Memorandums of Understanding and NGO Monitoring: a challenge to fundamental human rights

Governments in Europe and North America are increasingly sending persons who they allege are suspected of involvement in terrorism and others to places where they risk denial of fundamental human rights, especially freedom from torture and other ill-treatment. Such forcible transfers expose these individuals to serious risk of torture or ill-treatment in the states to which they are transferred. Some states have therefore sought and received "diplomatic assurances" (DAs) from the receiving state that transferred individuals would receive humane treatment upon transfer. States offering such assurances have typically included those where torture and other ill-treatment are often practiced, as well as those where detainees belonging to particular groups (such as suspected "terrorists") are routinely singled out for the worst forms of abuse. At least one government, the United Kingdom, is also increasing negotiating and agreeing Memorandums of understanding (MOUs) to implement those assurances.

This document sets out Amnesty International's opposition to the use of such diplomatic assurances and related MOUs and to the participation by international or local human rights and humanitarian NGOs in the flawed and discriminatory monitoring mechanisms envisaged by the MOUs.

States obligations regarding torture and other ill-treatment

1. The prohibition of torture and other cruel, inhuman or degrading treatment or punishment (ill-treatment) is absolute and unconditional. It applies at all times and can never be suspended (it is non-derogable). No emergency situations or any other exceptional circumstances whatsoever can justify their use. The right to freedom from torture and other ill-treatment is a universal right that all human beings must enjoy without distinction. The prohibition of torture and other cruel, inhuman or degrading treatment is provided for in major international human rights treaties, such as the International Covenant on Civil and Political Rights and the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment. It is also a rule of customary international law, which means that it applies to all states regardless of whether they are party to the specific treaties that prohibit torture or ill-treatment.

2. As part of their obligation to prohibit torture and ill-treatment, all states have an obligation to prevent and bring an end to all practices of torture or ill-treatment; bring to justice those responsible for such acts; and ensure reparation for the victims. Each state has a legal interest in preventing torture worldwide, and must not recognize or acquiesce to laws, policies or practices in other states which facilitate torture. In addition, states must not render aid or assistance in maintaining such laws, policies and practices. Under the UN Convention against Torture and international humanitarian law, states parties have an obligation to prosecute or extradite suspected torturers within their jurisdiction regardless of the place where the torture took place and the identity of the torturer and the victim (universal jurisdiction).

3. The prohibition against sending any person 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 (*non-refoulement*) forms an essential part of the general prohibition of torture and ill-treatment. *Non-refoulement* is also provided for in international treaties, including article 3 of the UN Convention against Torture. Only when an independent, impartial and competent court is convinced, based on reliable and credible evidence, of the absence of a risk of torture and other ill-treatment in the receiving state, may a person be sent there against his or her will.

Diplomatic Assurances and implementing MOUs are unacceptable

4. Amnesty International considers DAs and implementing MOUs to be both inappropriate and inadequate means of fulfilling a state's obligations in respect of *non-refoulement* and protection of persons at risk of torture or other ill-treatment. They are inappropriate because they are discriminatory and corrosive of the absolute prohibition against torture and other ill-treatment. They are inadequate because they are inherently unreliable and practically ineffective.

5. DAs and MOUs are agreed and signed between states that are anyway bound under international law to desist from torturing or ill-treating any person. Many of the states that conclude these DAs or MOUs already have made mutual binding international agreements not to torture or ill-treat, as signatories to the Geneva Conventions of 1949, the International Covenant on Civil and Political Rights, the UN Convention against Torture and regional treaties prohibiting torture. The UN Convention against Torture requires the 141 states which are currently party to it, *inter alia*, to take "effective legislative, administrative, judicial or other measures to prevent acts of torture." Diplomatic assurances are necessarily only sought if the sending state considers that there is a risk and that the receiving state does not ordinarily respect its existing obligations. The states to which a person is sought to be returned clearly have already failed to keep their promises, otherwise the DAs and MOUs would be unnecessary and likely not contemplated. Yet such states often deny that they torture or ill-treat, even in the face of well established documentation to the contrary. There is simply no reasonable basis for believing that their new promises will be honoured any more than were those they made to respect human rights treaties.

6. By signing DAs and MOUs, the sending states, in effect *acknowledge* that the receiving state practices torture and ill-treatment, and will probably continue to engage in these practices. In carving out an exception in the case of the specific returned persons, states are in effect agreeing to ignore the torture or ill-treatment of other detainees who do not benefit from the DAs. In other words, this exceptional mechanism comes far too close to accepting, or recognising, the routine practice of torture.

7. DAs and MOUs are therefore discriminatory. They favour specific individuals above others for special protection while giving tacit acceptance to the practice of torture or ill-treatment against the majority of detainees.

8. Diplomatic assurances have proven ineffective in practice. Persons, who have been transferred on the basis of such assurances, even when a system for the sending state to monitor the welfare of the person sent was included, complained later of torture. For instance, in May 2005, the UN Committee against Torture discussed the case of Mustafa

Kamil 'Agiza, who was deported (with Muhammad Suleiman Ibrahim El-Zari) from Sweden to Egypt by US agents. The Committee held that Sweden had breached its *non-refoulement* obligations. Despite the fact that assurances where provided by the Egyptian government at a senior level and despite monitoring of his situation by the Swedish Embassy, Mustafa Agiza was tortured upon his return to Egypt.

Universal, not selective, monitoring remains essential

9. Amnesty International considers that monitoring the treatment and conditions of detention of all persons deprived of their liberty is essential and indeed obligatory under the UN Convention against Torture. However, the organization does not consider that monitoring of beneficiaries of diplomatic assurances can ever replace, in whole or in part, the receiving state's obligation to set up and implement properly functioning, system-wide, national – as well as international – safeguards against torture and other ill-treatment. These safeguards are set out in 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.[1] They are also provided in detail in international law and standards, and include: ratification of international treaties; enactment of domestic legislation criminalising acts of torture and ill-treatment and ensuring humane treatment for all of those deprived of their liberty; training of staff; maintaining rules concerning interrogation, detention and similar issues under systematic review; monitoring (for instance by recording interrogations); prohibiting incommunicado detention, secret detention and "disappearances"; ensuring prompt, and thereafter regular, access of detainees to judges, lawyers, family, and medical staff; providing for an independent visiting mechanism that has unimpeded access to all detainees; conducting independent investigations of complaints of torture or ill-treatment; ensuring reparations for victims and that those responsible are brought to justice.

10. Amnesty International is concerned that visits – even of specific detainees – as a single safeguard cannot be sufficient to prevent torture and ill-treatment in states that wilfully engage in torture and ill-treatment. Such misplaced reliance on DAs and MOUs reflects a casual indifference by certain states towards one of the most fundamental human rights, or at least a readiness to allow perceived interests of national security to "outbalance" the absolute obligation not to send persons to states where they risk torture or ill-treatment. This posture flies in the face of consistent statements and rulings by international human rights monitoring bodies that the right to freedom from torture and other ill-treatment is absolute and does not lend itself to any balancing exercise.

11. In view of all the above, Amnesty International is concerned that participation of NGOs in such arrangements, however well-intentioned, may render legitimacy to this attempt at circumventing the absolute prohibition of torture and other ill-treatment and the prohibition of returning a person to a place where they risk torture or ill-treatment.

12. Amnesty International is also concerned that participating in an *ad hoc, ad personam* [relevant to specific persons only] monitoring may compromise the requirement of equality and prohibition of discrimination which are at the very heart of the law and principles of human rights. It is not acceptable that the few individuals who might be

[1] http://web.amnesty.org/library/index/engact400012005

returned under these MOUs will benefit from a monitoring mechanism, while a substantial number of others that are also in detention in the receiving state, including those who are detained on grounds of terrorism and therefore are at heightened risk of torture, do not benefit from any monitoring mechanism.

13. Amnesty International has called on all states to ratify the Optional Protocol to the UN Convention against Torture, which provides for visits to all detainees and all places of detention, without any discrimination, by independent impartial and competent mechanisms, both national and international. National preventive mechanisms as contemplated by the Optional Protocol should be established independently of the ratification and implementation of the Optional Protocol.

    Pending such ratification and implementation, and even once these have taken place, Amnesty International believes that NGOs should continue to seek visits to places of detention to monitor the situation of all detainees. NGOs should carry out visits to prison while ensuring, at minimum that they:

    - Fully maintain their independence and impartiality;
    - Visits are carried out by competent and professional staff, properly equipped and trained in relevant fields (such as law, prison visits, gender issues, forensic medicine, and psychology);
    - Visiting NGOs are granted powers to examine the situation of detainees regularly, make recommendations to the relevant authorities and submit proposals and observations on existing or draft legislation;
    - Visiting NGOs are guaranteed unhindered access to all relevant information, including statistics, as well as to all places of detention and detainees, including the opportunity to interview detainees in private. While specific NGOs may only have the capability to visit a limited number of places of detention, the principle of unhindered visits to all detainees without distinction and in private is imperative;
    - Visiting NGOs are guaranteed that no harm befalls anyone who communicates with the NGO concerned, and that all such communications remain confidential, not to be published without the express consent of the person concerned;
    - Visiting NGOs are allowed to publish information (without prejudice to the above) on the situation in places of detention.