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18 June 2008

## **Re: Denmark and diplomatic assurances against grave violations of human rights**

Dear Minister Espersen,

On behalf of Amnesty International, Human Rights Watch, the International Commission of Jurists, and the Redress Trust, we are writing to express our concern about comments attributed to you in an article published by the Danish news agency *Ritzau* on 10 May 2008. These remarks suggested that the Danish government is contemplating promoting the use of diplomatic assurances, whether obtained bilaterally or in the context of a European Union (EU)-wide initiative, as a means of returning or otherwise sending foreign nationals to states where they face a real risk of torture or other cruel, inhuman or degrading treatment or punishment (hereinafter, ill-treatment), as well, possibly, as a risk of other serious human rights violations.

Reliance on diplomatic assurances is deeply problematic, whether the assurances are sought and obtained by an individual state, or their use in principle is endorsed by a group of states or an international organization. As elaborated in the attached May 2005 *Call for Action against the Use of Diplomatic Assurances in Transfers to Risk of Torture and Ill-Treatment*, and December 2005 *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*, as well as in other reports by our organizations<sup>1</sup>, our position is based on fundamental principles of human rights, international law, and research into the operation of diplomatic assurances in practice. This view is shared by a wide range of regional and international human rights experts, including the UN Special Rapporteur on Torture; the UN High Commissioner for Human Rights; the UN Special Rapporteur on Human Rights and Counter-Terrorism; the European Commission; the EU's Network of Independent Experts on Fundamental Rights; the European Parliament; the Council of Europe's European Commission for Democracy through Law (Venice Commission),

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<sup>1</sup> See, for instance Human Rights Watch World Report 2008, "Mind the Gap: Diplomatic Assurances and the Erosion of the Global Ban on Torture," March 2008, at <http://hrw.org/wr2k8/diplomatic/index.htm>; REDRESS, "Non-refoulement under Threat", May 2006, at <http://www.redress.org/publications/Non-refoulementUnderThreat.pdf>; Amnesty International, "Memorandums of Understanding and NGO Monitoring: a challenge to fundamental human rights", January 2006, at <http://www.amnesty.org/en/library/info/POL30/002/2006/en>.

and the Council of Europe Commissioner for Human Rights. A summary of some of the concerns expressed by experts and expert bodies is contained in an appendix to this letter.

Diplomatic assurances do not provide an effective safeguard against torture, other ill-treatment, and other serious human rights violations. Relying on diplomatic assurances to facilitate the transfer of people in respect of whom there are substantial grounds for believing that they would face a real risk of serious human rights violations, including torture or other ill-treatment or a flagrant denial of the right to a fair trial, is fundamentally inconsistent with the principle of *non-refoulement* in international human rights law. Every person enjoys the right to be free from torture or other ill-treatment, which is a peremptory norm of international law and one that can never be limited, restricted or otherwise transgressed.

Denmark has long been a strong defender and promoter of the absolute prohibition of torture and other ill-treatment, including the absolute prohibition of transfers of individuals to states where they will face a risk of torture and other ill-treatment (i.e. *non-refoulement*). In this regard, we note that Denmark for a number of years has served as lead sponsor of annual resolutions against torture at the UN General Assembly, the UN Human Rights Council and its predecessor body, the UN Human Rights Commission. Denmark also played a significant role in the elaboration and promotion of the Optional Protocol to the UN Convention against Torture. We were therefore surprised and highly concerned by certain remarks attributed to you in the *Ritzau* story, and elsewhere in the Danish press, including in an interview with the *Berlingske Tidende* newspaper on 20 April 2008. Those comments appeared to signal a new willingness to contemplate reliance on assurances against such treatment from states where human rights violations are well-established to be systematic, endemic, persistent or widespread or where a particular group is routinely targeted for such abuse.

You were reported to be concerned that international treaties to which Denmark is a party provide protection for persons believed to pose a threat to national security. As you know, the international community has promulgated such human rights treaties which have as their very object and purpose the protection of rights to which every human being is entitled. Such protection includes the rights of people who are suspected, accused or convicted of having planned or committed acts of violence against others. Involvement – whether suspected or proven – in acts of violence does not place an individual outside the protection of the law, including human rights law. On the contrary, international human rights law provides for the means to address such suspicions, accusations, or convictions, by allowing for the limitation of some rights. For example, the right to liberty can be lawfully restricted by the imprisonment of an individual properly convicted of a criminal offence. The prohibition of torture and other ill-treatment, however, is absolute: it is one of the rights that can never be restricted or limited, irrespective of the circumstances.

As you are no doubt aware, the Grand Chamber of the European Court of Human Rights in its recent unanimous judgment in *Saadi v. Italy* (28 February 2008), unreservedly reaffirmed that the right not to be exposed to a real risk of torture or other ill-treatment by being transferred to another state is absolute and cannot be balanced against the alleged threat posed by an individual to public safety. The European Court underscored that the right applies to every human being, including those who have engaged even in the most “undesirable or dangerous” conduct. In the subsequent case of *Ismoilov v Russia*, the Court noted that it had, in the past, found diplomatic assurances insufficient for returns to countries where torture and ill-treatment were “endemic or persistent” (*Chahal v UK*), and also affirmed in *Ismoilov* that diplomatic assurances were insufficient to provide adequate

protection against ill-treatment following return to a state where the practices of torture and ill-treatment were systematic.

Respect for human rights requires states to find lawful ways to manage within the territory of the state any risk to public safety that persons who are non-nationals (but cannot be expelled due to risk of torture, other ill-treatment, or other serious human rights violations) may pose, just as states are in any event required to manage any such risks that their own citizens may pose. In particular, if there is sufficient admissible evidence that individuals, whatever their nationality, are planning, preparing, or have perpetrated violent attacks, they should be charged with a recognizable criminal offence and brought to trial in proceedings that fully accord with international fair trial standards.

The UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, in his 9 May preliminary comments on the conclusion of his recent visit to Denmark, expressed concern at “plans to employ diplomatic assurances to return suspected terrorists to countries known for their practice of torture” and recommended that Denmark “refrain from the use of diplomatic assurances”. It is the understanding of our organizations that, contrary to the seeming implication of the remarks attributed to you in the *Ritzau* report, the Special Rapporteur in no way suggested that the endorsement by the EU of diplomatic assurances against torture would make the practice any more acceptable. In fact, the Special Rapporteur continues to urge states, including Denmark, to abandon the concept of diplomatic assurances as a means of expelling people to face a real risk of torture, and to focus instead on comprehensive efforts, including efforts by the EU acting collectively, to prevent and eradicate torture in the Middle East, North Africa and globally.

Our organizations fully support such an approach. Accordingly we urge Denmark and other EU member states to refrain from adopting the position that diplomatic assurances provide a “human rights friendly” way to transfer suspects at risk of torture, and to abandon altogether these unreliable and unenforceable agreements. Persisting in such attempts, rather than focussing all efforts on achieving actual and demonstrable reduction in the overall risk of torture and other ill-treatment in the countries in question as required by international law, undermines respect for human rights, and for the framework of multilateral human rights treaties.

In this context we draw your attention to the recent conclusions drawn by the Council of the EU regarding the implementation of EU policy towards third countries on torture and other cruel, inhuman or degrading treatment: “In order to strengthen EU credibility and convincing power, coherence needs to be assured between external action against torture in third countries and the EU’s own performance e.g. ratifying OPCAT, providing support to torture rehabilitation services [...], and ensuring full respect for human rights when adopting measures to fight terrorism, including the upholding of the principle of non-refoulement.”<sup>2</sup>

Some governments have asserted that rigorous post-return monitoring is the linchpin to effective diplomatic assurances. From our experience in monitoring patterns of human rights violations worldwide, our organizations consider that no system of post-return

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<sup>2</sup>See Council of the EU, 18 April 2008, 8407/1/08 *Implementation of the EU guidelines on torture and other cruel, inhuman or degrading treatment or punishment - stock taking and new implementation measures*, page 13.

monitoring of individuals will render assurances an acceptable alternative to *non-refoulement*. Such ad hoc monitoring schemes necessarily omit the broader institutional, legal, and political elements that can, on the other hand, make certain forms of system-wide monitoring of all places of detention (and therefore all detainees) in a country an effective means of reducing the country-wide incidence of ill-treatment over the long-term (but even then can make no guarantees regarding the treatment of particular individuals). For instance, a series of post-return visits to one individual or even several individuals puts the detainee in an impossible position: he is forced to choose between staying silent or reporting abuse in a situation where he will be clearly identifiable as the source of the report. Moreover, it is unlikely that either the sending or the receiving state would be willing to acknowledge that torture or ill-treatment had occurred after return, since to do so would be to admit a breach of a core obligation under international human rights law, and to concede the failure of the assurance.

These two realities of any post-return monitoring of particular returnees under diplomatic assurances are in stark contrast to a key prerequisite of proper system-wide monitoring, i.e. ensuring that a sufficiently large number of detainees are visited in sufficiently private conditions to ensure that the authorities do not know which individuals provided which information – thereby helping to protect detainees against reprisal and better reassure detainees that they can safely provide critical information. The absence of any enforcement or remedial mechanism in the event of breach only further underscores the ineffectiveness of an assurance to prevent harm that is, in any event, never truly reparable. We share, therefore, the recent conclusion of the Council of Europe Commissioner on Human Rights that “it is absolutely wrong to put individuals at risk through testing such dubious assurances.”<sup>3</sup>

Moreover, in legitimizing and institutionalizing the use of diplomatic assurances, Denmark and EU member states would send an unfortunate signal to other states, some with poor human rights records, that the use of diplomatic assurances is an acceptable way to proceed. Indeed, there is emerging evidence that such states are beginning to resort to diplomatic assurances to justify returns to countries with long records of torture and ill-treatment.

We urge you, therefore, not to pursue the use of diplomatic assurances against torture and other ill-treatment in any return context. Rather than mandating a working group to examine means whereby individuals can be transferred to countries where they would face a real risk of serious human rights violations, including torture or other ill-treatment, we urge you instead to give the working group a remit to focus on additional measures that Denmark could take, both individually and through working collectively with other states and international organizations, to work more effectively with countries to eradicate the root causes of serious human rights violations, including torture and other ill-treatment and unfair trials. This approach would not only be consistent with Denmark’s historic position at the forefront of the struggle to eradicate torture and other ill-treatment, but could also lead to real and long-lasting improvements in the human rights situation in a range of countries.

We urge you to ensure, at the very least, that it is explicitly open to the working group, if it is to consider the question of reliance on diplomatic assurances, to conclude that Denmark should make no further efforts to pursue diplomatic assurances against torture or

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<sup>3</sup> See Viewpoint: ‘The protection against torture must be strengthened’, 18 February 2008.

other ill-treatment as a means of returning persons facing risk of such treatment. We further urge you to ensure that information about the membership, schedule of meetings, procedure and remit of the working group is made public, and that the working group invites and considers representations on the matters and proposals under consideration from non-governmental organizations working with victims of torture and for the promotion of human rights, and from relevant international experts, including all of those we have mentioned in this letter.

We reiterate, finally, our sincere hope that Denmark will choose to maintain the leading role it has assumed in the past against the erosion of the absolute prohibition of torture and other ill-treatment, and will abandon any intention to undermine that prohibition by promoting the inherently flawed concept of diplomatic assurances against torture. We look forward to your response.

Yours sincerely,

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## **Appendix: some expert opinions on the use of diplomatic assurances**

**UN Special Rapporteur on Torture, Manfred Nowak**, August 2005 report to the General Assembly, setting out his conclusions based on a study of the issue: “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.”

September 2006 statement to the Human Rights Council: “The absolute prohibition of torture, particularly in the context of counter-terrorism measures remains one of my preoccupations. I continue to emphasize and stress the importance of maintaining the focus and remaining vigilant against practices that undermine the principle of non-refoulement, such as the use of diplomatic assurances, or other bilateral agreements. I express the fear that in the context on the war against terror this fundamental principle of international law is also becoming a victim. (...)The prohibition of torture is absolute, and States risk violating this prohibition—their obligations under international law—by transferring persons to countries where they may be at risk of torture. I reiterate that diplomatic assurances are not legally binding, undermine existing obligations of States to prohibit torture, are ineffective and unreliable in ensuring the protection of returned persons, and therefore shall not be resorted to by States.”

**UN High Commissioner for Human Rights, Louise Arbour**, statement to the Council of Europe’s Group of Experts on Human Rights and the Fight against Terrorism, 29-31 May 2006: “I strongly share the view that diplomatic assurances do not work as they do not provide adequate protection against torture and ill-treatment.”

**UN Special Rapporteur on Human Rights and Counter-Terrorism, Martin Sheinin**, 14 May 2008 preliminary findings following his visit to Spain: “While the Special Rapporteur acknowledges that formal assurances have played a useful role in respect of the death penalty where the executive authorities of the receiving country can commit themselves to not asking for capital punishment and their compliance with the assurances will be controlled through a public trial, there is widespread agreement that diplomatic assurances do not work in respect of the risk of torture or other ill-treatment.”

**European Commission**, response to question tabled by Baroness Sarah Ludford, -agenda item 7 of the subcommittee on Human rights of the European Parliament, 28 February 2008 (PE402.663v01-00): “the European Commission shares the [...] concern expressed by the UN Special Rapporteur on Torture, Prof Manfred Nowak, that it is in the nature of diplomatic

assurances against torture that they will be sought from States only where it is judged that the returned individual would otherwise be likely to be subject to torture, given the widespread or systematic use of torture in that State, either in general or against particular classes of individuals. Such torture would be carried out in breach of the State's existing international legal obligations. Since the State's compliance with these obligations cannot be relied upon, the State is equally unlikely to comply with assurances given in particular cases. [...] Seeking assurances [...] implies [...] an understanding that the universal international prohibition on torture is taken less seriously than the terms of an individual bilateral assurance. Assurances may thus encourage States which routinely practise torture in the belief that such practices are tolerated in at least some cases."

**EU Network of Independent Experts on Fundamental Rights, Opinion No. 3-2006, May 2006**: "EU Member 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".

**European Parliament, February 2007 resolution P6\_TA-PROV(2007)0032**, on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners: "the prohibition of torture is a peremptory norm of international law (*jus cogens*) from which no derogation is possible [...]; the use of diplomatic assurances is incompatible with this obligation".

**Council of Europe's European Commission for Democracy through Law (Venice Commission), Opinion no. 363 / 2005, March 2006**: "when there is substantial evidence that a country practices or permits torture in respect of certain categories of prisoners, Council of Europe member States must refuse the assurances in cases of requests for extradition of prisoners belonging to those categories."

**Council of Europe Commissioner for Human Rights, Thomas Hammarberg, Viewpoint: 'The protection against torture must be strengthened', 18 February 2008**: "attempts to overcome this prohibition through 'diplomatic assurances' are not acceptable [...] It is absolutely wrong to put individuals at risk through testing such dubious assurances."