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Mr. Rafael RIVAS POSADA
Chairperson, Human Rights Committee
Office of the High Commissioner for Human Rights
United Nations Office at Geneva
CH 1211 Geneva 10
Switzerland

2 February 2009

Dear Mr Rivas Posada,

RE: SWEDEN - CONSIDERATION OF SIXTH PERIODIC REPORT TO THE HUMAN RIGHTS COMMITTEE

Amnesty International would like to draw to your attention the following information, ahead of the consideration by the Human Rights Committee, at its 95th session, of the sixth periodic report of Sweden. This information is provided with reference to the List of Issues adopted by the Committee at its 93rd session in July 2008, CCPR/C/SWE/Q/6. We would be grateful if you would make this information available to other members of the Committee.

■ **The case of Mohammed El Zari¹ (paragraph 3, List of Issues)**

The Human Rights Committee asks the Swedish authorities to provide "updated information [...] on the implementation of the Committee's Views on communication No. 1416/2005 (*Alzery v. Sweden*), in particular, the recommendations regarding remedies".

Amnesty International continues to believe that the award of residence permits by Sweden both to Mohamed El Zari and to Ahmed Agiza, who was deported at the same time as him and currently remains in prison in Egypt, would contribute towards ensuring that the men are given an effective remedy, including adequate restitution as defined in the *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*.

On 18 September 2007, the Swedish government told the Human Rights Committee that a decision on the appeal brought by Mohammed El Zari against the decision of the Swedish Migration Board to refuse his application for a residence permit in Sweden "might be expected before the end of [2007]". On 9 July 2008, the Swedish government told the Committee that the decision would "probably be made in August [2008]"². However, as of the date of this letter, the Swedish government has still made no final decision on the appeals brought by Mohammed El Zari and Ahmed Agiza against the decisions by the Swedish Migration Board to refuse their initial applications for residence permits.

Amnesty International does not consider that the grounds given by the Swedish Migration Board for its initial refusal of the residence permit applications made by each of the men offer sufficient reason to deny the men this aspect of reparation for the violations for which Sweden was responsible. According to the information available to Amnesty International, the application from Mohammed El Zari appears to have been refused solely on the basis of information provided to the Migration Board by the Swedish

¹ Referred to by the Human Rights Committee under the name Mohammed Alzery

² Communications cited in Report of the Human Rights Committee A/63/40 (Vol. II), p.543.

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Security Police (SÄPO), which purports to show that his presence in the country would be a threat to national security. This information appears to be the same that was used to justify the original decision, taken more than six years ago, to expel Mohammed El Zari to face torture and ill-treatment in Egypt. Amnesty International is concerned that these allegations, which have never been disclosed to Mohammed El Zari or his representatives, and which he has therefore been unable to challenge, are now being used to deny him the reparation to which he is entitled.

In the case of Ahmed Agiza Amnesty International notes, as did the Migration Board, that he would, if granted a permit, be unable to take up residence in Sweden immediately, since he is still imprisoned in Egypt following an unfair trial before a military court. Nonetheless, granting a residence permit in these circumstances would be an important acknowledgement of the violations which Ahmed Agiza has suffered, and would provide some comfort to his family, who have been recognized as refugees in Sweden and are currently kept in uncertainty as to whether he will be able to re-join them as and when he is released.

On the question of compensation, as the Human Rights Committee will already be aware, in July 2008 the Swedish Chancellor of Justice (*Justitiekanslern*) ordered that 3,160,000 Swedish kronor (307,000 euros) in damages should be paid to Mohammed El Zari, as compensation for the grave violations he suffered in the course of, and as a result of, his unlawful deportation from Sweden to Egypt. In September 2008, the Chancellor of Justice ordered that a similar amount of compensation should be paid to Ahmed Agiza.

■ **Reliance on diplomatic assurances (paragraph 21, List of Issues)**

In its fifth periodic report to the Committee Against Torture, the Swedish government refused to rule out reliance on diplomatic assurances in the future: "In very rare exceptional cases there may be a need, and [it may] be deemed possible to obtain such assurances in order to guarantee the security of a person refused entry or expelled when he or she is returned to the receiving country"³.

In the case of Mohammed El Zari, the Human Rights Committee expressed the view that "the existence of diplomatic assurances, their content and the existence and implementation of enforcement mechanisms are all factual elements relevant to the overall determination of whether, in fact, a real risk of proscribed ill-treatment exists." In its list of issues, the Human Rights Committee now asks the Swedish authorities "what mechanisms are put in place to ensure that the State party's reliance on diplomatic assurances fully meets its obligations under the Covenant to avoid mistreatment of persons expelled from the State party for security reasons?"

In line with the views expressed by, among others, the Special Rapporteur on torture,⁴ the Special Rapporteur on the protection of human rights while countering terrorism,⁵ the former UN High Commissioner on Human Rights,⁶ EU and Council of Europe institutions and bodies,⁷ as well as other

³ CAT/C/SWE/5, 10 February 2006, para. 79.

⁴ Report to the General Assembly A/60/316, 30 August 2005, and report to the Human Rights Council E/CN.4/2006/6, 23 December 2005.

⁵ UN Special Rapporteur on Human Rights and Counter-Terrorism, Martin Scheinin, 14 May 2008 Press Statement, preliminary findings following his visit to Spain.

⁶ 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.

⁷ European Commission, response to question tabled by Baroness Sarah Ludford MEP, agenda item 7 of the subcommittee on Human rights of the European Parliament, 28 February 2008 (PE402.663v01-00); EU Network of Independent Experts on Fundamental Rights, Opinion No. 3-2006, May 2006; 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; Council of Europe's European Commission for Democracy through Law (Venice Commission), Opinion no. 363 / 2005, March 2006; Council of Europe Commissioner for Human Rights, Thomas Hammarberg, Viewpoint: 'The protection against torture must be strengthened', 18 February 2008.

leading human rights non-governmental organizations,⁸ Amnesty International considers that diplomatic assurances should never be invoked by one state as permitting it to return an individual to another state where there are otherwise substantial grounds to believe he or she would be in danger of serious human rights violations such as torture or other ill-treatment, irrespective of whether the assurances contemplate particular monitoring or other mechanisms.

The use of assurances in such circumstances is always inconsistent with the general obligations of states under international law, including as States Parties to the International Covenant on Civil and Political Rights.

In cases where the **receiving state** is a State Party to the Covenant, issues may arise under Article 2(1) of the Covenant, in conjunction with Article 7. The state which gives the assurance thereby implicitly undertakes to ensure to certain individuals within its jurisdiction a higher degree of protection against treatment contrary to Article 7 than is afforded to others within its jurisdiction who are not subject to such assurances. The receiving state therefore fails its commitment to all other States Parties to respect and to ensure to all individuals within its territory and subject to its jurisdiction, without distinction of any kind, the right to be free from torture and other ill-treatment.

In cases where the **sending state** is a State Party to the Covenant, more general issues may arise under Article 2 of the Covenant, in conjunction with Article 7. The Committee has described human rights as constituting *erga omnes* obligations in general, and has referred to States Parties owing mutual obligations under the Covenant in particular. In its General Comment No. 31, the Committee said: "every State Party has a legal interest in the performance by every other State Party of its obligations. [...] [T]he contractual dimension of the treaty involves any State Party to a treaty being obligated to every other State Party to comply with its undertakings under the treaty."

In a case where diplomatic assurances are used to justify the return of individuals to states where there are otherwise substantial grounds to believe they would be in danger of grave human rights violations, the sending state gives priority to its perceived national interest in expelling the individual in question, over and above the fulfilment of this general treaty obligation owed to it under Article 2 by the receiving state. By so doing the sending state implicitly tolerates, and may even in effect encourage, the continuance of the broader situation of violations in the receiving state.

This undermines the multilateral system of treaties and preventive and remedial measures aimed at stopping torture and other ill-treatment. The use of assurances in such cases can be anticipated to have this undermining effect irrespective of how one answers the question whether such assurances, and whatever individualized monitoring mechanism may accompany them, can be in fact 'effective' in eliminating an already-acknowledged specific and real risk of torture or other ill-treatment in the individual case.

Governments have asserted that rigorous post-return monitoring can make diplomatic assurances effective. The question posed by the Committee to Sweden appears to rest on the assumption that some mechanism can be put in place to render reliance on diplomatic assurances fully compatible with Sweden's obligations under the Covenant. From its experience of monitoring patterns of human rights violations worldwide, together with the experience reported by other organizations, Amnesty International considers that no *ad hoc* system of post-return monitoring of individuals will render assurances an acceptable alternative to respect for the principle of non-*refoulement*.

⁸ See *Call for Action against the Use of Diplomatic Assurances in Transfers to Risk of Torture and Ill-Treatment*, Joint Statement 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, 12 May 2005 (AI Index: ACT 40/002/2005); see also *Denmark and diplomatic assurances against grave violations of human rights*, joint letter to the government of Denmark from Human Rights Watch, Amnesty International, International Commission of Jurists, and Redress Trust (AI Index: EUR 18/004/2008).

Such *ad hoc* monitoring schemes necessarily omit the broader institutional, legal, and political elements that can make certain forms of systematic monitoring of all places of detention (and therefore all detainees) in a country an effective means of reducing the incidence of torture and ill-treatment over the long-term.

Where an individual who has been returned subject to an assurance is detained, a monitoring scheme which envisages a series of post-return visits puts that individual in an impossible position if she or he wants to make a complaint of torture or ill-treatment: the detainee is forced to choose either to stay silent, or to report abuse in a situation where he or she will be clearly identifiable as the source of the report.

Moreover, neither the sending nor the receiving state have any real incentive to acknowledge that torture or ill-treatment has occurred after return, or to take meaningful steps to discover the truth of an allegation. To do so would be to risk being forced to admit a breach of a core obligation under the Covenant and other international human rights law, and to concede the failure of the assurance.

The absence of any enforcement or remedial mechanism in the event of breach of an assurance only further underscores the ineffectiveness of an assurance to prevent harm that is, in any event, never truly reparable.

The 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, which aims to ensure that a sufficiently large number of detainees are visited in sufficiently private conditions to prevent the authorities from knowing which individuals provided which information. Such system-wide monitoring thereby helps to protect detainees against reprisals, and to reassure detainees that they can safely provide critical information.

I trust that this information will be of use to you and to the members of the Committee.

Yours sincerely,

Nicola Duckworth
Director
Europe and Central Asia Programme