particular prisoners without a general agreement allowing it access to all prisoners and would not get involved in any process which could in any way be perceived to contribute to, facilitate, or result in the deportation of individuals to Egypt.<sup>34</sup>

It has also been noted that financial or other support by any of the state parties to an organization or body requested to take on the role of post-return monitoring in the context of diplomatic assurance could raise questions about the independence of the monitoring body.

## 7. Diplomatic assurances have a proven record of failure

The *Agiza* case, discussed above, constitutes a glaring example of diplomatic assurances failing to fulfil their stated purpose to protect the person subject to the assurances from torture and other ill-treatment. It illustrates the ineffectiveness of diplomatic assurances as a safeguard against torture, even when coupled with a post-return monitoring mechanism.

Another well-documented case is that of Maher Arar, a Syrian-Canadian of dual nationality, who was transferred to Jordan by the United States in 2002, and from there to Syria following assurances from the Syrian government that he would not be subjected to torture or other ill-treatment. Syrian authorities denied Arar's subsequent claims that he had been tortured whilst being interrogated in Syria and the U.S. government accepted the Syrian denial of torture at

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<sup>33</sup> ICRC website, <http://www.icrc.org/Web/Eng/siteeng0.nsf/iwplList265/929018E28243CCB0C1256B6600600D8C>, accessed 28 October 2005.

<sup>34</sup> *Hani El Sayed Sabaei Youssef v. The Home Office* [2004] EWHC 1884 (QB), 30 July 2004, para. 26.

face value.<sup>35</sup> However, a professional investigation into Maher Arar's treatment by an expert on behalf of a Canadian Commissioner of Inquiry recently concluded that Maher Arar was in fact tortured while in custody. He stated:

I conclude that Mr. Maher Arar was subjected to torture in Syria. The effects of that experience, and of consequent events and experiences in Canada, have been profoundly negative for Mr. Arar and his family. Although there have been few lasting physical effects, Mr. Arar's psychological state was seriously damaged and he remains fragile. His relationships with members of his immediate family have been significantly impaired. Economically, the family has been devastated.<sup>36</sup>

The European Court of Human Rights, in the case of *Shamayev and Others v. Georgia and Russia*,<sup>37</sup> experienced directly the total failure of diplomatic assurances to provide those who received them with any real power to react meaningfully where those who had proffered such assurances chose to ignore them. In this case, Georgia extradited five of the applicants, who were Chechens, to Russia, despite a request by the Court for interim measures requiring that none of the 13 be extradited. Subsequently, the Russian government offered diplomatic assurances, including guarantees of unhindered access of the applicants to appropriate medical treatment, to legal advice, and even to the European Court of Human Rights itself. The Russian government also gave assurances that the applicants would not be subject to the death penalty and that their health and safety would be protected.<sup>38</sup> However, when the Court subsequently declared the applications admissible and decided to send a fact-finding mission to visit the applicants in Georgia and Russia, the Russian authorities stated that Stavropol Regional Court, within whose jurisdiction the five extradited applicants were detained, had refused to give the delegation access to the applicants at that stage in the domestic proceedings. The Court issued an angry response, stressing, *inter alia*, that "[T]he issue of access to the applicants is a matter of international law – in particular the European Convention on Human Rights, which, under Russian law, takes precedence over domestic law – and, therefore, falls to be decided solely by the European Court of Human Rights."<sup>39</sup>

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<sup>35</sup> The U.S. government "has officially welcomed statements by the Syrian government that Mr. Arar was not tortured." See Congressional Record, Case of Maher Arar, February 10, 2004, pp. S781-S785, available at [http://www.fas.org/irp/congress/2004\\_cr/s021004.html](http://www.fas.org/irp/congress/2004_cr/s021004.html) (retrieved March 12, 2005).

<sup>36</sup> Commissioner of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, Report of Professor Stephen J. Toope - Fact Finder, 14 October 2005, available at [http://www.ararcommission.ca/eng/ToopeReport\\_final.pdf](http://www.ararcommission.ca/eng/ToopeReport_final.pdf), p. 23.

<sup>37</sup> *Shamayev and Others v. Georgia and Russia*, Application no. 36378/02. Only press releases have to date been published in this case.

<sup>38</sup> Press Release No. 601, 26 November 2002.

<sup>39</sup> Press release no. 528, 24 October 2003.

In a recent immigration case in Canada,<sup>40</sup> the Federal Court described how even the Canadian government itself, while actively seeking to expel the individual in question, had to admit, following a conclusion by its own expert, that it could not trust the reliability of the diplomatic assurances from Egypt that he would not be tortured or ill-treated by Egyptian officials. As described in the decision:

“(iii) Assurances received from the Arab Republic of Egypt: [31] The delegate<sup>41</sup> noted that the Canadian government had received assurances from Egypt that Mr. Mahjoub would be accorded his constitutional rights if returned to Egypt. These assurances took the form of diplomatic notes received by the Canadian government on three separate occasions. In them, Egyptian officials confirmed that Mr. Mahjoub, if returned to Egypt, would be treated in full conformity with constitutional and human rights laws.

[32] Mr. Mahjoub had argued that these assurances would not be respected, and submitted general reports concerning human rights abuses in Egypt, as well as reports from Amnesty International, Human Rights Watch, and an expert in Islamic law. The reports documented the experience of other Egyptians accused of similar terrorist activities who were sent back to Egypt from other countries and who, notwithstanding assurances, were subjected to alleged human rights abuses, ill-treatment and *incommunicado* detention.

[33] The delegate reviewed the reports and concluded that they presented a credible basis for calling into question the extent to which the Egyptian government would honour its assurances”.<sup>42</sup>

The above illustrative cases shed light on a number of additional problems associated with diplomatic assurances in transfers to risk of torture and other ill-treatment.

The first is that such assurances are based on trust that the receiving government will uphold its word when there is no basis for such trust. It defies common sense to presume that a government that routinely flouts its binding obligations in international law can be trusted to respect a non-binding promise in an isolated case.

Second, the governments of both the sending state and the receiving state have fundamental disincentives to acknowledge that torture or other ill-treatment have occurred, since doing so

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<sup>40</sup> *Mohamed Zeki Mahjoub v. The Minister of Citizenship and Immigration et al.*, 2005 FC 156, decision of 31 January 2005.

<sup>41</sup> The delegate had been appointed by Canadian Minister of Citizenship and Immigration to assess the risk that Mohamed Zeki Mahjoub faced and determine whether he should be expelled. It should be noted that, as per the *Suresh* “exception”, Canadian law is presently interpreted as allowing the return of persons to face torture in extreme circumstances, and the delegate ultimately decided that this was one such case, notwithstanding the striking express admission about the unreliability of the assurances proffered by Egypt.

<sup>42</sup> *Ibid.*, paras. 31-33.

would amount to an admission that they have violated a core principle of international human rights law. As a result, both governments share an interest in creating an impression that the assurances are meaningful rather than verifying that they actually are.

And third, when diplomatic assurances fail to protect returnees from torture and other ill-treatment, there is no mechanism inherent to the assurances themselves that would enable a person subject to the assurances to enforce them or to hold the sending or receiving government accountable. Diplomatic assurances have no legal effect and the person they aim to protect has no effective recourse if the assurances are breached.

## **8. Conclusion**

Amnesty International, Human Rights Watch and the International Commission of Jurists consider that diplomatic assurances against torture and ill-treatment circumvent and are inconsistent with the absolute, non-derogable prohibitions of torture and other ill-treatment and forcibly returning a person to a place where he or she risks being subjected to torture or other ill-treatment.

As highlighted above, diplomatic assurances have proved to be an ineffective safeguard against torture and other ill-treatment, even when they contain a mechanism for post-return monitoring. They also ignore the need for systemic reforms in receiving states.

The organizations consider that the elaboration of minimum standards for the use and content (and reliance on) diplomatic assurances is incompatible with states' obligations under international law, and undermine efforts - including of member states, bodies and mechanisms of the Council of Europe - to prevent and eradicate torture and other ill-treatment world-wide.

**Amnesty International, Human Rights Watch and the International Commission of Jurists therefore call on the member states of the Council of Europe;**

- **to reject any proposal to establish minimum standards for the use of diplomatic assurances against the risk of torture and other ill-treatment within the framework of the Council of Europe or elsewhere.**

**The organizations also urge all the member states of the Council of Europe:**

- **to refrain from using diplomatic assurances or similar bilateral agreements to justify involuntary transfers of individuals to countries where there are substantial grounds for believing that he or she would be in danger of being subjected to torture or other ill-treatment;**

- **to ensure that any person subject to transfer has the right, prior to transfer, to challenge its legality before an independent tribunal. Persons subject to transfer must have access to an independent lawyer and a right of appeal with suspensive effect;**
- **to ensure that continued energy and resources are focussed on assisting governments to take the range of necessary legislative, administrative judicial and other measures necessary to ensure system-wide implementation of the international obligation to prevent and prohibit torture.<sup>43</sup>**

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<sup>43</sup> To this end, among other things, see Amnesty International's 12 Point Programme for the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by Agents of the State available at <http://web.amnesty.org/library/index/engact400012005>

## Appendix I

### **Call for Action against the Use of Diplomatic Assurances in Transfers to Risk of Torture and Ill-Treatment**

#### **Joint Statement**

**Amnesty International, Association for the Prevention of Torture, Human Rights Watch, International Commission of Jurists, International Federation of Action by Christians for the Abolition of Torture, International Federation for Human Rights, International Helsinki Federation for Human Rights, and World Organisation Against Torture**

May 2005

Governments in Europe and North America are increasingly sending alleged terrorism suspects and others to abusive states based on so-called "diplomatic assurances" of humane treatment that expose these individuals to serious risk of torture or cruel, inhuman, or degrading treatment or punishment (ill-treatment) upon return. Countries offering such assurances have included those where torture and other ill-treatment are often practised, as well as those where members of particular groups are routinely singled out for the worst forms of abuse.

This is a deeply troubling trend. The international legal ban on torture and other ill-treatment is absolute and prohibits transferring persons -- no matter what their crime or suspected activity -- to a place where they would be at risk of torture and other ill-treatment (the *nonrefoulement* obligation).<sup>1</sup> No exceptions are allowed, even in time of war or national emergency. In the face of this absolute ban, many sending governments have justified such transfers by referring to diplomatic assurances they sought from the receiving country that the suspects would not be tortured or ill-treated upon return.

It is the position of the undersigned organizations that diplomatic assurances are not an effective safeguard against torture and other ill-treatment. Indeed, evidence is mounting that people who are returned to states that torture are in fact tortured, regardless of diplomatic assurances. 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, including the *nonrefoulement* obligation.

The essential argument against diplomatic assurances is that the perceived need for such guarantees in itself is an acknowledgement that a risk of torture and other ill-treatment exists in the receiving country. In order for torture and other ill-treatment to be prevented and eradicated, international law requires that systemic safeguards at

legislative, judicial, and administrative levels must be implemented on a state-wide basis. Such systemic efforts cannot be abandoned and replaced by consular visits aimed at ensuring compliance with diplomatic assurances.

Diplomatic assurances are also problematic for a number of other reasons. First, they are based on trust that the receiving state will uphold its word when there is no basis for such trust. Governments that torture and ill-treat almost always deny such abusive practices. It defies common sense to presume that a government that routinely flouts its binding obligations under international law and misrepresents the facts in this context can be trusted to respect a promise in an isolated case. As noted above, diplomatic assurances are only sought from countries with well-known records of torture and other ill-treatment.

Second, states have a legal interest in ensuring that torture and other ill-treatment are prevented and prohibited, and that all persons are protected from such treatment, anywhere and in all places (the *erga omnes* nature of the prohibition against torture and other ill-treatment). Implicit in such a legal interest is a general duty of enforcement and remedy on the part of the whole international community, and the principle that states also have an obligation not to facilitate violations of the ban on torture and other ill-treatment, not only by their own agents but also by agents of another state. Transferring individuals to states where they are at risk of torture and other ill-treatment, under the rationale of inherently unreliable diplomatic assurances, flies in the face of this principle. Moreover, to seek assurances only for the person subject to transfer amounts to acquiescing tacitly in the torture of others similarly situated in the receiving country, and could be considered to constitute a general abdication by the sending state of its obligations.

A third problem relates to post-return monitoring mechanisms, which some governments argue can make diplomatic assurances work. Torture and other ill-treatment are practised in secret and its perpetrators are generally expert at keeping such abuses from being detected. People who have suffered torture and other ill-treatment are often reluctant to speak about it due to fear of retaliation. Post-return monitoring schemes often lack many basic safeguards, including private interviews with detainees without advance notice to prison authorities and medical examinations by independent doctors.

Fourth, when diplomatic assurances fail to protect returnees from torture and other ill-treatment, there is no mechanism inherent to the assurances themselves that would enable a person subject to the assurances to hold the sending or receiving governments accountable. Diplomatic assurances have no legal effect and the person they aim to protect has no effective recourse if the assurances are breached.

A fifth problem stems from the fact that the sending government has no incentive to find that torture and other ill-treatment has occurred following the return of an

individual -- doing so would amount to an admission that it has violated its own *nonrefoulement* obligation. As a result, both the sending and receiving governments share an interest in creating the impression that the assurances are meaningful rather than establishing that they actually are.

Finally, it is important to distinguish diplomatic assurances against the death penalty from assurances as guarantees against torture and other ill-treatment. The undersigned organizations oppose the death penalty absolutely, but recognize that, subject to certain conditions, it is not prohibited *per se* under international law. Diplomatic assurances with respect to the death penalty thus simply acknowledge the different legal approaches of two states and serve as a tool that allows an exception to one state's laws and policies as an accommodation to the concerns of another state. Assurances against torture and other ill-treatment, however, do not acknowledge lawful activity, but unlawful, criminal behaviour to which persons in the receiving state are routinely subjected. As such, they are effectively an admission that the receiving state is in violation of the prohibition against torture and other ill-treatment.

Moreover, monitoring a government's compliance with assurances that it will not apply or carry out the death penalty is easier than monitoring compliance with assurances against torture, which is practised in secret. The death penalty is rarely carried out immediately after a person's return, thus any potential breach of the assurances (e.g. sentencing a person to the death penalty despite assurances to the contrary) can usually be identified and addressed before the sentence is carried out. In cases where diplomatic assurances are proffered as a guarantee of protection against torture, however, sending states run the unacceptable risk of being able to identify a breach, if at all given the secrecy surrounding torture, only after torture and other ill-treatment have already occurred.

In a welcome move, some national courts have recognized the problems associated with assurances against torture and other ill-treatment, subjecting diplomatic assurances to greater scrutiny and blocking returns based on these empty promises. At the international level, the United Nations Special Rapporteur on Torture, the U.N. Independent Expert on human rights and counter-terrorism, and the Council of Europe Commissioner for Human Rights have all warned that the use of assurances is threatening the global ban on torture and other ill-treatment.

Suggestions have been made that "minimum standards" on the use of diplomatic assurances against torture and other ill-treatment could be established. Such efforts are misguided and dangerous. They could easily be perceived to legitimize or otherwise endorse the use of diplomatic assurances for returns where there is a risk of torture and other ill-treatment. Developing guidelines for the "acceptable" use of inherently unreliable and legally unenforceable assurances ignores the very real threat they pose to the integrity of the absolute prohibition against torture and other

ill-treatment, including the ban on transferring a person to a place where he or she would be at risk of such abuse.

We are concerned that sending countries that rely on diplomatic assurances are using them as a device to circumvent their obligation to prohibit and prevent torture and other ill-treatment, including the *nonrefoulement* obligation. The use of such assurances violates the absolute prohibition against torture and other ill-treatment and is eroding a fundamental principle of international human rights law. The practice should stop.

### **Recommendations to governments and the international community**

The undersigned organizations call on governments to undertake the following measures as a matter of urgent priority:

- Reaffirm the absolute nature of the obligation under international law not to expel, return, extradite, render, or otherwise transfer (hereinafter "transfer") any person to a country where there are substantial grounds for believing that he or she would be in danger of being subjected to torture and other ill-treatment.
- Prohibit reliance upon diplomatic assurances in situations where there are substantial grounds for believing that a person would be in danger of being subjected to torture and other ill-treatment upon return, including but not limited to cases in which the following circumstances prevail in the receiving country:
  - there are substantial grounds for believing that torture and other ill-treatment in the receiving country are systematic, widespread, endemic, or recalcitrant or persistent problems;
  - governmental authorities do not have effective control over the forces in their country that perpetrate acts of torture and other ill-treatment;
  - governmental authorities consistently target members of a particular racial, ethnic, religious, political or other identifiable group, including terrorism suspects, for torture and other ill-treatment and the person subject to transfer is associated with that group;
  - there is a risk of torture and other ill-treatment upon return directly related to a person's particular circumstances;
  - there is any indication that the receiving government would subsequently transfer the individual to a third state where he or she would be at risk of torture and other ill-treatment.
- Ensure that any person subject to transfer has the right, prior to transfer, to challenge its legality before an independent tribunal. The legal review must include an examination of all relevant information, including that provided by the receiving state, and any mutual agreements related to the transfer.

Persons subject to transfer must have access to an independent lawyer and a right of appeal with suspensive effect.

- Include in required periodic reports to the United Nations Committee against Torture, the Human Rights Committee, and other relevant international and regional monitoring bodies detailed information about all cases in which diplomatic assurances against the risk of torture and other ill-treatment have been sought or secured in respect of a person subject to transfer, as such action clearly implicates states' absolute obligation to prohibit and prevent torture and other ill-treatment, including the *nonrefoulement* obligation.

We further call on the international community, in particular intergovernmental institutions whose mandate includes monitoring states' compliance with their obligations pertaining to torture and other ill-treatment, to:

- Reaffirm the absolute and non-derogable nature of the prohibition against torture and other ill-treatment, of which the absolute and non-derogable obligation not to transfer any person to a country where there are substantial grounds for believing that he or she would be at risk of torture and other ill-treatment is an integral component.
- Declare that diplomatic assurances in relation to torture and other ill-treatment are inherently unreliable and do not provide an effective safeguard against such treatment, and make clear 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, including the *nonrefoulement* obligation.
- Reject any attempt to establish minimum standards for the use of diplomatic assurances against the risk of torture and other ill-treatment as incompatible with the absolute prohibition in international law against torture and other ill-treatment, including the *nonrefoulement* obligation.

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<sup>1</sup>The *nonrefoulement* obligation enshrined in the 1951 Convention relating to the Status of Refugees and its 1967 Protocol do permit an exception to this principle in very narrowly defined circumstances. However, no such exceptions are permitted under the general international legal ban on torture and *refoulement* as enshrined in Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Article 7 of the International Covenant on Civil and Political Rights; and under customary international law.

## Appendix 2

### **Amnesty International's 12-Point Programme for the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by Agents of the State**

Torture and other cruel, inhuman or degrading treatment or punishment (other ill-treatment) are violations of human rights, condemned by the international community as an offence to human dignity and prohibited in all circumstances under international law. Yet they happen daily and across the globe. Immediate steps are needed to confront these abuses wherever they occur and to eradicate them. Amnesty International calls on all governments to implement the following 12-point programme and invites concerned individuals and organizations to ensure that they do so. Amnesty International believes that the implementation of these measures is a positive indication of a government's commitment to end torture and other ill-treatment and to work for their eradication worldwide.

#### **1. Condemn torture and other ill-treatment**

The highest authorities of every country should demonstrate their total opposition to torture and other ill-treatment. They should condemn these practices unreservedly whenever they occur. They should make clear to all members of the police, military and other security forces that torture and other ill-treatment will never be tolerated.

#### **2. Ensure access to prisoners**

Torture and other ill-treatment often take place while prisoners are held incommunicado – unable to contact people outside who could help them or find out what is happening to them. The practice of incommunicado detention should be ended. Governments should ensure that all prisoners are brought before an independent judicial authority without delay after being taken into custody. Prisoners should have access to relatives, lawyers and doctors without delay and regularly thereafter.

#### **3. No secret detention**

In some countries torture and other ill-treatment take place in secret locations, often after the victims are made to "disappear". Governments should ensure that prisoners are held only in officially recognized places of detention and that accurate information about their arrest and whereabouts is made available immediately to relatives, lawyers, the courts, and others with a legitimate interest, such as the International Committee of the Red Cross (ICRC). Effective judicial remedies should be available at all times to enable relatives and lawyers to find out immediately where a prisoner is held and under what authority, and to ensure the prisoner's safety.

**4. Provide safeguards during detention and interrogation** All prisoners should be immediately informed of their rights. These include the right to lodge complaints about their treatment and to have a judge rule without delay on the lawfulness of their detention. Judges should investigate any evidence of torture or other ill-treatment and order release if the detention is unlawful. A lawyer should be present during interrogations. Governments should ensure that conditions of detention conform to international standards for the treatment of prisoners and take into account the needs of members of particularly vulnerable groups. The authorities responsible for detention should be separate from those in charge of interrogation. There should be regular, independent, unannounced and unrestricted visits of inspection to all places of detention.

**5. Prohibit torture and other ill-treatment in law**

Governments should adopt laws for the prohibition and prevention of torture and other ill-treatment incorporating the main elements of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture) and other relevant international standards. All judicial and administrative corporal punishments should be abolished. The prohibition of torture and other ill-treatment and the essential safeguards for their prevention must not be suspended under any circumstances, including states of war or other public emergency.

**6. Investigate**

All complaints and reports of torture or other ill-treatment should be promptly, impartially and effectively investigated by a body independent of the alleged perpetrators. The scope, methods and findings of such investigations should be made public. Officials suspected of committing torture or other ill-treatment should be suspended from active duty during the investigation. Complainants, witnesses and others at risk should be protected from intimidation and reprisals.

**7. Prosecute**

Those responsible for torture or other ill-treatment should be brought to justice. This principle applies wherever those suspected of these crimes happen to be, whatever their nationality or position, regardless of where the crime was committed and the nationality of the victims, and no matter how much time has elapsed since the commission of the crime. Governments should exercise universal jurisdiction over those suspected of these crimes, extradite them, or surrender them to an international criminal court, and cooperate in such criminal proceedings. Trials should be fair. An order from a superior officer should never be accepted as a justification for torture or ill-treatment.

**8. No use of statements extracted under torture or other ill-treatment**

Governments should ensure that statements and other evidence obtained through

torture or other ill-treatment may not be invoked in any proceedings, except against a person accused of torture or other ill-treatment.

### **9. Provide effective training**

It should be made clear during the training of all officials involved in the custody, interrogation or medical care of prisoners that torture and other ill-treatment are criminal acts. Officials should be instructed that they have the right and duty to refuse to obey any order to torture or carry out other ill-treatment.

### **10. Provide reparation**

Victims of torture or other ill-treatment and their dependants should be entitled to obtain prompt reparation from the state including restitution, fair and adequate financial compensation and appropriate medical care and rehabilitation.

### **11. Ratify international treaties**

All governments should ratify without reservations international treaties containing safeguards against torture and other ill-treatment, including the International Covenant on Civil and Political Rights and its first Optional Protocol; and the UN Convention against Torture, with declarations providing for individual and inter-state complaints, and its Optional Protocol. Governments should comply with the recommendations of international bodies and experts on the prevention of torture and other ill-treatment.

### **12. Exercise international responsibility**

Governments should use all available channels to intercede with the governments of countries where torture or other ill-treatment are reported. They should ensure that transfers of training and equipment for military, security or police use do not facilitate torture or other ill-treatment. Governments must not forcibly return or transfer a person to a country where he or she would be at risk of torture or other ill-treatment.

This 12-point programme sets out measures to prevent the torture and other ill-treatment of people who are in governmental custody or otherwise in the hands of agents of the state. It was first adopted by Amnesty International in 1984, revised in October 2000 and again in April 2005. Amnesty International holds governments to their international obligations to prevent and punish torture and other ill-treatment, whether committed by agents of the state or by other individuals. Amnesty International also opposes torture and other ill-treatment by armed political groups.